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Availability of a Testimonial Privilege for State Legislators: The Seventh Circuit's Current Position

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THE AVAILABILITY OF A TESTIMONIAL PRIVILEGE FOR STATE LEGISLATORS: THE SEVENTH CIRCUIT'S CURRENT POSITION

United States v. Craig,
528 F.2d 773, *rev'd on rehearing*, 537 F.2d 957
(7th Cir.) (en banc), *cert. denied*, 45 U.S.L.W. 3416
(U.S. Dec. 7, 1976) (No. 76-179)

On December 4, 1974 three members of the Illinois House of Representatives were indicted by a federal grand jury on two charges of political corruption.[1] One of the defendants claimed that statements which he had given to federal officials were inadmissible because they concerned the motivations behind his legislative activities and were therefore protected by the speech or debate clauses of both the Illinois[2] and federal[3] constitutions. Although Congressmen increasingly have invoked the federal speech or debate clauses as a protective shield from criminal and civil liability premised upon their legislative activities,[4] until *United States v. Craig*[5] a state legislator had never claimed the protections of these clauses in a federal criminal proceeding.

Therefore, in *Craig* the Court of Appeals for the Seventh Circuit was presented with a case of first impression. The specific issue addressed was whether a state legislator's statements concerning his official acts were admissible in a federal criminal prosecution. At the first appellate hearing the court held that although neither the federal nor Illinois speech or debate clauses applied in the federal trial of a state legislator, a common law speech or debate privilege did exist to preclude admissibility of the controverted statements.[6] At the rehearing the en banc court agreed with the panel's determination that neither the Illinois nor federal clauses were applicable but reversed on the ground that no common law speech or debate privilege either

1. The defendants were charged with violating the Hobbs Act, 18 U.S.C. § 1951 (1970), and the Mail Fraud Statute, 18 U.S.C. § 1341 (1970).

2. The Illinois clause provides: "A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house." ILL. CONST. art. 4, § 12.

3. The federal clause provides: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."U.S. CONST. art. 1, § 6, cl. 1.

4. *See* text accompanying notes 22-53 *infra*.

5. 528 F.2d 773, *rev'd on rehearing*, 537 F.2d 957 (7th Cir.) (en banc), *cert. denied*, 45 U.S.L.W. 3416 (U.S. Dec. 7, 1976) (No. 76-179).

6. 528 F.2d 773, 779 (7th Cir. 1976).

existed or should be created for the benefit of state legislators in federal criminal trials.[7]

The importance of *Craig* lies not only in the evidentiary tool provided to federal prosecutors in cases of local political corruption but also in the Seventh Circuit's contribution to a clearer understanding of the concepts of official immunity and testimonial privilege. By precisely articulating a distinction between the scope of official immunity and the availability of testimonial privileges, *Craig* offers a mode of analysis which alleviates confusion when the two concepts become intertwined as defenses in sensitive political cases. In essence, the court in *Craig* refused to conclude that the political status of an individual automatically creates the existence of a testimonial privilege absent a corresponding immunity from liability.

However, by concluding that no privilege existed independent of a corresponding immunity from liability, the court in *Craig* failed to acknowledge the Illinois constitutional mandate that its legislators be protected when exercising their legislative duties. It is the thesis of this comment that although *Craig* may be legally sound in concluding that no common law testimonial privilege exists independent of an immunity from liability, as a matter of policy serious questions are raised concerning the extent of federal intrusion into local legislative matters.

This comment will analyze the reasoning of *Craig* in order to explain the court's final determination that no common law speech or debate privilege exists for state legislators in federal criminal proceedings. To that end it will be necessary to review the nature of the speech or debate clause as revealed through United States Supreme Court decisions, the limitations of official immunity for state legislators faced with criminal liability in the federal courts, and the rules by which the federal courts determine whether the common law warrants recognition of an asserted testimonial privilege in criminal cases. The two *Craig* opinions will then be analyzed by stressing not only the distinction between privilege and immunity but the policy issues raised by this decision. Before reviewing the legal precedents to *Craig*, the factual circumstances surrounding the grand jury indictment and the procedural development which ultimately brought the case to the appellate court must first be discussed.

THE HISTORY OF THE CRAIG LITIGATION

The three Illinois legislators were charged with violating the Hobbs Act[8]

7. 537 F.2d 957 (7th Cir. 1976) (en banc).

8. The Hobbs Act provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person

and the Mail Fraud Statute.[9] Count One charged that the defendants and an unindicted party conspired to extort $1500 from the Illinois Car and Truck Renting and Leasing Association through the lobbyist of this group by using their power as state legislators.[10] Count Two charged that the three legislators entered into a scheme whereby they introduced a bill detrimental to the auto and truck leasing business[11] and then proceeded to table the bill in a House of Representatives committee[12] in return for the $1500 which was mailed to the lobbyist by a corporate member of the association.[13]

During the course of a special grand jury investigation into corrupt practices within the Illinois legislature,[14] one of the *Craig* defendants, Louis Markert, had given statements to an assistant United States Attorney, postal inspectors, and the grand jury pertaining to the history and motives behind the controversial house bill.[15] Following the indictment, Markert and another defendant filed a motion to dismiss, claiming that the indictment was barred by both the Illinois and federal speech or debate clauses. The district court judge denied the motion and ruled that the legislators were subject to criminal liability regardless of speech or debate protections.[16]

Markert also filed a motion to suppress the controverted statements, claiming they were taken in violation of the federal and Illinois speech or debate clauses. The district court judge granted the motion to suppress and ruled that the Illinois clause did provide the defendants with a speech or debate privilege.[17] He requested that Markert identify which statements

> or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> . . . .
>
> (b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*.

18 U.S.C. § 1951 (a)-(b)(2) (1970) (emphasis added).

9. The Mail Fraud Statute provides in pertinent part:

> *Whoever*, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, . . . knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . .

18 U.S.C. § 1341 (1970) (emphasis added).

10. Indictment, Count 1, No. 5, United States v. Craig, 74 CR 877 (N.D. Ill., returned, Dec. 4, 1974).

11. Indictment, Count 2, No. 4, *id.*

12. The defendants allegedly caused consideration of the bill to be postponed in the Motor Vehicles Division of the House Transportation Committee. Indictment, Count 2, No. 5, *id.*

13. Indictment, Count 2, No. 9, *id.*

14. 528 F.2d at 774.

15. Markert was informed of his fifth amendment privilege against self incrimination but chose to answer all questions. *Id.*

16. United States v. Craig, No. 74 CR 877 (N.D. Ill. Mar. 13, 1975) (mem.).

17. United States v. Craig, No. 74 CR 877 (N.D. Ill. Mar. 17, 1975) (order granting motion to suppress).

violated this privilege and Markert accordingly filed a statement identifying the conversations he considered protected. In response the government claimed that Markert had no testimonial privilege and added in the alternative that if the court found a privilege, Markert had waived it by giving the statements.[18] The judge upheld the applicability of the Illinois clause and the government appealed to the Court of Appeals for the Seventh Circuit and requested that the order of suppression be reversed and the case remanded for trial.

Because Markert had not appealed the district court's determination that he was subject to liability for the substantive crimes, the appellate court only had to resolve the question of whether the Federal Rules of Evidence warranted recognition of a speech or debate privilege protecting Markert's disclosure of criminal conduct committed by him in the course of his legislative activities. Since the federal clause does not include state legislators within the scope of its protection,[19] it was not applicable to state legislators. Similarly, although the Illinois clause protected Markert in a state court,[20] in federal criminal trials the federal courts apply the Federal Rules of Evidence.[21] Therefore, the issue evolved into a determination of whether federal common law required recognition of a privilege for state legislators. An examination of the legal guidelines by which the court resolved this issue is necessary to understand the final disposition of the case.

SOURCES DETERMINATIVE OF A SPEECH OR DEBATE PRIVILEGE

The Nature of the Federal Clause

Although the federal speech or debate clause does not include state legislators within its coverage, understanding the nature of the federal clause assists in determining the propriety of extending its protections to state legislators indicted at the federal level. The federal clause provides congressmen with both an immunity and a privilege: immunity from civil and criminal liability for legislative activities and a testimonial privilege against disclosure

18. The issue of whether a state legislator can waive a speech or debate privilege was not pertinent to a determination of the existence of a testimonial privilege for state legislators and will not be analyzed in this comment. For discussion of whether Markert might have waived the privilege, had one existed, see United States v. Craig, 528 F.2d 773, 780-81 (7th Cir. 1976) (majority opinion).

19. The federal speech or debate clause is contained within the Constitutional provision pertaining to the compensation and privileges of "Senators and Representatives" of Congress. U.S. CONST. art. 1, § 6, cls. 1, 2.

20. To date public officials in Illinois have raised the clause only as a bar to civil liability. *See* Arlington Heights Nat'l Bank v. Arlington Heights Fed. Sav. & Loan Ass'n, 37 Ill. 2d 546, 229 N.E.2d 574 (1967) (village officials absolutely privileged from investigation for zoning ruling); Phillips v. Brown, 270 Ill. 450, 110 N.E. 601 (1916) (members of assembly subject to service of process in trespass action); Larson v. Doner, 32 Ill. App. 2d 971, 178 N.E.2d 399 (1962) (city officials immune from slander suit based on contents of official resolution).

21. *See* text accompanying notes 76-84 *infra*.

of the motivations and conduct underlying legislative activities. However, the two aspects of the clause do not function independently. The United States Supreme Court cases reveal that while Congressmen have continually invoked the clause as a source of civil and criminal immunity, the testimonial privilege arises only as an evidentiary defense in furtherance of an immunity claim.[22]

In this sense the United States clause differs from its British counterpart. In the developing years of Britain's parliamentary system "privileges" were bought and sold as protective devices whereby citizens could exert their independence from the Crown.[23] The distinction at first glance appears irrelevant since the end result is a protection to both legislators and members of Parliament in the exercise of their official duties. However, since the court in *Craig* was required to examine the common law in determining the existence of a testimonial privilege for state legislators, it is important to clarify the nature of the United States constitutional clause by focusing on the protections it provides within the United States judicial system. A brief examination of the United States Supreme Court interpretations of the federal clause illustrate the extent to which the testimonial privilege is connected with the invocation of an immunity claim.

The privilege issue has not arisen in civil suits against individual congressmen because the Congressmen in these cases have been concerned only with establishing their immunity from civil liability. For example, in *Kilbourne v. Thompson*,[24] the earliest United States Supreme Court interpretation of the federal clause, members of the House of Representatives claimed immunity under the clause when a private citizen brought suit for false imprisonment against individual House members. The plaintiff claimed his arrest resulted from a House vote erroneously charging him with contempt.[25] While the Court held the individual members immune from liability the plaintiff ultimately obtained relief from ministerial House functionaries.[26]

22. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1971); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourne v. Thompson, 103 U.S. 168 (1880).

23. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1137 n.128 (1973) [hereinafter cited as Reinstein & Silverglate]. For other comprehensive reviews of the evolution of English free speech or debate guarantees see Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1-18 (1968); Comment, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 336-341 (1965).

24. 103 U.S. 168 (1880).

25. *Id.* at 181.

26. *Id.* at 200-05. The Court held that the House sergeant-at-arms was subject to liability for false imprisonment since he executed the House resolution ordering the arrest and imprisonment. *Id.* at 205.

This pattern of finding Congressmen immune from civil liability pervades subsequent Court rulings. At times plaintiffs have been able to maintain a civil suit against lesser legislative functionaries but the consistency with which the Court has protected Congressmen illustrates the absolute nature of civil immunity provided by the clause. Thus, in *Dombrowski v. Eastland*,[27] the chairman of a Senate subcommittee was immune from suit by private citizens claiming his investigatory activities violated their civil rights. In *Powell v. McCormack*[28] representative-elect Powell was unable to maintain an action for declaratory relief against individual members of the House who adopted a resolution denying him his seat. However, the Court held that since House employees had also been named as defendants, the federal courts had jurisdiction to review the House vote excluding Powell.[29] In *Doe v. McMillan*[30] parents of school children in the District of Columbia were prohibited from suing individual Congressmen for invasion of privacy when the congressional committee issued a report on the District of Columbia school system and cast certain identified school children in an unfavorable light.[31] As in *Powell* and *Kilbourne*, the parents were able to maintain suit against the legislative employees who had distributed the report.[32] Finally, in *Eastland v. United States Servicemen's Fund*[33] the Court held that a Senate subcommittee could not be enjoined from subpoenaing the bank records of the Servicemen's Fund and ruled that this action would intrude upon the legislative activities of the investigating committee.[34]

To date only one United States Supreme Court case has interpreted the extent to which speech or debate clause immunity applies when a civil claim under federal law is brought against state legislators for their legislative acts. In *Tenney v. Brandhove*[35] a California citizen filed suit against members of the California legislature, claiming that the committee members deprived him of his civil rights by urging local prosecutors to institute contempt proceed-

27. 387 U.S. 82 (1967). The Court did hold that a subcommittee counsel would not enjoy the same immunities afforded the Congressmen. *Id.* at 85.

28. 395 U.S. 486 (1969).

29. *Id.* at 506.

30. 412 U.S. 306 (1973).

31. *Id.* at 308 n.1.

32. *Id.* at 315.

33. 421 U.S. 491 (1975).

34. The Court examined whether the investigatory activities of the committee were "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings." *Id.* at 504, (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).

35. 341 U.S. 367 (1951). *See also* Coffin v. Coffin, 4 Mass. 1 (1808), wherein the court held that the Massachusetts constitutional provision similar to the federal speech or debate clause provided state legislators with protection from executive and judicial interference in legislative discussion. However, the court found the defendant legislator liable in a slander suit as speaking outside his official capacity, although the remarks were delivered on the house floor. *Id.* at 30.

ings when he refused to testify at a committee hearing.[36] Although the California constitution did not have a speech or debate clause,[37] the Court held that the legislators were immune from civil liability by relying upon the immunities provided by the history of the federal clause [38] and the corresponding concern for legislative immunity which other states had expressed by enacting speech or debate clauses.[39] *Tenney* was an important precedent in resolving the *Craig* dilemma but the Court in *Tenney* did not discuss the privilege against disclosure in a criminal case. Instead the court only considered the extent of legislative immunity in a civil rights suit.[40] Even at that juncture the Court was careful to add that legislative "privilege"[41] deserved greater respect in a suit against the legislature than when "the legislature seeks the affirmative aid of the courts to assert a privilege."[42]

When individual Congressmen have been indicted and the charge has encompassed acts performed under the guise of their official status, the defendants have raised the federal clause as a source of both absolute immunity from criminal liability and testimonial privilege. In three key cases[43] the Court first determined whether the allegedly criminal conduct was within the scope of the immunity and only then determined if a privilege against disclosure was also operative.

In the first of these cases, *United States v. Johnson*,[44] a member of the House was indicted on seven counts of conflict of interest and one count of conspiracy to defraud.[45] The Court set aside the conviction of conspiracy because it was based upon the allegation that Johnson had delivered a speech

36. The plaintiff had circulated a petition within the legislature urging that no further funds be appropriated to a committee investigating allegedly un-American activities. The committee in turn summoned the plaintiff to a hearing which he contended was unrelated to any legislative purpose. Tenney v. Brendhove, 341 U.S. 367, 370-71 (1951).

37. *Id.* at 375 n.5.

38. "The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Id.* at 372.

39. *Id.* at 374-75.

40. "We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 [The Klu Klux Klan Act, Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1970)] does not create civil liability for such conduct." *Id.* at 379.

41. The Court continually referred to the protections of speech or debate clauses as "privileges", whether discussing immunity from arrest or civil process, 341 U.S. at 372; freedom to speak or act, *id.* at 375; or the provision in its entirety, *id.* at 376. Although the semantical distinction between privileges and immunities may seem unimportant when determining the scope of protection afforded legislative committee members in civil rights suits, in a criminal case the state legislator might assert the availability of a testimonial privilege premised upon speech or debate clause protection independently from a claim of criminal immunity, as in *Craig*, and the language of *Tenney* does not offer clear guidelines.

42. *Id.* at 378.

43. Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1971); United States v. Johnson, 383 U.S. 169 (1966).

44. 383 U.S. 169 (1966).

45. *Id.* at 170-71.

on the floor of the House, which was favorable to certain savings and loan institutions, for personal gain.[46] The Court then ruled that Johnson's statements at trial pertaining to the motives and construction of the speech were therefore privileged against disclosure.[47] In *Gravel v. United States*,[48] Senator Gravel's aide was subpoenaed to testify before a grand jury investigating criminal conduct surrounding the republication of the Pentagon Papers in manuscript form by Beacon Press, a Boston publishing house. When Senator Gravel moved to quash the subpoena on the ground that the federal speech or debate clause prohibited disclosure of legislative activities, the Court looked to the scope of the allegedly criminal conduct and then denied the availability of the privilege.[49] The Court reasoned that since republication in an independent press was beyond the scope of immunity afforded by the clause, there was no privilege against disclosure of the circumstances of this act.[50] In *United States v. Brewster*[51] the Court only reached the issue of criminal liability and significantly narrowed the protection of the clause in criminal cases by sustaining an indictment charging Senator Brewster with bribery. The Court held that "taking a bribe is, obviously, no part of the legislative process."[52] Although at first glance *Brewster* seems dispositive of *Craig*, in *Brewster* the elements of proof did not include any admissions by the Senator concerning acts on the Senate floor.[53]

This review has emphasized the nature of the immunities and privileges

46. The government claimed that Johnson had read the speech in furtherance of a plan to procure the dismissal of pending indictments of a Maryland savings and loan institution on mail fraud charges. *Id.* at 171-72.

47. The Court strongly disapproved of the government's lengthy questioning of Johnson at trial concerning the motives, construction, and delivery of the speech and quoted extensively from the direct examination. *Id.* at 173-77 & nn.4 & 5.

48. 408 U.S. 606 (1972).

49. The Court reasoned, "It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members." *Id.* at 616. For criticism of this decision, emphasizing the importance of the informing function of congressmen, see Reinstein & Silverglate, *supra* note 23, at 1148-57.

50. 408 U.S. at 623-27. The Court distinguished the republication of the Pentagon Papers from the publication of this document in the legislative record pertaining to the committee meeting, noting, "[P]rivate publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate . . . ." *Id.* at 626.

51. 408 U.S. 501 (1972).

52. *Id.* at 527. For reliance upon this statement in concluding that Markert, subject to criminal liability, could not claim a corresponding testimonial privilege as a *state* legislator, see United States v. Craig, 528 F.2d 773, 783-84 (7th Cir. 1976), and text accompanying notes 111-12 *infra*.

53. In relying upon *Johnson* for holding that Senator Brewster was not immune from criminal liability for taking the bribe, the Court recognized that proof of the bribery charge "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 408 U.S. at 527 (quoting United States v. Johnson, 383 U.S. 169, 185 (1966)). Arguably then, if the court in *Craig* had ultimately found Markert immune from criminal liability, the statements would have been privileged.

conferred by the federal clause in civil and criminal suits but has not discussed the rationales necessitating the inclusions of the clause in the Constitution. As the review of the *Craig* decision will show,[54] diverse opinions on the purpose of the clause have led to differing conclusions as to the existence of a privilege for state legislators. The United States Supreme Court cases do reveal that the clause provides a two-pronged protection: where there is an immunity congressmen have also enjoyed a testimonial privilege. Since state legislators are not covered by the federal clause, the extent to which the common law doctrine of official immunity provides protections similar to those of the federal clause should be examined.

Local Public Officials in Federal Court: Scope of Official Immunity

In determining the protections which state legislators enjoy in federal criminal cases, the analysis again centers on examining the extent to which the doctrine of official immunity protects state legislators from liability for their legislative acts and whether a testimonial privilege therefore arises in federal criminal proceedings. Case law reveals that the same broad protections which shield Congressmen are not available to state legislators in the federal courts.

With respect to criminal liability, it is clear that state legislators are not immune from prosecution although the charges encompass legislatively related acts. Both Illinois and federal statutes, such as the Illinois Corrupt Practices Act[55] and the Mail Fraud Statute,[56] clearly indicate a growing trend to provide statutory sanctions for political corruption.[57] The increasing plethora of convictions of public officials also illustrates that public office has not proved to be a shield from criminal liability.[58] For example, in the recent Seventh Circuit case of *United States v. Keane*,[59] a Chicago alderman was indicted and convicted of mail fraud and conspiracy. The defendant had allegedly used his political position first to obtain property at scavenger tax sales which he knew would be the site of urban renewal, then to recommend that the city council clear the tax liens, and finally to induce various city

54. *See* text accompanying notes 85-119 *infra*.

55. ILL. REV. STAT. ch. 102, §§ 1-4.2 (1975). For other Illinois statutes sanctioning legislative misconduct, see ILL. REV. STAT. ch. 38, § 33-3 (1975); ILL. REV. STAT. ch. 127, §§ 601-602 (1975) (Illinois Governmental Ethics Act).

56. 18 U.S.C. § 1341 (1970).

57. Thornburgh, *Preface*, 64 GEO. L.J. 173, 173-77 (1975). In his introduction to the 1975 circuit note, Assistant Attorney General Thornburgh commented on the ramifications of these statutes in federal prosecutions of local officials.

58. For a review of recent Seventh Circuit political corruption cases, see Note, *The Travel Act: Its Limitation by the Seventh Circuit Within the Context of Local Political Corruption*, 52 CHI.-KENT L. REV. 503 n.3 (1975) [hereinafter cited as *The Travel Act*].

59. 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3532 (U.S. Mar. 22, 1976) (No. 75-867).

departments to purchase the property which he had acquired.[60] The acts forming the substance of the indictments were clearly related to the alderman's official duties and yet this factor did not protect the alderman from criminal liability in the federal court. In fact, he did not raise immunity as a defense. In the Seventh Circuit alone, *Keane* is merely illustrative of a series of convictions of aldermen, police officers, and judges for extortion, conspiracy, and other forms of political corruption involving abuse of public office.[61]

Other circuits also provide analogous cases in which the indictment specifically included official acts as an element of the substantive crime. In *Braatelien v. United States*[62] a federal judge was convicted for conspiracy to defraud when he adjudicated cases in a light favorable to defendants who had provided a fee for the favorable decision.[63] In *United States v. Anzelmo*[64] the Attorney General of Louisiana was indicted under the Mail Fraud Statute[65] when he directly participated in the activities of a company for whom he issued favorable opinions. In the latter case the defendant argued that public officials were immune from criminal prosecutions stemming from an official act. The court, however, maintained that public officials could be prosecuted for both malfeasance and corruption and that it was unnecessary that the indictment limit the charges to allegations of corruption.[66] These cases reveal that when the officials were not immune from liability, evidence of the official act was admissible as proof.

In contrast to these criminal suits, in civil litigation the federal courts have consistently recognized that local officials are afforded either absolute or qualified immunity. Landmark United States Supreme Court decisions such as *Tenney*, *Wood v. Striktland*,[67] *Scheur v. Rhodes*,[68] *Pierson v. Ray*,[69] and

60. 522 F.2d at 538-44. *See also* City of Chicago *ex rel.* Cohen v. Keane, No. 48297 (Ill. Sup. Ct., filed Sept. 20, 1976) (granting Chicago resident standing to sue for accounting for all profits made by Alderman Keane from the property transactions forming the substance of the indictments in the federal criminal proceedings).

61. *The Travel Act*, *supra* note 58, at 511-16. The special grand jury investigation resulting in the indictments of the three Illinois legislators in *Craig* yielded three other indictments of Illinois legislators. Brief for Appellant at 2 n.1, United States v. Craig, 528 F.2d 773 (7th Cir. 1976).

62. 147 F.2d 888 (8th Cir. 1945).

63. *Id.* at 889-90. *Accord*, U.S. v. Manton, 107 F.2d 834 (2d Cir. 1938) (judge guilty of bribery when receiving payment for rendering correct decision); Cook v. Bangs, 31 F. 640, 642 (C.C.D. Minn. 1887) (dictum) (A judge "is just as amenable to the criminal law as any private citizen." 31 F. at 642.).

64. 319 F. Supp. 1106 (E.D. La. 1970).

65. 18 U.S.C. § 1341 (1970).

66. 319 F. Supp. at 1119. However, the court also noted that if the indictment had only charged the Attorney General with issuing erroneous opinions he "might have made a stronger case for immunity." *Id.*

67. 420 U.S. 308 (1975) (articulating test of qualified immunity for local school board officials).

68. 416 U.S. 232 (1974) (qualified immunity for governor and other public officers).

69. 386 U.S. 547 (1967) (absolute immunity for judges under 42 U.S.C. § 1983).

the recent case of *Imbler v. Pachtman*,[70] reveal a consistent concern that local officials enjoy some measure of immunity from civil claims premised upon exercise of a discretionary duty.[71] Nevertheless, even in civil litigation the federal courts have not universally refrained from intruding upon the activities of local governmental units. Three civil suits seeking injunctions against state legislatures[72] illustrate that the doctrine of official immunity does not prohibit injunctive relief when constitutional rights are clearly threatened.

In *Jordan v. Hutcheson*[73] three black lawyers claiming that a Virginia legislative committee was harrassing them in their efforts to litigate racial discrimination in the Virginia courts were awarded injunctive relief. In *Bond v. Floyd*[74] the Court held that the Georgia legislature could be enjoined from continuing to deny duly-elected Julian Bond his seat on the basis of anti-war statements made during the course of the political campaign. In *Bush v. New Orleans Parish School Board*[75] the district court enjoined the Louisiana legislature from thwarting the school board's efforts to comply with desegregation orders. In each of these cases the activity enjoined was legislative in nature and yet the courts manifested none of the reluctance which the United States Supreme Court has shown in injunction actions against Congress.

Thus, case law reveals that although the doctrine of official immunity continues to provide state legislators with immunity from civil liability, when individual local officials are charged with political corruption premised upon abuse of office, there is no immunity from criminal liability. Further, as *Keane* illustrates, the official act is often a central element of the indictment and evidence of the illegal official act is admissible. Even in civil suits the federal courts have not found that state legislatures are immune from injunctions as is Congress. Therefore, in determining whether a common law testimonial privilege exists for state legislators, it can be seen that the federal courts have not granted these officials the same deference accorded congressmen under the federal speech or debate clause.

70. 424 U.S. 409 (1975) (absolute immunity for state prosecuting attorney under 42 U.S.C. § 1983).

71. *See, e.g.*, Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) (civil immunity for state legislators in suit by female law student allegedly denied employment as page because she was female); Gambocz v. Sub-Committee on Claims, 423 F.2d 674 (3d Cir. 1970) (members of sub-committee immune in suit by mayoral candiate claiming deprivation of rights in election contest). *But see* Saffioti v. Wilson, 392 F. Supp. 1335 (S.D.N.Y. 1975) (governor's exercise of the veto power over private bill may be reviewed under 42 U.S.C. § 1983).

72. Bond v. Floyd, 385 U.S. 116 (1966); Jordan v. Hutcheson, 323 F.2d 957 (4th Cir. 1963); Bush v. New Orleans Parish School Bd., 191 F. Supp. 871 (E.D. La.), *aff'd sub nom.* Denny v. Bush, 367 U.S. 908 (1961).

73. 323 F.2d 957 (4th Cir. 1963).

74. 385 U.S. 116 (1966).

75. 191 F. Supp. 871 (E.D. La.), *aff'd sub nom.* Denny v. Bush, 367 U.S. 908 (1961).

Regardless of the limitations imposed upon state legislators claiming immunity from criminal liability, the fact remains that under the Federal Rules of Evidence the federal courts are free to fashion testimonial privileges in criminal cases. Therefore, a brief examination of the federal rules pertaining to testimonial privilege will clarify the framework within which the court in *Craig* attempted to resolve Markert's claim.

Federal Rule 501: Option to Create a Privilege

Rule 26 of the Federal Rules of Criminal Procedure[76] provides that the admissibility of a witness' testimony shall be governed by congressional acts, the Federal Rules of Evidence, or other rules which the United States Supreme Court may adopt. The Advisory Committee notes specifically state that in criminal cases the federal courts "are not bound by the State law of evidence."[77] Rule 501 of the Federal Rules of Evidence[78] addresses the privilege issue and provides that in the absence of an act of Congress or United States Supreme Court ruling, privileges "shall be governed by the common law" as the federal courts so interpret "in the light of reason and experience."[79]

The effect of rule 501, when read in conjunction with rule 26, is to give federal courts discretionary power when considering whether an asserted privilege warrants recognition in the particular criminal case. The United States Supreme Court Advisory Committee's draft of rule 501 enumerated nine specific privileges,[80] but when this draft was submitted to Congress, concern was voiced that the exclusion of other privileges would abrogate the scope of protection developed in the common law.[81] As a result the rule

76. FED. R. CRIM. P. 26 provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

77. *Compare* Federal Rules of Criminal Procedure, 18 U.S.C.A. § 26 (as amended 1975) Advisory Committee Notes 1 *with* FED. R. CIV. P. 43(a), prescribing partial conformity to state law in the taking of testimony.

78. FED. R. EVID. 501 [hereinafter cited in the text as rule 501] provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

79. For a review of the federal case law and statutory revisions resulting in the "reason and experience" approach, see United States v. Craig, 528 F.2d 773, 775-76 (7th Cir. 1976).

80. 56 F.R.D. 183, 234-56 (required reports, lawyer-client psychotherapist-patient, husband-wife, communications to clergymen, political vote at political elections, trade secrets, secrets of state and other official information, and identity of informer).

81. S. REP. NO. 93-1277, 93rd Cong., 2d Sess. 1974, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7058.

ultimately adopted provided a more flexible format for judicial resolution of privilege claims.

Therefore, the federal courts continue to evaluate whether the particular privilege asserted, such as the doctor-patient, husband-wife, or attorney-client protections, would result in the exclusion of useful testimony in the federal trial.[82] The difficulty inherent in this flexible approach is that a federal court's determination may contradict the evidentiary rules of the states which have promulgated by statute or case law a privilege in furtherance of some extrinsic policy.[83] A strong argument can be made that if the defendant has become accustomed to operating under the protections of a state-created privilege, the federal court's exclusion of this privilege results in an inconsistency and defeats the defendant's expectations of protection.[84]

The difficulty which the court in *Craig* encountered in determining whether a testimonial privilege applied to Markert's case was that in no other federal criminal proceeding had a state legislator invoked the protections of either a state speech or debate privilege or the federal clause. In view of the United States Supreme Court delineations of the two-pronged nature of the clause, the limited official immunity which local public officials have enjoyed in federal criminal court, and the discretionary guidelines of rule 501, the Seventh Circuit was presented with the option of determining for the first time whether or not a state legislator does indeed enjoy this testimonial privilege.

THE CRAIG DECISION

A Review of the Opinions

At the first hearing the court was sharply divided as to whether a testimonial privilege existed. The majority held that a common law testimonial privilege existed but that Markert had waived it by testifying. The concurring opinion agreed that the motion to suppress should be denied but contended that no testimonial privilege was available to state legislators in federal criminal cases. A review of these opinions illustrates how two judges

82. *See, e.g.*, United States v. Mancuso, 444 F.2d 691 (5th Cir. 1971) (common law physician-patient privilege inapplicable in Mail Fraud case); United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970) (en banc), *cert. denied*, 403 U.S. 933 (1971) (state attorney-client privilege rejected in federal criminal proceeding); *contra*, Love v. United States, 386 F.2d 260 (8th Cir. 1967), *cert. denied*, 390 U.S. 985 (1968) (state attorney-client privilege binding in federal court); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (state attorney-client privilege governing in federal tax proceeding).

83. C. WRIGHT, LAW OF FEDERAL COURTS ch. 10, § 94, at 414 (2d ed. 1970).

84. *See, e.g.*, United States v. Tratner, 511 F.2d 248 (7th Cir. 1975), a federal tax proceeding wherein the court found the circuits divided on whether the attorney-client privilege is resolved by federal or state law. The court looked to common law, finding that it was unnecessary to determine which particular law applies as in the case at bar the result was the same under either standard. *Id.* at 251. *See also* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101, 122-24 (1956) [hereinafter cited as Louisell].

can arrive at opposite conclusions by premising their analyses upon distinct authoritative guidelines.

The majority opinion began with the premise that rule 501 provided the court with the opportunity to fashion a common law speech or debate privilege.[85] By beginning its analysis with rule 501, the majority appeared to be rejecting Markert's claim that the Illinois speech or debate clause was applicable in the federal proceeding.[86] In stressing the great flexibility which rule 501 provides in resolving privilege issues, the majority reached back to the Rules of Decision Act of 1789,[87] at which time the federal courts looked to state law for procedural rules. The majority then traced the statutory and case law development of rule 501[88] and pointed out that the federal courts were continually given wider latitude to fashion evidentiary rules independently.[89]

The majority recalled the difficulties which Congress encountered when the original proposal of rule 501 enumerated specific privileges and concluded that since these enumerated privileges were eventually discarded in favor of the present flexible rule, Congress did not intend to limit the common law privilege of both the federal and state speech or debate clauses.[90]

The difficulty which an analysis premised upon rule 501 presents is that once the court so vociferously emphasizes its freedom to accept or reject a privilege claim, the floodgates are opened for considering a broad spectrum of legal and policy considerations. In a sensitive case, such as *Craig*, where the real issue centered on the ability of federal courts to intrude upon a state legislator's domain, it was inevitable that once the majority concluded that it could fashion a protection, it would hesitate to contradict the precedents set by the United States Supreme Court with respect to the federal clause.

Therefore, the majority proceeded to consider the common law history of the speech or debate clause, noting the existence of this privilege in 17th century Parliamentary struggles and emphasizing the Constitutional Conven-

85. 528 F.2d 773, 776 (7th Cir. 1976).

86. The court noted, "The primary question is whether state legislators have a Speech or Debate privilege, conferred either by the Illinois Constitution or as a matter of federal common law. . . ." *Id.* at 775. However, without further discussion of this issue, the court proceeded to analyze the nature of rule 501.

87. Rules of Decision Act, ch. 20, § 34, 1 Stat. 92 (1789) (current version at 28 U.S.C. § 1652 (1970)).

88. 528 F.2d at 775-76.

89. *Id. Compare* United States v. Reid, 53 U.S. 361, (12 How.) 383 (1851) (state law of 1789 determined admissibility of witness's testimony in federal court), *and* Logan v. United States, 144 U.S. 263 (1892) (state law at time of admission to Union controls in federal criminal trials) *with* Benson v. United States, 146 U.S. 325 (1892) (federal courts may examine state laws of evidence in the light of general authority) *and* Funk v. United States, 290 U.S. 371 (1933) (federal courts may modify or disregard local laws of privilege). *See also* Rosen v. United States, 245 U.S. 467 (1918); Wolfle v. United States. 291 U.S. 7 (1933).

90. 528 F.2d at 776. However, the Advisory Committee's proposals for rule 501, wherein the nine enumerated privileges originally appeared, did not include the speech or debate clause. *See* 56 F.R.D. at 230-34.

tion's adoption of this protection.[91] The majority considered the United States Supreme Court interpretations of the federal clause and drew on these cases not for a distinction between immunity from liability and privilege against disclosure but for the broader principle that the clause provides congressmen with extensive protection in exercising their legislative duties.[92] Brief acknowledgment was paid to the immunity and privilege distinction inherent in the nature of the clause, but the majority reasoned, citing *United States v. Johnson*,[93] that the purposes of these two aspects are essentially the same: "preservation of the independence of the legislature."[94]

The court then turned to a consideration of the important role of the states in the "American system of government"[95] and at this point mentioned the Founding Fathers' concern that the states remain "an important unit of the government."[96] This discussion of the role of the states reveals the broad scope which the opinion had taken at this point. By making general statements regarding the national government engulfing the states, the importance of the tenth amendment, "the essence" of the federal structure of government, and the "vital" function of the state legislature,[97] the majority was not so much analyzing these concepts as articulating an awareness of the political overtones of *Craig*. The majority acknowledged the government's contention that the purpose of the federal clause was to provide Congress with protection from a co-equal branch of the federal government but rejected the government's conclusions that this separation of powers policy did not apply in federal indictments of state legislators. In rejecting this contention, the majority again stressed that such an analysis "ignores the federal nature of the American system of government."[98]

This same concern for state independence permeated the majority's consideration of policy reasons mandating a protection for state legislators. The majority's main concern was the deterrent effect which the lack of testimonial privilege would have on state legislators, noting the government's concession at oral argument that denying a privilege would inhibit state legislators in their legislative conduct.[99] The majority further broadened the scope of the opinion by observing that first amendment protections would not

91. 528 F.2d at 776-77.
92. *Id.* at 777.
93. 383 U.S. 169 (1966).
94. 528 F.2d at 778.
95. *Id.*
96. *Id.* (citing II ELLIOT'S DEBATES 168, 199 (1836 ed.) and THE FEDERALIST No. 33 (New Am. Lib. Ed. 1961)).
97. 528 F.2d at 777-78.
98. *Id.* at 778.
99. *Id.* The Government attempted to qualify this concession at the en banc rehearing by explaining that denying a speech or debate privilege would hopefully only deter state legislators from engaging in *criminal* conduct. Brief for Appellant at 13 n.28, 537 F.2d 957 (7th Cir. 1976) (en banc).

adequately cover the state legislator's statements in a situation involving admission of testimony.[100]

Finally, the majority called attention to "principles of federal-state comity"[101] by citing *Younger v. Harris*[102] and *Tenney* for the proposition that regulation of state legislative abuses should be monitored at the local level. The majority perhaps somewhat idealistically suggested that local political corruption should primarily be curtailed in the state courts, "the political unit most directly involved."[103] In support of its overriding concern for deference to state legislative independence, the majority even suggested that "it is better to tolerate the potential abuses"[104] than to unduly interfere with a legislator's official activities.

Once the majority premised its analysis upon the language of rule 501, the common law history of the speech or debate clause and the nature of our federal government, the wide range of policy considerations supporting state legislative independence all weighed heavily upon the court and led to the creation of a common law testimonial privilege. Although the opinion began with a rule of evidence, the issue became so dominated by complex governmental function concerns that the court felt compelled to grant the privilege. As a review of the concurring opinion reveals, when the analysis is begun by determining the extent of Markert's immunity from criminal liability, the focus is shifted from consideration of the complex nature of state legislative independence to the practical problem of resolving exactly when a testimonial privilege arises for public officials in criminal cases.

Unlike the majority opinion which began with a discussion of rule 501, in the concurring opinion Judge Tone premised his analysis upon the nature of official immunity. He began by noting that state legislators derive their immunity in the federal courts not from the speech or debate clause but from the doctrine of official immunity. In support of this thesis he cited *Tenney* and noted that this case was relied upon in subsequent United States Supreme Court cases which granted some measure of official immunity in civil litigation. He then referred to the nature of the speech or debate clause, pointing to its two-pronged protections of immunity and privilege and observing that the privilege against disclosure "is commensurate"[105] with the immunity. Judge Tone cited *Brewster*[106] and *Gravel*[107] in support of this

100. 528 F.2d at 779 (citing Branzburg v. Hayes, 408 U.S. 665 (1972)) (first amendment does not provide newspaper reporters with testimonial privilege in grand jury proceeding).

101. 528 F.2d at 779.

102. 401 U.S. 37 (1971) (restricting federal courts' power to stay or enjoin pending state court proceedings).

103. 528 F.2d at 779.

104. *Id.* at 780.

105. *Id.*

106. 408 U.S. 501 (1972).

107. 408 U.S. 606 (1972).

double protection and concluded from this development of the federal clause that, absent an immunity, "it would be incongruous, if not useless, to recognize an evidentiary privilege."[108]

Once the concurring opinion had reasoned that no privilege exists independent of a corresponding immunity from liability, it was unnecessary to become immersed in an analysis of rule 501 because the existence of a common law testimonial privilege depended upon first establishing an immunity from liability for the particular defendant. Therefore, Judge Tone focused on those cases adjudicating the extent of immunity which local officials enjoy in criminal cases and cited *Braatelien*[109] and *Anzelmo*[110] as examples of the limitations of immunity in criminal suits. He also pointed to those cases in which the federal courts enjoined state legislatures and observed that public officials are not accorded absolute protections.[111] These precedents led Judge Tone to conclude that "[S]tate legislators are . . . subject to federal criminal liability for analogous conduct which falls within the prohibitions of a federal criminal statute. . . ."[112]

Once this mode of analysis was adopted, the policy considerations which had been so central to the majority opinion were dismissed as secondary in importance to the question of when a public official is liable for criminal conduct exercised while in public office. Judge Tone maintained that civil immunity is "sufficient"[113] to achieve the purposes of the official immunity doctrine, which he also acknowledged concerned legislative independence. However, unlike the majority he agreed with the government's conclusion that the rationale underlying the federal speech or debate clause—congressional independence—is inapplicable when the federal government indicts a state legislator. In support of this position he observed that the federal clause does not include state legislators within its coverage and that "nothing in our history" suggests a fear of unbridled federal intrusion into state legislative activities,[114] although no authority was cited in support of this latter proposition.

Finally, Judge Tone referred to *Brewster* where the Court sustained bribery charges against a congressman. Judge Tone disagreed with the majority's conclusion that *Brewster* mandates an immunity from investiga-

108. 528 F.2d at 782. The majority strongly disagreed with this conclusion, contending that the testimonial privilege enjoyed by Congressmen "follows not from any substantive immunity but from the Speech or Debate Clause itself." *Id.* at 779 n.5.

109. 147 F. Supp. 888 (8th Cir. 1945).

110. 319 F. Supp. 1106 (E.D. La. 1970).

111. *See* text accompanying notes 55-75 *supra.*

112. 528 F.2d at 783.

113. Judge Tone noted that the purpose of official immunity "is to promote independence and fearless discharge of duty on the part of the protected officials." *Id.*

114. *Id.*

tion into legislative motives. Although Judge Tone acknowledged that in *Brewster* the prosecution did not need to inquire whether a Senator actually fulfilled the bribe by acting accordingly in the Senate chambers, he maintained that the case still stands for the principle that public officials are *not* immune from criminal liability for legislatively related activities.[115] Therefore, Judge Tone implied that since state legislators do not enjoy the same broad protections from criminal liability as do congressmen, they are not privileged from disclosure of legislative motives in federal court. Once again, the thesis was urged that absent a grant of immunity there is no corresponding testimonial privilege.

Judge Tone did note that *Craig* had left open the question of whether the Mail Fraud Statute and Hobbs Act do extend to sanctioning state legislative conduct. Since Markert had not appealed this issue, the judge observed that "[i]t would be inappropriate . . . to pass on the sufficiency of the indictment in this interlocutory appeal of an order suppressing evidence."[116] This comment does not underscore the important policy issues raised by the initial motion to suppress but instead focuses on the narrower issue of availability of the testimonial privilege.

The en banc rehearing adopted Judge Tone's analysis without much discussion, merely reiterating the majority and concurring positions and adopting Judge Tone's central mode of analysis.[117] The court did caution that voting records and other legislative conduct would not alone support an inference of criminal misconduct.[118] The judge who had written the majority opinion maintained his views, another viewed the Illinois Speech or Debate clause as determinative, and a third agreed with the majority opinion of the first hearing but would have sustained the motion to suppress because Markert did not, in his opinion, waive the privilege.[119]

Although the majority opinion carefully considered the important policy concerns and the opportunity to create a testimonial privilege under rule 501, the final disposition of this issue and the reversal of the suppression order resulted from the en banc court's adoption of Judge Tone's succinct analysis of the inextricable nature of immunity and commensurate privileges. Whether the court's final disposition of this complex issue was warranted in light of the legal guidelines and policy considerations is the subject of the following section.

115. *Id.* at 783-84.
116. *Id.* at 784.
117. 537 F.2d 957 (7th Cir. 1976) (en banc).
118. *Id.* at 959.
119. *Id.* The United States Supreme Court rejected Markert's final appeal on this issue. 45 U.S.L.W. 3416 (U.S. Dec. 7, 1976) (No. 76-179).

Analysis of the Craig Decision

The foremost problem which *Craig* raises is the extent to which the federal court could have adopted the protections of the Illinois speech or debate clause for Markert's benefit. It is true that the federal clause does not include state legislators within its coverage because the clause appears in article one of the Constitution and directs its attention to the federal legislative branch. It is also true that rule 501, particularly its Advisory Committee notes, articulates a desire to achieve uniformity in the federal rules of evidence and criminal procedure. Nevertheless, as several eminent scholars have observed,[120] in adjudicating the availability of a privilege claim the federal courts often implicitly adopt the state rule on privilege, particularly when the state rule is in furtherance of extrinsic policy considerations. Since the United States Supreme Court has delineated the dual nature of the federal speech or debate clause, arguably the Illinois clause operates as a state-created privilege as well as a grant of immunity and deserves attention in the federal court. At a minimum, in searching for the "common law" via rule 501's directives, the state clause does present another factor which might be considered before denying the existence of this protection.

On the other hand, as Judge Tone so precisely explained, the privilege arose, at least in United States Supreme Court cases, only when the defendant was able to claim an immunity. The forcefulness of Tone's legal reasoning stems from the circular nature of this logical approach: if it is first necessary to establish immunity, the privilege can never exist as an independent source of legal protection. If, as *Brewster* establishes, taking a bribe is no part of one's legislative duties, and if, as case law illustrates, local public officials are criminally liable for activities of an official nature, then indeed no independent testimonial privilege surrounds a state legislator's revelations of his motives. The difficulty raised by Tone's analysis is that there still exists the general language of rule 501. Since no other circuit has yet confronted a claim of this nature, the search for the federal common law only includes case law interpreting the federal clause with respect to congressmen.

Therefore, it seems unavoidable that the question of comity is inherently important in the *Craig* factual situation and the problem really becomes one of determining at what point the federal courts must defer to the states' concern for intra-governmental independence.[121] In recent cases[122] the Court

120. *See* Orfield, *Privileges in Federal Criminal Evidence*, 40 U. DET. L. REV. 403, 411-13 (1963); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COL. L. REV. 353, 370-73 (1969).

121. When the issue before the court is admissibility of evidence, diverse opinions have been expressed as to the deference accorded state law. One view is expressed by Professor Weinstein as follows: "As the spectrum shifts from overriding federal to overriding state policy, we can expect the rule on recognition of state privilege to shift. Thus, in criminal cases, the federal law of exclusion and admission controls." Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COL. L. REV. 535, 547 (1956). Professor Louisell stresses recognition of principles of comity:

has manifested an increasing trend to defer to the statutes and case law of the states on matters of local governmental concern. In *National League of Cities v. Usery*,[123] the Court held that the federal government could not impose minimum wage and maximum hour provisions upon state and local governmental units. In this important decision the majority ruled that such a requirement would "directly displace the state's freedom to structure integral operations in areas of traditional governmental functions."[124] Thus, the majority's explicit attention to the importance of state sovereignty in local government functions indicates the Court's present leanings and the analogy to the *Craig* fact pattern is readily apparent.[125] Perhaps if the arguments in Markert's behalf had stressed this aspect of the case, with sufficient precedential support, the attention of the en banc court would have been diverted from Markert's personal position to the needs of the Illinois General Assembly to regulate its own internal affairs. It appears that general reiterations of "the nature" of the states in the federal system was not persuasive.

Finally, *Craig* raises, as Judge Tone and the en banc panel noted, the important question of the extent to which zealous prosecutors may or should pursue delinquent local officials. The allegations of the *Craig* indictment reveal a sordid scheme of misuse of the powers of public office for personal gain. Although a sense of justice may welcome the disposition reached in *Craig*, in considering the effect of this evidentiary ruling, concern for the future extent of investigations into the state legislature remains. In *Craig* the defendant had personally provided the controverted statements. However, *Craig* leaves open the question of whether statements made on the floor of the Illinois General Assembly, in committee meetings, and in other legislative settings, would be introduced in federal criminal litigation. Needless to say, although Judge Tone offered assurances that United States history does not reveal excessive federal interference with state legislative independence,[126] the future turn of events remains to be seen.

Thus, the differing viewpoints of the majority and concurring opinions at

> The privileges are institutions of the states in no way inharmonious with controlling federal standards; to the contrary some of them at least may ultimately have federal constitutional status. They represent substantive rights protected in the holder by the power competent in our federal system to protect such rights. Of course in any criminal prosecution it may be to the great convenience of the federal government to ignore a privilege, as it may be to ignore other state institutions. But this does not make it right to do so.

Louisell, *supra* note 84, at 123-24.

122. *See, e.g.*, Bishop v. Wood, 96 S. Ct. 2074 (1976) (state law interpretation that allegedly permanent public employee can be removed without hearing prevails in federal court); Kelley v. Johnson, 425 U.S. 238 (1976) (county hair-grooming regulation for police officers upheld).

123. 96 S. Ct. 2465 (1976).

124. *Id.* at 2474.

125. *Id.* at 2470-71.

126. 528 F.2d at 783.

the first appellate hearing illustrate the numerous policy considerations which must be weighed in creating a testimonial privilege. In light of the limitations upon official immunity for local officials in federal criminal cases and the concurring opinion's logical analysis of the nature of a speech or debate privilege, it appears that the concurring opinion is technically more persuasive. However, if this litigation had occurred in the state court, clearly Markert's admissions would have been protected by his state constitutional rights.

CONCLUSION

In this case of first impression, the Seventh Circuit decided that state legislators are not afforded a common law testimonial privilege when they have provided federal officials with statements concerning their legislative conduct. Because Markert was subject to criminal liability for receiving a bribe after manipulating passage of a house bill, he was ultimately denied the protections which his motion to suppress would have provided and was eventually convicted in the trial court.

The immediate effect of *Craig* will undoubtedly be a reluctance on the part of wayward state legislators in the Seventh Circuit to provide federal officials with extensive discourse on the motives and conduct underlying their legislative activities. Whether the long range effect of this evidentiary ruling will result in chilling other state legislators from discussing their official acts remains to be seen.

The Seventh Circuit, however, has explicitly articulated its position that in cases of local political corruption, state legislators are not automatically granted additional privileges on the basis of their political position. In an era replete with disappointing displays of abuse of public office, the Seventh Circuit has at a minimum established that in resolving evidentiary and procedural issues, the status of the defendant is not of paramount importance.

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