

Winter 1980

Federal Rules of Evidence--Testimonial Privileges

Anne Pachciarek

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Anne Pachciarek, Federal Rules of Evidence--Testimonial Privileges, 71 J. Crim. L. & Criminology 593 (1980)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

FEDERAL RULES OF EVIDENCE—TESTIMONIAL PRIVILEGES

Trammel v. United States, 100 S. Ct. 906 (1980).
United States v. Gillock, 100 S. Ct. 1185 (1980).

I. INTRODUCTION

Last Term the Supreme Court used its authority under Rule 501 of the Federal Rules of Evidence¹ to limit testimonial privileges in federal criminal trials. In *Trammel v. United States*² the Court narrowed the broad privilege that was the legacy of its decision in *Hawkins v. United States*³ by holding that the privilege against adverse spousal testimony vests in the witness spouse alone and that such a witness may neither be compelled to testify nor foreclosed from testifying.⁴ In *United States v. Gillock*⁵ the Court held that there is no speech or debate privilege barring the introduction of evidence of the legislative acts of a state legislator in a federal criminal prosecution.⁶ The Court found that the language and legislative history of Rule 501 revealed that such a privilege is not an established part of the federal common law and therefore is not applicable through the Rule.⁷ The Court also concluded that principles of federalism did not compel the privilege.⁸

In *Trammel*, the Court balanced the "right to every man's evidence"⁹ against a broad spousal privilege, and in *Gillock*, it balanced the right to enforce federal criminal statutes against the legislative privilege. The Court limited or rejected evidentiary privileges in these cases because it viewed the privileges as unduly hampering legitimate law enforcement efforts. The Court's promotion of the federal interest in criminal prosecutions indicates that it is concerned with facilitating the trial of persons charged with federal crimes at the expense of privileges designed to promote socially desirable conduct. The decision in *Trammel* achieved a restructuring of the law of marital privilege although

the Court failed to fashion a rule completely consistent with sound policy. The decision in *Gillock* sacrificed the important policy of promoting state legislators' independence to the federal interest in the conviction of criminals.

II. TRAMMEL V. UNITED STATES

By vesting the testimonial privilege solely in the witness spouse, the Court in *Trammel* rid itself of a rule which did not advance the ends it was theoretically designed to promote. It refused, however, to seize the opportunity to update completely the law of marital privilege by holding that only a privilege protecting confidential marital communications would be retained.

A. FACTS AND HOLDING

Prior to a trial on a narcotics indictment, Otis Trammel moved to sever his case from that of his two codefendants, asserting his claim to a privilege to prevent his wife, an unindicted co-conspirator, from testifying against him.¹⁰ The district court denied the motion after a hearing at which Trammel's wife was called as a government witness under a grant of use immunity and at which she testified that her cooperation with the government was based on assurances that she would be given lenient treatment.¹¹ The district court ruled that she could testify in support of the government's case to any act she observed during the marriage and to any communication made in the presence of a third person.¹²

After he was tried and convicted, Trammel appealed to the United States Court of Appeals for the Tenth Circuit on the grounds that the admis-

¹ "[T]he privilege of a witness . . . 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." FED. R. EVID. 501.

² 100 S. Ct. 906 (1980).

³ 358 U.S. 74, 78 (1958).

⁴ 100 S. Ct. at 914.

⁵ 100 S. Ct. 1185 (1980).

⁶ *Id.* at 1194.

⁷ *Id.* at 1190.

⁸ *Id.* at 1193.

⁹ *United States v. Bryan*, 339 U.S. 323, 331 (1950).

¹⁰ 100 S. Ct. at 908.

¹¹ *Id.* The Supreme Court concluded that even though Trammel's wife chose to testify after a grant of immunity and assurances of lenient treatment, her testimony was voluntary. 100 S. Ct. at 914. See note 19 *infra*.

¹² 100 S. Ct. at 908. The Court also ruled that confidential communications between Trammel and his wife were privileged and inadmissible. *Id.* The rule protecting confidential marital communications was not at issue in *Trammel*. For discussion of that rule, see *Blau v. United States*, 340 U.S. 332 (1951); C. McCORMICK, EVIDENCE §§ 78-86 (2d ed. 1972).

sion of the adverse testimony of his wife over his objection was reversible error.¹³ Trammel alleged that the district court's admission of his wife's adverse testimony contravened the rule set forth by the Supreme Court in *Hawkins v. United States*¹⁴ that the testimony of one spouse against the other is barred unless both consent.¹⁵ The court of appeals rejected his contention and concluded that *Hawkins* did not prohibit the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the government in return for her testimony.¹⁶

The Supreme Court affirmed in an opinion by Chief Justice Burger.¹⁷ The Court modified the *Hawkins* rule¹⁸ so that the witness spouse alone has the privilege to refuse to testify adversely.¹⁹ The Chief Justice cited Rule 501²⁰ and *Hawkins*²¹ as authority for the Court's re-examination of the testimonial privilege "in the light of reason and

experience."²² As an indication of the erosion of support for an unwise rule, the Court looked to the trend in the state law since *Hawkins* toward divesting the accused of the privilege to bar adverse spousal testimony.²³ The Court also examined the roots of the rule,²⁴ which were firmly ensconced in medieval jurisprudential canons that have long since been abandoned,²⁵ and the modern justification for the rule, which is the fostering of marital harmony.²⁶ It concluded that neither the ancient nor the modern rationale justified retention of the *Hawkins* rule.²⁷ The Court noted that the privilege against adverse spousal testimony swept more broadly than the testimonial privileges for attorney and client, physician and patient, and priest and penitent, which are similar to the rule protecting confidential marital communications.²⁸

B. ANALYSIS

Rules of privilege are substantive laws designed to influence the conduct of individuals.²⁹ Unlike rules of exclusion which guard against unreliable, prejudicial, or misleading evidence, they do not aid in the discovery of truth.³⁰ Instead, they serve to protect interests and relationships that society

¹³ 100 S. Ct. at 909.

¹⁴ 358 U.S. at 78.

¹⁵ 100 S. Ct. at 909.

¹⁶ *United States v. Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978).

¹⁷ Justice Stewart submitted a separate opinion in which he concurred in the judgment of the Court.

¹⁸ "While the rule forbidding testimony of one spouse for the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse against the other." *Hawkins v. United States*, 358 U.S. at 77 (emphasis in original).

¹⁹ 100 S. Ct. at 914. It also stated that even though a spouse chooses to testify after a grant of immunity and assurances of lenient treatment, her testimony is not involuntary. *Id.* Cf. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (characterizing the "give and take" of plea bargaining as a voluntary exchange). Justice Stewart, in his concurring opinion in *Hawkins*, suggested that the adverse testimony of the spouse in that case, who was herself subject to prosecution, could not be voluntary because the government possessed great influence over the witness in the form of offers of leniency. *Hawkins v. United States*, 358 U.S. at 82-83 (Stewart, J., concurring).

²⁰ See text accompanying note 38 *infra*.

²¹ See text accompanying note 39 *infra*. The *Hawkins* decision modified the Court's holding in *Funk v. United States*, 290 U.S. 371 (1933). In *Funk*, the Court abolished the testimonial disqualification preventing the accused's spouse from testifying either for or against the accused in any case, civil or criminal. *Id.* at 386. See C. McCORMICK, *supra* note 12, § 66. The *Funk* decision enabled the spouse of a defendant to testify in the defendant's behalf, 290 U.S. at 386, but retained a privilege against adverse spousal testimony whereby either spouse could prevent the other from giving adverse testimony. *Id.* at 373. The Court reasoned that the ancient policies for disqualifying a wife from testifying in behalf of her husband in criminal cases were no longer acceptable, *id.* at 381, but did not discuss her competency to testify against him. *Id.* at 373.

²² 100 S. Ct. at 910-11.

²³ *Id.* at 911-12. See text accompanying notes 49-51 *infra*.

²⁴ 100 S. Ct. at 909. See generally 8 J. WIGMORE, EVIDENCE § 2227 (McNaughton rev. 1961). Wigmore makes the following observations on the origin of the privilege: The history of the privilege not to testify against one's wife or husband is involved . . . in a tantalizing obscurity. That it existed by the time of Lord Coke is plain enough, but of the precise time of its origin, as well as the process of thought by which it was reached, no certain record seems to have survived. What is a little odd is that it comes into sight about the same time as the disqualification of husband and wife to testify on one another's behalf . . . , for the two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey.

Id. at 211.

²⁵ Long since abandoned are the medieval jurisprudential canons which necessitated a privilege against adverse spousal testimony: the common law rule of incompetency that excluded the testimony of interested parties to a lawsuit, 8 J. WIGMORE, *supra* note 24, § 2227, and the idea that the husband and wife were "two souls in one flesh," E. COKE, A COMMENTARIE UPON LITTLETON 6B (1628), quoted in 8 J. WIGMORE, *supra* note 24, § 2227.

²⁶ 100 S. Ct. at 909.

²⁷ *Id.* at 913-14.

²⁸ *Id.* at 913.

²⁹ C. McCORMICK, *supra* note 12, § 72.

³⁰ *Id.*

deems of sufficient importance to justify the suppression of facts necessary to the adjudicatory process.³¹ Since the protection ensured by the testimonial privilege frustrates the working of the fundamental principle the Court has articulated that "the public has a right to every man's evidence,"³² privileges must be strictly construed.³³ Only in the rare instance when the privilege serves a transcendent public good will a court thrust aside the all-important search for evidence.³⁴ Neither the ancient nor the modern social policies justify the retention of the privilege against adverse testimony by either spouse, except in the area of confidential communications.

The confidential marital communications privilege provides that communications in private between husband and wife are assumed to be confidential unless the subject of the discussion or the circumstances belie that assumption.³⁵ If a third person, other than a child who is too young to understand, is present to the knowledge of the communicating spouse, the communication is not privileged.³⁶ In order to encourage free communication, the communicating spouse is the holder of this privilege.³⁷

Trammel, however, did not deal with a privilege protecting confidential marital communications. It dealt only with the privilege to refuse to testify adversely, which protects communications made in the presence of third parties. The Court properly discarded the rule that the testimony of one spouse against the other is barred unless both consent by using its authority under Rule 501.

Congress enacted Rule 501 to allow the courts flexibility in developing the law of privilege³⁸ in cases such as *Trammel*, which require the re-examination of outmoded social policies. Moreover, the Court in *Hawkins* was careful to point out that its decision was not meant to "foreclose whatever changes in the rule [against adverse spousal testimony] may eventually be dictated by 'reason and experience.'"³⁹ However, the *Hawkins* Court in

1958 noted that:

there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned.⁴⁰

In 1980 the *Trammel* Court acknowledged that the reasons satisfying the *Hawkins* Court were no longer viable.⁴¹ In doing this, the Court has embraced the view Justice Stewart propounded in his concurring opinion in *Hawkins*.⁴² There, Justice Stewart observed that a rule which stemmed from long-abandoned concepts, criticized by numerous scholars, and modified by many states deserved close scrutiny from the Court, and not merely its indulgence in naive assumptions.⁴³ These criticisms of the privilege Justice Stewart advanced were valid in 1958 and remain valid in 1980.⁴⁴

In *Hawkins*, the Court supported its retention of the privilege against adverse spousal testimony by emphasizing that most states retained the exclusionary rule in some form.⁴⁵ But since 1958 many states have moved toward divesting an accused of the privilege.⁴⁶ At the time of the *Hawkins* decision, thirty-one jurisdictions allowed an accused a privilege to prevent adverse spousal testimony,⁴⁷ and in 1980 only twenty-four jurisdictions followed that rule.⁴⁸ Moreover, seventeen states have abolished all marital privileges not involving confidential communications in criminal cases.⁴⁹ Since the control of laws governing marriage is the traditional province of the state,⁵⁰ the trend in state law away from the *Hawkins* rule and toward a more limited spousal privilege is especially significant.⁵¹

⁴⁰ *Id.*

⁴¹ 100 S. Ct. at 914. Justice Stewart, however, in his concurring opinion, stated that the foundations of the privilege had disappeared well before the 1958 *Hawkins* decision. *Id.* (Stewart, J., concurring).

⁴² *Hawkins v. United States*, 358 U.S. at 81-83 (Stewart, J., concurring). See 100 S. Ct. at 914 (Stewart, J., concurring in the judgment).

⁴³ *Hawkins v. United States*, 358 U.S. at 81-82.

⁴⁴ See 100 S. Ct. at 914.

⁴⁵ *Hawkins v. United States*, 358 U.S. at 78-79.

⁴⁶ See 100 S. Ct. at 911-12 n.9.

⁴⁷ *Hawkins v. United States*, 358 U.S. at 81 n.3.

⁴⁸ 100 S. Ct. at 911-12 n.9.

⁴⁹ *Id.*

⁵⁰ *Id.* at 912. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

⁵¹ 100 S. Ct. at 912.

³¹ *Id.*

³² *United States v. Bryan*, 339 U.S. at 331.

³³ 100 S. Ct. at 912.

³⁴ *Id.* See *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). *Accord*, *United States v. Nixon*, 418 U.S. 683, 709-10 (1974).

³⁵ See C. McCORMICK, *supra* note 12, § 80.

³⁶ *Id.*

³⁷ *Id.* at § 83.

³⁸ H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 40891 (1974); S. REP. NO. 93-1277, 93d Cong., 2d Sess. 11 (1974); H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 8 (1973).

³⁹ *Hawkins v. United States*, 358 U.S. at 79.

Furthermore, many authorities have criticized the privilege against adverse spousal testimony.⁵² Wigmore labelled it "the merest anachronism in legal theory and an indefensible obstruction to truth in practice,"⁵³ while McCormick denounced it as "an archaic survival of a mystical religious dogma."⁵⁴ Both the Committee on the Improvement of the Law of Evidence of the American Bar Association and the American Law Institute's 1942 Model Code of Evidence rejected a rule vesting in the defendant the right to exclude adverse spousal testimony, and advocated the privilege only for confidential marital communications.⁵⁵ Similarly, the National Conference of Commissioners on Uniform State Laws called the rule of not requiring one spouse to testify against the other in a criminal action "a sentimental relic" and advised limiting the privileges to confidential communications between the spouses.⁵⁶

The rule vesting the witness spouse with the privilege to refuse to testify adversely may advance the stated goal of avoidance of dissension in the marital relationship.⁵⁷ However, it does not encourage and strengthen a married couple's private relationship. The privilege protecting confidential marital communications serves this latter goal because the full disclosure of private thoughts and feelings between spouses helps to achieve the trust and confidence necessary to a healthy marriage. The privileging of statements made in the presence of others, however, is unlikely to encourage this full disclosure because the spouses have no expectation

of privacy when they converse in front of other people. The need for evidence in federal criminal trials is too great to allow a sweeping privilege which shields communications made when third parties are known to be present.⁵⁸ Those types of communications are undeserving of a privilege because they do not encourage the repose of complete trust in a single person, the marriage partner. The key to the social policy of encouraging the marital relationship lies not in who holds the privileges to refuse to testify adversely, but in what type of communication is affected. The right to privacy in the marital relationship is fundamental, a necessary safeguarding of the basic social unit.⁵⁹ Only this interest, which is protected by the confidential communications privilege, outweighs the pressing need for evidence in criminal trials. Therefore, *Trammel* should have discarded entirely the privilege against adverse spousal testimony, leaving only the privilege protecting private marital communications.

III. UNITED STATES v. GILLOCK

The Court again demonstrated its reluctance to grant privileges that unduly burden law enforcement efforts in *United States v. Gillock*.⁶⁰ But in *Gillock*, the Court's promotion of law enforcement efforts sacrificed the delicate constitutional balance between federal and state government by aggrandizing the federal interest in the enforcement of its criminal statutes.

A. FACTS AND HOLDING

Edgar Gillock, a Tennessee state senator, was indicted on federal charges that he accepted money for the use of his public office to block the extradition of a criminal defendant from the state and that he had agreed to introduce state legislation to enable certain individuals to obtain master electricians' licenses which they had failed to obtain through existing processes.⁶¹ Before trial, the dis-

⁵² See, e.g., MODEL CODE OF EVIDENCE rule 215, Comment a (1942); UNIFORM RULE OF EVIDENCE 23(2), Comment (1953); C. McCORMICK, *supra* note 12, § 66; 8 J. WIGMORE, *supra* note 24, § 2228; 63 REPORTS OF THE ABA 570, 594-95 (1938).

⁵³ 8 J. WIGMORE, *supra* note 24, § 2228, at 221.

⁵⁴ C. McCORMICK, *supra* note 12, § 66, at 145.

⁵⁵ MODEL CODE OF EVIDENCE rule 215, Comment a; 63 REPORTS OF THE ABA 594-95.

⁵⁶ UNIFORM RULE OF EVIDENCE 23(2), Comment.

⁵⁷ See Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1370-71 (1973). Marital dissension may be avoided if the witness spouse refuses to testify against his defendant spouse. However, in those cases in which the witness spouse chooses to testify, like *Trammel*, marital dissension is not avoided. McCormick notes that "family harmony is nearly always past saving when the spouse is willing to aid the prosecution." C. McCORMICK, *supra* note 12, § 66, at 145. The Court itself admits that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." 100 S. Ct. at 913.

⁵⁸ Unlike the privileges between attorney and client, see C. McCORMICK, *supra* note 12, §§ 87-97, physician and patient, *id.* at §§ 98-105, and priest and penitent, *id.* at § 77, the testimonial privilege protects not only private communications, but permits the exclusion of spousal testimony about communications made with no expectation of privacy. *Id.* at § 66.

⁵⁹ Reutlinger, *supra* note 57, at 1370-71.

⁶⁰ 100 S. Ct. 1185 (1980).

⁶¹ 100 S. Ct. at 1187. The government's offer of proof charged him with soliciting money in exchange for using his influence as a state senator to block the extradition of a fugitive from Illinois. *Id.* at 1188. The government offered to prove that Gillock appeared at the extradition hearing, reviewed the extradition papers, questioned the

strict court granted the senator's motion to suppress all evidence relating to his legislative activities, holding that Gillock had an evidentiary privilege cognizable under Rule 501.⁶² The district court equated the senator's privilege with that granted members of both houses of Congress under the Speech or Debate Clause of the Constitution and concluded that it prohibited the introduction of evidence of the senator's legislative acts and his underlying motivations.⁶³ The United States Court of Appeals for the Sixth Circuit by a divided vote affirmed the district court in its protection of the privilege.⁶⁴

hearing officer about the propriety of extradition on a misdemeanor charge, and requested an official opinion from the Tennessee Attorney General on the subject. *Id.* Furthermore, the government stated that it intended to introduce at trial the transcript of a telephone call during which Gillock declared that he could have blocked the extradition proceedings by exerting pressure on the extradition hearing officer who had appeared before Gillock's senate judiciary committee on a budgetary matter. *Id.* The government also indicated that it would prove that Gillock attended a meeting of the senate judiciary committee where the extradition hearing officer presented his department's budget request. *Id.*

Next, the government offered proof that Gillock used his influence to assist four individuals in obtaining master electrician's licenses. *Id.* at 1188-89. The prosecution indicated that it would offer evidence that Gillock fixed a contingent fee of \$5000 per person, to be refunded if Gillock were unsuccessful. *Id.* at 1189. The government offered to prove that Gillock introduced legislation providing for reciprocity among states in licensing of electricians, and made statements on the floor of the senate in support of the bill. *Id.* The government sought to show that when opposition to the bill was voiced by union representatives, Gillock replied that he could not withdraw the bill because he had accepted fees for introducing it. *Id.* The government also intended to prove that Gillock moved to override the Governor's veto of the legislation. *Id.*

⁶² *Id.* at 1188. For the language of Rule 501, see note 1 *supra*.

⁶³ 100 S. Ct. at 1188.

The Speech or Debate Clause provides that Senators and Representatives:

shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1.

⁶⁴ 587 F.2d 284 (6th Cir. 1978). Chief Judge Edwards concluded "that the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming . . . [the] protection of the privilege in this case." *Id.* at 290.

The Supreme Court reversed in an opinion by Chief Justice Burger.⁶⁵ In holding that a state legislator possessed no speech or debate type privilege in a federal criminal prosecution,⁶⁶ the Court first determined that such a privilege was not applicable through Rule 501 as an established part of the federal common law.⁶⁷ The Court further found that the policy of legislative independence which inspired the Constitution's Speech or Debate Clause does not compel a similar privilege for state legislators.⁶⁸ Principles of comity between the federal government and the states yielded to the important federal interest in enforcement of criminal statutes.⁶⁹ The Court identified only a "speculative benefit to the state legislative process" as a result of recognition of a speech or debate privilege for state legislators, but recognized the government's interest as urgent and overriding.⁷⁰

⁶⁵ Justice Rehnquist, joined by Justice Powell, dissented for the reasons stated by Chief Judge Edwards in his opinion in this case for the Sixth Circuit. 100 S. Ct. at 1194 (Rehnquist, J., dissenting).

⁶⁶ *Id.* The Chief Justice did note, however, that were the Court to recognize an evidentiary privilege similar to the federal speech or debate privilege, much of the evidence at issue in this case would be inadmissible under the standard applicable to members of Congress. *Id.* at 1190.

⁶⁷ *Id.* The Chief Justice noted that the language and legislative history of Rule 501 failed to support Gillock's argument that the privilege was applicable through the Rule. *Id.* See note 1 *supra*; note 38 & accompanying text *supra*; PROPOSED FED. R. EVID. 501-13, 56 F.R.D. 183, 230-60 (1973).

Chief Justice Burger cited the House Conference Committee Report on the Federal Rules of Evidence, H.R. CONF. REP. No. 93-1597, 93d Cong., 2d Sess. 7 (1974), as support for the proposition that Rule 501 requires the application of federal privilege law in federal criminal cases. 100 S. Ct. at 1190. *Cf.* *Wolfe v. United States*, 291 U.S. 7, 13; *Funk v. United States*, 290 U.S. at 379. Because of this requirement, the evidentiary privilege guaranteed by the Tennessee Constitution, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place," TENN. CONST. art. 2, § 13, which may be asserted in a criminal prosecution in state court, does not compel the same privilege in a federal prosecution. 100 S. Ct. at 1190.

⁶⁸ *Id.* at 1192-93.

⁶⁹ *Id.* at 1193.

⁷⁰ *Id.* The Chief Justice added that Congress might have provided that a state legislator prosecuted under federal law receive the same privilege as a member of Congress or might have instructed the federal courts to apply to a state legislator the same evidentiary privileges available in a similar prosecution in the courts of the state, but did not. *Id.* at 1193-94. The Chief Justice concluded that, given the absence of a constitutional limitation on Congress' power to submit state officials to

B. ANALYSIS

The roots of the Speech or Debate Clause of the Federal Constitution are in English history.⁷¹ Conflicts between monarchs and Parliament during which a series of kings used the judicial process to suppress and intimidate critical legislators⁷² ultimately led the Founding Fathers to include a privilege for legislators in the Constitution.⁷³ In analyzing the purpose of the clause, the Court in *United States v. Johnson* stated:

There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate [sic] thrust of the Speech or Debate Clause.⁷⁴

Furthermore, the Framers did not intend the immunities of the Clause to inure to individual members of Congress in their personal capacities, but to ensure the integrity of the legislative process through the protection of individual legislators.⁷⁵ The policy underlying the adoption of the Speech or Debate Clause, then, is the Framers' perceived need for legislative independence. The same policy considerations which recommended adoption of the federal Speech or Debate Clause call for recognition of a speech or debate privilege for state legislators.

Principles of comity inherent in our federal system also require the creation of an evidentiary privilege for state legislators. While the Court acknowledged that "principles of comity command careful consideration,"⁷⁶ it concluded that its "cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields."⁷⁷

The Court's holding in *National League of Cities v. Usery*⁷⁸ that a federal statute regulating the wages of state employees was unconstitutional because it "operate[d] to directly displace the States' freedom

to structure integral operations in areas of traditional governmental functions"⁷⁹ supports the argument that principles of comity require the extension of the privilege to state legislators. The opinion in *Usery* evidenced the Court's concern with federal intervention in traditional state functions, but its denial of the legislative privilege in *Gillock* seems to belie this concern. A powerful federal government should not be allowed to tamper with a state's legislature, which is an integral part of the state governmental structure, if the state is to retain a measure of independence. Federal prosecutors should not be permitted to frustrate state self-government, one of the cornerstones of our federal system.

The Court pointed out that *Usery* distinguished between regulation of individuals and legislation which directly regulates the internal functions of states,⁸⁰ implicitly classifying the instant case as the former.⁸¹ *Gillock*, however, deals not with individuals, but with the integrity of the legislative process, a crucial part of any state's government.⁸²

Finally, the Court concluded that the hardship visited upon *Gillock* as a result of denial of the privilege "is not in any sense analogous to the direct regulation" considered in *Usery*.⁸³ The authors of the Constitution, however, deemed the potential disruption of the legislative process to be very great indeed.⁸⁴

The *Gillock* Court implied that a speech or debate privilege for state legislators was less tenable than the executive privilege rejected in *United States v. Nixon (Nixon I)*.⁸⁵ *Nixon I*, however, can be distinguished from *Gillock*. The Court denied the executive privilege in *Nixon I* because the President claimed an "absolute, unqualified . . . privilege of immunity from judicial process under all circumstances."⁸⁶ The Court balanced the "generalized assertion" of executive privilege against the "inroads of such a privilege on the fair administration of criminal justice."⁸⁷ It refused to sustain an abuse of the executive privilege in the form of an absolute privilege of confidentiality for all of Nixon's communications in light of the great need for evidence.⁸⁸

federal criminal sanctions, there was no reason for the Court to create a privilege hindering the proof of relevant facts. *Id.* at 1194.

⁷¹ See *United States v. Brewster*, 408 U.S. 501, 508 (1972).

⁷² See *United States v. Johnson*, 383 U.S. 169, 178 (1966).

⁷³ See 100 S. Ct. at 1191.

⁷⁴ *United States v. Johnson*, 383 U.S. at 182.

⁷⁵ See *United States v. Brewster*, 408 U.S. at 507.

⁷⁶ 100 S. Ct. at 1193.

⁷⁷ *Id.*

⁷⁸ 426 U.S. 833 (1976).

⁷⁹ *Id.* at 852.

⁸⁰ 100 S. Ct. at 1192. See 426 U.S. at 840-41.

⁸¹ 100 S. Ct. at 1192.

⁸² See *United States v. Brewster*, 408 U.S. at 507.

⁸³ 100 S. Ct. at 1192.

⁸⁴ See *United States v. Johnson*, 383 U.S. at 178-79.

⁸⁵ 418 U.S. 683 (1974).

⁸⁶ *Id.* at 706.

⁸⁷ *Id.* at 711-13.

⁸⁸ *Id.* at 713.

Gillock's claim, however, is not of an absolute, unqualified privilege, but merely of protection "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."⁸⁹ He also claimed no privilege for any communication made in any capacity other than his legislative role. Since the legislator's acts, votes, and decisions alone form the basis for the privilege,⁹⁰ its scope is more restricted than that of the privilege claimed in *Nixon I*. The Court's likening of the *Gillock* and *Nixon I* situations, therefore, is misleading.

The Court's dismissal of the "speculative benefit to the state legislative process"⁹¹ and the "minimal impact on the exercise of the legislative function"⁹² is unwarranted. The benefit to the state legislative process cannot be said to be speculative, for the Framers deemed the legislative independence of members of Congress to be important enough to merit constitutional protection. The danger of inhibition of legislative freedom looms just as large in the case of state legislators as it does in the case of members of Congress. The Third Circuit in *In re Grand Jury Proceedings*⁹³ noted the possible harm to important state legislative functions: "[State legislators'] work could be substantially hindered by exposing members to litigation arising out of the performance of legislative duties."⁹⁴ One panel of

⁸⁹ *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (quoting *United States v. Brewster*, 408 U.S. at 525).

⁹⁰ *Id.* at 527.

⁹¹ 100 S. Ct. at 1193.

⁹² *Id.*

⁹³ 563 F.2d 577 (3d Cir. 1977). The court stated: [W]e recognize the existence of a personal privilege which may be asserted by a legislator in a federal criminal case to exclude from a criminal proceeding in which he is involved any evidence of his action performed in a strictly legislative capacity, motivations for such action, or utterances in the course of his legislative duties. We do not find the privilege to exist on the part of the legislature as an institution in a similar context.

Id. at 585.

action, or utterances in the course of his legislative duties. We do not find the privilege to exist on the part of the legislature as an institution in a similar context.

Id. at 585.

⁹⁴ 563 F.2d at 583. The court noted:

Grant of the privilege is founded on unhappy experience in the past and is based on the premise that a legislature will function better in the public interest with the protection than without it. Though it may hamper somewhat prosecution of the few who are guilty of betraying the public trust, the privilege is needed to protect the great majority of legislators who are conscientious in the performance of their duties.

Id.

the Seventh Circuit in *United States v. Craig*⁹⁵ also warned of the dangers of the denial of the privilege to state legislators:

[T]he common law history of the privilege in England and the United States teaches emphatically that it is better to tolerate the potential abuses than to risk the harm to our system of government that would result from inhibiting a legislator's discharge of the responsibility conferred upon him by the electorate.⁹⁶

Careful consideration of the risk of harm of the denial of this privilege on the state legislative process thus reveals the need for protection of legislative independence.

The need the Framers recognized to ensure legislative independence argues persuasively for extension of the privilege to state legislators. Chief Judge Edwards, in his opinion in *Gillock* for the Sixth Circuit,⁹⁷ noted that the Founding Fathers were willing to pay a price—the inability to prosecute a few venal legislators—for an important constitutional safeguard.⁹⁸ However, the Supreme Court dismissed Gillock's claim that the privilege was necessary to ensure legislative independence⁹⁹ by distinguishing *Tenney v. Brandhove*.¹⁰⁰ In that case, the Court held that state legislators who were acting within the sphere of legitimate legislative activity enjoyed a common law immunity from civil suit.¹⁰¹ Despite the fact that *Tenney* involved a private civil action,¹⁰² and *Gillock* involved a federal criminal prosecution,¹⁰³ important similarities between the cases exist, the most important of which

⁹⁵ See *United States v. Craig*, 528 F.2d 773, *rev'd per curiam en banc*, 537 F.2d 957 (7th Cir.), *cert. denied*, 429 U.S. 999 (1976). Involved in *Craig* was a prosecution of a state legislator for an alleged violation of the Hobbs Act. *Id.* at 774. The legislator moved to suppress certain portions of his grand jury testimony and of interviews given to postal inspectors and an assistant United States attorney on the ground that such testimony was privileged under the speech or debate clause of the state constitution and at federal common law. *Id.* The court of appeals held that although the legislator enjoyed the privilege in question, he had voluntarily waived it by testifying. *Id.* at 781.

⁹⁶ *Id.* at 780.

⁹⁷ *United States v. Gillock*, 587 F.2d at 284.

⁹⁸ *Id.* at 287.

⁹⁹ 100 S. Ct. at 1192-93.

¹⁰⁰ 341 U.S. 367 (1951).

¹⁰¹ *Id.* at 379. In a later decision, the Court explained that its holding in *Tenney* rested on its interpretation of federal common law, not on the Speech or Debate Clause. *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979).

¹⁰² *Id.* at 369.

¹⁰³ 100 S. Ct. at 1187.

is the potential of disruption of the state legislative process.

In *Tenney*, Justice Frankfurter identified the essence of the legislative privilege:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.¹⁰⁴

The rationale behind the speech or debate privilege is the same regardless of whether the action is a criminal or civil one, or is brought under federal or state law.¹⁰⁵ The evils to be avoided are the deterrence of legislators from their important functions by involvement in time-consuming litigation and the inhibition of full and free debate by fear of litigation.¹⁰⁶ The speech or debate privilege guards against any interference with those functions. Thus, the distinction the Court drew between

immunity from civil and criminal actions,¹⁰⁷ while an accurate exposition of the relevant precedents,¹⁰⁸ misses the central theme the Court reiterated in *Tenney*,¹⁰⁹ *United States v. Brewster*,¹¹⁰ and *United States v. Johnson*¹¹¹ that acts done in a legislative capacity may not be scrutinized.¹¹² Since the major purpose of the speech or debate privilege was to prevent legislative intimidation,¹¹³ the privilege should be broadly construed¹¹⁴ and extended to state legislators.

IV. CONCLUSION

Both testimonial privilege cases decided last Term evidence the Court's attitude toward privileges which, in its opinion, needlessly hinder the enforcement of federal criminal statutes. *Trammel* and *Gillock* illustrate the Court's emphasis on the governmental interest in the successful prosecution of federal criminals. Because the justifications for retention of the privilege were unpersuasive in *Trammel*, the Court should have discarded entirely the privilege against adverse spousal testimony, leaving only the privilege protecting private marital communications. In *Gillock*, however, the Court weighted the federal interest too heavily, thereby endangering the independence of state legislators.

ANNE PACHCIAREK

¹⁰⁴ 341 U.S. at 377.

¹⁰⁵ See *In re Grand Jury Proceedings*, 563 F.2d at 583. The court noted:

Recognition of [the] fact [that legislators' work could be hindered by exposing members to litigation] led the Supreme Court to grant official immunity for federal civil suits, *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951). That same concern in common law history supports the existence of a privilege for state legislators in federal criminal proceedings. Principles of federal-state comity—'a proper respect for state functions,' *Younger v. Harris*, 401 U.S. 37, 44 (1971),—reinforce this conclusion.

Id.

¹⁰⁶ *United States v. Craig*, 528 F.2d at 778.

¹⁰⁷ 100 S. Ct. at 1193.

¹⁰⁸ *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Gravel v. United States*, 408 U.S. 606, 627 (1972). *Accord*, *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

¹⁰⁹ 341 U.S. at 377.

¹¹⁰ 408 U.S. at 516-17.

¹¹¹ 383 U.S. at 179-80.

¹¹² In *Johnson*, the Court noted that the chief fear prompting the legislative privilege was the instigation of criminal charges against disfavored legislators. 383 U.S. at 182. See text accompanying note 89 *supra*.

¹¹³ *Tenney v. Brandhove*, 341 U.S. at 375.

¹¹⁴ *United States v. Johnson*, 383 U.S. at 180.