ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

EDGAR H. GILLOCK,

RESPONDENT.

No. 78-1455

Washington, D. C.
December 4, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,	:	
	:	
Petitioner,	:	
v.	:	No. 78-1455
	:	
EDGAR H. GILLOCK,	:	
	:	
Respondent.	:	

Tuesday, December 4, 1979

Washington, D. C.

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

JAMES V. DORAMUS, ESQ., Neal & Harwell, 800 Third National Bank Building, Nashville, Tennessee 37219; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Gillock.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONER

Mr. McCREE: Mr. Chief Justice, and may it please the Court:

This case presents the question whether Rule 501 of the Federal Rules of Evidence encompasses a common law legislative privilege analogous to that under the speech or debate clause of the constitution that prohibits the Federal Government from adducing evidence of the legislative acts of a state legislator in a Federal criminal prosecution.

Respondent is a Tennessee State Senator, at least for all relevant times in this litigation he was; elected from Shelby County in the State of Tennessee.

He was indicted in the United States District Court for the Western District of Tennessee on five counts of violations of the Hobbs Act, the Travel Act and the Riekle Act, the racketeering and corrupt practices act.

It was--these three indictment--these several counts of the indictment charged him essentially with two transactions in which he is alleged to have abused his official status.

The first related to an effort for a bribe to prevent the extradition of a Tennessee prisoner to the state of Illinois.

The second transaction related to, in consideration for a bribe, introducing legislation in the state legislature to enable electricians who were licensed in states with fairly lax requirements to practice their trade in counties that had a more stringent requirement for licensure.

Respondent moved to dismiss the indictment and to suppress evidence of his legislative acts. The District Court granted the motion to dismiss the Travel Act portion of the indictment, but allowed the other two statutory violations allegations to stand, but did recognize a legislative--an evidentiary privilege which would exclude evidence of legislative acts in the prosecution in the United States District Court.

The government appealed, and the case was remanded to have the District Court specify the legislative act concerning which evidence could not be presented.

The district court again recognized an evidentiary privilege specified the legislative acts concerning which evidence could not be presented.

And the government has--the United States Court of Appeals affirmed the finding that Rule 501 did create an evidentiary privilege relating to legislative acts, and

disagreed in part with the identification of certain acts, evidence of which could not be adduced.

We do not quarrel for the purposes of this appeal with the United States District Court's determination about specific acts. And the only question presented to the Court at this time is whether Rule 501 creates an evidentiary privilege analogous to that under the speech and debate clause benefits only a member of the Federal Congress.

We assert in our argument three essential points: First, that the Federal common law does not recognize a legislative privilege akin to the speech or debate clause in the absence of an underlying immunity from prosecution; second, that the separation of powers doctrine that informs the speech or debate clause, does not apply in a case involving a state legislature; and third, that admission of this evidence is not incompatible with the due regard for the independence and functioning of state governments.

On the first point, we begin with the proposition often asserted by this Court that the government is entitled to every man's evidence, and that a privilege that would seek to keep out of a prosecution relevant evidence obstructs the search for truth.

QUESTION: General, how do you reconcile the application of that principle in this case with Tenney v. Brandhove?

MR. McCREE: Well, Tenney v. Brandhove was a case that recognized a common law immunity from prosecution--I beg your pardon, a common law immunity for civil liability for legislative acts. And this was to--on balance, the immunity protected the legislator in the performance of the duty for which he was elected.

He was not immunized from criminal liability. And this is a case where the respondent was indicted for violation of Federal criminal law. And we feel that this distinction is sufficient, because there is no interest in protecting the legislator from responding for criminal behavior as there would be for his non-criminal legislative acts.

QUESTION: Well, isn't there some interest akin to that spoken of in Mr. Justice White's dissenting opinion in Brewster that if this man is offered a bribe by the electrician--some out of state syndicate to introduce legislative language favoring electricians, that he will thereafter simply shy away from that issue for fear that he will be prosecuted, even though he in good faith believes that such legislation should be introduced?

MR. McCREE: Yes, there is validity to that point. But the Court has never gone that far. And we submit that the Court should not go that far.

QUESTION: And Brewster was a speech or debate

clause--

MR. McCREE: And Brewster was, as you point out, Mr. Justice White, a speech or debate clause case. And the speech or debate clause, as this Court has said, is informed by the values protected under the principle of the separation of powers. And it is to prevent a member of the Congress from being prosecuted either criminally or civilly for anything he does in the way of a legislative act, and---

QUESTION: Justice Frankfurter, in Tenney v. Brandhove, said that 1983 was informed by the common law understanding of legislative privilege.

MR. McCREE: Tenney v. Brandhove does make that suggestion. But subsequent rulings and decisions by this Court have made it clear that Tenney v. Brandhove is founded in the common law civil immunity of a state legislator, and not the speech and debate clause. Lake Country Estates v. Lake Tahoe is a decision of this Court in which it is recognized that Tenney v. Brandhove is not dependent on the speech or debate clause of the United States Constitution.

QUESTION: And as you pointed out, Mr. Solicitor General, Tenney v. Brandhove involved immunity from civil liability. This case involves an evidentiary privilege.

MR. McCREE: An evidentiary privilege in a criminal prosecution.

QUESTION: Right.

And there's no claim that the respondent in this case is immune from prosecution, is there?

MR. McCREE: No, there isn't, Mr. Justice Stewart. And we point out that where there is no underlying immunity, there is no need to protect it with an evidentiary privilege. against introducing any proof of any legislative act.

QUESTION: And we've--there are also remarks in certain cases, I should remember since I was responsible--

MR. McCREE: O'shea v. Littleton.

QUESTION: --where we've indicated that the non-speech or debate clause executive privilege, or privilege for Federal employees, doesn't reach criminal liability.

MR. McCREE: That's indeed so. The Court has said this on several occasions. And the privilege, the common law privilege, or the common law immunity from civil liability, it was recognized early in Tenney v. Brandhove, and has been refined in subsequent decisions of this Court, is not an absolute civil immunity.

It is a civil immunity from damages, but not from injunctive relief, as this Court has indicated Bond v. Atlanta, the case involving Julian Bond who was elected to the Georgia legislature and was denied a seat. And this Court found no obstruction to ordering the legislature to seat him.

Which means that the civil immunity is just for

money damages, and not from injunctive relief.

Contrariwise, in the case involving Adam Powell, Powell V. McCormack, I think it is, this Court said that the speech or debate clause, on the other hand, immunized the Congress from all liabilities, civil and criminal, and in this context of civil liability, from injunctive relief. And the relief ran against subordinate officials of the House, but not against members of the Congress.

QUESTION: In the Brewster case, to which you have made some reference, it was not necessary for the government to prove any--or offer proof of any legislative act of Senator Brewster, was it?

MR. McCREE: Well, the Court--I believe in the Brewster case, the Court held that there could be no showing of legislative acts, but that the--

QUESTION: It wasn't necessary, was it?

MR. McCREE: That's right. If the charge could be proved by evidence of non-legislative acts, and he would be liable for that. Because where there was no immunity, there was no need for a legislative--for--

QUESTION: There he was charged with taking money in consideration of a promise to do certain legislative acts--

MR. McCREE: Which is not, of course, a legislative act.

QUESTION: And I think the Court's opinion said that the criminal act was complete when he took the money, whether or not he ever performed any legislative acts because of that payment.

MR. McCREE: That is my understanding, Mr. Chief Justice. And for the non-immunized act, there is no evidentiary privilege to protect. And this is what--this is one of the distinctions that this Court has made.

The separation of powers doctrine, obviously, doesn't apply in the case of a state legislator. It operates only at a tier of the Federal Government. And the state legislator, if at all, can make some claim, as respondent does in his brief, for considerations of federalism.

And we urge in our brief that the admission of evidence of his legislative acts is not incompatible with the due regard of the independent functioning of state government, because state officials have been prosecuted in Federal courts for violation of the Federal law, without any suggestion that there is any danger of interfering with theproper function of state law, state governors, state legislators, state--indeed, state judges, for Federal offenses, are duly prosecuted. And it's not like Usery v. the National League of Cities, where there was an interference with an essential function of the state government. Here--

QUESTION: Nonetheless, here you do have a restriction on the legislator's ability to follow his normal instincts, or respond to his constitutents, in that you have another force, a fear of Federal prosecution, that may prevent him from perfectly honestly responding to the judgments of his constituents.

MR. McCREE: That is so, and we recognize that. We suggest, however, that when weighed against the desire for relevant evidence, and to prevent the criminal corruption of state government, that that is a small price to pay.

And this Court has never said that that price should be paid, the price of excluding it.

QUESTION: Well, why is it the business of the Federal Government to prevent the corruption of a state government?

MR. McCREE: Because the members, persons who function in state governments, are also citizens of the Federal Government, and are subject to its laws. They should not be immunized from obedience to its criminal laws unless there is a very cogent reason for so doing.

And it's never been suggested that state governments cannot function and at the same time have their officers or officials responsive to Federal criminal law.

In fact, it would be a scandalous proposition.

QUESTION: Is it not just a coincidence that this

gentleman happens to be a state official? He's being prosecuted under the same generaly type of statute as in the Perrin case which we decided last week, is it not so, under the interstate---

MR. McCREE: That's correct. The Hobbs Act is---

QUESTION: Well, Tenney was charged under the same sort of 1983 civil complaint as any other private citizen could have, as I recall it.

MR. McCREE: But Tenney was sued civil. Tenney was sued to civil damages. And this Court made a judgment that the common law immunity for liability from civil damages was not too much a price to pay to allow him to function in the capacity for which he was elected.

He was not indicted for a criminal offense, which of course is a more serious matter. We point out in our brief--I think the case is United States v. Anderson, or perhaps the style of it is Anderson v. United States--at page 10, and we cite other cases in other courts, United States v. Rabbitt, United States v. Mazzei, where regularly criminal indictments against state legislators have been conducted in the United States courts. And it's never been thought, up until this time, for the consideration of this Court, that that could not be done.

And we suggest that two of the three lower Federal courts that have considered the proposition that

Rule 501 affords a legislative privilege, have decided that it does not.

The First Circuit, the Seventh Circuit, en banc, reversing a panel of the Seventh Circuit, and the Third Circuit, by dictum, suggest that there may not be such an evidentiary privilege, until this decision, which speaks of a "felt need" for this.

But we submit that the case is not made for the "felt need," and that the price, as we point out, is too great a price to pay. We paraphrase Mr. Justice Cardozo in our brief, saying that given these overriding Federal interests, recognition of the legislative privilege would simply entail payment of too high a price for whatever minimal increment of security it might give to the mind of a state legislator.

QUESTION: In any event, the conflict is on the testimonial privilege, which is the issue before us in this case. Not on immunity.

MR. McCREE: Not on immunity.

QUESTION: All agree that there's no immunity to prosecution under these statutes.

MR. McCREE: Exactly, Mr. Justice Stewart.

QUESTION: And that's conceded in this case--

MR. McCREE: It's conceded in this case that there is no underlying immunity. And this Court has held, and

we submit correctly so, that where there is no underlying immunity, there is no need to protect it with a legislative privilege.

We suggest, of course, concluding as I began, that the law is entitled to every man's evidence. And that whoever would suggest that a privilege should keep out relevant evidence, and obstruct the pursuit of truth, has the burden of showing that there is a necessity for it.

We submit that necessity has not been made here.

With leave of the Court, I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE: Very well, Mr. Solicitor General.

Mr. D RAmus.

ORAL ARGUMENT OF JAMES V. DORAMUS, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. DORAMUS: Mr. Chief Justice, may it please the Court:

Our position before the District Court, the Court of Appeals, and before this Court, is that a state legislator in a Federal criminal proceeding is entitled to the same evidentiary privilege asserted and upheld in Brewster and Helstoski.

This Court has never held that a state legislator in a Federal criminal prosecution either does or does not

have a Helstoski-type privilege for legislative acts.

But the government concedes, or this Court has held, that in every other combination in which a legislator can get into court--state court, Federal court--in a civil case or a criminal case, and there are eight combinations of that, and the other seven, in each case, a legislator can look to the speech or debate principle for some relief.

QUESTION: Do you agree that we're not talking here about immunity but about an evidentiary privilege?

MR. DORAMUS: No, Your Honor.

QUESTION: You don't?

MR. DORAMUS: No, Your Honor. The immunity, which we have not asserted--

QUESTION: Well, I didn't think you had.

MR. DORAMUS: --is under this particular indictment. The distinction between immunity and privilege, in our view, is in effect if a principle excludes evidence, in some cases that may amount to immunity, because it excludes an essential element of the government's case.

But that is an effect. That is not something separate. If it's a privilege, it takes something like corroborative evidence, as in Helstoski; it says you can't use corroborative evidence. That is privileged. If it had taken away an essential element of the government's case, it would have been immunity.

But the principle, the underlying speech or debate principle, is the same.

QUESTION: Did you move to dismiss the indictment on the basis that you were immune from prosecution?

MR. DORAMUS: Yes, Your Honor.

QUESTION: And how did you fare on that?

MR. DORAMUS: Yes, Your Honor.

QUESTION: And how did you fare on that?

MR. DORAMUS: The District Court denied that.

QUESTION: And was that appealed?

MR. DORAMUS: Not, by us, Your Honor.

QUESTION: Hm?

MR. DORAMUS: No, Your Honor.

QUESTION: Well, it certainly wouldn't have been appealed by the government.

MR. DORAMUS: That's correct, Your Honor.

QUESTION: So it wasn't appealed, was it? So that's not an issue?

MR. DORAMUS: No, Your Honor, it was not appealed.

QUESTION: That's not an issue before us here, is it?

The issue is one of evidentiary privilege, is it not? That's the way the Court of Appeals opinion was written, and that's the way the briefs are written, and that's the way the oral argument was made by the Solicitor

General.

MR. DORAMUS: Your Honor, immunity is an issue here. If the privilege sustained in our particular case, in some other case, that same privilege may give rise to an immunity.

QUESTION: May give rise to an inability to convict, but hardly to any immunity from prosecution.

MR. DORAMUS: That's right, Your Honor. And if that is the point--

QUESTION: Well, which is right? Are you right, or am I, in my question?

MR. DORAMUS: Your Honor, we--it is our position that there is an underlying immunity, as the government uses that term.

QUESTION: Is that an issue before us here?

MR. DORAMUS: Yes, Your Honor.

QUESTION: It wasn't mentioned by the Court of Appeals.

MR. DORAMUS: It wasn't necessary--

QUESTION: The district court held that you were not immune from prosecution, you just told me, and that was never appealed.

MR. DORAMUS: That's correct, Your Honor.

QUESTION: Then why is that an issue before us?

MR. DORAMUS: Because that is the result of a

privilege in another case; not our case.

QUESTION: Maybe the result is, an inability to convict. But that's quite different from immunity from prosecution.

Do you disagree with that?

MR. DORAMUS: No, I would say that's exactly right, Your Honor.

QUESTION: Well, it was never tried, was it?

MR. DORAMUS: This comes on the government's motion to review the suppression order of the district court.

QUESTION: Well, if you didn't bring the--as a respondent, I don't think you can raise the immunity issue here, because that would mean there could be no trial at all.

And you haven't cross-petitioned, have you?

MR. DORAMUS: No, we have not, Your Honor. I suppose that under the Helstoski v. Mener[illegible]? there is a question of whether we would have an appeal, a direct appeal, from a denial of our motion to dismiss.

But I do not believe that we have waived that by waiting for the trial.

QUESTION: It isn't just a question for the judge and jury, that you could not have appealed the order denying your motion to dismiss the indictment; that's not an appealable order, is it?

MR. DORAMUS: That was our view at the time, Your Honor.

QUESTION: It may not be appealable, but that doesn't mean you couldn't have asserted it as a respondent in the Court of Appeals.

You weren't the appellant?

MR. DORAMUS: No, Your Honor.

QUESTION: No.

MR. DORAMUS: It is our position on immunity that that does not make a difference in this case. We go back to the original speech or debate principle, and apply that in a civil case or a criminal case.

Indeed, inthe Federal context--

QUESTION: You don't draw any distinction between the criminal and the civil?

MR. DORAMUS: Yes, Your Honor, we do.

QUESTION: Well, the way you just said, criminal or civil, I thought--

MR. DORAMUS: It is our position, it has a different application in a civil case than in a criminal case. For instance, you could move for summary judgment in a civil case; in a criminal case, there's no such procedure.

And we would maintain you would be entitled to an evidentiary privilege excluding the evidence of legislative

acts.

And we would also point out that there's no immunity in the Federal arena that you may not introduce evidence of legislative acts against a Federal legislator, but that does not mean that he is immune from prosecution.

QUESTION: Exactly.

MR. DORAMUS: And that is what we are asking in this case, is that the principle be treated in the same manner as with respect to a Federal legislator.

QUESTION: Well, they're a little different. The Federal one is in a particular, written form; isn't it?

MR. DORAMUS: That's correct, Your Honor.

QUESTION: It's in the speech or debate clause. And you don't have that?

MR. DORAMUS: Your Honor, according to the opinions of this Court, we have a Federal constitutional provision that comes from the very source that we assert here today.

It is our privilege that came first, in Federal common law. The English experience. The states, before the Articles of Confederation, before the United States Constitution, had this same privilege.

If anything, it would be our position that the Federal written provision is more limited than the broader scope of the common law.

QUESTION: Doesn't Tennessee have a speech or debate clause?

MR. DORAMUS: Yes, Your Honor. It's almost substantially identical to the Federal provision.

QUESTION: Virtually substantially identical.

MR. DORAMUS: Yes, sir. And as we point out in our brief, this is a hallmark of state constitutional government. All states have some form of protection for speech or debate; even Florida which has no statutory or constitutional provision has a state common law speech or debate principle.

I believe that the Court--the government, in view of the Court's precedent, will have to concede that the Federal provision was modeled after the common law which we assert here today.

And not only that, but the reason for the clause is not to protect people from civil suits, but as this Court has repeatedly stated, the instigation of criminal charges against critical or disfavored legislators is the chief fear that justifies the clause in the first place.

The--

QUESTION: You're not suggesting it doesn't give protection against civil suits, are you?

MR. DORAMUS: No, Your Honor.

QUESTION: What about a civil suit for libel for

a speech made on the floor of the House or Senate?

That's protected by the clause, isn't it?

MR. DORAMUS: It certainly is, Your HOnor. But--

QUESTION: Well--go ahead.

MR. DORAMUS: It is just our position that the criminal immunity, or criminal privilege, came first. Back when the Crown was prosecuting Parliament, they were not afraid about civil suits; they were afraid that they would be put in jail.

QUESTION: Well, are you making a constitutional argument here?

MR. DORAMUS: We're making a constitutional argument--

QUESTION: That the United States Constitution forbids the Federal Government from prosecuting a state legislator for a state legislative act?

MR. DORAMUS: We're making a constitutional argument in the sense that we look to other provisions of the constitution to supplement what we view to be a commonl law.

It's not--

QUESTION: I thought--perhaps I wholly misapprehended this case; I'm beginning to think perhaps I have--but I thought that you reliance, and the reliance of the Court of Appeals, was on common law evidentiary privileges; not on

the constitution.

MR. DORAMUS: Your Honor, it is unnecessary to reach the constitution, because of--

QUESTION: But now you tell my Brother White you're relying on the constitution. The Court of Appeals didn't. Your brief doesn't.

MR. DORAMUS: I believe that our brief does mention principles of federalism.

QUESTION: That's right.

MR. DORAMUS: And it mentions the republican form of government, and it mentions the Tenth Amendment. We do not say, because we do not think we have to say--

QUESTION: Well, do you say--is it your claim that if the Congress of the United States said specifically in a criminal statute, "This statute will apply to state legislators for their legislative acts," would you say that you would be invalid under the Federal constitution?

MR. DORAMUS: Your Honor, I would say that would be invalid. I would--that is a more serious question. For instance, if the statute said, "No state shall have a legislature."

QUESTION: Well, that's a different question. That's a different question. But just a criminal statute that without question applies to state legislators. You would say that would be invalid?

MR. DORAMUS: Yes, Your Honor.

QUESTION: Well, let's assume you're wrong on that. Assume you're wrong on that. What argument in addition to that are you making here, that Congress could not have intended to include state legislators within the reach of this particular criminal statute because of the common law, or what?

MR. DORAMUS: Your Honor, before Congress takes away from the state this old and well-established right, we think that they ought to specifically say that that's what they're doing.

The statutes under which Senator Gillock is charged--

QUESTION: You're making an argument--like in 1983, this Court has said that Congress didn't intend to invalidate, or not to recognize, or to set aside the common law immunities.

MR. DORAMUS: That's correct, Your Honor.

QUESTION: Under 1983. And you're making a similar argument with respect to the criminal statutes?

MR. DORAMUS: That's correct, Your Honor.

QUESTION: That Congress, just as a matter of legislative--just as a matter of statutory construction, we should construe the statute as not reaching legislative acts of state legislators?

MR. DORAMUS: That's correct, Your Honor.

QUESTION: At least that's one of your arguments?

MR. DORAMUS: That's correct.

QUESTION: But it's also your position, as I understood your answers to Mr. Justice White, that Congress constitutionally could not specifically say that these criminal statutes are available to be used to prosecute state legislators, and that if, in any such prosecution, the legislators were to have no evidentiary privilege for legislative acts. You say that would be unconstitutional?

MR. DORAMUS: Yes, Your Honor.

The--

QUESTION: And just which section of the constitution does it violate?

MR. DORAMUS: It would be the guarantee of a republican form of government, and the Tenth Amendment.

QUESTION: Fifth Amendment?

MR. DORAMUS: Tenth, Your Honor.

QUESTION: You're saying that the speech or debate clause is an essential part, indispensable part, of republican government in each state; is that it?

MR. DORAMUS: That's correct, Your Honor. It was a part of the states long before there was a Federal Government.

The government has taken the position that there

is no speech or debate privilege or principle at all for state legislators. That flies in the face of Tenney v. Brandhove and Lake Country Estates, which recognize the common law as setting up a Federal common law speech or debate principle.

QUESTION: What's your answer to the holding of the Court way back in the early part of the century that the Republican form of government guarantee is a political question, and can't be considered by this Court?

MR. DORAMUS: Two answers, Mr. Justice Rehnquist. The first is that we do not depend on that for the result in our case. That is--the guarantee itself is some evidence of the Federal common law.

The second answer with respect to the political question is that in Baker v. Carr it lists the type of cases which are political questions. I am unable to find any case where the Federal Government has interfered with something that has been thought to be such an essential element of the state legislature.

And I read Baker v. Carr as saying that it is not always a political question.

QUESTION: Do you think Baker v. Carr, then, undercut Pacific Tel & Tel v. Oregon, the early case?

MR. DORAMUS: To some extent, Your Honor.

The government has argued that there is no damage

to a state legislature, no harm, if this is not--this privilege is not recognized in a Federal court.

As the court found in Helstoski, there is harm to Federal legislators, even for the introduction of corroborative evidence. And it's an interference with the same interest that is protected--ought to be protected in a state prosecution.

In fact, the threat of criminal prosecution in the states vitiates the state provisions. It's our position it doesn't make any difference whether there's one executive looking over your shoulder over what you do, or whether there's two; that the threat of prosecution by either Federal or state--legislators is the same harm, and hurts the same interest that are protected by the principle.

And perhaps more importantly, the state legislators are powerless to protect themselves against the Federal executive. This is much closer to the scheme which gave rise to the privilege in the first place, when the Crown could prosecute parliament, and parliament could not do anything about it.

They--the state legislator is virtually powerless to do anything against the Federal executive. The Federal executive can act, if he chooses, at his whim.

The government has noted a measured hostility against this principle, or against an evidentiary privilege.

Time and again this Court has considered the legislative privilege; has weighed its value in relation to the use of evidence at trials. And in every instance the Court has determined that the principle underlying the clause has beenheld to be more important than the eneed for the evidence.

It is a limited privilege. It may be waived, but it may only be waived in a Federal prosecution by a clear, unequivocal and express waiver. Congressman--

QUESTION: Well, hasn't the Court indicated that a member of Congress, if he's acting outside the reach of the speech or debate clause, if what he's doing isn't a legislative act, because a claim that--but he claims in defense the Federal common law legislative privilege of a Federal official, that that privilege, that common law privilege, doesn't reach--doesn't immunize him cfrom criminal liability?

MR. DORAMUS: It does indeed, Your Honor.

QUESTION: Well, we've--but we've held that it hasn't.

MR. DORAMUS: You have held that it does not preclude prosecution. It is not immunized. The extra-legislative act of bribery is not something that is protected.

But what is protected--and all we ask in our case

is that the fact that a Congressman standing on the floor of the Senate and voting for a bill should be excluded; the same protection that is given to the Federal legislator.

QUESTION: Well, but you've--in order to really--you really would want to elevate a common law privilege or immunity to constitutional status then. You would want to equate it to the speech or debate clause, which is in the constitution.

MR. DORAMUS: Yes, I would, Your Honor. And the reason for that is because the Federal provision comes from the common law.

QUESTION: Well, this Court has certainly taken the Federal speech and debate clause far beyond its literal terms, hasn't it?

MR. DORAMUS: Your Honor, I'm not sure I can agree with that. Because the literal terms are, "shall not be questioned in any other place." And perhaps in the area of whether it extends to an aide acting instead of a congressman, yes.

But the literal scope of the privilege is quite broad.

The government has raised the argument that there's a different in the power of the Federal Government with respect to injunctions, and that a state legislator may be enjoined, while a Federal legislator may not. And it

depends on Powell v. McCormack for that.

In my view of Powell v. McCormack, footnote 26 expressly reserves that question. It says, given our disposition of this issue, we need not decide whether the speech or debate clause, petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action.

It's clear that you cannot enjoin a legislator himself. But in Bond v. Floyd it's also clear that the Court could have enjoined the clerk to administer the oath to Mr. Bond without ever enjoining any particular legislator.

The government has taken the position that they have routinely prosecuted state officials. The cases cited in their briefs are prosecutions for Congressmen acting outside the scope of legitimate legislative activities.

For example, they may not have any authority to act at all; and they maintain that they act under color of law, and they receive money for using their influence. That is not a legislative act. The issue could not be raised in those cases. And that is not the type of privilege which we're asking for.

There should be a reason that a legislator is treated differently in a state than the Federal executive or state executive or a state judge. Because of the history of the clause. A legislator has always been thought to be

different.

And this Court's words in Lake Country, it has a unique status and enjoys a unique historical position. Indeed, in the Federal arena, evidence of a president, evidence of a judge, is admissible, the official acts of those gentlemen. But the evidence of the legislative act of a Federal congressman is not admissible.

And that is all that we are asking in our case.

The government has mentioned briefly the case O'Shea v. Littleton, and how official immunity has never been applied in a criminal case.

That is correct, except for the case of in re Neagle where a United States Marshall was given official immunity for shooting a man in California in the course of defending a judge.

He--a writ of habeas corpus was issued by this Court granting him official immunity for his acts.

More importantly for our case, when O'Shea v. Littleton said, we've never extended official immunity for criminal actions, it's my reading of the case that they're talking about the official immunity that may apply to an aide, as in the Gravel case, the people acting outside the legislative privilege in the--who work for legislators--do have an official immunity.

And it is those--

QUESTION: Are you arguing immunity now, again?

MR. DORAMUS: No, Your Honor; I am saying that official immunity does not apply--is not a principle that this Court should consider.

Your Honor, the Court has considered the separation of powers argument, whether the difference between the coordinate branches of the Federal Government and the state government, and the relation between those two, makes a difference in this case.

I submit that it does--it does not make a different; that in fact, the power of the Federal Government to act without any check toward a member of the state government is a more compelling reason to recognize the privilege than when the other branch has the opportunity to respond.

QUESTION: In that connection, can you give us any instances of historical abuse of this kind of thing?

MR. DORAMUS: Your Honor, I cannot point to any abuse. The Court has, in the history of this country, protected against that abuse when it might aoccur.

To my knowledge, this range of cases--

QUESTION: When you say that, are you overlooking the conflict in this issue in the Courts of Appeals?

MR. DORAMUS: No, Your Honor, I was getting to that. Except within the last several years, to my

knowledge there has not been a case into conflict.

It is our position that there are few, if any privileges which are as well founded in reason and experience as the principle that legislators should be protected from criminal actions for legislative acts.

The speech or debate principle was established to protect legislators from intimidation by criminal actions by an executive, if the state or the Federal--the state privilege pre-existed the Federal constitution. The express provision is drawn from the common law, and based on the English experience.

QUESTION: Of course, there are lots of common law evidentiary rules that not only were not adopted in the constitution, but are not part of the Federal Rules of Evidence, such as the inability of a defendant in a criminal case to testify at all.

That's just one rather conspicuous example very deeply embedded in the common law.

MR. DORAMUS: Yes, Your Honor.

QUESTION: Are there any statistics, or if not statistics, figures in the briefs of either party indicating how often, and how recently, state legislatures have been prosecuted under Federal statute?

MR. DORAMUS: We have no such statistics, Your Honor. The statutes themselves are relatively recent vintage.

I believe the Travel Act and the Hobbs Act within the last 15 or 20 years; and definitely the Racketeering Influence and Corrupt Organizations Act is within the last several years.

QUESTION: So Congress didn't really authorize it until that time?

MR. DORAMUS: Not to my knowledge, Your Honor, unless a wire fraud or mail fraud prosecution under the Isaacs theory could have been brought years ago; to my knowledge, none such were brought.

QUESTION: I understand your argument to be that before our constitution was adopted, the common law was that all legislators, Federal, state and local, were covered; is that right?

MR. DORAMUS: Yes, Your Honor.

QUESTION: And then Congress adopted the speech and debate clause, which was limited to Congress.

Is that right?

MR. DORAMUS: Your Honor, it would appear to be limited to Congress, because it's in the section defining the--

QUESTION: Because it says Congress, right?

MR. DORAMUS: Yes, Your Honor.

QUESTION: Well, can you tell me why they did that, why they didn't make it broader?

MR. DORAMUS: No, Your Honor, I cannot tell you why they did not make it broader.

QUESTION: So I'm still in trouble.

QUESTION: Of course, Congress didn't adopt--the constitution doesn't contain any speech or debate privilege for state legislators in connection with 1983, and yet one was found in Tenney V. Brandhove.

MR. DORAMUS: That's correct, Your Honor. In fact one was found for regional legislators in Lake Country Estates.

QUESTION: In Lake Country Estates.

QUESTION: Well, now can you give me the reason why it was left out?

MR. DORAMUS: Your Honor, the best answer I have for that is that the constitution did not purport to set up the scheme of government within individual states. It recognized that states would retain some degree of sovereignty, but it did not propose to set out the rules under which a state would govern its internal affairs.

Your Honors, before I close, I would like to add, with respect to our initial argument on immunity, that the reason that immunity is not before this Court is that the District Court held that the indictment was not based on legislative acts.

When the principle applies, we submit it applies to criminal cases as well as civil cases, and that the

privilege is recognized in Federal common law, in Lake Country Estates, Tenney v. Brandhove.

The opinion below recognized an implied limited evidentiary privilege. The same privilege applied in Brewster. This holding is a reasonable accommodation between the interests of the Federal Government and prosecuting state legislators, and the necessity to ensure the independence of those legislators.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. McCREE: Mr. Chief Justice, and may it please the Court:

Just one or two very quick points, if I may.

My brother asserts a claim of immunity here for the first time, as the Court has observed; and that's also our understanding.

In answer and response to Mr. Justice Stewart's inquiry about the large number of common law privileges that were not carried over into the Federal common law, in 1972 when privilege--a number of privileges were proposed, superseded subsequently by Rule 501, which did not enumerate them, wthis privilege was not one of those listed. And it would appear that if it were such a fundamental privilege,

that it might have been listed there.

In response to Mr. Justice Rehnquist's inquiry about the number of pending prosecutions of this kind, at the time we briefed this matter, we were aware of only one other, a case called United States v. Wall?, pending in the Seventh Circuit. There may be others at this time.

We would therefore, asserts for the reasons--several reasons that we make in our brief and reply brief that the judgment below should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:00 o'clock, a.m., the case in the above-entitled matter was submitted.)