

# Privilege and Immunity: Protecting the Legislative Process

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# Legislative Immunity

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- What is it?
- How did we get there?
- When does it apply?
- How to use legislative immunity?
- What's it look like today?
- Recent trends?

# Legislative Immunity - what is it?

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- A legal privilege granted to legislators that protects them from being sued and having to testify or produce documents in court proceedings for all actions taken in the “sphere of legitimate legislative activity.”
- Generally, a legislator will be immune from suit if the basis of the prosecution is a legislative act or the motivation for a legislative act.
- Legislative Immunity from liability is different from the “privilege from arrest” provisions.

# Legislative Immunity v. Legislative Privilege

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- Inconsistent use of the terms “legislative immunity” and “legislative privilege”
  - “Legislative Immunity” protects legislators from lawsuits threatening personal liability.
  - “Legislative Privilege” is an evidentiary privilege limiting evidence and testimony at trial.
- Some courts differentiate terms and some do not!

# Legislative Immunity - Origin

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- Privilege of Parliament Act – “Strode’s Case” (1512)
- English Bill of Rights (1689)
  - *“That the Freedom of Speech, and Debates or proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament”*
- Articles of Confederation (1777)
  - “Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress...”
- United States Constitution (1787)
  - “[f]or any Speech or Debate in either House, they shall not be questioned in any other Place.”

# United States Constitution

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- “...and for any Speech or Debate in either House, they shall not be questioned in any other Place.”
- *“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.”*

II Works of James Wilson

# State Constitutions

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- 43 state constitutions have some form of a speech or debate clause.
  - California, Florida, Iowa, Mississippi, Nevada, North Carolina & South Carolina do not.
- 13 out of 43 states have not yet reported a court case interpreting their clause.
- Florida – 1865 constitution contained speech or debate clause, but constitutions of 1868, 1885 and 1968 omitted it.
- Oregon is most recent state to interpret its speech and debate clause for the first time. *State v. Babson*, 355 Or. 383 (2014).

# State Constitutions

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- **Alaska**: “Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session.” ALASKA CONST. art II, §6.
- **Arizona**: “No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate.” ARIZ. CONST. art. IV, Pt.2 §7.
- **Kansas**: “For any speech, written document or debate in either house, the members shall not be questioned elsewhere.” KAN. CONST. art. II, § 22.
- **Maryland**: “No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate.” MD. CONST. art. III, §18.



# State Constitutions

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- **New Jersey**: “...and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place.” N.J. CONST. art. IV, § IV, para. 9.
- **Massachusetts**: “The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.” MASS. CONST. Pt. 1, art. XXI
- **New Mexico**: “...and they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.” N.M. CONST. art IV, § 13.
- **West Virginia**: “...and for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place.” W. VA. CONST. art. VI, § 17.

# State Statutes

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- **Iowa:** “A member of the general assembly shall not be held for slander or libel in any court for words used in any speech or debate in either house or at any session of a standing committee.” Iowa Code § 2.17
- **Michigan:** “A member of the legislature of this state shall not be liable in a civil action for any act done by him or her pursuant to his or her duty as a legislator.” Mich. Comp. Laws § 4.551
- **North Carolina:** “The members shall have freedom of speech and debate in the General Assembly, and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken.” N.C. Gen. Stat. § 25-1-101

# Why Legislative Immunity?

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- Privilege secured “not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.”

*Cotton v. Cotton*, 4 Mass. 1 (1808)

- Three Themes of Legislative Immunity:
  - Separation of powers & preserving legislative independence.
  - Eliminates fear from resentments of others, and saves time and energy otherwise needed to defend against claims.
  - Promotes degree of confidentiality, fosters relationships, deal making, & negotiations.

# Legislative Immunity for State Legislators

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*Tenney v. Brandhove (1951)*– U.S. Supreme Court recognized common law legislative immunity for state legislators for their legislative acts.

- *“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 the conclusion of the pleader, or to the hazard of a judgment against them based on a jury’s speculation as to motives.”*  
*Tenney v. Brandhove, 341 U.S. 367, 373 (1951)*

# What are Legislative Acts?

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“A legislative act has been consistently defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.”

*United States v. Brewster*, 408 U.S. 501, 512 (1971)

Acts that are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”

*Gravel v. United States*, 408 U.S. 606, 625 (1972)

# What are Legislative Acts?

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- Legislative acts go beyond traditional speech or debate on the floor.
- Activities must be “within the sphere of legitimate legislative activity.”
- Whether an act is legislative is a functional decision & decided on a case by case basis.
- Legislator's motives are irrelevant to the determination - it depends on the nature of act, rather than the person who performs it and their motive and intent.

# What are Legislative Acts?

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- An act merely done by a legislator is not necessarily a 'legislative act' that's protected under Speech or Debate Clause.
- Legislative in form & legislative in substance?
- Legislative acts v. administrative acts.
- Scope of impact – greater/narrow?
- Party claiming privilege must prove activities are an integral part of the legislative process.

# What are Legislative Acts?

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- Introducing Bills
- Making Speeches on Floor
- Serving on a Committee
- Questioning Witness in Committee
- Failing or Refusing to Vote on Bill
- Voting on Executive Appointment
- Voting on an Impeachment
- Authoring Committee Reports
- Lobbying Other Legislators
- Voting to Seat or Unseat Member
- Publishing Reports
- Drafting Documents
- Gathering Information
- Some Constituent Communication



# Not Legislative Acts!

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- Criminal Activity
- Serving on Executive Branch Committee
- False Disclosures and Claims
- Unconstitutional or Illegal Procedures
- Travel on Legislative Business & Requesting Travel Reimbursement
- Making Speeches in Community
- Illegal Investigations
- Some Constituent Communications
- Issuing Newsletters
- Publishing Books
- Political Acts
- Calendar / Expense Account
- Personnel Decisions (sometimes!)

# Political Acts

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- Activities that are more political than legislative will not qualify for legislative immunity.
  - Communications to the Press / Press Releases
  - Communications to Constituents / Newsletters
  - Media Interviews
  - Pressure on Executive Branch
  - Promises of Future Action

# Personnel Decisions

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- Is a personnel decision a legislative act or an administrative act?
- A personnel decision is administrative in nature if it is directed at a particular employee or employees, and is not part of a broader legislative policy.
- Speech or Debate Clause protection will only apply to personnel decisions if legislative acts must be proved to establish the claim challenging action.
- *Forrester* function test: legislative immunity in personnel cases depends on the nature of decision rather than title/identity of person making decision. *Forrester v. White*, 484 U.S. 219 (1988)
- The nature of the employee's duties is not relevant; i.e. connection/input into the legislative process.

# Legislative Immunity is Absolute...or is it?

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- Absolute v. Qualified Immunity?
- If activities fall within “sphere of legitimate legislative activity,” legislative immunity is an absolute immunity...maybe!
- Allegation of bad faith, improper motives, or unworthy purpose do not affect or destroy the privilege.
- Immunity for legislative acts continues even after legislator leaves office.

# Legislative Staff

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- Legislative process has evolved – work now performed by legislative staff was once performed by the legislator.
- General principle – Speech or Debate Clause applies to a member's aides and staff insofar as the conduct of the aide or staffer would be a protected legislative act if performed by the member.
- Legislators and aides are to be 'treated as one.'
- But, some courts view the protection to staff, aides and officers as more limited than legislators.

# Non-Legislators Performing Legislative Function

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- “Officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions.” *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998).
- Action must be “part and parcel of the legislative process.”
- Governor signing/vetoing legislation
- State Supreme Court justices adopting orders
- Timing is important!

# How to Use Legislative Immunity

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- Raise legislative immunity at earliest opportunity!
- Legislative privilege belongs to individual legislator and not unit of government legislator serves.
- Motion to dismiss usually the result sought when claim of legislative immunity is invoked.
- Denial of a claim of legislative immunity is immediately appealable.

# How to Use Legislative Immunity?

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- Federal Speech or Debate Clause does not apply to state legislators, and a state Speech or Debate Clause does not limit the federal government.
- Legislative immunity does not apply to shield legislative acts of a state legislator from criminal prosecution in a federal court.
- Any evidentiary privilege a state legislator enjoyed under federal common law does not apply to criminal cases.
- When a legislator has been improperly questioned before a grand jury concerning legislative acts, the counts in an indictment based on that testimony must be dismissed.



# How to Use Legislative Immunity?

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- Subpoena
  - Quashed
  - Protective Orders
- Injunctions
- Declaratory Judgments
- Writs of Quo Warranto and Mandamus
- Claims for Repayment
- Right to Interlocutory Appeal

# Admissible Evidence

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- Some evidence is admissible without violating Speech or Debate Clause:
  - Proof of status as legislator.
  - Acts offered by legislator in defense.
- “If a member offers evidence of his own legislative acts at trial, rebuttal evidence narrowly confined to the same legislative act may be introduced and such rebuttal evidence does not constitute questioning in violation of the Speech or Debate Clause.”

*United States v. Renzi*, 769 F.3d 731,747 (9<sup>th</sup> Cir. 2014)

# Waiver of Legislative Immunity

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- Immunity may belong to individual legislators or legislature as a whole.
- Legislators must assert legislative privilege or may be deemed waived.
- Distinction:
  - 1. Waiver of immunity can occur only “after explicit and unequivocal renunciation of the protection.” *United States v. Helstoski*, 442 U.S. 477, 491 (1979)
  - 2. Waiver of privilege need not be explicit, but “may occur either in the course of the litigation when a party testifies . . . or when purportedly privileged communications are shared with outsiders.” *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012)
- One legislator may not waive immunity on behalf of any other legislator.
- Avoid Unknown Waiver!

# Redistricting Cases

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- In redistricting cases, most courts have recognized a “qualified legislative privilege”
- Courts generally apply five-factor balancing test:
  1. Relevance of evidence
  2. Availability of other evidence
  3. Seriousness of evidence
  4. Role of the government
  5. Future timidity

# Fact Scenario # 1

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- Reporter requested and was denied media press credentials for house and senate. Denial was based on reporter's organization being registered as a lobbying entity.
- The following year reporter tried again arguing that organization was no longer registered as a lobbyist, but was again denied credentials.
- Reporter sued house speaker, senate president and their press secretaries alleging of violation of freedom of the press, and rights to due process and equal protection.
- Defendants moved to dismiss all claims based on absolute legislative immunity.

# Fact Scenario # 2

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- Defendants convicted of criminal trespass for an around-the-clock vigil on steps of state capitol building in violation of a Legislative Administration Committee (LAC) guideline prohibiting overnight use of steps.
- LAC provides centralized administrative services to the legislative branch and is a joint committee of the legislature.
- Defendants appealed and Court of Appeals remanded back to trial court to allow defendants to question the legislator co-chairs of the LAC about “any instructions or other communications” concerning enforcement of the guideline. Defendants claim guideline was applied unconstitutionally to defendant’s expression and assembly.
- State asserts that speech and debate clause in state constitution bars defendants from questioning legislator co-chairs.

# Fact Scenario #3

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- Statute criminalizes use of another's personal identification information for the purpose of obtaining employment.
- Plaintiffs claim statutes violated Equal Protection Clause by discriminating against non-citizens.
- House & Senate serves with subpoena seeking documents and communications related to the statute including "actual or perceived consequences of employment of undocumented immigrants."
- State produced some documents but withheld others claiming legislative privilege. Plaintiffs accepted some of the state's assertions of privilege, but filed a motion of compel disclosure of the remaining documents.
- Plaintiffs argue that immunity/privilege does not apply because: (1) emails were sent to third-parties; (2) defendants waived privilege; and (3) privilege must give way to plaintiff's interest in vindicating federal constitutional rights.

# Recent Trends

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- Open Government – “Good Government”
  - Privilege v. People’s Right to Know
- Speech or Debate Clause Interpretations:
  - 2010 – Montana
  - 2013 – Alabama
  - 2014 – Oregon
- Does it apply to tribal legislative bodies?
- Redistricting Cases – *Favors v. Cuomo*, 285 F.R.D. 187 (E.D. N.Y. 2012)



# Conclusion

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- Make Members & Staff Aware of Legislative Privilege
  - New Member Orientation
  - Include in Staff & Member Manual
- Avoid Unknowing Waiver!
- No Disclosure of Non-Public Documents!

# Questions or Comments?

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Legislative Immunity Paper:

<http://www.senate.leg.state.mn.us/departments/scr/treatise/immunity/legimm.htm>