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# LEGISLATORS TESTIFYING IN LITIGATION

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**LEGISLATIVE IMMUNITY AND THE "SPEECH OR DEBATE" CLAUSE**

In general, state legislators have legislative immunity in state court, under the state constitution's speech or debate clause, for matters related to their legitimate legislative activity. Article III, § 15, provides as follows:

"The senators and representatives shall, in all cases of civil process, be privileged from arrest, during any session of the general assembly, and for four days before the commencement and after the termination of any session thereof. *And for any speech or debate in either house, they shall not be questioned in any other place*" (emphasis added).

## ISSUE

Do legislators have immunity if subpoenaed to testify about legislative activity in a civil lawsuit?

The Office of Legislative Research is not authorized to provide legal opinions, and this report should not be construed as such.

## SUMMARY

The Connecticut Constitution provides that "for any speech or debate in either house," state legislators "shall not be questioned in any other place" (Article third, § 15). This "speech or debate" clause is similar to a provision in the U.S. Constitution and most other states' constitutions.

There have been few Connecticut cases interpreting the scope of the state's speech or debate clause, and we were unable to find any Connecticut cases concerning a legislator being subject to subpoena to testify about legislation.

Most speech or debate cases we found in other jurisdictions involve situations where the legislator is a party to the proceeding. In those civil cases we found where a legislator was not a party and was subpoenaed to testify about legislative acts, most courts held that legislative immunity applied.

Based on available case law and related commentary, the speech or debate clause provides legislators with immunity for their legislative acts that are an integral part of the lawmaking process, such as debate, speech, voting, and legislative actions at

committee hearings or meetings. The clause provides immunity from liability as well as a testimonial privilege. Thus, when the clause applies, legislators cannot be compelled to testify or produce documents in response to a subpoena.

However, the clause is not all-encompassing. For example, it does not apply to "political acts" that are outside the scope of legislative business (such as constituent services or press releases) or administrative actions (such as personnel decisions under certain circumstances).

For a more detailed overview of legislative immunity and cases interpreting the federal speech and debate clause and similar provisions in other states, see this report from the Minnesota Senate Counsel.

## SPEECH OR DEBATE CLAUSE

The U.S. constitution provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other place" (U.S. Const. art. I, § 6, cl. 1). The federal clause has its roots in 17th century English law. More than 40 states, including Connecticut, have a comparable provision in their state constitutions.

The federal speech or debate clause applies to members of Congress. For state legislators, the comparable state clause applies in state court. In federal court, state legislator immunity is generally governed by federal common law rather than the speech or debate clause.

When the speech or debate clause applies, courts have interpreted it broadly to further its purposes of protecting the independence and integrity of the legislature and of freeing legislators from the burden of defending themselves in litigation, thus preventing interference with the legislative process.

The U.S. Supreme Court has held that the clause applies beyond "speech or debate" to encompass other matters 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)). Courts have applied the clause to activities such as voting on bills, participation in committee meetings and public hearings, and several other actions.

In cases involving the speech or debate clause (either the federal clause or other states' comparable provisions), a common issue is whether the legislator's actions are within the "legitimate legislative sphere" such that legislative immunity would

apply. There are also many cases presenting issues outside the scope of this report, such as how the clause applies in criminal cases against legislators or certain other officials.

The protections of the speech or debate clause extend to legislative aides if acting on the legislator's behalf and the clause would have protected that act if performed by the legislator himself or herself.

## CONNECTICUT CASE LAW

There have been few Connecticut cases interpreting the scope of the state's speech or debate clause. Among Connecticut cases, the most extensive discussion of the speech or debate clause was in a 2004 case concerning a legislative committee's subpoena in the context of an impeachment investigation (*Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540 (2004)).

In that case, the court noted that Connecticut's "appellate courts previously have not had occasion to consider the meaning of our state constitution's speech or debate clause," but because the state's clause closely resembles the federal clause, the court could seek guidance "from the interpretation afforded the federal speech or debate clause by the federal courts."

According to the court:

> As the United States Supreme Court has indicated, the design of the federal speech or debate clause is to ensure that the legislative branch will be able to discharge its duties free from undue external interference. . . . [T]he United States Supreme Court has voiced a willingness to interpret the immunity afforded by the clause generously, on the basis of a "practical rather than a strictly literal reading" of the provision. The clause has been construed to provide "protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." Moreover, the immunity conferred by the federal speech or debate clause has been held to consist of not just immunity from liability, but immunity from suit (*Id.* at 560-562) (internal citations omitted).

The court held that Connecticut's speech or debate clause did not prevent the court from exercising subject matter jurisdiction over a request by the governor's office to quash a legislative subpoena which would require the governor to testify. However, the court ruled against the governor's office on other grounds.

In a 2014 case, the plaintiff sued 17 state defendants, including state senators, seeking injunctive relief and a declaratory judgment that a particular statute was unconstitutional. The plaintiff alleged that the legislative defendants "attempted to derail" a specific bill by voting against it or speaking against in during debate. The Appellate Court concluded that "[p]articipating in such legislative debate and voting on proposed legislation undoubtedly constitutes 'acting within the legitimate legislative sphere' " (internal citations omitted). The court held that the plaintiff's claims against the legislative defendants were thus barred by absolute legislative immunity under the speech or debate clause of the state constitution (*Traylor v. Gerratana et al.*, 148 Conn. App. 605, 611-612 (2014)).

There have also been a small number of Superior Court cases involving the speech or debate clause. None of the cases involved a third party litigant seeking to subpoena a non-party legislator to testify about legislation.

## CASES FROM OTHER JURISDICTIONS

Below we briefly describe examples of cases from federal courts or other states' courts in which a legislator raised legislative immunity as a defense to responding to a subpoena.

- In a 1995 case, the District of Columbia Circuit Court of Appeals held that the speech or debate clause protected two members of Congress from having to produce documents in response to a subpoena in private litigation to which they were not a party. Among other things, the court noted that the degree of disruption of the subpoena was not material (*Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995)).

- In a 1983 case, the 9th Circuit Court of Appeals held that a nonparty former Congressman could invoke legislative privilege under the speech or debate clause as to questions about material he inserted into the Congressional Record while in Congress (*Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983)).

- In a 1984 case, the Alaska Supreme Court held that a state senator, although not a party to the underlying action, could invoke legislative privilege under a state constitutional provision similar to the federal speech or debate clause. Certain members of the state House of Representatives had subpoenaed the senator to ask him about conversations he had with the governor about convening a legislative session (*Kerttula v. Abood*, 686 P.2d 1197 (1984)).

- By contrast, in a 1984 state trial court case from New York concerning the state's speech or debate clause, the court concluded that "if the legislator to be questioned is not a party to the pending action, and no criminal or civil actions are pending against him as to his testimony, then the privilege does not exist" (*Abrams v. Richmond County S.P.C.*, Supreme Court, Richmond County, 479 N.Y.S.2d 624 (1984)). It is unclear whether this case is still good law, in light of a later case from the state Court of Appeals which noted that "it appears that [the state's speech or debate clause] was intended to provide at least as much protection as the immunity granted by the comparable provision of the Federal Constitution" (*People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990)).

- In a 2000 case, an Ohio state appellate court held that the state's speech or debate clause did not protect legislators from having to respond to a discovery request to identify corporate representatives with whom the legislators had met off the record concerning legislation. Legislative privilege did protect the legislators from having to respond to various other aspects of the discovery request (*City of Dublin v. Ohio*, 138 Ohio App.3d 753 (2000)).

## SOURCES AND ADDITIONAL READING

72 American Jurisprudence, Second Edition: States, Territories, and Dependencies, § 62, *Speech or Debate Clause.*

24 American Law Reports 6th 255, *Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions*.

Congressional Research Service, *The Speech or Debate Clause: Constitutional Background and Recent Developments* (August 8, 2012).

Minnesota Senate Counsel, *Legislative Immunity* (Updated July 1, 2016).

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