Legislative Immunity in Minnesota

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Contents

TABLE OF AUTHORITIES

Minnesota Cases

Federal Cases

Cases from Other States

State Constitutions

INTRODUCTION

This paper is a compilation and explanation of federal and state cases on legislative immunity. I have used major parts of it in memoranda in support of a motion to quash a subpoena or to dismiss the complaint in a civil action, and have also found it useful as a quick source of points and authorities when trying to convince opposing counsel not to waste his or her time trying to subpoena my client who does not wish to testify concerning legislative intent. I have tried to include enough cases, and enough about the facts of each case, to be able to find a case that is on all fours with the facts of almost any situation with which I may be presented.

While the common law of legislative immunity arose out of the sixteenth and seventeenth century struggles between the English Crown and Parliament, most of the cases in the United States have arisen since the passage of the Civil Rights Attorney's Fees Act as an amendment to 42 U.S.C. § 1988 in 1976. *See* Pub. L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641; and the annotations to 42 U.S.C. § 1983. Most of these cases are cited and described in this paper. There are some older cases, especially state cases, that I have not bothered to mention. Additional state cases can be found under the West keynote "States 28(2)." Federal cases can be found under West keynotes "Civil Rights 13.8(2)" and "United States 12," and under 42 U.S.C.A. § 1983, annotations 2977-88.

A hypertext version of this paper, with hyperlinks to the U.S. Supreme Court cases and other cases that are in the public domain, is available on the Internet at:

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

I. Origins of the Doctrine of Legislative Immunity

A. Common Law

The doctrine of legislative immunity had it origins in the struggles between the English Crown and Parliament that began more than 500 years ago. For some, it was a matter of life and death. In the reign of Richard II (1396-1397), a member of Parliament, Thomas Haxey, was condemned to death as a traitor for having introduced a bill to reduce the expenditures of the royal household. Richard II was deposed by Parliament before the sentence was carried out and Henry IV annulled the judgment. *See* Yankwich, *The Immunity of Congressional Speech --- Its Origin, Meaning and Scope*, 99 U. of Pa. L. Rev. 960, 962(1951); 1 G.M. Trevelyan, *History of England* 335 (3rd ed. reissue 1952). In 1512, Henry VIII prosecuted a member of Parliament, Richard Strode, and had him thrown into prison for having proposed bills to regulate the tin industry. Parliament passed an act annulling the judgment against him and declared void all suits and proceedings against Strode and every other member of Parliament. Yankwich, *supra*, at 963. Later kings granted the members of Parliament the right to speak with impunity, *id*., until Charles I, in 1632, prosecuted Sir John Eliot and his friends Valentine and William Strode and kept them in prison for what they had done in the House of Commons. Eliot died in the Tower. Valentine and Strode were not freed until 1643, after Parliament had raised an army and begun the Civil War. The struggle was not ended until the army of Parliament had won the war and Charles I was beheaded, January 30, 1649. *See* 2 G.M. Trevelyan, *History of England* 165, 179-203 (3rd ed. reissue 1952); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

We usually think of the common law as judge-made law. Legislative immunity is one part of the common law that was written in blood with quills of iron.

In 1689, following the "Glorious Revolution" that brought William and Mary to the throne of England, the legislative immunity that the members of Parliament had fought so hard to achieve was codified in the English Bill of Rights as:

> 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. (Quoted in *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)).

It was "taken as a matter of course" by our Founding Fathers and included in the Articles of Confederation as:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress.

Id.

and included in the United States Constitution, Article I, Section 6, as:

> [F]or any speech or debate in either house [the members] shall not be questioned in any other place.

As the court said in *Tenney*

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "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 (Andrews ed. 1896) 38. Quoted in 341 U.S. at 373.
>
> 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 upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Id. at 377.

Due to its common law origins, legislative immunity under federal common law is afforded to state legislators even where not specifically provided for in a state's constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

Legislative immunity is afforded to nonlegislators when performing a quasi-legislative function. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980) (members of Virginia Supreme Court promulgating *Code of Professional Responsibility*); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp.2d 617 (W.D. Tex. 2000) (members of the Texas Supreme Court promulgating rule relating to Interest on Lawyers' Trust Account (IOLTA)program); *Arizona Independent Redistricting Comm'n v. Fields*, No. 1CA-SA 03-0085, 206 Ariz. 130, 75 P.3d 1088 (2003) (members of redistricting commission developing redistricting plan to become law without legislative approval); *In re Perry*, 60 S.W.3d 857 (Tex. 2001) (members of Legislative Redistricting Board developing redistricting plan to become law without legislative approval); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (governor drawing redistricting plan for presentation to the legislature).

Common law legislative immunity has also been recognized for members of local legislative bodies. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (members of city council); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (members of regional planning body created by interstate compact). *See also, Carlos v.* Santos, No. 97-7523,123 F.3d 61, 66 (2nd Cir. 1997); Burtnick *v. McLean*, No. 95-1345, 76 F.3d 611 (4th Cir. 1996); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992); *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) (parish police jury); *Haskell v. Washington Township*, 864 F.2d 1266, 1276-78 (6th Cir. 1988) (town board of trustees); *Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987) (town commissioners); *Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3rd Cir. 1983) (members of borough council); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983) (village board of trustees); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982) (county supervisors); *Bruce v. Riddle*, 631 F.2d 272, 274-80 (4th Cir. 1980) (county council members); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980) (city directors); *Searingtown Corp. v. Incorporated Village of North Hills*, 575 F. Supp. 1295 (E.D. N.Y. 1981) (village board of trustees); *Rheuark v. Shaw*, 477 F. Supp. 897, 921-22 (N.D. Tex. 1979) *aff'd in part, rev'd in part*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1392 (1981) (county commissioners); *Sanchez v. Coxon*, 175 Ariz. 93, 854 P.2d 126 (1993) (town council).

Tenney involved a suit by a witness against the chairman and members of a committee of the California State Senate for misusing the subpoena power of the committee to "intimidate and silence Plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law . . . ." 341 U.S. at 371. The central question in the case was whether Congress by the passage of 42 U.S.C. § 1983, had intended to "overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National governments here." 341 U.S. at 376. The Court found that Congress, "itself a staunch advocate of legislative freedom," had not intended to "impinge on a tradition so well grounded in history and reason" and that § 1983 did not subject legislators to civil liability for acts done within "the traditional legislative sphere" or "the sphere of legitimate legislative activity." 341 U.S. at 376. The Court found Tenney and the other members of the committee immune from suit under § 1983 for their conduct of the committee hearings and compelling Brandhove to appear before the committee as a witness. It reversed the judgment of the Court of Appeals and affirmed the judgment of the District Court dismissing the Complaint. 341 U.S. at 379.

B. Constitutions

The constitution of almost every state has a speech or debate clause, and most are similar to the federal clause. *See Tenney v. Brandhove*, 341 U.S. 367, 375-76 n. 5 (1951). As a result of the common law origins of legislative immunity, where state courts have been called upon to interpret

a speech or debate clause in their own constitution, they have chosen to follow the guidance given them by the decisions of federal courts interpreting the United States Speech or Debate Clause.

Alaska	*Kertulla v. Abood*, 686 P.2d 1197 (Alaska 1984) (ALASKA CONST. art. II, §6, "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.")
Arizona	*Arizona Independent Redistricting Comm'n v. Fields*, No. 1CA-SA 03-0085, 206 Ariz. 130, 137 n.4, 75 P.3d 1088, 1095 n.4 (2003) (ARIZ. CONST. art. IV, Pt. 2, § 7, "No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate.")
Colorado	*Romer v. Colorado General* Assembly, 810 P.2d 215, 220-25 (Colo. 1991) (COLO. CONST. art. V, § 16, "for any speech or debate in either house, or any committees thereof, they shall not be questioned in any other place.")
Connecticut	*Office of the Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 559, 858A.2d 709, 722 (2004) (CONN. CONST. art. III, § 15, "And for any speech or debate in either house, they shall not be questioned in any other place.")
Kansas	*State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 631-34 (Kan. 1984) (KAN. CONST. art. 2, § 22, "For any speech, written document or debate in either house, the members shall not be questioned elsewhere.")
Kentucky	*Wiggins v. Stuart*, 671 S.W.2d 262, 264 (Ky. App. 1984) (KY. CONST. § 43, "for any speech or debate in either House they shall not be questioned in any other place.")
Louisiana	*Copsey v. Baer*, 593 So.2d 685, 688 (La. App. 1 Cir. 1991) (LA. CONST. art. III, § 8, "No member shall be questioned elsewhere for any speech in either house.")
Maryland	*Blondes v. State*, 16 Md.App. 165, 294 A.2d 661 (1972) (MD. CONST. Dec. of Rights, art. 10, "That freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." MD. CONST. art. 3, § 18, "No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate.")
Michigan	*Prelesnik v. Esquina*, 347 N.W.2d 226 (Mich. App. 1984) (MICH. CONST., art. 4, § 11, "They shall not be questioned in any other place for any speech in either house.")

New Hampshire	*Keefe v. Roberts*, 116 N.H. 195, 355 A.2d 824 (1976) (N.H. CONST. Pt. I, art. 30, "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 action, complaint, or prosecution, in any other court or place whatsoever.")
New Jersey	*State v. Gregorio*, 451 A.2d 980 (N.J. Super.L. 1982) (N.J. CONST. art. IV, § 4, ¶ 9, "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.")
New York	*Straniere v. Silver*, 281 A.D.2d 80, 83, 637 N.Y.S.2d 982, 985, *aff'd* 89 N.Y.2d 825, 653 N.Y.S.2d 270, 675 N.E.2d 1222 (mem.) (1996) (N.Y. CONST. art. III, § 11, "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.")
Ohio	*City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (2000) (OHIO CONST. art. II, § 12, "for any speech, or debate, in either house, they shall not be questioned elsewhere.")
Oklahoma	*Oklahoma State Senate ex. rel. Roberts v. Hetherington*, 1994 OK 16, 868 P.2d 708 (1994) (OKL. CONST. art. 5, § 22, "for any speech or debate in either House, they shall not be questioned in any other place.)
Pennsylvania	*Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323, 330-31 (1986) (PA. CONST. art. II, § 15, "for any speech or debate in either House they shall not be questioned in any other place.")
Rhode Island	*Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984) (R.I. CONST. art. VI, § 5, "For any speech in debate in either house, no member shall be questioned in any other place.")
Tennessee	*Mayhew v. Wilder*, No. M2000-01948-COA-R10-CV, (concur), 46 S.W.3d 760 (Tenn. App. 2001), *appeal denied* (Mar 19, 2001), *rehearing of denial of appeal denied* (Apr 30, 2001) (TENN. CONST. art. II, § 13, "for any speech or debate in either House, they shall not be questioned in any other place.")
Utah	*Riddle v. Perry*, 439 Utah Adv. Rep. 29, 2002 UT 10, 40 P.3d 1128 (2002) (UTAH CONST. art. VI, § 8, "for words used in any speech or debate in either house, they shall not be questioned in any other place.")

The same has been true in the Commonwealth of Puerto Rico. *Silva v. Hernandex Agosto*, 118 P.R.Offic.Trans. 55, 70 (1986) (P. R. CONST. art. III, § 14, "The members of the Legislative Assembly shall not be questioned in any other place for any speech, debate or vote in either house or in any committee.")

But see State v. Beno, 341 N.W.2d 668 (Wis. 1984) ("The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs--let us construe, and stand by ours." Quoting *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567, 785 [757, 758] (1855)). *See* WIS. CONST. art IV, § 16. *Accord, State v. Chvala*, 2004 WI App. 53, ¶ 33, 678 N.W.2d 880, 893 (2004).

Legislative immunity under the Speech or Debate Clause of the Constitution of Hawaii was intended to be broader than under the U.S. Constitution. *Abercrombie v. McClung*, 55 Haw. 595, 525 P.2d 594 (1974) (HI. CONST. art III, § 7, "No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative function.")

The Minnesota Constitution has a speech or debate clause, art. IV, § 10, that is identical to the Speech or Debate Clause in the United States Constitution.

> For any speech or debate in either house they shall not be questioned in any other place.

The Minnesota Supreme Court has never had occasion to construe this clause, but its recognition of the doctrine of legislative immunity can be inferred from its opinion in *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975), prospectively abolishing the doctrine of state sovereign immunity in the tort area but retaining sovereign immunity for legislative functions.

> We wish to make clear, however, that we are only indicating our disfavor of the immunity rule in the tort area, and our decision should not be interpreted as imposing liability on any governmental body in the exercise of discretionary functions or legislative, judicial, quasi-legislative, and quasi-judicial functions.

306 Minn. at 131.

C. Statutes

In Minnesota, and presumably in other states, legislative immunity has been provided for by statute. Minn. Stat. § 540.13 (1996), a recodification of the Act of March 31, 1893, ch. 53, 1893 Minn. Gen. Laws 164, provides:

> 540.13 **EXEMPTIONS OF LEGISLATIVE MEMBERS AND EMPLOYEES.**
>
> No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done by him in pursuance of his duty as such legislator.

There have been no reported Minnesota cases construing this section.

II. Scope of Legislative Immunity

A. "Legislative Acts" Are Immune from Questioning

1. Introducing and Voting for Legislation

Legislative immunity extends to all of a legislator's "legislative acts," *United States v. Helstoski*, 442 U.S. 477 (1979). "Legislative acts" include introducing a bill, *Helstoski, supra*; writing headnotes and footnotes into a bill, *Romer v. Colorado General Assembly*, 810 P.2d 215 (Colo. 1991) (omnibus appropriations bill); and voting for a bill or resolution. *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Chappell v. Robbins*, No. 93-17063, 73 F.3d 918 (9th Cir. 1996); *Acierno v.* Cloutier, 40 F.3d 597 (3rd Cir. 1994) (No. 93-7456) (county council voting to rezone a single parcel of property); *Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214, 1221-24 (2nd Cir. 1994); *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991) (local zoning board adopting construction moratorium); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) (denial of request for zoning variance); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983) (municipal legislators voting to reduce number of liquor licenses); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976) (voting for committee report and urging passage of bill on the floor);*Children A & B v. Florida*, 355 F. Supp.2d 1298 (N.D. Fla. 2004) (voting for current system of aid to education); *Jenkel v. 77 U.S. Senators*, 2003 WL 22016788 (N.D. Cal. 2003) (voting for joint resolution authorizing use of military force in Iraq); *Warden v. Pataki*, 35 F. Supp.2d 354 (S.D.N.Y. 1999) (state legislators' role in enacting legislation to change governance of New York City schools); *2BD Associates Limited Partnership v. County Comm'rs for Queen Anne's County*, 896 F. Supp. 528 (D. Md. 1995) (municipal legislators drafting and passing amendment to zoning ordinance); *Rateree v. Rockett*, 630 F. Supp. 763, 769-72 (N.D. Ill. 1986) (municipal legislators voting to reduce budget and eliminate positions); *Latino Political Action Comm. v. City of Boston*, 581 F. Supp. 478 (D. Mass. 1984) (municipal legislators voting to pass redistricting plan that allegedly discriminated against minorities); *Joyner v. Mofford*, 539 F. Supp. 1120 (D. Ariz. 1982) (passing an allegedly unconstitutional law; *dicta*, legislators not named as defendants); *Searingtown Corp. v. Incorporated Village of North Hills*, 575 F. Supp. 1295 (E.D. N.Y. 1981) (village board of trustees enacting zoning ordinances); *Fralin & Waldron, Inc. v. County of Henrico, Va.*, 474 F. Supp. 1315, 1320-21 (E.D. Va. 1979) (members of county planning board voting to rezone a single parcel of property); *Joe v. Two Thirty-Nine Joint Venture*, 47 Tex., Sup. Ct. J. 1058, 145 S.W.3d 150 (2004) (city council member who was also an attorney voting for construction moratorium adverse to client); *Kniskern v Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (2001) (state legislators voting for tort reform bill that was later held to be unconstitutional); *Humane Society of New York v. City of New* York, 188 Misc.2d 735, 729 N.Y.S.2d 360 (2001) (members of city board of health voting to adopt list of prohibited wild animals); *Pennsylvania State Lodge v. Commonwealth*, 692 A.2d 609 (Pa. Commw. Ct. 1997) (inquiry into state legislators' reasons for enacting a law); *Lincoln Party v. General Assembly*, 682 A.2d 1326 (Pa. Commw. Ct. 1996) (state legislature passing a proposed constitutional amendment); *Lucchesi v. State*, 807 P.2d 1185 (Colo. App. 1990) (voting for allegedly unconstitutional tax bill); *77th District Judge v. State*, 175 Mich. App. 681, 438 N.W.2d 333 (1989) (enacting unconstitutional system of compensating district judges); *Wiggins v. Stuart*, 671 S.W.2d

262, 264 (Ky. App. 1984) (voting for allegedly unconstitutional bills relating to compensation and pensions for legislators); *Village of North Atlanta v. Cook*, 219 Ga. 316, 133 S.E.2d 585 (1963) (voting for allegedly unconstitutional bill relating to county).

Kilbourn v. Thompson was the first Speech or Debate Clause case decided by the United States Supreme Court. It was a civil suit by a private citizen who had been jailed by the Sergeant at Arms of the House of Representatives after he had been voted in contempt of the House for failing to answer questions as a witness before a committee. The Court found that the Speaker of the House, who had signed the order for the witness' imprisonment, and the members of the committee who had reported to the House that the witness had refused to testify and should be found in contempt, and who had introduced a resolution to that effect and voted for it, were immune from having to defend themselves in court. The Court refused to limit the privilege only to words spoken in debate, but rather extended it to the written report presented to the House by the committee, the resolution offered by committee members finding the witness in contempt and the act of voting for the resolution, "In short, to things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. The court quoted approvingly from an 1808 decision of the Massachusetts Supreme Court, *Coffin v. Coffin*, 4 Mass. 1, which said in regard to a similar clause in the Massachusetts Constitution (MASS. CONST. Pt. First, art. XXI):

> I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular . . . or irregular . . . . I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to the privilege when not within the walls of the representatives' chamber.

103 U.S. at 204.

More recently, the court has described a legislative act as any act that is: (1) "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," and (2) relates "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).

United States v. Helstoski, 442 U.S. 477 (1979) was a criminal prosecution of a former congressman who was alleged to have solicited and obtained bribes from resident aliens in return for introducing private bills on their behalf to suspend the application of the immigration laws so as to allow them to remain in the United States. The court held that evidence of Helstoski's actions to introduce the bills could not be admitted at trial, since the legislative acts of a member were not a proper subject of judicial scrutiny.

2. Failing or Refusing to Vote or Enact Legislation

Failing or refusing to vote or enact legislation is also conduct entitled to legislative immunity. *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43 (4th Cir. 1988) (not voting to reelect state circuit court judge); *Gambocz v. Sub-Comm. on Claims of Joint Legislative Appropriations Comm., New Jersey Legislature*, 423 F.2d 674 (3rd Cir. 1970) (voting to deny a claim); *Suhre v. Board of Comm'rs*, 894 F. Supp. 927 (W.D.N.C. 1995) (refusing to remove Ten Commandments from wall of courtroom); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (failing to adopt alternative to redistricting plan presented by governor); *Quillan v. U. S. Government*, 589 F. Supp. 830 (N.D. Iowa 1984) (failing to enact private claims bill); *Simpson v. Cenarrusa*, 130 Idaho 609, 611-12, 944 P.2d 1372, 1374-75 (1997) (failure to support calling constitutional convention to consider term limits); *State v. Township of Lyndhurst*, 650 A.2d 840 (N.J. Super. Ch. 1994) (approving a transfer of money by an executive agency by failing within a certain time to object to it); *Marra v. O'Leary*, 652 A.2d 974 (R.I. 1995) (preventing private claims bill from being passed out of committee).

3. Voting on the Seating of a Member

Voting to seat or unseat a member is a legislative act. *Jubelirer v. Singel*, 638 A.2d 352 (Pa. Commw. Ct.. 1994) (voting to seat a member); *Porter v. Bainbridge*, 405 F. Supp. 83 (S.D. Ind. 1975) (voting to unseat member).

4. Voting on the Confirmation of an Executive Appointment

Voting on the confirmation of an executive appointment is a legislative act. *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1994).

5. Voting on an Impeachment

State legislators participating in impeachment proceedings are entitled to absolute immunity for their actions. *Larsen v. Senate of the Commonwealth of Pennsylvania*, No. 97-7153, 152 F.3d 240 (3rd Cir.1998). *Larsen* was an action by a judge of the state supreme court against numerous state officials who had participated in various disciplinary proceedings against him, including 49 members of the Pennsylvania Senate who had voted on articles of impeachment presented by the House of Representatives. In addition to money damages against the senators, the judge sought declaratory and injunctive relief voiding the Senate verdict of guilty on Article II. The trial court dismissed the claim against the senators for money damages but not the claim for declaratory and injunctive relief. The Court of Appeals observed that both the federal and state constitutions had placed the impeachment power in the legislative branch primarily as a function of the separation of powers. It therefore held that impeachment proceedings were a legislative activity and remanded the case to the trial court with instructions to dismiss all the claims against the senators.

Members of a city council participating in impeachment proceedings have been held entitled to absolute judicial immunity, rather than absolute legislative immunity. *Brown v. Griesenauer,* 970 F.2d 431 (8th Cir. 1992).

6. Determining Whether a Bill Requires Local Approval

Determining whether a bill requires a "home rule message" from a local government is a legislative act for which legislators are immune from suit. *Straniere v. Silver*, 637 N.Y.S.2d 982 (A.D. 3 Dept. 1996).

7. Making Speeches

Under the Speech or Debate Clause, a member of Congress is immune from inquiry into his or her motives for giving a speech on the House floor, even when the speech is alleged to be part of a criminal conspiracy. *United States v. Johnson*, 383 U.S. 169 (1966). Representative Johnson was tried and convicted of conflict of interest and conspiracy to defraud the United States. Part of the conspiracy to defraud included a speech made by Representative Johnson on the House floor, favorable to savings and loan institutions. The Government claimed Johnson was paid a bribe to make the speech. The Supreme Court held that the Government was precluded by the Speech or Debate Clause from inquiring into Johnson's motives for giving the speech, and thus could not use the speech as evidence of the conspiracy, even without questioning the representative directly.

8. Enforcing Rules

"Legislative acts" include compelling attendance at a legislative session in order to secure a quorum, *Schultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985); *Keefe v. Roberts*, 116 N.H. 195, 355 A.2d 824 (1976); excluding private lobbyists from the house floor while admitting governmental lobbyists, *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622 (1st Cir. 1995); allowing a witness before a congressional committee to demand that his testimony not be televised, *Cable News Network v. Anderson*, 723 F. Supp. 835 (D.D.C. 1989); denying press credentials for admission to the Senate and House galleries, *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975); and refusing permission to videotape committee proceedings for failure to seek advance permission, *Wilkins v. Gagliardi*, No. 174456, 219 Mich. App. 260, 556 N.W.2d 171 (1996).

9. Serving as a Member of a Committee

Serving as a member of a standing committee that considers legislation is a legislative act, and proof that a member served on two committees that considered a bill imposing criminal penalties for certain conduct may not be used to prove the member knew when he engaged in that type of conduct that it was illegal. *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), *cert. denied*, 510 U.S. 1040 (1994).

10. Conducting Hearings and Developing Legislation

"Legislative acts" include conducting committee hearings, *Gravel v. United States*, 408 U.S. 606, 624 (1972); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983); *Dominion Cogen, Inc. v, District of Columbia*, 878 F. Supp. 258 (D.D.C. 1995); *United States v. Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1979); *Stamler v. Willis*, 287 F. Supp. 734 (N.D. Ill. 1968), *appeal dismissed*, 393 U.S. 217 (1968), *vacated on other grounds*, 393 U.S. 407 (1969); *Bardoff v. United States*, 628 A.2d 86 (D.C. App. 1993); *Oates v. Marino*, 482 N.Y.S.2d 738 (N.Y. App. Div. 1984); compelling attendance of witnesses at a committee hearing, *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983); *Acosta v. Agosto*, 590 F. Supp. 144 (D. Puerto Rico 1984); issuing subpoenas for documents, *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976); *Urbach v. Farrell*, 229 A.D.2d 275, 656 N.Y.S.2d 448 (1997); procuring contempt of Congress citations against persons who refuse to produce the documents, *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976); receiving information from a confidential source, *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983), *contra, Tavoulareas v. Piro*, 527 F. Supp. 676 (D.D.C. 1981); and voting by legislators and the preparation of committee reports, *Gravel*, 408 U.S. at 624; *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980); *Smith v. Eagleton*, 455 F. Supp. 403 (W.D. Mo. 1978); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

Legislative immunity, both under a state Speech or Debate Clause and at common law, "prevents the courts from making the Legislature justify its decision to hold closed sessions" to adopt budget and revenue bills. *Mayhew v. Wilder*, 46 S.W.3d 760, 776 (Tenn. App. 2001) (No. M2000-01948-COA-R10-CV, slip op. at 14), *appeal denied* (Mar 19, 2001), *rehearing of denial of appeal denied* (Apr 30, 2001).

Where investigative hearings by a legislative committee have been duly authorized, the members of the committee are immune from suit for damages under 42 U.S.C. § 1983, even when they are alleged to have illegally issued subpoenas, examined witnesses, and gathered evidence. *Romero-Barcelo v. Hernandez-Agosto*, No. 95-1235, 75 F.3d 23 (1st Cir. 1996).

"Legislative acts" include developing a legislative redistricting plan, even when some meetings take place outside the State House and are not formal committee meetings. *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984). *Cf. Rodriquez v. Pataki*, 280 F. Supp.2d 89 (S.D. N.Y. 2003), *aff'd* 293 F. Supp.2d 302 (2003) (legislative privilege did not protect members of an advisory task force that included four legislators and two nonlegislators, who were assigned to assist in developing a redistricting plan, from having to produce documents arising from their deliberations, so long as the production did not include depositions of legislators or their staffs).

11. Investigating Conduct of Executive Agencies

"The power to investigate and to do so through compulsory process plainly falls within [the legitimate legislative sphere]." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (quoted in *United States v. McDade*, 28 F.3d 283, 304 (3rd Cir. 1994) (No. 93-1487, slip op.

at 49) (Scirica, J., concurring and dissenting in part); *Brown & Williamson Tobacco Corp. v. Williams*, No. 94-5171, 62 F.3d 408 (D.C. Cir. 1995); *Pentagen Technologies Int'l, Ltd. v. Committee on Appropriations of the U.S. House of Representatives*, 20 F. Supp.2d 41 (D.D.C. 1998) (confidential reports prepared by investigative staff of House subcommittee were protected from compulsory disclosure). On the other hand, legislative immunity does not insulate a legislative committee from a good faith colorable claim by the governor's office that its impeachment investigation is being conducted in violation of the separation of powers. *Office of the Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 858A.2d 709 (2004).

12. Gathering Information

Gathering information about the expenditure of public money is within the legitimate legislative sphere, even when done by an individual legislator. *Harristown Development Corp. v. Commonwealth*, 135 Pa. Commw. Ct. 177, 580 A.2d 1174 (1990) (chair of state Senate Appropriations Committee); *but see Bastien v. Office of Campbell*, 390 F.3d 1301, 1316 (10th Cir. 2004) (informally gathering information by member of U.S. senator's district staff meeting with constituents is not a legislative act).

13. Publishing Reports

"Legislative acts" also include distributing published reports for legislative purposes to "Members of Congress, congressional committees, and institutional or individual legislative functionaries," *Doe v. McMillan*, 412 U.S. 306, 312 (1975); publishing a transcript of witnesses' testimony at a hearing, *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir 1983); releasing the official report of committee hearings to news reporting and publishing agencies, *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980); and inserting material into the Congressional Record, *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983), even when the material contains revisions and extensions of the remarks actually made on the Floor. *Gregg v. Barrett*, 594 F. Supp. 108 (D.D.C. 1984).

Authorizing live television coverage of open hearings is a legislative decision entitled to absolute legislative immunity, even against an allegation that the broadcast went beyond the reasonable requirements of the legislative function. *Romero-Barcelo v. Hernandez-Agosto*, No. 95-1235, 75 F.3d 23, 30-31 (1st Cir. 1996).

14. Sending Letters

"Legislative acts" include sending a letter containing defamatory material from one Senator to another in response to the second Senator's inquiry into the first Senator's exercise of his official powers, *Ray v. Proxmire*, 581 F.2d 998 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 933 (1978); and composing and sending a letter containing defamatory material concerning alleged dishonest and illegal conduct by a naval contract supervisor to his commanding officer. *Rusack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978).

15. Drafting Memoranda and Documents

"Legislative acts" include drafting memoranda and other documents for discussion between a legislator and legislative staff, even when the documents discuss proposed actions outside the sphere of legitimate legislative activity. *United Transportation Union v. Springfield Terminal Ry.*, 132 F.R.D. 4 (D. Me. 1990) (documents discussing efforts to influence an executive branch agency on behalf of a constituent). In Michigan, however, legislative immunity does not extend to discussion between a senator and his aide about an investigation being conducted by an executive agency. *In re Deposition of Prange*, 542 N.W.2d 354 (Mich. App. 1995).

16. Lobbying for Legislation

"Legislative acts" include lobbying other state legislators to enact legislation, *State v. Neufeld*, 260 Kan. 930, 926 P.2d 1325 (1996); *Thillens, Inc. v. Community Currency Exchange Ass'n. of Illinois, Inc.*, 729 F.2d 1128 (7th Cir. 1974); lobbying fellow city council members to enact a construction moratorium, *Joe v. Two Thirty-Nine Joint Venture*, 47 Tex., Sup. Ct. J. 1058, 145 S.W.3d 150 (2004); and working as chairman of the state senate finance committee to get the executive branch to include in the governor's proposed budget money to purchase real property owned by the senator. *State v. Dankworth*, 672 P.2d 148 (Alaska App. 1983).

17. Making Budgetary Decisions

Voting to adopt a county budget is a legislative act. *Woods v. Gamel*, No. 96-7171, 132 F.3d 1417 (11th Cir. 1998). Enacting a budget that denied appellants a salary increase is a legislative act. *Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302-03 (4th Cir. 1995) (*en banc*). Allocating the General Assembly's office-staffing appropriation among individual representatives is a legislative act. *Youngblood v. DeWeese*, No. 03-1722, 352 F.3d 836 (3rd Cir. Dec. 18, 2003). Voting to adopt an ordinance appropriating money to purchase voting equipment is a legislative act. *American Ass'n of People with Disabilities v. Smith*, 227 F. Supp.2d 1276 (M.D. Fla. 2002). Abolishing a position is a legislative act. *Hollyday v. Rainey*, 964 F.2d 1441 (4th Cir. 1992), *cert. denied* 506 U.S. 1014 (1992). Abolishing personnel positions through budget cuts is a legislative act. *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679 (4th Cir. 1990); *Rateree v. Rocket*, 852 F.2d 946, 950 (7th Cir. 1988); *Gordon v. Katz*, 934 F. Supp. 79 (S.D.N.Y. 1996); *Rini v. Zwirn*, 886 F. Supp. 270, 283 (E.D.N.Y. 1995); *Orange v. County of Suffolk*, 830 F. Supp. 701 (E.D.N.Y. 1993); *Herbst v. Daukas*, 701 F. Supp. 964 (D. Conn. 1988); *Drayton v. Mayor and Council of Rockville*, 699 F. Supp. 1155 (D. Md. 1988).

18. Making Personnel Decisions

a. Speech or Debate Clause Immunity

The Speech or Debate Clause of the U.S. Constitution provides legislative immunity for personnel decisions made by members of Congress regarding employees whose "duties were directly

related to the due functioning of the legislative process." *Browning v. Clerk, U. S. House of Representatives*, 789 F.2d 923, 928-29 (D.C. Cir 1986), *cert. denied* 479 U.S. 966 (1986). *Browning* involved firing an official reporter of committee and subcommittee hearings, whose duties were found to be an integral part of the legislative process. The duties of a congressional chief of staff have been found to be directly related to the due functioning of the legislative process, *Niedermeier v. Office of Baucus*, 153 F. Supp.2d 23, 31 n.5 (D.D.C. 2001); but the duties of an employee in a senator's district office who primarily worked with the senator's constituents were not. *Bastien v. Office of Campbell*, 390 F.3d 1301 (10th Cir. 2004).

The Speech or Debate Clauses in state constitutions likewise provide legislative immunity for personnel decisions regarding certain employees of the Legislature. *See, e.g., Prelesnik v. Esquina*, 347 N.W.2d 226, 227-28 (Mich. App. 1984) (employing a legislative corrections ombudsman who issues a defamatory report).

b. Common Law Immunity

Federal common law legislative immunity, which applies to legislative bodies where there is no Speech or Debate Clause, does not provide as broad protection for personnel decisions as does a Speech or Debate Clause. Whether a given personnel decision is entitled to legislative immunity at common law depends on the nature of the decision rather than on the title of the official making it. *Forrester v. White*, 484 U.S. 219, 224 (1988). In *Forrester*, the Supreme Court found that a state court judge was not immune from suit for firing a probation officer because the action was an administrative function rather than a judicial function.

Where the Speaker of the House of Representatives of the Commonwealth of Puerto Rico refused to hire a journalist as a legislative press officer after the journalist published an article attacking him, the court found that a press officer had "enough opportunity for 'meaningful input' into the legislative process such that the employment decision should be immunized." *Agromayor v. Colberg*, 738 F.2d 55, 60 (1st Cir. 1984); *cert. denied*, 469 U.S. 1037 (1984). Where the Speaker of the House of Representatives and the President of the Senate of the Commonwealth of Puerto Rico fired the superintendent of the state capitol building, who held office at their discretion, the court found that the employee was "a political creature" whose firing was protected by legislative immunity. *Lasa v. Colberg*, 622 F. Supp. 557, 560 (D. Puerto Rico 1985).

Where a town board voted to hire a consultant to review the police force as part of an investigation of the police department, it was protected by legislative immunity. *Carlos v.* Santos, 123 F.3d 61, 66 (2nd Cir. 1997) (No. 97-7523). Where town police officers were discharged as a consequence of the town board having voted to contract with the county sheriff for police services, the court found the town board entitled to legislative immunity for both the vote and the discharge. *Healy v. Town of Pembroke Park* 831 F.2d 989, 993 (11th Cir. 1987). Where the town board voted to reduce the salaries of the town supervisor and his confidential secretary, and failed to reappoint the deputy town attorney, the members of the town board were protected by legislative immunity. *Dusanenko v. Maloney*, 560 F. Supp. 822 (S.D.N.Y. 1993).

For a discussion of personnel decisions that have been held not immune because they were "administrative" rather than "legislative," see section III.C.1.

B. Legislative Immunity is Absolute

Once it is determined that the activities of a legislator fall within the "sphere of legitimate legislative activity," the protection of the Speech or Debate Clause is absolute. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Doe v. McMillan*, 412 U.S. at 311-312; *Gravel v. United States*, 408 U.S. at 623 n. 14; *Powell v. McCormack*, 395 U.S. 486, 502-503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); *United States v. Johnson*, 383 U.S. at 184-185; *Oklahoma State Senate ex rel. Roberts v. Hetherington*, 1994 OK 16, 868 P.2d 708 (Okl. 1994).

The immunity of a legislator is not destroyed by a mere allegation of bad faith or an unworthy purpose. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *X-Men Security, Inc. v. Pataki*, 196 F.3d 56 (2nd Cir. 1999) (allegation that legislators had threatened to introduce legislation); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 (5th Cir. 1976); *Larsen v. Early*, 842 F. Supp. 1310 (D. Colo. 1994) (allegation that a Colorado state senator had fraudulently misrepresented the effect of a bill to fellow legislators and had conspired to fraudulently mislead other legislators not sufficient to overcome defense of legislative immunity); *Stamler v. Willis*, 287 F. Supp. 734 (N.D. Ill. 1968), *appeal dismissed*, 393 U.S. 217 (1968), *vacated on other grounds*, 393 U.S. 407 (1969); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984).

"The issue . . . is not whether the information sought might reveal illegal acts, but whether it falls within the legislative sphere." *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 860-61 (D.C. Cir. 1988).

C. Legislative Immunity is Personal

Legislative immunity is personal and belongs to each individual member. It may be asserted or waived as each individual legislator chooses. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992). It does not belong to the body as a whole. *Pataki v. New York State Assembly*, 190 Misc.2d 716,729; 738 N.Y.S.2d 512, 523 (2002).

D. Legislative Immunity Continues for Former Legislators

Immunity for "legislative acts" continues even after a legislator has ceased to hold office. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983). *See United States v. Brewster*, 408 U.S. 501 (1972); *Thillens, Inc. v. Community Currency Exchange Ass'n. of Illinois, Inc.*, 729 F.2d 1128 (7th Cir. 1984).

E. Legislative Immunity Extends to Non-Legislators Participating in the Legislative Process

"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). This includes a mayor presenting a budget to the city council, 523 U.S. 44; a governor presenting a budget to the state legislature, *Abbey v. Rowland*, 359 F. Supp.2d 94 (D. Conn. 2005); an executive agency employee preparing a change in an education funding formula for consideration by the legislature, *Campaign for Fiscal Equity v. State*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd* 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999); a judge preparing a budget proposal for presentation to the town board, *Gordon v. Katz*, 934 F. Supp. 79 (S.D.N.Y. 1996); a governor signing a bill that reduces the number of members on an industrial commission, *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205 (1st Cir. 2005); a governor signing a bill that creates a "Choose Life" specialty license plate program, *Women's Emergency Network*, 323 F.3d 937 (11th Cir. 2003); a county executive signing a budget resolution, *Orange v. County of Suffolk*, 830 F. Supp. 701 (E.D.N.Y. 1993); and a mayor vetoing an ordinance passed by the city council. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). "It is the nature of the work in question performed by a state employee—not the employee's title—that determines whether the Speech or Debate Clause obtains." *Campaign for Fiscal Equity v. State*, 687 N.Y.S.2d at 231.

A witness at a legislative hearing who makes defamatory statements related to the subject matter of the hearing has an absolute common law immunity from suit for making them. *Riddle v. Perry*, 2002 UT 10, 439 Utah Adv. Rep. 29, 40 P.3d 1128 (2002). As the court said:

> We recognize there is a potential danger for abuse, but conclude that the greater good is served by ensuring that citizens who want to participate in the legislative process may do so without fear of liability for defamation.

2002 UT 10, ¶ 10, 40 P.2d at 1132. *Accord, Bio/Basics International Corp. v. Ortho Pharmaceutical* Corp., 545 F. Supp. 1106 (S.D.N.Y. 1982); *DeSantis v. Employees Passaic County Welfare Ass'n.*, 237 N.J. Super. Ct. 550, 568 A.2d 565 (1990); *Sherrard v. Hull*, 53 Md.App. 553, 456 A.2d 59 (1983); *Jennings v. Cronin*, 256 Pa. Super. Ct. 398, 389 A.2d 1183 (1978).

An unsolicited statement made to a legislative investigative employee is not protected by legislative immunity unless the communicator shows that he would not have made the unsolicited statement but for his intention to inform the legislative body on a subject properly within its jurisdiction and the statement has some relation to the legitimate legislative business to which it is addressed. *Webster v. Sun Company, Inc.*, 731 F.2d 1 (D.C. Cir. 1984).

Circulating an initiative petition is a legislative function and the citizens who promote it are entitled to legislative immunity for their circulation-related activities. *Brock v. Thompson*, 1997 OK 127, ¶ 20, 948 P.2d 279, 290 (1997) (dicta; defendants in this case had not yet begun to circulate the petition).

Where a state constitution provides for publication of official arguments for and against initiated legislation or a constitutional amendment, the officials who prepare and publish those arguments are entitled to absolute common law legislative immunity for defamatory statements in the arguments, but a private citizen who acts in concert with the officials is not entitled to immunity. *Bigelow v. Brumley*, 138 Ohio. St. 574, 37 N.E.2d 584 (1941).

III. Some Activities of Legislators are Not Immune

A. Actions Without Lawful Authority Are Not Immune

1. Unconstitutional Procedures for Enacting Legislation

Legislative immunity does not prevent judicial review of the procedure used by a legislature to enact a bill. *Pennsylvania School Boards Ass'n v. Commonwealth Ass'n of School Administrators*, 805 A.2d 476 (Pa. 2002) (claim that amended version of bill had not been read on three different days); *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023 (Pa. Commw. Ct. 1997) (claim that House of Representatives committee had violated Sunshine Act by holding a hearing on a bill at a time other than the one announced was not barred by Speech and Debate Clause).

Legislative immunity does not prevent a court from issuing a declaratory judgment that procedures used by the legislature to enact legislation were unconstitutional. *Romer v. Colorado General Assembly*, 810 P.2d 215 (Colo. 1991). In *Romer*, the governor had used his item veto authority to veto certain headnotes and footnotes in the "long" appropriation bill. Rather than override the vetoes or bring a declaratory judgment action in district court to have them declared invalid, the General Assembly chose to publish a letter that said, in the Assembly's opinion, the vetoes were invalid and should be ignored. The Colorado Supreme Court held that this was an improper procedure for overriding a veto and thus outside the sphere of legitimate legislative activity. It presumed the vetoes valid until properly challenged.

2. Illegal Investigative Procedures

Legislative immunity does not protect otherwise legislative acts that are taken without legislative authority, as when a special investigative committee of the Puerto Rican House of Representatives issued subpoenas after its authority to investigate had expired. *Thompson v. Ramirez*, 597 F. Supp. 730 (D. Puerto Rico 1984).

Legislative immunity does not extend to the unlawful seizure of documents by a subcommittee investigator without a subpoena, especially documents conceded to be irrelevant to the subcommittee's inquiry, *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976), 753 F.2d 88

(1985); nor to the surreptitious videotaping of an interview with a subcommittee investigator, *Benford v. American Broadcasting Companies,* 502 F. Supp. 1148 (D. Md. 1980).

3. False Disclosures and Claims

Legislative immunity does not extend to filing false or incomplete reports of campaign contributions or expenditures, *United States v. Rose,* 28 F.3d 181 (D.C. Cir. 1994); *United States v. Hanson*, 566 F. Supp. 162 (D. D.C. 1983), *aff'd* No. 83-1689 (D.C. Cir. Aug. 1, 1983) (unpublished order), *cert. denied*, 464 U.S. 1042 (1984); nor to the allegedly false disclosure of income from sources other than the United States, *United States v. Myers*, 692 F.2d 823 (2nd Cir. 1982); nor to allegedly receiving income in excess of Congressional limits on honoraria, *Federal Election Comm'n v. Wright*, 777 F. Supp. 525 (N.D. Tex. 1991); nor to submission by a congressman of allegedly false claims for travel expense reimbursement for trips home to his district. *United States ex rel. Hollander v. Clay,* 420 F. Supp. 853 (D.D.C. 1976).

Legislative immunity does not bar recovery of money paid for health insurance premiums for the benefit of local legislators under ordinances that were not authorized by state law. *Massongill v. County of Scott*, No. 98-807, 337 Ark. 281, 991 S.W.2d 105 (1999).

Legislative immunity does not bar inquiry into whether a legislator's activities and conversations were, in fact, legislative in nature. *Government of Virgin Islands v. Lee,* 775 F.2d 514 (3rd Cir. 1985). In *Lee*, a Virgin Islands legislator had requested reimbursement for the portion of his travel expenses that related to his activities as a legislator engaged in a fact-finding trip. The government alleged that his request overstated that portion, and the Court of Appeals held that legislative immunity did not bar inquiring into whether the private conversations he engaged in were, in fact, legislative in nature. 775 F.2d. at 522.

B. "Political" Acts Are Not Immune

1. Solicitation of Bribes

The Speech or Debate Clause does not preclude inquiry into alleged criminal conduct of a congressman apart from his actions as a member of Congress. *United States v. Brewster,* 408 U.S. 501 (1972); *United States v. Myers,* 635 F.2d 932 (2nd Cir. 1980); *United States v. Dowdy,* 479 F.2d 213 (4th Cir. 1973), *cert. denied*, 414 U.S. 823 (1973); *United States v. Garmatz,* 445 F. Supp. 54 (D. Md. 1977). Nor does a state Speech or Debate Clause preclude a similar inquiry into the conduct of a state legislator. *Blondes v. State,* 16 Md.App. 165, 294 A.2d 661 (1972). In *Brewste*r, United States Senator Daniel Brewster of Maryland was accused of solicitation and acceptance of bribes in violation of law. The Supreme Court held that the Speech or Debate Clause did not protect him from prosecution, because the bribery could be proved without inquiry into his "legislative" acts or motivation. The Court said:

> A legislative act has consistently been 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 Senate in the performance of official duties and into the motivation for those acts.
>
> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these activities has grown over the years. . . . Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have been afforded protection by the Speech or Debate Clause.

408 U.S. at 512.

The Court referred back to the early Massachusetts case of *Coffin v. Coffin*, 4 Mass. 1 (1808), to show that while the privilege may extend beyond the legislative chamber, that is only because not all legislative business is done in the chamber.

> If a member . . . be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought therefore to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions, as a representative either in debating, in assenting to, or in draughting a report. 4 Mass. at 28.

Quoted in 408 U.S. at 515.

Legislative immunity "does not extend beyond what is necessary to preserve the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 517 (1972). It does not extend to discussions that involve only the possible future performance of legislative functions, as when Senator Harrison Williams discussed with an ABSCAM undercover agent disguised as an Arab sheik the possibility that the Senator would introduce a private immigration bill on the sheik's behalf. *United States v. Williams*, 644 F.2d 950 (2nd Cir. 1981). *Accord, United States v. Myers*, 635 F.2d 932 (2nd Cir. 1980). Nor does it extend to a whispered solicitation on the House floor by one member to another member to accept a bribe. *United States v. Myers*, 692 F.2d 861 (2nd Cir. 1982).

Federal common law legislative immunity does not prevent the use in federal court of evidence of a state legislator's actions in directing the course of a committee's investigation of a contractor's performance as a construction manager according to whether the contractor made timely payment of a series of bribes the contractor had agreed to pay to secure a favorable investigation. *United States v. DiCarlo*, 565 F.2d 802 (1st Cir. 1977).

2. Communications to the Press

Legislative immunity does not extend to the issuance of a press release that republishes a speech made on the Senate floor, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), *but cf. Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980) (release to press of official committee report is a legitimate legislative activity); and *Abercrombie v. McClung*, 55 Haw. 595, 525 P.2d 594 (1974) (defamatory remarks made to reporter off the Senate floor amplifying charges made in a speech on the Senate floor was in the "exercise of his legislative functions"); nor to defamatory statements made at a press conference, *Cole v. Gray*, 638 F.2d 804 (5th Cir. 1981), *cert. denied*, 454 U.S. 838 (1981) (dicta, complaint dismissed on other grounds); nor to speeches made outside the Congressional forum, *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983); nor to allegedly defamatory remarks made during an appearance by a congressman on a television broadcast, *Williams v. Brooks*, 945 F.2d 1322 (5th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (interview in congressman's office); *Dickey v. CBS, Inc.*, 387 F. Supp. 1332 (E.D. Pa. 1975), *accord, Hahn v. City of Kenner*, 984 F. Supp. 436, 441-42 (E.D. La. 1997) (comments by state senator who called in to radio talk show); *Greenberg v. Collier*, 482 F. Supp. 200 (E.D. Va. 1979) (news releases and speeches by state legislator outside of General Assembly); nor to the release by a congressman to the press of a defamatory letter the congressman had sent to the Attorney General, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1420 (1988); nor to the release to the press of derogatory information in a deceased congressman's files concerning a candidate to fill his seat in a special election, *Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124 (E.D. Tex. 1979); nor to the dissemination of unlawfully seized documents outside of Congress, *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976), 753 F.2d 88 (D.C. Cir. 1985); nor to the broadcast on the ABC Nightly News of a videotape of a meeting between subcommittee investigators and a person being investigated. *Benford v. American Broadcasting Companies*, 502 F. Supp. 1148 (D. Md. 1980).

3. Communications to Constituents

Legislative immunity does not extend to the use of the franking privilege to mail materials to constituents and potential constituents. *Schiaffo v. Helstoski*, 492 F.2d 413 (3rd Cir. 1974); *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972); *Hamilton v. Hennessey*, 783 A.2d 852, 855 (Pa. Commw. Ct. 2001).

4. Communications to a Legislator's Spouse

A legislator who uses his desk phone on the House floor to telephone another representative's wife to urge her to call her husband and urge him to change his vote on a bill then pending before

the House is not engaging in a legislative act within the protection of the Speech or Debate Clause. *State v. Neufeld*, 260 Kan. 930, 926 P.2d 1325 (1996).

5. Pressure on the Executive Branch

Legislative immunity does not extend to efforts by members of Congress to influence the executive branch. *Doe v. McMillan*, 412 U.S. 306, 313 (1975); *Gravel v. United States*, 408 U.S. 606, 625 (1972). It does not extend to attempts to secure government contracts for constituents, *United States v. Brewster*, 408 U.S. 501, 512 (1972); nor to attempts to influence the Department of Justice in enforcing the laws, *United States v. Johnson*, 383 U.S. 169, 172 (1966); nor to attempts to get an executive branch employee fired after an investigating committee has been dissolved, *Cole v. Gray*, 638 F.2d 804 (5th Cir. 1981), *cert. denied*, 454 U.S. 838 (1981) (dicta, complaint dismissed on other grounds); nor to the application of pressure by a state senator on the executive branch to discharge a public employee having responsibilities vested exclusively with the executive branch. *Hartley v. Fine*, 595 F. Supp. 83 (W.D. Mo. 1984), *judgment on the merits in favor of state senator aff'd*, 780 F.2d 1383 (8th Cir. 1985).

6. Travel on Legislative Business

Travel by a member of Congress to or from a location where the member performs legislative acts is not itself protected by the Speech or Debate Clause. *United States v. McDade*, 28 F.3d 283, 298-99 (3rd Cir. 1994) (No. 93-1487, slip op. at 35-37); *United States v. Biaggi*, 853 F.2d 89, 104 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). "[R]eimbursement of travel expenses is [not] part of the deliberative process of the legislative branch." *In re Norman v. Hynes*, 799 N.Y.S.2d 222 (2005).

C. Administrative Acts are Not Immune

1. Personnel Decisions

a. Congressional Employees

Whether a personnel decision regarding congressional employees is entitled to legislative immunity depends upon the nature of the duties of the employee about whom the decision is made. *Browning v. Clerk, U. S. House of Representatives*, 789 F.2d 923, 928 (D.C. Cir. 1986). If the employee's duties are not directly related to the functioning of the legislative process, such as the duties of the general manager of the House of Representatives restaurant system, the chairman of the subcommittee overseeing the restaurant is not immune from suit for alleged sex discrimination in firing her. *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984). Duties are not directly related to the functioning of the legislative process if they do not involve "work that significantly informs or influences the shaping of our nation's laws," *id*. at 931, such as when the employee does not have "meaningful input into . . . legislative decision making," 733 F.2d at 930 (quoting *Davis v. Passman*, 544 F.2d 865, 880-81 n. 25 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978)

(en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed. 846 (1979)). Duties are also not directly related to the functioning of the legislative process if they are not "peculiar to a Congress member's work qua legislator," or stated differently, "'intimately cognate' . . . to the legislative process." *Walke*r, 733 F.2d at 931 (quoting *Davis v. Passman*, 544 F.2d at 879). *See, also, Hudson v. Burke*, 617 F. Supp. 1501, 1511 (N.D. Ill. 1985) (factual record inadequate to show whether city council finance committee investigators had "the opportunity for meaningful input into the legislative process").

The "deliberative and communicative processes by which the Members participate in committee and House proceedings," *Gravel v. United States*, 408 U.S. 606, 625 (1972), "are only those within Congress itself," *Bastien v. Office of Campbell*, 390 F.3d 1301, 1319 (10th Cir. 2004), so an employee in a senator's district office who informally gathers information for the senator by meeting with his constituents is not performing "legislative acts" and the decision of his office to terminate her employment is not entitled to legislative immunity. *Id.*.

Placing individuals on a congressman's staff as a pretext for paying them out of congressional funds, where their duties did not have even a tangential relationship to the legislative process, does not entitle the member to immunity from prosecution for using public money for private services. *United States v. Rostenkowski*, No. 94-3158, 59 F.3d 1291, 1303 (D.C. Cir. 1995).

b. State and Local Government Employees

Like members of Congress, state legislators are not immune from criminal prosecution for placing on the legislative payroll certain "no show" employees who performed no services of any kind. *People v. Ohrenstein*, 77 N.Y.2d 38, 563 N.Y.S.2d 744, 565 N.E.2d 493 (1990). A state legislator is not immune from criminal prosecution for hiring legislative aides solely to manage political campaigns or for directing legislative aides as they worked on campaigns. *State v. Chvala*, 2004 WI App. 53, 678 N.W.2d 880 (2004).

Immunity for other personnel decisions made by a state or local official is not as broad under federal common law as that afforded to members of Congress under the Speech or Debate Clause. Immunity for local officials under federal common law depends on the nature of the decision rather than on the title of the official making it. *Forrester v. White*, 484 U.S. 219, 224 (1988) (state court judge not immune from suit for firing probation officer since the action was an administrative rather than a judicial function); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 21 (1st Cir. 1992) (city assembly members adopting ordinance to abolish specified civil service positions may not have been legislative act if ordinance was used to fire only employees who supported the opposition party).

A legislative act is one that involves establishment of general policy; an administrative act singles out individuals and affects them differently from others. *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994). Terminating a librarian employed by the legislative library because she was a member of the opposition party after the opposition party lost control of the

legislature was an administrative act and not entitled to legislative immunity from damages under 42 U.S.C. § 1983. *Id.* Laying off employees is an administrative act, even if done after adoption by ordinance of a layoff plan. *Acevedo-Garcia v. Vera-Monroig*, No. 99-1137, 204 F.3d 1 (1st Cir. 2000). Demoting and then discharging a state Senate caucus information officer who refused to do illegal campaign activity on state time was an administrative act. *Chateaubriand v. Gaspard*, No. 95-36086, 97 F.3d 1218 (9th Cir. 1996). Eliminating a position's salary, consolidating it with another position, and refusing to reappoint the incumbent to the new position was an administrative act. *Alexander v. Holden*, No. 94-1810, 66 F.3d 62 (4th Cir. 1995). Voting to replace the white clerk of a county board with an African American clerk was an administrative act. *Smith v. Lomax*, No. 93-8062, 45 F.2d 402 (11th Cir. 1995). A discussion on whether new positions for specific individuals could be funded was an administrative act. *Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991). Terminating a legislative researcher for a District of Columbia council member allegedly because she took time off to observe Jewish holidays was an administrative act. *Gross v. Winter*, 692 F. Supp. 1420 (D.D.C. 1988). Refusing to accept an employee's resignation in order to prevent another person from being rehired to fill the vacancy the resignation would have created was an administrative act. *Harhay v. Blanchette*, 160 F. Supp.2d 306 (D. Conn. 2001), *aff'd sub nom. Harhay v. Town of Ellington Board of Education*, 323 F.3d 206 (2nd Cir. 2003). Refusing to rehire the Democratic clerk of a city council after Republicans gained a majority on the council at the general election was an administrative act. *Visser v. Magnarelli*, 542 F. Supp. 1331 (N.D.N.Y. 1982). Failing to rehire a police chief who had resigned is an administrative act. *Detz v. Hoover*, 539 F. Supp. 532 (E.D. Pa. 1982). Deciding not to hire an applicant for employment as a committee clerk of the Texas House of Representatives because the applicant was suing a member of the committee for defamation was an administrative act. *Associated Press v. Cook*, 17 S.W.3d 447 (Tex. App. 2000). Voting to not pay an annuity to an individual is an administrative act. *Lopez v. Trevino*, 2 S.W.3d 472 (Tex. App. 1999).

A decision by a county board to terminate the superintendent of public works is an administrative act even though made by vote of a legislative body. *Roberson v. Mullins*, 29 F.3d 132 (4th Cir. 1994); *accord, Abraham v. Pekarski*, 728 F.2d 167 (3rd Cir. 1984) (township director of roads and public property). Where a county commission has divided responsibility for administering the county's executive departments among the members of the county commission, personnel decisions by a commissioner regarding a department under the commissioner's control are administrative acts. *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992).

Where the chair of the county board threatened and harassed county employees who supported a candidate for elected county office whom the chair opposed, and after the election the chair ordered their supervisors to fire the employees, the subsequent vote by the county board to eliminate their positions did not cloak the chair with legislative immunity for his actions before the vote that were independent of the vote. *Carver v. Foerster*, No. 96-3008, 102 F.3d 96 (3rd Cir. 1996).

If a decision on how much money to allocate to each member of the state Senate is made by a vote as part of a legislative budget process, it is legislative, but if the same decision is made

unilaterally by the Senate Majority Leader, it is administrative. *Manzi v. DiCarlo*, 982 F. Supp. 125, 128-29 (E.D.N.Y. 1997).

Legislative immunity does not protect a member or employee of a state legislature from a suit in federal court for damages under Title VII of the Civil Rights Act of 1964 (equal employment opportunity) or under the Age Discrimination in Employment Act of 1967. *Bostick v. Rappleyea*, 629 F Supp. 1328, 1332-33 (N.D.N.Y. 1985), *aff'd sub nom. Bostick v. Cochrane*, 907 F.2d 144 (2nd Cir. 1990) (mem.).

For a discussion of personnel decisions that were found to be "legislative," see section II.A.18.

2. Other Administrative Acts by a Local Legislative Body

In order for an act by a local legislative body to be considered "legislative" for purposes of absolute common law legislative immunity, the act must be both "substantively" legislative and "procedurally" legislative. *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286 (3rd Cir. 1989).

a. Substantively Legislative

Some courts have used a two-part test to determine whether an act is "substantively" legislative. The first part focuses on the facts considered by the decision-maker.

> If the underlying facts on which the decision is based are "legislative facts", such as "generalizations concerning a policy or state of affairs", then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative.

Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984).

> The second part focuses on the impact of the decision.
>
> If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others", it is administrative.

Id. Accord, Bryan v. City of Madison, No. 99-60305, 213 F.3d 267 (5th Cir. 2000); *Roberson v. Mullins*, 29 F.3d 132 (4th Cir. 1994); *Brown v. Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918, 921 (5th Cir. 1991); *Crymes v. DeKalb* County, 923 F.2d 1482, 1485 (11th Cir. 1991); *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1290-91 (3rd Cir. 1989); *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988); *Cinevision Corp. v. City of Burbank,*

745 F.2d 560; 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229 (Tex. App. 1995).

Cutting v. Muzzey involved a decision by a town planning board to condition approval of a subdivision plat on completion of a particular road, which the court found to be an administrative action. Other cases have found similar actions by a local legislative body, even though taken by a vote of the legislative body, to be administrative in nature. *See, e.g., Acierno v.* Cloutier, No. 93-7456, 40 F.3d 597 (3rd Cir. 1994) (vote to void approved record development plan and related subdivision plans for one parcel); *Trevino ex rel. Cruz v. Gates*, 23 F.3d 1480, 1480-82 (9th Cir. 1994), *cert. denied sub nom. Wachs v. Trevino*, 513 U.S. 932 (1994) (vote to pay punitive damage award); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918 (5th Cir. 1991) (refusal to pay attorney's fees incurred by county employee); *Crymes v. DeKalb* County, 923 F.2d 1482, 1485 (11th Cir. 1991) (decision to uphold denial of development permit); *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, Va.*, 865 F.2d 77 (4th Cir. 1989) (failure to provide sewer service after being ordered by court to do so); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988) (decision to deny building permit); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied* 471 U.S. 1054 (1985) (vote to deny rock groups access to city amphitheater); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (withholding a builder's permit); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982) (vote to institute action to abate a private business); *Franklin Building Corp. v. City of Ocean City*, 946 F. Supp. 1161 (D. N.J. 1996); *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.*, 917 F. Supp. 91 (D.N.H. 1996) (enforcement of local zoning ordinance); *Stone's Auto Mart, Inc. v. City of St. Paul, Minn.*, 721 F. Supp. 206 (D. Minn. 1989) (actions of a city planning commission imposing certain conditions upon the development of a particular subdivision); *Fralin & Waldron, Inc. v. Henrico County, Va.*, 474 F. Supp. 1315 (E.D. Va. 1979) (refusal to approve a plan of development or attempts to hinder construction of a project); *Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229 (Tex. App. 1995) (vote to deny development permit).

b. Procedurally Legislative

Even if an act is substantively legislative, it will not be entitled to absolute legislative immunity if it has not been taken in accordance with established legislative procedures to insure that it is "a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve." *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1291 (3rd Cir. 1989). Where the members of the county board administered the county jail "in an informal manner" where decisions were not always made by passage of a resolution or ordinance, they were not entitled to absolute legislative immunity from a claim that the jail's poor administration had contributed to an inmate becoming a quadriplegic. *Id.* A mere technical violation of a statutory procedure is not sufficient to convert an otherwise legislative action into an administrative one. *Acierno v. Cloutier*, 40 F.3d 597, 614-15 (3rd Cir. 1994) (No. 93-7456).

D. Executive Branch Activities are Not Immune

1. Sitting on an Audit Commission

While the Minnesota Supreme Court has never been called upon to construe the Speech or Debate Clause in the Minnesota Constitution, Judge Otis H. Godfrey, Jr., of Ramsey County District Court has ruled that legislative immunity "does not extend to such duties as sitting as members of an audit commission." *Layton v. Legislative Audit Comm'n*, No. 429436 (2nd Dist. Ramsey County, Aug. 29, 1978) (unpublished order). This decision was appealed to the Minnesota Supreme Court, but the issue was made moot when the Audit Commission released the working papers to the public.

2. Sitting on an Executive Branch Committee

Legislative immunity does not extend to sitting as a member of a committee in the executive branch, either for legislators, *Small v. Hunt*, 152 F.R.D. 513 (D.S.C. 1994); or for legislative staff. *Florida Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dept. of Health and Rehabilitative Services*, 164 F.R.D. 257 (N.D. Fla. 1995).

IV. Some Offers of Proof About Legislative Activity are Not Prohibited

A. Proof of Status as a Member is Not Prohibited

Proof that the defendant was a member of Congress and thus covered by a statute prohibiting acceptance of a bribe by a public official is not barred by the Speech or Debate Clause. *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Helstoski*, 576 F.2d 511 (3rd Cir. 1978), *aff'd*, 442 U.S. 477 (1979). Likewise, proof that the defendant was a member of a congressional committee or the holder of a committee leadership position is not barred. *United States v. McDade*, 28 F.3d 283, 289-94 (3rd Cir. 1994) (No. 93-1487, slip op. at 10-23).

B. Proof of Legislative Acts Offered by Defendant in Criminal Action is Not "Questioning"

The Speech or Debate Clause protects a member from being questioned about legislative acts. A member who chooses to offer evidence of legislative acts in defense of a criminal prosecution is not being "questioned," even though he thereby subjects himself to cross-examination. *United States v. Kolter*, 71 F.3d 425, 430-31 (D.C. Cir. 1995); *United States v. Rostenkowski*, No. 94-3158, 59 F.3d 1291, 1302-04 (D.C. Cir. 1995); *United States v. McDade*, 28 F.3d 283, 294-95 (3rd Cir. 1994) (No. 93-1487, slip op. at 23-25).

V. A Legislator and Aide Are "Treated as One" for Purposes of Legislative Immunity

A. Legislative Acts of an Aide Are Immune

Legislative immunity extends to an aide working on behalf of a legislator to prepare for a committee meeting. *Gravel v. United States*, 408 U.S. 606 (1972); or conducting an investigation on behalf of the member, *State v. Beno*, 341 N.W.2d 668 (Wis. 1984). In *Grave*l, Senator Mike Gravel of Alaska had read extensively aloud from the hitherto secret Pentagon Papers at a meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, held on the night of June 29, 1971. Senator Gravel was the chairman and had called the meeting himself. A federal grand jury investigating possible criminal conduct with respect to release and publication of the Papers subpoenaed an assistant to Senator Gravel who had helped him prepare for the meeting. Senator Gravel intervened and moved to quash the subpoenas on the ground that requiring the assistant to testify would violate the Senator's immunity under the Speech or Debate Clause. The Government contended that the meeting was "special, unauthorized, and untimely," and that the courts had power to limit the immunity to meetings that were related to a legitimate legislative purpose. The District Court rejected the contention:

> Senator Gravel has suggested that the availability of funds for the construction and improvement of buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations. *United States v. Doe*, 332 F. Supp., 930, 935 (D. Mass. 1972).

Quoted in 408 U.S. at 610, n. 6. The Supreme Court upheld the District Court's decision and prohibited the grand jury from inquiring further into the conduct of the Senator or his aides at the subcommittee meeting and in preparation for it.

In discussing the legislative immunity of the Senator's aide, the Court found that "for the purpose of construing the privilege a Member and his aide are to be 'treated as one' . . . . [T]he 'Speech or Debate Clause prohibits inquiry into things done . . . as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.'" 408 U.S. at 616; *Jones v. Palmer Media, Inc*., 478 F. Supp. 1124 (E.D. Tex. 1979).

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; . . . if they are not so recognized, the central role of the Speech or

> Debate Clause - to prevent intimidation of legislators by the Executive and accountability before a hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966) - will inevitably be diminished and frustrated.

408 U.S. at 617.

The protection afforded a legislator and a member of his or her personal staff is also accorded to the principal employee of a committee when working on committee business. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Romero-Barcelo v. Hernandez-Agosto*, No. 95-1235, 75 F.3d 23, 31-32 (1st Cir. 1996); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980); *Marra v. O'Leary*, 652 A.2d 974 (R.I. 1995) (claims committee legal counsel and committee clerk).

In *Eastland*, the U.S. Senate Subcommittee on Internal Security, pursuant to its authority under a Senate resolution to make a complete study of the administration, operation, and enforcement of the Internal Security Act of 1950, began an inquiry into the various activities of the U.S. Servicemen's Fund to determine whether they were potentially harmful to the morale of the U.S. armed forces. In connection with the inquiry, it issued a subpoena *duces tecum* to the bank where the organization had an account ordering the bank to produce all records involving the account. The organization and two of its members then brought an action against the chairman, senator members, chief counsel of the subcommittee, and the bank to enjoin implementation of the subpoena on First Amendment grounds. The Supreme Court held that the activities of the Senate Subcommittee, the individual senators, and the chief counsel fell within the "legitimate legislative sphere" and, once this appeared, were protected by the absolute prohibition of the Speech or Debate Clause of the Constitution against being "questioned in any other Place" and hence were immune from judicial interference. The Court drew no distinction between the members and the chief counsel, saying that "Since the Members are immune because the issuance of the subpoena is 'essential to legislating' their aides share that immunity." 421 U.S. at 504. *Cf. Peroff v. Manuel*, 421 F. Supp. 570 (D.D.C. 1976), where a subcommittee investigator was held immune from liability for damages due to emotional distress and other harm he allegedly caused to a witness in the process of preparing him for a subcommittee hearing.

This same protection is also afforded to committee staff in general. *Doe v. McMillan*, 412 U.S. 306 (1973). *Doe v. McMillan* was a civil suit involving publication and distribution of materials in a committee report that were damaging to private individuals. The individuals brought suit against the committee members, the committee employees, a committee investigator, and a consultant, among others, for their actions in introducing materials at committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report. All were granted legislative immunity for their actions.

Protection is also afforded to the Sergeant at Arms and other employees and agents who adopt and enforce rules on behalf of either or both Houses, *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975); to the official reporters who

prepare the Senate and House versions of the Congressional Record, *Gregg v. Barrett*, 594 F. Supp. 108, 112 n. 4 (D.D.C. 1984); and to a legislative corrections ombudsman who investigates actions of the department of corrections on behalf of the legislature and publishes an allegedly defamatory report. *Prelesnik v. Esquina*, 347 N.W.2d 226 (Mich. App. 1984).

An independent contractor retained by a redistricting commission is entitled to the same protection as members of the commission when performing tasks on their behalf. *Arizona Independent Redistricting Comm'n v. Fields*, 206 Ariz. 130, 75 P.3d 1088 (2003).

Congressional staff who *supervise* employees whose duties are directly related to the functioning of the legislative process, such as an official reporter of committee and subcommittee hearings, are immune from suit for alleged racial discrimination in firing. *Browning v. Clerk, U. S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986). *But cf. State v. Haley*, 687 P.2d 305 (Alaska 1984). In *Haley*, the Executive Director of the Legislative Affairs Agency and the Director of its Research Division were sued for damages and reinstatement under 42 U.S.C. § 1983 for discharging a researcher in violation of her right to free speech. These two defendants failed to assert legislative immunity but successfully asserted a qualified official immunity for their actions. The Legislative Affairs Agency and Legislative Council, on the other hand, were required to reinstate the researcher and pay her back pay and benefits, interest, costs, and attorney's fees. The court held that the act of firing the researcher, even though done by a vote of the Legislative Council, was "an administrative rather than a legislative act, and that it was therefore not within the scope of legislative immunity." 687 P.2d at 319.

Executive branch officials who participate in the legislative process by preparing budget proposals for consideration by a legislative body are entitled to legislative immunity for their actions. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Abbey v. Rowland*, 359 F. Supp.2d 94 (D. Conn. 2005); *Rini v. Zwirn*, 886 F. Supp. 270, 284 (E.D.N.Y. 1995); *Campaign for Fiscal Equity v. State*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd* 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999).

B. "Political" Acts of an Aide Are Not Immune

Just as when a member himself engages in "political" acts, the courts have also held the conduct of legislative staff subject to judicial scrutiny when it has gone beyond what is "essential to the deliberations" of a legislative body, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gravel v. United States*, 408 U.S. 606, 625 (1972); *United States v. Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1979); or "beyond the reasonable requirements of the legislative function," *Doe v. McMillan*, 412 U.S. at 315-16, such as when arranging for a republication, *Hutchinson v. Proxmire, supra*; *Gravel, supra*; *Doe v. McMillan, supra*; *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970); or contacting an executive agency to arrange for the release of grant funds, *Eilberg, supra*; or conducting prayers before the opening of a legislative session. *Kurtz v. Baker*, 630 F. Supp. 850 (D.D.C. 1986).

Activities of an aide employed by a congressman to investigate matters not related to any pending congressional inquiry or legislation are not entitled to legislative immunity. *Steiger v. Superior Court*,112 Ariz. 1, 536 P.2d 689 (1975).

Congressional staff who s*upervise* employees whose duties are *not* directly related to the functioning of the legislative process, such as the general manager of the House of Representatives restaurant system, are not immune from suit for alleged sex discrimination in firing. *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984).

C. Unconstitutional or Illegal Conduct of an Aide is Not Immune

Although legislators are immune from liability or questioning even when their legislative acts go beyond the constitutional authority of the legislative body, their aides do not share the same absolute immunity for their conduct in executing invalid orders or policies of the legislature.

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.

Powell v. McCormack, 395 U.S. 486, 505 (1969).

When a legislative act is alleged to be unconstitutional, the proper subject of judicial power is not a legislative body or its members, but rather those officials who are charged with executing the legislative act. *Powell v. McCormack*, 395 U.S. 486 (1969) (dismissal of action for declaratory judgment and injunctive relief against the Speaker of the House and four other members individually and as representatives of all House members for voting to exclude Adam Clayton Powell from membership and refusing to administer to him the oath of office was affirmed, while dismissal of same action against the Chief Clerk of the House for refusing services to excluded member, Sergeant at Arms for refusing to pay salary to excluded member, and Doorkeeper for refusing to admit excluded member was reversed and remanded for further proceedings); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (Sergeant at Arms liable for damages for arresting a person found in contempt of the House); *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973) (action against President and President pro tem of South Carolina Senate, members of the Senate, and Clerk of the Senate for declaratory judgment that denying a female law student employment as a page solely on the ground of gender was unconstitutional and for an injunction against continuing that denial, dismissed as to senators on the basis of legislative immunity; injunction granted as to Clerk of the Senate); *Sweeney v. Tucker*, 473 Pa. 493, 503-07, 375 A.2d 698, 703-04 (1977) (action by expelled member of Pennsylvania House of Representatives against House Comptroller for back pay not barred by state Speech or Debate Clause).

Likewise, where a legislative staff person is accused of participation in a crime, the protection of the Speech or Debate Clause is not absolute. *Gravel v. United States*, 408 U.S. 606, 622 (1972);

Dombrowski v. Eastland, 387 U.S. 82 (1967); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976); *Benford v. American Broadcasting Companies*, 502 F. Supp. 1148 (D. Md. 1980). In *Dombrowski*, the chairman and the chief counsel of the Senate Internal Security Subcommittee were both accused of conspiring with Louisiana officials to seize petitioners' property and records in violation of the Fourth Amendment. The chief counsel was required to go to trial on the factual question of whether he participated in the conspiracy, even though the case against the chairman of the committee was dismissed on the basis of legislative immunity. The Court found that legislative staff was not entitled to the same absolute protection afforded members where criminal activity was alleged.

VI. Uses of Legislative Immunity

A. From Ultimate Relief

1. Criminal Prosecution

Legislative immunity may be invoked to shield a legislator from criminal prosecution for his legislative acts. *United States v. Helstoski*, 442 U.S. 477 (1979); *United States v. Johnson*, 383 U.S. 169 (1966); *Government of Virgin Islands v. Lee*, 775 F.2d 514 (3rd Cir. 1985); *State v. Neufeld*, 260 Kan. 930, 926 P.2d 1325 (1996); *State v. Dankworth*, 672 P.2d 148 (Alaska App. 1983); *Blondes v. State*, 16 Md.App. 165, 294 A.2d 661 (1972).

Legislative immunity does not apply, however, to shield the legislative acts of a *state* legislator from criminal prosecution in a *federal* court. *United States v. Gillock*, 445 U.S. 360 (1980); *United States v. Gonzalez de Modesti*, 145 F.Supp.2d 171 (D. Puerto Rico 2001). The federal Speech or Debate Clause does not apply to state legislators, and a state Speech or Debate Clause does not limit the federal government. The court in *Gillock* found that common law principles protecting the independence of legislators from their executive and judicial co-equals did not require state legislators to be free from prosecutions by federal officials.

The courts will not assume that Congress intended to abrogate the common law legislative immunity of a state legislator unless Congress has made a clear statement to that effect. In passing RICO, Congress did not express that clear intent, so legislative immunity is available to a state legislator as a defense to a prosecution under RICO. *Chappell v. Robbins*, No. 93-17063, 73 F.3d 918, 922-25 (9th Cir. 1996).

2. Liability for Damages

Legislative immunity may also be invoked to shield a legislator from liability for damages for his or her legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Doe v. McMillan*, 412 U.S. 306 (1975); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Single Moms, Inc. v. Montana Power Co.*, No. 02-35361, 331 F.3d 743 (9th Cir. 2003) (action for money damages against state legislators who voted for bill to deregulate Montana energy

markets); *Larsen v. Senate of the Commonwealth of Pennsylvania*, No. 97-7153, 152 F.3d 240 (3rd Cir. 1998); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992); *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986); *Schultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985); *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984); *cert. denied*, 469 U.S. 1037 (1984); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980); *Ray v. Proxmire*, 581 F.2d 998 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 933 (1978); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976); *Lasa v. Colberg*, 622 F. Supp. 557 (D. Puerto Rico 1985); *Searingtown Corp. v. Incorporated Village of North Hills*, 575 F. Supp. 1295 (E.D. N.Y. 1981); *Rusack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978); *Smith v. Eagleton*, 455 F. Supp. 403 (W.D. Mo. 1978); *Kniskern v Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (2001) (action for money damages against state legislators who voted for tort reform bill that was later held to be unconstitutional).

3. Declaratory Judgments

Legislative immunity protects legislators from declaratory judgments. *Powell v. McCormack*, 395 U.S. 486 (1969); *Larsen v. Senate of the Commonwealth of Pennsylvania*, No. 97-7153, 152 F.3d 240 (3rd Cir. 1998); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975) (action for declaratory judgment that rules of Senate and House of Representatives excluding certain correspondents from the press galleries were unconstitutional dismissed on basis of legislative immunity and non-justiciability of subject matter); *Consumers Education & Protective Ass'n v. Nolan*, 368 A.2d 675 (Pa. 1977); *Wiggins v. Stuart*, 671 S.W.2d 262 (Ky. App. 1984) (action for declaratory judgment that various bills passed by the legislature relating to compensation and pensions for legislators were unconstitutional).

Powell v. McCormack was an action against the Speaker of the House and four other members individually and as representatives of all House members for a declaratory judgment that the vote whereby congressman Adam Clayton Powell was excluded from membership in the House was null and void and to enjoin the Speaker from refusing to administer to him the oath of office. The action also sought to enjoin the Chief Clerk of the House from refusing services to the excluded member, the Sergeant at Arms from refusing to pay a salary to the excluded member, and the Doorkeeper from refusing to admit the excluded member. The action was dismissed as to the Speaker and members of the House on the basis of legislative immunity.

Larsen v. Senate of the Commonwealth of Pennsylvania was an action by a judge of the state supreme court against numerous state officials who had participated in various disciplinary proceedings against him, including 49 members of the Pennsylvania Senate who had voted on articles of impeachment presented by the House of Representatives. In addition to money damages against the senators, the judge sought declaratory and injunctive relief voiding the Senate verdict of guilty on Article II. The trial court dismissed the claim against the senators for money damages but not the claim for declaratory and injunctive relief. The Court of Appeals held that impeachment proceedings were a legislative activity and remanded with instructions to dismiss all the claims against the senators.

Consumers Education and Protective Ass'n v. Nolan was an action against the chairman of a committee of the Pennsylvania Senate for a declaratory judgment that the vote whereby the committee recommended confirmation of an appointment by the Governor was void as in violation of the "sunshine" law because of inadequate public notice of the meeting, to declare the senate vote on the confirmation likewise void, to enjoin the chairman from submitting any other name to the Senate for confirmation, and to enjoin the chairman to take minutes of all meetings of his committee. The action was dismissed on the basis of legislative immunity.

Legislative immunity also protects legislative staff from declaratory judgments. *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975).

In one case, however, the Supreme Court of Oklahoma refused to dismiss a declaratory judgment action brought against the President Pro Tempore of the Senate and the Speaker of the House of Representatives to have a law declared unconstitutional, finding that the suit was really against the state itself and that the legislators were only nominal defendants. *Ethics Comm'n of the State of Oklahoma v. Cullison*, 850 P.2d 1069 (Okl. 1993).

Where legislators have been named as defendants but legislative immunity has not been asserted as a defense, courts have issued declaratory judgments invalidating legislative actions. *Rose v. Council for Better Education, Inc.,* 790 S.W.2d 186 (Ky. 1989) (current common school system did not satisfy constitutional requirement that General Assembly provide efficient system of common schools throughout state); *Williams v. State Legislature of Idaho*, 111 Idaho 156, 722 P.2d 465 (1986) (failure of the Legislature to appropriate money to the State Auditor to conduct post-audit functions was "impermissible"); *State ex rel. Judge v. Legislative Finance Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975) (law granting Legislative Finance Committee power to amend enacted budget was unconstitutional); *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 448 P.2d 799 (1968) (law removing duties implicit in office of state auditor was unconstitutional). In similar circumstances, courts have upheld legislative actions, again without mentioning legislative immunity under the Speech or Debate Clause. *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995) (General Assembly's amendments to statute governing state retirement system were constitutional); *Philpot v. Haviland*, 880 S.W.2d 550 (Ky. 1994) (senate rule on withdrawing bills from committee was constitutional); *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992) (suit challenging senate rule as unconstitutional was moot where rule expired at end of session).

4. Injunctions

Legislative immunity also insulates legislative conduct from judicial interference by means of an injunction. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Powell v. McCormack*, 395 U.S. 486 (1969); *Newdow v. U.S. Congress*, No. 00-16423, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds sub nom. Elk Grove Unified School Dist. v. Newdow*, No. 02-1624, ___ U.S. ____ (June 14, 2004) (district court may not direct Congress to delete the words "under God" from pledge of allegiance); *Larsen v. Senate of the Commonwealth of Pennsylvania*, No. 97-7153, 152 F.3d 240 (3rd Cir. 1998); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir.

1983); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980); *Lasa v. Colberg*, 622 F. Supp. 557 (D. Puerto Rico 1985); *Acosta v. Agosto*, 590 F. Supp. 144 (D. Puerto Rico 1984); *Gregg v. Barrett*, 594 F. Supp. 108 (D.D.C. 1984); *Stamler v. Willis*, 281 F. Supp. 734 (N.D. Ill. 1968), *appeal dismissed*, 393 U.S. 217 (1968), *vacated on other grounds*, 393 U.S. 407 (1969); *Lincoln Party v. General Assembly*, 682 A.2d 1326 (Pa. Commw. Ct. 1996); *Harristown Development Corp. v. Commonwealth*, 135 Pa. Commw. Ct. 177, 580 A.2d 1174 (1990)*; Consumers Educational Protective Ass'n v. Nolan*, 368 A.2d 675 (Pa. 1977).

In *Eastland*, an action to enjoin a Senate subcommittee from implementation of a subpoena *duces tecum* was dismissed on the basis of legislative immunity. In *Stamler*, an action to enjoin the House Un-American Activities Committee from conducting a hearing and from enforcing its subpoenas was dismissed on the basis of legislative immunity.

However, if the members of a subcommittee are not named as defendants in an action to enjoin implementation of a subcommittee subpoena *duces tecum* directed against a private corporation, and the executive branch moves to quash the subpoena on the basis of a claim of executive privilege to protect national security, as with a subpoena of telephone records of warrantless wiretaps, the court may be willing to balance a claim of legislative immunity against a claim of executive privilege. *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121 (D.C. Cir. 1977).

Legislative immunity from injunctive relief applies at common law to protect state legislators from a federal injunction under 42 U.S.C. § 1983. *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2nd Cir. 1980). There a motion for a preliminary injunction to restrain the members of a New York state legislative committee from enforcing subpoenas *duces tecum* served upon printers, publishers, and distributors of sexually-oriented material as part of a legislative investigation of child pornography was denied.

5. Writs of Quo Warranto and Mandamus

Legislative immunity protects a Senate and House of Representatives, as well as their members, from writs of quo warranto and mandamus seeking to determine the constitutionality of a law, *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984) (law authorizing legislature to adopt, modify, or revoke administrative rules by concurrent resolutions passed by the legislature without presentment to the governor); or seeking to order Congress to carry out its obligations under a treaty, *Orta Rivera v. Congress of the United States of America*, 338 F. Supp.2d 272 (D. Puerto Rico 2004).

Where a state constitution does not include a Speech or Debate Clause, *see* NEV. CONST. art. 4, § 11, and common law legislative immunity is not asserted, a writ of mandamus may issue directing the Legislature to enact a tax increase to fund education, *Guinn v. Legislature*, 71 P.3d 1269, 1276 (Nev. 2003), while individual legislators are dismissed from the suit on the basis of the separation of powers, 76 P.3d 22, 30 (Nev. 2003).

6. Claims for Repayment

Legislative immunity protects state legislators from having to defend a claim for repayment of amounts paid to them under a law increasing legislative expense allowances when the law is challenged as unconstitutional. *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (Pa. 1986).

7. Cancellation of Enrollment in Political Party

Legislative acts, such as voting, participating in caucus activities, and choosing a seat in the Senate Chamber, may not be used as evidence of party affiliation that is used to cancel a member's enrollment in a political party. *Rivera v. Espada*, 98 N.Y.2d 422, 777 N.E.2d 235, 748 N.Y.S.2d 343 (2002).

B. From Having to Testify or Produce Documents

1. In Criminal Actions

The Speech or Debate Clause protects a legislator from having to respond to a subpoena, even one issued by a grand jury investigating possible criminal conduct, insofar as the subpoena would require him or her to testify concerning legislative activities.

> [T]he Speech or Debate Clause at the very least protects [a Senator] from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible.
>
> . . . We have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution - for the events that occurred at the subcommittee meeting.

Gravel v. United States, 408 U.S. 606, 615-16 (1972).

The immunity of a legislator from having to respond to a subpoena relating to conduct "within the sphere of legitimate legislative activity" is shared by the legislator's aides.

> [F]or the purpose of construing the privilege a Member and his aide are to be 'treated as one,' *United States v. Doe*, 455 F.2d, at 761 . . . [T]he 'Speech or Debate Clause prohibits inquiry into things done by [a Senator's aide] as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.' *United States v. Doe*, 332 F. Supp. at 937-938.

Quoted in Gravel, 408 U.S. at 616.

Nor will the courts attempt to enforce a subpoena *duces tecum* served on the chief counsel of a House subcommittee on behalf of a defendant in a criminal trial when the subpoena is directed to the official record of testimony received by the subcommittee in executive session. *United States v. Ehrlichman*, 389 F. Supp. 95 (D.D.C. 1974).

Legislative immunity under the Speech or Debate Clause is both a use immunity to protect a legislator from liability and a testimonial immunity to protect a legislator from harassment, but it does not protect legislative documents from subpoena by a grand jury when they are not in the possession of a legislator or the legislator's personal or committee staff.

> [T]o the extent that the Speech or Debate Clause creates a testimonial privilege as well as use immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy . . . . As we have said on two other occasions, the privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure.
>
> *In re Grand Jury Investigation*, 587 F.2d 589 (3rd Cir. 1978).

In this case, the court held that records of telephone calls, both official and unofficial, to and from Representative Eilberg and in the possession of the Chief Clerk of the U.S. House of Representatives, rather than in the possession of Rep. Eilberg or his aide, were subject to subpoena by a grand jury, but that calls identified by Representative Eilberg as relating to official business could not be presented to the grand jury.

In a Wisconsin case, the court held that a subpoena *duces tecum* issued by a magistrate judge at the request of the Dane County District Attorney and served on the Legislative Technology Services Bureau to produce all the backup tapes made on December 15, 2001, for all of the electronically stored communications of the Wisconsin Legislature was overly broad and therefore unreasonable. *In re John Doe Proceeding*, No. 02-3063W, 2004 WI 65, 272 Wis.2d 208, 680 N.W.2d 792 (June 9, 2004), *modified* 2004 WI 149 (Dec. 15, 2004). The court said the record before it was insufficient for it to determine how the Speech or Debate Clause of the Wisconsin Constitution, art. IV, § 16, related to the data sought by the subpoena *duces tecum*, but that even when it did apply, it provided "only use immunity and not secrecy for communications of government officials and employees." *Id.* at 35.

Even where the records of a congressman were subpoenaed by a grand jury from his administrative assistant, the congressman's motion to quash the subpoena was denied, but he was granted the right to assert legislative immunity as to specific documents *in camera* and his request for a protective order prohibiting testimony by his administrative assistant relating to the

congressman's legislative activities was upheld. *In re Possible Violations,* 491 F. Supp. 211 (D.D.C. 1980).

Legislative immunity under federal common law does not protect state legislators and staff from having to testify and produce records regarding legislative actions in a federal criminal proceeding. *In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987). A federal grand jury investigating alleged improprieties in procurement of granite for expansion of the Pennsylvania state capitol issued a subpoena *duces tecum* to members of a state legislative committee that had already been investigating the same allegations. The federal district court quashed the subpoena as to all documents conveying impressions and thought processes of committee members, but enforced it as to information regarding identity of witnesses interviewed by the committee and as to documents or exhibits authored by a witness or third party that could not be obtained by any other means. *In re Grand Jury Subpoena*, 626 F. Supp. 1319 (M.D. Pa. 1986). The court noted that the committee members had voluntarily supplied the grand jury with substantial information from their own investigation and that "much of the information sought is readily available from other sources." 626 F. Supp. at 1329 n. 9. The Court of Appeals reversed, holding that Speech or Debate Clause immunity does not protect state legislators from having to produce documents for a federal grand jury. 821 F.2d 946. Their proper remedy to protect from an unreasonable or oppressive subpoena is a motion under Rule 17 of the Federal Rules of Criminal Procedure. 821 F.2d at 957.

Federal common law legislative immunity does not shield a state senator and chief clerk of the state Senate from producing legislative payroll and tax evidence before a federal grand jury that is investigating allegations of mail fraud, racketeering, and tax evasion, although records of legislative actions would be protected. *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3rd Cir. 1977).

Legislative immunity under Minnesota's Speech or Debate Clause has been used to protect legislators and legislative staff from having to testify about legislative intent in enacting a tax law when subpoenaed by the defendant in his criminal trial for tax evasion. *State v. Granse*, No. 4133153 (2nd Dist. Ramsey County, Sep. 3, 1987) (Gearin, J.) (unpublished order) (subpoenas quashed as to senator, Senate Counsel, and electronic technician).

2. In Civil Actions

a. Legislators

(1) Members of Congress

The Speech or Debate Clause gives legislators protection "not only from the consequences of litigation's results but also from the burden of defending themselves" when they are made a party to a civil action. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

> [A] private civil action . . . creates a distraction and forces Members to direct their time, energy, and attention from their legislative tasks to defend the litigation . . . . Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.

Id.

Legislative immunity under the United States Speech or Debate Clause protects a member of Congress from having to testify in a civil action in which the member is not a party concerning the member's "legislative acts." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (congressman served with subpoena *duces tecum* for deposition regarding source of article he inserted in Congressional Record); *Shape of Things to Come, Inc. v. Kane County*, 588 F. Supp. 1192 (N.D. Ill. 1984) (congressman served with subpoena *duces tecum* for all documents in his files relating to a housing project); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246 (D.D.C. 1981). This is true whether the testimony relates to information that was subsequently published, as in *Transamerican Press, Inc.*, or to information that was never published, as in *Peoples Temple*.

The *Peoples Temple* case was a civil action by the United States government to collect costs accrued in searching for the living and transporting the dead in the Jonestown tragedy. Defendants served subpoenas *duces tecum* to attend a deposition on the Chairman of the House Committee on Foreign Affairs and the committee clerk seeking unpublished information gathered by the committee in its investigation of the Jonestown tragedy. The motion of the chairman and the clerk to quash the subpoenas was granted. The court held that the investigation of a congressman's assassination in Jonestown, the publication of the report, and the discretionary inclusion or omission of information was within the sphere of legitimate legislative activity protected by the Speech or Debate Clause and was absolutely immune from questioning.

> Otherwise, Members of Congress conducting investigations would be forced to consider at every turn whether evidence received pursuant to the investigation would subsequently have to be produced in court. This would "imperil" the legislative independence protected by the Clause. Moreover, producing documents and testifying at a deposition would certainly disrupt the functioning of a Member of Congress.

515 F. Supp. at 249.

The United States Speech or Debate Clause protects a member of Congress from having to produce documents for inspection and copying in response to a subpoena in a private civil action brought by a third party, even if the degree of disruption to the legislative process is minimal; "*any* probing of legislative acts is sufficient to trigger the immunity." *Brown & Williamson Tobacco Corp. v. Williams*, No. 94-5171, 62 F.3d 408, 419 (D.C. Cir. 1995).

Confidential reports prepared by the investigative staff of a House subcommittee are not subject to compulsory disclosure. *Pentagen Technologies Int'l, Ltd. v. Committee on Appropriations of the U.S. House of Representatives*, 20 F. Supp.2d 41 (D.D.C. 1998).

Legislative immunity under the United States Speech or Debate Clause does not shield congressional documents from disclosure under the Freedom of Information Act when the documents have been left in the custody of the Central Intelligence Agency and Congress has not, by resolution, asserted that the documents should not be disclosed. *Holy Spirit Ass'n for Unification of World Christianity v. Central Intelligence Agency*, 558 F. Supp. 41 (D.D.C. 1983). Nor does it bar inquiry into the identity of a congressman's aides. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983).

(2) State Legislators

Legislative immunity at federal common law protects a state legislator from having to testify in a civil action in federal court in which the legislator is not a party about the legislator's motives for supporting the passage of a bill. *Greenberg v. Collier*, 482 F. Supp. 200 (E.D. Va. 1979). Where plaintiffs challenged the constitutionality of a law and subpoenaed for deposition the chairman of the subcommittee of the Virginia General Assembly that had recommended the bill to pass, the chairman's motion to quash the subpoena was denied but a protective order prohibiting inquiry into "any legislative activity or his motives for same" was granted on the basis of federal common law legislative immunity. *Id.*

In an action against a state legislator in state court alleging a violation of federal law, such as 42 U.S.C. § 1983, a court will apply federal common law, rather than a state's own Speech or Debate Clause, in determining the scope of legislative immunity. *Uniontown Newspapers, Inc. v. Roberts*, 777 A.2d 1225, 1232-34 (Pa. Commw. Ct. 2001). Common law legislative immunity protects a legislator from having to disclose records of telephone calls on legislative business. *Id.*

The Speech or Debate Clause of the Pennsylvania constitution prevents a court from ordering a state legislator to disclose records of his use of the House Minority Caucus Special Leadership Account. *DeWeese v. Calkins Media, Inc.*, 2005 WL 1362131, 70 Pa. D. & C.4th 382 (Pa. Comm. Pl. 2005).

The Speech or Debate Clause of the New York constitution prevents the introduction of testimony by a legislator about the motives and deliberations of nontestifying legislators regarding the funding of New York City schools. *Campaign for Fiscal Equity, Inc. v. State*, 271 A.D.2d 379, 707 N.Y.S.2d 94 (2000).

The Speech or Debate Clause of the Rhode Island constitution protects state legislators from having to testify in an action challenging the constitutionality of a legislative redistricting plan concerning their actions and motivations in developing the plan. *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984).

A Pennsylvania legislator may not be deposed in a defamation action about private conversations concerning various candidates to fill a judicial vacancy. *Melvin v. Doe*, 2000 WL 33252882, 48 Pa. D. & C.4th 566 (Pa.Com.Pl. 2000). This is because, even if the questioning were not barred by the Speech or Debate Clause of the Pennsylvania Constitution, it would violate a citizen's right to petition the government in confidence. *Id*. at 574–76.

The Speech or Debate Clause of the Ohio Constitution protects legislators from being questioned about their private, off-the-record meetings with corporate representatives concerning legislation, but it does not protect them from having to divulge the identity of those corporate representatives or protect the corporate representatives from being deposed about the meetings. *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (2000).

The Speech or Debate Clause of the Louisiana constitution protects legislative staff from having to produce bill drafting files related to specific legislation authored by a member. *Copsey v. Baer*, 593 So.2d 685 (La. App. 1 Cir. 1991).

Legislative immunity from having to testify in a civil action in which the legislator was not a party has been recognized by the Minnesota Court of Appeals. *McGaa v. Glumack*, No. C9-87-2398 (Minn. App., Dec. 31, 1987) (unpublished order). *McGaa* was a defamation action brought against the former chair of the Metropolitan Airports Commission. The plaintiff alleged that defamatory statements about him had been included in a document given to a legislative committee. Plaintiff sought to question Senator Donald M. Moe, who chaired the committee, and his aide, Michael Norton, about whether they had received the document and, if so, when and where. He also sought to question them about whether they knew of anyone else who had received the document and, if so, when and where. The senator and his aide moved to quash the subpoenas served on them. The trial court refused to grant the senator and his aide absolute immunity and instead weighed the benefit to the plaintiff in being able to ask the questions against the imposition on the deponents in having to answer them. The trial court ordered the senator and his aide to answer just four questions about their receipt of the document. The Court of Appeals, in a decision for a three-judge panel written by Chief Judge D.D. Wozniak, issued a writ of prohibition reversing the trial court's order on the ground that it required the production of information that was clearly non-discoverable. The Court cited both *Eastland v. United States Servicemen's Fund* and *Doe v. McMillan* for the proposition that, "within the sphere of legitimate legislative activity," the protection of the Speech or Debate Clause is absolute.

Legislative immunity for a member from having to testify in a civil action in which a legislator was not a party has likewise been recognized in Minnesota at the district court level.

Judge Edward S. Wilson of Ramsey County District Court upheld a claim of legislative immunity made by former senator Donald M. Moe, his former committee administrator Michael Norton, and former Senate Counsel Allison Wolf when C. Michael McLaren, former Executive Director of the Public Employees Retirement Association ("PERA"), sought to question them about information they had gathered as part of a senate committee's investigation of PERA. Judge Wilson

issued a protective order prohibiting McLaren from questioning them "about anything said, done, received, or learned by either of them within the sphere of legitimate legislative activity, particularly the 1984 investigation of the management of the Public Employees Retirement Association." *State ex rel. Humphrey v. McLaren*, No. C5-85-475478 (2nd Dist. Ramsey County, Nov. 23, 1992) (unpublished order).

Judge Lawrence L. Lenertz of the First Judicial District upheld a claim of legislative immunity made by Senator Clarence M. Purfeerst and Representative Robert E. Vanasek in the case of *Lifteau v. Metropolitan Sports Facilities Comm'n*, No. 421416 (2nd Dist. Ramsey County, Dec. 14, 1977) (unpublished order). The legislators had been subpoenaed to give depositions in a case challenging the constitutionality of the act creating the Metropolitan Sports Facilities Commission. They moved to quash the subpoenas or for protective orders prohibiting plaintiff from questioning them "about anything said or done by them as members of the . . . Legislature in the exercise of the functions of that office, particularly the passage of" the act in question. Judge Lenertz granted the protective orders.

Later that same month, Judge Ronald E. Hachey of Ramsey County District Court upheld a similar claim of legislative immunity asserted by Senator Nicholas D. Coleman and Representative Martin O. Sabo in the *Lifteau* case, and signed a similar protective order. (Dec. 27, 1977) (unpublished).

Legislative immunity will not protect from disclosure by a state senator documents showing the allocation of money to pay the senator's office expenses if the decision is made by the Senate Majority Leader as an administrative action, rather than by a vote in the budget process as a legislative action. *Manzi v. DiCarlo*, 982 F. Supp. 125, 128-29 (E.D.N.Y. 1997).

(3) Local Legislators

Common law legislative immunity protects the members of a local governing body from having to testify concerning their motives in enacting an ordinance, *Knights of Columbus v. Town of Lexington*, 138 F. Supp.2d 136 (D. Mass. 2001); *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.*, 917 F. Supp. 91 (D.N.H. 1996); *Searingtown Corp. v. Incorporated Village of North Hills*, 575 F. Supp. 1295 (E.D.N.Y. 1981); or in adopting a list of prohibited wild animals. *Humane Society of New York v. City of New York*, 188 Misc.2d 735, 729 N.Y.S.2d 360 (2001). It also protects them from having to testify about their deliberations and communications related to the passage of legislation. *Orange v. County of Suffolk*, 855 F. Supp. 620 (E.D.N.Y. 1994).

Common law legislative immunity protects members of a local governing body from having to produce documents outside the official record concerning their procedures or their motives in taking legislative action. *Id.* (adopting list of protected wild animals). However, they must produce documents that are part of the official record. *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.*, 917 F. Supp. 91 (D.N.H. 1996).

b. Legislative Aides

The immunity of a legislator from having to respond to a subpoena in a civil action relating to conduct "within the sphere of legitimate legislative activity" is shared by the legislator's aides. *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (subpoenas *duces tecum* for oral depositions served on custodian of records and staff director of subcommittee of U.S. House of Representatives for production of documents relating to testimony presented to the subcommittee and information gathered by it; subcommittee's motion to quash granted); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246 (D.D.C. 1981) (committee clerk subpoenaed to testify and produce documents at deposition concerning committee's investigation of Jonestown tragedy; chairman and clerk's motion to quash granted); *Arizona Independent Redistricting Comm'n v. Fields*, No. 1CA-SA 03-0085, 206 Ariz. 130, 75 P.3d 1088 (2003) (independent contractors hired by commissioners to develop redistricting plan not compelled to disclose documents provided to commission, unless commission chose to call them as expert witnesses at trial); *In re Perry*, 60 S.W.3d 857 (Tex. 2001) (notice of deposition of aides to Legislative Redistricting Board quashed); *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984) (legislative aide to General Assembly's Reapportionment Commission not required to testify at trial concerning formation of redistricting plan); *State v. Beno*, 341 N.W.2d 668 (Wis. 1984) (administrative assistant to speaker of state assembly subpoenaed to testify at deposition about investigation into member's misconduct; speaker and aide's motion to quash granted). *See, Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (congressman served with subpoena *duces tecum* for deposition regarding source of article he inserted in Congressional Record; dicta said that "If [his] aides are deposed, [the congressman] may have them assert his privilege. Because Congressmen must delegate responsibility, aides may invoke the privilege to the extent that the Congressman may and does claim it.")

The Wisconsin Constitution provides, in art. IV, § 16, that:

> No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

When the administrative assistant to the Speaker of the Wisconsin Assembly, who also served as staff to the Assembly Organization Committee and Joint Committee on Legislative Organization, was served with a subpoena relating to information he had provided to the Speaker and committee members as a result of his investigation into alleged misconduct and violation of law by legislators, the administrative assistant and the Speaker moved to quash the subpoena on the basis of legislative immunity. Granting the motion was upheld on appeal. *State v. Beno*, 341 N.W.2d 668 (Wis. 1984).

In *State ex rel. Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (2nd Dist. Ramsey County, Minn.), defendant tobacco companies served subpoenas *duces tecum* on the Secretary of the Senate and the Chief Clerk of the House demanding that they produce any nonpublic documents in the possession of the legislature since 1946 related to the dangers of cigarette smoking to your health,

public health regulations imposed by the state to reduce those dangers, taxes imposed on tobacco products, and spending of tobacco tax receipts. Judge Kenneth J. Fitzpatrick quashed the subpoenas on the ground of legislative immunity, saying:

> Such information is traditionally protected, and for good reason. Such documents fall squarely into the sphere of legitimate legislative activity. The sorts of documents sought directly relate to the process of developing and considering proposed legislation. The exchange of such information is recognized as vital to the legislative process. Disclosure of such matters would chill, if not cripple, free debate, discussion, and analysis of proposed legislation.

(Mar. 13, 1997) (unpublished order).

In *Blume v. County of Ramsey*, 1988 WL 114606 (Minn. Tax Ct. 1988), the court quashed a third-party subpoena served on several tax committee staff persons and the Chief Clerk of the House, holding that the Speech or Debate protection prevented *discovery* into dates, places, and circumstances of committee meetings. The Court held that:

> [T]he proposed questions about the dates, places and circumstances of committee meetings fall within the sphere of protected legislative activity. Questions regarding resolutions to suspend or alter Senate or House Rules, and questions about the availability of computer data presented to committees of the legislature likewise relate to the deliberation of the legislative body. . . . We find the recording in the Journals in this case is part of the legislative process because it is required of the legislature as part of its official action. Minn. State. § 3.17. No further inquiry is therefore allowed.

Id. * 4.

Where subpoenas to testify in a civil action to which they were not a party have been served on both Minnesota legislators and legislative staff, the subpoenas have been quashed or protective orders issued for the benefit of legislative staff along with the legislators. *McGaa v. Glumack*, No. C9-87-2398 (Minn. App., Dec. 31, 1987) (unpublished order); *State ex rel. Humphrey v. McLaren*, No. C5-85-475478 (2nd Dist. Ramsey County, Nov. 23, 1992) (unpublished order).

In *Minnesota-Dakota Retail Hardware Ass'n v. State*, No. 406422 (2nd Dist. Ramsey County, Sep. 14, 1976) (unpublished order), the hardware dealers challenged the validity of certain regulations promulgated by the Director of Consumer Services. In discovery, they served subpoenas *duces tecum* upon various legislative staff members seeking information concerning the Legislature's intent in enacting the law pursuant to which the Director of Consumer Services had promulgated the regulations. Judge Otis H. Godfrey, Jr., applied to the Minnesota Constitution the same construction given the Speech or Debate Clause of the United States Constitution by the federal courts, and in his order of September 14, 1976, quashed the subpoenas served upon legislative staff "as to any matters

pertaining to memoranda, documents or actions by said offices which are or were in connection with the Legislative process." Other matters, those related to the preparation, drafting, and issuance of the *regulations*, he found to be not related to the due functioning of the legislative process and thus subject to discovery. Matters relating to the regulations may not have been within the legitimate legislative sphere because the duty of promulgating them was, by statute, placed upon the Director of Consumer Services in the executive branch.

Federal common law legislative immunity may not protect a *state* legislative staff member from having to produce documents in a civil suit in *federal* court in which he is not a party, even though the staff member would be immune from being deposed regarding the documents. *Corporation Insular de Seguros v. Garcia*, 709 F. Supp. 288 (D. Puerto Rico 1989).

In Michigan, legislative immunity does not protect a senator's aide from having to testify about private conversations he had with the senator in the senator's office about an investigation being conducted by an executive agency. *In re Deposition of Prange*, 542 N.W.2d 354 (Mich. App. 1995).

In New York, legislative immunity protects an employee of the executive branch from having to testify or produce documents in court related to a budget proposal being prepared for consideration by the legislature. *Campaign for Fiscal Equity v. State*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd* 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999).

VII. Appropriate Relief

A. From Criminal Indictment

When a legislator has been improperly questioned before a grand jury concerning legislative acts, the counts in an indictment that are based on that testimony must be dismissed. *United States v. Swindall*, 971 F.2d 1531, 1546-50 (11th Cir. 1992), *cert. denied*, 510 U.S. 1040 (1994).

If written evidence of any legislative acts is presented to a grand jury, a grand jury's indictment that may have been based on that evidence must be dismissed. *United States v. Durenberger*, Crim. No. 3-93-65, 1993 WL 738477 at *3-4 (D. Minn. 1993).

B. From Civil Complaint

The usual relief granted when a legislator has been found to be immune from a civil complaint is to have the complaint dismissed. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 512 (1975).

In one case, the state supreme court issued a writ of prohibition to stop further proceedings in the district court. *Brock v. Thompson*, 1997 OK 127, 948 P.2d 279 (Okla. 1997).

C. From Subpoena

In *Gravel v. United States*, 408 U.S. 606 (1972), the U.S. Supreme Court ordered the Court of Appeals to fashion a protective order that forbade questioning the Senator's aide:

> (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senate; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparing for the subcommittee hearing.

408 U.S. at 628-29.

In *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246 (D.D.C. 1981); *State v. Beno*, 341 N.W.2d 668 (Wis. 1984); and *Melvin v. Doe*, 2000 WL 33252882 (Pa.Com.Pl.), 48 Pa. D. & C.4th 566, the court granted a motion motion to quash the subpoenas.

In *Campaign for Fiscal Equity v. State*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd* 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999), the court granted a protective order barring plaintiffs from "seeking disclosure concerning contacts between [an executive branch employee] and legislative and executive officials and staff concerning the creation, consideration and enactment of legislation." 687 N.Y.S.2d at 232.

In *Knights of Columbus v. Town of Lexington*, 138 F. Supp.2d 136 (D. Mass. 2001), the plaintiffs sought to depose five members of the town's board of selectmen about their motives for enacting regulations governing the use of the Battle Green at Lexington Common that prevented them from displaying a creche on the Battle Green. The court issued a protective order prohibiting plaintiffs from questioning the selectmen about their motives for passing the regulations and from deposing them at any time before demonstrating to the court that the selectmen had evidence of objective facts not available from any other source.

In *Minnesota-Dakota Retail Hardware Ass'n v. State*, No. 406422 (2nd Dist. Ramsey County, Sep. 14, 1976) (unpublished order), the district court quashed the subpoenas served on legislative staff "as to any matters pertaining to memoranda, documents or actions by said offices which are or were in connection with the Legislative process." And in *Lifteau v. Metropolitan Sports Facilities Comm'n*, No. 421416 (2nd Dist. Ramsey County), the Minnesota district court granted protective orders (Dec. 14, 1977, unpublished), (Dec. 27, 1977, unpublished) prohibiting plaintiffs from questioning senators "about anything said or done by them as members of the . . . Legislature in the exercise of the functions of that office, particularly the passage of [the act whose constitutionality was in question]."

VIII. Right to Interlocutory Appeal

Denial of a claim of legislative immunity is immediately appealable under the collateral order doctrine because the Speech or Debate Clause is designed to protect Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *United States v. Rostenkowski*, No. 94-3158, 59 F.3d 1291, 1297-1300 (D.C. Cir. 1995); *United States v. Durenberger*, 48 F.3d 1239, 1241-42 (D.C. Cir. 1995); *Smith v. Lomax*, No. 93-8062, 45 F.3d 402 (11th Cir. 1995); *United States v, McDade*, 28 F.3d 283, 288-89 (3rd Cir. 1994) (No. 93-1487, slip op. at 8-10); *United States v. Rose*, 28 F.3d 181, 185 (D.C. Cir. 1994); *see also Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 926 n. 6 (D.C. Cir. 1986). Federal common law grants the same right of interlocutory appeal to state legislators, *Youngblood v. DeWeese*, No. 03-1722, 352 F.3d 836 (3rd Cir. Dec. 18, 2003), or to county commissioners, *Woods v. Gamel*, No. 96-7171, 132 F.3d 1417 (11th Cir. 1998), whose motion to dismiss a claim in federal court based on legislative immunity was denied.

The proper method of appeal is by direct interlocutory appeal; because a direct appeal is possible, a writ of mandamus will not lie in federal court. *Helstoski v. Meanor*, 442 U.S. 500, 505-08 (1979). The Minnesota Court of Appeals, however, has issued a writ of prohibition. *McGaa v. Glumack*, No. C9-87-2398 (Minn. App., Dec. 31, 1987) (unpublished order). The Arizona Court of Appeals has used special action jurisdiction to provide immediate review of an order to compel discovery, *Arizona Independent Redistricting Comm'n v. Fields*, No. 1CA-SA 03-0085, 206 Ariz. 130, 75 P.3d 1088 (2003); and of an order denying a motion to dismiss a complaint, *Sanchez v. Coxon*, 175 Ariz. 93, 854 P.2d 126 (1993). The Texas Supreme Court issued a writ of mandamus when the trial court denied a motion to quash a notice of deposition of members of the Legislative Redistricting Board and their aides. *In re Perry*, 60 S.W.3d 857 (Tex. 2001).

There is no right to interlocutory appeal of an order compelling discovery against legislators who had intervened in a suit and intended to press their claims, but who refused to respond to discovery requests against them. *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001).

IX. Waiver of Immunity

The legislative immunity afforded by the Speech or Debate Clause may be waived, if that is possible, "only after explicit and unequivocal renunciation of the protection." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). *Helstoski* held that voluntary testimony to grand juries on ten occasions was not a waiver. Other cases have likewise held that a legislator may cooperate with an investigation in various ways and still be permitted to assert legislative immunity. *See, e.g., 2BD Associates Limited Partnership v. County Comm'rs for Queen Anne's County*, 896 F. Supp. 528, 535 (D. Md. 1995) (county commissioners answering certain discovery questions about their legislative activities not a waiver of objections to further discovery); *Greenberg v. Collier*, 482 F. Supp. 200 (E.D. Va. 1979) (submission of affidavit not a waiver); *State v. Township of Lyndhurst*, 278 N.J. Super. 192, 650 A.2d 840 (N.J. Super. Ch. 1994) (participating in criminal investigation, submitting

affidavits, and explicitly waiving immunity of legislative staff was not a waiver of immunity of members); *Holmes v. Farmer*, 475 A.2d 976, 985 (R.I. 1984) (testimony at depositions in a related case not a waiver; voluntary testimony at trial not a waiver, testimony held improperly admitted into evidence at trial).

Legislative immunity belongs to individual legislators and may be waived or asserted by each individual legislator. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). One legislator may not waive immunity on behalf of any other legislator. *United States Football League v. National Football League*, 842 F.2d 1335, 1374-75 (2nd Cir. 1988); *United States v. Craig*, 528 F.2d 773, 780-81 n.7 (7th Cir. 1979); *Cano v. Davis*, 193 F. Supp.2d 1177, 1179-80 (C.D. Cal. 2002). Legislative immunity does not belong to the legislature as a whole, so legislative rules cannot waive the immunity. *Campaign for Fiscal Equity v. State*, 179 Misc.2d 907, 687 N.Y.S.2d 227, 232, *aff'd* 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999). An open meeting law that "does not expressly or unequivocally waive the immunity of individual legislators under the Speech or Debate Clause" will not be construed as a waiver. *Wilkins v. Gagliardi*, No. 174456, slip op. at 6, 219 Mich. App. 260, 271, 556 N.W.2d 171, 178 (Mich. App. 1996)

To receive the protection of legislative immunity, a member must assert it. In *United States v. Seeger*, 180 F. Supp. 467 (S.D.N.Y. 1960), the chairman of a House committee was subpoenaed to testify at a third-party criminal trial while Congress was in session. The chairman moved to quash the subpoena on the ground compliance would be unreasonable and oppressive but did not advance a claim of legislative immunity. The court denied the motion to quash the subpoena, mentioning in a footnote that failure to claim legislative immunity was a waiver of it. In *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736 (N.H. 2005), the Speaker of the House, the President of the Senate, and others were sued by a member of the House for conducting conference committee meetings in private, in violation of the New Hampshire constitution's open meeting requirement. The court noted that, because the defendants had not sought immunity under the Speech or Debate Clause of the state constitution, the court did not need to decide whether the Clause made the claim nonjusticiable, but dismissed it on the merits.

Testifying voluntarily is a waiver of legislative immunity. *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3rd Cir. 1985) (Virgin Islands legislator voluntarily submitted to deposition by Assistant United States Attorney); *United States v. Craig*, 528 F.2d 773, 780 (7th Cir. 1979) (Illinois legislator testified to grand jury); *Alexander v. Holden*, No. 94-1810, 66 F.3d 62, 68 n.4 (4th Cir. 1995).

Choosing to call one's legislative aide as an expert witness at trial is a waiver of the aide's legislative immunity with regard to that testimony. *Arizona Independent Redistricting Comm'n v. Fields*, No. 1CA-SA 03-0085, 206 Ariz. 130, 75 P.3d 1088 (2003).

Intervening in an action to defend the constitutionality of a law is a waiver of legislative immunity; legislators who so intervene may be assessed attorney's fees when the law is declared unconstitutional. *May v. Cooperman*, 578 F. Supp. 1308 (D. N.J. 1984). In *May*, the New Jersey

Legislature enacted, over the governor's veto, a law directing principals and teachers to "permit students of each school to observe a 1 minute period of silence." 578 F. Supp. at 1309. The attorney general and executive branch officials refused to defend the statute when its constitutionality was challenged in court. The President of the Senate and the Speaker of the House of Representatives moved, on behalf of their respective bodies, to intervene to defend the statute. The motion was granted, and they served throughout the litigation as the only defenders of the statute. The statute was found to be unconstitutional. The court found that the legislators had waived their legislative immunity and moved outside the sphere of legitimate legislative activity by undertaking the executive's responsibility to defend the statute, and assessed attorney's fees against them under 42 U.S.C. § 1988.

In Alabama, the Constitution of 1901, article IV, § 106, as amended by Amendment 341, and § 110, as amended by Amendments 375 and 397, requires that, before a local law may be introduced in the Legislature, four-weeks notice of its substance must be published in the affected counties. The Alabama Supreme Court, in *Bassett v. Newton*, 658 So.2d 398, 402 (Ala. 1995), held that "a legislator waives any confidentiality regarding proposed legislation once public notice is published."

APPENDIX

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

_____

John Doe, Case Type: Other Civil

Plaintiff, File No. C1-96-_____
Judge _____

vs.

Richard Roe,

Notice of Motion and Motion

Defendant.

_____

To: Plaintiff John Doe and his attorney _____

_____;

and defendant Richard Roe and his attorney _____

_____.

PLEASE TAKE NOTICE that on November 24, 1996, at 9:30 a.m. at Special Term before the Honorable _____, Judge of the District Court, Room ____, Ramsey County Courthouse, St. Paul, Minnesota 55101, or as soon thereafter as counsel can be heard, Senator _____ will move the Court for an order:

1. That the subpoena served on him on November 5, 1996, be quashed; or, in the alternative,

2. That plaintiffs be prohibited from questioning movant about anything said or done by him within the sphere of legitimate legislative activity as a member of the Minnesota State Senate, including, but not limited to, his actions, motives for his actions, or intent in sponsoring or voting for any bill or amendment to a bill.

This motion is made under Rule 45.02 of the Minnesota Rules of Civil Procedure, and upon all the files and records in this action. The ground for this motion is that movant, a member of the Minnesota State Senate, is immune from the use of compulsory process to question him about anything said or done by him within the sphere of legitimate legislative activity.

Dated: November 6, 1996

Respectfully submitted,

Peter S. Wattson
Senate Counsel

_____
Atty Reg. No. _____
Senate Counsel & Research
17 Capitol
St. Paul, Minnesota 55155
(952) 296-3812
Attorney for Movant
Senator _____

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

_____

John Doe, Case Type: Other Civil

Plaintiff, File No. C1-96-_____
Judge _____

vs.

Protective Order

Richard Roe,

Defendant.

_____

The above-entitled matter was heard by the Court, at Special Term, on _____, before the Honorable _____, on a motion to quash a subpoena or, in the alternative, for a protective order made by Senator _____. Peter S. Wattson, Senate Counsel, appeared for movant in support of the motion and _____, Esq., appeared for plaintiff in opposition to the motion.

Based on the files and records of this proceeding and the arguments and representations of counsel, and for good cause shown,

It Is Hereby Ordered that plaintiff not question Senator _____ about anything said or done by him as a member of the Minnesota State Senate within the sphere

of legitimate legislative activity, particularly in connection with the passage of Laws 1996, chapter _____.

Dated: _____ _____

Judge of District Court