

Legislative Privilege

An Overview

Ted Booth, September 21, 2021

Legislative Privilege

Outline of presentation

- What is Legislative privilege/immunity?
- Sources of the privilege
- The availability of the privilege in federal court
- Conclusions

What are Legislative Privilege and Immunity?

Related doctrines

- Legislative privilege is an evidentiary rule that protects legislators from being required to testify or produce documents in certain instances.
- Legislative immunity shields legislators from being parties in certain matters.
- Both are related and often trace their sources to the same constitutional provisions or common law sources.

What is a privilege?

General attributes

- A privilege is an evidentiary rule that protects persons or documents in their possession from discovery or presentation at trial.
- Privileges are not preferred by courts.
- Privileges often shield otherwise relevant and material evidence from disclosure, and run contrary to current notions of openness in government
- Privileges may be either absolute or qualified.

What are the Sources of Legislative Privilege?

State constitutions and common law

- Varies from state to state
- Your state has a Speech or Debate Clause in its constitution (Section 43).
- Seven states, including my state of Mississippi, have no such clause.
- For such states, the privilege will be the creature of a constitutional structural argument, the common law, or a rule of evidence.
- In federal courts, the privilege is the product of what is sometimes called “federal common law.”

Privilege Distinguished from Confidentiality

Privileges shield persons/records from testimony

- Some states have provisions scattered throughout their codes making certain documents confidential and exempt from public disclosure.
- This is not the same thing as a privilege.
- While a confidentiality statute shields the release of a document from a public records request, privilege makes the records or testimony of a person not subject to discovery.
- Generally, a confidentiality statute does not in and of itself create and evidentiary privilege.

Privilege Distinguished from Legislative Immunity

Immunity shields persons from liability

- Privileges protect persons of information from being discovered.
- Immunity protects legislators from being parties to litigation.

Legislative Immunity (In General)

Protection from suit

- Immunity may be derived from a state's constitution, the Common Law, or a statute (Tort Claims Acts).
- Immunity tends to be absolute, not qualified.
- Immunity applies to suits against members in their personal and official capacities.
- Immunity protects members from liability arising out of acts occurring within the course and scope of carrying out legislative duties.
- Immunity is recognized in federal courts.

Legislative Immunity (Continued)

Tenny v. Brandhove

- *Tenney v. Brandhove*, 341 US 367 (1951)
- SCOTUS recognizes the need for immunities and privileges for state legislators.
- Justice Frankfurter cites “federal common law” as the source of the privilege.

Legislative Privilege, Scope, and Application

These statements are not jurisdiction specific.

- The privilege must be invoked by a member. No other officer or member may involve it for the member.
- The privilege may apply to staff as well as members.
- In some states, a balancing test will be applied.
- Generally, testimony and records that relate to the drafting, consideration, and passage of legislation is protected.
- The privilege may be waived through inconsistent behavior, delay, or by policy.

Legislative Privilege in the Federal Courts

Usually a qualified privilege

- While there are exceptions, most federal courts take the position that the privilege is qualified.
- Court must determine if the public good of allowing the privilege outweighs the value of receiving relevant evidence.
- A few federal courts have held that the privilege is absolute.

Legislative Privilege in the Federal Courts

Balancing

- In cases where the cause of action is not related to private rights but important public policies, the use of balancing may arise.
- The privilege can be balanced because it is a product of common law rather than statute or constitutional law.
- The common law must yield to the important public policy.
- We often see this in redistricting cases.

Other Related Privileges

Deliberative process and work product

- Deliberative Process Privileges is when some courts conclude that this privilege applies to legislators. This is a qualified privilege.
- Work Product Rule FRCP Rule 26

Conclusions

The forum court matters

- In federal courts, privilege is likely to be subject to balancing.
- In state courts, the critical questions are related to the source of the privilege.
Is it constitutional, common law, or based on a rule of evidence?
- Open Records Acts may contain provisions that effectively waive a privilege.
- Protections of evidence is less likely when the information sought dealt with occurrences after the drafting, discussion, and adoption of legislation.
- Questions?