Executive Privilege Isn’t for Everyone

An Introduction to Legislative Privilege

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This slideshow does not contain most citations. Please review the State Legislatures and Litigation Toolkit, available from NCSL, for more information and citations.

Legislative privilege is not settled law and is highly contextual, so you should not rely on this slideshow to resolve any lawsuits at any time.
What is legislative privilege and why does it matter?

Legislative privilege...

- is a limitation on a person's ability to demand information about communications and to interrogate witnesses regarding legislative acts.
- shields legislators from interference with carrying out official duties.
- is an extension of the separation of powers by preventing executive or judicial scrutiny of legislative actions.
“[Members of Congress] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”

U.S. Constitution art. I, §6, cl. 1

Members need the protection to represent their constituents effectively, even where doing so may offend others.
Does legislative privilege apply to state legislators?

- Yes, but...

  - In most states and in federal courts, the privilege is qualified (limited) when applied to state legislators, and courts apply a balancing test to determine if testimony or documents are protected.

  - Some state courts have held that the privilege is absolute.

- Most states have also adopted their own speech and debate clause or similar protections for their legislators.
What and who does legislative privilege protect?

Legislative privilege…

- Protects testimony and documents related to official legislative actions.
- Extends beyond floor debates to acts that relate to “an integral part of the deliberative and communicative processes” of the legislature.
  - Ex. committee hearings and workgroups
- Extends from legislators to staff, committees, and legislative agencies, but…
Legislative privilege may extend beyond a legislator when a person is both:

1. acting on behalf of the legislator and
2. performing legislative duties
What does legislative privilege *not* protect?

- Speech or conduct that occurs outside the legislative arena or is not required as part of legislative duties
  - Ex. Constituent newsletters, media briefings
- Ministerial actions where a member has no discretion in performing a specific act
- Potentially criminal conduct
- Factual reports or documents created after legislation was enacted
Confidentiality v. Privilege

- Confidentiality entails a duty to protect documents or records, is often narrowly defined, and is more likely to be subject to discovery in legal proceedings.
  - Inherent to the information

- Privilege typically protects a larger societal value, like relationships between a doctor and patient or between an attorney and client, and usually includes the right to not provide information or testimony when compelled.
  - Inherent to the relationship
Immunity v. Privilege

- Immunity protects a person from having legal action brought against them.
  - For members of Congress, legislative immunity creates an absolute bar to civil actions based on legislative acts.
  - State legislators may still be subject to federal criminal prosecutions, and potentially state civil or criminal actions.

- Privilege authorizes a person to withhold information.
  - Legislative privilege is absolute for members of Congress and qualified for state legislators.
Deliberative process privilege (often called executive privilege) protects advice, recommendations, and deliberations made as part of the executive branch’s policy-making process.

Attorney-client privilege protects the “full and frank communication between attorneys and their clients,” which may include members of the Legislature, but requires an attorney-client relationship.
Subpoena v. Public Information Request

- Subpoenas are a judicial tool to compel testimony or information.
- Public information requests are non-judicial tools to obtain public information.
- Major differences:
  - Timeline and procedural requirements for responses
  - Type of information potentially subject to disclosure
  - Presumption of protected or public nature of requested information
  - Intention to use the information for litigation or general decision-making
Most federal courts determine whether to recognize or pierce legislative privilege by balancing the following factors:

1. the relevance of the evidence sought to be protected;
2. the availability of other evidence;
3. the seriousness of the litigation and the issues involved;
4. the role of the government in the litigation; and
5. the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.
How can you protect privileged documents and information?

- Gather information intentionally for direct legislative purposes.
- Have clear policies on destroying documents or sharing information with individuals from the office.
- Establish safe practices for accessing documents from personal computers, tablets, and cellphones.
- Review the information or documents your office requests and consider documenting requests for specific purposes.
- Maintain and update a records retention schedule to ensure your office keeps only current, relevant information needed to perform your work.
- Request legal guidance where you are unclear about certain information.
Record Retention Schedules

Retention schedules...

- categorize and set minimum (and sometimes maximum) timeframes to keep documents.
- ensure consistent maintenance and destruction of documents.
- reduce risks of exposing sensitive information or over-retaining records.

Even where state law does not require it, legislative offices are well served by a retention policy and a staff trained on the importance of records retention.
How can you still work with the public?

- **Release the document**

  A member who receives a public information request may choose to release the document or information, in whole or part, even if it is protected by legislative privilege. You should follow your state’s open records law regarding authority to withhold any information.

- **Waive your privilege**

  Members can intentionally or unintentionally waive legislative privilege by disclosing documents or discussing information outside of their legislative duties. Also, voluntarily releasing privileged information in response to a public information request may constitute a waiver of legislative privilege in the future, so be sure to consult an attorney about your state’s public information law.
Common Scenarios

- **What if I released a document to one person, but want to claim legislative privilege now?**
  
  Inconsistent actions related to disclosing information could be seen as waiving legislative privilege. Discussing privileged matters with one group of constituents could preclude a legislator from withholding the same information from another group.

- **Can I establish a relationship with a member to claim legislative privilege, even if I don’t work for them?**
  
  In some cases, yes. The nature of a relationship between a legislator and a third party can be evidenced by a signed, written request or agreement for a specific legislative purpose; clear statutory direction to provide assistance; records of communications; or a pattern of behavior.
General Key Points

- Legislative privilege protects legislative oversight and independence.

- Legislative privilege is not absolute.
  
  Facts, context, venue, and relationships will all play a part in determining if legislative privilege applies in each case.

- You can take steps to protect your legislative privilege, but you may have good reasons to disclose information. Be intentional and consistent.
Why does all of this matter?

Rep. Duncan Hunter and his wife indicted in use of campaign funds for personal expenses

Ginsburg puts census depositions on hold
Tonight Justice Ruth Bader Ginsburg granted the federal government's request to put off the depositions of two high-level Trump-administration officials, Secretary of Commerce Wilbur Ross and John Gore, the acting head of the Department of Justice's Civil Rights Division. Gore's deposition had been scheduled for tomorrow morning, and Ross for Thursday, in a challenge to their decision to bring back a question about citizenship on the 2020 census. More details on the challenge and the issues involved can be found in an article next.

Supreme Court will take up Texas redistricting case

U.S. District Court Says Five Michigan Legislators Must be Deposed in Lawsuit Over Straight-Ticket Device

FEINSTEIN: Thank you very much, Mr. Chairman.

I'll make just a brief comment on your references to me.

Yes, I did receive a letter from Dr. Ford. It was conveyed to me by a member of Congress, Anna Eshoo.

The next day, I called Dr. Ford. We spoke on the phone. She reiterated that she wanted this held confidential. And I held it confidential, up to a point where the witness was willing to come forward.

Governor's petition seeks to block chief of staff from giving testimony in Jackson airport lawsuit
Legislative Intent in Redistricting

**Bethune-Hill Virginia redistricting case:**

- Virginia redrew legislative districts after the 2010 census. Voters in 12 House districts alleged racial gerrymandering. The House and Speaker intervened as defendants.
- Evidence showed legislative discussions centered on concerns related to the re-election of members of the House Black Caucus, but the District Court still found for the state.
- Supreme Court ruled that the district court applied an incorrect standard to determine if race was impermissibly considered. *Bethune-Hill v. VA State Bd. of Elections*, 137 S. Ct. 788 (2017)
- District Court found that race played a predominate factor over traditional districting factors and that the interveners could not show the use of race was narrowly tailored to achieve a compelling state interest. *Bethune-Hill v. VA State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. VA — 2018)
- AG declined to appeal the case again. Interveners appealed.
- Supreme Court ruled that interveners lacked standing either as the State’s representatives or in their own right. *VA House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)
Legislative Intent in Regulation


- The Federal Atomic Energy Act gives the Nuclear Regulatory Commission significant authority over uranium and nuclear power plants, but didn’t expressly touch state’s mining regulations for private lands within their jurisdiction. Virginia state law prohibits uranium mining (they have a lot of uranium).
- Virginia Uranium alleged that the AEA preempts state uranium mining laws, and the NRC’s silence as to uranium mining allows the company to mine in Virginia.
- Supreme Court relies on strict statutory interpretation, finding no language in the law to preempt state regulation and refusing to conduct an inquiry into legislative purpose.

"Consider just some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative purpose too precipitately. The natural tendency of regular federal judicial inquiries into state legislative intentions would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge. That would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws."

J. Gorsuch writing the judgment of the court (JJ. Thomas & Kavanaugh join)
J. Ginsburg concurring in the judgment (JJ. Sotomayor & Kagan join)
C.J. Roberts dissenting (JJ. Breyer & Alito join)
Legislative Intent Interpreted by Executive


The VA denied a claim for part of Kisor’s disability benefits based on an interpretation of agency rules governing claims. The Federal Circuit affirmed based on *Auer* deference to an agency’s reasonable interpretation of its own ambiguous statute.

Supreme Court declines to overrule *Auer*, but clarifies that (1) such deference is not afforded until exhausting all traditional tools of statutory construction first to determine if there is a true ambiguity; and (2) not every reasonable agency reading of an ambiguous rule is entitled to *Auer* deference.

"Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." And let there be no mistake: That is a requirement an agency can fail."

J. Kagan writing the judgment of the court (lots of concurring to different parts of four different opinions)
Legislative Intent in Delegated Authority


- Antitrust challenge against the NC Dental Board for cease-and-desist letters sent against teeth whiteners for practicing dentistry without a license.

- Supreme Court creates a two prong test to apply Parker immunity to agencies controlled by active market participants: (1) clearly articulated state policy to displace competition, and (2) active state supervision.

“The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under Parker is to be invoked.”

J. Kennedy writing the opinion of the court

J. Alito dissenting (joined by J. Scalia and J. Thomas.)
Shift in Judicial Approval of Legislative Acts

Bethune-Hill
- Increasing trend to question legislative actions and hold to more objective bases for jurisprudence

Virginia Uranium

Kisor
- Increasing disfavor for traditional legislative presumptions in delegated authority

NC Dental

Future willingness to pierce legislative acts to find the truth and/or return to strict interpretation of authority and duties of legislative branch
Considerations for 2020 Redistricting

- Clearly establish that the work is *legislative* in nature
- If an attorney is on the project, document that work done is *attorney work-product*
- Set clear expectations when relying on *technical staff* for specific projects
- Privilege only covers *core* legislative work, not peripheral or ancillary work
- Ensure your data is kept on *secure servers* only (not dropbox, generic cloud, etc.)
Any Questions?

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