What is legislative immunity?

Legislative immunity is a topic that many people, legislators included, do not know a lot about. According to separation of powers provisions, legislative immunity prohibits the executive and judicial branches from interfering with the operation of the legislative branch beyond the powers given in each state’s constitution. The protections were designed to ensure that ideas are debated freely during the legislative process without concern for censorship or adverse consequences.

Legislative immunity “confers a privilege on legislators from inquiry into their legislative acts or into the motivation for actual performance of legislative acts that are clearly part of the legislative process,” as the Rhode Island Supreme Court put it in Irons v. Rhode Island Ethics Commission. Essentially, immunity protects legislators from being questioned about certain legislative actions by an entity outside the legislative branch.

But how exactly those legislative actions are defined is vigorously debated, at times creating tension between branches of government.

Certainly, legislative immunity is not a get-out-of-jail-free card, and there are limits to the legal protection it provides. Criminal behavior, for example, is generally not protected. But some courts have found that executive branch regulators must take a hands-off approach when it comes to applying ethics laws to members of the legislature, in their capacity as legislators, unless a constitutional provision states otherwise. Depending on the circumstances and the jurisprudence in a given state, oversight of certain legislative actions might have to be performed by the legislative branch, and the legislative branch alone.

—Ethan Wilson

Want to know more? Be sure to attend the session “Privilege and Immunity: Protecting the Legislative Process,” at NCSL’s 2016 Legislative Summit in Chicago on Monday, Aug. 8, 1–2:15 p.m. Contact Ethan Wilson at ethan.wilson@ncsl.org.

IN THE REAL WORLD: Does immunity mean lawmakers are …

… above the law?
No. Two years ago in Minnesota, for example, the secretary of state stopped issuing the “legislative immunity” cards carried by lawmakers, who considered them a prized perk, according to the Star Tribune. Historically, the cards were issued to keep powerful interests from arresting lawmakers to prevent them from voting, the newspaper reports. But the cards caused confusion and raised concern that legislators should avoid arrests for drunken driving or other illegal behavior. The attorney general clarified that “legislators have no immunity from arrest for criminal activity, including the crime of driving while intoxicated.”

… protected from malicious litigation?
Yes. At least 43 states have provisions similar to the U.S. Constitution’s “speech or debate” clause, which protects lawmakers from having to answer questions in court about what they have said or done in their capacity as legislators. The protection ensures that legislators are able to do their work without being pressured or threatened by interests among the executive or judicial branches, or the public, who might be hostile toward particular legislation.