



Separation of Powers and Legislative Immunity

By Ethan Wilson

The term “separation of powers” reminds many of their high school civics course and the three branches of state and federal governments. Some may even recall Chief Justice John Marshall’s opinion in the landmark 1803 Supreme Court case, *Marbury v. Madison*, in which the doctrine of separation of powers was interpreted in American jurisprudence for the first time. However, most may not consider the impact that separation of powers has on legislative oversight and, specifically, on who enforces ethics laws governing the nation’s legislators. In fact, constitutional issues can arise when one branch of government interferes with another branch; therefore, legislators are generally immune from prosecution of certain legislative acts by the executive branch for ethics violations.

The idea behind legislative immunity is this: Pursuant to both state and federal constitutional separation of powers provisions, the executive and judicial branches cannot interfere with the operation of the legislative branch, and vice versa, beyond the express powers given to the individual branches in the constitution. This autonomy can create tension among the branches of government. Tension is revealed when the executive branch is tasked with enforcing ethics laws related to members of the legislative branch, absent a constitutionally granted power to do so.

State Action

The authority of state ethics commissions to enforce ethics laws regulating legislators was called into question in 2009 by two state supreme court decisions. The supreme courts in Rhode Island and Nevada determined that lawmakers, while performing certain legislative acts and functions, are immune from prosecution by state entities outside of the legislative branch, including executive branch ethics commissions. These two cases illustrate how state supreme courts may approach legislative immunity and the constitutional provisions that establish it.

Nevada. In *Commission on Ethics v. Hardy*, the Supreme Court of Nevada held that a statutorily created ethics commission could not punish a legislator for failing to disclose a conflict of interest and failing to seek recusal from voting. Specifically, the court found that Nevada’s constitutional mandate of separation of powers could prevent a statutorily created ethics commission from punishing an Assembly member for violating a state ethics law. The court held that the ethics commission was a function of the executive branch and, consequently, violated separation of powers by taking disciplinary measures against the legislator.

Rhode Island. In *Irons v. The Rhode Island Ethics Commission*, the Rhode Island Supreme Court held that a constitutional speech and debate clause “ensures[s] the Legislature freedom in carrying out its duties,” and that “this freedom ensures the separation of powers among

Did You Know?

- Constitutional separation of powers provisions have been interpreted to prevent executive branch oversight of certain legislative acts.
- Legislative immunity is meant to allow for the free flow of ideas and debate among legislators when discussing and voting on legislation.
- Forty-three states have constitutional provisions pertaining to “speech and debate” immunity.

the coordinate branches of government.” Unlike Nevada’s statutorily created ethics commission, the Rhode Island Ethics Commission was created by constitutional amendment during a constitutional convention in 1986. The court explained, however, that, without an express repeal of the “ancient and venerable hallmark” of legislative immunity contained in the speech and debate clause, the ethics commission lacked authority to punish a legislator for “core” legislative acts.

Acts That Fall Under the Protection of Legislative Immunity. In *Irons*, the Rhode Island Supreme Court used the constitutional speech and debate clause to narrow the class of behavior falling under the scope of core legislative activity. Specifically, the speech and debate clause covers “legislative acts that are clearly part of the legislative process,” including any motive for voting in a way that represents a conflict of interest.

Separation of Powers as a Shield for Certain Legislative Actions. All 50 states and the federal government have incorporated the doctrine of separation of powers into their respective constitutions. Moreover, 43 states have a constitutional speech and debate provision. As is the case in *Irons*, courts require no deviation from constitutional strictures without proper constitutional amendment. This means that, if a legislature delegates oversight authority to an executive branch ethics commission charged with enforcing ethical rules on all public officials, the commission would not have unbridled jurisdiction over members of the legislature. If the commission tries to exercise jurisdiction over a member of the legislature, as was the case in both Nevada and Rhode Island, it might be violating a constitutional provision on separation of powers or speech and debate.

Improper Legislative Acts Are Subject to Oversight. Although this is true, because of constitutionally mandated separation of powers, an executive branch ethics commission is not permitted to use certain disciplinary measures. Oversight of core legislative acts might instead be performed by the legislative branch. For example, in Nevada, legislative ethics committees in both chambers may advise legislators and hear complaints on alleged breaches of ethics and conflicts of interest rules. In Rhode Island, the Senate Judiciary Committee has oversight of ethical matters.

The *Irons* and *Hardy* cases employ aspects of constitutional law to prevent, at least to some degree, an inappropriate shift of constitutionally mandated legislative functions. While the court opinions are binding only in Nevada and Rhode Island, respectively, they provide good examples of how legislative immunity functions. These opinions could serve as a road map in other states, which address separations of powers similarly in their constitutions.

Courts require that functions under a separation of powers system change only through the appropriate constitutional amending process. A constitutional amendment that fundamentally changes the powers of the legislative and executive branches, including an express repeal of any legislative immunity, could allow an executive branch ethics commission to maintain oversight and enforcement power over members of the legislative branch.

NCSL Contacts and Resource

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Additional Resources

Irons v. Rhode Island Ethics Comm’n, 973 A.2d 1124 (2009)

Comm’n on Ethics v. Hardy, 125 Nev. 285, 212 P.3d 1098 (2009)

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