

Activities Held to be Within or Outside of the Sphere of Legitimate Legislative Activity

Types of actions that fall clearly within the legislative sphere:

- Actions taken on the floor of the House or Senate that are part of the legislative process and that do not violate the constitutional procedural rules that govern the legislative process. Examples of such actions are: Authoring, sponsoring, considering, and voting on legislation;¹ making speeches;² sponsoring amendments to legislation;³ and taking any other action to "directly affect the enactment of legislation or the contents of bills to be submitted to the legislature;"⁴ regardless of the motivations for such actions.⁵

- Actions taken during a legislative committee meeting or in the course of an investigation being conducted by a legislative committee that are within the scope of the committee's authority and that do not violate any constitutional procedural rules that govern the committee. Examples of such actions are: Voting;⁶ preparation and adoption of committee reports and resolutions;⁷ authorizing the publication of committee reports;⁸ introducing material, making statements, or giving testimony at a

¹ *E.g.*, *Romer*, 810 P.2d at 222-23; *Lucchesi v. State*, 807 P.2d 1185, 1189 (Colo. App. 1990); *Chappell v. Robbins*, 73 F.3d 918, 921-22 (9th Cir. 1996).

² *E.g.*, *U.S. v. Johnson*, 86 S. Ct. 749, 751-54 (1966). *See Chappell*, 73 F.3d at 921-22.

³ *Larsen v. Early*, 842 F. Supp. 1310, 1313-14 (D. Colo. 1994).

⁴ *State v. Dankworth*, 672 P.2d 148, 151 (Alaska App. 1983).

⁵ *See e.g.*, *Tenney v. Brandhove*, 71 S. Ct. 783, 788 (1951) ("The claim of an unworthy purpose does not destroy the privilege"); *U.S. v. Brewster*, 92 S. Ct. 2531, 2537 (1972); *Larsen v. Early*, 842 F. Supp. at 1314.

⁶ *E.g.*, *Gravel v. U. S.*, 92 S. Ct. 2614, 2623, 2626 (1972).

⁷ *E.g.*, *id.*

⁸ *Doe v. McMillan*, 93 S. Ct. 2018, 2025 (1973). *See Green v. DeCamp*, 612 F.2d 368, 372 (8th Cir. 1980) (Nebraska legislative committee's release of a committee report to news agencies is "a legitimate legislative activity").

committee hearing;⁹ authorizing or engaging in an investigation;¹⁰ issuing subpoenas;¹¹ and questioning witnesses.¹²

- Actions taken during impeachment proceedings.¹³
- Enactment and enforcement of legislative rules that govern the manner in which a legislature conducts its business.¹⁴
- Actions taken or statements made, both public and private, in order to directly influence the enactment or contents of specific legislation.¹⁵

Additionally, a legislative staffer or aide who performs any act on behalf of a legislator for which the legislator would be entitled to legislative immunity may

⁹ See *Gravel*, 92 S. Ct. at 2622, 2629; *Doe*, 93 S. Ct. at 2025; *Lunderstadt v. Colafella*, 885 F.2d 66, 74 (3d Cir. 1989).

¹⁰ *Eastland v. U.S. Servicemen's Fund*, 95 S. Ct. 1813, 1821-22 (1975); *Doe*, 93 S. Ct. at 2025.

¹¹ *Eastland*, 95 S. Ct. at 1822;

¹² *Tenney v. Brandhove*, 71 S. Ct. 783, 789 (1951); See also *Government of Virgin Islands v. Lee*, 775 F.2d 514, 520-22 (3d Cir. 1985) (concluding that legislative fact-finding generally falls within the legislative sphere).

¹³ *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 248-54 (3d Cir. 1998), *cert. denied sub. nom. Larsen v. Afflerbach*, 119 S. Ct. 1041 (1999).

¹⁴ See *Nat'l Assoc. of Social Workers v. Harwood*, 69 F.3d 622, 629-35 (1st Cir. 1995) (barring civil suit against speaker of Rhode Island House of Representatives challenging constitutionality of house rule banning private lobbyists from the floor of the house during legislative sessions); *Cable News Network v. Anderson*, 723 F. Supp. 835, 839-42 (D.D.C. 1989) (speech or debate clause precluded judicial review of rule of U.S. House of Representatives that allowed subpoenaed witnesses to prevent televised coverage of testimony before a subcommittee); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (President of the Alaska Senate immune from suit for compelling a legislator to attend a joint session in accordance with Alaskan legislative rules).

¹⁵ *State v. Dankworth*, 672 P.2d 148, 151 (Alaska App. 1983). The Alaska Court of Appeals ruled that legislative immunity precluded prosecution of state senator Dankworth on conflict of interest charges even though he had used his position as Senate Finance Chairman to secure a budget appropriation for a state purchase of property he owned (at a substantial profit to him). The court held that legislative immunity:

... protects any statements made or actions taken by a legislator that directly affect the enactment of legislation or the contents of bills to be submitted to the legislature whether or not the statements or actions occur in public.

generally claim legislative immunity.¹⁶

Types of actions not within the sphere of legitimate legislative activity:

- Preparing and publishing constituent news letters, press releases, and election campaign materials.¹⁷
- Giving speeches other than during a floor session or committee meeting.¹⁸
- Meeting with employees of government agencies or attempting to persuade a government agency or employee to act in a particular manner.¹⁹
- Providing assistance in securing government contracts.²⁰
- Republishing any speech, testimony, or document, or privileged or classified information, to the general public outside of a formal legislative proceeding.²¹

¹⁶ See, e.g., *Eastland v. U.S. Servicemen's Fund*, 95 S. Ct. 1813, 1823 (1975); *Gravel v. U.S.*, 92 S. Ct. 2614, 2622 (1972); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 31-32 (1st Cir. 1996).

¹⁷ *Id.*; *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2686-87 (1979). See also *Williams v. Brooks*, 945 F.2d 1322, 1324-26 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992) (U.S. Congressman could not claim legislative immunity with respect to comments made by the Congressman during a television interview); *Lunderstadt v. Colafella*, 885 F.2d 66, 77-78 (3d Cir. 1989) (counsel for state legislative committee not entitled to legislative immunity for statements made at a press conference).

¹⁸ *Brewster*, 92 S. Ct. at 2537. See *Lunderstadt*, 885 F.2d at 76-78.

¹⁹ *Brewster*, 92 S. Ct. at 2537; *Chastain v. Sundquist*, 833 F.2d 311, 312 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988) (U.S. Congressman not entitled to legislative immunity with respect to allegedly defamatory statements made about a public employee in a letter to the employer executive agency); *Hartley v. Fine*, 595 F. Supp. 83, 88 (W.D. Mo. 1984), *aff'd*, 780 F.2d 1383 (1985) ("[T]he application of pressure by legislator on the executive branch to make a decision in an area vested exclusively within the executive branch cannot be classified as a legitimate legislative activity.).

²⁰ *Brewster*, 92 S. Ct. at 2537.

²¹ E.g., *Gravel v. U.S.*, 92 S. Ct. 2614, 2626-27 (1972) (U.S. Senator not immune from questioning regarding his private publication (through a publisher) of the Pentagon Papers); *Hutchinson*, 99 S. Ct. at 2686-87 (holding that "transmittal of . . . information by press releases and newsletters is not protected by the Speech or Debate Clause").

Finally, as made clear in *Romer*,²² a member of the General Assembly cannot claim legislative immunity if he or she fails to comply with procedural requirements imposed by constitution, statute, or legislative rule when performing activities that might otherwise fall within the legislative sphere. For example, a member cannot claim legislative immunity if the member:

- Engages in activities as a member of a legislative committee that are clearly beyond the scope of the committee's authority.²³
- Commits to a vote in a party caucus in violation of the GAVEL amendment.²⁴

²² See note 1.

²³ See *Thompson v. Ramirez*, 597 F. Supp. 730, 735 (D. Puerto Rico 1984) (Legislators serving on special investigatory committee that issued subpoenas after its authority to do so had expired not entitled to legislative immunity). The *Thompson* court also stated as a general proposition that "legislators do not enjoy absolute immunity when the Legislative Rules and Resolutions are not strictly followed in taking action." *Id.*

²⁴ *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 211 (Colo. 1991).