Legislative Immunity and Separation of Powers: Implications from Irons v. The Rhode Island Ethics Commission and Commission on Ethics v. Hardy

By Ethan Wilson, legal intern, Center for Ethics in Government

The authority of state ethics commissions to enforce ethics laws on legislators was narrowed in 2009 by a couple of state Supreme Court decisions. The high courts of Rhode Island and Nevada, in two separate cases, determined that certain legislative acts and functions are immune from question and prosecution from state entities outside of the legislative branch, including ethics commissions. However, at least theoretically, this determination does not leave legislators’ “immune” behavior completely unchecked.

Nevada
In Commission on Ethics v. Hardy the Supreme Court of Nevada held that a statutorily created ethics commission could not levy punishment on 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 can prevent a statutorily created ethics commission from punishing an assembly member for violating a state ethics law. Nevada’s constitutional separation of powers provision is located in Article 3, Section 1 of the Nevada Constitution. The court found 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
The Rhode Island Supreme Court, in Irons v. The Rhode Island Ethics Commission held that a constitutional speech in debate clause “ensures[s] the Legislature freedom in carrying out its duties” and that “this freedom ensures the separation of powers among the coordinate branches of government.”
Rhode Island’s speech in debate clause is located in Article 6, Section 5 of the Rhode Island Constitution. Unlike Nevada’s statutorily created ethics commission, the Rhode Island Ethics Commission was created by constitutional amendment during a constitutional convention in 1986, and is located in Article 3, Section 8. The court explained, however, that despite the commission being established by constitutional amendment, without an express repeal of the “ancient and venerable hallmark” of legislative immunity contained in the speech in debate clause, the ethics commission lacked authority to punish a legislator for core legislative acts.

Legislative Immunity
Legislative immunity, described by the Rhode Island Supreme Court in Irons, “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.” Essentially, legislative immunity makes legislators immune from any questioning of certain acts by an entity outside of the legislative branch.

1 Irons v. Rhode Island Ethics Comm’n, 973 A.2d 1124, 1125 (2009).
2 Id at 1132.
3 Id at 1134.
4 Id at 1129.
“Core” Legislative Acts

In Inrons, the Rhode Island Supreme Court used the constitutional speech in debate clause to narrow the class of behavior falling under the scope of core legislative activity. Specifically, the speech in debate clause covers “legislative acts that are clearly part of the legislative process” including the act of voting, and any motivation of actual performance for such acts. Moreover, in Hardy, the Nevada Supreme Court included the disclosure (and nondisclosure) of a conflict of interest within the purview of core legislative activity. Although the courts do not completely articulate the bounds of “core” legislative activity, they do provide examples and a rough formulation of what acts are covered by the immunity.

Separation of Powers as a Shield for “Core” Legislative Acts

At the heart of legislative immunity is the idea of separation of powers and allowing the legislature to conduct its activities without being impinged upon by another branch of government. Like most states, and the United States Constitution, both Rhode Island and Nevada have incorporated the doctrine of separation of powers into their respective constitutions. By doing so, the courts stress that such constitutional strictures cannot be deviated from without proper constitutional amendment. This means that even though legislatures can delegate oversight to an ethics commission charged with enforcing ethical rules on all public officials, the commission would not have unbridled jurisdiction over members of the legislature itself. If it did, as was the case in both Nevada and Rhode Island, separation of powers, as defined in either state’s constitution, would be violated.

Is an Improper Core Legislative Act Subject to Punishment?

Yes, however, in states with a separation of powers framework similar to Nevada and Rhode Island, certain disciplinary measures will not be permissible by an executive branch ethics commission. In these states, punishment of improper behavior falling under the category of core legislative activity might be constitutionally required to be executed by the legislative branch itself. The Rhode Island Constitution, Article 6, Section 7, of and the Nevada Constitution, Article 4, Section 6, require that each house of the legislature determine its own rules and proceedings to punish its members for disorderly conduct, including expelling a member. In Nevada, both chambers have a legislative ethics committee that may advise legislators and shall hear complaints on alleged breaches of ethics and conflicts of interest brought by legislators and others. In Rhode Island, neither chamber has a standing committee or procedures to create an ad hoc committee, though by chamber rule the Senate Judiciary Committee has oversight of legislation and matters that affect ethics.

Conclusion

The Inrons and Hardy cases employ aspects of constitutional law to prevent, at least to some degree, an inappropriate shift of constitutionally mandated legislative functions – namely, the requirement that the legislative branch determine the procedures for punishing a legislator for disorderly conduct. These two courts require that functions under a separation of powers system be changed only through the appropriate constitutional amending processes. A constitutional amendment fundamentally changing the powers of the legislative and executive branches, including an express repeal of any legislative immunity, could in effect allow for an executive branch entity, such as an ethics commission, to punish legislators who perform inappropriate core legislative acts.

---

6 Inrons at 1129.
7 Id. at 1103.
8 See footnote 1.