Texas Legislative Council and Its Living Dead Privileges

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Who are you?

- Texas Legislative Council
  - Legislative drafting
  - Legislative mapping
  - Legislative research
  - Printing
  - Information technology
  - Purely staff
Who do you work for?

- Texas Legislative Council
  - Nonpartisan
  - All legislators are clients
What Did Our Cat Look Like, Again?

- First legal recognition of parliamentary immunity is Strode’s Case and Privilege of Parliament Act (1512)
- First documented reference to legislative privilege is under Henry VIII (1521)
  - “Whatever any man may happen to say, may it please your noble Majesty, in your inestimable goodness, to take it all with no offense . . . . ”
  - i.e., “So, you’re not going to throw us in jail, right?”
- Persisted until overthrow of James II (1688)
- English Bill of Rights (1689):
  - “Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament . . . . ”
- Speech or Debate Clause
  - Article III, Section 21, Texas Constitution
  - Article I, Section 6, United States Constitution
Legislative Privilege

- Legitimate legislative acts
- Not covered
  - Criminal activity
  - Employment decisions
  - Strictly administrative acts
  - Purely factual information
Texas Court (and courts of most other states)?

Cat Is Definitely Alive!

- *In re Perry* (Tex. 2001):
  - Attempt to subpoena Legislative Redistricting Board testimony and documents
  - Evidentiary and testimonial privilege
  - Applied to non-legislative elected officials serving legislative function AND staff supporting that function
  - Privilege applies, barring an “extraordinary instance”
Attorney-Client Privilege

- In re Sealed Case
  - 737 F.2d 94
- Applies when:
  - Holder is a client
  - Recipient is an attorney
  - Concerns legal advice / services
  - Without the presence of strangers
Attorney-Client Privilege

- Not covered
  - Purely factual information
  - Information related to future death or serious injury
  - Crime/fraud
  - Lawyer’s self-defense
Federal Court with a Federal Issue? Leg. Privilege Cat is alive, unless it is dead.

- **But** SCOTUS recognized a federal common-law privilege in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* and *Tenney v. Brandhove*.
  - Specifically addressed intent of the legislature
  - Appropriate to obtain such evidence only in an “extraordinary instance”
  - Encourages courts to look elsewhere
  - FRCP 501
Texas Legislature Acts in 2011

- Redistricting
- Voter identification law
- Voting Rights Act
  - Section 2:
    - Default
    - Prohibits “discriminatory effect” relating to racial minority status
    - Discriminatory intent
  - Section 5:
    - “P preclearance”
    - Prohibits “retrogression” in racial minority voting influence
    - Discriminatory purpose
Three Federal Court Experiments

1. Voting Rights Act, Section 2—Redistricting
   - Texas legislature is sued by a variety of plaintiffs
   - United States District Court for the Western District of Texas
   - Issued August 1, 2011
   - Judges: Garcia (Clinton), Smith (Reagan), Rodriguez (GW Bush)
Three Federal Court Experiments

2. Voting Rights Act, Section 5—Redistricting
   - Texas sues the US Department of Justice for preclearance
   - United States District Court for the District of Columbia
   - Issued January 2, 2012
   - Judges: Collyer (GW Bush); Griffith (GW Bush); Howell (Obama)
Three Federal Court Experiments

3. Voting Rights Act, Section 5—Voter ID
   - Texas sues the US Department of Justice for preclearance
   - United States District Court for the District of Columbia
   - Issued June 7, 2012
   - Judges: Collyer (GW Bush), Tatel (Clinton), Wilkins (Obama)
DOJ: You’re Not Attorneys

- Conflict of interest
DOJ: You’re Not Attorneys

- BUT:
  - Client’s reasonable expectation is paramount.
  - Conflicts do not eliminate confidential nature of work.
DOJ: You’re Not Attorneys

- ALSO:

- Item 13, Preamble to the Texas Disciplinary Rules of Professional Conduct:

  . . . [State government] lawyers . . . may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. . . . These rules do not abrogate any such authority.
Comment 9 to Rule 1.12, Texas Disciplinary Rules of Professional Conduct:

. . . [D]uties of lawyers employed by the government . . . may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. . . .
You’re Not Authorized

- Section 323.006, Texas Government Code:

(a) The council shall:
   1. study and investigate . . . ;
   2. conduct investigations and studies and make reports . . . ;
   3. gather and disseminate information . . . ;
   4. meet and perform council functions . . . ;
   5. make periodic reports . . . ;
   6. report . . . and, if appropriate, provide drafts of legislation with the report;
   7. assist the legislature in drafting proposed legislation; and
   8. provide data-processing services . . . .

(b) By agreement with either house of the legislature or a legislative agency, the council may perform other services or functions for or on behalf of the house or agency.
Legislative Privilege Must Yield

- **Tenney v. Brandhove**
  - 341 U.S. 367 (1951)
  - Legislative subpoena of critic
  - “The claim of an unworthy purpose does not destroy the [legislative] privilege. . . . the holding of this Court . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.”

  - 429 U.S. 252 (1976)
  - Equal Protection Clause--“racially discriminatory intent”
  - Legislative act by a city
  - Adopts *Tenney*
  - “Legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”
Legislative Privilege Must Yield

Section 323.017, Texas Government Code:

Communications . . . between a member of the legislature . . . and an . . . employee of the council that relate to a request by the official for information, advice, or opinions from an . . . employee of the council are confidential. Information, advice, and opinions given privately by an . . . employee of the council to a member of the legislature . . . acting in the person's official capacity, are confidential.
“Deponents may invoke privilege, but then answer.”

“Privileged portions sealed and submitted to the court for *in camera* review.”

Court was familiar with Texas law.

Not much left after waiver.
VRA, Section 5 (DC)—Redistricting Cat Is Dead

- DC Court does not deal with many claims of state legislative privilege.

- “DC Circuit has never recognized state legislative privilege.”

- “Texas has never recognized legislative privilege for its own legislature.”
VRA, Section 5 (DC)—Redistricting: Cat Is Dead

- TLC can’t possibly have an A-C relationship with everyone in the legislature.

- Didn’t use the magic words:
  “Communications between the Texas Legislative Council and members of the Legislature are ‘confidential.’ They are not ‘privileged.’ . . . The Texas Legislature knew the difference.”
VRA, Section 5 (DC)—Redistricting
Cat Is Dead

- Order vacated
- Privileges waived
“DOJ does not dispute that the TLC documents at issue involve legislative acts covered by the privilege, but instead argues that the privilege should yield.”

“DOJ has not established the extraordinary circumstances required to abrogate the privilege.”
Texas Legislative Privilege Achieves Superposition

- August 2011—Legislative privilege exists.
  - SA Court
- January 2012—Legislative privilege does not exist.
  - DC Court, Judge Collyer
- June 2012—Legislative privilege is nearly inviolate.
  - DC Court, Judge Collyer
Texas Legislative Privilege Achieves Superposition

- Same basic documents
- Same law at issue
- Same litigants
- Concurrent timelines
So...

- Existence of legislative privilege is highly dependent on the observer.
- When federal courts consider state legislative privilege, it’s a close issue.
- You’re going to have to live with it.
ZOMBIE CAT 2: THE CATTENING
We rejoin our characters

- Section 2 court adopts interim maps for 2012 election.
- June 2013—*Shelby County v. Holder* strikes down VRA Section 4, the Section 5 coverage formula.
- Redistricting and Voter ID Section 5 cases are dismissed/vacated
- DOJ sues Texas regarding its voter ID law.
- Summer 2013—Texas legislature adopts a very close approximation of court’s maps.
- DOJ continues suing Texas.
- (Still in trial.)
Two More Discovery Disputes

1. Voting Rights Act, Section 2—Redistricting (Continued)
   - Texas legislature is sued by a variety of plaintiffs
   - United States District Court for the Western District of Texas
   - Issued August 1, 2013
   - Judges: Garcia (Clinton), Smith (Reagan), Rodriguez (GW Bush)
   - Still at trial
Two More Discovery Disputes

2. Voting Rights Act, Section 2—Voter ID
   - Texas legislature sued by a variety of plaintiffs
   - United States District Court for the Southern District of Texas
   - Issued June 2014
   - Judge: Ramos (Obama)
Section 5 is ALIIIIIVE! (Kind of.)

- Section 3, Voting Rights Act

- Consistent public statements = conspiracy to conceal discriminatory intent
Remember: Section 2 Redistricting
Cat Is Alive, Unless It’s Dead

- “Deponents may invoke privilege, but then answer.”

- “Privileged portions sealed and submitted to the court for in camera review.”

- Really only applies to 2013 records, thanks to previous waiver.
Remember: Section 2 Redistricting
Cat Is Alive, Unless It’s Dead

- Attorney-client privilege generally unchallenged
Section 2 Voter ID
DOJ asks…and we unwittingly oblige

- DOJ sends interrogatories to “state” for documents
  - Public bill files
  - Legislative records from members waiving privilege
  - Our records held by OAG

- All in “possession of the state”
Remember: VRA, Section 5 (DC) — Voter ID

It’s Aliiiiiiiiiiiiive!

- “DOJ has not established the extraordinary circumstances required to abrogate the privilege.”
Section 2 Voter ID
So, no problem! It’s all privileged!

- **BUT:**
  - That was a Section 5 Case
  - Section 3 bail-in is critical
  - *Intent* is critical
Voter ID—Judges are busy, too

- **Vacancies**
  - 5th Circuit Court of Appeals—2
  - TX Federal District Courts—9
  - Emergencies in TX—6
  - Emergencies in TX Southern Region—3
  - Mentioned **SEVERAL** times
Voter ID—Balancing Act

- Recognizing absolute privilege?
  - Problematic for plaintiffs
- In camera review?
  - Lots of work for judge
Voter ID—Legislative Privilege Ruling

- “Motive and intent is the crux of this . . . case.”

- In re Sealed Case:
  - Subpoena duces tecum of former US Secretary of Agriculture
Five-factor balancing test

1. Relevance of the evidence sought;
2. Availability of other evidence;
3. Seriousness of the litigation and the issues involved;
4. Role of the government in the litigation; and
5. Possibility of future timidity by government employees.
Voter ID—Legislative Privilege Ruling

• “Deponents may invoke privilege, but then answer.”

• “All documents submitted to plaintiffs under seal.”

• “Privileged portions reviewed at trial for introduction.”
Both Cases—Rule 26(f) Conference

- Discussion of what can be turned over and how it will be turned over

- Not much legislator correspondence turned over, last time
Both Cases—Rule 26(f) Conference

- DOJ: All legislators and staff:
  - emails
  - electronic documents

- ~3000 accounts
  - ~3000 email accounts
  - ~3000 user network drive accounts
  - ~3000 local computer drives
  - ~200 office network drive accounts
We are the janitors.
Talk to the members like you did last time.
Request is over-inclusive.
Request is under-inclusive.
We are not a party.
Not ours to give.
Highly disruptive.
Both Cases—Computer Searches

- Rule 34, Federal Rules of Civil Procedure

(a) A party may . . . request . . . :
   (1) to produce . . . the following items in the responding party's possession, custody, or control:
      (A) any . . . electronically stored information . . . .
Rule 45 Subpoena

- “Non-party” subpoena

- (1)(A) Every subpoena must:
  
  * * *

  (iii) command each person to whom it is directed to . . . produce . . . electronically stored information . . . in that person's possession, custody, or control. . . .

- NOT OUR INFORMATION
Both Courts’ Rulings on Member Network Drive Searches

- Email searches must be performed.
- Smaller number of targets.
- Legislative privilege considered at trial.
- Attorney-client privilege still available.
We Comply

- >90 individual accounts
- 2 hours per account
- Briefing of offices
- Scheduling of observers
- >100 8G thumb drives
- No local hard drives
- Could not search
  - Dropbox
  - Archive files with passwords
Let’s look at our journey

- **Village of Arlington Heights**
  - “Legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”
Let’s look at our journey

- **Now:**
  - Third party
  - Searching legislative records
  - Turned over to opposing litigants
Bar Admission Rules amended to add definition of “Practice of law”:

“interpreting and giving advice regarding the law;”
What are you going to do about it?

Legislative Draft Request Form

I understand that the Texas Legislative Council provides legislative and legal services both directly to me and to me through my staff. Furthermore, I understand that communications between my office and the council, as well as records relating to those communications, are confidential in accordance with law and council policy and are privileged to the extent provided by law. I authorize the staff member(s) listed above to be granted administrator access to the Legislative Draft Request (LDR) application.

_______________________________
(Legislator Signature)
What are you going to do about it?

- Amend statute?
- Amend agency rules?
- Amend legislative rules of procedure?
- Pass a separate resolution?
- NCSL?
- Worry in 2021.
Before you get sued:

- Where do your loyalties lie?
- Check your statute.
- Check your rules.
- Consider an attorney-client agreement.
Before you get sued:

- Know your agency’s computer systems.
- Know your agency’s business processes.
When you get sued:

- Buy all the thumb drives.
- Hire your own attorney.
- Production coordinator?
- 3rd party? Act that way.
When you get sued:

- Get a subpoena.
- Get a court order. For everything.
- Attorney-client > legislative privilege.
- Monitor IT staff.
After you’re sued:

- Wide variety of discovery solutions that court can use.
- You’re going to have to live with it.
- Get your documents back.
Questions?

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