South Dakota Legislative Research Council

Issue Memorandum 96-28

LEGISLATIVE IMMUNITY

Background

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings had its origins in the English Parliamentary struggles of the sixteenth and seventeenth centuries. Monarchs exerted pressure against the Parliament by using judicial processes. As the Parliament became increasingly independent of the Crown, the privilege evolved and was formally incorporated in 1689 in the English Bill of Rights which declared "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

The precedent of freedom of speech in the legislature was carried over to the colonies. After the American colonies won their independence, it was written into the Articles of Confederation and later into the United States Constitution. Article V of the Articles of Confederation was drafted similarly to the English Bill of Rights. It states "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress...." Article I, § 6, of the United States Constitution provides "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The provision in the United States Constitution came after three states--Maryland, Massachusetts, and New Hampshire--had already adopted similar provisions protecting the privilege in their constitutions. In fact, legislative freedom was so carefully guarded at the time that Thomas Jefferson, who, like other political figures of the time, was the subject of slanderous attacks in congressional debate, expressed fear of legislative excess:

> The tyranny of the legislatures is the most formidable dread at present, and will be for long years.

As other states joined the Union or revised their constitutions, they took great care to preserve the principle that the Legislature be free to speak and act without fear of liability. The people of South Dakota adopted the privilege when the state constitution was adopted in 1889. The privilege is found at Article III, § 11 of the South Dakota Constitution.

> § 11. Senators and representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same; and for words used in any speech or debate in either house, they shall not be questioned in any other place.

When the Constitutional Revision

Committee examined this section in the mid-1970s, it recommended the section be rewritten as follows:

> No member shall be questioned in any other place for any speech or debate in the Legislature.

This would have deleted the freedom from arrest clause as currently provided in the section. The proposal, which was part of an entirely rewritten Article III of the South Dakota Constitution, was twice defeated by the electorate.

Freedom from Arrest

No South Dakota court case has addressed the issue of what is meant by the phrase, "treason, felony or breach of the peace," but the United States Supreme Court has addressed this issue. Article I, § 6 of the United States Constitution states in pertinent part:

> [The senators and representatives] shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same....

The phrase "treason, felony or breach of the peace" can be traced back to Parliamentary England. Since the framers adopted those exact words from England, it follows that they must have intended the well understood and accepted meaning of those words in England at the time. The words as used there were well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses, confining the privilege to arrests in civil cases. The United States Supreme Court, citing this rationale, held that the exemption applied only to civil arrests and not to criminal charges.[1]

This provision in state constitutions has generally been given the same interpretation. For example, a legislator was held not to be exempt from arrest for the charge of the criminal offense of battery.[2]

In South Dakota, an attorney general's opinion concluded that a legislator was not privileged from arrest and prosecution for a violation of a traffic rule of the Department of Administration.[3] While stating that the legislator may be arrested, the opinion pointed out that § 2-4-7 of the South Dakota Codified Laws prohibited a person from preventing a legislator from attending a legislative session or voting on any question:

> Every person who intentionally, by intimidation or otherwise, prevents any member of the Legislature of this state from attending any session of the branch of which he is a member, or of any committee thereof, or from giving his vote upon any question which may come before such branch, or from performing any other official act, is guilty of a Class 2 misdemeanor.

Furthermore, § 15-11-5 would likely prohibit the trial of a legislator during a legislative session:

> § 15-11-5. Whenever any action or proceeding, including a contested small claims action other than for attachment, garnishment, arrest and bail, claim and delivery, injunction, receivership, and deposit in

> court, to which any member of the Legislature is a party or in which any member of the Legislature is the attorney in charge for either party, comes on for trial or hearing during a session of the Legislature, the attendance of the party or attorney upon the session is cause for the postponement of the trial or hearing until after the conclusion of the session, provided the party or attorney serves notice, on the opposite party, of his intention to apply for the postponement at least fifteen days before the term or time at which the action or proceeding may be brought on for trial or hearing or as soon as notice of hearing is received if less than fifteen days prior to the date set for hearing.

This section not only applies to cases in which the legislator is a party but also to cases in which the legislator is the attorney representing a party. The designated procedures must be followed and it may not be used as a means of delay. A South Dakota court case explained:[4]

> This section was designed to protect lawyers, public spirited enough to serve in the Legislature, from being penalized on that account, and was not designed to furnish another means of delay in the trial of those charged with crime.

Freedom of Speech

Legislators are generally immune to any type of action against them for any act done or statement made in their official capacity. The immunity is absolute. The privilege is given not for the benefit of the legislators, but rather for the benefit of the people, so that their representatives may carry out their responsibilities without interference from persons who might take issue with a legislator's actions. It serves to ensure that representatives of the people are able to carry out the duties of office with conviction. There are two underlying rationales for this protection. First, there is the separation of powers doctrine. The legislature should be independent of the other two branches of government, the executive and the judicial. The speech and debate clause allows for separate, equal, and independent branches of government. The framers of the United States Constitution viewed the speech and debate clause as fundamental to a system of checks and balances. The second rationale for the privilege is the protection of legislative independence. The reason for the privilege is described by James Wilson, a member of the Committee of Detail which was responsible for the provision in the United States Constitution:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

There are restrictions on this immunity. An act must be within the scope of a legitimate legislative activity to fall within the protection of legislative immunity. Two requirements must be met in order for there to be legislative immunity. The act must be legislative in character; that is, it must involve policymaking on a broad scale affecting a large number of people. The act must also be procedurally legislative. The act must have been undertaken by established legislative procedure. The action of voting and participating in committee are acts that are procedurally legislative. For example, a hearing held by a state legislative committee was within the scope of legitimate legislative action since investigations by legislative committees are an established part of representative government.[5] Those acts that go beyond broad policymaking and are accomplished without legislative procedure fall outside the bounds of legislative immunity. Also outside the scope of legislative immunity are those acts which are deemed administrative, like a legislator's actions as an employer. Finally, the privilege does not extend to political acts.

Recent Legislation

Senate Bill 99, introduced during the last legislative session, would have provided special protection to legislators if it had passed. The bill sought to include in the crime of aggravated assault the assault of a law enforcement officer or other public officer, such as a legislator, if the reason for the assault related to the official discharge of the officer's duties. For example, if a legislator spoke out against Indian gambling on the floor during debate in chambers, and then went to an Indian gambling establishment where the legislator was assaulted by a person, angry over the legislator's critical remarks regarding Indian gambling, the crime committed under current law and under Senate Bill 99 would have differed. If the described events occurred under current law, the crime would have been simple assault. However, if the same events occurred after Senate Bill 99 had been enacted, the crime would have been that of aggravated assault, a much more serious crime. The effect of Senate Bill 99 would have been to extend the blanket of legislative immunity to some areas beyond what is normally considered the legislative realm.

Conclusion

The immunity given to legislators in the South Dakota Constitution is limited. The arrest privilege applies only to arrests in civil suits, which were common in this country at the time of the adoption of the United States Constitution. The privilege does not apply to service of process in either civil or criminal cases nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" has been interpreted by the United States Supreme Court to exclude all criminal offenses from the operation of the privilege. The speech or debate privilege secures freedom for the legislative branch from the executive and judicial branches of government. It also provides for legislative independence. The freedom of speech privilege provides a legislator with absolute immunity for acts done or statements made in the legislator's official capacity. This serves to ensure that there is no interference in representative government, thus allowing the legislators the freedom to carry out the responsibilities of office. The immunity only applies in situations that are legitimate legislative activities.

This issue memorandum was written by Jacque Storm, Senior Legislative Attorney for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.

Endnotes

1. *Williamson v. United States*, 207 U.S. 425 (1908).
2. *In re Application of Emmett*, 7 P.2d 1096 (1932).
3. Official Opinion 75-60.
4. *State v. Caldwell*, 235 N.W. 649 (1931).
5. *Tenney v. Brandhove*, 341 U.S. 367 (1951).