# Research Department

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# Minnesota House of Representatives


March 17, 2000

TO: Representative Elaine Harder, Ethics Committee Co-chair
Representative Bob Milbert, Ethics Committee Co-chair

FROM: Deborah K. McKnight, Legislative Analyst (651-296-5056)

RE: Speech and Debate Clause in Legislative Ethics Proceedings

You asked me to review case law on whether the speech and debate clause affects the legislature's ability to discipline a member for speech in the legislative process.

I found no case law indicating that the speech and debate clause prevents a legislature from hearing an ethics complaint against a member arising out of speech. However, there is some case law indicating that the federal Constitution limits sanctions that may be imposed on a legislator for pure speech.

**Speech and Debate Clause**

The Minnesota Constitution contains the following provision, the last sentence of which is commonly known as the speech and debate clause:

> The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place. **Art. IV, sec. 10.**

The above provision is similar to a federal constitutional provision that relates to Congress. Because there is no case law under the Minnesota speech and debate clause, it is reasonable to rely on cases construing the federal Constitution and the constitutions of other states with similar provisions.

The United States Supreme Court has explained the history and purpose of the federal clause in *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749 (1966). The provision was adopted at the Constitutional Convention. It is almost identical to the English Bill of Rights. The purpose of the

English provision was to defend Parliament against a history of monarchs who had used both civil and criminal legal proceedings to intimidate key legislators. Although the United States has not had a similar history of executive encroachments on the independence of individual legislators, the clause has been seen as an important tool in assuring the independence of the co-equal legislative branch by (1) preventing intimidation of legislators and (2) protecting legislators from the burden and interruption of defending or giving testimony in lawsuits.

Despite its name, the "speech and debate" clause is more accurately understood as a protection for a wide range of legislative acts, such as introducing bills, voting, conducting hearings, serving on committees, investigating executive agencies, publishing reports, and writing memos and letters. See cases discussed in *Legislative Immunity in Minnesota*, Peter S. Wattson, Senate Counsel (1997).

The numerous speech and debate clause cases I have been able to review in the time available to me have dealt in some respect with the extent to which a state legislator or member of Congress can be subjected to the judicial process because of actions taken in his or her official capacity as a legislator. For example, cases involve legislators as criminal defendants,[1] respondents in civil suits,[2] and deponents in cases where they are not named parties.[3] I did not find any case in which a legislator argued that the speech and debate clause should prevent the body where the member served from holding disciplinary proceedings against the member.

**First and Fourteenth Amendment Issues**

There are some cases stating that the federal Constitution's First Amendment guarantee of free speech, which is applied to the states through the Fourteenth Amendment, limits the sanctions a legislative body may impose on a member for pure speech. Most significantly, the Georgia House was barred from excluding a representative from membership on the basis of statements he had made that were critical of federal government policy in Viet Nam and the Selective Service. *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339 (1966). To the same effect, a federal district court ruled that a city council could not impose a two week suspension on one of its members for impugning the motives of another member by implying that he had accepted money in exchange for passing tax abatement legislation. *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D.Ohio, 1977). Finally, another federal district court has indicated that the speaker of the New Jersey General Assembly could not remove a member from the Appropriations Committee (where a rule permitted removal only for good cause) based solely on the member's outspoken opposition to party leadership. *Gewertz v. Jackman*, 467 F. Supp. 1047 (D. N.J. 1979).

Contrary authority also exists on this point. The Fourth Circuit Court of Appeals found in favor of a county board of supervisors that had disciplined a member for abusive language toward

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[1] United States v. Johnson, 383 U.S. 169, 86 S,Ct. 749 (1966).

[2] Hutchinson v. Proxmire, 99 S.Ct. 2675.

[3] State v. Township of Lyndhurst, 650 A.2d 840 (N.J. Super., 1994).

another member. *Whitener v. McWatters*, 112 F.3d 740 (CA4, 1997). The discipline imposed was to remove the member from all standing committees and appointments to outside committees and commissions for a period of one year. The court found that the board had absolute legislative immunity against a federal civil rights suit brought by the disciplined member. It held that "a legislative body's discipline of one of its members is a core legislative act." 112 F.3d at 741.

Exclusion is an action that can only be taken against a member at the time he or she initially takes a seat in the body. Thus, the effect of the above cases is that there is no controlling authority addressing the possible range of actions the Ethics Committee might take in the matter pending before it at this time. "Controlling authority" would be a decision of the United States Supreme Court, the Eighth Circuit Court of Appeals, the federal District Court in Minnesota, or the Minnesota state courts. The committee may, of course, be persuaded by the policy stated in either branch of the decisions cited above.

DM/ks

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# Minnesota House of Representatives

March 16, 2000

TO: Representative Elaine Harder, Ethics Committee Co-chair
Representative Bob Milbert, Ethics Committee Co-chair

FROM: Deborah K. McKnight, Legislative Analyst (651-296-5056)

RE: Attorney General Opinion on Legislative Ethics Issues

You asked me to comment on a proposal to seek an Attorney General Opinion on whether the Ethics Committee has jurisdiction over a complaint about speech on the House floor.

The Minnesota Constitution provides as follows on the issue of legislator discipline:

> Each house may determine the rules of its proceedings, sit upon its own adjournment, *punish its members for disorderly behavior*, and with the concurrence of two-thirds, expel a member; but no member shall be expelled a second time for the same offense. **Art. IV, sec. 7.** (italics added).

The matter of legislative ethics discipline is consigned not only to the legislative branch but to the specific house where a legislator serves. The Senate may not discipline a House member, and the House may not discipline a Senator. There is no express constitutional rule for another branch of government in this area other than the body where a member serves. Arguably, it would violate separation of powers for the Attorney General to intervene by offering an opinion in a matter of legislative discipline.

Under Minnesota Statutes, section 8.03, the legislature as a whole or a standing committee or interim committee or commission of either house may ask the Attorney General for "a written opinion upon any question of law." If you are not concerned about the possibility of a violation of the separation of powers, you as committee co-chairs may decide under this statute to request the Attorney General to issue an opinion on any issue of legislator discipline.

I hope this is helpful to you.

DKM/jb
xc: Brenda Elmer, Committee Administrator