HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JDC 12-03 Legislative Immunity
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		De La Paz	Havlicak

SUMMARY ANALYSIS

The Florida Constitution has no express provision regarding legislative immunity. Legislators or their staff have occasionally been subpoenaed to testify concerning their legislative activity including their motivations and intentions concerning legislative acts. Although there is considerable federal law providing protection for state legislators in federal court based on long standing case precedent protecting inherent state legislative power, there is virtually no reported case law developing, explaining or acknowledging legislative immunity at the state constitutional level. Currently, there is no general law provision articulating any standard of legislative immunity for state legislators.

Under federal law, legislative immunity for state legislators is based on federal common law and is similar in scope to the immunity provided members of Congress under the Speech or Debate Clause of the United States Constitution. Federal legislators are protected from inquiry into legislative acts or the motivation for legislative acts, from having to defend themselves against certain types of suits, and from the consequences of litigation. They are also shielded by an evidentiary privilege protecting them from having their legislative acts used against them in court, and a testimonial privilege protecting legislators and their staff from questioning regarding legislative acts. The critical factor in determining whether legislative action is protected by immunity in a given situation is whether the action was within the sphere of legitimate legislative activity. Under this federal level of protection, state and local legislators, including their surrogates, have immunity from civil liability for their legislative acts.

This bill includes legislative findings which in essence find a comparable level of legislative immunity, including testimonial and evidentiary privilege, for state legislators in state level proceedings by the executive and judicial branches of government, that exist for Congress in proceedings brought by the co-equal branches of government at the federal level.

This bill is a legislative articulation of privileges and immunities found by the legislature for its members and staff. The bill specifies that a member or former member of the legislature has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding against compelled testimony or the compelled production of any document or record in connection with any action taken or function performed in a legislative capacity. Legislative staff members also have the privilege to the same extent as legislators with regard to duties performed within the scope of their legislative employment. The privilege stated in the bill belongs to legislators and former legislators and may only be waived by the legislator in writing before it may be waived by a legislative staff member or former staff member. The bill also preserves in perpetuity the privilege of a deceased legislator or former legislator in the same status it was on the date of his or her death. The bill specifically provides that it shall not affect or alter the right of access to public records which are open to personal inspection and copying pursuant to s. 24, Art. I of the State Constitution or s. 11.0431, F.S.

Article III, Section 1 of the Florida Constitution vests the lawmaking power of the state in the Florida Legislature. Powers vested among the respective branches of government are provided in the Constitution and cannot be enlarged or reduced by general law.

The bill does not appear to have a fiscal impact.

The bill provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Legislators as Witnesses or Parties to Suits for Legislation

Legislators or their staff have occasionally been subpoenaed to testify concerning their legislative activity including their motivations and intentions concerning legislative acts.[1] Although there is considerable federal law providing protection for state legislators in federal court based on long standing case precedent protecting inherent state legislative power, there is virtually no reported case law developing, explaining or acknowledging legislative immunity at the state constitutional level.[2] Further, there is no general law provision articulating any standard of legislative immunity for state legislators.

Federal Protection of Legislative Power

Members of Congress

United States Senators and Representatives are protected by legislative immunity which is expressly established under the "Speech or Debate Clause" of the United States Constitution.[3] It provides:

> "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; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The United States Supreme Court has interpreted the Speech or Debate Clause (the Clause) broadly to effectuate its purposes.[4] The Court has explained its purposes as follows:

> 'The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.' *United States v. Brewster, supra*, 408 U.S. 507, 92 S.Ct. at 2535.
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> . . . our cases make it clear that the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966),' *Gravel v. United States, supra*, 408 U.S. at 617, 92 S.Ct. at 2623. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it 'must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . ..' United *States v. Brewster, supra*, 408 U.S. at 508, 92 S.Ct. at 2535.[5]

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[1] Most recently, Representative Kriseman was subpoenaed for testimony in litigation involving online travel companies and suits against several local governments. Also, Representatives Baxley and McKeel, along with a legislative staff member on the House side, and Senators Dockery and Diaz de la Portilla, along with a senate staff member, were subpoenaed in connection with preclearance litigation regarding HB 1355 relating to elections. *See* footnote 46 for other examples.

[2] *See, Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-05 (1979) where the Supreme Court explained that the federal protection recognized in their case precedent did not depend on the presence of a Speech or Debate clause in any state constitution.

[3] ART. I, SEC. 6, U.S. CONST.

[4] *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *United States v. Brewster*, 408 U.S. 501, 508-09 (1972); *Gravel v. United States*, 408 U.S. 606, 617-18 (1972); *Tenney v. Brandhove*, 341 U.S. 367, 376-78 (1951) .

[5] *Eastland*, supra at 503.

The Clause has been interpreted to protect federal legislators "engaged in the sphere of legitimate legislative activity."[6] It expressly excludes arrest for all criminal offenses from its protection.'[7] The protection it provides from arrest applies to civil cases which were still common in America at the time the Constitution was adopted.[8] The Clause, also does not grant immunity from service of process in a civil case or from being called as a witness in a criminal case.[9]

Specifically, members of Congress are protected from inquiry into legislative acts or the motivation for actual performance of legislative acts,"[10] from having to defend themselves against certain types of suits,[11] and "from the consequences of litigation.[12] They are also shielded by an evidentiary privilege protecting them from having their legislative acts used against them in court,[13] and a testimonial privilege protecting legislators and their staff from questioning regarding legislative acts.[14]

The critical factor in determining the Speech or Debate Clause's protection to a member of Congress in a given situation is whether the legislative action was within the sphere of legitimate legislative activity. With respect to activities other than speech and debate, federal courts look to see whether the activities took place "in a session of the House by one of its members in relation to the business before it."[15] In making this assessment, courts will determine whether the activities are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[16] Supreme Court precedent has made clear that not every action a legislator may do while serving in a legislative role is necessarily protected by the Speech or Debate Clause.[17] For example:

> A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. (footnote omitted) The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which members participate in committee and House proceedings.[18]

Courts determining the legitimacy of legislative activity may not inquire into motives for legislative acts or look at the final product of a legislative inquiry.[19] The Supreme Court explained:

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[6] *Supreme Court of Virginia. v. Consumers Union of the U.S., Inc*., 446 U.S. 719, 732 (1980).

[7] The reference in the Clause to "Breach of the Peace" had a broader meaning in the 18th century to mean breach of the king's peace and was meant to embrace a whole range of crimes at common law. *Brewster, supra* at 521.

[8] *Gravel, supra* at 614.

[9] *Gravel, supra* at 614-15.

[10] *Brewster, supra* at 509.

[11] *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[12] *Id.*

[13] *U.S. v. Helstoski*, 442 U.S. 477, 488-89 (1979)

[14] As used in this analysis the term "immunity" refers to the general principles of protection from suit and defense from the consequences of litigation, and the term "privilege" refers either to an evidentiary or testimonial privilege precluding inquiry into legislative acts, motivations for legislative acts and protection from compelled testimony concerning legislative activity. Privilege is considered a subset of immunity.

[15] *Eastland, supra* at 503; *Kilbourn*, supra at 204.

[16] *Eastland, supra* at 504; *Grave, supra* at, 625.

[17] *Doe v. McMillan*, 412 U.S. 306, 313 (1973).

[18] *Doe, supra* at 314-15, *citing Gravel* at 625.

[19] *Eastland*, supra at 508. In one case involving a charge of racial discrimination speaking of determining invidious discriminatory purpose, the Supreme Court acknowledged that in some "extraordinary circumstances the members might be called to . . . testify concerning the purpose of the official action, although even then such testimony will frequently be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 (1977), *citing Tenney v. Brandhove*, 341 U.S. 367 (1951). The Court followed this remark with a footnote stating: "This Court has recognized, ever since *Fletcher v. Peck, 6 Cranch* 87, 130-31, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decision maker on the stand is therefore 'usually to be avoided.'" (Citation Omitted). *Arlington Heights, supra* at n. 18.

> the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.' 408 U.S. at 525, 92 S.Ct. at 2544 (emphasis added). And in *Tenney v. Brandhove* we said that '(t)he claim of an unworthy purpose does not destroy the privilege.' 341 U.S. at 377, 71 S.Ct., at 788. If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. 'In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.' Id. at 378, 71 S.Ct. at 789. The wisdom of congressional approach or methodology is not open to judicial veto. *Doe v. McMillan*, 412 U.S. at 313, 93 S.Ct. at 2025. Nor is the legitimacy of a congressional inquiry to be defined by what it produces.[20]

Once it is determined that the action of the member was within the "legitimate legislative sphere, the Clause is an absolute bar to interference."[21] That interference exists not only when legislators are sued, but also when they are called to defend a lawsuit, because it "creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation."[22]

The Clause extends its legislative immunity to staff or surrogates performing tasks which would be legislative acts if performed by the legislator directly.[23] The privilege, however, belongs entirely to the legislator and must be invoked by the legislator or the staff member on his or her behalf.[24]

As noted earlier, the protection from arrest under the Speech or Debate Clause does not apply to criminal offenses. However, it's evidentiary and testimonial privilege still applies to legislative acts. In order for federal criminal prosecutions involving federal legislators to proceed, the government's case cannot rely on the legitimate legislative acts involved, or the motivation for such acts, in its prosecution of the offense.[25]

State Legislators

With respect to state legislators, the United States Supreme Court, in, *Tenney v. Brandhove*, extended protections similar to those found in the federal Speech or Debate Clause to state legislators for actions taken in "the sphere of legitimate legislative activity."[26] After discussing the historical origins and the "indispensible" necessity of protections embodied in the Speech or Debate Clause,[27] the Supreme Court explained that with respect to state legislators:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck, 6 Cranch* 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.[28]

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[20] *Eastland, supra* at 508-09.
[21] *Eastland, supra* at 503.
[22] *Id.*
[23] *Gravel, supra* at 616-17.
[24] *Gravel, supra*, at 622.
[25] *Brewster, supra*.
[26] *Id*. at 376.
[27] *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951).
[28] *Id*. at 377. *See also, Lake County Estates, Inc, supra*.

The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) has explained:

> Doctrinally, legislative immunity emanates from the well-spring of the federal common law; nevertheless, it is similar in scope and object to the immunity provided federal legislators under the Speech or Debate Clause. Indeed, when the Supreme Court initially recognized state legislative immunity as a constituent of the federal common law, it looked to its Speech or Debate Clause jurisprudence for guidance anent the contours of the doctrine. *See Tenney v. Brandhove*, 341 U.S. 367, 376-79, 71 S.Ct. 783, 788-90, 95 L.Ed. 1019 (1951). In later decisions, the Court acknowledged that the legislative immunity federal and state legislators enjoy are essentially coterminous. *See Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed.2d 641 (1980).[29]

Under this federal level of protection, state and local legislators, including their surrogates, have immunity from civil liability for their legislative acts.[30] The Eleventh Circuit has described this immunity as being "parallel" with that provided to Congress under the Speech or Debate Clause.[31] However, unlike the Speech or Debate Clause's level of evidentiary and testimonial privilege as it applies members of Congress against federal prosecution, a parallel level of evidentiary and testimonial privilege does not apply to state legislators facing federal criminal prosecutions. With respect to federal common law protection of state legislators, the Supreme Court "[drew] the line" at civil actions."[32] The Supreme Court said:

> Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.[33]

Part of the Supreme Court's rationale also rested on a recognition that federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch.[34]

The level of evidentiary and testimonial privilege which federal law extends to state legislators in civil actions has not been specifically addressed by the Eleventh Circuit. These privileges, however, have been treated at the trial court level as part and parcel of that which is necessary to craft the protection of legislative immunity in such a way as to effectuate its purposes as articulated by the U.S. Supreme Court, i.e., to shield legislators from inquiry into their legislative acts and the motivations for such acts, and to protect legislators from the burden of defending themselves for performing their legislative duties.[35] Several federal district courts from the Eleventh Circuit, as well as, other circuits have recognized that legislative immunity includes testimonial and evidentiary privilege.[36]

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[29] *Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009), *See also, Gravel, supra* at 618 (1972).
[30] *Lake Country Estates Inc, supra* at 405.
[31] *Bryant, supra* at 1303.
[32] *U.S. v. Gillock*, 445 U.S. 360, 373(1980)
[33] *Gillock, supra* at 373
[34] *Gillock, supra* at 370 citing Baker v. Carr, 369 U.S. 186, 210 (1962).
[35] *See, Eastland, supra; Tenney, supra; Lake County Estates, supra*; and *Dombrowski, supra*.
[36] *M Securities & Investments, Inc., v. Miami- Dade County*, 2001 WL 1685515 (S.D. Fla. 2001*); Dyas v. City of Fairhope*, 2009 WL 3151879 (S.D. Ala. 2009); *Marylanders for Fair Representation Inc. v. Schaefer*, 144 F.R.D. 292, 297-98 (D. Md. 1992); *Miles-Un-Ltd., Inc. v Town of New Shoreham*, R.I., 917 F.Supp. 91, 98 (D.N.H. 1996); *Johnson v. Metro. Gov't of Nashville & Davidson County*, 2009 WL 819491*; Knights of Columbus v. Town of Lexington*, 138 F. Supp. 136, 140 (D. Mass. 2001); *See also, Burnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996*); Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R 1989).

Lack of an Articulated Protection in Florida Law

The Florida Constitution has no express provision regarding legislative immunity.[37]

Article III, Section 1, of the Florida Constitution provides that "the legislative power of the state shall be vested in a legislature of the State of Florida . . ."

Article II, Section 3, the Separation of Powers Clause of the Florida Constitution, provides

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

There are two District Court of Appeal opinions where arguments were raised to have the court recognize legislative privilege as being inherent within the Separation of Powers Clause of the state constitution. In neither instance did the court decide the issue.

The more recent of these two cases was *City of Pompano Beach v. Swerdlow Lightspeed Management Company*.[38] This case involved the appeal of a trial court order for city commissioners to appear at a deposition in a civil action. The trial order, however, stated that the commissioners did not have to answer questions "touching the legislative process." The appellate court dismissed the challenge without prejudice finding it was premature because the commissioners had not been ordered to answer specific questions claimed to violate a privilege.[39]

The prior case was *Girardeau v. State.*[40] This case involved an appeal of a judgment of contempt against a state representative for refusal to answer questions before a grand jury. In *Girardeau* a representative was serving as chair of the House Committee on Corrections and as a member of an ad hoc subcommittee investigating the death of an inmate at a correctional facility. He and other members received information from inmates and correctional officers during the course of their investigation. A grand jury was also investigating the death. The grand jury issued a subpoena duces tecum for the representative to appear and bring tapes and documents in his possession relating to the inmate's death. The representative filed a motion to quash the subpoena which was denied before his appearance before the grand jury. The representative asserted legislative privilege and refused to answer questions of the grand jury. The trial court denied the claim of legislative privilege and when the representative continued in his refusal to answer questions, he was held in contempt and sentenced to 30 days in jail unless he testified.

On appeal to the First District Court of Appeal (1st DCA) , the state argued that even without an express Speech or Debate clause in the state constitution, the interplay between the separation of powers provision and the express legislative power to conduct investigations[41] protected such legislative acts. The state's position was that the separation of powers provision implies the ability of the legislature to refuse to disclose its findings "when necessary," and that the power to conduct legislative investigations would be severely diminished if it had to make forced disclosures to a grand jury. In its argument to the 1st DCA, the state pointed out the fundamental aspect of constitutional jurisprudence, that specific grants of power to one branch of government carry with them inherent powers which necessarily facilitate the exercise of express powers.[42] The state used as one example the fact that no express constitutional provision exists for the United States Congress to conduct

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[37] While Florida's Constitution of 1865 contained a Speech or Debate clause, the clause was omitted from the 1868, 1885, and the current Constitution.

[38] *City of Pompano Beach v. Swerdlow Lightspeed Management Company*, 942 So.2d 455 (4th DCA 2006).

[39] *City of Pompano Beach, supra* at 457.

[40] *Girardeau v. State*, 403 So.2d 513 (1st DCA, 1981)

[41] ART. III, SEC. 5, FLA. CONST.

[42] *Girardeau, supra* at 515 noting appellant's reference *to McCulloch v. Maryland*, 17 U.S. 316 (1819) and to *Amos v. Matthews*, 126 So. 308 (1930).

investigations, yet the U.S. Supreme Court has ruled that such power is inherent in congressional legislative power.[43] The state also noted that the United States Constitution contains no specific separation of powers clause, yet it's principles are firmly established.[44]

The 1st DCA did not find it necessary to determine the matter of an inherent legislative privilege:

> In reaching our decision we are not called upon and do not decide the scope or even the existence of a "legislative privilege" similar to that provided to members of Congress under the Speech or Debate clause. There is every reason to believe that all due deference will and should be extended by the judicial branch to any properly asserted legislative claim of privilege, and it is imperative that it be kept in mind that such claims of privilege are supported by substantial authority. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1931); (citation omitted). However, even assuming (without deciding) the existence of a legislative power to conduct confidential investigations and a generalized privilege on the part of a member to refuse to disclose evidence received in the course of such an investigation, any such claim of confidentiality cannot override or defeat the pressing need of the criminal justice system, of which the grand jury is an integral part, for evidence of a crime alleged to have been committed in the state.[45]

Notwithstanding the absence of reported opinions describing or admitting that the Florida Legislature inherently posses no less immunity protecting its lawmakers for their legitimate legislative acts than lawmakers of other states, multiple trial courts have quashed subpoenas directed to legislators[46] seeking compelled testimony for legislative activity. In addition, the Florida Supreme Court has issued an order prohibiting a circuit judge from enforcing a subpoena to compel testimony from a legislative assistant.[47]

Effect of the Bill

This bill includes legislative findings which in essence find a comparable level of legislative immunity, including testimonial and evidentiary privilege, for state legislators in state level proceedings by the executive and judicial branches of government, that exist for Congress in proceedings brought by the co-equal branches of government at the federal level.

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[43] *Id*. at 515 citing *Sinclair v. United States*, 279 U.S. 263 (1928) and *McGrain v. Daughtery*, 273 U.S. 135 (1926)..

[44] *Id*. at 515 citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[45] *Id*. at 516-17.

[46] *See Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, No.83-761 (Fla. 2d Cir. Ct. April 26, 1983), (quashing subpoenas duces tecum for deposition of two legislative employees challenging the constitutionality of Chapter 83-3, Laws of Florida, relating to motor fuel taxation); *Leon County Research and Development Authority v. State of Florida*, No. 88-3273 (Fla. 2d Cir. Ct. Feb. 20, 1989) (quashing subpoenas directed to staff and a former member to discover information before the Legislature when it passed the 1988-89 General Appropriations Act); *Sea Club Associates IV, Ltd. v. Interval Marketing Associates, Inc*., No. 84-1747-CA-01 (Fla. 12th Cir. Ct. July 31, 1987) (quashing a subpoena duces tecum to a member of the House staff seeking testimony concerning, among other things, the purpose and effect of a provision of Chapter 772, Florida Statutes); *Sanphil v. City of Pompano Beach*, No. 83-18017 (Fla. 17th Cir. Ct. Sept. 29, 1983) (quashing deposition subpoenas served on two legislators to determine information the Legislature had before it when it considered the subject bill); *Lanville Jvfengedoht v. Betty Pitt Burch and Frank Pitt*, No. 85-5671 CA-T (Fla. 18th Cir.Ct. Sept. 12, 1986) (quashing deposition subpoenas directed to two Senators concerning the intent or motivation of the Legislature); *State v. Billie*, No. 83-202 (Fla. 20th Cir. Ct. Oct. 29, 1984) (quashing subpoenas served on a staff director of a Senate committee where the Defendant wished to inquire into the source of information used in written and oral presentations to the legislative committee in the passage of the bill); and *Billie v. State of Florida*, No. 02-499-CA (Fla. 7th Cir. Ct. Feb. 7, 2003) (quashing a deposition subpoena of a state senator seeking the senator's intent or purpose of, or motives for sponsoring legislation).

[47] *The Florida Legislature et al. v. N. Sanders Sauls. Judge*, 614 So.2d 502 (Fla. 1993). Order issued in Case No. 80,834, February 2, 1993.

This bill makes legislative findings that:

- State legislators and their staff have broad privileges and immunities under the Florida Constitution arising from their service in the legislative branch of government, including a broad privilege and immunity against compelled testimony in forums outside the legislative body in which they serve, encompassing all legislative actions and functions and their mental impressions and intentions regarding legislative actions and functions.

- Such privileges and immunities exist to encourage and protect the uninhibited discharge of a legislator's duty for the public good and not a legislator's personal benefit.

- Such privileges and immunities are inherent in the legislative powers vested in the Florida Legislature by Art. III, s. 1, and implicit in the separation of powers under Art. II, s. 3, of the Florida Constitution.

This bill is a legislative articulation of privileges and immunities found by the legislature for its members and staff. The bill specifies that a member or former member of the legislature has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding against compelled testimony or the compelled production of any document or record in connection with any action taken or function performed in a legislative capacity.

The bill provides that a legislative staff member or former legislative staff member also has an absolute privilege in the same types of proceedings and to the same extent as legislators with regard to matters, documents or records involving duties performed within the scope of their legislative employment.

The bill also provides that such legislative privilege belongs to legislators and former legislators. A legislative staff member or former legislative staff member cannot waive the privilege unless the privilege has been waived, in writing, by the legislator or former legislator on whose behalf the legislative staff member was acting. In situations where the staff member was not acting on behalf of a specific legislator, the presiding officer of the chamber at the time of the staff's employment must provide the waiver. The bill requires that, in order to be sufficient, the waiver must be an explicit and unequivocal renunciation of the privilege or immunity.

The bill preserves in perpetuity the privilege of a deceased legislator or former legislator in the same status it was on the date of his or her death.

The bill specifically provides that it shall not affect or alter the right of access to public records which are open to personal inspection and copying pursuant to s. 24, Art. I of the State Constitution or s. 11.0431, F.S.

B. SECTION DIRECTORY:

Section 1. Creates s. 11.112, F.S., relating to legislative privileges and immunities

Section 2. Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Relationship Between Legislative Immunity and Separation of Powers

"The preservation of the inherent powers of the three branches of government-legislative, executive, and judicial-free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule."[48]

The United States Supreme Court said in *Brewster*:

> It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members.[49]

Three years later in *Eastland* the Court said:

> In our system 'the [Speech and Debate] clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.' *United States v. Johnson, supra*, 383 U.S., at 178, 86 S.Ct., at 754.

A comparison between the purposes served by the protections of the Speech or Debate Clause and the principals of separation of powers reveal some commonalities. It also directs attention to the fact

[48] *Daniels v. State Road Department*, 170 So.2d 846, 851 (Fla. 1964) *citing Simmons v. State*, 36 So.2d 207, 208 (3rd DCA 1948).
[49] *Brewster, supra* at 525.

that what is protected by legislative immunity is the people's right to representation in the democratic process. The United States Supreme Court has said, with respect to the purpose of the separation of powers:

> "Separation-of-powers principles are intended, in part, *to protect each branch of government from incursion by the others*. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers *protect the individual as well*." *Bond v. United States*, 564 U.S. ——, ——, 131 S.Ct. 2355, ——, 180 L.Ed.2d 269, 2011 WL 2369334, *8 (2011) (emphasis added).[50]

The relationship between legislative immunity and the separation of powers can be seen by examining their respective purposes both from the perspective of the government interaction with a co-equal branch of government on one hand, and from the perspective of government interaction with its people on the other hand. Contrast the above excerpt with the following excerpts from United States Supreme Court opinions explaining the purposes of the Speech or Debate Clause from these two different perspectives:

> . . . our cases make it clear that the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary,[51] (citations omitted)

> . . . the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of Speech or Debate to state legislators, recognized that "the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people...." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. *Lake Country Estates, supra*, 440 U.S. at 404-405, 99 S.Ct. at 1178-1179; *Tenney, supra*, 341 U.S. at 377, 71 S.Ct. at 788.[52]

The fact that the United States Supreme Court recognized that the Speech or Debate Clause serves an "additional function to reinforce the separation of powers" among co-equal branches of government,[53] and then extended similar protections to state legislatures in *Tenney*, suggests that legislative immunity protections at the state level would also reinforce the separation of powers among the co-equal branches of state government.

The extension of legislative immunity to state legislators by the United States Supreme Court was made without regard to whether the state constitutions themselves included a Speech or Debate clause.

> . . . the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the "public good."[54]

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[50] *Stern v. Marshall*, 131 S.Ct 2594 (2011).
[51] *Eastland, supra* at 503.
[52] *Spallone v. U.S.*, 493 U.S. 265 (1990).
[53] See *Gillock, supra*.
[54] *Lake Country Estates Inc. supra*, at 405 (1979).

The same historical rationale and "public good" which provided a basis for the United States Supreme Court to recognize legislative immunity protections to all state legislatures, exists for state courts to draw similar conclusions with respect to state level protection afforded inherently within their own respective state constitutions.[55]

Although the Florida Constitution does not contain a provision that specifically addresses immunity for "speech or debate" as is provided in the United States Constitution, the Speech or Debate Clause does not expressly mention all forms of legislative activity that is included within its protection. The United States Supreme Court has included inherent legislative powers within the scope of its protection because to do otherwise "would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'"[56]

Codifying Inherent Constitutional Power

Article III, Section 1 of the Florida Constitution vests the lawmaking power of the state to the Florida Legislature. Powers vested among the respective branches of government are provided in the Constitution and cannot be enlarged or reduced by general law.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Why Speech or Debate Clause Type Protections Were Extended to the States

Justice Frankfurter, writing for Supreme Court in *Tenney*, elaborated on the essential nature and the scope of protection that ought to be contained within the legislative immunity protected by the Speech or Debate Clause:

> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: 'Freedom of Speech or Debate in Congress shall not be impeached or questioned in any court or place out of Congress . . .
>
> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal 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 offense.' II Works of James Wilson (Andrews ed. 1896) 38. *See* the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv. . . .
>
> . . . I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making

[55] *See, Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason."). *See also, Lake Country Estates Inc., supra* at 405.

[56] *Eastland, supra* at 505 (Where the U.S. Supreme Court was discussing the integral nature of committee investigative and subpoena power to performing legislative functions assigned by Congress).

of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.[57]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

[57] *Tenney*, *supra* at 372-74.