

Legislative Immunity

Congressional Members are “immune from liability for their actions within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would be illegal.” (emphasis added) (Doe v. McMillan, 412 U.S. 306, 3112-13 (1973))

The Supreme Court has held that the following are within the legislative sphere:

- speaking or acting on the House or Senate floor (U.S. v. Johnson, 383 U.S. 166, 184-85 (1966); Gravel v. U.S., 408 U.S. 606, 616 (1972))
- introducing and voting on bills and resolutions (Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (holding that the Clause protects “resolutions offered ... and ... the act of voting ...”);
- preparing and submitting committee reports (McMillan, 412 U.S. at 311; Kilbourn, 103 U.S. at 204);
- speaking or acting at committee meetings and hearings (See McMillan, 412 U.S. at 311; see also, Gravel, 408 U.S. at 628-29. In addition, some lower federal courts have held that the Clause bars the use of evidence of a Member’s committee membership. Compare United States v. Swindall, 971 F.2d 1531, 1543 (11th Cir. 1991), rehearing denied, 980 F.2d 1449 (11th Cir. 1992), with United States v. McDade, 28 F.3d 283, 291 (3rd Cir. 1994), cert. denied, 514 U.S. 1003 (1995));
- conducting official investigations and issuing subpoenas (See Eastland v. US Servicemen’s Fund, 421 U.S. 481, 507 (1975); Tenney v. Brandhove, 341 U.S. 367, 377 (1951)(refusing to examine motives of state legislator in summoning witness to hearing)); and
- engaging in fact-finding and information-gathering for legislative purposes (Gov’t of V.I. v. Lee, 775 F.2d 514, 521 (3rd Cir. 1985); Miller v. Transamerican Press, Inc., 709 F.2d 524, 530 (9th Cir. 1983); McSurely v. McClellan, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976).

Conversely, actions that have been viewed as not “integral” to the legislative process and therefore not necessarily protected by immunity:

- writing constituent newsletters or issuing press releases (Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979));
- privately publishing a book (Gravel, 408 U.S. at 625-26.);
- distributing official legislative reports outside the legislative sphere (McMillan, 412 U.S. at 315-16);
- engaging in political activities (U.S. v. Brewster, 408 U.S. 501, 512 (1972));
- making appointments for, or contacting the executive branch on behalf of, a constituent (Id.);

- outside of the legislative process, promising to perform a future legislative act (U.S. v. Helstoski, 442 U.S. 477, 489 (1979)); and,
- accepting a bribe. (Brewster, 408 U.S. at 525)