# LEGISLATIVE IMMUNITY: LAW AND PRACTICE

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**CHAPTER 4**

# VITA

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# LEGISLATIVE IMMUNITY: LAW AND PRACTICE

## I. INTRODUCTION

Legislative immunity is a trap for the unwary. Sure, the legislative immunity doctrine is simple enough to understand. It's enshrined in both the United States Constitution and the Texas Constitution, *see* U.S. CONST. art. I, § 6; TEX. CONST. art. III, § 21, and grants those who serve a legislative function with *absolute immunity* to both suit and liability. *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998); *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001). The doctrine also includes what has been variously described as the "legislative privilege" or "legislative testimonial privilege." *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 615–16 (1972) (holding that United States senators may not be made to testify about events in subcommittee); *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001) (applying federal common law to establish state "legislative testimonial privilege"). But, in practice, the legislative immunity doctrine is rarely so simple.

The doctrine's application and scope often hinges on fine distinctions between legislative versus "administrative" acts. *Bogan*, 523 U.S. at 54–55. The wrong parties often invoke the doctrine, leaving their clients potentially exposed to discovery. *See, e.g.*, *Hobart v. City of Stafford*, No. 09-cv-3332, 2010 WL 3419660, at *3 (S.D. Tex. Aug. 30, 2010). Then there are questions about the doctrine's scope, and whether the privileges it affords can be pierced. *See, e.g.*, *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 763 (S.D. Tex. 2011) (collecting cases); *In re Perry*, 60 S.W.3d at 860.

The resolution of these entirely collateral issues can have serious impacts on the merits of a case. For those suing governmental defendants, the failure to understand the law and practice of legislative immunity can result in dismissal with prejudice, or the deprivation of evidence necessary to establish the elements of a plaintiff's causes of action. For those representing governmental parties, failure to understand the law and practice of legislative immunity and privilege, can lead to disruption of governmental functions, the client's false expectations as to the burdens of discovery in a particular suit, waiver of the legislative privilege, undue pressure to settle, and exposure to contempt sanctions.

The point of this article is to provide some guidance on the basics of the legislative immunity doctrine, and how lawyers may effectively negotiate this often-tricky area of law to their clients' advantage. This article will first address absolute immunity from suit, and its confines, and then the legislative testimonial privilege.

## II. FEDERAL OR STATE LAW

Legislative immunity and legislative privilege exist under both federal and state law. *See, e.g.*, *Bogan*, 523 U.S. at 49–51 (explaining origins of the doctrine); *In re Perry*, 60 S.W.3d at 86 (citing *Bogan*, 523 U.S. 44). Whether federal or state immunity law applies depends largely on the forum, and the basis for jurisdiction.

In federal court, federal law controls the issue of legislative immunity and privilege when the case arises under federal law. *See, e.g.*, *Bogan*, 523 U.S. at 49–51; *see also Martinez v. State of Cal.*, 444 U.S. 277, 284 n.8 (1980) (holding that state immunity law is inapplicable in adjudicating federal rights). State immunity law may apply in federal court, however, in that rare case involving a local government and federal diversity jurisdiction. *See, e.g.*, *Meecorp Capital Markets, LLC v. Tex-Wave Indus., LP*, No. 06-cv-148, 2006 WL 2883054, at *4–5 (S.D. Tex. Oct. 5, 2006). In state court, both federal and state immunity law applies. *See, e.g.*, *In re Perry*, 60 S.W.3d at 859–61 (noting that legislative immunity derives from both the federal and state constitutions).

That said, there are presently few material differences between the federal and state legislative immunity doctrines. In Texas, federal and state legislative immunity doctrines are largely in lockstep. State cases routinely cite and rely on federal cases to explain or establish the confines of the state legislative immunity doctrine. *See, e.g.*, *id.* Accordingly, the article discusses the federal and state doctrines jointly, except where state law is or may be different.

## III. LEGISLATIVE IMMUNITY FROM SUIT.

In its broadest application, legislative immunity is an absolute bar to suit. *Bogan*, 523 U.S. at 48. When considering a party's assertion of legislative immunity, litigants should pay careful attention to the following issues: (1) who may assert legislative immunity; (2) when the defense applies; (3) how it may be asserted; and (4) whether interlocutory decisions related to the defense are reviewable on appeal.

### A. Only a "Legislator" May Assert Immunity.

Like other immunity defenses, legislative immunity belongs to the legislator individually, and not the unit of government the legislator serves. *See Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174–75 (5th Cir. 1991) (holding that officials were entitled to legislative immunity only in their *individual* capacities); *Hobart*, 2010 WL 3419660, at *3; *cf.*, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (holding that city was not entitled to qualified immunity because qualified immunity defense belonged only to the accused public officials themselves); *Hays County v. Hays County Water*

*Planning P'ship*, 106 S.W.3d 349, 359 (Tex. App.—Austin 2003, no pet.) (holding that suit against the county, and not the county commissioners, did not give rise to legislative immunity).

This does not mean, however, that only legislators may assert legislative immunity. Executive and judicial branch members, and legislative staff members may all be entitled to assert legislative immunity, so long as these officials perform "legislative functions." *See, e.g.*, *Bogan*, 523 U.S. at 55 (holding mayor was entitled to legislative immunity where actions at issue were integral steps in the legislative process); *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980) (holding that judges were immune from suit under the legislative immunity doctrine for their role in promulgating rules of conduct); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) (legislative staff members); *In re Perry*, 60 S.W.3d at 858 (members of a state redistricting board and their staff).

### B. Legislative Immunity Applies Only to "Legislative Acts."

To claim legislative immunity, the party asserting the immunity has the burden of showing the acts are "legislative in nature." *See, e.g.*, *Bogan*, 523 U.S. at 54–55; *Weingarten Realty Investors v. Silvia*, 376 Fed. Appx. 408, 410 (5th Cir. 2010). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54. When assessing whether an act is "legislative," the reviewing court's analysis should be "stripped of all considerations of intent and motive[.]" *Id.* at 55. Courts instead look at whether the accused actions bear "the hallmarks of traditional legislation," such as (1) whether the actions were accompanied by a vote or debate, (2) whether the official was acting "in a field where legislators traditionally have power to act," and (3) whether the accused actions reflect discretionary policy making decisions. *Id.*; *accord In re Perry*, 60 S.W.3d at 860–61. On the other hand, actions by officials that are merely "administrative"—that is, individualized decisions based upon particular facts—do not entitle officials to legislative immunity. *See, e.g., Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir. 2000); *Bowles v. Clipp*, 920 S.W.2d 752, 758 (Tex. App.—Dallas 1996, writ denied).

Under this framework, determinations of whether acts are legislative or administrative are highly fact intensive, and do not often lend themselves to categorical rules. For example, an executive's use of a veto is widely accepted as a legislative act. *See Bogan*, 523 U.S. at 55 (citing *Smiley v. Holm*, 285 U.S. 355, 372–73, 52 S. Ct. 397, 401–02 (1932)). Accordingly, in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), the Fifth Circuit held that legislative immunity protected a mayor's veto of a rezoning ordinance. *Id.* at 1193–94. Yet, in *Bryan*, the Fifth Circuit held that a mayor's veto was not a legislative act for purposes of legislative immunity. 213 F.3d at 273–74. The distinction between the two cases, hinged on the fact that the veto in *Bryan* was not "prospective" and did not "affect[] the entire community," but was instead limited to one particular person's request for a permit. *Id.*

Accordingly, *as a practical matter*, whether particular legislative actions amount to "legislative acts" for immunity purposes generally hinges on the legislative action's impact, as in *Bryan*. The broader the impact on the public, the higher the likelihood the court will conclude the act was "legislative." *See, e.g.*, *Bogan*, 523 U.S. 54–56 (holding council members' passage of, and mayor's signing, ordinance cutting the city budget and eliminating the plaintiff's position was protected by legislative immunity); *Hernandez*, 643 F.2d at 1193–94 (zoning law); *Rice v. Williams*, 06-CV-341, 2007 WL 2064695, at *15–16 (E.D. Tex. July 17, 2007) (holding that canceling elections and dividing political subdivision up into precincts was protected by legislative immunity); *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.*, 917 F. Supp. 91, 99 (D.N.H. 1996) (holding legislative immunity protected town council members' passage of town ordinance restricting moped use); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 (Tex. 2004) (holding that city councilperson's support for moratorium on apartments gave rise to legislative immunity to plaintiff's breach of fiduciary duty claim); *see also In re Perry*, 60 S.W.3d at 860–61 (redistricting committee). Conversely, the narrower the impact on the public, the higher the likelihood a court will conclude the act was administrative. *See, e.g., Hughes v. Tarrant Cnty.*, 948 F.2d 918 (5th Cir. 1991) (holding that county's refusal to reimburse an employee for his attorney's fees was not a legislative act because it affected only that employee); *Lopez v. Trevino*, 2 S.W.3d 472, 473 (Tex. App.—San Antonio 1999, pet. dism'd w.o.j.) (holding that legislators' promise to pay plaintiff a retirement plan was not a legislative act for purposes of legislative immunity).

### C. Legislative Immunity Should Be Raised at the Earliest Possible Point.

Because the point of *any* immunity defense is to avoid not only liability, but also trial and pre-trial discovery, *see, e.g., Backe v. LeBlanc*, 691 F.3d 645, 648–49 (5th Cir. 2012), legislative immunity should be raised at the earliest possible point. In federal court, this means raising the issue in a motion to dismiss under Federal Rule of Civil Procedure 12(b). *See, e.g.*, *Wilson v. Marshall Indep. Sch. Dist.*, No. 09-CV-273, 2011 WL 1431410, at 3 (E.D. Tex. Feb. 1, 2011); *see also United States v. Texas Tech Univ.*, 171 F.3d 279,

285 (5th Cir. 1999) (reversing district court's denial of motion to dismiss on Eleventh Amendment immunity grounds, and remanding for dismissal).

That said, lawyers should consult local practice, in determining how best to assert the defense in a particular case. For example, some courts in the Northern District of Texas have held that cases cannot be dismissed on immunity grounds until the immunity defense is asserted in an answer. *See, e.g.*, *McKay v. Dallas Indep. Sch. Dist.*, No. 06-CV-2325, 2007 WL 2668007, at 9 (N.D. Tex. Sept. 6, 2007) (Lindsay, J.); *Johnson v. Anderson*, 03-CV-1355, 2004 WL 1908212 (N.D. Tex. Aug. 25, 2004) (Means, J.). In such cases, parties asserting legislative immunity should consider filing a Rule 12(b)(6) motion on legislative immunity grounds, and then filing their answer immediately *after* the motion is filed. This will preserve the Rule 12(b)(6) motion while still asserting the defense in a pleading as these courts may require. *See, e.g.*, FED. R. CIV. P. 12(b) (providing that Rule 12(b)(6) motions "must be made *before* pleading" (emphasis added)). If filed in reverse order, the motion becomes one for judgment on the pleadings, as opposed to a motion to dismiss. *See, e.g.*, *Puckett v. United States*, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999).

In state court, legislative immunity is raised through a plea to the jurisdiction. *See, e.g.*, *Ware v. Miller*, 82 S.W.3d 795, 804–05 (Tex. App.—Amarillo 2002, pet. denied). Unlike federal motions to dismiss, there is no deadline to file a plea to the jurisdiction. Moreover, unlike in federal court, state courts can conduct evidentiary hearings on pleas to the jurisdiction, and then rule on the motion based on evidence presented at the hearing. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Accordingly, state courts may offer a quicker remedy for officials asserting legislative immunity in cases where fact issues may predominate.

### D. Decisions Regarding Legislative Immunity Are Immediately Appealable Under the Collateral Order Doctrine.

If a trial court denies a public official's motion or plea regarding legislative immunity, such an order is immediately appealable. Under federal law, interlocutory decisions denying an official legislative immunity are immediately appealable under the collateral order doctrine. Although the Fifth Circuit has not considered this issue within the context of legislative immunity, every circuit court that has considered the issue has held that such orders are immediately appealable under the collateral order doctrine. *Youngblood v. DeWeese*, 352 F.3d 836, 838 (3d Cir. 2003); *Maitland v. Univ. of Minnesota*, 260 F.3d 959, 962 (8th Cir. 2001); *Kamplain v. Curry Cnty. Bd. of Comm'rs*, 159 F.3d 1248, 1250 (10th Cir. 1998); *Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1484 (11th Cir. 1991); *Krohn v. United States*, 742 F.2d 24, 27 (1st Cir. 1984); *McSurely v. McClellan*, 553 F.2d 1277, 1284 n.18 (D.C. Cir. 1976). The Fifth Circuit has reached a similar conclusion, however, within the context of *judicial* immunity. *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993) ("The denial of a motion to dismiss raising a colorable claim of immunity is appealable under the collateral order exception to the finality requirement of 28 U.S.C. § 1291.").

Texas courts, on the other hand, have definitively held that orders denying a plea to the jurisdiction on legislative immunity grounds are immediately appealable. *Ware*, 82 S.W.3d at 804–05; *Hays Cnty.*, 69 S.W.3d at 260–61. So there are few barriers for appealing an order denying a defense of legislative immunity.

## IV. LEGISLATIVE PRIVILEGE.

Legislative privilege is governed by all of the same legal theory as legislative immunity from suit. So, like immunity from suit (and most other privileges), only the privilege holder can invoke the legislative privilege. *See, e.g.*, *Hobart*, 2010 WL 3419660, at *3. The legislative privilege has the same scope as immunity from suit, and therefore applies to public servants outside the legislative branch who serve a legislative function, and to legislative staff. *See, e.g.*, *A Helping Hand*, 295 F. Supp. 2d at 591. And, like immunity from suit, the legislative privilege's application turns on whether activities about which discovery is sought were "legislative in nature." *See, e.g.*, *In re Perry*, 60 S.W.3d at 861–62.

There are, however, significant differences between the two doctrines *in practice*. First, unlike legislative immunity from suit, legislative privilege is not always absolute; depending on who is asserting the privilege, and the law that applies, a legislator may have only a *qualified* discovery privilege. *See, e.g.*, *Hobart*, 784 F. Supp. 2d at 763 (collecting cases). Second, like all privileges, the legislative privilege is subject to waiver. *See, e.g.*, *A Helping Hand*, 295 F. Supp. 2d at 591; *In re Perry*, 60 S.W.3d at 862. Third, unlike issues of immunity from suit, issues of legislative privilege probably are not immediately appealable under the collateral order doctrine, but probably should be addressed by mandamus review. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 104 (2009); *In re Perry*, 60 S.W.3d at 861–62.

### A. Nature of the Privilege: Absolute v. Qualified.

The nature of the legislative privilege depends on the identity of the privilege holder and the law to be applied. If the privilege holder is a federal official with a legislative role, the federal Speech and Debate Clause provides an *absolute privilege* from discovery. *See, e.g.*, *United States v. Helstoski*, 442 U.S. 477, 488–89

(1979); *Gravel v. United States*, 408 U.S. 606, 617 (1972). For state and local legislators, however, federal common law—according to most courts that have addressed the issue—provides only a qualified discovery privilege in suits involving federal claims. *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297–98 (D. Md. 1992). And, although the nature of the legislator's privilege under state law is unclear, arguments could be made that the state-law privilege is as expansive as the federal one since the Texas Speech and Debate Clause has the same purpose and function as the federal one. *See In re Perry*, 60 S.W.3d at 859-60.

1. Federal legislators have an absolute nondisclosure privilege.

Article I, § 6 forbids the questioning of federal legislators. The Federal Speech and Debate Clause has its roots "'in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and was 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Bogan*, 523 U.S. at 49 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786 (1951)). So, aside from providing immunity from liability, the federal Speech and Debate Clause also provides "an evidentiary privilege 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.'" *Hobart*, 784 F. Supp. 2d at 764 (quoting *United States v. Gillock*, 445 U.S. 360, 366–67 (1980)). There are no interests that, placed in the balance, can override a federal legislator's privilege: "once it is determined that the [Congressional] Members are acting within the legitimate legislative sphere, the Speech or Debate Clause is *an absolute bar* to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975).

2. Under federal common law, the privilege for state and local legislators is qualified (probably).

Although federal common law provides state and local legislators with absolute immunity from suit, there is no absolute immunity from discovery. The full protections of the federal Speech and Debate Clause "do[] not extend to a state legislator." *Cole v. Gray*, 638 F.2d 804, 810 (5th Cir.1981). That said, the Supreme Court has extended to state and local legislators a *qualified* privilege under federal common law. *See, e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268, 97 S. Ct. 555, 50 (1977) (noting that judicial inquiries into the legislative acts of local legislators "frequently will be barred by privilege"); *Hobart*, 784 F. Supp. 2d at 764–65; *Marylanders for Fair Representation*, 144 F.R.D. at 297–98. In other words, even legislators who establish their entitlement to the legislative privilege may be subjected to discovery, including deposition. *Id*.; *Hobart*, 784 F. Supp. 2d at 763. A few courts have held that even state or local legislators have an absolute privilege. *See Hobart*, 784 F. Supp. 2d at 764 (collecting cases). But these courts are in the minority. The Fifth Circuit has yet to decide whether state and local legislators have a qualified or absolute privilege. *See id.*

Even under the qualified privilege, however, discovery into a state or local legislator's legislative activities is not merely for the asking. To the contrary, courts will not pierce the state legislator's qualified privilege except under "extraordinary instances." *Arlington Heights*, 429 U.S. at 268. To establish these "extraordinary instances," a party must show that all other available evidentiary sources have been exhausted, and that the party's interest in asserting federal rights outweighs the legislator's need for confidentiality and the potential harm to the state legislative process. *See id.*; *Hobart*, 748 F. Supp. 2d at 764.

Applying these principles, the court in *Hobart* held that the plaintiffs were entitled to pierce the qualified privilege of, and to depose, several city council members in connection with their § 1983 claims. *Id*. at 764–66. The plaintiffs in *Hobart* had sued the city after city police shot and killed the plaintiffs' son. *Id*. at 749. To state a claim against the city under § 1983, the plaintiffs alleged that the police chief was the city's final policy maker as to police training, and that the chief had failed to properly train his officers on the proper use of force. *Id*. at 751–52. The plaintiffs then sought discovery from the city counsel members and mayor, including their depositions, so plaintiffs could prove that the police chief, and not the city council, was the final policy maker. *Id*. at 763. The city council members then moved to quash the deposition notices, arguing that they were "barred by absolute legislative privilege." *Id*.

In ruling on the city legislators' motion, the *Hobart* court rejected their assertion of absolute immunity, and instead held that the legislators were entitled to a qualified privilege at most. *Id*. at 763–64. In deciding whether to pierce the legislators' qualified privilege, the court weighed the various factors. The court found that federal interests in piercing the privilege were strong since the plaintiffs were seeking to vindicate their civil rights. *Id*. at 765. The court also observed that the information the plaintiffs sought from the city legislators' was relevant to plaintiffs' claims against the city, since plaintiffs were required to prove the police chief, and not the city council, was the final policy maker. The court further found that there was no clear alternative method for plaintiffs to obtain the evidence they needed since they had already deposed the police chief, who gave contested testimony. *Id*. Looking at the potential for intrusion, the court saw none since the plaintiffs sought evidence on a very

narrow topic that did not require plaintiffs to probe the legislators' thought processes or motives. *Id*. The court therefore pieced the legislators' privilege subject to careful limits on the number of depositions the plaintiffs could take. *Id*.; *accord Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997); *cf. Marylanders for Fair Representation*, 144 F.R.D. at 299 (holding that all discovery into the reasons state legislators approved a redistricting map was "entirely barred" under the legislators' legislative privilege).

Compare Hobart with the court's conclusion in *Elijah Group, Inc. v. City of Leon Valley, Texas*, No. 08-CV-0907, 2009 WL 774427 (W.D. Tex. Mar. 24, 2009). There the district court granted a motion for protective order to prevent a plaintiff from seeking discovery of the subjective knowledge intent of several city council members in approving a zoning ordinance in part because the plaintiff could "rely on the official minutes, transcripts and comments made during the meetings[.]" *Id*. at *1. In other words, if alternative sources of evidence exist, the plaintiff must exhaust those sources before seeking to pierce the legislative privilege.

3. The state-law privilege should be as absolute for state legislators as the federal privilege is for federal legislators since the Texas Speech and Debate Clause has the same purpose as the federal one.

Whether a state or local legislator has an absolute privilege under the state Speech and Debate Clause is unclear. The Texas Supreme Court expressly refused to reach this issue in *In re Perry*, and seemed to indicate that a qualified privilege may apply. *Id*. at 861–62. But *In re Perry* may also provide good reasons to argue that the legislative privilege is as absolute under state law for state legislators as the federal privilege for federal legislators.

In *In re Perry*, the court noted that the Texas and federal Speech and Debate clauses shared the same purpose and "embody fundamental separation-of-powers tenets." *Id.* at 859. The court then held that "[b]ecause the immunity doctrine serves important public purposes, courts have affirmed that the doctrine generally shields legislative actors not only from liability, *but also from being required to testify* about their legislative activities." *Id*. at 860 (emphasis added).

The same concerns for separation of powers and intruding into the legislative sphere raised in *In re Perry* are the same concerns that drive the Supreme Court's broad interpretation of the federal Speech and Debate Clause, and its absolute application. *Eastland*, 421 U.S. at 501. If the two clauses share the same purpose, there is no principled reason to apply them in two different ways. State law should therefore provide its own absolute privilege.

Although the *In re Perry* court discussed the qualified privilege as being in line with *Arlington Heights*, *id*. at 861–62, it is important to remember that federal rights were at issue in *In re Perry* (equal protection claims), thus requiring the court to discuss federal and state law issues. *Id*. at 861. And it is within the court's discussion of the plaintiff's federal claims, and federal common law, that it alludes to a possible qualified privilege—under federal common law. So *In re Perry* should not be read as an opinion that the legislative privilege is qualified and not absolute under state law. Arguably, then, the state privilege is just as broad and absolute for state legislators as the federal privilege is for federal legislators.

### B. Legislative Privilege May Be Waived.

Like any privilege, legislative privilege can be waived, though not easily. Waiver of the legislative privilege exists "'only after explicit and unequivocal renunciations of the protection,'" *A Helping Hand.*, 295 F. Supp. 2d at 591 (quoting *Helstoski*, 442 U.S. 477, 491). In other words, waiver will not be implied. *See id*. Furthermore, simply speaking to the press does not amount to an explicit and unequivocal waiver of the privilege. *Id.* Indeed, even "meetings with constituents and interest groups are ordinary legislative business and fall within the scope of the immunity." *Id.* (citing *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980)).

*Hesltoski* is an illustrative case for how difficult it is to show waiver. There a former congressional representative was charged with conspiracy. During grand jury proceedings, the representative made for several grand jury appearances, voluntarily produced legislative documents to the grand jury, and provided grand jury testimony about his legislative activities. *Id*. at 492. The Court refused, however, to find that the representative explicitly and unequivocally waived his legislative privilege despite his conduct. *Id*.; *see also A Helping Hand*, 295 F. Supp. 2d at 591 (holding there was no explicit or unequivocal waiver of the legislative privilege despite the legislator's statements to the press about his legislative activities and his meetings with constituents).

### C. Obtaining Appellate Review

Unlike decisions as to absolute immunity to suit, interlocutory decisions regarding legislative privilege are not reviewable by immediate appeal under the collateral order doctrine or under state law. In *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) the court held that an order denying members of a military selection board a statutory privilege from discovery was appealable under the collateral order doctrine. *Id*. at 1174.

In reaching its holding, the court in *In re England* relied on *United States v. Phillip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003), which held that orders requiring the disclosure of attorney-client communications are appealable under the collateral order doctrine. *Id*. at 617. But *Phillip Morris* was recently abrogated by the Court in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 604 (2009), where the Supreme Court held that attorney-client privilege issues are not appealable under the collateral order doctrine. *See also Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43 (5th Cir. 1993) (holding order piercing attorney-client privilege is not immediately appealable under the collateral order doctrine). Although none of these cases address legislative privilege directly, the logic of the Court's decision in *Mohawk* suggests that the collateral order doctrine will not apply to interlocutory decisions denying the legislative privilege where legislative immunity from suit is not also an issue.

That said, the Court's decision in *Will v. Hallock*, 546 U.S. 345, 352, 126 S. Ct. 952, 959 may provide some additional authority for why appeal under the collateral order doctrine may apply to issues of legislative privilege. In *Will*, the Court held that a customs agent's appeal of an order denying a motion for judgment on the pleadings was not appealable under the collateral order doctrine. In reaching its conclusion, the Court noted that orders are appealable under the collateral order doctrine only if they concern "compelling public ends," such as "the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not clearly established." *Id*. at 352 (internal quotations omitted).

Piercing a legislator’s legislative privilege arguably threatens governmental functions, and risks inhibiting legislators from exercising discretion in conducting legislative activities. Indeed, the legislative privilege (and immunity) doctrines exist to prevent those very ends. *Bogan*, 523 U.S. at 49–50. *Will* therefore indicates that collateral order doctrine may apply. On the other hand, in cases where the legislators themselves are not parties (and immunity from suit is not at issue), there is no “full trial threatened" against the legislators themselves, which may make *Will* distinguishable. The safest course would be to do as the military board members did in *In re England*: file a notice of interlocutory appeal *and* a mandamus petition. *See id.* at 1174.

Under *In re Perry*, mandamus appears to be the appellate remedy of choice in state court. The court had no problem concluding that mandamus relief existed to remedy an order requiring the production of privileged information. *Id*. at 862.

## V. CONCLUSION

Legislative immunity lurks in the shadows of nearly all challenges to government action, and can come to light almost without notice. As shown above, a deadly force case that, at first blush, turns solely on an official’s use of *executive* power, can quickly change into a case that turns on the government’s use (or abrogation) of *legislative* power, suddenly thrusting issues of legislative immunity to the forefront of the case—issues that, depending on their outcome, may dispose of the case. After all, the court made clear in *Hobart* that had plaintiffs not been allowed to depose the councilmembers they would have had *no* evidence to support their claim against the city. In other words, it was the favorable outcome of the purely collateral legislative privilege issue that saved the plaintiffs’ claim from dismissal and summary judgment. Lawyers who sue or represent governments and officials therefore do their clients a grave disservice if they fail to understand the law and practice of legislative immunity.