Touro Law Review

Volume 16 | Number 2 Article 44

2000

Speech and Debate

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SPEECH AND DEBATE CLAUSE

U.S. Const. art. I, § 6, cl. 1:

". . . [f]or any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

N.Y. Const. art. III, § 11:

"For any speech or debate in either house of the legislature, the members shall not be questioned in any other place."

SUPREME COURT
NEW YORK COUNTY

Campaign for Fiscal Equity v. State[1]
(decided February 8, 1999, affirmed October 28, 1999)

In an action challenging the adequacy of state funding of New York City public schools, defendant, the State of New York, entered a motion for a protective order barring plaintiff, the Campaign for Fiscal Equity,[2] from seeking certain disclosures relating to the State's computer modeling system for the funding of public schools.[3] A Judicial Hearing Officer denied the motion and the State sought review of this decision, asserting that the information sought was protected from disclosure by the Speech or

[1] 179 Misc. 2d 907, 687 N.Y.S.2d 227 (Sup. Ct. NY County 1999), *aff'd* 697 N.Y.S.2d 40, 1999 N.Y. Slip Op. 08873 (App. Div. 1st Dep't 1999).

[2] The Campaign for Fiscal Equity is a not-for-profit corporation comprising a coalition of community school boards, individual citizens and parent advocacy organizations. *See* Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 312, 655 N.E.2d 661, 663, 631 N.Y.S.2d 565, 567 (1995).

[3] *Campaign for Fiscal Equity,* 179 Misc. 2d at 909-10, 687 N.Y.S.2d at 229-30.

Debate Clause of the New York State Constitution[4] as well as by common law legislative immunity.[5] Upon review, the Supreme Court, New York County, reversed the Judicial Hearing Officer's decision and granted the protective order.[6] The basis of its holding was that the Speech or Debate Clause of the State Constitution barred disclosure of the deponent's (an expert witness for the defendant State) contacts with state legislatures and their staff, and that common law legislative immunity[7] barred the corresponding contacts with executive officials and their staff.[8] In so holding, the court reasoned that the deponent's involvement in the formulation of budgetary legislation constituted an integral legislative function which the clause placed beyond judicial scrutiny to secure the independence of the legislative branch.[9] Additionally, the court concluded that the executive branch officials who were involved in the preparation of budget proposals were engaged in legislative activity within the scope of common law legislative immunity,[10] and that the deponent was entitled to assert the privilege on their behalf.[11]

Plaintiff organization brought suit against the State of New York challenging the adequacy of state funding of New York City public

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[4] N.Y. CONST. art. III, § 11. This section provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." *Id.*

[5] *Campaign for Fiscal Equity*, 179 Misc. 2d at 910, 687 N.Y.S.2d at 230.

[6] *Id.* at 914, 687 N.Y.S.2d at 232.

[7] The doctrine of common law legislative immunity was first recognized by the United States Supreme Court in Tenney v. Brandhove, 341 U.S. 367 (1951). Common law legislative immunity extends the protection which the Speech or Debate Clause of the Federal Constitution confers upon members of the United States Congress to state and local legislators and government officials acting in their legislative capacities. *See* 2BD Assocs. v. County Comm'rs., 896 F. Supp. 528 (D. Md. 1995) (finding that drafting and passage of amendment to county zoning laws were legislative acts entitling county commissioners to immunity), *later proceeding*, 896 F. Supp. 518 (D. Md. 1995), *later proceeding vacated and remanded*, 89 F.3d 830 (4th Cir. 1996), *later proceeding aff'd*, 162 F.3d 1158 (4th Cir. 1998).

[8] *Campaign for Fiscal Equity*, 179 Misc. 2d at 914, 687 N.Y.S.2d at 232.

[9] *Id.* at 911-12, 687 N.Y.S.2d at 230.

[10] *Id.* at 913. 687 N.Y.S.2d at 231.

[11] *Id.* at 913, 687 N.Y.S.2d at 232.

schools.[12] The State retained Ruth Henahan, a former employee of the State Education Department, as an expert witness in the action.[13] During Ms. Henahan's approximately twenty year tenure with the State Education Department, her principal responsibilities were the creation and implementation of the state aid modeling system, a computer program used to predict the impact of changes in the state's public school funding formulae on individual school districts.[14] The state aid modeling system was used by personnel from the State Education Department and Division of the Budget, as well as members of both houses of the state legislature and their staffs.[15]

During Ms. Henahan's deposition, the plaintiff's counsel sought to elicit information regarding the deponent's contacts with various legislative and executive personnel and documents provided to these persons concerning the state aid modeling system.[16] Ms. Henahan's counsel, an Assistant Attorney General, asserted a legislative privilege,[17] claiming that the information sought pertained to the drafting of budget legislation, and instructed the client not to respond.[18] The State subsequently filed a motion for a protective order which was denied by the Judicial Hearing Officer in an order dated December 28, 1998.[19] The State sought review of this order in Supreme Court, New York County, arguing that the information sought was protected by the Speech or Debate Clause

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[12] *Id.* at 909, 687 N.Y.S.2d at 229.

[13] *Campaign for Fiscal Equity*, 179 Misc. 2d at 909, 687 N.Y.S.2d at 229.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 910, 687 N.Y.S.2d at 910.

[17] A legislative privilege is a privilege invoked pursuant to either constitutional or common law legislative immunity. *See e.g.* Campaign for Fiscal Equity v. State, 697 N.Y.S.2d 40, 41, 1999 N.Y. Slip Op. 08873 (App. Div. 1st Dep't 1999).

[18] Campaign for Fiscal Equity v. State, 179 Misc. 2d at 910, 687 N.Y.S.2d at 229.

[19] *Id.* at 909-10, 687 N.Y.S.2d at 229-30.

of the New York State Constitution[20] and by common law legislative immunity.[21]

The court first addressed the immunity provided by the Speech or Debate Clause of the New York State Constitution and its applicability to Ms. Henahan's contacts with state legislative personnel.[22] The language of the Speech or Debate Clause of the New York State Constitution[23] essentially tracks a comparable provision of the Federal Constitution.[24] The New York Court of Appeals first considered the scope of the immunity granted by the New York State Constitution's Speech or Debate Clause in *People v. Ohrenstein*.[25] The *Ohrenstein* court concluded that the clause, "was intended to provide at least as much protection as the immunity granted by the comparable provision of the Federal Constitution."[26] Consequently, this court found that cases interpreting the federal Speech or Debate Clause constituted persuasive authority and proceeded to cite a number of federal cases as aids to interpreting the analogous New York State provision.[27]

In *Eastland v. United States Servicemen's Fund*,[28] the United States Supreme Court found that the federal Speech or Debate Clause's fundamental purpose was to ensure that legislatures

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[20] *See supra* note 4 and accompanying text..

[21] *Campaign for Fiscal Equity*, 179 Misc. 2d at 910-11, 687 N.Y.S.2d at 230. *See also supra* note 7 and accompanying text.

[22] *Id.* at 230, 179 Misc. 2d at 911.

[23] *See supra* note 4 and accompanying text.

[24] U.S. CONST. art. I, § 6, cl. 1. This clause provides in pertinent part: "[f]o any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." *Id.*

[25] 77 N.Y.2d 38, 53, 565 N.E.2d 493, 501, 563 N.Y.S.2d 744, 752 (1990), *later proceeding*, 574 N.Y.S.2d 616, 151 Misc. 2d 512 (Sup. Ct. New York County 1991). In *Ohrenstein*, the Minority Leader of the State Senate and other defendants alleged that their criminal prosecution for placing "no-show" employees on the Senate payroll was prohibited by the Speech or Debate Clause of the New York State Constitution. The Court of Appeals rejected this argument, finding the immunity conferred by the clause did not extend to the fraudulent acts allegedly perpetrated by the defendants.

[26] *Id.* at 53, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

[27] *Campaign for Fiscal Equity*, 179 Misc. 2d at 911, 687 N.Y.S.2d at 230.

[28] 421 U.S. 491 (1975).

performed their duties independently, free from fear of lawsuits or interference from the coordinate branches of government.[29] In order to secure this legislative independence, the clause was interpreted broadly to immunize both legislatures and their staff when engaged in legislative activities.[30]

In the instant case, the court deemed the formulation of budgetary legislation to be an integral legislative function.[31] Accordingly, it concluded that Ms. Henahan's assistance of legislatures and their staff in determining the allocation of state funds to public schools was clearly a legislative activity immunized by the New York State Constitution's Speech or Debate Clause.[32] Plaintiff argued that the privilege can only be asserted by a legislature and that Ms. Henahan, as an employee of an independent state agency rather than of a house of the legislature or committee thereof, was not entitled to assert the immunity conferred by the clause.[33] The court rejected these arguments, focusing not on Ms. Henahan's job title, but rather on the nature of the work she performed and the extent to which her testimony would reveal the legislative thought process.[34]

Additionally the Supreme Court, New York County, relying on the District of Columbia Circuit's decision in *Brown & Williamson Tobacco Corp. v. Williams*,[35] held that the Speech or Debate Clause exempted the State from producing documents or data

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[29] *Id.* at 502.

[30] Gravel v. United States, 408 U.S. 606 (1972). In *Gravel*, the Supreme Court found that the federal Speech or Debate Clause barred questioning of a Senator's aide with respect to the Senator's disclosure of certain classified documents to a Senate subcommittee and the placement of same in the public record.

[31] *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 230, 179 Misc. 2d at 911.

[32] *Id.* at 911-12, 687 N.Y.S.2d at 230-31.

[33] *Id.* at 912, 687 N.Y.S.2d at 231.

[34] *Id.*

[35] 62 F.3d 408 (D.C. Cir. 1995). In *Brown & Williamson*, the Court of Appeals for the District of Columbia Circuit affirmed an order of the district court quashing subpoenas duces tecum issued to two members of the United States House of Representatives. The subpoenas were directed toward sensitive documents damaging to a tobacco company which were allegedly stolen by a former paralegal for a law firm representing the tobacco company and in the possession of the Congressmen.

which Ms. Henahan had prepared at the legislators' request.[36] The *Brown & Williamson* court determined that the federal Speech or Debate Clause extended not only to personal questioning, but also to documentary materials, reasoning that such evidence could be just as revealing as oral communications.[37]

The court in the instant case next addressed the State's contention that Ms. Henahan's contacts with executive branch officials were protected by common law legislative immunity.[38] Common law legislative immunity is a judicially-created doctrine which extends the type of protection provided by the federal Speech or Debate Clause to state and local officials engaged in legislative activities.[39] The court relied on *Bogan v. Scott-Harris*[40] for the proposition that an executive official's preparation of a proposed budget is legislative activity protected by common law legislative immunity, and concluded that Ms. Henahan's work on behalf of the State's Division of the Budget was similarly privileged.[41]

In ruling that common law legislative immunity also precluded discovery of the documents and data prepared by Ms. Henahan for the Division of Budget,[42] the New York court rejected interpretations of the privilege given by federal district courts in

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[36] *Campaign for Fiscal Equity*, 179 Misc. 2d at 912, 687 N.Y.S.2d at 231.

[37] *Brown & Williamson*, 62 F.3d at 420.

[38] *Campaign for Fiscal Equity*, 179 Misc. 2d at 913, 687 N.Y.S.2d at 231.

[39] *See* 2BD Assocs. v. County Comm'rs., 896 F. Supp. 528 (D. Md. 1995) (finding that the drafting and passage of amendment to county zoning laws were legislative acts entitling county commissioners to immunity), *later proceeding*, 896 F. Supp. 518 (D. Md. 1995), *later proceeding vacated and remanded*, 89 F.3d 830 (4th Cir. 1996), *later proceeding aff'd*, 162 F.3d 1158 (4th Cir. 1998).

[40] 523 U.S. 44 (1998). In *Bogan*, a city mayor submitted a budget proposal calling for the elimination of the city's Department of Health and Human Services, of which the plaintiff was the sole employee. The proposal was approved and the employee brought civil rights charges against the city, the mayor and other officials, alleging her termination was retaliatory and motivated by racial animus. The Supreme Court held the mayor's actions were legislative in nature and that he was immune from suit under the doctrine of common law legislative immunity.

[41] *Campaign for Fiscal Equity*, 179 Misc. 2d at 913, 687 N.Y.S.2d at 231-32.

[42] *Id.* at 913-14, 687 N.Y.S.2d at 232.

Maryland[43] and Puerto Rico[44] which were characterized as too narrow.[45] While the other jurisdictions might arguably have permitted discovery of certain documents at issue here, the New York court faulted these federal district courts' overemphasis on the doctrine of common law legislative immunity as a use privilege and found that they failed to adequately consider the underlying purpose of the immunity in promoting and protecting independent policy debate in legislative activity.[46]

In sum, New York courts' interpretation of the Speech or Debate Clause of the New York State Constitution[47] is substantially similar to judicial interpretation of the analogous provision of the Federal Constitution.[48] Both New York and federal courts interpret the privilege broadly to preclude discovery of testimonial and documentary evidence from legislatures and from those who assist them. With respect to common law legislative immunity and its applicability to documentary evidence, New York appears to give a broader scope to the privilege than some other jurisdictions. This result is achieved by focusing on both the nature of the immunity as a use privilege and on its underlying purpose of promoting legislative independence.

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[43] Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 302 note 20 (D. Md. 1992) (finding that legislative immunity did not extend to certain types of documentation relating to Maryland state legislative redistricting plan and requiring production of same, absent assertion of another, valid privilege), *summary judgment granted*, 849 F. Supp. 1022 (D. Md. 1994), *judgment entered, later proceeding*, 849 F. Supp. 1072 (D. Md. 1994).

[44] Corporacion Insular de Seguros v. Garcia, 709 F. Supp. 288, 297 (D. P.R. 1989) (finding that documents created by legislative activity can be disclosed in litigation not directly involving the document's author and accordingly ordering discovery of correspondence relating to Puerto Rican medical malpractice legislation), *appeal dismissed*, 876 F.2d 254 (1st Cir. 1989).

[45] *Campaign for Fiscal Equity*, 179 Misc. 2d at 914, 687 N.Y.S.2d at 232.

[46] *Id.* at 913-14, 687 N.Y.S.2d at 232.

[47] *See supra* note 4 and accompanying text.

[48] *See supra* note 24 and accompanying text.