

A state representative made a speech on the floor of the state legislature in which she asserted that a state senator had violated the legislature's code of ethics by having a sexual relationship with a staff member. In making this assertion, the representative played a recording of a phone conversation between the senator and staff member in which they admitted having such a relationship. The representative obtained the recording from an acquaintance, who had placed an illegal wiretap on the staff member's phone.

One year later, the federal government initiated a prosecution against the state representative for violating a federal criminal statute that prohibits the intentional publication of communications that were unlawfully recorded. A person found guilty under the statute is subject to a one-year prison sentence and a monetary fine.

The representative has moved to dismiss the action.

Is the court likely to dismiss the action?

- A. No.
- B. Yes, because state legislators are absolutely immune from liability for actions taken pursuant to their official legislative functions.
- C. Yes, because the Eleventh Amendment bars actions of this kind in federal court.
- D. Yes, because the speech or debate clause wholly insulates state legislators from civil and criminal liability for legislative activity.

## Explanation:

### State legislative immunity

#### Absolute immunity

Legislative acts that are subject of:

- state civil or criminal action
- federal civil action

#### No immunity

Legislative acts that are subject of:

- federal criminal action

State legislators generally possess **absolute immunity** from *state* civil or criminal liability for actions taken pursuant to official legislative functions (eg, making speeches in the legislature).<sup>\*</sup> In the context of *federal* civil and criminal liability, the Supreme Court has held that a **state legislator's absolute immunity**:

- **extends to federal *civil* liability** because the federal government's interest in ensuring private civil actions is outweighed by the substantial impact such actions have on state legislative functions *but*
- **does not extend to federal *criminal* liability** because the federal government's important interest in enforcing criminal statutes outweighs the minimal impact prosecutions have on state legislative functions.

As a result, the state representative is not immune from federal prosecution for violating the federal statute, and the court will likely not dismiss the action **(Choice B)**.

<sup>\*</sup>State legislative immunity derives from the common law. Today, most states have codified legislative immunity in their constitutions or statutes.

**(Choice C)** The **Eleventh Amendment** generally prohibits private parties and foreign governments from suing a state or state official for money damages in federal court. However, this amendment does not apply to actions initiated by another state or the United States (as seen here).

**(Choice D)** The **speech or debate clause** of the U.S. Constitution wholly insulates members of Congress, but not state legislators, from civil and criminal liability for any official legislative activity.

### Educational objective:

A state legislator has absolute immunity from federal civil liability for official legislative actions. However, this immunity does not extend to federal criminal liability.

### References

- *Tenney v. Brandhove*, 341 U.S. 367, 378–79 (1951) (holding that state legislators are immune from civil liability for acts performed in the regular course of the legislative process).
- *United States v. Gillock*, 445 U.S. 360, 373 (1980) (stating that a state legislator is subject to criminal prosecution for a violation of federal law).
- 72 Am. Jur. 2d States, Territories, and Dependencies § 62 (2020) (explaining state legislative immunity).

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