

SENATE BILL NO. 160—COMMITTEE ON JUDICIARY

FEBRUARY 25, 2009

Referred to Committee on Judiciary

SUMMARY—Makes various changes to comport with the constitutional doctrines of separation of powers and legislative privilege and immunity. (BDR 3-1164)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted-material] is material to be omitted.

AN ACT relating to the Legislative Department of State Government; implementing the constitutional doctrines of separation of powers and legislative privilege and immunity by codifying in statutory form the constitutional right of State Legislators to be protected from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity; confirming that the constitutional doctrine of legislative privilege and immunity provides a testimonial privilege and an evidentiary privilege; revising provisions of the Nevada Ethics in Government Law to comport with the constitutional doctrines of separation of powers and legislative privilege and immunity; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

- 1 **Section 1** of this bill provides that for any speech or debate in either House of
- 2 the Legislature, a member of the Senate or Assembly shall not be questioned in any
- 3 other place. The purpose and effect of **section 1** is to implement the constitutional
- 4 doctrines of separation of powers and legislative privilege and immunity by
- 5 codifying in statutory form the constitutional right of State Legislators to be
- 6 protected from having to defend themselves, from being held liable and from being
- 7 questioned or sanctioned in administrative or judicial proceedings for speech,



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8 debate, deliberation and other actions performed within the sphere of legitimate
9 legislative activity.

10 Under case law, the constitutional doctrine of legislative privilege and
11 immunity provides a testimonial privilege and an evidentiary privilege which
12 protect a Legislator from having to testify or disclose documents in administrative
13 or judicial proceedings when such acts would intrude upon, interfere with or pry
14 into the legislative process. (*Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614
15 (1972); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir.
16 2007)). **Section 2** of this bill amends the Nevada statute governing testimonial and
17 evidentiary privileges to confirm that the constitutional doctrine of legislative
18 privilege and immunity provides a testimonial privilege and an evidentiary
19 privilege. (NRS 49.015)

20 **Sections 3-9** of this bill amend provisions of the Nevada Ethics in Government
21 Law to make those provisions comport with the constitutional doctrines of
22 separation of powers and legislative privilege and immunity. (Chapter 281A of
23 NRS) In particular, **section 9** amends NRS 281A.420 to clarify that the
24 responsibility of a State Legislator to make disclosures concerning gifts, loans,
25 interests or commitments and the responsibility of a State Legislator to abstain from
26 voting upon or advocating the passage or failure of a matter are governed by the
27 Standing Rules of the Legislative Department of State Government. However, other
28 provisions of the Nevada Ethics in Government Law remain applicable to State
29 Legislators so that, for example, State Legislators will continue to be required to
30 file the same financial disclosure forms as other public officers and the provisions
31 prohibiting misuse of office that are applicable to other public officers will continue
32 to apply to State Legislators. **Section 9** also clarifies that the provisions of NRS
33 281A.420 concerning disclosure, voting and abstention do not apply to State
34 Legislators or allow the Commission on Ethics to exercise jurisdiction or authority
35 over State Legislators with regard to disclosure, voting and abstention.

36 On December 22, 2008, the First Judicial District Court in and for Carson City
37 held that the Commission on Ethics could not apply the provisions of NRS
38 281A.420 concerning disclosure, voting and abstention to State Legislators because
39 under the constitutional doctrines of separation of powers and legislative privilege
40 and immunity, the Legislator's own House is the only governmental entity that may
41 sanction the Legislator for performing legislative actions, like voting, that fall
42 within the sphere of legitimate legislative activity and are an essential part of the
43 legislative function. (*Warren B. Hardy II v. Commission on Ethics*, Nev. First Jud.
44 Dist. Ct. Case No. 08 OC 00381 1B (Dec. 22, 2008))

45 The decision of the district court was based on the Nevada Supreme Court's
46 pronouncement that "[u]nder the separation of powers doctrine, individual
47 legislators cannot, nor should they, be subject to fines or other penalties for voting
48 in a particular way." (*Guinn v. Legislature*, 119 Nev. 460, at 472 (2003)) The
49 decision of the district court was also based on a long line of cases from the United
50 States Supreme Court which hold that under the constitutional doctrines of
51 separation of powers and legislative privilege and immunity, Federal and State
52 Legislators must be free to represent the interests of their constituents with
53 assurance that they will not later be called to task for that representation by the
54 other branches of government. (*Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783
55 (1951); *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944 (1969); *Gravel v.*
56 *United States*, 408 U.S. 606, 92 S.Ct. 2614 (1972); *Supreme Court of Virginia v.*
57 *Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967 (1980)) Given this well-
58 established and long-standing precedent, the district court found that the
59 constitutional doctrines of separation of powers and legislative privilege and
60 immunity are intended to protect the independence of individual Legislators by
61 giving them broad freedom of speech, debate, deliberation and action during the



legislative process and by shielding them from executive and judicial oversight that realistically threatens to control their conduct as Legislators.

Thus, because of the constitutional doctrines of separation of powers and legislative privilege and immunity, the district court determined that any inquiry into the ethical propriety of legislative actions concerning disclosure, voting and abstention must be conducted by the Legislative Department and cannot be conducted by an administrative agency of the Executive Department, such as the Commission on Ethics. The district court also determined that because each House is given the exclusive constitutional power to determine the rules of its legislative proceedings and to punish its members for improper conduct related to those legislative proceedings, the Standing Rules adopted by each House concerning disclosure, voting and abstention take precedence over NRS 281A.420. Therefore, out of respect for the separation of powers under Section 1 of Article 3 of the Nevada Constitution and out of respect for the exclusive constitutional power of each House to determine its rules and punish its members under Section 6 of Article 4 of the Nevada Constitution, the district court held that the determination of whether a State Legislator has properly followed the Standing Rules concerning disclosure, voting and abstention is a matter reserved exclusively to the Legislator's own House.

Finally, the district court emphasized that its decision applied only to the provisions of NRS 281A.420 concerning disclosure, voting and abstention and that the constitutional doctrines of separation of powers and legislative privilege and immunity do not provide State Legislators with blanket protection from the Nevada Ethics in Government Law. Rather, State Legislators remain subject to the Ethics Law for conduct that falls outside the scope of legitimate legislative activity.

WHEREAS, The doctrine of separation of powers is fundamental to our system of State Government; and

WHEREAS, The constitutional source of the doctrine of separation of powers is Section 1 of Article 3 of the Nevada Constitution, which establishes a tripartite system of State Government and which firmly fixes the principle of separation of powers in the organic law of this State; and

WHEREAS, Under the doctrine of separation of powers, when the Nevada Constitution expressly grants the Legislative Department an exclusive power, the other Departments of State Government may not usurp, exercise, infringe upon or interfere with that exclusive power out of respect for an equal and coordinate branch of government; and

WHEREAS, Under Section 6 of Article 4 of the Nevada Constitution, each House of the Legislature has the exclusive constitutional power to determine the rules of its legislative proceedings and to punish its members for improper conduct related to those legislative proceedings; and

WHEREAS, Because Section 6 of Article 4 of the Nevada Constitution creates an exclusive constitutional power in each House, neither the Legislature nor one of the Houses may delegate that exclusive constitutional power to another branch of government; and



1 WHEREAS, For centuries, freedom of speech, debate,
2 deliberation and action in National and State Legislatures has been
3 recognized as essential to protect the integrity of the legislative
4 process by ensuring that individual Legislators may perform their
5 core legislative functions without harassment, intimidation or
6 interference by the other branches of government; and

7 WHEREAS, Legislative privilege and immunity has its origins in
8 the Parliamentary struggles of the 16th and 17th centuries when the
9 English monarchs used civil and criminal proceedings to harass,
10 intimidate and suppress members of Parliament who were critical of
11 the Crown; and

12 WHEREAS, Legislative privilege and immunity was first codified
13 in the English Bill of Rights of 1689, which provided "That the
14 Freedom of Speech, and Debates or Proceedings in Parliament,
15 ought not to be impeached or questioned in any Court or Place out
16 of Parliament"; and

17 WHEREAS, Legislative privilege and immunity was extended to
18 Legislators in the American Colonies where freedom of speech,
19 debate, deliberation and action in the legislative process was taken
20 as a matter of course by those who severed the American Colonies
21 from the Crown and who became the Founders of our Nation; and

22 WHEREAS, The Founders of our Nation viewed legislative
23 privilege and immunity as fundamental to the system of checks and
24 balances and indispensable to the constitutional structure of
25 separate, coequal and independent branches of government; now,
26 therefore,

27
28 THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
29 SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:
30

31 **Section 1.** Chapter 41 of NRS is hereby amended by adding
32 thereto a new section to read as follows:

33 *1. The Legislature hereby finds and declares that:*

34 *(a) The Framers of the Nevada Constitution created a system*
35 *of checks and balances so that the constitutional powers*
36 *separately vested in the Legislative, Executive and Judicial*
37 *Departments of State Government may be exercised without*
38 *intrusion from the other Departments.*

39 *(b) As part of the system of checks and balances, the*
40 *constitutional doctrines of separation of powers and legislative*
41 *privilege and immunity facilitate the autonomy of the Legislative*
42 *Department by curtailing intrusions by the Executive or Judicial*
43 *Department into the sphere of legitimate legislative activities.*

44 *(c) The constitutional doctrines of separation of powers and*
45 *legislative privilege and immunity protect State Legislators from*



1 *having to defend themselves, from being held liable and from*
2 *being questioned or sanctioned in administrative or judicial*
3 *proceedings for speech, debate, deliberation and other actions*
4 *performed within the sphere of legitimate legislative activity.*

5 *(d) Under the constitutional doctrines of separation of powers*
6 *and legislative privilege and immunity, State Legislators must not*
7 *be hindered or obstructed by executive or judicial oversight that*
8 *realistically threatens to control their conduct as Legislators.*

9 *(e) Under the constitutional doctrines of separation of powers*
10 *and legislative privilege and immunity, State Legislators must be*
11 *free to represent the interests of their constituents with assurance*
12 *that they will not later be called to task for that representation by*
13 *the other branches of government.*

14 *(f) Under the constitutional doctrines of separation of powers*
15 *and legislative privilege and immunity, State Legislators must not*
16 *be questioned or sanctioned by the other branches of government*
17 *for their actions in carrying out their essential legislative*
18 *functions.*

19 *(g) Under the constitutional doctrines of separation of powers*
20 *and legislative privilege and immunity, the only governmental*
21 *entity that may question or sanction a State Legislator for any*
22 *actions taken within the sphere of legitimate legislative activity is*
23 *the Legislator's own House pursuant to Section 6 of Article 4 of*
24 *the Nevada Constitution.*

25 *(h) Therefore, the purpose and effect of this section is to*
26 *implement the constitutional doctrines of separation of powers and*
27 *legislative privilege and immunity by codifying in statutory form*
28 *the constitutional right of State Legislators to be protected from*
29 *having to defend themselves, from being held liable and from*
30 *being questioned or sanctioned in administrative or judicial*
31 *proceedings for speech, debate, deliberation and other actions*
32 *performed within the sphere of legitimate legislative activity.*

33 *2. For any speech or debate in either House, a State*
34 *Legislator shall not be questioned in any other place.*

35 *3. In interpreting and applying the provisions of this section,*
36 *the interpretation and application given to the constitutional*
37 *doctrines of separation of powers and legislative privilege and*
38 *immunity under the Speech or Debate Clause of Section 6 of*
39 *Article I of the Constitution of the United States must be*
40 *considered to be persuasive authority.*

41 *4. The rights, privileges and immunities recognized by this*
42 *section are in addition to any other rights, privileges and*
43 *immunities recognized by law.*



1 **5. As used in this section, “State Legislator” or “Legislator”**
2 **means a member of the Senate or Assembly of the State of**
3 **Nevada.**

4 **Sec. 2.** NRS 49.015 is hereby amended to read as follows:

5 49.015 1. Except as otherwise required by the Constitution of
6 the United States or of the State of Nevada, and except as *otherwise*
7 provided in this title or title 14 of NRS, *or section 1 of this act*, no
8 person has a privilege to:

- 9 (a) Refuse to be a witness;
10 (b) Refuse to disclose any matter;
11 (c) Refuse to produce any object or writing; or
12 (d) Prevent another from being a witness or disclosing any
13 matter or producing any object or writing.

14 2. This section does not:

15 (a) Impair any privilege created by title 14 of NRS or by the
16 Nevada Rules of Civil Procedure which is limited to a particular
17 stage of the proceeding; or

18 (b) Extend any such privilege to any other stage of a proceeding.

19 **Sec. 3.** Chapter 281A of NRS is hereby amended by adding
20 thereto the provisions set forth as sections 4 and 5 of this act.

21 **Sec. 4. “Member of a local legislative body” means a**
22 **member of a board of county commissioners, a governing body of**
23 **a city or a governing body of any other political subdivision who**
24 **performs a legislative function.**

25 **Sec. 5. “State Legislator” or “Legislator” means a member**
26 **of the Senate or Assembly of the State of Nevada.**

27 **Sec. 6.** NRS 281A.020 is hereby amended to read as follows:

28 281A.020 1. It is hereby declared to be the public policy of
29 this State that:

30 (a) A public office is a public trust and shall be held for the sole
31 benefit of the people.

32 (b) A public officer or employee must commit himself to avoid
33 conflicts between his private interests and those of the general
34 public whom he serves.

35 2. The Legislature finds *and declares* that:

36 (a) The increasing complexity of state and local government,
37 more and more closely related to private life and enterprise, enlarges
38 the potentiality for conflict of interests.

39 (b) To enhance the people’s faith in the integrity and
40 impartiality of public officers and employees, adequate guidelines
41 are required to show the appropriate separation between the roles of
42 persons who are both public servants and private citizens.

43 (c) ~~[Members of the Legislature]~~ *In interpreting and applying*
44 *the provisions of this chapter that are applicable to State*
45 *Legislators, the Commission must give appropriate weight and*



1 *proper deference to the public policy of this State under which*
2 *State Legislators* serve as “citizen Legislators” who have other
3 occupations and business interests ~~[. Each Legislator has]~~, *who are*
4 *expected to have* particular philosophies and perspectives that are
5 necessarily influenced by the life experiences of ~~[that]~~ *the*
6 Legislator, including, without limitation, professional, family and
7 business experiences ~~[. Our system assumes that Legislators will]~~,
8 *and who are expected to* contribute those philosophies and
9 perspectives to the debate over issues with which the Legislature is
10 confronted. ~~[The law concerning ethics in government is not~~
11 ~~intended to require a member of the Legislature to abstain on issues~~
12 ~~which might affect his interests, provided those interests are~~
13 ~~properly disclosed and that the benefit or detriment accruing to him~~
14 ~~is not greater than that accruing to any other member of the general~~
15 ~~business, profession, occupation or group.]~~

16 **Sec. 7.** NRS 281A.030 is hereby amended to read as follows:

17 281A.030 As used in this chapter, unless the context otherwise
18 requires, the words and terms defined in NRS 281A.040 to
19 281A.170, inclusive, *and sections 4 and 5 of this act* have the
20 meanings ascribed to them in those sections.

21 **Sec. 8.** NRS 281A.130 is hereby amended to read as follows:

22 281A.130 “Member of the legislative branch” means ~~[any]~~ *a*
23 *State Legislator or a* member of ~~[the Legislature or any member of~~
24 ~~a board of county commissioners or governing body of a city or~~
25 ~~other political subdivision who performs a legislative function.]~~ *a*
26 *local legislative body.*

27 **Sec. 9.** NRS 281A.420 is hereby amended to read as follows:

28 281A.420 1. Except as otherwise provided in subsection 2, 3
29 or 4, a public officer may vote upon a matter if the benefit or
30 detriment accruing to him as a result of the decision either
31 individually or in a representative capacity as a member of a general
32 business, profession, occupation or group is not greater than that
33 accruing to any other member of the general business, profession,
34 occupation or group.

35 2. Except as otherwise provided in subsection 3, in addition to
36 the requirements of the code of ethical standards, a public officer
37 shall not vote upon or advocate the passage or failure of, but may
38 otherwise participate in the consideration of, a matter with respect to
39 which the independence of judgment of a reasonable person in his
40 situation would be materially affected by:

41 (a) His acceptance of a gift or loan;

42 (b) His pecuniary interest; or

43 (c) His commitment in a private capacity to the interests of
44 others.



1 ➤ It must be presumed that the independence of judgment of a
2 reasonable person would not be materially affected by his pecuniary
3 interest or his commitment in a private capacity to the interests of
4 others where the resulting benefit or detriment accruing to him or to
5 the other persons whose interests to which the member is committed
6 in a private capacity is not greater than that accruing to any other
7 member of the general business, profession, occupation or group.
8 The presumption set forth in this subsection does not affect the
9 applicability of the requirements set forth in subsection 4 relating to
10 the disclosure of the pecuniary interest or commitment in a private
11 capacity to the interests of others.

12 3. In a county whose population is 400,000 or more, a member
13 of a county or city planning commission shall not vote upon or
14 advocate the passage or failure of, but may otherwise participate in
15 the consideration of, a matter with respect to which the
16 independence of judgment of a reasonable person in his situation
17 would be materially affected by:

- 18 (a) His acceptance of a gift or loan;
19 (b) His direct pecuniary interest; or
20 (c) His commitment to a member of his household or a person
21 who is related to him by blood, adoption or marriage within the third
22 degree of consanguinity or affinity.

23 ➤ It must be presumed that the independence of judgment of a
24 reasonable person would not be materially affected by his direct
25 pecuniary interest or his commitment described in paragraph (c)
26 where the resulting benefit or detriment accruing to him or to the
27 other persons whose interests to which the member is committed is
28 not greater than that accruing to any other member of the general
29 business, profession, occupation or group. The presumption set forth
30 in this subsection does not affect the applicability of the
31 requirements set forth in subsection 4 relating to the disclosure of
32 the direct pecuniary interest or commitment.

33 4. A public officer or employee shall not approve, disapprove,
34 vote, abstain from voting or otherwise act upon any matter:

- 35 (a) Regarding which he has accepted a gift or loan;
36 (b) Which would reasonably be affected by his commitment in a
37 private capacity to the interest of others; or
38 (c) In which he has a pecuniary interest,

39 ➤ without disclosing sufficient information concerning the gift,
40 loan, commitment or interest to inform the public of the potential
41 effect of the action or abstention upon the person who provided the
42 gift or loan, upon the person to whom he has a commitment, or upon
43 his interest. ~~[Except as otherwise provided in subsection 6, such]~~
44 **Such** a disclosure must be made at the time the matter is considered.
45 If the officer or employee is a member of a body which makes



1 decisions, he shall make the disclosure in public to the Chairman
2 and other members of the body. If the officer or employee is not a
3 member of such a body and holds an appointive office, he shall
4 make the disclosure to the supervisory head of his organization or, if
5 he holds an elective office, to the general public in the area from
6 which he is elected. This subsection does not require a public officer
7 to disclose any campaign contributions that the public officer
8 reported pursuant to NRS 294A.120 or 294A.125 or any
9 contributions to a legal defense fund that the public officer reported
10 pursuant to NRS 294A.286 in a timely manner.

11 5. Except as otherwise provided in NRS 241.0355, if a public
12 officer declares to the body or committee in which the vote is to be
13 taken that he will abstain from voting because of the requirements of
14 this section, the necessary quorum to act upon and the number of
15 votes necessary to act upon the matter, as fixed by any statute,
16 ordinance or rule, is reduced as though the member abstaining were
17 not a member of the body or committee.

18 6. ~~[After a member of the Legislature makes a disclosure~~
19 ~~pursuant to subsection 4, he may file with the Director of the~~
20 ~~Legislative Counsel Bureau a written statement of his disclosure.~~
21 ~~The written statement must designate the matter to which the~~
22 ~~disclosure applies. After a Legislator files a written statement~~
23 ~~pursuant to this subsection, he is not required to disclose orally his~~
24 ~~interest when the matter is further considered by the Legislature or~~
25 ~~any committee thereof. A written statement of disclosure is a public~~
26 ~~record and must be made available for inspection by the public~~
27 ~~during the regular office hours of the Legislative Counsel Bureau.~~

28 ~~—7.]~~ The provisions of this section do not, under any
29 circumstances:

30 (a) Prohibit a member of ~~[the legislative branch]~~ *a local*
31 *legislative body* from requesting or introducing a legislative
32 measure; or

33 (b) Require a member of ~~[the legislative branch]~~ *a local*
34 *legislative body* to take any particular action before or while
35 requesting or introducing a legislative measure.

36 7. *The provisions of this section do not, under any*
37 *circumstances, apply to State Legislators or allow the Commission*
38 *to exercise jurisdiction or authority over State Legislators. The*
39 *responsibility of a State Legislator to make disclosures concerning*
40 *gifts, loans, interests or commitments and the responsibility of a*
41 *State Legislator to abstain from voting upon or advocating the*
42 *passage or failure of a matter are governed by the Standing Rules*
43 *of the Legislative Department of State Government which are*
44 *adopted, administered and enforced exclusively by the appropriate*
45 *bodies of the Legislative Department of State Government.*



- 1 8. As used in this section ~~[, “commitment”]~~ :
- 2 (a) *“Commitment* in a private capacity to the interests of others”
- 3 means a commitment to a person:
- 4 ~~[(a)]~~ (1) Who is a member of his household;
- 5 ~~[(b)]~~ (2) Who is related to him by blood, adoption or marriage
- 6 within the third degree of consanguinity or affinity;
- 7 ~~[(c)]~~ (3) Who employs him or a member of his household;
- 8 ~~[(d)]~~ (4) With whom he has a substantial and continuing
- 9 business relationship; or
- 10 ~~[(e)]~~ (5) Any other commitment or relationship that is
- 11 substantially similar to a commitment or relationship described in
- 12 this subsection.
- 13 (b) *“Public officer” and “public employee” do not include a*
- 14 *State Legislator.*
- 15 **Sec. 10.** This act becomes effective on January 1, 2009.

