

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF THE)
STATE OF NEVADA)

Appellant,)

vs.)

WARREN B. HARDY II, in his official capacity as)
Nevada State Senator for Clark County Senatorial)
District No. 12,)

Respondent.)

Supreme Court Case No. 53064

First Judicial District Court
Case No. 08 OC00381 1B

APPELLANT’S REPLY BRIEF

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I. ARGUMENT

A. Summary of the argument

The principal question before the Court is whether the Ethics in Government Law (Ethics Law) violates separation-of-powers principles. The Commission argues that when the Constitution is viewed in light of changing conditions, the Ethics Law does not violate separation-of-powers principles. The purpose of legislative immunity, derived from separation of powers, is to preserve the independence and thereby the integrity of the legislative process. Here, the Legislature designed the Nevada Commission on Ethics (Commission) and delegated to the Commission the authority to execute the Legislature's policy on conflicts of interest. Therefore, granting Hardy legislative immunity from the Ethics Law does not preserve the integrity of the legislative process.

B. This Court should not rely on the district court's order for the facts in this case as Hardy suggests.

In his Answering Brief, Hardy asks this Court to ignore the Commission's statement of the case and the facts provided in its Opening Brief and instead to rely on the district court's order. (Ans. Brief, p. 2, pp. 11-15). The Commission opposes such request, considering that the Commission's appeal concerns precisely those findings and conclusions adopted by the district court in its order. Additionally, the facts in the Commission's Opening Brief provide relevant historical information that is essential for the Court's understanding of the events that have occurred leading up to this appeal. (Op. Brief, pp. 2-6). Therefore, the Court should not ignore the Commission's statement of the case and facts.

C. Because the Ethics Law does not offend separation of powers, Hardy should not be granted immunity.

Since the Nevada Constitution has no speech or debate clause that prohibits a state legislator from being questioned "elsewhere" for his legislative acts, Hardy asserts that he is protected by legislative

1 immunity derived from the constitutional doctrine of separation of powers in Article 3, §1 of the Nevada
2 Constitution. (Ans. Brief, pp. 12-19).

3 Legislative immunity derived from separation-of-powers principles functions to protect a
4 legislator from any “executive and judicial oversight that **realistically** threatens to control his conduct as
5 a legislator.” Gravel v. United States, 408 U.S. at 618 (1972) (emphasis added). Legislative immunity,
6 therefore, is intended “to protect each branch from undue intrusions by the other branches, but does not
7 preclude all intrusions.” Mistretta v. United States, 488 U.S. 361, 380 (1989). As Justice Story
8 explained, separation of powers does not require three airtight departments of government.

9 [W]hen we speak of a separation of the three great department of government, and
10 maintain that that separation is indispensable to public liberty, we are to understand this
11 maxim in a limited sense. It is not meant to affirm that they must be kept wholly and
entirely separate and distinct, and have no common link of connection or dependence, the
one upon the other, in the slightest degree.

12 1 Joseph Story, Commentaries on the Constitution of the United States § 525 (M. Bigelow, 5th ed. 1905).

13 Separation-of-powers principles were expressly designed to check the abuses England experienced
14 in the 16th to the 18th centuries with the conflict between parliament and the monarchy. United States v.
15 Johnson, 383 U.S. 169, 178 (1966). However, “[w]e should bear in mind that the English system differs
16 from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or
17 debate privilege was designed to preserve legislative independence, not supremacy.” United States v.
18 Brewster, 408 U.S. 501, 508 (1972).¹

19 More than 4 centuries after England’s struggle, the legislatures of virtually every state, including
20 Nevada, expressly designed external ethics commissions to check the abuses of public servants. And the
21 Nevada Legislature expressly authorized the Commission to challenge legislative acts of state legislators
22 pertaining to conflicts of interest. NRS 281A.420.

23
24 ¹ Citing Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 15 (1968).

1 Accordingly, the constitution is a living thing and should be interpreted in light of changing
2 conditions. Evans v. Job, 8 Nev. 322 (1873). Therefore, the issues before this Court, mainly, separation
3 of powers in the context of the Ethics in Government Law deserves to be examined under current
4 conditions. When the constitution is interpreted in this light, the Ethics Law does not offend separation-
5 of-powers principles.

6 A state legislature cannot transfer or delegate to the governor any strictly legislative powers.
7 164A Am Jur. 2d Constitutional Law §310 (1998); see also Peters v. Frye, 223 P.2d 176 (1950); Ray v.
8 Parker, 101 P.2d 665 (1940) (for a statute to be unconstitutional as a delegation of legislative power, the
9 power involved must be exclusively legislative). However, the Legislature may and does, delegate to
10 administrative agencies the authority to enforce the laws made by the Legislature. Id.

11 In 1985, the Legislature made the conscious decision to abolish its Legislative Ethics Commission
12 and create one commission with authority over state legislators. S.B. 345, 63rd Session (1985). In doing
13 this, the Legislature decided how the Commission would be structured. Since the small agency could
14 not be self-sustained, it was placed in the executive rather than the legislative department. However,
15 other than for certain budgetary and personnel procedures,² the governor has no authority over the
16 Commission. The only thing the governor does is appoint half of the Commission members. NRS
17 281A.200. The other half is appointed by the Legislative Commission of the Legislature. Id. The
18 Commission has just as much jurisdiction over the governor’s ethical conduct (without concern about
19 executive immunity from the Ethics Law), as state Legislators’ ethical conduct.

20 The “strictly legislative powers” under review in this case are found in Article 3, §1 and Article 4,
21 §6 of the Nevada Constitution. The Ethics Law does not violate the strictly legislative powers found in
22

23 ² The Commission’s budgetary funds derive from the General Fund (35%) and local government assessments (65%). The
24 Commission pays for services received from the Executive Branch’s Departments of Administration and Personnel for
certain accounting and personnel transactions.

1 either constitutional provision.

2 Under Article 3, §1, the Commission shall not exercise any functions appertaining to the
3 Legislature. Galloway v. Truesdell, 83 Nev. 13, 20 (1967)(legislative power is the power of law-making
4 representative bodies to frame and enact laws, and to amend or repeal them).

5 By investigating the allegations against Hardy and holding further proceedings to render an
6 opinion as to whether he violated the conflicts-of-interest law, subsections 2 and 4 of NRS 281A.420,
7 the Commission is not attempting to make laws. Instead, the Commission is merely complying with its
8 statutory mandate to execute laws made by the Legislature. Therefore, the Ethics Law does not offend
9 Article 3, §1.

10 Under Article 4, §6, each house of the Legislature “shall...determine the rules of its proceedings.”
11 The Commission is not attempting to determine the rules of the Legislature’s proceedings. The
12 Legislature determined what its rules would be with regard to disclosure, abstention and participation,
13 when it adopted NRS 281A.420 and created the Commission to execute the law. Therefore, the Ethics
14 Law does not offend Article 4, §6.

15 The Legislature may delegate authority to an administrative agency to carry out legislative policy
16 as long as boundaries of delegation are clearly defined and standards and guidelines are established to
17 prevent abuse of discretion. AA Oilfield Service, Inc. v. New Mexico State Corp. Com’n, 881 P.2d 18
18 (1994); Florida Gas Transmissssion Co. v. Public Service Com’n, 635 S. 2d 941 (Fla. 1994).

19 Here, the Legislature delegated authority to the Commission to carry out the Legislature’s Policy
20 on disclosure and abstention by state legislators. (App. Addendum, p. 217). Further, the Legislature set
21 clearly defined standards and guidelines in the Ethics Law to prevent abuse of discretion. (See, for
22 example, NRS 281A.480(4)(a) requiring the Commission to forward a matter for impeachment
23 proceedings to the appropriate legislative house; NRS 281A.440(3) requiring that an ethics complaint
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1 initially go to a panel of ethics commissioners to assess whether the allegations are warranted and not
2 frivolous; NRS 281A.220(3) providing that members of a panel may not be members of the same
3 political party).

4 Viewed under current conditions, the Ethics Law does not violate separation-of-powers principles.
5 The Commission is merely carrying out the Legislature’s policy on disclosure and abstention. This does
6 not realistically threaten to control Hardy’s conduct as a legislator, nor does it involve the exercise of
7 strictly legislative powers. Because the Ethics Law does not violate separation-of-powers principles,
8 intended to prohibit undue intrusions from other branches of government, and since the Legislature
9 authorized the Commission to challenge legislative acts regarding conflicts of interest, legislative
10 immunity is inapplicable in this case. Therefore, the Court should decline to grant Hardy legislative
11 immunity.

12 **D. Granting Hardy legislative immunity from the Ethics Law is contrary to the purpose of**
13 **legislative privilege because it does not preserve the integrity of the legislative process.**

14 Legislative privilege is not absolute. The whole purpose of the privilege is “to protect the
15 individual legislator, **not simply for his own sake**, but to preserve the independence and thereby the
16 integrity of the legislative process.” United States v. Brewster, 408 U.S. 501, 524 (1972)(emphasis
17 added).

18 The High Court, in Brewster refused to extend the privilege “beyond its intended scope, its literal
19 language, and its history, to include all things in any way related to the legislative process. Given such a
20 sweeping reading, we have no doubt that there are few activities in which a legislator engages that he
21 would be unable somehow to "relate" to the legislative process.” Id.

22 In its holding, that the executive branch could prosecute under the bribery statute, the Court in
23 Brewster found a balance between competing interests; the remote possibility of the executive branch
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1 abusing its power over the legislative branch and the potential danger flowing from either the absence of
2 a bribery statute applicable to members of Congress or a holding that the bribery statute violates the
3 Constitution. The Court explained:

4 [F]inancial abuses by way of bribes, perhaps even more than Executive power, would
5 gravely undermine legislative integrity and defeat the right of the public to honest
6 representation. Depriving the Executive of the power to investigate and prosecute and the
7 Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance
8 legislative independence. Given the disinclination and limitations of each House to police
9 these matters, it is understandable that both Houses deliberately delegated this function to
10 the courts, as they did with the power to punish persons committing contempts of
11 Congress.

12 Id. at 524-525 (citation omitted).

13 In this case, like the Brewster Court, the Court should refuse to extend the privilege beyond its
14 intended scope. A refusal by the Court to grant Hardy legislative immunity from NRS 281A.420, would
15 preserve legislative integrity and enhance the right of the public to honest, conflict-free representation.

16 The Legislature chose not to police its members and deliberately delegated its authority to regulate
17 legislators' conflicts of interest to the Commission, an administrative agency that the Legislature created
18 to its specifications. Therefore, Hardy should be estopped from now invoking legislative immunity from
19 exactly what the Legislature commanded the Commission do—question legislative acts by executing
20 NRS 281A.420.

21 The Legislature is a co-equal, not supreme, branch of Nevada government. Therefore, a balance
22 must exist between the Legislature's interest in its independence, the Commission's interest in enforcing
23 the Ethics Law and the Court's interest in the administration of justice. Granting Hardy legislative
24 immunity from the Ethics Law goes against the purpose of the legislative privilege because it does not
preserve the integrity of the legislative process.

E. A waiver of legislative immunity exists by the Legislature's enactment of the Ethics Law and by Hardy's own personal conduct.

1 An institutional waiver was created by the Legislature by its enactment of the Ethics Law. Still,
2 even if this Court finds no institutional waiver in this case, Hardy waived immunity from the Ethics Law
3 by his conduct. Therefore, Hardy should be estopped from now asserting the legislative privilege.

4 In his answering brief, Hardy states:

5 [A]lthough the Supreme Court in Johnson and Helstoski discussed, as a theory, the
6 institutional waiver of constitutional legislative immunity, the Court has never actually
7 applied that theory, and it has never held that Congress has the power to make such an
8 institutional waiver through the enactment of a statute. After considerable research,
9 Senator Hardy’s counsel has been unable to find a single federal or state case which
10 expressly holds that Congress or a state legislature has the power to enact a statute
11 waiving constitutional legislative immunity.

12 (Ans. Brief, p. 34, lns. 16-21).

13 The following cases, although may not explicitly state “Congress or a state legislature has the
14 power to enact a statute waiving constitutional legislative immunity,” the fact that the courts in these
15 cases analyzed whether the statute at issue contained such a waiver—in other words, applied the waiver
16 theory—is proof that the courts believed the legislative branch had power to enact a statute waiving
17 constitutional immunity:

- 18 • United States v. Johnson (concerning Congress and Federal Speech or Debate Clause).

19 The Supreme Court did not reject the waiver theory. Instead, the Court stated:

20 [W]e **leave open for consideration** when the case arises a prosecution which, though
21 possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly
22 drawn statute passed by Congress in the exercise of its legislative power to regulate the
23 conduct of its members.

24 383 U.S. 169, 185 (1966) (emphasis added).

- United States v. Helstoski (concerning Congress and Federal Speech or Debate Clause).

Assuming, *arguendo*, that the Congress could constitutionally waive the protections of
the Clause for individual members, such waiver could be shown only by an explicit and
unequivocal expression. **There is no evidence of such a waiver** in the language or the
legislative history of § 201 or any of its predecessors.

1 **We conclude** that there was neither individual nor institutional waiver...

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3 442 U.S. 477, 494 (1979) (emphasis added).

- 4 • Wilkins v. Gagliardi (concerning a state legislature and a state's Speech or Debate Clause).

5 Nowhere in the OMA is there a provision that expressly and unequivocally waives the
6 Speech or Debate Clause protection for legislators. Although MCL 15.273(1); MSA
7 4.1800(23)(1) provides for personal liability of a "public official" who intentionally
8 violates the OMA, it does not define the term "public official." As such, **it cannot be
9 seen as an express and unequivocal waiver** of the protections of the Speech or Debate
10 Clause. Further, even though MCL 15.262(a); MSA 4.1800(12)(a) defines "public body"
11 in part as a "state . . . legislative . . . committee," **it does not expressly or unequivocally
12 waive the immunity** of individual legislators under the Speech or Debate Clause.

13 In addition to his constitutional argument, defendant claims that the immunity of the
14 Speech or Debate Clause was codified in MCL 4.551; MSA 2.55(1). We agree.

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16 556 N.W.2d 171, 271 (Mich. Ct. App. 1996) (emphasis added) (footnote omitted).

17 The cases illustrated above, all concerning a **constitutional** immunity, applied the institutional
18 waiver theory. Just because the facts in those cases did not give rise to a finding that a waiver existed,
19 does not mean that a waiver does not exist in this case.

20 The instant case, unlike the cases illustrated above, concerns a Commission that was designed by
21 the Legislature, a law applicable to state legislators that authorizes the Commission to challenge certain
22 legislative acts, and a history that illustrates a long-continued acquiescence by the Legislature.³ Unlike
23 the cases illustrated above, an institutional waiver of legislative immunity was created here with the
24 enactment of the Ethics Law.

 Hardy further argues that a legislative privilege derived from the common-law does not stand on
equal footing as one derived from a specific constitutional provision. (Ans. Brief, p. 35, lns. 13-16).

³ See Siox Tribe of Indians v. U.S., 316 U.S. 317 (1942) (implied delegation to the President of a power vested exclusively in Congress upheld).

1 However, **constitutional** separation-of-powers principles is the whole reason behind the privilege.
2 United States v. Johnson, 383 U.S. 169,182 (1966).

3 Still, even if the Court finds that an institutional waiver does not exist, the Court should find that
4 Hardy personally waived legislative immunity from the Ethics Law. Hardy states in his Answering
5 Brief that a waiver must be based on the personal conduct of each legislator on a case-by-case basis.
6 (Ans. Brief, p. 39, lns. 5-10).

7 First, by acknowledging that he was subject to the Ethics Law, Hardy waived his immunity from
8 the law. Every public officer must file with the Commission an acknowledgment “that he has received,
9 read and understands the statutory ethical standards” found in the Ethics Law. NRS 281A.500(1).
10 Second, when the Commission advised Hardy that it was taking jurisdiction over the underlying ethics
11 complaint, Hardy did not object to the Commission’s jurisdiction and thus, waived immunity from it.
12 (JA113-132).

13 Therefore, based on the above, whether by an institutional waiver or based on Hardy’s personal
14 conduct, a waiver of legislative immunity exists.

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16 **F. The cases Hardy relies on to argue that the Senate is the only governmental entity that
may question or sanction Hardy are not persuasive.**

17 Hardy argues that the Senate has plenary power to punish its members for “disorderly conduct”
18 and that the term extends to conflicts of interest. (Ans. Brief, p. 24 lns. 19-24, p. 25 lns. 1-6). Hardy
19 cites to State ex rel. Tyrell v. Common Council, 25 N.J.L. 536, 538-42 (N.J. 1856) and Etzler v. Brown,
20 50 So. 416, 417-18 (Fla. 1909).

21 The Commission is not attempting to punish Hardy for “disorderly conduct.” The term does not
22 appear anywhere in the Ethics Law. Further, the cases cited by Hardy are not helpful, considering that
23 they are 100 or more years old and this case should really be looked at with the creation of ethics in
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1 government laws in mind, something that occurred only recently.

2 Next, Hardy likens Heller v. Legislature of Nev., 120 Nev. 456 (2004) to the instant case. In
3 Heller, the Secretary of State challenged the qualifications of a member of the Legislature. Article 4, §6
4 of the Nevada Constitution states that “[e]ach House shall judge of the qualifications...of its own
5 members.”

6 Here, the Commission is not attempting to challenge the “qualifications” of Hardy or assume any
7 other strictly legislative power. The Commission, unlike the Secretary of State, has been delegated the
8 duty of executing the Ethics Law. This includes investigating and holding proceedings to determine
9 whether Hardy violated the conflicts-of-interest provisions in NRS 281A.420. In other words, to
10 execute the Legislature’s policy in 2007 on conflicts of interest. (App. Addendum, p. 217).

11 Hardy also cites to Dunphy v. Sheehan, 92 Nev. 259 (1976). In assessing the constitutionality of
12 the Ethics Law, the Dunphy Court acknowledged the Ethics Law’s exclusion of judges as being
13 constitutionally mandated. Id. at 265. However, the Court did not observe any separation-of-powers
14 issues with the Legislature’s delegation to the Commission. Otherwise, it is reasonable to assume that
15 the Court would have stated so.

16 Hardy’s reliance on In re Arnold, 991 S. 2d. 531 (La. Ct. Ap. 2008) is also not persuasive. In
17 Arnold, the Louisiana Court of Appeals granted two legislators legislative immunity from the ethics law
18 because of the Louisiana constitution’s speech or debate clause. Id. at 545. The clause prohibits the
19 legislators being questioned “elsewhere.” Id.

20 In the instant case, Hardy is asserting legislative immunity by way of separation-of-powers
21 principles and since the Ethics Law does not offend said principles, Hardy can be questioned elsewhere.

22 The New Jersey Superior court in Joint Legislative Committee on Ethical Standards v. Perkins,
23 432 A.2d 116 (1981) flatly rejected the same argument Hardy makes to this Court.

1 In Perkins, the court reasoned that the state conflicts-of-interest law, a general legislative
2 enactment, was applicable to all state officers, including legislators. Id. at 20. Further, the court
3 likened the conflicts-of-interest law to criminal law, in that any person, including a legislator is subject
4 to it. Id. The New Jersey court, therefore, rejected the idea that the Legislature's constitutional rule-
5 making authority overrides the enactment of general laws. Id.

6 Hardy's argument that the Senate is the only governmental entity that may question or sanction
7 Hardy on conflicts of interest is not persuasive. This is because the Legislature's policy on conflicts of
8 interest (see App. Addendum, p. 217) for the last 24 years has been the Ethics Law. Therefore, the
9 Commission should be able to proceed with a hearing on the remaining allegations against Hardy.

10 **G. This Court should strike the last 18 pages of Hardy's Answering Brief as it exceeds the**
11 **maximum allowed.**

12 Rule 28(g) of the Rules of Appellate Procedure provides that "[e]xcept by permission of the court,
13 briefs shall not exceed 30 pages." Hardy's answering brief, exclusive of pages containing the table of
14 contents and authorities, is 48 pages. Therefore, unless this Court gives Hardy permission for the
15 additional 18 pages, the Commission requests said pages be stricken.

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1 **II.**

2 **CONCLUSION**

3 The Court's refusal to grant Hardy legislative immunity in this case would preserve the integrity
4 of the legislative process by protecting the public's right to honest, conflict-free representation.

5 Therefore, the Commission respectfully requests that this Court find that the Commission is not
6 barred by separation of powers and legislative immunity from proceeding with the remaining ethics
7 allegations from the 2007 Legislative Session against Hardy and reverse the District Court's Order that
8 granted Hardy Judicial Review and issued a Permanent Injunction enjoining the Commission from
9 conducting further administrative proceedings.

10 Dated this 6th day of April, 2009.

11 By: _____
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1 **ATTORNEY'S CERTIFICATE**

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge, information,
3 and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief
4 complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which
5 requires every assertion in the brief regarding matters in the record to be supported by a reference to the
6 page of the transcript or appendix where the matter relied on is to be found. I understand that I may be
7 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements
8 of the Nevada Rules of Appellate Procedure.

9 Dated this 6th day of April, 2009.

10
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Nevada Commission on Ethics, and that on this 6th day of April,
3 2009, I caused the foregoing Appellant’s Reply Brief to be delivered by personal delivery to the
4 following:

5
6 Brenda J. Erdoes, Esq.
7 Eileen G. O’Grady, Esq.
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