February 24, 1999

No. 8265

This opinion responds to questions from the Honorable Brady Adams, Senate President, and the Honorable Lynn Lundquist, Speaker of the House of Representatives,[(1)] regarding the meaning and scope of Article IV, section 9, of the Oregon Constitution.

QUESTION PRESENTED

Does each chamber of the Legislative Assembly have exclusive authority to investigate and sanction its members for failing to declare (or for inadequately declaring), on the floor or in committee, an actual or potential conflict of interest, as required by ORS 244.120(1)(a)?

ANSWER GIVEN

Yes. Under Article IV, section 9, of the Oregon Constitution, each chamber of the Legislative Assembly has the exclusive authority to adjudicate a member of that chamber for speech that takes place within the performance of the member's legislative function, including the member's failure to make a required disclosure of potential or actual conflicts of interest. This authority has not been delegated to any other body, including the Government Standards and Practices Commission (GSPC).

DISCUSSION

I. Legal background

The rules of the Oregon House of Representatives and Senate provide, in roughly identical terms, that when a member has a conflict of interest, he or she "shall announce, on the floor or in the committee meeting, the nature of the potential conflict prior to voting on the issue giving rise to the potential conflict." House Rule 3.21(1); *accord* Senate Rule 3.33. These rules are incorporated by reference into ORS 244.120(1)(a), which requires each member of the Legislative Assembly who has an actual or potential conflict of interest to "announce publicly, pursuant to rules of the house of which the public official is a member, the nature of the conflict before taking any action." Authority to instigate, investigate, and adjudicate allegations that a member has failed to make the required declaration is vested in the GSPC. ORS 244.250, 244.260.[(2)] The GSPC also has statutory authority to impose civil penalties on legislators who violate the disclosure requirement. ORS 244.350.

The question presented raises the issue whether the GSPC's enforcement of these mandatory disclosure statutes against a legislator violates Article IV, section 9, of the Oregon Constitution, in particular its last clause, the Debate Clause:

> Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof; ***Nor shall a member for words uttered in debate in either house, be questioned in any other place***.

Or Const, Art IV, § 9 (emphasis added). At issue is whether this clause gives each chamber of the Legislative Assembly the exclusive authority to adjudicate charges against its members based on what they say or fail to say during the legislative process.

In interpreting the Debate Clause, which is an original provision of the Oregon Constitution, we consider its "specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[(3)] ***Priest v. Pearce***, 314 Or 411, 415-16, 840 P2d 65 (1992).

II. Historical background

Article IV, section 9, finds its roots in English history. Before the revolution of 1688, the Crown had used "criminal and civil law to suppress and intimidate critical legislators." ***United States v. Johnson***, 383 US 169, 178, 865 S Ct 749, 15 L Ed2d 681 (1966). After that revolution, Parliament included a clause in the "English Bill of Rights of 1689" to respond to those practices. That clause provides "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not

to be impeached or questioned in any Court or Place out of Parliament." 1 W & M, Sess 2, c 2. Similar clauses were included in the early state constitutions, the United States Constitution,[(4)] and virtually every state constitution adopted since then. *See* 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 U L Rev 1, 3-16 (1968) (tracing English and colonial history).

"Although the clause sprang from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament, [the American courts] have held that it would be a 'narrow view' to confine the protection of the Speech or Debate Clause to words spoken in debate." ***Powell v. McCormack***, 395 US 486, 502, 89 S Ct 1944, 23 L Ed2d 491 (1969). As early as 1808, the Massachusetts Supreme Court explained that its comparable state constitutional provision was not limited to words spoken in debate. Chief Justice Parsons, writing for the court, reasoned:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but ***will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office***[.]

Coffin v. Coffin, 4 Mass 1, 27, 3 Am Dec 189 (1808) (emphasis added).

Following ***Coffin***, the United States Supreme Court read the federal Speech or Debate Clause broadly to carry out its purposes. ***Kilbourn v. Thompson***, 103 US 168, 202-04, 13 Otto 168, 26 L Ed 377 (1880). In ***Kilbourn***, members of a House investigative committee had reported that Kilbourn was in contempt of the committee's subpoena and had initiated a resolution that resulted in his arrest. 103 US at 171-72, 200. Kilbourn sued for damages. After holding that the House lacked authority to punish a witness for contempt, the Court turned to the question whether Kilbourn could sue either the members of the committee or the sergeant at arms who had carried out their orders.

The issue, as the Court framed it, was whether "a resolution offered by a member [was] a speech or debat[e] within the meaning of the clause" and whether the clause's "protection extend[s] to the report which [the members] made to the House" concluding that Kilbourn was in contempt. *Id.* at 201. In finding that the clause covered both acts, the Court relied primarily on three propositions.

First, the Court traced briefly the history of the English Speech or Debate Clause and its interpretation by the English courts. *See id.* at 201-02. Noting that the protection had not been limited to what members said in Parliament but also applied to the orders they issued, the Court concluded that "it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *Id.* at 202. Second, the Court looked to the Massachusetts Supreme Court's interpretation of its constitutional provision in ***Coffin*** and observed that it was "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies." *Id.* at 204. Finally, the Court looked to the purpose of the provision, beginning its discussion with this rhetorical question: "[I]f a report, or a resolution, or vote is not a speech or debate, of what value is the constitutional protection?" *Id.* at 201. The Court returned to that proposition at the end of its discussion, explaining:

The reason of the rule is as forcible in its application to written reports presented in [Congress] by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Id. at 204. The Court accordingly held that the clause prevented Kilbourn's suit against the members of Congress.

Oregon's constitutional provision is an original part of the Oregon Constitution of 1857, adopted almost 50 years after Massachusetts gave a definitive construction to its comparable provision and slightly more than 20 years before the United States Supreme Court construed the Speech and Debate Clause of the United States Constitution. The extant records of the Oregon Constitutional Convention indicate no extensive discussion regarding the understanding that the framers of the constitution had of the Debate Clause, disclosing only that Article IV, section 9, was based on Article IV, section 8, of the 1851 Indiana Constitution. Charles H. Carey, The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 at 471 (1926). The records do disclose that, as originally submitted, the Debate Clause read: "Nor shall a member for any speech or debate in either house be questioned in any other place." *Id.* at 280. At one point, Matthew Deady (presiding Chair of the Convention) moved to amend the provision by adding to it the words, "provided

such speech had been actually made during a session of said house." *Id.* This motion failed. *Id.* The failure may indicate that the Convention rejected an attempt to narrow the scope of the immunity, but this inference is tenuous at best; it may also indicate that the framers regarded the addition as redundant. Ultimately, through some unreported process, the original phrase "speech or debate" was replaced by the phrase "words uttered in debate" in the final document that emerged from the Committee on the Legislative Article to be adopted by the Convention. Because no explanation for the change is reported, it is unclear whether the Committee believed that it was simply eliminating a redundancy or making some subtle substantive change. It is, however, safe to presume that had the framers intended the new language to convey an original or unusual interpretation, it would have provoked some discussion, as did, for example, the novel language in the Constitution's religion clauses. *Id*. at 296-306. Since no reported discussion exists regarding the Debate Clause, we presume that the original understanding of Article IV, section 9, reflects the understanding of similar provisions in the United States Constitution and in other state constitutions.

From this historical background, we glean the following precept. The Debate Clause should be broadly construed to further its purpose, which is to assure citizens that their elected representatives, in conducting legislative business, are accountable only to the people and to their colleagues and not to some forum or tribunal outside of the legislative branch.

With this historical background serving to inform our textual analysis, we turn now to the language of the Debate Clause itself.

III. Article IV, Section 9

The Debate Clause of Article IV, section 9, states: "Nor shall a member for words uttered in debate in either house, be questioned in any other place." To interpret this clause, we must answer several questions. First, because it applies to "words uttered," the initial issue is whether the provision applies to words not uttered, that is, to nondisclosure of a conflict. Second, because the provision refers to "debate in either house," we must determine whether the protection is limited to floor debates, or extends to votes and to committee sessions as well. Third, because the provision provides immunity to being "questioned," we must examine whether it protects members from being investigated and sanctioned as well. Finally, because the provision bars questioning "in any other place," we must determine whether it prohibits the chambers from waiving members' immunity by delegating discipline to the judiciary or the executive.

A. "Words Uttered"

The Debate Clause deals with questioning a member of a legislative chamber "for words uttered in debate in either house." To determine whether this clause covers questioning of a member who fails to adequately make a required declaration of conflict, we must initially address whether being questioned for ***not*** making a required statement amounts to being questioned for "words uttered." For several reasons we conclude that it does.

In ***McIntyre v. Ohio Elections Comm'n***, 514 US 334, 115 S Ct 1511, 131 L Ed2d 426 (1995), the United States Supreme Court held that an Ohio statute requiring campaign literature to contain language identifying its source violated the free speech guarantee of the First Amendment to the United States Constitution. A key aspect of the holding was the presumption that a law regulating McIntyre's decision to omit certain information from an utterance amounted to a regulation of her speech. *Id*. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). The same principle applies in the context of the present inquiry, that is, whether the prerogative to question members because of the words uttered includes the prerogative to question members for words omitted. Questioning members because they have "uttered" an "aye" or "nay" vote[(5)] without also uttering the required disclosure amounts to questioning them "for words uttered," in the same sense that regulating McIntyre's failure to identify the author of her literature amounted to regulating her "freedom of speech." In both situations, the legal rule is phrased in terms of what a speaker articulates ("freedom of speech," "words uttered"), but the rule's scope encompasses what the speaker's articulation omits. In both situations, the law's concern is not with the existence or non-existence of certain sounds or marks, but with an individual's ability to capture a concept in language; and in both situations the law recognizes that a concept can be defined by exclusion as well as inclusion. Freedom of speech means freedom to choose one's words. Thus, freedom of speech includes freedom to speak selectively, and freedom from civil or criminal prosecution for "words uttered" includes freedom from prosecution for selective utterance.[(6)]

A related line of United States Supreme Court cases makes the same point. The Court has held repeatedly that the First Amendment protects not only the right to speak freely but the right to be free from compelled speech. *See, e.g.*, ***West Va. State Bd. of Educ. v. Barnette***, 319 US 624, 63 S Ct 1178, 87 L Ed 1628 (1943) (public school children may not be forced to recite flag salute); ***Abood v. Detroit Bd. of Educ.***, 431 US 209, 97 S Ct 1782, 52 L Ed2d 261 (1977) (compelling

teachers to "speak" by funding union's partisan activities raises First Amendment issues); *accord* ***Lehnert v. Ferris Faculty Ass'n.***, 500 US 507, 111 S Ct 1950, 114 L Ed2d 572 (1991). These cases and the principle embedded in them demonstrate that a constitutional right of free speech is also a constitutional right of non-speech. The people's protection against government sanction for what they choose to utter includes their protection from government sanction for what they choose not to utter. Similarly, a legislator's protection against prosecution for "words uttered" includes protection against prosecution for words not uttered.(7)

Further, the Supreme Court has defined "speech" in the First Amendment context as that which is intended to convey, and does convey, a particular meaning to the reasonable listener. ***Spence v. Washington***, 418 US 405, 410-11, 94 S Ct 2727, 41 L Ed2d 842 (1974). In the context of a statute imposing a duty to disclose conflicts, the knowing silence of nondisclosure is intended to, and does, "speak" -- it is intended to convey, and does convey, the message that the speaker does not have a conflict.(8)

Thus, several relevant precedents from the First Amendment context militate against limiting the phrase "words uttered" to its narrow literal meaning. A broader reading also seems to follow from the historical context outlined above. *See, e.g.*, ***Coffin***, 4 Mass 1 ("[T]he article ought not to be construed strictly, but liberally"); ***Kilbourn***, 103 US 168 (following ***Coffin***). For all of these reasons, we conclude that whatever immunity from executive or judicial accountability for "words uttered" members enjoy, they also enjoy an identical immunity from accountability for failing to utter specified required words.

B. "Debate in Either House"

The immunity conferred by the Debate Clause extends to words uttered "in debate in either house." Relevant United States Supreme Court precedent clearly holds that the term "debate" includes not only argument and discussion, but also voting and any other activity "generally done in a [legislative] session * * * in relation to the business before it." ***Kilbourn***, 103 US at 204 ("The reason of the rule is as forcible in its application to written reports presented in [Congress] by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers."); *accord* ***Gravel v. United States***, 408 US 606, 624, 92 S Ct 2614, 33 L Ed2d 583 (1972) (Clause applies to activity "within the sphere of legitimate legislative activity"). We see no reason to interpret the Oregon provision differently.

We must also determine if the phrase "debate in either house" includes only debate on the actual House or Senate floor, and, if not so limited, what else it includes. The narrowest interpretation of the phrase "in either house" -- that is, "on the floor of either chamber" -- is untenable. For example, a senator would not be immune if the State Capitol were damaged in an earthquake and the Senate had to meet in a nearby university auditorium. In context, the term "house" in the Debate Clause obviously refers not to some specific building, nor, in fact, to any location, but to the legislative body. *See, e.g.*, Or Const Art IV, §§ 11, 12, 13, 15, 16, 17, 18 (using "house" to refer to legislative body, not building).

The significant question is whether the term "house" refers only to the entire body when it meets in plenary session for floor debates and votes, or also to the smaller subsets of the membership when they meet to conduct legislative business. For several reasons we conclude that it refers to the latter.

First, an interpretation limited to plenary sessions runs counter to the historical precept calling for a broad and liberal interpretation of the provision to ensure the accomplishment of its purpose, *see, e.g.*, ***Kilbourn***, 103 US 168 (applying Speech or Debate clause to committee action), as well as explicit precedent interpreting the analogous federal provision. ***Gravel v. United States***, 408 US at 624 (1972) ("voting by Members and committee reports are protected"). That purpose is to guarantee that fear of subsequent extra-cameral prosecution or litigation does not influence the legislative actions of members. Since a vote or a persuasive argument to kill a bill in committee, or to send out a radically amended version, is as significant an action as actually participating in a floor debate or vote, no reason exists to treat one part of the legislative process differently from the other. An interpretation leading to such a situation not only frustrates the overarching purpose of the Debate Clause, but leads to anomalous results, and should therefore be avoided. ***McKean-Coffman v. Employment Div.***, 312 Or 543, 824 P2d 410, *adhered to on reconsideration* 314 Or 645, 842 P2d 380 (1992).

To interpret the provision broadly, sensibly and in conformity with its purpose, we conclude that the United States Supreme Court was correct -- the immunity applies not only to actual floor debate but also "to things generally done in a session of [a] House by one of its members in relation to the business before it," including committee business. ***Kilbourn***, 103 US at 204. This would certainly include floor votes, hearings, work sessions and votes in committee.(9)

C. "Questioned"

The Debate Clause concerns the prerogative to "question" members of a legislative chamber. The word "question" could not possibly have its current, normal, everyday meaning: "to ask questions of." That interpretation leads to absurd results; it is simultaneously too broad and too narrow. Nobody could seriously maintain that the framers intended to prohibit newspaper reporters, strangers or constituents from asking questions and nothing more. It must include, in addition to a prohibition on asking questions per se, a prohibition on rendering judgments on individuals and imposing penalties on them. If not, then under the Debate Clause a member who uttered allegedly defamatory words during floor debate could (after the session adjourned) be sued, subpoenaed, found liable and required to pay damages, so long as he was never interrogated in a deposition or on the witness stand. This interpretation cannot be reconciled with the lessons of history. It is not what the framers intended.

In determining what they did intend, we use the methodology endorsed by the Oregon Supreme Court: we examine the meaning that the framers' words had at the time the constitution was written. ***Vannatta v. Keisling***, 324 Or 514, 530, 931 P2d 770 (1997). According to the modern English dictionary generally accepted as the ultimate authority on the history and evolution of words' meanings, at the time of the Oregon Constitution's framing, a common definition of "to question" was: "To examine judicially; hence, to call to account, challenge, accuse (*of*)." 2 The Compact Edition of the Oxford English Dictionary Q48 (1971). As an example, the dictionary cites an 1839 essay: "[He] cannot be questioned before any tribunal for his baseness and ingratitude." *Id.* Applying this definition in light of the historically footed mandate to interpret the Debate Clause liberally, we conclude that the power to "question" refers to the power to subject a member to an adjudicatory process, that is, the power to apply pre-existing general standards to a specific fact situation for the purposes of determining a member's culpability and, if culpable, the appropriate sanction.(10)

D. "In Any Other Place"

We have thus far determined that the Debate Clause protects a legislator from certain adjudicatory or quasi-adjudicatory proceedings when those proceedings are based on an accusation stemming from the legislator's conduct of official legislative business, including an accusation that the legislator failed to make a required disclosure. In order to determine the extent to which each chamber's jurisdiction in these matters is exclusive, we must interpret the phrase defining where a member may not be questioned: "in any other place."

This phrase by its terms refers back to the phrase "in either house"; the complete (albeit inelegant) expression would be that members may not be questioned "in any place other than in either house." Because, as we have already concluded, "house" refers to the legislative body that usually occupies one of the chambers of the Legislative Assembly, it follows that "in any other place" refers to a proceeding before any other body.

The Debate Clause, then, provides that if members of either house are to be adjudicated for what they utter or refrain from uttering in performance of their legislative duties, that adjudication is to be conducted by the members of the particular chamber itself. Clearly, this rule prohibits subjecting a member to traditional judicial process in a court established under Article VII of the Oregon Constitution. It also prohibits adjudication by the plenary legislature; that would contradict the express language of the clause ("either house"). Furthermore, nothing in the constitution authorizes the kind of bi-cameral proceeding that would be required for such a quasi-trial.(11)

That leaves the question whether the adjudication could take place in an administrative agency such as the GSPC operating pursuant to a legislative delegation of authority. The legislature, after all, lawfully delegates to many other administrative agencies some quasi-legislative and quasi-adjudicative functions, *see, e.g.*, ORS 679.250(7), (8) (delegation of rulemaking and contested case hearing authority to Oregon Board of Dentistry), despite the command in Article III, section 1, that "no person charged with official duties under one of [the Legislative, Executive or Judicial] departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." It would seem that an agency such as the GSPC could likewise perform delegated adjudications despite the exclusivity mandate in the Debate Clause. For the following reasons, however, we conclude that it could not.

Administrative agencies do not violate the separation of powers mandate when engaged in rulemaking because they do so in their executive capacity, that is, as the implementors or administrators of a more general policy decision articulated in the first instance by the legislature. Thus, for example, when the Oregon Board of Dentistry promulgates rules of conduct for dentists, it does so in its role as the agency that puts into effect the legislative command to ensure that dentists act professionally. *See* ***Megdal v. Bd. of Dental Examiners***, 288 Or 293, 605 P2d 273 (1980); *cf.* ***INS v. Chadha***, 462 US 919, n 16, 103 S Ct 2764, 77 L Ed2d 317 (1983). The agency rule is analogous to a recommendation to the legislature in that the legislature retains the power to supersede, amend or repeal the rule by legislation; the ultimate performance of the essentially legislative function (policy choice) resides within the legislative branch where the constitution requires it to be.

Likewise, when an agency performs a contested case adjudication, the outcome can be appealed in an Article VII court. The agency "verdict" is, again, in the nature of a recommendation, with the final outcome lodged in the branch of government that, under the Constitution, appropriately decides adjudications.

GSPC (or other agency) adjudications of legislators, however, are different. Unlike other adjudications, these are not constitutionally assigned to the judicial branch. Article III, section 1, permits other branches to perform adjudications "as in this Constitution expressly provided," and the Debate Clause expressly provides that adjudications of legislators for words uttered in debate must take place "in either house," i.e., within the legislative branch. Thus, unlike normal adjudications performed by executive agencies and appealable to the judiciary, adjudications of legislators by an executive branch agency would not ultimately reside in the branch to which they are consigned by the constitution. A legislator who is found by the GSPC to have violated the disclosure rule would have been adjudicated within the executive branch, and could appeal to the judicial branch, but under no circumstances could the ultimate decision lodge where the constitution requires it to lodge -- in one of the houses of the Legislative Assembly. Thus, while principles of administrative law rectify the apparent constitutional violation inherent in executive branch rulemaking and most executive branch adjudications, these principles would not rectify the constitutional violation inherent in executive branch (or other extra-cameral) adjudication of legislators for words uttered in debate. Such adjudications have no constitutional justification.

Furthermore, even if the constitution did permit the designated tribunal (each house) to delegate its adjudicatory powers to an external tribunal over which the house had no ultimate oversight, no such delegation has occurred. To the extent that ORS 244.250 to 244.260 and ORS 244.350 purport to delegate adjudication of legislators to the GSPC, those statutes purport to delegate a power that the legislature does not possess. Each house of the Legislative Assembly has the constitutional authority to judge its own members; the plenary Legislative Assembly has no such power. No government body can lawfully delegate what it does not possess. ***Youngstown Sheet & Tube v. Sawyer***, 343 US 579, 72 S Ct 863, 96 L Ed 1153 (1952). For an even arguably constitutional delegation of the power to adjudicate members for legislative activity to occur, each house would have to make its own delegation. That has not occurred. It did not occur when members voted to enact the current adjudicatory machinery in ORS chapter 244. That measure was presented as a bill establishing a system with jurisdiction over both chambers. We cannot presume that members of one chamber would have voted the same way for a measure waiving only their own chamber's exclusive adjudicative authority over its own members. For example, we can hypothesize that some members of one chamber who voted for the bill did so only because their desire to subject members of the other chamber outweighed their own desire to remain immune. *Cf.* ***Powell v. McCormack***, 395 US 486, 506-512 (Court refuses to presume that members who voted for measure under impression it needed bare majority would have voted for it if they had known it needed two-thirds). Hence, no member has ever voted in favor of a measure waiving his or her chamber's exclusive adjudicatory jurisdiction, and no chamber has ever passed such a measure.(12)

Since neither house of the Legislative Assembly has the authority to cede its power to adjudicate members for words uttered in debate to the GSPC, and because, even if a house had such authority neither one has exercised it, we conclude that the GSPC is one of the "other places" that is constitutionally precluded from adjudicating legislators for their legislative activities.

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1. Representative Lundquist was Speaker during the Sixty-Ninth Legislative Assembly (1997-98) when this opinion request was made (November 20, 1998).

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2. The GSPC is a seven-member, bi-partisan body consisting of four persons appointed by the Governor from a list of recommendations by legislative leadership, and three persons appointed by the Governor without legislative participation. ORS 244.250(1).

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3. Unlike statutes or constitutional amendments, original provisions are not subjected to the analysis set out in ***PGE v. BOLI***, 317 Or 606, 859 P2d 1143 (1993). That analysis resorts to non-textual materials only if the text (in conjunction with context) is ambiguous. *Id.* at 611-12. When interpreting original provisions, the Oregon Supreme Court will examine historical material "in order to determine whether there is something in the background of the provision that calls for a revision of our preliminary reading of it." ***Vannatta v. Keisling***, 324 Or 514, 533, 931 P2d 770 (1997). We follow the Court's practice.

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4. Article I, section 6, clause 3, of the United States Constitution states: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

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5. The rules and statute at issue in this opinion require disclosure "prior to voting," House Rule 3.21(1), Senate Rule 3.33(1), and "before taking any action" on a bill, ORS 244.120(1)(a). We take this language to mean that the statutory violation is possible if a vote occurs without prior debate, and also if the member participates in debate on the issue even when no vote subsequently occurs, for example when the member's speech contributes to the decision not to take a vote.

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6. We do not mean to imply by this analogy that either the state or federal free speech guarantees give legislators a constitutional right to conceal conflicts of interest. The Debate Clause does not insulate legislators from all adjudication for what they say or do not say in conducting their legislative business; it insulates them only from adjudication outside of the chamber for speech that is part of their legislative duties.

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7. An Oregon Supreme Court decision makes a similar point. In ***Fidanque v. Oregon Govt. Standards and Practices Comm.***, 328 Or 1, 9, 969 P2d 376 (1998), the court holds that the GSPC may not compel a lobbyist to pay a registration fee. Such a requirement, the court concludes, "impermissibly restricts the right to speak, write or print freely on any subject whatever under Article I, section 8, of the Oregon Constitution." By the same logic, a disclosure requirement restricts legislators' rights under Article IV, section 9, to speak freely in the conduct of their official business. The principle underlying both situations is that free speech requires freedom to speak selectively.

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8. This principle is also familiar in other areas of law. For example, a fiduciary has an obligation to refrain not only from affirmatively misleading statements, but from misleading nondisclosures as well, and failure to do so is fraud. ***Starkweather v. Shaffer***, 262 Or 198, 497 P2d 358 (1972).

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9. We have not been asked for, and do not render, an opinion as to the applicability of the Debate Clause to such activities as meetings with interest groups, party caucuses, press conferences, etc.

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10. The power to "question" does not include such non-judicial powers as the power to formulate standards of general applicability and future effect. In reserving to each house the power to "question" a member, Article IV, section 9, says nothing about the power to determine the standards about which such questioning might occur.

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11. When the constitution describes the proceedings of the Legislative Assembly, it does so in terms of two separate houses, each with its own prerogatives and procedures. *E.g.*, Or Const Art IV, § 11 ("Each house when assembled, shall * * * judge of the election, qualifications, and returns of its own members; determine its own rules of proceeding * * *."); Art IV, § 15 ("Either house may punish its members for disorderly behavior * * *."); Art IV, § 17 ("Each house shall have all powers necessary for a branch of the Legislative Department, of a free, and independent (sic) State.).

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12. Further, it is not at all clear that the Oregon Constitution permits a single chamber to "enact" by itself anything except its own internal rules. The constitutional method of enacting law, with a few explicit exceptions, is bicameral passage and presentation to the governor.

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