

Opinion No. 93-04

March 5, 1993

OPINION OF: TOM UDALL, Attorney General

BY: Madonna N. Bixby, Assistant Attorney General

TO: The Honorable Richard C de Baca, Secretary, State of New Mexico Department of Public Safety, P.O. Box 1628, Santa Fe, New Mexico 87504-1628

QUESTIONS

1. What conduct by a state legislator constitutes a "breach of the peace" as that term is used in the privileges and immunities clause, art. IV, § 13 of the New Mexico constitution?
2. Does a special committee session or interim committee session which occurs at a place and time other than regular and special legislative sessions constitute a "session" as contemplated by the privileges and immunities clause, art. IV, § 13 of the New Mexico constitution?

CONCLUSIONS

1. The privileges and immunities clause protects legislators only from civil arrest. Thus, a state senator or representative who violates any criminal statute, including a misdemeanor statute, commits a "breach of the peace" and is not immune from arrest.
2. Yes. The term "session" as used in the privileges and immunities clause includes special committee sessions and interim committee sessions.

FACTS

The Department of Public Safety in November 1992 asked this office for its opinion whether the privileges and immunities clause of the state constitution protects legislators from arrest for certain criminal offenses, including traffic offenses, while attending and traveling to or from a legislative session and whether protection afforded by the clause extends to special committee sessions and interim committee sessions.

ANALYSIS

1. Interpretation of "Breach of the Peace" Under the Privileges and Immunities Clause.

The privileges and immunities clause of the New Mexico constitution provides:

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote case in either house.

N.M. Const. art. IV, § 13.

While New Mexico courts have not had occasion to address an issue regarding legislative immunity afforded by the privileges and immunities clause, other courts, including the United States Supreme Court, have extensively discussed the origin and scope of the privilege in constitutional provisions similar to ours. The legislative privilege from arrest set forth in art. IV, § 13 of the New Mexico constitution is substantially similar to the language used in the United States constitution to grant the same privilege to members of Congress. Art. 1, § 6 of the United States constitution provides:

Sec. 6. The Senators and Representatives ... shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place.

The first case in which the United States Supreme Court undertook an extensive review of legislative privilege was **Williamson v. U.S.**, 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278 (1908). In construing art. 1, § 6, the Supreme Court concluded that the intent of the phrase "except Treason, Felony and Breach of the Peace" was to distinguish between criminal arrest and civil arrest¹ and to extend the privilege only to civil arrests and not to criminal arrests.² The Court said that the phrase was derived from "breaching the King's peace," a term which was adopted from English common law and included the whole range of crimes at common law. 207 U.S. at 437-46, 28 S. Ct. at 166-70. After the Court had reviewed the history of the privilege and the views of noted legal scholars in England and the United States, the Court concluded that the term "treason, felony and breach of the peace," as used in the U.S. constitutional provision, excepted all criminal offenses from the operation of the privilege. 207 U.S. at 446, 28 S. Ct. at 170.³

Courts in other jurisdictions where legislative immunity is granted by language similar to that in our constitution have adopted the interpretation set forth in **Williamson** in construing their state constitutions. In **Howard v. Webb**, 570 P.2d 42 (Okla. 1977), the court held that the legislative privilege from arrest granted by the Oklahoma constitution encompassed only arrest on civil process, and there was no privilege from arrest for even the most minor criminal offenses.⁴ The case involved a petition for writ of prohibition to restrain officers in the state Public Safety Department from enforcing all traffic laws, including arrests for minor traffic violations, against legislators as the department would against other drivers. **Id.** at 43. The court said,

We can only conclude that the majority view, and indeed the view most consistent with the principles of free democratic government, prevailing at the time our State Constitution was adopted [in 1907], held that privilege from arrest except for "treason, felony or breach of the peace" encompasses only arrest on civil process. Since no crime comes within the purview of the privilege, there can be no privilege from arrest for even the most minor criminal offenses.

Id. at 47.

Similarly, in **People of the State of Illinois v. Flinn**, 362 N.E.2d 3 (Ill. Ct. App. 1977), the Illinois Court of Appeals held that a traffic violation was a "breach of the Peace" within the constitutional provision which exempted legislators from arrest except for treason, felony or breach of the peace and that a legislator was not exempt from arrest for speeding while returning home from a legislative session. **See, also, Swope v. Commonwealth of Kentucky**, 385 S.W.2d 57 (Ky. Ct. App. 1964) (all crimes are excepted from the operation of the legislative privilege; thus, a member of the Kentucky General Assembly could be found guilty of breach of the peace. **Id.** at 58.)⁵

The New Mexico constitution was adopted in 1912 at a time when the majority view already held that immunity from arrest for "treason, felony and breach of the peace" encompassed only arrest on civil process⁶ and four years after the privileges and immunities clause in the United States constitution had been construed by the Supreme Court in **Williamson**. In light of the principles set forth in **Williamson** and the uniformity with which other jurisdictions have interpreted constitutional provisions which are substantially similar to ours, we conclude that art. IV, § 13 of the New Mexico constitution affords immunity to state legislators only for civil arrests and not for criminal arrests, no matter how minor.⁷

2. "Sessions" Under the Privileges and Immunities Clause.

New Mexico courts have not determined whether the immunity from arrest afforded under the privileges and immunities clause extends to committee sessions which occur at times other than regular and special legislative sessions. Other jurisdictions, however, have held that immunity is to be extended to legislative committees created by statute, because members of the legislature do not lose their legislative character by serving on a committee. **Harmer v. Superior Court of the State of California**, 79 Cal.Rptr. 855, 857, **reh'g denied** (Cal. Ct. App. 1969).⁸ Moreover, other state courts that have interpreted speech and debate provisions substantially similar to that in art. IV, § 13 of our constitution⁹ have extended immunity to any duly constituted part of the senate or house of representatives, such as a committee created by the house under its rules, authority and powers. **See, e.g., Van Riper v. Tumulty**, 56 A.2d 611 (N.J. 1948).¹⁰ Thus, a committee created by the senate or house from its own members acts for the legislature and enjoys the same privileges as when its full membership is in session. **Id.** at 614. In addition, courts have held that legislatures have broad authority to create committees of members authorized to meet outside of regular and special sessions. **See, e.g., State ex rel. Hamblen v. Yelle**, 185 P.2d 723 (Wash. 1947) (by statute,

legislative committees may be created and authorized to sit during the interim between sessions for any proper purpose. 185 P.2d at 727).

For the reasons discussed above, we conclude that the privileges and immunities clause of the New Mexico constitution affords protection to duly appointed legislative committees and that the term "session" as used in art. IV, § 13 of the constitution includes committee sessions which occur outside of regular and special sessions.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) Arrest in civil suits was still a possibility at the time the New Mexico constitution was adopted. Arrest and imprisonment could be imposed in New Mexico, for example, for civil contempt of court pursuant to § 1038, Comp. Laws 1897. Immunity from civil arrest, however, does not mean immunity from civil process in general. **See Long v. Ansell**, 69 F.2d 386 (D.C. App. 1934), **aff'd** 293 U.S. 76, 79 L. Ed. 208, 55 S. Ct. 21 (1934).

[n2](#) "A brief consideration of the subject of parliamentary privilege in England will, we think, show the source whence the expression 'treason, felony, and breach of the peace' was drawn, and leave no doubt that the words were used in England for the very purpose of excluding all crimes from the operation of the parliamentary privilege, and therefore to leave that privilege to apply only to prosecutions of a civil nature." 207 U.S. at 438, 28 S. Ct. at 167.

[n3](#) In other contexts, a "breach of the peace" is a violation of public order, the engaging in behavior that is "inconsistent with the peaceable and orderly conduct of society." **State v. James M.**, 111 N.M. 473, 806 P.2d 1063 (Ct. App. 1990), **cert. denied**, 111 N.M. 529, 807 P.2d 227 (1991). As discussed in this opinion, this general definition of breach of the peace does not apply to the phrase as used in "treason, felony or breach of the peace" in art. IV, § 13 of the New Mexico constitution.

[n4](#) The Oklahoma Constitution states:

Sec. 22. Privileges -- Arrest -- Speeches or debate. Senators and Representatives shall, except for treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same

Okla. Const. art. V., § 22.

[n5](#) The Kentucky Court of Appeals said, in discussing the legislative immunity provision in the Kentucky constitution:

"The constitutional exemption has never been interpreted as a retreat for Congressmen and Senators from arrest for crime. ... The decisions of the courts, therefore, in limiting the exemption merely to arrests in aid of civil process ... have greatly limited the scope of the exemption. That which at the time of the adoption of the Constitution was of substantial benefit to a Member of Congress has been reduced almost to a nullity."

Id. (quoting **Ansell**).

[n6](#) There was some earlier authority to the contrary. In **State ex rel. Isenring v. Polacheck**, 77 N.W. 708 (Wisc. 1898), a legislator raised the privilege from arrest on a writ of habeas corpus after an appearance and after he had posted bail. **Id.** at 709. The Wisconsin constitution provided that members of the legislature were privileged from arrest "in all cases, except treason, felony, and breach of the peace." **Id.** The Wisconsin Supreme Court concluded that the legislator was privileged from arrest but reversed the lower court's grant of the writ on the grounds that the legislator had waived the privilege by failing to assert the privilege in the first instance. **Id.**

[n7](#) While we agree with the opinion of the Attorney General set forth in A.G. Op. No. 69-83 (1969) to the extent it provides that the privileges and immunities clause does not grant immunity from civil process, prevent the service of subpoenas on members of the deliberative body or grant any license to commit crimes, we disagree with the opinion to the extent it implies that the privileges and immunities clause grants immunity from arrest for misdemeanors. We believe the weight of authority to the contrary is persuasive. As a consequence of that conclusion, A.G. Op. No. 69-83 is hereby overruled to the extent it is inconsistent with this opinion.

[n8](#) The issue in **Harmer** was whether legislative members of the State Advisory Commission on Indians were exempt from civil process under art. IV, § 14 of the California constitution which provided that "[a] member of the Legislature is not subject to civil process during a session of the Legislature or for 5 days before and after a session." **Id.** at 855.

[n9](#) Art. IV, § 13 provides that legislators "shall not be questioned in any other place for speech or debate or for any vote cast in either house." While the freedom from arrest privilege is not identical to the speech and debate privilege, their purposes and origins are closely related.

[n10](#) The New Jersey Supreme Court interpreted the word "house" in its constitutional privileges and immunities clause to mean the meeting of members of either the Senate or the General Assembly as a whole or by committee. **Id.** at 614. **See also People v. Ohrenstein**, 563 N.Y.S.2d 744 (N.Y. 1990) (immunity extends to committee meetings and hearings which do not occur on the floor. **Id.** at 752 (citing **Doe v. McMillan**, 412 U.S. 306, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973))).