STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-12

December 3, 2021[1]

QUESTION PRESENTED[2]

An administrative complaint alleges that a bill, if enacted, would result in personal benefits to a Member of the Legislature. The complaint further alleges that the Member violated the Governmental Conduct Act by (i) introducing the bill, (ii) making comments related to the bill in a legislative committee or on the Member's respective floor, or (iii) voting on the bill. Does the State Ethics Commission have jurisdiction to adjudicate the administrative complaint?

ANSWER

No.

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[1] This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

[2] Under 1.8.1.9(A)(5) NMAC, "[a]t the request of any commissioner, the director or the director's designee shall draft an advisory opinion based on any legal determination issued by the director, the general counsel, or a hearing officer for the commission to consider for issuance as an advisory opinion." On October 28, 2021, Commissioner Bluestone requested that the director draft an advisory opinion that presents the jurisdictional determinations that the director issued in Commission administrative cases Nos. 2021-004 and 2021-008. This advisory opinion omits references to the parties in those cases.

ANALYSIS

Under Article IV, Section 13 of the New Mexico Constitution, the Commission lacks jurisdiction to adjudicate Governmental Conduct Act claims where those claims are based on allegations that a Member of the Legislature either introduced a bill, made comments relating to a bill in legislative committee or on a legislative floor, or voted on a bill. Article IV, Section 13 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 cast in either house*.

N.M. Const. art. IV, § 13 (emphasis added). Since the advent of New Mexico's statehood, the New Mexico appellate courts have not interpreted Article IV, Section 13. We believe, however, that the state constitutional provision confers on Members of the New Mexico House of Representatives and Senate an immunity analogous to the immunity that the federal Speech or Debate Clause, U.S. Const., art. I, § 6, cl. 1, provides to Members of Congress. Our reading finds support in both the constitutional text and an Attorney General advisory opinion interpreting Article IV, Section 13's privilege-from-arrest clause.

First, Article IV, Section 13, which formed part of the original 1911 New Mexico Constitution, follows the text of the federal Speech or Debate Clause. *Compare* U.S. Const., art. I, § 6, cl. 1, *with* N.M. Const. art. IV, § 13.[3] In addition

[3] At the 1910 constitutional convention, the committee on legislative department submitted in its majority report language that mirrors the eighteenth-century phrasing of the federal constitutional text. *See Proceedings of the Constitutional Convention of the Proposed State of New Mexico held at Santa Fe, New Mexico*, at 60 (Press of the Morning Journal, 1910) ("[N]o member, for words spoken in any speech or debate, or for any vote he cast as such member, shall be questioned in any other place."). The committee on revision and arrangement might have edited the provision with an eye to formulations in other state constitutional provisions that had adopted the speech or debate protection for the members of their respective legislatures. *See* Thomas C. Donnelly, "The Making of the New Mexico Constitution Part II" *New Mexico Quarterly*, at p. 442, 12:4 (1942) ("No draft constitution was prepared in advance of the convention to guide the delegates in their work, but a copy of the proposed constitution of 1890 and copies of all the state constitutions were available."). In any event, any edits to the speech or

to language it copies from the federal Constitution, Article IV, Section 13 also states that Members "shall not be questioned in any other place . . . *for any vote cast in either house*." N.M. Const. art. IV, § 13 (emphasis added). This addition makes manifest in the New Mexico Constitution what, by 1881, the United States Supreme Court had held to be encompassed by the federal Speech or Debate Clause—namely, that the constitutional protection extends to a legislator's act of voting. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) (concluding that the protections afforded to members of Congress by the federal Speech or Debate Clause extend not only for "words spoken in debate," but also "to things generally done in a session of the House by one of its members in relation to the business before it," including the "act of voting").

Second, in a 1993 advisory opinion, the Office of the Attorney General interpreted Article IV, Section 13's privilege-from-arrest clause to have the same limits that the United States Supreme Court, in 1908, found in the analogous clause in the federal Constitution. *See* N.M. Att'y Gen. Op. No. 93-04, 1993 WL 364398, at *2 (Mar. 5, 1993) (interpreting Article IV, Section 14's privilege-from-arrest clause not to extend to criminal arrests) (citing *Williamson v. United States*, 207 U.S. 425, 446 (1908) (concluding that the term "treason, felony and breach of the peace," as used in the federal Constitution, excepted all criminal offenses from the operation of the privilege)). The Office of the Attorney General's reliance on federal case law when interpreting Article IV, Section 13 makes good sense. Where the New Mexico Constitution's text follows analogous text in the federal constitution, and where neither structural differences between the state and federal government nor distinctive characteristics of New Mexico call for a different result, federal precedents interpreting the federal constitutional text inform the meaning of the state constitutional text.[4] This approach is readily applicable to the speech or debate protection, which is common to the vast majority of state

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debate clause were just wordsmithing: by 1910, the speech or debate protection had long formed a foundational part of American law, having come down from the English Bill of Rights of 1689, through Article V of the Articles of Confederation. *See United States v. Johnson*, 383 U.S. 169, 177–178 (1966). By the time of the federal constitutional convention, the speech or debate protection was already so well established that it was approved without discussion or opposition. *Id.* at 177 (citing II Records of the Federal Convention 246 (Farrand ed. 1911)).

[4] *See State v. Gomez*, 1997-NMSC-006, ¶¶ 19–20, 122 N.M. 777 (explaining and adopting the "interstitial approach" to state constitutional interpretation) (citing *Developments in Law – The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1358 (1982)).

constitutions. *Cf. State v. Dankworth*, 672 P.2d 148, 151 (Alaska Ct. App. 1983) ("[W]e find persuasive the line of cases interpreting the federal . . . [the Speech or Debate Clause] and utilize the same analysis in interpreting our own constitution.").

Article IV, Section 13's speech or debate clause provides Members of the Legislature with immunity from administrative, civil, and criminal actions—whether brought by private individuals or an executive branch agency—for legislative acts taken in the course of the Members' official responsibilities. *Cf., e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975); *Gravel v. United States*, 408 U.S. 606, 624 (1972); *Kilbourn*, 103 U.S. at 204. When claims alleged against a legislator are predicated on that legislator's legislative acts, Article, Section 13 operates as a jurisdictional bar to both judicial and administrative proceedings. *Cf. Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (quoting *Doe v. McMillan*, 412 U.S. 306, 312 (1974)); *cf. also Dankworth*, 672 P.2d at 151–152 (affirming the dismissal of conflict-of-interest counts against an Alaska state senator where the counts were based on allegations of legislative acts for which the state constitution afforded immunity). This jurisdictional bar is a consequence of Article IV, Section 13's sweeping terms: the provision expressly provides that, for their speech or debate and for their votes, legislators "shall not be questioned in any other place." N.M. Const. art. IV, § 13.

"[A]ny other place" includes the State Ethics Commission. N.M. Const. art. IV, § 13. Article V, Section 17, which creates the Commission, does not reduce the immunity that Article IV, Section 13 confers on legislators. Article V, Section 17 authorizes the Commission to initiate, receive, investigate, and adjudicate complaints against legislators. *See* N.M. Const. art. V, § 17(B). But that authorization is consistent, not in conflict, with the protections that Article IV, Section 13 provides to legislators: not all of a legislator's actions are constitutionally protected legislative acts.[5] Furthermore, the legislative acts for

[5] *See Gravel*, 408 U.S. at 625 ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."); *Fields*, 459 F.3d at 12 ("Legislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process."); *see also, e.g.*, *State v. Gregorio*, 451 A.2d 980, 988 (N.J. Super. Ct. Law Div. 1982) (denying a motion to dismiss indictment against state senator for willfully providing false information in a financial disclosure statement and holding that "the submission of a financial disclosure statement does not constitute a part of the legislative or deliberative process protected by the [state] Constitution"). Regarding

which Article IV, Section 13 confers immunity are not coextensive with every use of the powers and resources of a legislator's public office or with every action that a legislator takes *qua* legislator; accordingly, the immunity provided by Article IV, Section 13 does *not* prevent the Commission from adjudicating all Governmental Conduct Act claims that complainants might assert against legislators. It only does so where the claims are predicated on protected legislative acts. And that is the case where a complainant alleges that a Member of the Legislature violated the Governmental Conduct Act because the Member introduced a bill, made comments relating to a bill in committee or on the floor, or voted on a bill.

A claim against a legislator cannot be maintained if it is based on a legislative act. *See United States v. Renzi*, 651 F. 3d 1012, 1035 (9th Cir. 2011) ("That was the primary point of *Eastland*; that the Clause's privilege against liability applies in equal measure to preclude . . . civil actions against a Member . . . that are premised on 'legislative acts.'" (quoting *Eastland*, 421 U.S. at 503)). Sponsoring a bill, advocating for a bill in a legislative committee, and voting for a bill, whether in committee or on the floor, are quintessentially legislative acts. *See Helstoski*, 442 U.S. 477 (introducing proposed legislation); *Gravel*, 408 U.S. 606 (introducing testimony and evidence into public record at a subcommittee hearing); *Johnson*, 383 U.S. 169 (speeches); *Kilbourn*, 103 U.S. 168 (voting). Accordingly, the Commission lacks jurisdiction for Governmental Conduct Act claims based on such conduct—even if the complaint's allegations are true that, if enacted, the bill would personally benefit the Member.

We emphasize that this advisory opinion concerns the State Ethics Commission's jurisdiction, not the duties imposed by the Governmental Conduct Act. The Governmental Conduct Act prohibits self-dealing by legislators through legislative acts. *See* NMSA 1978, § 10-16-3(A) ("The legislator . . . shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests."). But Article IV, Section 13 creates an immunity for legislators from claims by the executive branch, and this immunity is both ancient in pedigree and, as courts have repeatedly opined, necessary to preserve the separation of powers. *See, e.g.*, *United States v. Johnson*, 383 U.S. 169, 177–178 (1966). If a legislator has taken official legislative acts "to

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the scope of immunity for legislative acts (and motives for legislative acts), see *United States v. Helstoski*, 442 U.S. 477, 489 (1979); *McMillan*, 412 U.S. at 313–18; *Gravel*, 408 U.S. at 613–29; *United States v. Brewster*, 408 U.S. 501, 507–29 (1972); *United States v. Johnson*, 383 U.S. 169, 174–85 (1966); *Kilbourn*, 103 U.S. at 201–205; *accord United States v. Menendez*, 831 F.3d 155, 166–67 (3d. Cir. 2016).

obtain personal benefits or pursue private interests," § 10-16-3(A), the State Ethics Commission lacks jurisdiction to issue a remedy. But the law provides for a remedy in other ways. Article IV, Section 13 does *not* protect legislators from sanctions administered by the legislative body of which they are a member. *See* N.M. Const. art. IV, § 13 (providing that members "shall not be questioned in any *other* place") (emphasis added); *see also* N.M. Const., art. IV, § 11 (regarding expulsion of members). Hence, under subsection 10-16-14(B) of the Governmental Conduct Act, each legislative body can discipline its members for violations of the Act. So can the electorate. The State Ethics Commission, however, cannot.

Finally, we observe that consideration of Article IV, Section 13 is not improper in a review of whether the Commission has jurisdiction for an administrative complaint. The Legislature imposed on the Commission's director the duty to determine if a complaint is outside the Commission's jurisdiction. § 10-16G-10(D); *cf. also* 1.8.3.10(C)–(E). In making that jurisdictional determination in a particular administrative proceeding, the director may apply constitutional provisions that bear upon the Commission's jurisdiction in that administrative proceeding, so long as the jurisdictional determination does not involve a constitutional review of any statute, including the Commission's own enabling legislation. *See, e.g.*, *Sandia Sav. & Loan Ass'n v. Kleinheim*, 1964-NMSC-067, ¶ 14, 74 N.M. 95 (quoting 3, Davis, Administrative Law Treatise, § 20.04); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 36, 124 N.M. 479 (Hartz, J., concurring in part and dissenting in part). Indeed, the director must consider any law (again, without subjecting a statute to constitutional review) that bears on the Commission's jurisdiction because if the Commission takes an *ultra vires* action, it is subject to reversal by a state district court. *See* Rule 1-075(R)(3) NMRA. The consideration of Article IV, Section 13's speech or debate clause in no way amounts to a review of the constitutionality of either the Governmental Conduct Act, §§ 10-16-1 to -18, or the State Ethics Commission Act, §§ 10-16G-1 to -16. Rather, consideration of Article IV, Section 13's speech or debate clause is limited to whether, as applied to the allegations of a particular complaint, the speech or debate clause bars the Commission's jurisdiction to investigate and decide the claims in the complaint.

CONCLUSION

The State Ethics Commission lacks jurisdiction to adjudicate an administrative complaint that alleges a Member violated the Governmental

Conduct Act by (i) introducing a bill, (ii) making comments related to a bill in a legislative committee or on the Member's respective floor, or (iii) voting on a bill.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
CELIA FOY CASTILLO, Commissioner
HON. GARREY CARRUTHERS, Commissioner
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