

## Opinion No. 69-83

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**BY:** OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,  
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**TO:** Mr. John B. Irick, Chairman, Constitutional Convention Steering Committee, 334  
State Capitol, Santa Fe, New Mexico

### QUESTIONS

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Do delegates to the Constitutional Convention enjoy a similar immunity to that of the members of the State Legislature?

#### CONCLUSION

Yes, but see analysis.

### OPINION

#### {\*131} ANALYSIS

The New Mexico Constitution specifically provides in Article IV, Section 13 as follows:

"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."

The New Mexico section is similar to Article I, Section 6 of the United States Constitution which {\*132} applies to members of Congress. The privilege for legislators first appeared in unequivocal form in the English Bill of Rights of 1689. See **Tenney v. Brandhove**, 341 U.S. 367, 95 L.ed. 1019, 71 S. Ct. 783 (1951); Veeder, Absolute Immunity in defamation: Legislative and Executive Proceedings, 10 Col. L.Rev. 131 (1910).

By its terms, the Constitutional provision is limited to members of the legislature. The Constitutional Convention enabling act, N.M. Laws 1969, Ch. 134, is silent with regard to any privileges and immunities afforded the delegates to the convention. One text writer on constitutional conventions, an authority relied upon by the New Mexico Supreme Court in the case of **Hutcheson v. Gonzales**, 41 N.M. 474, 71 P.2d 140 (1937), has viewed the matter thusly:

"Are the members of a Convention, or is the body itself, entitled to claim the immunities usually accorded to the legislature, and to its individual members, such as exemption from legal process, from service as jurors or witnesses, or from legal question tending to impair the freedom of their debates and proceedings? . . . The immunities thus indispensable are, in the case of legislatures, commonly secured by rules and maxims or constitutional provisions, and are styled privileges, as being rights or exemptions appertaining to their office to which citizens generally are not entitled . . . [t]he real difficulty is, not to determine whether or not a Convention ought to enjoy those privileges, but to ascertain how and by whom they should be protected and enforced. . . . There is . . . but one position that can be maintained with safety . . . [conventions] must look to the law of the land and to its appointed administrators, and not to their own powers, for protection in their office . . ." Hoar, *Constitutional Conventions* 191 (1917).

Looking then to the "Law of the Land" we find that the rationale for the privileges given the legislature should be applied to the delegates to the Constitutional Convention. Because we do not have a specific provision like Article IV, Section 13 of the New Mexico Constitution we must rely on more general principals. Basically, the privileges are categorized into two parts; (1) the freedom from harassment of misdemeanor prosecutions during the term of the convention and (2) the privilege to debate the issues without fear of suits for defamation.

The freedom from arrest provision has as its basis the protection of the delegates from petty harassment which would tend to disrupt the effectiveness and usefulness of the deliberations in the Constitutional Convention. In a case involving a delegate to the Pennsylvania Convention to consider the proposed United States Constitution of 1787, the Pennsylvania Court of Common Pleas applied the rationale to a delegate to that convention in the absence of any specific statutory or constitutional provisions. The Court held that the delegates "ought not to be diverted from the public business by lawsuits, brought against them during the sitting of the house; which, though not attended with the arrest of their persons, might yet oblige them to attend to those lawsuits . . . ." **Bolton v. Martin**, 4 Dall. 296, 1 L.ed. 144 (1788).

In spite of the somewhat sweeping language of the Pennsylvania Court in **Bolton v. Martin, supra**, it is fairly well established that the specific immunity from arrests for misdemeanors does not grant an immunity from civil process. See Annot., 94 A.L.R. 1470 (1935). Nor does it prevent the service of subpoenas on members of the deliberative body. See Annot., 79 A.L.R. 1214 (1932). It is likewise, unquestioned that the {\*133} privilege or immunity does not grant any license to commit crimes.

With regard to the question of liability for defamation it appears that the law of the land has long recognized the privileges and immunities of government officials other than legislators or U.S. Congressmen. See Annot., 132 A.L.R. 1340 (1941) and **Barr v. Matteo**, 360 U.S. 564, 3 L.ed.2d 1434, 79 S. Ct. 1335 (1959). There does appear to be some doubt as to whether the privilege in this area is an extensive for non-legislative bodies. As stated by Mr. Veeder in the Columbia Law Review article, supra:

"Absolute immunity is confined to members of congress and of the state legislatures. The public policy which requires an utmost freedom of action in the conduct of these independent departments of government does not apply to inferior bodies exercising certain legislative functions . . . members of such bodies are sufficiently protected by their exemption from liability in the exercise of good faith."

Absent any definitive holding on the question, we would assume that the privilege granted to delegates of the constitutional convention would be characterized as "qualified" although the courts are not always certain as to the validity of the distinction between an absolute and qualified privilege. See e.g., 53 C.J.S., Libel and Slander §§ 88-89. Basically, a qualified privilege protects only utterances made without actual malice. **Ward v. Ares**, 29 N.M. 418, 223 P. 766 (1924). The important question is whether or not the utterance of the delegates pertains to his duties as a delegate:

"It is not the title of his office but the duties with which the particular officers sought to be made to respond in damages is entrusted -- the relation of the act complained of to 'matters committed by law to his control or supervision' . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits."

**Barr v. Matteo, supra**, 360 U.S. at 373-74.

The scope of the privilege extended to the so-called inferior legislative bodies relates to utterance made in the discharge of public duties and which are relevant and proper and in good faith. See e.g., **Greenwood v. Cobbey**, 26 Neb. 449 (1889); **Burch v. Bernard**, 107 Minn. 210 (1909). As state by one of the earliest American decisions on the scope of the legislative immunity:

"To consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it uttered in the walls of the representatives chamber . . . would be to extend the privilege farther than was intended by the people, or is consistent with sound policy. . . ."

**Coffin v. Coffin**, 4 Mass. 1, 31 (1808).

It is our conclusion, therefore, that the delegates to the constitutional convention do have similar privileges and immunities of the legislators although the privileges and immunities are less well defined and may not have the same broad scope of those granted to the legislators.