

MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

June 8, 1977

Honorable Gerard P. Conley
Senate Chambers
State House
Augusta, Maine 04333

Dear Senator Conley;

I am responding to your request for an opinion of this office with regard to interpretation of Article IV, Part Third, Section 8 of the Constitution of Maine. That section reads, in pertinent part:

"The Senators and Representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the Legislature, . . ."

Your specific question is what constitutes a "breach of the peace" for purposes of the exemption from the legislative privilege from arrest. The answer to your question is that a "breach of the peace" as used in this constitutional section means all crimes which are neither treason nor a felony, so that the entire section exempts all criminal matters and proceedings from the privilege against arrest. In other words, the constitutional privilege against arrest means only that a Senator or Representative may not be arrested in conjunction with a civil matter, a procedure that is somewhat anachronistic today.

The bases for our opinion are judicial interpretations of similar provisions in the United States Constitution and the Constitutions of other states. Although Article IV, Part Third, Section 8 has been cited in a few decisions of the Supreme Judicial Court, these citations do not assist in interpreting the meaning of the words in question, e.g. Kalloch v. Elward, 118 Me. 346 (1919); Chase v. Fish, 16 Me. 132 (1839). The provision for legislative immunity for United States Senators and Representatives is found in Article I, Section 6, Clause I of the United States Constitution, which is almost identical to the provision in the Maine Constitution. The Federal provision reads:

"They [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; . . ."

The leading case for interpreting this language is Williamson v. United States, 207 U.S. 425 (1908). In that case Representative Williamson, while in office, was indicted and convicted of conspiring to suborn perjury in a proceeding with regard to purchase of public lands. In answering Williamson's defense based upon the Constitutional privilege, the Supreme Court made a detailed review of the history of the phrase in English parliamentary usage before the Revolutionary War. As a result of this historical investigation, the Court concluded that the words "treason, felony or breach of the peace" were used in England for the purpose of excluding all crimes from the general parliamentary privilege against arrest. The purpose of the privilege itself was to prevent arrest in civil cases, primarily for debt, and avoid conflict with the public interest of having attendance and representation in Parliament. The Court also noted that the lack of debate concerning this phrase at the time that it was adopted in both the Articles of Confederation and later in the United States Constitution indicates that the application of the privilege had a general and well understood meaning, i.e. the meaning that had been adopted in English parliamentary usage and that this is the interpretation which should be used today. It may be noted that there was a similar lack of debate on this provision when it was included in the Constitution of Maine. The Court also cited Cushing's 1856 Treatise on Elements of the Law and Practice of Legislative Assemblies in the United States for the proposition that the legislative privilege may be considered the same as it was in England and that all criminal cases and proceedings come within the exception to that privilege.

Another United States Supreme Court case which considered the meaning of the legislative privilege provisions is Gravel v. United States, 408 U.S. 606 (1972); rehearing denied 409 U.S. 902. This case concerned investigations into the background of Senator Gravel's reading from the "Pentagon Papers" before a Senate Sub-committee. Although the major concern of the Court was in the "Speech and Debate" provisions of this constitutional section, the Court noted that the "arrest" section provides a privilege from arrest only in civil cases. In doing so, the Court stated, "Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." Citing: T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92-1, page 437 (1971).

A third federal case is Long v. Ansell, 293 U.S. 76 (1934) which involved a civil action for libel against Senator Huey P. Long. Senator Long had been summoned to appear in this case but had refused to do so on the basis of the privilege against arrest. The Court held that the privilege did not prevent summons in civil cases but only arrests in those cases, citing Williamson (supra). However, the prior decision by the Court of Appeals of the District of Columbia in this same case (69 F.2d 386) is more interesting for purposes of this opinion. The Court considered some of the same historic background and cited the Williamson case. The Court then concluded:

"The constitutional exemption has never been interpreted as a retreat from Congressmen and Senators from arrest for crime. At the time of the adoption of the Constitution there were laws in the states authorizing imprisonment for debt in aid of civil process. Undoubtedly it was to meet this condition that the exemptions in federal and state constitutions were aimed. The reason for incorporating this provision in a constitution has largely disappeared." 69 F.2d 386, 388. 1/

There are also two cases arising under similar provisions in the Constitutions of California and Kentucky. The first of these cases is Ex Parte Emmett, 7 P.2d 1096 (Cal., 1932). Mr. Emmett was a California assemblyman who violated a city traffic ordinance by crossing a street on foot in front of oncoming traffic, despite an order from a traffic policeman to remain where he was. Mr. Emmett also struck the policeman when the policeman attempted to restrain him after Mr. Emmett had identified his position as a legislator. The California Supreme Court cited Williamson as the leading case and concluded that the exception from arrest covers all crimes and that the privilege applies only to arrest in civil cases. The Court also noted that it was unnecessary to determine whether the violation of the ordinance, a misdemeanor, was a "breach of the peace" as defined by the criminal code since misdemeanors were crimes known at common law. The Court added ". . . violations of the traffic ordinances would necessarily lead to disorder, and in large measure impair personal peace and security." 7 P.2d 1096, at 1099.

The second state case is Swope v. Commonwealth, 385 S.W.2d 57 (Ken., 1964). Senator Swope was a member of the Kentucky General Assembly who was arrested on a charge of breach of the peace after a dispute which occurred while he was parking his car at a high school basketball game. The provision of legislative privilege from arrest found in section 43 of the Constitution of Kentucky is nearly identical to the provision in the Maine Constitution. After

1/ It is interesting in this regard to note that the one case in Maine in which the Constitutional provision was directly discussed, Chase v. Fish (supra), involved the question of arrest on execution for a debt owed by the Senator-elect.


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tracing the history of this provision, the Court, citing Williamson, concluded that all crimes are excluded from the privilege. The Court stated that the provision was ". . . never intended as a sanctuary for members who had committed a public offense."

Based upon the above judicial interpretations of constitutional provisions similar to or identical with Article IV, Part Third, Section 8 of the Constitution of Maine, we repeat our opinion that the term "treason, felony or breach of the peace" serves to exclude from the privilege against arrest all arrests with regard to criminal matters and proceedings. This opinion is not a comment on any currently pending matter which may involve questions of legislative privilege.

Please continue to call on us whenever we may be of assistance.

Sincerely,


Joseph E. Brennan
Attorney General

JEB:jg