

Legislative Immunity: Who Benefits?

Recently, an oft quoted myth has resurfaced that legislative immunity is a perk for State Representatives which can be invoked whenever convenient. For example, this myth is being used as the basis for accusations of impropriety being leveled against Idaho State Representative Phil Hart (3rd H.D.)

Rep. Hart has relied on a provision in the Idaho Constitution to postpone an income tax controversy he is involved in until after the conclusion of the legislative session. Both Washington and Idaho legislators are protected from “any civil process” while their legislatures are in session. As a threshold matter of state sovereignty that protection also includes civil process attempted by the federal government.

State Constitutions

Article 2, Section 16 of the [Washington Constitution](#) reads:

Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; *they shall not be subject to any civil process during the session of the legislature,* nor for fifteen days next before the commencement of each session.

Similarly [Article III, Section 7](#) of Idaho’s Constitution reads:

Senators and representatives in all cases...shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof...

There are eleven states that have similar language in their respective constitutions which use the phrase “any civil process.” An I.R.S. decision on what Rep. Hart’s allowable business deductions are is administrative in nature and clearly a civil matter because it involves an attempt to take property. It is therefore, “any civil process.”

The History of and Reasons for Legislative Immunity

Our Founding Fathers just freed from English tyranny wanted to ensure that elected Representatives would not face arbitrary arrest for the sake of political retribution.

As stated by the United States Supreme Court:

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from

the Crown, its statement of the privilege grew stronger. In 1689, the Bill of Rights declared in unequivocal language: "That 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 Wm. & Mary, Sess. 2, c. II. See *Stockdale v. Hansard*, 9 Ad. & El. 1, 113-114 (1839)... Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

The Founding Fathers also wanted to ensure that the people's voice was protected and uninhibited:

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." *Id.* at 373.

The court continued in summary "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, **not for their private indulgence but for the public good.** One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial... [Emphasis added] *Id.* at 377.

This idea has been affirmed time and again in many states.

In Wisconsin the Speaker of the House's office received a subpoena for one of the speaker's administrative assistants related to an audit of a lobbyist's tax return. The Speaker took the position that his administrative assistant was his alter ego and should be protected by the constitutional provision that a member of the legislature not be "subject to any civil process, during the session of the legislature...." The Supreme Court of Wisconsin agreed with the Speaker.

"...the meaning of a constitutional provision may be determined by looking at the objectives of the framers in adopting the provision. We conclude, as did the court of appeals, that the rationale for the privilege was to preserve the public's right to representation in the state legislature. **When a legislator cannot appear the people whom the legislator represents lose their voice in debate and vote.**" [Emphasis added] *State v. Beno*, 341 N.W. 2d 668 (1984).

In Michigan there was a legislator who had a garnishment on his wages. The judgement was in place before the legislative session started. The Attorney General for the state of Michigan defended the legislator because the garnishment was viewed more as an attack against the legislative branch of government as opposed to an attack on the legislator. The Michigan Constitution uses the same “any civil process” language used in Idaho and Washington. Here is what the Michigan Supreme Court said of the garnishment:

“This is too narrow view of the situation. The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before and after, so that the state could have their undivided time and attention in public affairs.” *Fuller v. Barton*, 208 N.W. 696 (1926).

In Arizona and Wisconsin the Attorneys General agreed that a garnishment shall not be allowed on a legislator’s paycheck during the legislative session in their respective states. The Arizona Attorney General cited the *Fuller v. Barton* case as his authority. “It is my opinion that the Arizona constitutional provision prohibits garnishment proceedings, and, therefore, you should not honor any garnishments involving any legislator during the sessions of the Legislature.” *Arizona, Opinion of Attorney General*, No. 56-24.

In Kansas the point is made again that the immunity provision of their constitution is for the benefit of the state and of the people that the legislator represents.

The use of the words “subject to” means that the member is not “liable to” the service of civil process. To construe our constitution differently would be to defeat its apparent object. The state is clearly entitled to the service of its members of the legislature during the time sessions of either branch thereof are being held. Our constitution has wisely provided that the members shall not be annoyed with arrests or suits, or be obliged to be absent from their duties....” *Cook v. Senior*, 45 P. 126, 127-8 (1896).

In California the language in that state constitution reads “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.” The California Court of Appeals said:

In precise terms article IV, section 14, creates an exception from civil process without qualification as to the kind of subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator’s personal affairs. ...such immunities are designed to benefit the public by protecting legislators against compelled distraction and interference during the session.” *Harmer v. Superior Court*, 79 Cal. Reporter 855 (1969).

And finally in my state, **Washington**, a member of the Washington Senate, was sued for legal malpractice because he filed a lawsuit after the statute of limitations had expired. Senator

Gordon Walgren, in his capacity as an attorney, argued successfully that the statute of limitations tolls (is postponed) while he was tied up with the business of the legislature.

These similar constitutional provisions convince us that immunity was granted by our constitution to protect the legislators from distraction during the stated periods of time and should be broadly construed. Immunity from service of “any civil process” should be granted during the constitutional described time periods... When a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right... *Seamans v. Walgren*, 82 Wn.2d 771, 774 (1973).

This is exactly the case with Representative Phil Hart. The deadline to appeal given by the IRS or the Idaho Tax Commission should toll (be postponed) during the legislative session. Otherwise, Rep. Hart would have likely missed votes and debate to address his tax litigation. However, it is important to also note that this constitutional provision cannot be waived. For example:

In Alaska, that Attorney General says the legislator has no flexibility. According to him, exercising the immunity from civil process is mandatory. “Immunity against civil process cannot be waived by the legislator since the Alaska immunity is intended to protect the public as well as serve the convenience of the legislators.” *Alaska, Attorney General Opinion*, 159 Op. Att’y Gen. No. 8.

Conclusion

Rep. Hart has relied on the legislative immunity provision of the Idaho Constitution to postpone working on his own tax issues, which have been ongoing for a few years. There is no question that it is within the sovereign power of the states to afford this protection. Furthermore, the law seems to be clearly on Rep. Hart’s side. So why does the witch hunt continue? Has the I.R.S. ever been used as a weapon for political retribution? Both President Richard Nixon¹ and President Bill Clinton were accused of this.²

For a man who wrote a book challenging the I.R.S. definition of “income,”³ to face an arbitrary I.R.S. denial of normal business deductions⁴ and then not be allowed to appeal that decision because the I.R.S. ignores the Idaho Constitution while he is in legislative session...is a glimpse into the future of an Obama nation. Remember Obama’s request for [16,000 additional I.R.S. agents?](#)

Not only are Rep. Hart’s accusers in error, but the entire situation substantiates the very reason legislative immunity was written into the constitution in the first place...to prevent political persecution.

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¹ http://en.wikipedia.org/wiki/Nixon's_Enemies_List

² <http://archive.newsmax.com/archives/articles/2002/4/22/200136.shtml>

³ <http://www.constitutionalincome.com/>

⁴ It has been reported in the press that the IRS's denial of **100%** of Rep. Hart's business deductions over an eight year period was political payback after Rep. Hart's refusal to turn over the names and addresses of those who purchased his book. Now both the IRS and the Idaho Tax Commission are attempting to impose the income tax on the amount of these denied deductions which totals approximately \$300,000.