FOLDER NO.

194

TERRITORY OF ALASKA
Office of
ATTORNEY GENERAL
JUNEAU

J. Gerald Williams
Attorney General

David J. Pree
Assistant Attorney General

Henry J. Camarot
Assistant Attorney General

Edward A. Merdes
Assistant Attorney General

December 9, 1955

Honorable William A. Egan, President
Alaska Constitutional Convention
University of Alaska
College, Alaska

Re: Interpretation of Chapter 46, SLA 1955

Dear Mr. Egan:

This is in reply to your letters of December 3 and December 5, 1955, wherein you ask the following questions:

1. "Are the remarks made by delegates of the Alaska Constitutional Convention on the Convention floor and at public hearings of Convention Committees entitled to privileges and immunities similar to the remarks of members of the territorial legislature made on the floor of the legislature and at public hearings of legislative committees?

2. "Assuming that the Convention adopts a program to recess for a period of fifteen (15) days for the purpose of holding public hearings in various parts of Alaska, are we correct in assuming that the period of recess does not count as a part of the seventy-five (75) days which the Convention is authorized to meet? If the following arrangements for compensation, per diem, and costs of travel during the recess period are approved by the convention, would there be, in your opinion, any legal objection thereto?

a. That the delegates shall be entitled to reimbursement for their actual travel costs going to and returning from their homes for the recess and to compensation and per diem for the days involved in such travel.

b. That the delegates who participate in public hearings scheduled by the convention will be entitled to compensation and per diem for the actual days devoted to such hearings which shall not exceed the number of days approved in advance by the convention. If the site of the hearings is away from their homes, they shall also be entitled to reimbursement for the actual cost of travel going to the hearings and returning to their homes or to the convention.

c. That those delegates whose normal residence is outside the Fairbanks area and who are unable to return thereto during the recess period, shall be entitled to per diem for the days of convention recess spent in the Fairbanks area.

d. That the rate of compensation and per diem shall be those established in the convention enabling act."

Answering each question in the same order as they are set forth in your letters, you are advised as follows:

I.

Initially, it is noted that Chapter 46, Session Laws of Alaska, 1955, the Constitutional enabling act, does not extend any privilege or immunities to the delegates for any words uttered in the discharge of their official duties 1/ For this reason, the common law, which is applicable within the Territory, must be examined to determine if such privilege or immunity exists. Section 2-1-2 ACLA 1949 makes the common law applicable to Alaska.

1/ Compare Section 12 of the Organic Act for the Territory of Alaska, which states:

"That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions.***"

Also, see Article I, Section 6 of the United States Constitution, which provides:

"***for any Speech or Debate in either House, (the Senators and Representatives) they shall not be questioned in any other Place."

Attorney General of Alaska

I believe it hardly subject to argument that the privilege or immunity sought is primarily to allow delegates to the Convention to speak their minds freely and exercise their respective functions in drafting a Constitution for the State of Alaska without incurring the risk of an action for the recovery of damages. This freedom from libelous or slanderous legal action will contribute greatly to freedom of expression.

The statements and communications by members of any public governing or deliberative body are divided into two main general classes namely:

(1) Those that are absolutely privileged, and

(2) Those that are qualifiedly or conditionally privileged.

An absolute privilege affords a complete defense to a libel or slander lawsuit and even the existence of malice will not destroy such an absolute privilege. Ryan v. Wilson, 300 N.W. 707, 712; Robinson v. Home Fire and Marine Ins. Co., 59 N.W. 2d 776.

It may be generally stated that the occasion and the office afford the test as to whether an alleged slanderour or libelous statement may be absolutely privileged, conditionally privileged, or not at all privileged. Ryan v. Wilson, supra.

The doctrine of privileged communication is based upon public policy. This is especially true in cases of absolute privilege, where the interests and the necessities of society require that on certain occasions, utterances or publications of individuals, even though they are both false and maliciously made, shall protect the defamer from all liability to prosecution. Ryan v. Wilson, supra; Newell on Slander and Libel, 4th Ed., Section 349; Tanner v. Stevenson, 128 S.W. 878.

It is usually held that the public welfare alone justifies the privilege and on occasions some persons who are members of such public bodies, should be allowed to express their sentiments fully and fearlessly upon all questions and subjects. Mills v. Denny, 63 N.W. 2d 222, 48 A.L.F. 2d 933.

Attorney General of Alaska

This rule should be and usually is confined strictly to cases in which the public service requires complete immunity to legislatures in debate. Ryan v. Wilson, supra. Most courts as well as textbook writers agree that this privilege is and must be restricted to narrow limits. Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary. The same is true in federal and state legislatures, and their committees, where the decorum is under the watchful eye of presiding officers and records may be stricken and the offending member punished. Mills v. Denny, supra.

The rule is quite well settled that in final analysis the question as to whether or not there is a privilege, absolute or qualified, under the circumstances or occasion involved is for the court to decide. Robinson v. Home Fire and Marine Ins. Co., supra; Ryan v. Wilson, supra; Mills v. Denny, supra.

The general rule is that that defamatory statements uttered by members of Congress or of state or territorial legislatures in the performance of their legislative function is absolutely privileged. Tenney et al. v. Brandhove, 341 U.S. 367; 3 Restatement of the Law of Torts, Sec. 590, p. 236; 40 A.L.R. 2d 941 (Anno.).

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 offense." II Works of James Wilson, (Andrews Ed 1896) 38; Tenney v. Brandhove, supra.

In the time allowed, no case was found extending such common law privileges and immunities to delegates of a Constitutional Convention. However, in analyzing the nature of such a body, it is inescapable that, at the very minimum

Attorney General of Alaska

it has the very basic and fundamental powers and rights within its jurisdiction as are likewise vested in the Congress of the United States and the Legislature for the Territory of Alaska.

In Goodrich v. Moore, 72 Am. Dec. 74, the Supreme Court of Minnesota declared that a constitutional convention is the "highest legislative assembly recognized in law." In Frantz v. Autry, 91 P. 193, 202, the Court held that:

> "In a Territory, the source of all power is Congress. But in the formation of a Constitution and state government the power emanates from the people."

The Court further held that the delegates to the convention were the immediate representatives of the people of the "two Territories" (Territory of Oklahoma and the Indian Territory) and that the convention "was created by the direct action of the people, and in the discharge of its powers, duties and obligations it performs one of the highest and most important acts of popular sovereignty." In Sproule v. Fredericks, 11 S. 472, the Supreme Court of Mississippi, in discussing the powers of the convention said:

> "It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth."

Based on the above premise, that the delegates to the convention are serving, by any interpretation, in at least an equal or comparable capacity as members of the Congress and the legislature, I am of the opinion that remarks made by them on the convention floor and in the discharge of their duties of office at any public hearing should be afforded an absolute privilege. This conclusion is also supported by Judge Jameson, quoted by you in your letter, wherein he fully endorses granting members of a convention the same immunities and privileges allowed jurors, witnesses and legislators.

II.

The questions under Paragraph 2 of your letter are primarily a matter of statutory construction. The following

provisions of Chapter 46, SLA 1955, are pertinent to the discussion herein:

> "Section 1. *** The convention shall meet for not more than seventy-five days but may, at its discretion, recess for a period of not to exceed fifteen days for the purpose of holding public hearings in Alaska on proposed provisions of the constitution."
>
> "Section 18. The convention shall have power to incur such expenses as may be necessary, including but not limited to expenses for employment of such clerical, technical, and professional personnel as it may require, in order to exercise the powers conferred and to perform the duties imposed by this Act."
>
> "Section 19. The delegates shall receive a per diem of twenty dollars for each day in attendance at, including time spent going to and returning from, the convention; and they shall be reimbursed for their actual travel costs incurred in attending upon their duties as delegates. In addition they shall receive for their services the sum of fifteen dollars per day as compensation for each day's attendance while the convention is in session."

The primary rule of construction is to ascertain and declare the intention of the legislature and carry such intention into effect to the fullest degree. 50 Am. Jur. 200, Statutes, Section 223. The legislative will is the all-important factor. Juneau Spruce Corporation v. International Longshoremen's and Warehousemen's Union, 12 A. 260, 83 F. Supp. 224.

All laws are to be given a sensible construction. United States v. Katz, 271 U.S. 354. Where the language of a statute leads to an absurdity or hardship presumably not intended, it may be construed by modifying its words so as to carry out the real intention. Cf. Tolsom v. United States, 160 U.S. 121. Interpretational inconsistencies must be avoided and all parts of the statute must be harmonized to reach the real

intent of the legislature. Iglehart v. Iglehart, 204 U.S. 478, 51 L. Ed. 525.

I am of the opinion that under Section 1, quoted above, the Convention is authorized to meet for a period not exceeding seventy-five days, exclusive of the time allowed for a recess. As the word "meet" is used in the context of the statute, it suggests the full gathering of the delegates as a deliberating body engaged in the function of drafting a Constitution. It is the Convention that "shall meet for not more than seventy-five days"; the conducting of public hearings is not a meeting of the Convention.

(a) As I interpret Chapter 46, a recess is authorized "for the purpose of holding public hearings." However, it is readily recognized that all members will not be engaged in such a function. Therefore, several delegates may be faced with the alternative of remaining in Fairbanks or returning to their place of residence. 2/ Under these circumstances, and recognizing the absence of any intentional avoidance of the duties of office, I am of the opinion that the delegates are entitled to be reimbursed for the actual travel costs incurred while going to and returning from their homes during the recess together with a per diem of $20.00 for each day involved in such travel. However, as I read the Act, they are not entitled to receive any compensation for that time spent in travel; nor may they be given any per diem while at their place of residence.

(b) If, during the recess, a delegate participates in a public hearing scheduled by the Convention, he is entitled to receive compensation and per diem for the actual days devoted to such hearings. I feel it is implied that a delegate has the right to be paid for services rendered in the furtherance of his official duties, which by statute specifically includes the holding of such public hearings. Consider Section 18.

Furthermore, I interpret Section 19 as authorizing

2/ If a delegate remains in Fairbanks, he is entitled to receive a per diem allowance of $20.00; however, no travel expenses are charged against the Convention's appropriation. On the other hand, if he returns to his place of residence travel expenses will be incurred, while a certain portion of the per diem otherwise allowed, will be saved.

Attorney General of Alaska - Reference

the reimbursement to delegates of the actual cost of travel, together with the allowance of a per diem during such times as they are going to a hearing and returning to their homes or to the Convention. However, once again, I conclude they are not permitted to be paid any compensation during such travel.

(c) As discussed in subsection (a) above, a delegate not scheduled to take part in a hearing is faced with the alternative of remaining in the Fairbanks area or returning to his place of residence. Consistent with the discussion in subsection (a), I am of the opinion that those delegates whose normal place of residence is outside the Fairbanks area are entitled to per diem for those days spent in that city.

(d) As a matter of law, the rate of compensation and per diem must be $20.00 a day per diem and $15.00 a day compensation. Use of the word "shall" in the Act makes this mandatory and does not permit deviations therefrom.

Very truly yours,

J. GERALD WILLIAMS
Attorney General

By: Henry J. Camarot
Henry J. Camarot
Assistant Attorney General

HJC:mez

Attorney General of Alaska

TERRITORY OF ALASKA
OFFICE OF
ATTORNEY GENERAL
JUNEAU

J. GERALD WILLIAMS
ATTORNEY GENERAL

DAVID J. PREE
ASSISTANT ATTORNEY GENERAL
HENRY J. CAMAROT
ASSISTANT ATTORNEY GENERAL
THOMAS B. STEWART
ASSISTANT ATTORNEY GENERAL
EDWARD A. MERDES
ASSISTANT ATTORNEY GENERAL

December 30, 1955

Mr. William A. Egan, President
Alaska Constitutional Convention
University of Alaska
College, Alaska

Dear Mr. Egan:

This is in reply to your letter of December 6, 1955 wherein you request an opinion on the following questions:

(1) Can the convention by majority vote "stop the clock" immediately prior to completing 75 days in session and continue meeting thereafter?

(2) If the answer is in the affirmative, would the delegates be entitled to compensation or per diem for the additional days for which they meet after the clock is stopped?

In brief response to each question, I conclude as follows:

(1) The convention may not "stop the clock" after the 75 days in actual session has elapsed, and accordingly, must adjourn, in fact, on the 75th day.

(2) In no event would the delegates be entitled to receive additional compensation or per diem for any work performed after the expiration of the 75th day.

Analysis

Section 1 of Chapter 46 SLA 1955 reads in part as follows:

"***The convention shall meet for not more than seventy-five days but may, at its discretion, recess for a period of not to

exceed fifteen days for the purpose of holding public hearings in Alaska on proposed provisions of the Constitution." (Emphasis added.)

Speaking in very general terms, the legality of the Constitutional Convention and its enactments are dependent upon whether or not its activities are carried on within the terms perscribed by Chapter 46.

On March 20, 1953, this office issued an opinion, a copy of which is attached, wherein it was held that any action taken by a Territorial Legislature after the sixtieth day would be meaningless, notwithstanding the "stopping of the clock". The case cited in the opinion, Alaska Pacific Fisheries v. Territory of Alaska, 236 F. 52, 4 Alaska Fed. 432, 444, although involving a Territorial Legislature, would appear to apply with equal force to a Constitutional Convention.

Furthermore, I am of the view that no clerical officer of the Convention has the right to create a journal of the Convention proceedings other than a record of what actually transpired during the authorized period of time it was entitled to sit as a convention. 1/

Although some states follow the so-called "conclusive presumption rule" whereby the courts refuse to go behind the final enrolled and authenticated enactment of the law-making body, the applicability of this rule to Alaska has not yet been clearly ascertained. Compare Griffin v. Sheldon, 11 A 607, 78 F. Supp. 466, reversed on other grounds in 12 A 329, 174 F2d 382. To sanction a "stop-the clock" without the benefit of judicial precedent in the Territory would be legally hazardous and could easily jeopardize the validity of the Constitution. For this reason alone I would be reluctant to endorse the Convention's adopting the questionable practice of "stopping the clock".

1/ It has been held that in a proper suit instituted for the purpose of questioning the validity of the legislative journal entries that portion of the purported record which does not contain the truth, in fact, as to the proceedings could be expunged. State v. Thompson, 164 So. 192.

Attorney General of Alaska

In no event do I find any language in the Act expressly or impliedly authorizing the delegates to receive additional compensation or per diem following the 75th day of the Convention.

Very truly yours,

J. GERALD WILLIAMS
Attorney General

By: Henry J. Camarot
Henry J. Camarot
Assistant Attorney General

HJC/mw

Encl

cc: Legislative Auditor
Director of Finance

Attorney General of Alaska

Copy

TERRITORY OF ALASKA
Office of
ATTORNEY GENERAL

Juneau

March 20, 1953

Honorable Mike Stepovich
Chairman, Committee on Judiciary and Federal Relations
Alaska Senate
Juneau, Alaska

Dear Senator Stepovich:

This is in reply to your communication of March 18, 1953, in which you request my opinion as to what length of time the Twenty-First Territorial Legislature can remain in session, and whether the practice of "stopping the clock" is permissible.

Section 6 of the Alaska Organic Act (48 USCA Sec. 74) contains this provision:

> "The Legislature of Alaska shall convene.... on the fourth Monday in January....but.... shall not continue in session longer than sixty days in any two years unless convened in extraordinary session by a proclamation of the Governor...."

The legislative body now in session convened on January 26, 1953, at ten o'clock A.M.; hence, the sixtieth day will expire, and the legislature must adjourn, on March 27, 1953, at ten o'clock A.M. See Alaska Pacific Fisheries v. Territory of Alaska, 236 F. 52, 4 Alaska Fed. 432, 444. Any action taken by that body after such time will be meaningless, as will be the act of "stopping the clock" after the sixty days have elapsed.

Very truly yours,

J. GERALD WILLIAMS
Attorney General of Alaska

By:
John H. Dimond
Assistant Attorney General

Attorney General of Alaska

December 16, 1955

The Honorable J. Gerald Williams
Attorney General of Alaska
Juneau, Alaska

Attention: Mr. Henry Camarot

Dear Mr. Williams:

I want to thank you and Mr. Camarot for the opinion contained in Mr. Camarot's letter of December 9, 1955. The opinion provides a useful guide for the work of the Convention.

Another question has been raised on which your opinion would be most helpful. Can the Convention, by majority vote, stop the clock immediately prior to completing 75 days in session and continue meeting for several days thereafter? If your answer is in the affirmative, please advise whether the delegates would be entitled to compensation or per diem for the additional days on which they meet after the clock is stopped.

I know you will appreciate the importance of having a common understanding among the delegates of the rigidity or flexibility of the adjournment time. We would greatly appreciate your sending us an opinion on this question within a few days after the Convention reconvenes on January 4.

Best wishes.

Sincerely yours,

Wm. A. Egan, President
Alaska Constitutional Convention

WAE:eh

Reference - Attorney General of Alaska

Constitutional Convention
Secretariat/30
December 10, 1955

CONCLUSIONS OF OPINION AS TELEPHONED TO PRESIDENT WM. A. EGAN BY HENRY CAMAROT OF THE TERRITORIAL ATTORNEY GENERAL'S OFFICE JUNEAU, ALASKA ON SATURDAY, DECEMBER 10, 1955**

1. "I conclude that the members and delegates of the Constitutional Convention, regarding remarks made by them on the Convention floor and in the discharge of their duties of office at any public hearing, should be afforded the same absolute privileges and immunities allowed legislators of the territory.

2. I am of the opinion that under Section 1 the Convention is authorized to meet for a period not exceeding 75 days, exclusive of that time allowed for recess. As the word "meet" is used in the context of the statute it suggests the full gathering as a deliberating body engaged in the function of drafting the Constitution. It is the Convention that shall meet for not more than 75 days. The conducting of public hearings is not a meet of the Convention.

(a) As I interpret Chapter 46, the act setting up the drafting of the Constitution for the State of Alaska, a recess is authorized "for the purpose of holding public hearings." However, it is readily recognized that all members will not be engaged in such a function. Therefore, several delegates may be faced with the alternative of remaining in

** Written opinion will be delivered on December 11 or 12.

Fairbanks or returning to their place of residence. Under these circumstances and recognizing the absence of any intentional avoidance of the duties of office, I am of the opinion that the delegates are entitled to be reimbursed for the actual travel costs while going to and returning from their homes during the recess together with a per diem of twenty dollars ($20.00) for each day involved in such travel. However, as I read the act, they are not entitled to receive any compensation for that time spent in travel; nor may they be given any per diem while at their place of residence.

(b) If during the recess a delegate participates in a public hearing scheduled by the Convention, he is entitled to receive compensation and per diem for the actual days devoted to such hearings. I feel it is implied that a delegate has a right to be paid for services rendered in the furtherance of his official duties, which by statute specifically includes the holding of such public hearings.

Furthermore, I interpret Section 19 as authorizing the reimbursement to delegates of the actual cost of travel, together with the allowance of a per diem during such time as they are going to a hearing and returning to their homes or to the Convention. However, once again, I conclude they are not permitted to be paid any compensation during such travel.

(c) In sub-section (a) above a delegate not scheduled to take part in a hearing is faced with the alternative of remaining

Attorney General of Alaska

in the Fairbanks area or returning to his place of residence. Consistent with the discussion in sub-section (a) I am of the opinion that those delegates whose normal place of residence is outside the Fairbanks area, are entitled to per diem for those days spent in that city.

(d) As a matter of law, the rate of compensation for per diem must be twenty dollars ($20.00) per day and fifteen dollars ($15.00) a day compensation. Use of the word "shall" in the act makes this mandatory and does not permit deviation therefrom."

TERRITORY OF ALASKA
Office of
ATTORNEY GENERAL
JUNEAU

J. Gerald Williams
Attorney General

David J. Pree
Assistant Attorney General

Henry J. Camarot
Assistant Attorney General

Edward A. Merdes
Assistant Attorney General

December 9, 1955

Honorable William A. Egan, President
Alaska Constitutional Convention
University of Alaska
College, Alaska

Re: Interpretation of Chapter 46, SLA 1955

Dear Mr. Egan:

This is in reply to your letters of December 3 and December 5, 1955, wherein you ask the following questions:

1. "Are the remarks made by delegates of the Alaska Constitutional Convention on the Convention floor and at public hearings of Convention Committees entitled to privileges and immunities similar to the remarks of members of the territorial legislature made on the floor of the legislature and at public hearings of legislative committees?

2. "Assuming that the Convention adopts a program to recess for a period of fifteen (15) days for the purpose of holding public hearings in various parts of Alaska, are we correct in assuming that the period of recess does not count as a part of the seventy-five (75) days which the Convention is authorized to meet? If the following arrangements for compensation, per diem, and costs of travel during the recess period are approved by the convention, would there be, in your opinion, any legal objection thereto?

a. That the delegates shall be entitled to reimbursement for their actual travel costs going to and returning from their homes for the recess and to compensation and per diem for the days involved in such travel.

b. That the delegates who participate in public hearings scheduled by the convention will be entitled to compensation and per diem for the actual days devoted to such hearings which shall not exceed the number of days approved in advance by the convention. If the site of the hearings is away from their homes, they shall also be entitled to reimbursement for the actual cost of travel going to the hearings and returning to their homes or to the convention.

c. That those delegates whose normal residence is outside the Fairbanks area and who are unable to return thereto during the recess period, shall be entitled to per diem for the days of convention recess spent in the Fairbanks area.

d. That the rate of compensation and per diem shall be those established in the convention enabling act."

Answering each question in the same order as they are set forth in your letters, you are advised as follows:

I.

Initially, it is noted that Chapter 46, Session Laws of Alaska, 1955, the Constitutional enabling act, does not extend any privilege or immunities to the delegates for any words uttered in the discharge of their official duties. 1/ For this reason, the common law, which is applicable within the Territory, must be examined to determine if such privilege or immunity exists. Section 2-1-2 ACLA 1949 makes the common law applicable to Alaska.

1/ Compare Section 12 of the Organic Act for the Territory of Alaska, which states:

"That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions.***"

Also, see Article I, Section 6 of the United States Constitution, which provides:

"***for any Speech or Debate in either House, (the Senators and Representatives) they shall not be questioned in any other Place."

I believe it hardly subject to argument that the privilege or immunity sought is primarily to allow delegates to the Convention to speak their minds freely and exercise their respective functions in drafting a Constitution for the State of Alaska without incurring the risk of an action for the recovery of damages. This freedom from libelous or slanderous legal action will contribute greatly to freedom of expression.

The statements and communications by members of any public governing or deliberative body are divided into two mail general classes namely:

(1) Those that are absolutely privileged, and

(2) Those that are qualifiedly or conditionally privileged.

An absolute privilege affords a complete defense to a libel or slander lawsuit and even the existence of malice will not destroy such an absolute privilege. Ryan v. Wilson, 300 N.W. 707, 712; Robinson v. Home Fire and Marine Ins. Co., 59 N.W. 2d 776.

It may be generally stated that the occasion and the office afford the test as to whether an alleged slanderour or libelous statement may be absolutely privileged, conditionally privileged, or not at all privileged. Ryan v. Wilson, supra.

The doctrine of privileged communication is based upon public policy. This is especially true in cases of absolute privilege, where the interests and the necessities of society require that on certain occasions, utterances or publications of individuals, even though they are both false and maliciously made, shall protect the defamer from all liability to prosecution. Ryan v. Wilson, supra; Newell on Slander and Libel, 4th Ed., Section 349; Tanner v. Stevenson, 128 S.W. 878.

It is usually held that the public welfare alone justifies the privilege and on occasions some persons who are members of such public bodies, should be allowed to express their sentiments fully and fearlessly upon all questions and subjects. Mills v. Denny, 63 N.W. 2d 222, 48 A.L.F. 2d 933.

This rule should be and usually is confined strictly to cases in which the public service requires complete immunity to legislatures in debate. Ryan v. Wilson, supra. Most courts as well as textbook writers agree that this privilege is and must be restricted to narrow limits. Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary. The same is true in federal and state legislatures, and their committees, where the decorum is under the watchful eye of presiding officers and records may be stricken and the offending member punished. Mills v. Denny, supra.

The rule is quite well settled that in final analysis the question as to whether or not there is a privilege, absolute or qualified, under the circumstances or occasion involved is for the court to decide. Robinson v. Home Fire and Marine Ins. Co., supra; Ryan v. Wilson, supra; Mills v. Denny, supra.

The general rule is that that defamatory statements uttered by members of Congress or of state or territorial legislatures in the performance of their legislative function is absolutely privileged. Tenney et al. v. Brandhove, 341 U.S. 367; 3 Restatement of the Law of Torts, Sec. 590, p. 236; 40 A.L.R. 2d 941 (Anno.).

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 offense." II Works of James Wilson, (Andrews Ed 1896) 38; Tenney v. Brandhove, supra.

In the time allowed, no case was found extending such common law privileges and immunities to delegates of a Constitutional Convention. However, in analyzing the nature of such a body, it is inescapable that, at the very minimum

Attorney General of Alaska

it has the very basic and fundamental powers and rights within its jurisdiction as are likewise vested in the Congress of the United States and the Legislature for the Territory of Alaska.

In Goodrich v. Moore, 72 Am. Dec. 74, the Supreme Court of Minnesota declared that a constitutional convention is the "highest legislative assembly recognized in law." In Frantz v. Autry, 91 P. 193, 202, the Court held that:

> "In a Territory, the source of all power is Congress. But in the formation of a Constitution and state government the power emanates from the people."

The Court further held that the delegates to the convention were the immediate representatives of the people of the "two Territories" (Territory of Oklahoma and the Indian Territory) and that the convention "was created by the direct action of the people, and in the discharge of its powers, duties and obligations it performs one of the highest and most important acts of popular sovereignty." In Sproule v. Fredericks, 11 S. 472, the Supreme Court of Mississippi, in discussing the powers of the convention said:

> "It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth."

Based on the above premise, that the delegates to the convention are serving, by any interpretation, in at least an equal or comparable capacity as members of the Congress and the legislature, I am of the opinion that remarks made by them on the convention floor and in the discharge of their duties of office at any public hearing should be afforded an absolute privilege. This conclusion is also supported by Judge Jameson, quoted by you in your letter, wherein he fully endorses granting members of a convention the same immunities and privileges allowed jurors, witnesses and legislators.

II.

The questions under Paragraph 2 of your letter are primarily a matter of statutory construction. The following

Attorney General of Alaska

provisions of Chapter 46, SLA 1955, are pertinent to the discussion herein:

> "Section 1. *** The convention shall meet for not more than seventy-five days but may, at its discretion, recess for a period of not to exceed fifteen days for the purpose of holding public hearings in Alaska on proposed provisions of the constitution."
>
> "Section 18. The convention shall have power to incur such expenses as may be necessary, including but not limited to expenses for employment of such clerical, technical, and professional personnel as it may require, in order to exercise the powers conferred and to perform the duties imposed by this Act."
>
> "Section 19. The delegates shall receive a per diem of twenty dollars for each day in attendance at, including time spent going to and returning from, the convention; and they shall be reimbursed for their actual travel costs incurred in attending upon their duties as delegates. In addition they shall receive for their services the sum of fifteen dollars per day as compensation for each day's attendance while the convention is in session."

The primary rule of construction is to ascertain and declare the intention of the legislature and carry such intention into effect to the fullest degree. 50 Am. Jur. 200, Statutes, Section 223. The legislative will is the all-important factor. Juneau Spruce Corporation v. International Longshoremen's and Warehousemen's Union, 12 A. 260, 83 F. Supp. 224.

All laws are to be given a sensible construction. United States v. Katz, 271 U.S. 354. Where the language of a statute leads to an absurdity or hardship presumably not intended, it may be construed by modifying its words so as to carry out the real intention. Cf. Tolsom v. United States, 160 U.S. 121. Interpretational inconsistencies must be avoided and all parts of the statute must be harmonized to reach the real

Attorney General of Alaska

intent of the legislature. Iglehart v. Iglehart, 204 U.S. 478, 51 L. Ed. 525.

I am of the opinion that under Section 1, quoted above, the Convention is authorized to meet for a period not exceeding seventy-five days, exclusive of the time allowed for a recess. As the word "meet" is used in the context of the statute, it suggests the full gathering of the delegates as a deliberating body engaged in the function of drafting a Constitution. It is the Convention that "shall meet for not more than seventy-five days"; the conducting of public hearings is not a meeting of the Convention.

(a) As I interpret Chapter 46, a recess is authorized "for the purpose of holding public hearings." However, it is readily recognized that all members will not be engaged in such a function. Therefore, several delegates may be faced with the alternative of remaining in Fairbanks or returning to their place of residence. 2/ Under these circumstances, and recognizing the absence of any intentional avoidance of the duties of office, I am of the opinion that the delegates are entitled to be reimbursed for the actual travel costs incurred while going to and returning from their homes during the recess together with a per diem of $20.00 for each day involved in such travel. However, as I read the Act, they are not entitled to receive any compensation for that time spent in travel; nor may they be given any per diem while at their place of residence.

(b) If, during the recess, a delegate participates in a public hearing scheduled by the Convention, he is entitled to receive compensation and per diem for the actual days devoted to such hearings. I feel it is implied that a delegate has the right to be paid for services rendered in the furtherance of his official duties, which by statute specifically includes the holding of such public hearings. Consider Section 18.

Furthermore, I interpret Section 19 as authorizing

2/ If a delegate remains in Fairbanks, he is entitled to receive a per diem allowance of $20.00; however, no travel expenses are charged against the Convention's appropriation. On the other hand, if he returns to his place of residence travel expenses will be incurred, while a certain portion of the per diem otherwise allowed, will be saved.

Correspondence - Attorney General of Alaska

the reimbursement to delegates of the actual cost of travel, together with the allowance of a per diem during such times as they are going to a hearing and returning to their homes or to the Convention. However, once again, I conclude they are not permitted to be paid any compensation during such travel.

(c) As discussed in subsection (a) above, a delegate not scheduled to take part in a hearing is faced with the alternative of remaining in the Fairbanks area or returning to his place of residence. Consistent with the discussion in subsection (a), I am of the opinion that those delegates whose normal place of residence is outside the Fairbanks area are entitled to per diem for those days spent in that city.

(d) As a matter of law, the rate of compensation and per diem must be $20.00 a day per diem and $15.00 a day compensation. Use of the word "shall" in the Act makes this mandatory and does not permit deviations therefrom.

Very truly yours,

J. GERALD WILLIAMS
Attorney General

By: Henry J. Camarot
Henry J. Camarot
Assistant Attorney General

HJC:mez

Alaska - Attorney General of Alaska

CLASS OF SERVICE DESIRED

DOMESTIC		CABLE	
TELEGRAM		FULL RATE	
		DEFERRED	
DAY LETTER		NIGHT LETTER	
NIGHT LETTER		SHIP RADIOGRAM	

PATRONS SHOULD CHECK CLASS OF SERVICE DESIRED; OTHERWISE MESSAGE WILL BE TRANSMITTED AS A FULL RATE COMMUNICATION

ALASKA COMMUNICATION SYSTEM

SIGNAL CORPS U. S. ARMY

TELEGRAM

ACCOUNTING DATA

T/L	
O/L	
TAX	
TOTAL	

NUMBER	TIME FILED	CHECK

SEND THE FOLLOWING MESSAGE, SUBJECT TO THE TERMS ON BACK HEREOF:

December 6, 1955
Time sent: 2:45 P.M.

The Honorable J. Gerald Williams
Attorney General of Alaska
Juneau, Alaska

HAVE URGENT NEED YOUR ANSWER IN WRITING TO QUESTIONS POSED MYLET DECEMBER 3 AS AMENDED MYLET DECEMBER 5 REGARDING CONVENTION RECESS STOP

CAN YOU TELEGRAPH REPLY STOP REGARDS

EGAN

cc: Reading
Confirmation

ACS-SC FORM 920
Rev. 29 MAY 51

ARMY-ALASKA COMMUNICATION SYSTEM

Att: Correspondence - Attorney General of Alaska

December 5, 1955

The Honorable J. Gerald Williams
Attorney General of Alaska
Juneau, Alaska

Attention: Mr. Henry Camarot

Dear Mr. Williams:

With reference to my letter of December 3, 1955, the opening question posed in numbered Paragraph 2 should perhaps be restated as follows: "Assuming that the Convention adopts a program to recess for a period of fifteen (15) days for the purpose of holding public hearings in various parts of Alaska, are we correct in assuming that the period of recess does not count as a part of the seventy-five (75) days which the Convention is authorized to meet?"

Your cooperation in providing advice on legal questions which have arisen at the Convention is warmly appreciated.

Very truly yours,

Wm. A. Egan
President
Alaska Constitutional
Convention

WAE:eh

Attorney General of Alaska

December 5, 1955

The Honorable J. Gerald Williams
Attorney General of Alaska
Juneau, Alaska

Attention: Mr. Henry Camarot

Dear Mr. Williams:

With reference to my letter of December 3, 1955, the opening question posed in numbered Paragraph 2 should perhaps be restated as follows: "Assuming that the Convention adopts a program to recess for a period of fifteen (15) days for the purpose of holding public hearings in various parts of Alaska, are we correct in assuming that the period of recess does not count as a part of the seventy-five (75) days which the Convention is authorized to meet?"

Your cooperation in providing advice on legal questions which have arisen at the Convention is warmly appreciated.

Very truly yours,

Wm. A. Egan
President
Alaska Constitutional
Convention

WAE:eh

Correspondence - Attorney General of Alaska

Correspondence - Attorney General of Alaska

December 3, 1955

The Honorable J. Gerald Williams
Attorney General of Alaska
Juneau, Alaska

Attention: Mr. Henry Camarot

Dear Mr. Williams:

In accordance with our discussions, there are presented below several questions on which your opinion is desired at the earliest practicable date:

1. Privileges and Immunities of Delegates: Are the remarks made by delegates of the Alaska Constitutional Convention on the Convention floor and at public hearings of Convention Committees entitled to privileges and immunities similar to the remarks of members of the territorial legislature made on the floor of the legislature and at public hearings of legislative committees? Mr. Roger Herman Hoar states in a book entitled Constitutional Conventions, Their Nature, Powers, and Limitations (Little, Brown and Company, Boston, 1917): "They (delegates to constitutional conventions) have similar privileges and immunities to those enjoyed by members of the State legislature and jurors, but should look to the courts to enforce them." I am attaching also pertinent paragraphs which the author quotes from a classic work on Constitutional Conventions by Judge Jameson in 1887.

2. Convention Recess: Assuming that the Convention adopts a program to recess for the purpose of holding public hearings in various parts of Alaska for a period of fifteen (15) days, must the days in recess be considered a part of the seventy-five days which the convention is authorized to meet? If the following arrangements for compensation, per diem, and costs of travel during the recess period are approved by the convention, would there be, in your opinion, any legal objection thereto?

a. That the delegates shall be entitled to reimbursement for their actual travel costs going to and returning from their homes for the recess and to compensation and per diem for the days involved in such travel.

b. That the delegates who participate in public hearings scheduled by the convention will be entitled to compensation and per diem for the actual days devoted to such hearings which shall not exceed the number of days approved in advance by the convention. If the site of the hearings is away from their homes, they shall also be entitled to reimbursement for the actual cost of travel going to the hearings and returning to their homes or to the convention.

c. That those delegates whose normal residence is outside the Fairbanks area and who are unable to return thereto during the recess period, shall be entitled to per diem for the days of convention recess spent in the Fairbanks area.

d. That the rate of compensation and per diem shall be those established in the convention enabling act.

In order that plans for the recess may go forward, we would greatly appreciate an early reply.

Sincerely yours,

Wm. A. Egan
President, Alaska
Constitutional Convention

WAE:eh
Attachment

Correspondence - Attorney General of Alaska

Privileges and Immunities of Delegates To Constitutional Conventions

It may be useful now to append a few remarks in relation to the question of privileges, as applicable to Conventions. 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? It is doubtless essential, in order to enable a legislature, or any other public assembly, to accomplish the work assigned to it, that its members should not be prevented or withdrawn from their attendance, by any causes of a less important character; but that, for a certain time at least, they should be excused from obeying any other call, not so immediately necessary for the welfare or safety of the State; they must also be always protected in the exercise of the rights of speech, debate and determination in reference to all subjects upon which they may be rightfully called to deliberate and act; it is absolutely necessary, finally, that the aggregate body should be exempted from such interferences or annoyances as would tend to impair its collective authority or usefulness. 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.

Out of the catalogue of privileges above given, it is not easy to select one with which a Convention or its members could safely dispense. It ought never to be, as without them it would frequently be, in the power of the enemies of reform to prevent or postpone it by arresting, harassing or intimidating the delegates to the body by whom it is to be accomplished. But the 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.

Upon this point, there is, in my judgment, but one position that can be maintained with safety, and that is, that Conventions must stand upon the same footing with jurors and witnesses; they must look to the law of the land and to its appointed administrators, and not to their own powers, for protection in their office. If a juror or a witness, going or returning, is harrassed by arrest, he does not himself or with his professional associates cite the offending officer before him for punishment, but sues out a writ of Habeas Corpus, and

on pleading his privilege procures his discharge. Beside this, for personal indignity or injury, he may appeal to the laws for pecuniary compensation. j The same course is doubtless open to any member of a Convention, and it furnishes for all ordinary cases a practical and sufficient remedy. Behind those bodies stands continually, armed in full panoply, the state, with all its administrative and remedial agencies, ready to protect and defend them.

Excerpt from Treatise on
Constitutional Conventions
by Judge Jameson (pp 473-4)