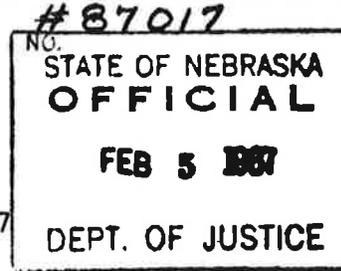


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: February 5, 1987

SUBJECT: LB 48 - Amendments to §53-180.05 (Cumulative Supplement 1986)

REQUESTED BY: Senator James E. Pappas
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
William L. Howland, Assistant Attorney General

This is in response to your request for an opinion dated January 14, 1987. You have requested our opinion regarding the constitutionality of LB 48, a bill proposing to amend certain provisions of the Minor in possession statute, Neb.Rev.Stat. §53-180.05 (Cumulative Supplement 1986). Specifically, you asked whether the legislature has the constitutional authority to enact a law which grants immunity from prosecution to a person who has committed a crime if that person will identify other persons who have committed a criminal act. The Nebraska Legislature has the constitutional authority to enact a law which grants immunity from prosecution to a person who has committed a crime if that person will identify other persons who have committed a criminal act.

The Nebraska Supreme Court has discussed the constitutionality of the Legislature's authority in Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981), as follows:

Certain fundamental constitutional principles must guide, and always have guided, us when the constitutional bounds of legislative power are questioned. The first principle is the Legislature has plenary legislative authority limited only by the state and federal Constitutions. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937); Swyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972); Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975). The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

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The current Nebraska statute pertaining to immunity in part provides:

Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or to provide other information in a criminal proceeding before a court or grand jury, the court, on motion of the county attorney or other prosecuting attorney, may order the witness to testify or to provide other information. The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

Neb.Rev.Stat. §29-2011.02 (Reissue 1985).

The Nebraska Supreme Court discussed Neb.Rev.Stat. §29-2011.02 (Reissue 1985) in State v. Jones, 213 Neb. 1, 328 N.W.2d 166 (1982), in regard to the constitutionality of immunity statutes, as follows:

It is clear that immunity statutes are designed to serve as substitutes for the fifth amendment right not to incriminate oneself, without such statutes no person in a criminal case can constitutionally be compelled to testify. It is also clear that the only true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. Id. at 13, 14.

The proposed amendment in LB 48 will permit the violator's privilege against self-incrimination to be coextensive with the protection provided by the grant of immunity, thereby not conflicting with the Nebraska or United States Constitution.

In State v. Worgull, 128 Wis.2d 1, 381 N.W.2d 547 (1986), the court stated in Matter of Grant, 83 Wis.2d 77, 264 N.W.2d 587, that "the power to grant immunity is a legislative power and not an inherent power of either the prosecutor or the court." Id. at 89. The power to grant immunity is a legislative power.

The United States Supreme Court has upheld the constitutionality of immunity statutes ever since Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896), and Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956). United States Supreme Court Justice Frankfurter

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observed, speaking for the court, in Ullmann, supra, that such statutes have "become part of our constitutional fabric . . ." Id. at 438. Immunity statutes seek a rational accommodation between the imperatives of the fifth amendment privilege and the legitimate demands of the government to compel citizens to testify. "The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." Kastigar v. United States, 406 U.S. 441, 446, 92 S.Ct. 1653, 1657, 32 L.Ed.2d 212, 218 (1972), reh. denied, 408 U.S. 931, 92 S.Ct. 2478, 33 L.Ed.2d 345 (1972). Not only has the United States Supreme Court recognized the importance of immunity statutes, but the Nebraska Supreme Court has also found immunity statutes essential to the effective enforcement of various criminal statutes. State v. McCown, 189 Neb. 495, 203 N.W.2d 445 (1973), and State v. Ammons, 208 Neb. 812, 305 N.W.2d 812 (1981).

The Nebraska Supreme Court in McCown, supra, stated that immunity statutes are an essential investigative tool. Without them it would virtually be impossible to enforce some of our criminal statutes. "Immunity statutes are intended for those offenses where the only persons capable of giving useful testimony are those implicated in the crime. Immunity has historically been a governmental investigative tool for offenses which could not be investigated or proved otherwise. It is solely a governmental prerogative." Id. at 502.

Therefore, it is our opinion, that as long as the grant of immunity is as broad as the constitutional protections against self-incrimination for which it is a substitute, then it's constitutional. The amendment proposed in LB 48 satisfies the constitutionality test as stated by the Nebraska Supreme Court in Jones, supra. The Nebraska Legislature does have the constitutional authority to grant immunity.

Sincerely,

ROBERT M. SPIRE
Attorney General



William L. Howland
Assistant Attorney General

WLH:jem

cc: Senator Rex Haberman

Patrick J. O'Donnell, Clerk of Legislature

3/05

APPROVED:


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