

Opinion No. 54-5949

May 14, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Beatrice B. Roach Secretary of State State Capitol Building Santa Fe, New Mexico

{*403} Sometime ago you requested an opinion from this office on five different questions concerning Ch. 40, of the Session Laws of 1953 which is Section 56-701 (a) to 56-701 (c) of the New Mexico Statutes Annotated, 1941 Compilation, pocket supplement.

Your first question is on the validity of the provisions of said Ch. 40, New Mexico Session Laws of 1953 for the indirect or proxy election of unlisted presidential elector nominees in presidential General Elections in New Mexico. We have tried to get from several states that have a similar law as this to give us any decisions of their Supreme Courts as to the validity of their law, but as yet have not been able to get any information.

Since the President and Vice-President, who under this statute are voted for by electors who are residents of the State of New Mexico, Title 3, Section 1 and Title 3, Section 5 of Titles 1-4 USCA, pocket supplement reads as follows:

"§ 1. Time of appointing electors; The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

"§ 5. Determination of controversy as to appointment of electors. If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned"

In the case of Maddox et al., vs. Bd. of State Canvassers et al., reported {*404} in 149 P. 2d at page 112, wherein Dan W. Maddox and Arthur F. Lamey, both personally and as Chairman, respectively, of the Republican and Democratic State Central Committees, against the Board of State Canvassers of the State of Montana and others for a declaratory judgment determining the rights and duties of citizens and public officers under statute relating to voting by members of the military forces of the United States, the Supreme Court of Montana in interpreting the election statute involved in this

case, held, "that Federal and State election laws must be read together insofar as presidential electors are concerned."

In the case of *Walker vs. United States* and *Drummond vs. Same*, reported in 93 Federal Reporter 2d, appellants with five others, were indicted in an indictment containing two counts for violating the criminal election Code of the United States. In affirming the case the Circuit Court held, "that the presidential electors are 'state officers', and not 'federal officers' since the Federal Constitution leaves it to the State Legislature to define method of choosing electors."

Vol. 18 of Am. Jur. at page 188, Section 11, under the heading of Construction of Statutes, reads as follows:

"Settled rules of statutory construction are applied in interpreting legislation relating to elections. Such statutes should be liberally construed, especially in favor of citizens whose right to vote they tend to restrict. In order to give effect to the will of the majority and to prevent the disfranchisement of legal voters, the courts uniformly have held to be formal and directory those provisions which are not essential to a fair election. Even provisions of an election law which are viewed as mandatory, if enforcement is sought before election in a direct proceeding, will be held directory only in a proceeding after the election, unless an essential element of the election is affected or there is an express declaration in the statute that the act is essential to a valid election or that its omission will render the election void, in which case all courts whose duty it is to enforce the statute must so hold, regardless of whether the particular act goes to the merits or affects the result of the election. Illustrations of provisions held to be either mandatory or directory, within the operation of this rule, are given in subsequent sections. It seems that a distinction in this connection is made by some courts between acts required of candidates and those required of voters and election officials."

and in the same Volume, under the last portion of Section 51, reads as follows:

"* * * Accordingly, the legislature has the authority to make reasonable regulations for the exercise of the elective franchise, so long as it does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial. In accordance with the established rule, if a reasonable doubt may be entertained about the act being in violation of the plain spirit and provision of the Constitution, the question must be resolved in favor of the act. The meaning of the terms 'any' and 'all' elections, as used in constitutional provisions relating to {*405} the qualifications of electors, has already been discussed.

"While the legislature may choose between election and appointment in the case of officers not provided for by the Constitution, after it has chosen that a particular office should be elective, an election to fill such office falls within the scope and terms of the constitutional provisions applicable to elections by the people."

In the case of Re Cancellation from Registry Lists of the name of Matilda Joslyn Gage, reported in Book 25 LRA at page 783, in affirming the Order wherein defendant appeared from an Order of the general term of the Supreme Court, 4th Department, affirming an order entered in the office of the Clerk of Guondaga County striking the defendant's name from the registry, the New York Court of Appeals held:

"The Legislature chose that the office should be elective, and becoming such, it fell within the scope and terms of the constitutional provisions applicable to elections by the people."

Our Supreme Court in the case of Baca vs. Perez, 8 N.M. 197, on the construction of a statute, held that:

"* * * it is the duty of the Courts to sustain legislative actions unless clearly satisfied of its invalidity."

The Court went on to say that it is adjudicated that the constitutionality of a law is to be presumed that reasonable doubts must be resolved in favor of legislative action, and that Courts should sustain it, when not clearly satisfied of its invalidities. See also the case of Baldrige vs. Morgan et al., 15 N.M. 249.

In view of the above authorities and cases cited, it is the opinion of this office that Ch. 40 of the New Mexico Session Laws of 1953, which is Section 56-701 (a) to Section 56-701 (c) of the 1941 Compilation, New Mexico Statutes Annotated, pocket supplement, and the provisions of same are valid, even though it provides for the indirect or proxy elections of unlisted presidential election nominees in presidential General Elections in New Mexico.

Your second request is to the validity of said portion of Ch. 40, New Mexico Session Laws of 1953, which seemingly would in part restrict the right of the voter to split his vote, and also restrict his liberty to write-in the name of any citizen he may chose to represent him in the office of presidential elector.

In addition to authorities given in our answer to your Question No. 1, the fact is that if in the future should a case arise wherein the right of the voter would be restricted and he could not split his vote or his liberty would be restricted to writing in the name of any citizen whom he may chose to represent him, in the office of presidential elector, the Federal Law supersedes our Law in case no election is had, since the Legislature has the power to appoint, if necessary, the presidential electors.

Title 3, Sections 2 and 5 of the U.S. Code, Annotated, read as follows:

"§ 2. Failure to make choice on prescribed day -- Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."

{*406} "§ 5. Determination of controversy as to appointment of electors. -- If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

It is therefore the opinion of this office that the above quoted Federal provision answers your Question No. 2.

In your third numbered paragraph you request our confirmation of a Federal Law regarding the implied requirement that the Secretary of State shall hereafter certify for appearance on the General Election ballot the names of the presidential or vice-presidential nominees for all political parties participating in any given presidential year during General Elections in this State.

In answer to your third question, I quote Section 7 of Title 3 of the U.S. Code, which reads as follows:

"§ 7. Meeting and vote of electors -- The electors of President and Vice-President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment of such place in each State as the legislature of such State shall direct."

In answer to your fourth numbered paragraph in which you request our opinion as to which prior laws will be so affected by the provisions of Ch. 40 of the New Mexico Session Laws of 1953, Ch. 40, New Mexico Session Laws of 1935 supersedes all other states laws of New Mexico providing for the election of presidential electors.

It is therefore the opinion of this office that since Ch. 40, New Mexico Session Laws of 1953 supersedes all other state laws providing for the election of presidential electors, that it is the last expression of the Legislature and is the law.

In your fifth question you ask whether any nominee can be certified in a General Election to an office for which no candidate or candidates were listed on the ballot.

Chapter 40 of the New Mexico Session Laws of 1953 supersedes any and all other election laws concerning the election of presidential electors. It is the last expression of the Legislature, and as explained in authorities and cases cited in answer to your question, it is the present law even though it is an indirect way of electing presidential electors, therefore, Chapter 40 of the New Mexico Session Laws of 1953 provides for

certification of presidential electors by the New Mexico Canvassing Board in Section 20 of said Ch. 40 of the 1953 New Mexico Session Laws.

We trust that this fully answers your inquiries.

By: Hilario Rubio

Assist. Attorney General