

Opinion No. 56-6486

July 5, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mrs. Natalie Smith Buck, Secretary of State, State Capitol Building, Santa Fe, New Mexico

In reply to your letter of June 26, 1956, in which you raise several questions relating to Section 2, Chapter 40, House Bill No. 63, approved March 13, 1953, the following is submitted for your consideration.

In paragraph 4 of your letter you raise the question that possibly the voter would have no choice among multiple candidates for offices other than Presidential Electors as a result of Section 2, Chapter 40. This law would not affect the voters' choice as to any other office since it applies only to the Presidential Electors as is set forth in its title: "An Act Providing for the Nomination and Election of Presidential Electors."

The second point raised by your letter was whether or not the voting arrangement provided by Section 2, Chapter 40, Laws of 1953, was not a violation of Section 5, Article VII of the Constitution -- the answer is no, and for the following reasons:

A. Section 5, Article VII by its title states (Election by Ballot -- Plurality Elects **candidate.**) (Emphasis supplied).

In the body of the section reference is made to any office, and logical conclusion is that this section refers to any candidate for a public office. Attention is directed to 153 A.L.R., page 1067, where in relation to Presidential Electors the following is mentioned and we quote:

"Although these functionaries in their aggregate voting choose the chief executives of the nation, **they do so primarily as agents** of their respective states." (Emphasis Supplied.)

Again at 153 A.L.R., page 1067, with further reference to Presidential Electors we quote:

"But despite the effect of their voting in the aggregate **they are essentially but chosen agents of their respective states**, each meeting within its own state, under the jurisdiction of its courts, though returning the accounts of their balloting to the President of the Senate." (Emphasis Supplied.)

B. Finally attention is directed to the case of Spreckles vs. Graham, Supreme Court of California, decided in 1924 and reported at 228 Pacific Reporter, 1040, where they lay

down the requisites and definition of a public office and point out that these elements must be present:

(1) A tenure of office which is not transient, occasional or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency, and

(2) The delegation to the office of some position of the sovereign functions of government, either legislative, executive or judicial.

The Court goes on to point out that, "they are in effect no more than messengers whose duty is to certify and transmit the election returns" and that "the sole public duty to be performed by them after the election involves no exercise of judgment or discretion and no portion of the sovereign powers of government." The Court further points out that "it was originally supposed by the framers of our National Constitution that the electors would exercise an independent choice based upon their individual judgment." "But, in practice so long established as to be recognized as part of our unwritten law, they have been selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power." Keeping in mind the functions performed by the Presidential Electors and applying them to the above mentioned yardstick we must conclude that Presidential Electors are not within the purview of Article VII, Section 5 of the Constitution and that Chapter 40, Section 2 in no way contravenes this constitutional provision.

The third point raised by your letter is whether or not the law is valid in that it lists the Presidential and Vice-Presidential nominees in one block and does not list the Presidential Electors. The answer is yes, and for the following reasons:

(A) Article VII, Section 1 of the Constitution sets out that the Legislature shall have the power to require the registration of the qualified electors as a requisite for voting, **and shall regulate the manner, time and places of voting.** (Emphasis Supplied.) This section, when read with the case of Chase vs. Lujan, 48 N.M. 261, which in turn refers to State vs. Connelly, 39 N.M. 312, recognizes and establishes the principle that the Legislature has plenary power to regulate the manner of voting. Referring to 153 A.L.R., page 10-72, one finds a clear statement on this point as follows:

"As (probably subject, therefore, to the state constitution) a legislature has a general power to grant or withhold the right to elect presidential electors, it may, except as restricted by the constitution, prescribe such method of nomination of candidates and of voting for them, as it may see fit."

(B) Attention is also called to the case of State ex rel Hawke vs. Myers, Secretary of State, Supreme Court of Ohio, decided October 28, 1936, and reported at 4 N.E. 2d 397, where the situation is definitely in point with our own and there the Court provided that

"Section 1, Article II, U.S. Constitution, vests the Legislature with authority to direct the manner in which presidential electors shall be appointed, and as there is no provision in the Ohio Constitution limiting the exercise of that delegated power, Sections 4785-107 and 4785-108 are not unconstitutional."

Here the decision was based on their statute like ours and as stated in the headnote of the case:

"State statute directing that names of candidates of presidential electors shall not be printed upon ballots but that names of candidates for President and Vice-President shall be printed on ballot with statement that vote for candidates named would be vote for electors held constitutional."

Thus, we must conclude that Section 2, Chapter 40 of the Laws of New Mexico, 1953, is a valid exercise of legislative discretion, and being the latest and last expression of legislative intent is controlling as to the manner of selection of Presidential Electors.

In conclusion attention is called to Attorney General's Opinion No. 5949, given to your office, May 14, 1954, and covering the three sections of Chapter 40. That opinion along with this should, we trust, be of some help in any future question that may arise. A copy of that opinion is attached.

We trust this has completely answered your inquiry.

By: Harry E. Stowers, Jr.

Assistant Attorney General