

Opinion No. 69-105

September 8, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Jeff Bingaman, Assistant Attorney General

TO: David H. Townsend, Delegate, Constitutional Convention

QUESTIONS

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1. Under Article XIX, Section 2 of the New Mexico Constitution can the Constitutional Convention submit its new Constitution to the electorate in such a manner that the voter will vote for or against separately presented proposals?
2. Under Article XIX, Section 2 of the New Mexico Constitution can the Constitutional Convention submit its new Constitution to the electorate in such a manner that the voter will be asked to approve either of two alternative contradictory provisions on certain issues?

CONCLUSIONS

1. Yes
2. See Analysis.

OPINION

{*167} ANALYSIS

1. Under Article XIX, Section 2 of the New Mexico Constitution, can the Constitutional Convention submit its new Constitution to the electorate in such a manner that the voter will vote for or against separately presented proposals?

This is one of the two questions which this office considered in Opinion of the Attorney General {*168} No. 69-64, a copy of which is attached hereto. The conclusion reached there was that the determination of "how the Constitutional Convention's proposed changes must be submitted to the voters . . . is left to the Constitutional Convention itself." Our answer to that question has not changed, nor has anything come to light which causes us to question the correctness of that conclusion. However, before reviewing that opinion and correcting some misconceptions which have arisen concerning its scope, we will expressly deal with a subject which underlines the discussion of both questions presented in this opinion.

If the New Mexico Constitution does direct the Convention concerning the method by which a new Constitution must be presented to the voters, is the Constitutional directive binding upon the Convention?

It is the overwhelming weight of authority that provisions of an existing Constitution must be complied with in order for amendment or revision of that Constitution to be effective. The New Mexico Constitution, like most state constitutions, contains in Article XIX, Section 2, provisions governing the method of amendment. Such provisions are generally held by courts to be mandatory, and are often strictly construed. A reason voiced by courts for strict construction is that the "the Constitution is the organic and fundamental law, and to permit a change in it without a strict adherence to the rules therein laid down would be a step in the direction of the destruction of the stability of the government." **Edwards v. Lesueur**, 132 Mo. 410, 33 S.W. 1130, 31 L.R.A. 815 (1896). See also **Moore v. Brown**, 350 Mo. 256, 165 S.W. 2d 657 (1942); **State ex rel, Board of Fund Comm'rs v. Holman** (Mo), 296 S.W. 2d 482 (1956); **Ellingham v. Dye**, 178 Ind. 336, 99 N.E. 1 (1912, **appeal dismissed**, 231 U.S. 250 (1913)); **McFadden v. Jordan**, 32 Cal. 2d 330, 196 P.2d 787 **cert. denied**; **Allen v. McFadden**, 69 S. Ct. 640, 336 U.S. 918, 93 L. Ed. 1080 (1948).

In order to be thorough it should be pointed out that there is much authority in support of the view that the wording of the "call", or the proposition approved by the people in calling the convention, serves as an effective limit on the Convention's power.

Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913 (1949); **Staples v. Gilmer**, 183 Va. 613, 33 S.E.2d 49 (1945); **Foley v. Democratic Parish Committee**, 138 La. 220, 70 So. 104 (1915); **State v. American Sugar Refining Co.**, 137 La. 407, 68 So. 742 (1915); see also 10 Utah Law Review 390 (1966).

As regards the New Mexico Constitutional Convention, however, this is a moot point since the call which the voters approved on November 5, 1968 repeats the exact wording of the first sentence of Article XIX, Section 2 of the New Mexico Constitution. Specifically, the question the voters decided was: "Shall a Convention be called to revise or amend the Constitution of the State of New Mexico?" Since the New Mexico Constitution is binding on the Convention, and the call merely repeated the words of the Constitution, the question of the binding effect of the "call" is rendered moot in the case of the New Mexico Constitutional Convention.

Having established that the Convention is bound by the procedural provisions of the existing New Mexico Constitution, it must next be determined whether or not that Constitution deals with the subject of how subsequent amendments or revisions are presented to the voters. Since this was the question discussed at length in Opinion of the Attorney General No. 69-64, a review of that opinion is appropriate here.

The precise question asked and answered in that Opinion of the Attorney General was whether the Convention's new Constitution or **{*169}** proposed changes must, because of legal restrictions, be presented as a single package or whether the document and amendments may be presented separately. The conclusion reached in that opinion was

that there are no legal restrictions which require the Convention to present its work in a single package. In other words, a revised Constitution or amendments to the existing Constitution adopted by the Convention can be presented to the voters as a single package, or piecemeal, or semipackaged and semi-piecemeal. In support of this conclusion the opinion began by stating that the United States Constitution does not appear to include any provision relevant to the question. The opinion then reviewed federal legislation (in particular the Enabling Act for New Mexico, 36 Statutes at Large 557, Ch. 410, approved June 20, 1910, and the Joint Resolution of August 21, 1911, No. 8, 37 Statutes at Large 39), the New Mexico Constitution, and the New Mexico Statutes. The opinion concluded that the Constitutional Convention can "submit its proposed changes to the electorate in a manner in which the electorate would vote for or against individual proposals.

By way of elaborating on this conclusion, the opinion went on to discuss briefly the question of what methods of presentation the Convention can use. Three methods were mentioned: presentation as a single document to be accepted or rejected in its entirety; presentation of separate proposed changes which would be accepted or rejected separately; and presentation of "a new document containing the unchanged portions of the existing Constitution and the non-controversial changes which the convention proposes, along with separately presented amendments embodying more controversial changes in the basic document." If the proposal on a particular issue were presented separately, the voter would then be allowed to choose between the Convention's proposed provisions on the subject and the provision in the existing Constitution governing the subject, without having to vote at the same time on other proposals presented by the Convention.

This Office's opinion on the question of presenting certain proposals separately, as stated in Opinion of the Attorney General No. 69-64, has not changed. Likewise, the three methods discussed therein for presenting proposed changes to the voters are endorsed. It must be clearly understood, however, that Opinion of the Attorney General No. 69-64 does not, even by implication, consider the question of presentation to the voters of **alternative contradictory** proposals on a single issue. On the contrary, that opinion was written with the assumption in mind that the Convention would adopt and submit to the voters a single proposal on each issue.

In light of the questions asked in the opinion, the conclusion on the final page is correct in stating that, "Absent any constitutional or statutory directive on the subject either at the federal or state level the Convention is free to prescribe the method of presentation to the voters as it sees fit." However, when applied to questions not dealt with in the opinion the language is too broad and is misleading. In order to correct any misconceptions which have arisen as to the scope of that opinion we will proceed to a discussion of the question of submitting alternative contradictory provisions to the voters.

2. Under Article XIX, Section 2, of the New Mexico Constitution, can the Constitutional Convention submit its new Constitution to the electorate in such a manner that the voter

will be allowed to approve either of two alternative contradictory provisions on certain issues?

Although the submission of certain controversial proposals separately {*170} would almost certainly be free from legal attack, this certainty vanishes in the case of submitting alternative contradictory proposals to the voters. Whereas the first question is basically a question of how the Convention's proposed changes will be packaged, the submission of alternative contradictory proposals on certain issues rather than single proposals raises questions about the role of the Constitutional Convention in bringing about Constitutional revision. These questions will be discussed at this time.

As was stated in the discussion of separately presented proposals, the New Mexico Constitution and the "call" of the Convention are binding on the Convention to the extent that they deal with the questions being considered. Since the call merely repeats the language in part of Article XIX, Section 2 of the Constitution, we will proceed to an analysis of the language of Section 2 to determine its relevance to the question of submitting alternative contradictory provisions to the voters.

The last sentence of Article XIX, Section 2, states:

The Constitution adopted by such convention shall have no validity until it has been submitted to and ratified by the people.

A legitimate interpretation of this sentence might be that the role of the Constitutional Convention in the process of constitutional revision is to "adopt" a Constitution, and the role of the people is to "ratify" what has been adopted.

The definition of the word "adopt" is stated in one legal dictionary to be "To accept, consent to, and put into effective operation." **Black's Law Dictionary**, Fourth Ed., West Publishing Co., St. Paul, Minn., 1951. The definition of the word "ratify" is stated in that same dictionary to be "to approve and sanction." In the opinion of this office the use of these words in the last sentence of Article XIX, Section 2 raises some doubt as to the constitutionality of the Convention's proposing to the voters alternative contradictory provisions on any issue. By doing so, the Convention might be in the position of not having "adopted" any provision on that subject. By choosing between alternatives the voters might be in the position of adopting parts of the Constitution rather than ratifying that which the Convention has adopted. Stated another way, the submission to the voters of alternative contradictory provisions might be seen as proposing choices to the people and allowing them to adopt, rather than adopting provisions which the people then ratify.

The considerations discussed above do not affect the opinion of this office, expressed in Opinion of the Attorney General No. 69-64, that the separate submission to the voters of certain provisions is legal. Nor do these considerations lead us to the conclusion that the presentation to the voters of alternative contradictory provisions is illegal. The conclusions we do reach as a result of the above analysis are as follows:

CONCLUSIONS

1. Under Article XIX, Section 2 of the New Mexico Constitution, the Constitutional Convention can submit its new Constitution to the electorate in such a manner that the voters will vote for or against separately presented proposals.
2. Under Article XIX, Section 2 of the New Mexico Constitution, there is some doubt as to the legality of the Constitution to the electorate in such a manner that the voter will be allowed to approve either of two alternative contradictory provisions on certain issues.