

## Opinion No. 69-118

October 14, 1969

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

**TO:** Don G. McCormick, Style Committee Chairman, New Mexico Constitutional Convention, Santa Fe, New Mexico 87501

### QUESTIONS

#### QUESTIONS

Are there any legal obstacles to this Convention adopting and presenting to the people an entire new Constitution for acceptance or rejection, and at the same time, presenting the Article on Amendments separately for acceptance or rejection as an amendment to the present New Mexico Constitution?

#### CONCLUSION

We find no serious legal obstacles to the procedure which you contemplate in your letter.

### OPINION

#### {\*187} ANALYSIS

As we understand the procedure contemplated here, the Article on Amendments which would be presented separately as an amendment to the present New Mexico Constitution would be exactly the same as the Article on Amendments which is included in the proposed revised constitution. On the assumption that this is the case, the procedure being contemplated would not involve the submission to the voters of "alternative contradicting provisions on any issue." The convention would have adopted a single article on the subject of amendments and would be asking the voters to decide if they want an entire new constitution, or, if that constitution {\*188} is not adopted, whether they favor leaving the present constitution unchanged, or favor amending it by substituting a new article or amendments. With this understanding of the assumption underlying the question presented, we will proceed to answer the question.

This office has recently issued two opinions regarding the submission of the work of the Constitutional Convention to the voters. (See Opinions of Attorney General No. 69-64, issued June 17, 1969 and No. 69-105, issued September 8, 1969). The first determination which should be made in answering the question presented here is whether either of the earlier opinions dealt with this same problem.

The conclusions reached in the previous opinions were **summarized** in the following language from Opinion of Attorney General No. 69-105;

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 Constitutional Convention's submitting 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.

As we will attempt to point out, these previous opinions did not deal with the questions presented in this opinion.

In Opinion of the Attorney General No. 69-64, we addressed ourselves to the question of whether the Constitutional Convention would submit parts of its proposed new constitution to the voters for a separate vote, or whether there were legal obstacle which required the submission of the new document as a single package. After reviewing relevant constitutional and statutory provisions at the federal and state level we concluded that no legal obstacles would be found to submission of certain parts of the constitution for a separate vote by the people. With this short review of the question asked and answered in that opinion, it is obvious that the question presented here was not discussed. Possible legal obstacles to presenting proposed constitutional changes as part of a proposed revised constitution and also as an amendment to the present constitution, should it remain in effect, were not considered.

In Opinion of the Attorney General No. 69-105, we addressed ourselves to the question of the legality of the Convention submitting to the voters alternative contradictory provisions on certain issues. In other words the Convention, instead of adopting a single provision on a subject to be covered in the new constitution, would adopt more than one provision on a subject and would allow the voters to choose which of the provisions would become effective. We pointed out that the language in Article XIX, Section 2 of the New Mexico Constitution which provides that the convention shall "adopt" a new constitution and the people "ratify" that which was adopted raises some doubt as to the legality of that which was contemplated. As stated above, we understand the procedure contemplated in this opinion request to involve the submission of the same provisions, both as a part of the proposed constitution and as an amendment to the present constitution if it remains in effect. Since, under this procedure, there would be no doubt that the convention had "adopted", and the people "ratified" whatever is approved, the conclusion reached {*\*189*} in Opinion No. 105 does not control here.

Since the inquiry is not answered in the previous opinions we must review the relevant constitutional and statutory provisions to determine what legal objections could be raised to the procedures contemplated.

As we pointed out in Opinion of the Attorney General No. 69-105, a constitutional convention is bound by the provisions of the existing constitution which it is attempting to revise. To quote from that Opinion, "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." In light of this we must determine if the New Mexico Constitution contains provisions prohibiting the submission to the voters of the new constitution in the manner contemplated.

Article XIX of the New Mexico Constitution contains language which might be construed as causing difficulties for the contemplated plan of submission. Specifically, two objections might be raised. First, Section 1 of Article XIX contains language which might be interpreted to prevent a Constitutional Convention from submitting an entire new article as a single amendment to be voted on as one proposal. The language we are referring to here is the sentence which reads, "If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately." The second objection which might be raised is that certain language in Section 2 of Article XIX could be construed to mean that a constitutional convention is prohibited from proposing a revision of the old constitution and an amendment of the old constitution at the same time. The language we are referring to here is that which states that a convention can be called "to revise or amend this constitution". Before we discuss the validity of these objections we will review the other possible sources of legal difficulty to determine if other potential objections can be found.

In Opinion of the Attorney General No. 69-105 it was mentioned that the weight of authority supports the view that a convention is bound not only by the existing state constitution, but also by the convention "call" which was approved by the people. The question on the call which the New Mexico voters answered in the affirmative was "Shall a convention be called to revise or amend the Constitution of the State of New Mexico?" The language in the call was obviously copied from Section 2 of Article XIX which we quoted above, and as such raises the same legal question which that language raised in the constitution.

The only other possible source of legal objection to the procedure contemplated in the opinion request is the legislation enacted to provide for the holding of the Constitutional Convention. Chapter 134, Laws of 1969. Two sentences in that Enabling Act are worth mentioning in this regard: First, the sentence in Section 1, which reads, "There is called pursuant to Article 19, Section 2 of the Constitution of New Mexico a constitutional convention for the purpose of considering, revising or amending the constitution of New Mexico." And second, the sentence in Section 27 which states, "The Governor by proclamation shall call a special statewide election for the purpose of ratification or adoption of any proposed constitution or constitutional amendment adopted by the constitutional convention." Both of these sentences raise the question raised by the language of Section 2 of Article XIX of the New Mexico Constitution; namely, can a convention under this language submit to the voters a revised constitution and an amendment to the present constitution. Since no legal objection can be raised on the basis of the legislation which cannot also be raised on the basis of {\*190} the language

contained in the New Mexico Constitution, we will not treat the question of the extent to which the legislature can control the convention in these matters.

Our review of the relevant constitutional and statutory provisions has unearthed two possible legal objections to the submission of the Article on Amendments as part of the new constitution and also as a separate amendment to the present constitution should it remain in force and effect. Both possible objections are based on a construction of the language of Article XIX of the New Mexico Constitution, although the language giving rise to the second objection is also contained in the "call" and in the legislation enacted to provide for the holding of the convention. In our opinion neither objection is sufficiently valid to raise serious questions regarding the contemplated procedure. At this point we will explain the reasoning supporting this view.

The first legal objection which might be raised on the basis of the language of Article XIX stems specifically from the following sentence in Section 1. "If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately." The objection is that according to this sentence an entire new article on amendments could not be legally proposed as a single amendment to the constitution. We can cite several reasons why we believe that this objection, if properly presented, would not be sustained by the New Mexico Supreme Court.

The reasons and authorities to support this opinion were summarized well in Opinion of the Attorney General 65-22 which dealt with the legality of presenting an entire new judicial article as a single amendment to the constitution. In reaching the conclusion that the entire article could be presented as a single amendment, Deputy Attorney General Oliver E. Payne stated:

"While we cannot state with certainty how our Supreme Court would rule on this question, there are three reasons why we believe it would hold the proposed constitutional amendment valid as encompassing a single subject.

First, our Supreme Court has many times stated the separation of powers principle in an unequivocal fashion. *State ex rel. Hovey Concrete Products Co., Inc. v. Mechem*, 63 N.M. 250, 316 P.2d 1069. And this, after all, is really an expression that each branch of government will pay considerable deference to the actions of the other branches in their particular spheres of responsibility.

Second, the State of Minnesota has adopted the liberal approach in determinations as to whether the single-amendment provision has been violated. *Fugina v. Donovan*, Minn., 104 N.W. 2d 911. It has also adopted the liberal view as to what constitutes a single subject (*Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923) and our Supreme Court has quoted from this decision with approval. *State ex rel. Taylor v. Mirabal*, 33 N.M. 553, 273 Pac. 928.

Third, the more recent cases in other jurisdictions have inclined toward a broad, liberal view rather than a strict view in construing the constitutional single - amendment

provisions. See e.g. *Rupe v. Shaw*, Okla. 286 P.2d 1094; *Perry v. Jordan*, 34 Cal.2d 87, 207 P.2d 47.

While such decisions are in no way binding on our Supreme Court, it would most assuredly examine carefully the reasoning therein."

In the case of **City of Raton v. Sproale**, 78 N.M. 138, the New Mexico Supreme Court was called upon to decide whether the constitutional {\*191} amendment there under consideration was in fact two amendments and consequently violated the prohibition in Article XIX, Section 1. Judge Oman began the analysis by pointing to the Court's duty to uphold "the constitutional validity of the amendment, unless its illegality is made to appear beyond all reasonable doubt." Then dealing more specifically with the prohibition which concerns us in Article XIX, Section 1 he stated:

"The majority of the cases, which have undertaken to construe and apply a like constitutional enjoiner, seem to have adopted the rule that a constitutional amendment, which embraces several subjects or items of change, will be upheld as valid, and may be submitted to the electorate as one general proposition, if all the subjects or items of change contained in the amendment are germane to one general object or purpose . . .

The factual situation presented here does not lend itself to a close analogy with any other case or cases which we have found.

However, we are of the opinion that such constitutional provisions should receive a liberal rather than a narrow or technical construction, especially where, as here, the legislature obviously considered the problem carefully, and the matter has been submitted to the people for their vote thereon. See *Rupe v. Shaw*, supra."

In our opinion had there been any serious legal doubt to be raised under Article XIX concerning the submission of an entire article on amendments as a single amendment, that doubt was dispelled by the language above quoted from the Sproule case.

The second legal objection which might be raised on the basis of the language of Article XIX stems from the phrase in Section 2 which provided that a convention can be called, "to revise or amend this constitution". The objection here is that the procedure contemplated might be an attempt by the convention to "revise **and** amend" which the constitution does not allow. In our opinion this objection is invalid.

"Revise" is defined as, "To review, re-examine for correction; to go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it." (Black's Law Dictionary, Fourth Edition, West Publishing Company). The same authority defines "amend" as "To change, correct, revise". Viewed in this light the contention that the language in Article XIX, Section 2 requires a convention to do one or the other of these two things, but not both, becomes meaningless. The two concepts, although not

identical certainly overlap to an extent that they cannot be juxtaposed with an "either . . . or" or connotation.

Even if the definition of the terms "revise" and "amend" did not make illegal the contention that a convention can only do one of the two, the contention would be invalid on a separate ground. Specifically, it is obvious from the last sentence in Article XIX, Section 2 that a constitutional convention can either revise nor amend the constitution. The convention can adopt changes in the constitution and propose those changes to the people, but any revision or amendment takes place at the time of the ratification by the people. Consequently, if the contention could logically be made that either revision or amendment can take place, but not both, that limitation would be a limit on what the people could be allowed to ratify rather than a limit on what the convention could propose.