

Opinion No. 69-151

December 29, 1969

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

TO: Maralyn S. Budke, Director Legislative Finance Committee Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

1. What is the status of House Joint Resolution 1, 2, 3, and 7, passed during the 1969 session of the New Mexico legislature? If these Resolutions have not been nullified by the submission of the proposed constitution, may they be amended at the 1970 legislative session?

2. Would the Attorney General reconsider his opinion of October 25, 1965 (No. 65-212), which concluded that resolutions and constitutional amendments may not be considered in legislative sessions taking place in even-numbered years? Reconsideration is requested because of the apparent conflict between the opinion and the New Mexico Supreme Court case of *Hutcheson v. Gonzales*, 41 N.M. 474, 71 P.2d 140 (1937). Note also that the opinion sanctions amendment to Article XIX, Section 1 by a method other than the exclusive method provided in Article XIX, Section 5.

CONCLUSIONS

1. See Analysis.

2. See Analysis.

OPINION

{*240} ANALYSIS

(1) Section 2 of House Joint Resolution 1 passed during the 1969 session of the New Mexico Legislature (Laws of 1969, p. 1543) provides:

"The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose unless a new constitution or an amendment to Article 8, Section 1, of the existing constitution has been submitted by the constitutional convention at that same election or a prior election."

Section 2 of House Joint Resolution 2 passed during the 1969 session of the New Mexico Legislature (Laws of 1969, p. 1545) provides:

"The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose unless a new constitution or an amendment to Article 8, Section 5, of the existing constitution has been submitted by the constitutional convention at that same election or a prior election."

Section 2 of House Joint Resolution 3 passed during the 1969 session of the New Mexico Legislature (Laws of 1969, p. 1546) provides:

"The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose unless a new constitution or an amendment to repeal Article 12, Section 4, of the existing constitution has been submitted by the constitutional convention at that same election or a prior election."

Regarding your first question the above language provides that House Joint Resolutions 1, 2, and 3 are to be submitted to the voters "at the next general election or at any special election prior to that date which may be called for that purpose unless a new constitution . . . has been submitted by the constitutional convention at . . . a prior election." The inescapable conclusion which we draw from this language is that ,by their own terms, House Joint Resolutions 1, 2, and 3 are not to be submitted to the voters if "a new constitution . . . has been submitted by the constitutional convention at . . . a prior election." Since the 1969 Constitutional Convention did submit a new document to the people on December 9 (which was a "prior election") House Joint Resolution 1, 2, and 3 by their own terms are not to be submitted to the voters.

Section 2 of House Joint Resolution 7 passed during the 1969 session of the New Mexico Legislature (Laws of 1969, p. 1548) provides:

"The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose. This amendment shall not take effect in the event that a new constitution is enacted."

The clear meaning of this language is that the enactment of a new constitution rather than the submission of a new constitution is necessary in order that the amendment not "take effect". No new constitution has been enacted and House Joint Resolution 7, by its own terms, will be submitted to the voters "at the next general {241} election or at any special election prior to that date which may be called for that purpose."

In light of our above conclusion the question remains whether House Joint Resolution 7 may be amended at the 1970 legislative session. Article XIX, Section 1 of the New Mexico Constitution provides in part:

"Any amendment or amendments to this Constitution may be proposed in either house of the legislature at any regular session thereof."

We conclude that if constitutional amendments may be "proposed" during the 1970 session of the legislature, then previously proposed constitutional amendments may be amended in that session. However, if the 1970 session of the legislature is precluded from proposing amendments they are also precluded from amending previously proposed amendments.

(2) Attorney General Opinion No. 65-212 concluded that resolutions and constitutional amendments may not be considered in legislative sessions taking place in even-numbered years. The reasoning of that opinion was that Article IV, Section 5 of the New Mexico Constitution which prescribes what can be considered at a regular session of the legislature convening during an even numbered year allows only certain types of "bills" to be considered. The Opinion concluded that, "Resolutions and proposed constitutional amendments do not have to be presented to the governor for approval and are not bills," therefore, they could not be considered by regular sessions of the legislature convening during even-numbered years.

The New Mexico Supreme Court in **Hutcheson v. Gonzales**, 41 N.M. 474, 71 P.2d 140 (1937) pointed out, among other things, that the proper method and correct time for the proposal of constitutional amendments is provided for in Article 19 of the New Mexico Constitution.

As has been shown elsewhere (Information Memorandum No. 202.9674, New Mexico Legislative Council Service, February 11, 1966) there is also language within the **Hutcheson** opinion which indicates that provisions affecting general legislation under Article IV of the New Mexico Constitution do not affect the legislature's power to indicate constitutional amendments under Article XIX, Section 1 of the New Mexico Constitution. While the language in **Hutcheson** does throw doubt on the reasoning behind the conclusion in Attorney General Opinion No. 65-212, we believe that it supports by another course of reasoning the conclusions recorded in our previous opinion.

Article XIX, Section 1 of the New Mexico Constitution provides the time at which constitutional amendments can be proposed as follows:

"Any amendment or amendments to this constitution may be proposed in any house of the legislature at any regular session thereof."

Article XIX, Section 5 of the New Mexico Constitution provides:

"The provision of section one of this article may not be changed, altered, or abrogated in any manner except through a general convention called to revise this Constitution as herein provided."

We take this to mean that the time at which constitutional amendment may be proposed as provided under Article XIX, Section 1 "may not be changed, altered, or abrogated in any manner except through a general convention called to revise this Constitution as herein provided."

Article XIX, Section 1 provides for the proposal of amendments at any regular session. At the time of adoption of the New Mexico {242} Constitution and Article XIX, Section 1, a regular session of the legislature convened, according to Article IV, Section 5, during the year "next after each general election." We can only conclude that the framers of the New Mexico Constitution meant for amendments to the constitution to be proposed in regular sessions as they have defined that term in Article IV, Section 5 of the Constitution.

To allow the change in the definition of "regular session" in Article IV, Section 5 which was involved in the 1964 Amendment to the Constitution, also to change the definition of "regular session" as that term is used in Article XIX, Section 1 is to allow a substantial change and alteration of Article XIX, Section 1 by other than "a general convention called to revise this Constitution as herein provided." In our opinion such an interpretation would subvert the intent of the framers of the New Mexico Constitution as clearly expressed in Article XIX, Section 5.

We therefore conclude that for purposes of Article XIX, Section 1 a regular session is one which convenes in the year following the general election, or the odd-numbered year. The 1970 session of the New Mexico Legislature is not a "regular session" for purposes of proposing constitutional amendments pursuant to Article XIX, Section 1. In our opinion it is therefore not empowered to do so regardless of the interpretation given to Article IV, Section 5B.

The question of whether a constitutional amendment proposed by the 1970 legislature could be effectively attacked in the courts either before its presentation to the voters or after approval by the voters, if such approval were forthcoming, is neither asked nor answered in this opinion. However, see **Johnson v. Stephenson**, 170 F.2d 108, 110 (5th Cir., 1948) where it was held:

"According to the common law there was no right at all to contest in a court any public election, because they belong to the political branch of the government and are beyond the control of judicial power, and the only remedy in the nature of an election contest was quo warranto or an information in that nature."