Opinion No. 70-81

October 23, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable David F. Cargo Governor of New Mexico State Capitol Santa Fe, New Mexico 87501

QUESTIONS

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Can Constitutional Amendment No. 3, Senate Joint Resolution 7, constitutionally extend the terms of officers to be elected in the same election that the amendment is to be submitted to the voters?

CONCLUSION

Yes.

OPINION

*{*138}* **ANALYSIS**

The relevant portion of Joint Resolution 7 is as follows:

"Section 1. It is proposed to amend Article V, Section 1 of the Constitution of New Mexico to read:

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands who shall unless otherwise provided in the Constitution of New Mexico be elected for the term of four (4) years beginning on the first day of January next after their election."

There are two issues which must be discussed to arrive at a conclusion on the constitutional question. First, does the substance of the resolution violate any constitutional principle? Second, does the resolution conform to all the formal requirements for amendments stipulated in Article XIX of our state Constitution?

Is the Substance of the Resolution Constitutional?

Examination of the amendment's *{*139}* substance must be done with certain basic principles in mind.

"All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will, and is instituted solely for their good." N.M. Const. art. 2, **§** 2.

"The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state." **Id. § III.**

The courts, who are creatures of this sovereign will, are most unwilling to interfere with its expression. The Supreme Court of Montana has expressed the typical standard of review of constitutional amendments in the following terms:

"And here, as always, we enter upon a consideration of the validity of a constitutional amendment after its adoption by the people with every presumption in its favor: the question is not whether it is possible to condemn the amendment but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt."

State v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).

While this standard refers to amendments already approved by the people it is equally applicable to your question. It is as much an interference with the exercise of sovereign will to prevent the people from considering an amendment as it is to strike down what they have already approved.

The courts have displayed much sensitivity to these principles in considering amendments which would affect constitutionally-established offices. In **State v. Cooney, supra,** the Court upheld an amendment to the Montana Constitution which abolished certain county and municipal offices even though it interfered with the terms of the officers. In **Martello v. Superior Court,** 202 Cal. 400, 261 P. 476 (1927), the California Supreme Court upheld an amendment which abolished a particular judicial office while the officer was still hearing a pending lawsuit. The Court held that the amendment was effective immediately and that the judge could not render final judgment. The principle upon which the Court based its decision is applicable to the present question:

"It is well settled that the sovereign power which creates a public office may abolish it or change the tenure thereof even though the tenure of an incumbent is affected thereby, unless restricted by the constitution." **Martello v. Superior Court, supra,** at 479.

The Montana Supreme Court has applied these principles in a case whose facts are almost identical to those of the present question. A constitutional amendment extending the terms of county sheriffs from two to four years was submitted to the voters in the same election in which the county sheriffs were to be elected. The Court upheld the amendment and held it applied to the sheriffs elected in that same election. The Court invoked the following doctrine to support its decision:

"It is clear from the authorities generally, and from the constitution itself, that public offices may be created, abolished or the term shortened or lengthened by constitutional amendment at any time the sovereign power in our government the people, choose to express their will to that effect in the manner provided in the constitution."

State ex rel. O'Connell v. Duncan, 108 Mont. 141, 88 P.2d 73 (1939). This case has been cited with approval by the New Mexico Supreme Court in **In re Thaxton,** 78 N.M. 668, 437 P.2d 129 (1968). The principle is dispositive of the first issue of the present question. It is clearly within the sovereign power of the people to enact the substance of this amendment.

The **Duncan** case also resolves any doubts about when the amendment in question is to take effect. In that case, the amendment contained a proviso that it would take effect upon proclamation by the governor. Since the governor did not proclaim it until one month after the election the defendant maintained the amendment did not *{*140}* apply until the next election. The court rejected this argument. No proclamation was necessary, the court said, because the Constitution contained no requirement that the governor proclaim an amendment; consequently, the amendment took effect immediately. The people, the court went on, were legislating and electing officers at the same time; and as far as the people were concerned, the amendment took effect the day they voted. There was no question of retroactivity. The present case is even more applicable, for the proposed amendment specifically provides that it shall apply to officers elected in the 1970 General Election. There is no provision of Article XIX which would prohibit this.

There is no equal protection problem because of the amendment's differential treatment of the offices. Legislatures have wide discretion to classify, and classifications do not violate the Equal Protection Clause because they are not precise or result in some inequality. **Morey v. Dowd,** 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). The United States Supreme Court has said that legislative judgments may be debatable, "but if our recent cases mean anything they leave debatable issues as respects business, economic and social affairs to legislative decisions." **Daybright Lighting, Inc. v. Missouri,** 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952), reh. denied 343 U.S. 291, 72 S. Ct. 764, 96 L.Ed 1334 (1952). The New Mexico Courts have followed the United States Supreme Court doctrine. They have formulated the following test for the constitutionality of legislative acts:

"Is it so wholly devoid of any semblance of reason to support it, as to amount to mere caprice, depending on legislative fiat alone for support? If so it will be stricken down as violating constitutional guarantees. But the fact that the legislature has adopted the classification is entitled to great weight." **City of Raton v. Sproule,** 78 N.M. 138, 148, 429 P.2d 336 (1967), quoting from **Hutcheson v. Atherton,** 44 N.M. 144, 99 P.2d 462 (1940).

Does the Amendment Comply With the Procedures of Article XIX?

The issue here is whether the Legislature can propose constitutional amendments in those regular sessions held in even-numbered years. We have discussed this question in Attorney General Opinion Nos. 65-212, issued October 25, 1965 and 69-151, issued December 29, 1969. Those opinions state that the Legislature should not consider amendments in even-numbered years. The context of the question has changed considerably since then; while we feel those opinions are still sound, we wish to emphasize a point made only peripherally in Opinion No. 69-151.

In 1965 and 1969 we answered this question when the Legislature was only **considering** acting. Now we consider the question after the Legislature has in fact acted. As we noted in Opinion No. 69-151, that opinion did not answer the question whether the Court would strike down an amendment proposed in 1970. In view of the courts' deference to the Legislature and the people when they act in partnership to express the will of the sovereign, it is doubtful that the Court would strike down the amendment. The following language from **City of Raton v. Sproule, supra,** supports this conclusion:

"We have repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments . . . logic and reason compel that a like or even stronger presumption must prevail in favor of the validity of a constitutional amendment which has received both legislative approval and approval of the qualified voters of the state." **Id.** at 142.

This conclusion is not inconsistent with our former opinions. We were asked to construe Article XIX; and after thorough research and long deliberation, we gave what we felt was the proper construction. We did not conclude that the construction given was the **only** possible construction; in fact, other reasonable constructions were offered during the course of our deliberations.

If the amendment is attacked in court either before or after the election, the courts will be faced with the accomplished fact that the Legislature has formulated amendments in even-numbered years. In view of the strong *{*141}* presumption of validity which controls here, the courts will be obliged to seek an alternative, reasonable construction of Article XIX to uphold the validity of the amendment. We conclude, then, that although the rationale of Opinion Nos. 65-212 and 69-151 are proper constructions of Article XIX, there are alternative constructions which the courts can reasonably adopt to uphold this amendment.