

Opinion No. 71-12

January 29, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable David M. Salman State Representative Legislative-Executive Building
Santa Fe, N.M. 87501 Honorable Max Coll State Representative Legislative-Executive
Building Santa Fe, N.M. 87501

QUESTIONS

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Are the Senate and House Rules on paired or proxy voting constitutional in view of Article IV, Section 17 of the New Mexico Constitution?

CONCLUSION

Such rules do not automatically violate the constitution; but in the passage of a particular bill, use of such voting procedures could produce an unconstitutional statute and that result would not be known until the "damage" had been done.

OPINION

{*16} ANALYSIS

The legislature itself is constitutionally authorized to adopt its own rules of procedures (N.M. Constitution, Article IV, Sec. 1) and this both the New Mexico Senate and House of Representatives have done. But failure to comply with its own rules does not invalidate an otherwise duly enacted statute. **Keenan v. Price**, Idaho, 195 P.2d 662; **Bradley Lumber Co. v. Cheney**, Ark. 295 S.W.2d 765; **Goodwin v. State Board of Administration**, Ala., 102 So. 718. However, constitutional provisions as to the number of votes required on final passage are mandatory and the validity of legislative enactments is dependent on compliance therewith. **Doyle v. Hofstader**, N.Y., 177 N.E. 489; **Waldauer v. Britton**, Tenn., 113 S.W.2d 1178; **Allen v. State Auditors**, Mich., 81 N.W. 113.

Rule 76 of the New Mexico State Senate authorized its members to proxy vote under specified conditions. The New Mexico House of Representatives provides for "paired" voting in its Rule 94. Neither pairings nor voting by proxy is permitted in House Committees. Rule 38(J).

At issue here is the constitutional requirement of Article IV, Section 17 which provides as follows:

"No bill shall be passed **except by a vote of a majority of the members present** in each house, nor unless on its final passage a vote be taken by yeas and nays, and entered on the Journal." (Emphasis added)

Article IV, Section 12 also speaks in terms of "members present." It seems important too that various Rules of both the House and Senate refer to "members present."

The basic question of course is whether "members present" means physically present or simply present in what might be called a "legislative sense" by way of a proxy or paired vote authorization.

The New Mexico Supreme Court again announced in the 1969 case of **Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board**, 80 N.M. 633 that

"The people are presumed to know the meanings of the words they use in constitutional provisions, **and they are presumed to give to the words their plain, natural and usual signification and import**, with due regard being given to the fact that the words are being used in expressing a part of the permanent and fundamental law of the State. A constitution is a practical instrument adapted to common wants and designed for common use, and it is made and adopted by the people themselves. It must be construed as if intended to stand for a great length of time."

Accord: **Flaska v. State**, 51 N.M. 13, {^{*17}} 177 P.2d 174. We would be hard put to say that the framers of the constitution meant "present" to mean in a legislative sense. The usual and ordinary meaning of the word as used in the constitution means "to be before one"; "being in view or at hand." **Webster's New Collegiate Dictionary**, Seventh Edition (1970).

While on the subject of word definition it is interesting to note the definition given to the word "pairing-off" in **Black's Law Dictionary**, Fourth Edition (1951) as follows:

"In the practice of legislative bodies, a species of negative proxies, by which two members, who belong to opposite parties or are on opposite sides with regard to a given question, mutually agree that they **will both be absent from voting**, either for a specified period or when a division is had on the particular question. By this mutual agreement a vote is neutralized on each side of the questions, and the relative numbers on the division are precisely the same as if both members were present. May, Parl. Pr. 370." (Emphasis added)

The case of **Opinion of the Justices**, Ala., 152 So. 901 involved a situation where one member announced that he and an absent member were paired on the vote for a particular bill and that he would vote "no" and such absent member, if present, would vote "aye". The question was whether the Senate passed the Act with the required number of votes. On this question, the court has this to say:

"We are of the opinion the Senator who was present but who agreed with one who was absent to pair their votes on the question should be treated as **not** a participant in that proceeding. The effect of his 'pair' is that for that occasion **he was absent.**"

In the Wisconsin case of **Integration of the Bar**, 11 N.W. 2d 604, the court also said that paired legislators **are not present.**

Our opinion is that the phrase "members present" as used in the State Constitution means physical presence. Our further conclusion is that the proxy and pairing rules of the Senate and the House of Representatives are not unconstitutional per se, but that an invalid statute **could** result from the use of them. This would happen when the paired or proxy vote was the one needed to pass a bill by a majority vote. Since the critical question of whether a proxy or paired vote was the critical one in passing the bill by a majority would not be known until after the fact, by the very use of these procedures the legislature is voluntarily placing itself in the position of passing unconstitutional statutes.

This office is not unaware of the "enrolled and engrossed bill doctrine" enunciated by the New Mexico Supreme Court on a number of occasions. Attorney General Opinion 64-40 is the most comprehensive one issued on this subject. The question posed in the request was

"Does the Supreme Court of New Mexico look behind an enrolled and engrossed bill which has been signed by the presiding officers of each house and approved by the governor to determine whether the bill was actually passed and signed in conformity with constitutional requirements? That is, will it look to the journal of either house, or perhaps to other evidence outside the record, in making such determination?"

Our conclusion was "Generally speaking, no, but see summarization at the conclusion of this opinion." A copy of this Opinion is attached.

But **even if** the law in this jurisdiction is that the Court will not look behind the properly authenticated bill to the journal for the purpose of ascertaining whether all constitutional provisions relative to enactment have been complied with, we feel certain that the legislature will nonetheless desire to **insure** that its enactments are duly and constitutionally enacted.

By: Oliver E. Payne

Deputy Attorney General