Opinion No. 75-13

February 13, 1975

BY: OPINION OF TONEY ANAYA, W Royer

TO: The Honorable Odis Echols New Mexico State Senate Executive Legislative Building Santa Fe, New Mexico 87501

QUESTIONS

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Would the proposed legislation contained in Senate Bill 53, if enacted, be unconstitutional?

CONCLUSION

Yes. Listing the incumbents first on the Primary Election Ballot and requiring all other candidate positions to be determined by lot is special legislation in violation of Article IV, Section 24 of the New Mexico Constitution.

OPINION

*{*49}* **ANALYSIS**

Senate Bill 53 proposes to amend Section 3-8-30, NMSA, 1953 Comp. to change the manner in which the candidate positions are determined on the primary election ballot. Section 3-8-30, **supra,** presently provides that all candidate positions are to be determined by lot. Senate Bill 53 would amend Section 3-8-30, **supra,** to provide that an incumbent to that office would be listed first on the primary election ballot and that all other positions would be determined by lot.

Article IV, Section 24, of the New Mexico Constitution prohibits the enactment of local or special laws. Article IV, Section 24 states in pertinent part:

The legislature shall not pass local or special laws in any of the following cases: Regulating . . . the opening or conducting of any election . . . . In every other case where a general law can be made applicable, no special law shall be enacted.

General and special legislation were defined in **City of Raton v. Sproule,** 78 NM 138, 429 P.2d 336 (1967) as follows:

"A statute relating to persons or things as a class is a general law. A special statute, on the other hand, is one that relates to particular persons or things of a class, or is made for individual cases, or for less than a class of persons or things requiring laws

appropriate to its peculiar condition and circumstances. **State v. Atchison T.& S.F. Ry.,** 20 NM 562, 151 P. 305 (1915); **Scarbrough v. Wootsen,** 23 NM 616, 170 P. 743 (1918). If a statute is general in its application to a particular class of persons or things and to all of the class within like circumstances, it is a general law. **Albuquerque Met. Arroyo Flood Con. A. v. Swinburne,** 74 NM 487, 394 P.2d 998 (1964); **Davy v. McNeill,** supra." **City of Raton v. Sproule,** supra, 78 NM at 152.

The proposed amendment falls directly within the definition of a special statute; it relates to particular persons of a class. The class involved here is all individuals who are seeking their party's nomination for a particular office.

The constitutional prohibition against special legislation on a subject does not prohibit the legislature from making class distinctions, and applying different rules thereto, but nevertheless:

Classifications must be based upon substantial distinctions, which makes one class no different from another as to suggest the necessity of different legislation with respect to them. And the characteristics which form the basis of the classification must be germane to the purposes of the law; that is, the legislation must be confined to matters peculiar to the class. **State v. Atchison T. & S.F. Ry.,** *{*50}* 20 NM 562 at 570, 151 P. 305 (1915).

See also **Davy v. McNeill,** 31 NM 7, 240 P. 482 (1925); **Hutchison v. Atherton,** 44 NM 144, 99 P.2d 462 (1940); **Crosthwait v. White,** 55 NM 71, 226 P.2d 477 (1951); and **City of Raton v. Sproule, supra.**

It is elementary that such classifications must be reasonable and not arbitrary, and that the classification attempted in order to avoid the constitutional prohibition must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not enough. **State v. Sunset Ditch Co.,** 48 NM 17 at 25, 145 P.2d 219 (1944).

We must therefore investigate the differences between incumbents and non-incumbents to determine whether Senate Bill 53 establishes a valid classification. In so doing, we recognize that such legislation begins with a presumption of constitutionality and a reasonable basis for classification.

The only difference we find is that an incumbent presently holds the office in question. Is this distinction pertinent, real, and substantial so as to make the incumbent so different from the non-incumbent as to require different legislation? Is this distinction so germane to the purpose of the law so as to form the basis for a separate classification? We think not. The purpose of the law is to determine the order of candidates on the primary election ballot. With this purpose in mind, the incumbent is no different than the other individuals who have filed for that office. All must stand for election to determine the party's general election candidate. The incumbent status is not so pertinent, real, or substantial so as to give an incumbent a preferential position on the primary election

ballot. Therefore, it is our opinion that Senate Bill 53 is unconstitutional because it is a special law, where a general law would suffice, in violation of Article IV, Section 24 of the New Mexico Constitution.

It is also our opinion, although it will not be discussed herein at length, that Senate Bill 53 violates the equal protection clause of both the United States and New Mexico Constitutions.

Assistant Attorney General