Opinion No. 87-01

January 19, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: James O. Browning Deputy Attorney General; Carolyn A. Wolf, Assistant Attorney General

TO: Ms. Paula Tackett, Legislative Council Service, State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

May the Lieutenant Governor vote in the case of a tie in the election of president pro tempore?

CONCLUSIONS

Yes

ANALYSIS

New Mexico Const. Art. V, § 8 states:

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.

Constitutional provision Art. V, § 8 is unambiguous. We believe what the language plainly states and what it means is that the lieutenant governor shall cast a tie-breaking vote on all questions where the Senate is equally divided. Cf. A.G. Op. 59-73. There is persuasive case law that supports this conclusion. These cases rely by analogy on the powers granted to the Vice President of the United States. As quoted in **State ex rel. Easbey v. Highway Patrol Board,** 372 P.2d 930, 937 (Mont. 1962):

"In Volume 5 of Hinds' Precedents (1907) at p. 518, it is said: '5976. The Vice President votes on all questions wherein the Senate is equally divided, even on a question relating to the right of a Senator to his seat.'"

Thus, the lieutenant governor in like manner can vote on any question before the Senate to break a tie. See **Opinion of the Justices,** 225 A.2d 481, 485 (Del. 1966) ("Implicit in Art. 3, § 19, we think, is the unqualified power of the Lieutenant Governor to vote on any question -- large or small -- whenever the Senate is equally divided."); **Advisory Opinion on Constitutionality of 1978 PA 426,** 272 N.W.2d 495, 499 (Mich. 1978) ("[T]he framers intended the Lieutenant Governor cast a tie-breaking vote in all deadlock situations, thereby permitting the legislative process to move forward.")

Art. V. § 8 clearly is intended to assist the Senate in providing the citizens of New Mexico predictable, stable government by preventing partisan deadlocks that could create a political crisis threatening the democratic form of government that our constitution envisioned. By providing an orderly means of avoiding tie votes, the Constitution provides a reliable mechanism for ensuring that issues are resolved. See Opinion of the Justices, supra at 485. The House may lack this express provision precisely because the larger numbers in the House may make tie votes less likely and less of a problem.

It has been noted to us that Art. IV, § 9 states in part, "The legislature shall select its own officers and employees and fix their compensation", and Art. IV, § 11 allows each house to determine its own rules or procedures. The argument has been made to us that these provisions set limits on the lieutenant governor's power to vote in the case of ties, i.e, because the lieutenant governor is not part of the legislature, the Senate, by its rules, could either allow or prohibit the lieutenant governor from voting in the election for president pro tempore. But this argument has no principled limitation and could lead to results that completely abrogate the intent and purpose of Art. V, § 8. Indeed, it has been held that the lieutenant governor cannot vote to break a tie on final consideration of a bill because the state constitutions required that bills be passed by a majority vote of the members present or elected. Because the lieutenant governor is not a member of the Senate, a vote in which he broke a tie would not be a vote of the majority of the members. **State ex rel. Sanstead v. Freed,** 251 N.W.2d 898 (N.D. 1977); **Coleman v. Miller,** 146 Kan. 390, 21 P.2d 518 (1937); **Kelley v. Secretary of State,** 149 Mich. 343, 112 N.W. 978 (1907). We are, however, most reluctant to construct a rule that is not capable of being easily or neutrally applied. Instead, Art. V, § 8 is a specific grant of power to the lieutenant governor:

Since the Lieutenant Governor is not empowered to vote unless and until "the senate is equally divided", it necessarily follows that, with the single, specific and express exception, the right to vote in the Senate is restricted to the duly elected and qualified State Senators, there present and voting. However, "when the senate is equally divided" by reason of a tie vote, it is then and there that the Lieutenant Governor is expressly empowered, permitted and directed to step in, take over and cast the deciding vote either for or against the bill, resolution, question or proposition being voted upon. **State ex rel. Easbey,** supra at 939.

Few rules can have more impact on legislation than organizational rules, and a principled distinction between organizational matters and substantive matters is lacking. To draw with difficulty a line between organizational issues and legislation is to take away from the process a helpful rule where it may be most needed in our republican form of government. We believe that Art. V, § 8 serves its constitutional purpose in the case of a tie in the election of president pro tempore.

We are aware that A.G. Op. 59-13 might be construed to be inconsistent with the line of cases beginning with **State ex rel. Easbey** supra. Without withdrawing that opinion, we question the reasoning used to reach the result.

Finally, we do not believe that the separation of powers doctrine prohibits the lieutenant governor from voting in organizational matters. Although the lieutenant governor is not a member of the Senate, but is rather an executive officer, nonetheless, the constitution makes him president of the Senate and authorizes him to vote whenever the Senate is equally divided. In this way, N.M. Const. Art. V., § 8 is an express exception to the separation of powers doctrine.

Respectfully submitted,

ATTORNEY GENERAL

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