MAINE STATE LEGISLATURE

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MEMORANDUM OF LAW CONCERNING QUESTIONS POSED BY THE SENATE OF THE STATE OF MAINE RESPECTING LEGISLATIVE DOCUMENT NO. 24.

STATEMENT OF FACTS

The 104th Legislature, pursuant to authority granted it in the Constitution of Maine, Article X, Section 4, proposed an amendment to the Constitution of Maine entitled "RESOLVE, Proposing an Amendment to the Constitution Providing for Convening of the Legislature at Such Times as the Legislature Deems Necessary." (Legislative Document 24) The Resolve was passed by a two-thirds vote of both Houses of the Legislature, signed by the Speaker of the House of Representatives and President of the Senate and forwarded to the Governor on the twenty-seventh day of June, 1969. The 104th Legislature adjourned without day on July 2, 1969. The 104th Legislature reconvened in Special Session on January 6, 1970.

The Senate of the State of Maine has raised a question as to the constitutionality of the presentation to the Governor and has presented two questions to the Court for their consideration.

QUESTIONS PRESENTED

1. Did the Legislature err in sending Legislative Document 24, RESOLVE, Proposing an Amendment to the Constitution Providing for the Convening of the Legislature at Such Times as the Legislature Deems Necessary, to the Governor for his approval, instead of sending it forthwith to the Secretary of State to prepare for the referendum provided in said Resolve?

2. Does the Governor have the power to veto over said Legislative Document 24, RESOLVE, Proposing an Amendment to the Constitution Providing for the Convening of the Legislature at Such Times as the Legislature Deems Necessary, which is a proposed amendment to the Constitution of the State of Maine?

STATEMENT OF LAW

1. Amendments to the Maine Constitution are specifically provided for in the Constitution and require two-thirds vote of the Legislature and a reference to the people for approval.

Article X, Section 4 of the Maine Constitution provides in pertinent part as follows:

> ". . . The Legislature, whenever two-thirds of both Houses shall deem it necessary, may propose amendments to this Constitution; and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law . . . to meet . . . to give in their votes on the question, whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this Constitution."

The Constitution of Maine, Article IV, Part 3, Section 2 also provides in pertinent part:

> ". . . Every bill or resolution, having the force of law, to which the concurrence of both Houses may be necessary, except on a question of adjournment, which shall have passed both Houses, shall be presented to the Governor, and if he approve, he shall sign it; if not, he shall return it with his objections to the House, in which it shall have originated . . . . If the bill or resolution shall not be returned by the Governor within five days

> (Sundays excepted) after it shall have been presented to him, it shall have the same force and effect, as if he had signed it unless the Legislature by their adjournment present its return, in which case it shall have such force and effect, unless returned within three days after their next meeting."

The basic question presented to the court for determination is the relationship of Article IV, Part Third, Section 2 and Article X, Section 4. The question is whether the Article X, Section 4 provides a system for amending the Constitution complete in and of itself or whether it is dependent in part for its operation on Article IV, Part 3, Section 2. More simply, is the signature of the Governor a necessary ingredient in the recipe for amending the Constitution?

A. Is the method of amendment of the Constitution provided in Article X, Section 4 dependent for its operation on other constitutional provisions governing ordinary legislation?

1. The Legislature, in proposing an amendment to the Constitution is not exercising a legislative function.

> "Generally, under the constitutions of various states, constitutional amendments may be initiated by the legislature, and, in proposing a constitutional amendment, the legislature is not exercising its ordinary legislative power, but is acting as a special organ of government for the purpose of constitutional amendment." 16 C.J.S., Constitutional Law, Sec. 9.

The Supreme Court of Mexico, in Hutcheson v. Gonzalez. 41 N.M. 474, 71 P.2d 140 (1937) said at page 145:

> "The legislature in taking any steps toward the framing of a constitution does not act in its legislative capacity."

2. The rules applicable to ordinary legislation do not apply to constitutional amendments.

A further refinement of the general rule is that the rules applicable to ordinary legislation are inapplicable to constitutional amendments.

> "The proposal by the legislature of amendments to the constitution is not the exercise of an ordinary legislative function; and it is not subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments, although the amendment may be proposed in the form of an ordinary legislative bill. . . ." 16 C.J.S., Constitutional Law, Sec. 9.

The Supreme Court of Florida in Collier v. Gray, 116 Fla. 845, 157 So. 40 (1934) said at page 44:

> "Proposed amendments to the Constitution are required to be agreed to by three-fifths of all the members elected to each house . . . Such proposals are not at the exercise of an ordinary legislative function, nor are they subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments."

3. Constitutional amendments are not legislation.

The general rule is that constitutional amendments are not legislation.

The Supreme Court of Alabama in Opinion of the Justices, (Ala., 1949) 40 So.2d 623 said that the state constitution described the exclusive mode of amending the constitution and it said at page 625:

> "In proposing amendments to the Constitution to be voted upon by the electorate, the legislature is not exercising its other power to make laws."

The Supreme Court of Pennsylvania in Sweeney v. King, (Pa., 1927) 137 A. 178, said at page 178:

> "We held in Commonwealth v. Griest 196 Pa. 396 46 A. 505, 50 L.R.A. 500, that constitutional amendments are not 'legislation'."

The Court in Opinion of the Justices (Ala., 1963) 155 So.2d 329 at page 330 said:

> "The legislative process with respect to constitutional amendments is not the exercise of the power of the Legislature to make laws, but is merely to propose such amendments to the consideration and judgment of the electorate and such a proposition is ineffectual unless the requisite majority of the electorate affirmatively approves the proposition submitted. Moreover, the proposal and submission of such amendments may be made by resolution.
>
> "The following authorities support this conclusion: Opinion of the Justices, 252 Ala. 205, 40 So.2d 623; Opinion of the Justices, 252 Ala. 89, 39 So.2d 665, Doody v. State, 233 Ala. 287, 171 So. 504; Opinion of the Justices, 227 Ala. 296, 149 So. 781; Jones v. McDade, 200 Ala. 230, 75 So. 988."
>
> See also Larkin v. Gronna, (N.D., 1939) 285 N.W. 59; and Hatcher v. Meredith (Ky., 1943) 173 S.W.2d 665.

4. Constitutional amendments need not be presented to the Governor for his signature.

The Supreme Court of Nebraska in re Senate File 31, 25 Neb. 864, 41 N.W. 981 (1889) said:

> "It will be conceded that under our constitution it is unnecessary to forward a proposition to amend the constitution, duly passed by each branch of the legislature, to the governor for his approval, as such proposition is not ordinary legislation."

a. The Maine rule is that legislation having the "force of law" must be submitted to the Governor for his approval.

There are at least two Maine cases which interpret the phrase "having the force of law" found in Article IV, Part 3, Section 2 of the Constitution. One is the case of Moulton v. Scully, (1914) 111 Me. 428. The court defined the words "every bill or resolution having the force of law" as meaning "legislative acts and resolves, which are passed by both branches, are usually signed by the governor and are embodied in the Legislative Acts and Resolves, as printed and published."

Too, the words "having the force of law" encompass those acts and resolves which, when approved by the Governor, merely wait the passage of the constitutionally denominated 90-day period of time before taking effect.

The court has also intimated that when a legislative act cannot be equated with legislation there is no necessity for the governor's signature or for the governor's veto. See Opinion of the Justices, 118 Me. 544, (1919).

The reference legislative document appears to be neither an act or a resolution having the force of law because it is in the first place not a legislative function, not a bill that becomes law 90 days after its enactment but is an extrodinary exercise of power by the Legislature granted by the people. It is a proposed amendment to the Constitution as distinguished from a law.

The court will also want to refer to Opinion of the Justices, 231 A.2d 617, (1967) in which the court held that an act appropriating state funds conditioned upon the voter's ratification was an act having the force of law and thus requiring the governor's approval. This case clearly involved a legislative function of appropriating money.

b. The sanction or approval of the Governor is not essential to the validity of a constitutional amendment.

The general rule is that the governor's action of approval or disapproval of a constitutional amendment proposed by a legislature adds nothing to and subtracts nothing from the validity of the legislative action. See Coulter v. Dodge (Ark. 1939) 125 S.W.2d 115; Opinion of the Justices (Ala., 1948) 46 S.2d 499; Kalber v. Redfern (S. Car., 1949) 54 S.E.2d 791, and Bonds v. State Department of Revenue (Ala. 1950) 49 So.2d. 280.

> "The sanction or approval of the Governor of a state is not essential to the validity of a proposed amendment, and accordingly, veto of the Governor would not affect the validity of the proposed amendment, and his action approving the proposed amendment adds nothing to, and subtracts nothing from, the validity of the legislative action." 16 C.J.S., Constitutional Law, Sec. 9, page 52. See also State v. Grayson, 123 So. 573.

The only provision of law requiring a Governor to act concerning constitutional amendments is ministerial in nature. (See Title 1 M.R.S.A. § 352) This requires the Governor to make proclamation of the adoption of a constitutional amendment.

5. The Courts have construed the interaction of constitutional provisions relating to the Governor's power of veto and those relating to amendment of the Constitution.

The general rule is that constitutional amendments may be framed and submitted by the Legislature, under authorization by the Constitution and subject only to the limitations imposed therein.

The case of People ex rel Stewart v. Ramer (Colo., 1916) 160 P. 1032 interpreted provisions similar to Maine relating to the Governor's power of veto and to amendment to the Constitution.

The Court said:

> ". . . . The two articles of the Constitution are not inconsistent, and may be fully executed without any conflict. One relates to ordinary legislation by the General Assembly, and the other relates to the establishment of constitutions and amendments thereto. Each contains the essentials for its complete enforcement without impinging upon any function of the other. Each of these articles is of equal dignity, and neither can be used to change, alter, or overturn the other. That which the General Assembly is authorized to do by Article 19, relative to initiating proceedings to amend or change the fundamental law, is its business solely, with which the executive has nothing whatever to do. Such seems to be the uniform holdings of the courts under constitutional provisions similar to ours (citing cases)."

The question before the Supreme Court of Pennsylvania in Commonwealth v. Griest, supra was whether a proposed amendment to the Constitution must be submitted to the Governor and be subjected to the requirements of his approval. That Court held at page 507:

> "The first and most obvious answer to this question is that the article which provides for the adoption of an amendment is a complete system in itself, from which the submission to the governor is carefully excluded, and therefore such submission is not only not required, but cannot be permitted. It can only be done by reading into the eighteenth article words which are not there, and which are altogether inconsistent with and contrary to the words which are there. Under that article the amendment becomes a part of the constitution without any action of the governor. Under the opposing contention it cannot become a part of the constitution without the positive approval of the governor, when no such approval is either expressed in or implied from the explicit words of the article. They cannot be implied, because there is no necessity for such implication. This is a most familiar principle in the construction of mere ordinary statutes, and also in the construction of written contracts.... The only authorities which have any right to assent or dissent to the adoption of the amendment are the two houses of the general assembly and the people. If these two latter vote adversely, it falls. If the two houses do not agree, it never has any existence, even as a proposition. But nowhere in the article is any other assent or any other dissent permitted to affect the question of adoption, nor is there any place in the article into which the necessity or the propriety of any other assent or dissent can be imported by implication. Therefore it follows, upon the most obvious and ordinary principles of statutory interpretation, that, there being no warrant for executive intervention contained in the eighteenth article, it cannot be placed there by any kind of implication from the twenty-sixth section of the third article."

The position of the Supreme Court of Pennsylvania as to the distinction between the legislature's normal function of enacting laws versus proposing amendments to the Constitution which do not require the Governor's consideration has been followed in other jurisdictions.

The case of Mitchell v. Hopper (Ark., 1922) 241 S.W. 10, the Court considered constitutional provisions similar to Maine's, both respecting the veto power of the Governor and the amendment of the constitution.

The Court said at page 11 with respect to veto power of the Governor:

> "It is quite obvious that this section has no relation to proposals for amending the constitution. The veto power there referred to relates expressly and solely to bills which become laws when approved by the Governor; or when retained by him without action beyond the time there limited for his action; or when passed by the two houses over his veto."

The Court also considered section 16 of Article VI of the Constitution of Arkansas which read as follows:

> "Every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment, shall be presented to the Governor, and, before it shall take effect, be approved by him; or, being disapproved, shall be repassed by both houses, according to the rules and limitations prescribed in the case of a bill."

The Court noted that this provision was in fact borrowed from the Constitution of the United States and that precedent with respect to that Constitution was compelling.

The court said that in only one instance has a proposed amendment to the Federal Constitution had been submitted to the President for his approval. The court said also at page 13:

> "(that it would be) . . . entirely superfluous to have the Governor to act in approving proposals for constitutional amendments. His action in so doing could not be anything more than a mere recommendation to the electors and would not render less necessary their approval at the ensuing election."

The court relied on the leading case of Warfield v. VanDiver, (Maryland, 1905) 60 A. 539 in which the court said:

> "'The people are the source of power. It is they who make the abrogate and written constitutions, and when in the organic law which they have chosen for themselves they have designated the General Assembly, consisting of a Senate and a House of Delegates and nothing more, to be the agency for propounding amendments to the Constitution; no Executive has the right to step in between that agency and the people themselves and to say that without his approval they shall not be permitted to express their views on measures amendatory of the organic law. Unless the expressed language of the Constitution has unequivocally clothed the Governor with such an authority, in relation to proposed Constitutional Amendments, as in the case in Delaware, but in no other State, it cannot be borrowed from some other provision pertaining to a wholly different subject.'"

The Maryland Court went on at page 540 to state:

> "Hence the test as to whether a particular measure adopted by the General Assembly is ' one which the Governor must sign to give it efficacy is the fact that when signed it becomes at once, and in virtue of being signed, a law, and thereupon ceases to be a bill. 'Every bill . . . shall, before it becomes a law, be presented to the Governor,' etc. If he signs it, it will become a law. If he does not approve it, and the two houses pass it by a three-fifths vote over his veto, it will also become a law. Obviously, then the measures which the Governor has the authority to sign or veto are only such as, when signed, or when passed over his veto, becomes laws. A bill proposing an amendment to the Constitution, and nothing more, would not become a law if signed by the Governor, nor would it become a law if passed by three-fifths vote over his veto, because it is required to be submitted to the people for their adoption or rejection; and not until it shall appear that a majority of the votes cast at the polls on such proposed amendments are in favor thereof can the

> Governor proclaim that it has been 'adopted by the people of Maryland as part of the Constitution.' It is not operative unless adopted by the people. It is a mere proposal to amend until sanctioned by them; and when adopted by their votes it becomes, not a law in the sense in which that word is used in the Constitution, but a 'part of the Constitution' . . ."

a. The Maine Supreme Court has examined the necessity of the approval of the President of the United States to an amendment to the Federal Constitution.

The Supreme Court of Maine in Opinion of the Justices, 118 Me. 544 observed that when the Federal Constitution is amended by joint resolution of the two Houses of Congress:

> "Such proposed amendment is a matter within the sole control of the two Houses, and is independent of all executive action. The signature of the President is not necessary and it need not be presented to him for approval or veto. Hollingsworth v. Virginia, 3 Dall., 378; State v. Dahl, 6 ND 81, 34 L.R.A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power."

It could be argued that since the Federal and State Constitutions are grounded on the same basis with respect to similar articles that an analogy between the Opinion of the Justices decision and the present factual situation would be consistent and proper. This historic construction and judicial parallel could be coupled with the general rule that the act of the legislature in proposing constitutional amendments is not legislative in character and thus does not require the approval of the governor.

b. Two jurisdictions have taken the view that when a constitutional amendment is to become operative in a manner and time provided by the legislature, the Governor may exercise his veto power.

There is another view which would indicate that the governor might become involved in the process of amending a state constitution. Delaware, because of specific constitutional language, requires that a proposed amendment be sent to the governor for his approval.

California, may follow the case of Hatch v. Stoneman (Cal., 1885) 6 P. 734. The case said that amendments to the California constitution, under its provisions, are proposed by the two Houses of the legislature, but the time for submission of the same to the people must be fixed by an act of the legislature and receive the approval of the governor, or passage in a constitutional manner, after disapproval of veto by the governor, in the regular manner of other bills.

The California Constitution as reproduced in the Hatch case, recites in part in Section 1, Article 18:

> ". . . 'Any amendment or amendments to this constitution may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their journals, with the nays and yeas taken thereon; and it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such times and after such publication as may be deemed expedient.'"

This provision should be compared carefully with Article X, Section 4 of the Constitution of Maine. It appears to be different. The Maine Constitution clearly provides the method of voting on the constitutional amendment and apparently allows the legislature the selection of only one alternative, that, concerning time of voting.

It raises the interesting question of whether the governor, although not having the power to veto the amendment to the constitution itself, may veto any portion of the resolve by which the constitutional amendment is to be submitted to the people. In other words, if the governor may not veto as to matters of substance, may he veto as to matters of procedure?

Dated: January 7, 1970.

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STATE OF MAINE

Inter-Departmental Memorandum Date November 13, 1969

To Jon R. Doyle, Assistant Dept. Attorney General

From John Paterson, Research Assistant Dept. Attorney General

Subject Veto of Proposed Constitutional Amendment - Hatch v. Stoneman

Except in special circumstances, it is the general rule that proposed State constitutional amendments are not subject to the Governor's veto power. In Hatch v. Stoneman, 66 Cal. 734, 6 Pac. 734 (1885), it was held that the legislature in proposing a constitutional amendment was not acting in its legislative capacity. The Governor's veto would be inoperative on this issue. However, in that same decision the California court held that the Governor could veto the legislature's proposals regarding time and manner of ratification. When prescribing the manner of ratification the legislature was acting as a legislature and its actions were subject to veto.

No subsequent case has overruled Hatch and it is frequently cited for the general principal it propounds, that a legislature when proposing a constitutional amendment is acting in a special capacity and the normal legislative requirements do not apply. In Commonwealth v. Griest, 196 Pa. 396, 146 A. 505 (1900) and Kalber v. Redfearn, 215 S.C. 224, 54 S.E. 2d 791 (1949), the court recognized the unique nature of this provision in the California Constitution. Similarly, other cases recognize that a gubernatorial veto is irrelevant to constitutional amendments unless it is specifically provided for in the amending process. People ex rel Stewart v. Ramer, 160 Pac. 1032 (Colo. 1916); Ramsey v. Persinger, 43 Okla. 41, 141 Pac. 13 (1914); Johnson v. Craft, 205 Ala. 386, 87 So. 375 (1921). Even in a constitution that provided that the Governor should publish proposed amendments prior to the general election, it was held that the Governor had no discretion as to this requirement. Warfield v. Vandiver, 101 Md. 78, 60 A. 538 (1905).

It seems doubtful that the Maine provision for amending the constitution, M.R.S.A. Const. Art. X, § 4 (1964), is similar to California's. In Re Senate File #31, 25 Neb. 864, 41 N.W. 981 (1889), the court in comparing many State procedures said the provision was essentially automatic. The requirement of a legislative resolution is essentially a process to notify the various towns to vote on the issue in the next election. Therefore it can

be argued that the notification is not "resolution, having the force of law." M.R.S.A. Const. Art. IV, Pt. 3, § 2 (1964).

On the other hand it can be argued that the material in the proposed constitutional amendment that exceeds the provisions of Art. X, § 4 is legislative in nature and subject to veto as in Hatch.