Evans
Diamond

RICHARD S. COHEN
ATTORNEY GENERAL

STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

#79-40

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 6, 1979

Honorable Swift Tarbell
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Tarbell:

You have inquired as to the appropriate means of introducing for consideration by the Maine Legislature an application to Congress for a constitutional convention under Article V[1/] of the United States Constitution. As we have indicated in the past, questions involving legislative procedure must ultimately be resolved by the Legislature. Accordingly, our answer is intended solely to provide the Legislature with the fruits of our research and our analysis, in the hope that we can assist the Legislature in resolving this matter.

In our view, this issue breaks down into two questions. First, does the State Legislature have the authority under Article V to determine the parliamentary procedures by which it will undertake consideration of a proposed application for a constitutional convention? We believe that this authority does rest with the individual state legislature. This conclusion gives rise to the second question: has the Maine Legislature, through the adoption of Joint Rule 35, established an exclusive parliamentary mechanism for introduction of an Article V application? We would answer this question in the negative and would thus conclude that an application may be introduced through any procedure which the Legislature chooses to use.

1/ Article V in relevant part provides:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . ."

I shall now set forth the results of our research and our analysis in more detail.

The threshold question concerns the authority to determine the internal parliamentary procedures which a state legislature may follow in considering a proposed application to Congress for a constitutional convention.[2/] Although there is no case law directly on point,[3/] the available authorities suggest that, with limited exceptions, the power to make these procedural decisions resides with the individual state legislatures.

At the outset, it is necessary to understand the unique role assigned to a state legislature under Article V. In contrast with its other duties and powers, which are derived from the people of the state through the state constitution, both application and ratification involve the legislative body in carrying out a federal function. As stated by Justice Brandeis:

2/ The 90th Congress considered, but failed to enact, a Federal Constitutional Convention Act, which would have specified the procedures for proposing amendments through the application process. It is interesting to note that the proposed bill would have required a state legislature to follow the rules of procedure that govern the enactment of a statute bv that legislature, but without the need for approval by the Governor.

3/ The lack of precedent probably stems from the fact that while applications have been made to Congress, there have never been a sufficient number for Congress to call a convention. For a general discussion of this subject, see Symposium on the Article V Convention Process, 66 Mich. L. Rev. 837 -1016 (1968).

> ". . . [t]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution, . . . " Leser v. Garnett, 258 U.S. 130, 137 (1922).

Given the nature of the legislature's role under Article V, it is clear that all questions concerning the method for making application are ultimately governed by the United States Constitution.4/ The issue thus becomes whether the framers of that Constitution intended to prescribe specific procedures binding on all state legislatures or whether they intended to allow each legislative body to determine its own practice.

The one case which considered this question in some depth concluded that most procedural matters under Article V were deliberately left to the state legislatures. Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill., 1975). In Dyer, the plaintiffs challenged a decision by the Illinois Legislature requiring approval by three-fifths of the members of each house in order to ratify the proposed Equal Rights Amendment. Their argument that Article V mandates approval by a simple majority was rejected by the three-judge court.

In considering this issue, the Dyer court initially noted that "the Constitution is totally silent with respect to the procedure which each . . . state legislature. . . should follow in performing the ratifying function." Dyer v. Blair, supra, at 1304. Similarly, a review of the debate on Article V failed to disclose any clear indication that the framers intended to impose uniform procedures on the states. The absence of specific references to the manner of ratification by the state legislatures, coupled with the underlying philosophy of the framers that powers not expressly delegated to the federal government were to remain with the states, led the court to decide that the procedures were to be determined by the ratifying bodies.

4/ As pointed out by a leading commentator on the subject,

> "The provisions of the state constitution and the rules of the legislature as to the passage of statutes, bills, and other forms of legislation are not controlling in the adoption of an amendment. . . . The courts have asserted that the legislature acts as a federal agent and exclusively under the federal Constitution." See Orfield, Amending of the Federal Constitution, p. 63 (1942).

> ". . . [T]he failure to prescribe any particular ratification procedure, or required vote to effectuate a ratification, is certainly consistent with the basic understanding that state legislatures should have the power and discretion to determine for themselves how they should discharge the responsibilities committed to them by the federal government." Dyer v. Blair, supra, at 1307.

It is important to emphasize that the authority to formulate the application and ratification procedures under Article V is not given to the states as political entities, but rather is given to the state legislatures. Responding to the contention that the Nineteenth Amendment was invalid because some of the state legislatures were without the power to ratify under their own constitutions, the Supreme Court noted that a legislature's ratification power "transcends any limitation sought to be imposed by the people of a State." Leser v. Garnett, supra, at 137; see also Hawke v. Smith, 253 U.S. 221 (1920) (provision of state constitution requiring ratification by popular referendum held invalid.) The Dyer case clearly illustrates this distinction. While holding that the Illinois Legislature could itself impose a three-fifths requirement for ratification, the Court concluded that the identical requirement in the Illinois Constitution was not binding. Simply stated, the Illinois Constitution could not limit the legislature's power to ratify, insofar as that power belongs to the state legislative body and not to the body politic.

Although the existing precedent deals largely with ratification under Article V, it seems clear that the same conclusions would hold true for the application process. See Petuskey v. Rampton, 307 F. Supp. 235 (D. Utah, 1969), rev'd on other grounds, 431 F.2d 378, cert. denied, 401 U.S. 913 (1971). If a state legislature has the authority to determine the percentage of the vote necessary to ratify, then it certainly must have the power to establish the parliamentary procedures for bringing a proposed application before its constituent houses. In short, it is for the legislature to determine the parliamentary route which an Article V application may follow.5/

Having concluded that the Legislature has the power to determine its own procedural course for the introduction of an Article V application, we must now consider whether Joint Rule 35

5/ Since Congress has not acted in this area, there is no need to consider what effect federal legislation setting forth the procedures for making application would have on this conclusion.

provides the only procedural route by which a proposed application may come before the Maine Legislature. The question is clearly one of legislative intent: that is, did the Legislature, in the adoption of Joint Rule 35 and its precursors, intend to establish an exclusive procedural path for an Article V application?

To ascertain the intent of the Legislature, we look first to the language of Joint Rule 35. The Rule reads:

> "35. No memorial shall be in order for introduction unless approved by a majority of the Legislative Council."

In the context of the matter under consideration, the question is whether the term "memorial," as used in Joint Rule 35, includes by definition applications under Article V, so that such applications may come before the Legislature only with the approval of a majority of the Legislative Council.

The term "memorial," used in reference to a document of the Legislature or other assembly, is not defined in the Joint Rules, in any other legislative document (so far as we have been able to determine) or elsewhere in Maine law. The recently issued Manual for Legislative Drafting[6/] contains a definition[7/]; that definition is, of course, in no way binding on the Legislature. Both Black's Law Dictionary[8/] and Webster's Dictionary[9/] define "memorial" in more general language.[10/]

6/ 3rd Edition, August, 1978, issued by the Director of Legislative Reserach, State of Maine.

7/ The definition given in the Manual is:

> "Memorial: a joint resolution addressed to a person or body other than the Maine Legislature or someone subject to its control, formally expressing the opinion of the Legislature or urging a course of action on a matter within the power of a person or entity outside the Legislature (example; the President of the United States or the Congress of the United States)."

8/ Revised 4th Edition, 1968.

9/ 3rd International Edition, 1963.

10/ Black's definition is:

> "A document presented to a legislative body, or to the executive, by one or more individuals, containing a petition or representation of facts."

Webster's definition is:

> "A statement of facts addressed to a government or some branch of it often accompanied with a petition or remonstrance.

If we attempt to derive a definition from past usage of memorials by the Maine Legislature, it is clear that in the overwhelming majority of the cases, memorials have served as the vehicle for more or less formal expressions of the Legislature's viewpoint on a wide variety of matters.[11/] The typical memorial is essentially precatory in nature and, while it may express serious legislative concern, it exerts no compulsion and is in no way binding on the recipient. By contrast, an Article V application involves the Legislature in discharging one of the most fundamental responsibilities under our federal system, namely, the amending of the United States Constitution. Further, such applications are at least potentially compulsory and binding upon the Congress by the terms of Article V.

Based upon the definitions of "memorial" and upon past usage, it is impossible to conclude that the term, as used in Joint Rule 35, was intended to encompass applications under Article V. Accordingly, we must look next to the legislative history of Joint Rule 35 in the effort to ascertain whether the Legislature intended, in adopting the Rule, to institute an exclusive procedure for the introduction of applications.

Joint Rule 35 originated in 1960 as a recommendation by the Interim Joint Committee on Legislative Procedure in its report to the 100th Legislature on revision of the Senate, House and Joint Rules. The Interim Joint Committee recommended creation of a Joint Committee on Rules and Business[12/], which would, among other powers, have control over the introduction of memorials.[13/] The

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11/ Examples of typical memorials are:

> "Joint Resolution Memorializing Congress to Extend the Northern Terminus of the Interstate and Defense Highway System in Maine from Houlton to Some Point Located on the Northern Boundary of the State of Maine," S.P. 520, 101st Legislature, 1963; "Joint Resolution Memorializing Congress to Enact Legislation Abolishing Futures Trading of Potatoes on the New York Mercantile Exchange," L.D. 354, 101st Legislature, 1963; "Joint Resolution Memorializing the Honorable William P. Rogers, Secretary of State, to Negotiate by Treaty the Eastern Seaward Boundary Between Canada and the United States and the Responsibilities of Each Government with Respect to Oil Spillings in the Bay of Fundy," L.D. 1435, 105th Legislature, 1971; "Joint Resolution Memorializing the Honorable Richard M. Nixon, President of the United States, to Abolish the Oil Import Quota," H.P. 156, 106th Legislature, 1973.

12/ To be composed of a Committee on Rules and Business from each House, acting jointly. The Interim Joint Committee recommended dissolution of the Committee on Reference of Bills.

13/ Report of the Interim Joint Committee on Legislative Procedure to the 100th Legislature, 1960, p. 7. The report contained no discussion of reasons for the recommendation nor of the purposes intended to be served by requiring that memorials be screened.

Joint Committee on Rules and Business was not created, but the 1961 Legislature adopted without debate new Joint Rule 11-A:

> "Rule 11-A. Introduction of any memorial shall not be in order unless approved by a majority of the Committee on Reference of Bills."[14/]

In 1967, Joint Rule 11-A was renumbered Joint Rule 12 and was reworded:

> "Rule 12. No memorial shall be in order for introduction unless approved by a majority of the Committee on Reference of Bills."

The 1967 changes were made without debate. In 1969, Joint Rule 12 was renumbered Joint Rule 11 and was readopted without debate; from 1969 to 1977 there were no changes. In 1977, the rule was renumbered Joint Rule 34 and was rewritten to reflect the creation of the Legislative Council and the assumption by the Council of many of the duties of the Committee on Reference of Bills, now abolished. There was again no legislative debate. Thus, from its origin in 1960 to its present form as Joint Rule 35[15/], there has been no legislative consideration of the meaning of the Rule in the context of applications or, for that matter, in any context.

Our final area of inquiry, in ascertaining whether the Legislature intended to require that all Article V applications be in the form of memorials, is to examine how the Legislature has made applications in the past. Our research reveals that the Legislature has discharged this responsibility by way of joint resolutions or resolves which have been in both memorial and non-memorial form. Applications in memorial form have included:

14/ 1961 Legislative Record, pages 566, 601-602. The Committee on Reference of Bills at the time consisted of two Senators and three Representatives, and the President of the Senate and the Speaker of the House, ex officio. The two Senators and Representatives who served on the Committee were the Senate and House leaders. The number of Senate and House members on the Committee on Reference of Bills varied from time to time, but the personnel was always leadership.

15/ Joint Rule 34 was renumbered Joint Rule 35 in a printing revision occasioned by the inclusion of new Joint Rule 18 and consequent renumbering of the following Rules.

"Joint resolution proposing a constitutional convention of the United States or amendments to the Constitution of the United States relating to strengthening the United Nations and limited world federal government," L.D. 425, 94th Legislature, 1949 ("Resolved. . . that application is hereby made. . . pursuant to Article V. . . ", L.D. 425, ¶ 10);[16/] "Joint resolution making application to the Congress of the United States for the calling of a convention to propose an amendment to the Constitution of the United States," L.D. 1315, 95th Legislature, 1951; and "Joint resolution making application to the Congress of the United States for the calling of a convention to propose an amendment to the Constitution of the United States," L.D. 1428, 104th Legislature, 1969.[17/]

16/ A joint resolution of the next Legislature urged that Congress "rescind and repudiate" the "memorial" of 1949. L.D. 460, 95th Legislature, 1951.

17/ We have not attempted to find every instance in which the Maine Legislature has made application under Article V. The examples from 1949 and 1951 are illustrative of a type of application. The example of 1969 is the only application found in a search of the legislative Registers and Records for the years 1961 to present, the period during which Joint Rule 35 or its precursors were in force. That application, captioned "Memorial," presumably was approved for introduction by the Committee on Reference of Bills, which at the time controlled the introduction of memorials under then Joint Rule 11. While there is no indication that the Legislature considered the propriety of submitting an Article V application to a procedure by which a minority of a committee could prevent its introduction, we note that the application was referred to standing committee and eventually came to the floor, where the committee's Ought Not to be Adopted report was sustained.

In 1973, a "Joint Resolution Memorializing Congress to Call a Convention for the Purpose of Amending the United States Constitution Relative to Abortion" was introduced but was immediately amended to delete the prayer for a constitutional convention. The joint resolution was adopted as a memorial asking Congress to propose an abortion amendment. H.P. 857, amended by H-67, 106th Legislature, 1973.

Applications in non-memorial form have included: "Resolve Relating to the calling of a Convention to Propose an Amendment to the Constitution of the United States for the Prevention of Polygamy", 73rd Legislature, 1907;[18] and "Joint Resolution of the 75th Legislature of the State of Maine Making Application to the Congress of the United States to Call a Convention for Proposing an Amendment to the Constitution of the United States," S.P. 104[19], 75th Legislature, 1911.

The action of the 75th Legislature in passing a non-memorial application is of particular interest. The 75th Legislature considered an application under Article V, ratification of a proposed constitutional amendment under Article V, and four memorials to Congress. Thus, in one session, the Legislature, communicating with Congress on six different subjects and to six different ends, characterized four of its messages as memorials.[20] Neither the application nor the ratification,[21] each undertaken as a part of an Article V process, was in memorial form. The Legislature's actions suggest that it perceived a difference between memorials and applications.[22]

18/ Our research uncovered no Senate or House paper for this Resolve, nor was it printed in the laws of Maine for 1907. The text appears in the 1907 Legislative Record, pp. 308-309, and the Senate and House actions are recorded in their respective Journals for that year.

19/ Originally S.P. 80, amended by S.P. 104 and finally passed in the amended version. Neither S.P. 80 nor S.P. 102 was a memorial.

20/ The four were: Memorial to Congress for an Extra Session to Revise the Tariff; Memorial to Congress in Favor of the Sulloway Pension Bill; Memorial to Congress Relating to Panama Canal Exposition; Memorial to Congress to Increase the Efficiency of the Life-Saving Service.

21/ So far as we have been able to determine, ratifications by the Maine Legislature of amendments proposed by Congress under Article V have never been in the form of memorials.

22/ The Senate debate on the application lends support to this interpretation of the Legislature's actions. See 1911 Legislative Record, pp. 298-303.

As indicated, the past practice of the Legislature shows that applications under Article V have been made in both memorial and non-memorial form. It is clear that Joint Rule 35 was intended to establish certain procedural prerequisites for memorials. However, there is nothing in the language of the Rule or in the legislative history to indicate that the Legislature wished to eliminate the practice of introducing applications in non-memorial form. Accordingly, we conclude that Joint Rule 35 does not compel that applications under Article V be in memorial form or be treated as memorials. We conclude that, based upon legislative precedent, the Legislature is free to utilize any procedural route it wishes for introduction of such applications.

I trust this opinion is responsive to your inquiry. If I can be of further service, please let me know.

Very truly yours,

RICHARD S. COHEN
Attorney General

RSC/ec
cc: Legislative Council
Edith Hary
David Silsby