



STATE OF KANSAS

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March 4, 1977

ATTORNEY GENERAL OPINION NO. 77- 73

The Honorable Patrick J. Hurley
Majority Leader of the House
House of Representatives
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Re: Constitution--Amendments--Referendum Elections

Synopsis: House Concurrent Resolution No. 5023, if adopted, would not authorize the submission of a proposition to rescind 1972 House Concurrent Resolution No. 1155 to the voters at the time of the 1978 general election or at any other election. If adopted, the resolution would have no legal effect whatever, and would not authorize the expenditure of state funds for such an election, nor would it authorize the calling and holding of any such election by the Secretary of State or any other official. If, for any reason, the resolution were passed and the proposition submitted to the voters, approval thereof would have no effect on the 1972 ratification of the Equal Rights Amendment by the Kansas Legislature, it would not be binding upon the United States Congress, and it would not be binding upon the 1979 legislature or any subsequent session thereof.

* * *

Dear Representative Hurley:

You inquire concerning House Concurrent Resolution No. 5023, which provides thus:

The Honorable Patrick J. Hurley
Page Two
March 4, 1977

"Be it resolved . . . That the legislature shall submit to the qualified electors of the state of Kansas at the general election held in November of 1978 a proposition providing for the rescission [sic] of the action of the legislature of March 28, 1972, by which it adopted House concurrent resolution No. 1155, which resolution related to and ratified the proposed amendment to the constitution of the United States relative to equal rights for men and women; and

Be it further resolved: That the legislature shall adopt a resolution providing for the rescission [sic] of its ratification of such proposed amendment if a majority of the voters voting on such proposition shall vote in favor thereof."

Since adoption of 1972 House Concurrent Resolution No. 1155, various groups and interested citizens have sought rescission of that resolution. The questions involved here do not relate to the legal effect of any rescission, for that question has been addressed repeatedly in prior opinions from this office. Rather, the questions involved here concern the power of the legislature to submit a proposition such as framed in 1977 House Concurrent Resolution No. 5023 to a popular vote.

It is by now a familiar rubric of constitutional law in Kansas that the legislature enjoys all legislative power except that which is expressly or by necessarily implication withheld from it or limited by the constitutions of the United States or of the State of Kansas. *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304 (1975). Article 2, § 1 of the Kansas Constitution provides that "[t]he legislative power of this state shall be vested in a house of representatives and senate."

However, the ratification of a federal constitutional amendment does not entail the exercise of legislative power derived from the state constitution. Article V of the United States Constitution provides in pertinent part thus:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when

The Honorable Patrick J. Hurley
Page Three
March 4, 1977

In *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895 (1953), cert. denied, 290 U.S. 679, 78 L.Ed. 586, 54 S.Ct. 102, the court stated thus:

"The ratification or rejection of an amendment to the federal Constitution is a federal function derived from the federal Constitution itself. By the adoption of article 5 of the federal Constitution the people divested themselves of all authority to either propose or ratify amendments to the Constitution. By the same article they vested the power to propose amendments in the Congress and in a convention called by Congress, and designated the state Legislatures and state conventions as representatives of the people, with authority to ratify or reject proposed amendments to the Constitution. When a state Legislature performs any act looking to the ratification or rejection of an amendment to the federal Constitution, it is not acting in accordance with any power given to it by the state Constitution, but is exercising a power conferred upon it by the federal Constitution."

In *Re Opinion of the Justices of the Supreme Court of Maine*, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412, the court denied resort to a referendum in passing upon a proposed amendment to the United States Constitution, stating thus:

"The state Legislature in ratifying the amendment, as Congress in proposing it, is not strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body under the power expressly conferred upon it by article 5 [of the United States Constitution.]"

In the adoption of 1972 House Concurrent Resolution No. 1155, the measure was adopted by both houses of the legislature, but it was not signed by the governor, nor was it adopted with an enacting clause. In other words, it was not a bill, and it did

The Honorable Patrick J. Hurley
Page Four
March 4, 1977

not become law. Article 2, § 20, Kansas Constitution. In adopting that resolution, the legislature did not act in its legislative capacity, but in the exercise of the powers conferred on it by Article V of the United States Constitution. The present resolution, for precisely the same reasons, is likewise not a legislative act. Thus, to respond to your first question, if passed in its present form, either by a majority vote of both houses or by a two-thirds vote of the members of both houses, the resolution would have no legal effect whatever. In the first instance, of course, precisely because it is a concurrent resolution and not a bill, it cannot become law upon its adoption, whatever the margin of approval in both houses. If passed in its present form, it would constitute no legal authority for the calling and holding of an election in November, 1978, upon a "proposition providing for the rescission [sic] of the action of the legislature of March 28, 1972, by which it adopted House concurrent resolution No. 1155." The resolution would, if passed, constitute no legal authority for the expenditure of state funds for the calling and holding of any election which it purports to contemplate, and it would not authorize the Secretary of State to prepare a ballot submitting the question to an election, or to take any steps whatever respecting such an election. In short, adoption of this resolution would have no legal effect whatever.

If cast in bill form, the resolution would still not authorize the submission of the question to a popular vote. The decision whether to ratify the present proposed constitutional amendment is vested in the legislatures of three-fourths of the states. The Kansas Legislature has ratified the amendment, and there is no provision in either the Kansas Constitution or in the United States Constitution whereby any ratification which is once granted by a legislative body may be withdrawn by a popular referendum. Whatever determination the Congress ultimately makes regarding the recognition, if any, to be afforded an attempted legislative rescission of a prior ratification, it is indeed clear that the 1972 ratification in this instance must stand at least until withdrawn by the same body which adopted that ratification, *i.e.*, the Kansas legislature. And as previous opinions from this office have indicated that the effect of any legislative rescission is indeed uncertain.

You inquire what the electorate would actually be voting upon and what would be the effect of their vote if this resolution were passed by the 1977 legislature and the question placed upon a ballot at the time of the 1978 general election. As indicated, the resolution in its present form, if adopted, would constitute no legal authority for the holding of any such election, precisely

The Honorable Patrick J. Hurley
Page Five
March 4, 1977

because it is not a legislative act, adopted by both houses of the legislature in bill form and signed by the governor, but merely a concurrent resolution which does not have the force and effect of law. Even in the exercise of its *legislative* powers, the legislature has no power under Article V of the United States Constitution to commit to the voters the decision whether to ratify this proposed constitutional amendment or whether to rescind a previous ratification once granted. The proposition which this resolution purports to submit to a popular election, of course, is one "providing for the recission [sic] of . . . the adoption of [1972] House concurrent resolution No. 1155." An affirmative vote upon this proposition which was submitted to the electorate pursuant to this resolution would have no binding legal effect whatever, upon either the Kansas Legislature or the United States Constitution. Approval of the proposition would have no legal effect upon the prior ratification, no binding effect upon the United States Congress under Article V of the United States Constitution, and no binding effect upon any subsequent legislature in this state. The last paragraph of the resolution, which recites that the "legislature shall adopt a resolution providing for the recission [sic] of its ratification of such proposed amendment if a majority of the voters voting on such proposition shall vote in favor thereof," is ludicrous and overreaching surplusage. The 1977 Legislature cannot, obviously, bind or control the legislative acts of any subsequent legislative body. If adopted, this paragraph would have no effect other than as a precatory and wishful memorialization to subsequent legislative bodies.

Although the people can exercise no direct legislative power over proposed amendments to the federal constitution, Kansas voters could exercise direct legislative powers over state issues if the appropriate constitutional amendments were proposed by the Legislature to authorize statewide initiative and referendum elections. All too often in recent years, the voters have seen their wishes ignored or disregarded by their elected representatives, and they are helpless to compel the enactment of legislation which the people will clearly support. By the adoption of constitutional provisions for initiative and referendum elections, the Kansas electorate need no longer suffer arrogant disdain of their needs and wishes by legislative bodies. In a number of other states, the voters have been permitted to vote directly upon legislation involving such matters as capital punishment, limits of taxation, environmental questions, issues of major state energy policy, and pay issues for elected public officials. This privilege has not been extended to Kansas voters, and in the face of recent floundering legislative unresponsiveness to the obvious

The Honorable Patrick J. Hurley
Page Six
March 4, 1977

wishes of the people, it is timely that the legislature consider extending direct legislative powers to Kansas voters.

Yours very truly,



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