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ATTORNEY GENERAL OPINION NO. 86-9

To: The Hon. C. A. "Skip" Smyser
Senator, District 11
134 South Fifth Street
Boise, ID 83702

Per Your Request For Attorney General's Opinion

QUESTION PRESENTED:

Whether Idaho Code § 34-2217, which outlines procedures for the ratification of amendments to the U. S. Constitution, impermissibly infringes upon our legislature's federally derived ratifying function.

CONCLUSION:

The provision of § 34-2217 requiring that the legislature defer action on ratification until it receives the results of a popular referendum conflicts with and is rendered a nullity by Art. V of the federal constitution.

ANALYSIS:

Idaho Code § 34-2217 requires that, prior to ratifying an amendment to the United States Constitution, our legislature must first submit the issue to the electorate for an "advisory" vote. The statute provides:

> The legislature of the state of Idaho shall not in any case ratify an amendment to the United States Constitution unless the

> proposed amendment shall first have been submitted to the electorate. The question shall be submitted to the electorate at a regularly scheduled general election by concurrent resolution of the legislature. The results of such submission of the question to the electorate shall be advisory in nature only, and shall not prevent the legislature from acting in any manner on the proposed amendment.

In the course of our research, we have located no statute from any other jurisdiction which is identical to § 34-2217. The law was enacted in 1975 while Idaho was embroiled in controversy regarding its position on the equal rights amendment. Our legislature initially ratified the amendment on March 24, 1972, but then rescinded the ratification on February 9, 1977. See, St. of Idaho v. Freeman, 529 F.Supp. 1107 (D.C. Idaho 1981). We may speculate that the passage of § 34-2217 was a product of this imbroglio and was intended to insure that future amendments be cautiously considered prior to ratification.

* * * * *

Article V of the federal constitution states, in relevant part:

> The congress, whenever two-thirds of both houses deem it necessary, shall propose amendments to this Constitution, ... which ... 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; ...

The power of a state legislature to ratify an amendment to the federal constitution is derived from that instrument. By virtue of the supremacy clause in Art. VII, it is clear that the legislature's ratifying function may not be abridged by a state. A unanimous Supreme Court articulated this rule in Leser v. Garnett, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922):

> But the 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; and it transcends any limitations sought to be imposed by the people of a state.

258 U.S. at 136-37.

Clearly, therefore, if the federal constitution specifies that ratification be accomplished in a particular way, no state may superimpose more stringent requirements on that federal specification. The states have the power to regulate the ratification process only so long as the state provisions do not conflict with the mandate of Art V. See, Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972). The question we must resolve is whether § 34-2217 "conflicts" with Art. V.

There are two aspects of § 34-2217 which merit consideration. First, the law requires the holding of a nonbinding popular vote on the question of ratification. Second, the statute provides that ratification cannot take place until an advisory election is held "at a regularly scheduled general election." In our view, the former requirement is not fatal to the statute; however, the mandatory election prior to ratification presents serious constitutional concerns.

(a) Nonbinding Referenda.

It is settled that ratification of a constitutional amendment cannot be conditioned upon approval by the voters via the referendum process. The Supreme Court reached this conclusion in Hawke v. Smith, 253 U.S. 221 (1920), where it observed:

> Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people ...

> The framers of the Constitution might have adopted a different method. Ratification might have been left to the vote of the people ... . [However the] language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method by which the constitution is fixed.

253 U.S. at 226 - 227.

The Court, in Hawke, held that conditioning ratification upon a popular vote is contrary to the constitutional delegation of the ratifying function to state legislatures. Accordingly, had § 34-2217 provided for a binding referendum prior to ratification, it would have unquestionably run afoul of the rule of Hawke v. Smith. However, a referendum conducted pursuant to our law is merely "advisory"; approval or disapproval of a proposed amendment is not delegated to the voters. This factor renders Hawke inapposite.

There is contemporary authority which supports the validity of nonbinding referenda as part of the ratification process. In Kimball v. Swackhamer, 584 P.2d 161 (Nev. 1978), the Nevada Supreme Court reviewed a statute requiring submission to the voters of an advisory question as to whether the voters recommended ratification by the state legislature of the equal rights amendment. The Nevada provision, like § 34-2217, expressly stated that the result of the referendum would not place any legal requirements on the legislature in terms of its ultimate action on the ratification question. In upholding the law, the Nevada Supreme Court distinguished Hawke v. Smith on the ground that the Nevada law:

> ... does not concern a binding referendum, nor does it impose a limitation upon the legislature ... . [T]he legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

584 P.2d at 162.

When opponents of the Nevada initiative sought a stay from the United States Supreme Court, Justice Rehnquist, sitting as circuit justice, denied the stay with the following order:

> Appellants' ... contention ... is in my opinion not substantial because of the nonbinding character of the referendum ... . Under these circumstances, ... reliance [on] ... Leser v. Garnet, [258 U.S. 130 (1922)], ... and Hawke v. Smith, ... is obviously misplaced ... . I can see no constitutional obstacle to a nonbinding advisory referendum of this sort.

Kimball v. Swackhamer, 439 U.S. 1385, 1387 - 1388, 99 S.Ct. 51, 53 - 54, 58 L.Ed.2d 225 (1978).

In view of the holdings of the Nevada Supreme Court and Justice Rehnquist in the Swackhamer case, we believe that a provision requiring a nonbinding popular vote passes constitutional muster.

(b) Mandatory Election.

The more difficult question arises from the requirement of § 34-2217 that our legislature defer ratification until after the popular vote. The statute reviewed in Swackhamer did not preclude the Nevada legislature from ratifying an amendment pending the required election. Justice Rehnquist made reference to this point in his opinion:

> Applicants also contend that art. V is offended insofar as the statute requires the Nevada Legislature to defer action on ratification until it receives the results of the referendum, which is not to occur until the next regularly scheduled election of Nevada legislators.
>
> The plain meaning of the Nevada statute and the opinion of the Supreme Court of Nevada convince me that the deferral issue presented by the latter contention is not in this case because the Nevada statute does

> not prevent the state legislature from acting on the Equal Rights Amendment before the referendum. That the Nevada Legislature is unlikely to vote on the amendment before a referendum that it mandated is not a constitutionally cognizable grievance. (Court's emphasis)

439 U.S. at 1386.

We believe there is a substantial likelihood that the Swackhamer outcome would have been different had the Nevada statute mandated that the referendum be held prior to ratification. The inclusion of such a provision represents a dictation of the timing of ratification.

As mentioned above, our § 34-2217 requires that an issue be submitted to the voters prior to ratification. Application of the law will result in significant delay since it bars the legislature from ratifying an amendment until after the next general election; since general elections are held biennially (Idaho Code § 34-601), the legislature may be prevented from exercising its ratifying authority for nearly two years.

In Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972), the Tennessee Supreme Court reviewed a section of the state constitution which provided that the legislature could not act upon any amendment until a general election intervened. The Tennessee legislature ignored this section in ratifying the twenty-sixth amendment. The plaintiffs argued that unless the election requirement was judicially enforced, they would be deprived of their right to "indirectly vote" on the amendment through their vote for their legislators. The court rejected this claim and found the election requirement to be contrary to the legislature's federally granted prerogative to ratify constitutional amendments. The court concluded that a state constitutional provision may not impose a temporal condition precedent to ratification; the timing of ratification is a matter that lies within the discretion of the body to which Congress has delegated the task of ratifying. We find this analysis to be compelling.

We are cognizant of the fact that the limitation in § 34-2217 was the result of an act of the legislature itself; our case is, therefore, arguably distinguishable from Walker v.

Dunn where the election requirement was mandated by the draftsmen of the state constitution. However, we believe that Idaho's 1975 legislature was powerless to bind future sessions of that body which may seek to exercise the federally derived ratifying function without waiting for the results of the "advisory" election. The issue of when ratification may occur is, in our view, reserved exclusively to the legislature charged with the responsibility of considering the pending amendment.

Our statute clearly requires the legislature to defer action on ratification until an election on the question has been held. This is a state imposed limitation upon the federally created right of our legislature to ratify. We are not unmindful of our constitutional oath to uphold and support the constitution and laws of the state of Idaho; nor do we ignore the presumptive validity of statutory enactments. However, our analysis of the issue you have presented allows, in our opinion, no other reasonable conclusion but that § 34-2217 is in conflict with Art. V. Application of the supremacy clause, therefore, renders the conflicting requirement of the statute a nullity.

AUTHORITIES CONSIDERED:

Idaho Code § 34-601

Idaho Code § 34-2217

Art. V, United States Constitution

Art. VII, United States Constitution

Hawke v. Smith, 253 U.S. 221, 40 S.Ct. 495, 66 L.Ed. 505 (1920)

Kimball v. Swackhamer, 584 P.2d 161 (Nev. 1978)

Kimball v. Swackhamer, 439 U.S. 1385, 99 S.Ct. 51, 58 L.Ed.2d 225 (1978)

Leser v. Garnett, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922)

St. of Idaho v. Freeman, 529 F.Supp. 1107 (D.C. Idaho 1981)

Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972)

DATED this 18th day of August, 1986.

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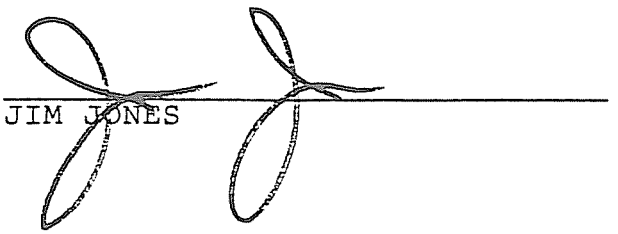

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cc: Idaho Supreme Court
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