OPINIONS Ken Eikenberry | 1981-1992 | Attorney General of Washington

INITIATIVE AND REFERENDUM -- LEGISLATURE -- CONSTITUTIONAL CONVENTION -- USE OF INITIATIVE TO CALL FOR FEDERAL CONSTITUTIONAL CONVENTION

An initiative, under Article II, § 1 of the Washington Constitution, may be used for the purpose of applying to the federal Congress to call a convention for proposing amendments to the United States Constitution in accordance with Article V thereof.

March 18, 1983

Honorable Doc Hastings
St. Rep., 16th District
416 Legislative Building
Olympia, Wa. 98504

Cite as: AGO 1983 No. 4

Dear Sir:

By recent letter you requested our opinion on a question which we paraphrase as follows:

May an initiative, under Article II, § 1 of the Washington Constitution, be used for the purpose of applying to the federal Congress to call a convention for proposing amendments to the United States Constitution?

We answer the foregoing question in the affirmative.

ANALYSIS

Article V of the United States Constitution, relating to the amendment thereof, provides as follows:

"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 [[Orig. Op. Page 2]] 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; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate." (Emphasis supplied)

Article II, § 2 of our own state constitution, which originated with the Seventh Amendment thereto in 1912, provides, in material part, that:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

"..."

Our research has disclosed no cases dealing with the use of aninitiative in the performance of a legislative function relating to the federal constitution's amendatory process. We have, however, a case squarely in point insofar as the availability of a referendum in that general context is concerned; namely, State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920 (1919).

In theHowell case, the question presented to the Court was whether a joint resolution of the legislature, ratifying an amendment to the United States Constitution, was an "act, bill or law" within the meaning of so much of Article II, § I (Amendment 7) of the state constitution, supra, as further provides:

"... The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public [[Orig. Op. Page 3]] institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted. ..."

The Court, after a thorough consideration of the underlying purposes of the Seventh Amendment to the state constitution, answered in the affirmative--notwithstanding that the act of ratification was in the form of a joint resolution rather than a bill. The critical point, it appears, was that the joint resolution nevertheless was of obvious legal force and effect in the implementation, by the State of Washington, of the procedures set forth in Article V of the United States Constitution,supra, relating to the amendatory process. In other words, it was not the form of the state action but, instead, its actual legal force and effect which was determinative. As stated by the Court, at page 173:

"The contention that a resolution, although it may have the force and consequence of a formal legislative enactment and affect the people in their civil and political rights, cannot be referred arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the act of the legislature in adopting it that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished...." (Emphasis supplied)

In addition, the Court noted the language of Article V of the United States Constitution,supra, and it then met the contention that the reference therein to the "legislature's" contemplated formal action by the respective state legislatures themselves by saying, at pages 176-177:

"It is argued that, inasmuch as article V of the constitution of the United States provides that a proposed amendment '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,' etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word 'legislatures,' if that word, and that alone, is the Alpha and Omega of our inquiry, it follows that the controversy is at an end, but we are [[Orig. Op. Page 4]] cited to no instances where a great question involving the political rights of a people have been met by such technical recourse--where any court has so exalted the letter or so debased the spirit of the law." (Emphasis theirs)

Also, at page 178, the Court said

"It is provided in the Federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the constitution used the words 'legislatures' and 'conventions' as terms describing then present institutions, for it is well known that, at the time the constitution was adopted, some of the states did not have legislative assemblies.

"Article V can mean no more than this: that no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention, or such other method as might thereafter be adopted by the people in the several states."

Lastly, we note the Court's apparent acceptance, at page 183, of the following excerpt from a decision of the South Dakota Supreme Court:

"'. . . The "Legislature" of the state, in its fullest and broadest sense, signifies that body in which all the legislative power of a state reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the federal Constitution, or such as they themselves may provide by the organic law of the state.'"

See,State ex rel. Schrader v. Polley, 26 S.D. 5, 127 N.W. 848 (1910) at pages 11-12.

In our opinion this same reasoning is equally applicable to the use of an initiative--as a form of legislative action under Article II, § 1 (Amendment 7),supra--to carry an application by the State of Washington to the United States Constitution for the [[Orig. Op. Page 5]] convening of a federal constitutional convention. We would, therefore, prepare an official ballot title for such an initiative should it be presented to us for that purpose in accordance with the applicable procedures set forth in RCW 29.79.040, et seq.1/ We trust that the foregoing will be of assistance to you.

Very truly yours,
KENNETH O. EIKENBERRY
Attorney General

PHILIP H. AUSTIN

Senior Deputy Attorney General

***** FOOTNOTES *****

1/In the past, this office has declined to process, and prepare ballot titles for, initiatives which merely proposed to memorialize the United States Congress to take action on subjects over which the Congress, itself, has complete discretion--on the ground that such initiatives would be of no legal force or effect under the provisions of the United States Constitution relating to congressional action. Cf., State ex rel. Mullen v. Howell, supra. We would, however, distinguish those instances from the subject of your present inquiry because of the legal force and effect of state legislative action, on the Congress, of an application submitted pursuant to Article V of the United States Constitution, supra.