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19a
Op. No. 82-7

November 9, 1982

Mr. Morris Takushi
Director of Elections
Office of the Lieutenant Governor
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Takushi:

On November 3, 1982, you requested our opinion as to whether a legislatively proposed amendment to the Hawaii State Constitution had been properly ratified at the November 2, 1982 General Election.

We answer in the negative.

We understand the salient facts to be as follows:

1. The proposal in question received approximately 152,154 votes in favor of its ratification and 126,110 votes in opposition to its ratification.

2. The total votes cast at the 1982 General Election, including blank and spoiled ballots, approximated 325,274 votes.

The requirements for revisions and amendments to the State Constitution are set forth in Article XVII of the State Constitution.

Article XVII, Section 3 of the Hawaii State Constitution, provides in full:

> Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each

house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in section 2 of this article for ratification at a general election. [Emphasis added.]

Article XVII, Section 2 of the Hawaii State Constitution, provides in relevant part:

The revision or amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty per cent of the total number of registered voters. [Emphasis added.]

Based on the foregoing constitutional provisions, it appears that in order for a proposed amendment to the constitution to be ratified, it must first be approved by a majority of all votes tallied upon the question. Secondly, this majority must constitute at least fifty per cent of the total votes, including blank and spoiled ballots, cast at the election.

Support for this interpretation is found in the history of said constitutional provisions. Both quoted provisions were first adopted, in almost identical language, by the 1950 Constitutional Convention of Hawaii. The delegates to the 1950 convention, however, imposed a less stringent requirement that the majority of votes tallied upon a question at a general election must constitute "at least 35 per cent" (as opposed to the current 50 per cent) of the total vote cast at the election. This 35 per cent requirement remained a part of the Hawaii Constitution until 1980, when the current 50 per cent requirement was adopted.

In discussing the above requirements for revision and amendment of the Hawaii Constitution, the 1950 Constitutional Convention's Committee on Revision, Amendments, Initiative, Referendum and Recall stated, in Standing Committee Report No. 48, as follows:

> This section also permits the convention to provide for the time and manner in which the proposed constitutional provisions shall be submitted to vote of the electors, but imposes the following limitations:
>
> (a) Upon questions other than reapportionment of the Senate, if the vote is taken at a general election, the ratification must be by a majority of the votes tallied upon the question, but such majority must also constitute at least 35 per cent of the total vote cast at such election. The reason for using the term "votes tallied," is to exclude blank ballots and spoiled ballots on the ratification question only, thus requiring the majority of the votes actually tallied for or against ratification. This measure is used because of evidence submitted to your Committee showing that, in a great many general elections, the total number of votes cast for or against a constitutional amendment or revision is very much less than the total number of votes cast for candidates. This seems to be accounted for by the fact that many voters find little difficulty in voting to elect individuals, but are confused or unwilling to indulge in the mental labor of deciding difficult questions of constitutional policy, and therefore often either cast blank ballots or, in the case of voting machines, refuse to vote on the

proposition. The result often is that, although an overwhelming majority of the persons actually voting for or against the proposition may approve it, the total of all such persons so voting is less than one half of the total number voting for candidates. Such tendencies have made practically impossible amendment of the constitutions of certain states, such as Tennessee and Illinois, which require a majority of the total number of persons voting at a general election, as a condition of ratification.

Under the circumstances, in order to render the system of ratification reasonably workable, your Committee has adopted the above mentioned method of determining a majority upon the basis of the total of votes tallied, rather than the requirement of a majority of all persons voting at the election. To reassure those who feel that at least a minimum number of the total electorate ought to ratify an amendment, your Committee has also added a requirement that such a majority must also equal at least 35 per cent of the total vote cast at the election.

Upon the basis of past experience in general elections in Hawaii, which shows that from 70 to 85 per cent of all registered electors turn out to vote, one half of 70 would be 35 per cent of the total votes cast. This indicates that the 35 per cent minimum is a fairly conservative one.
[Emphasis added.]

The debates of the Committee of the Whole of the 1950 Constitutional Conventional also reflect the intention of the delegates that before an amendment to the Constitution could be ratified, said amendment had to be approved by a majority of all votes tallied upon the question, which majority had to constitute at least a certain percentage of the total votes, including blank and spoiled ballots, cast at the election. Pertinent portions of the debate are as follows:

ROBERTS: I'd like to raise a question and then propose an amendment, if I may. We have provided in this paragraph that it would require 35 per cent of the

total votes cast to be cast in the affirmative on any question which would provide for a constitutional change. There have been two states, the State of Tennessee and the State of Illinois, that have had a tremendous amount of difficulty bringing about a constitutional change. Part of the reason in those states deals with the fact that it requires a majority, but it's not a majority of those voting on the proposition, but a majority of those voting in the total election. Now this provides for a majority of those voting on the proposal, but requires a 35 per cent vote in the affirmative. I'd like to suggest to the delegates that that percentage might be reduced somewhat. You have this situation, you have a general election, and you have a total popular vote, let's say of 100,000. When it comes to questions on constitutional amendment, you find that people either are not interested or don't quite understand the proposition and don't specifically cast their votes either for or against, and the experience of other states with the amendment procedure has been that it is extremely difficult to get in excess of 50 per cent of those who are eligible to vote. This, in fact, then would require 35 per cent of approximately 50, which would require close to 70 per cent of those total voting. If our experience turns out to be the contrary, that we have more people voting on these amendments, then we have a different proposition. But in other states, the experience has been that you cannot get in excess of 50 per cent of the total people who go to vote on individuals in general elections but don't cast their votes on constitutional amendments.

Therefore, I suggest that we reduce that 35 per cent to either 25 or 30. I'd like to hear from -- Suppose I move for 25.

* * *

ROBERTS: Prior to offering the amendment to change the word "35" to "25," I spoke at some length on the reason for offering the amendment. The experience of the other states has been that it is extremely difficult to get a large vote on constitutional

amendments or on constitutional changes. Most of the states actually provide a majority of those voting on the proposal. We are making that tighter in our Constitution by requiring an actual number voting, and by requiring a percentage of votes in the affirmative. That in itself indicates that we regard a constitutional amendment as quite serious, and properly so. There ought to be a substantial showing of votes. I do believe, however, we ought not to make it impossible to modify or change our Constitution as the times and needs change.

I'd like to call the attention of the delegates to the fact that our Constitution, the one that we are drafting now, is going to be submitted to the people on the basis of a majority, a simple majority of those voting on the Constitution. It seems to me that if we are going to provide that our first Constitution is going to be submitted to the people on a simple majority vote, regardless of the number of people voting, that to make subsequent amendments and revisions based on a 35 per cent vote, which I indicated yesterday in most situations will mean a 70 per cent vote because of the number of a turn out, that we ought not to make it so difficult in the future to change or amend our Constitution. I recognize that we all think we're doing a wonderful job. I think we are, but we also ought to recognize that perhaps future generations may not think quite the same way that we do, and we ought to give them the opportunity as times change to make amendments and revisions to the Constitution.

PORTEUS: It isn't often that I differ with my brother from the same combination of precincts, but I do to a certain degree this morning. If you will just check these figures for the moment, you will see the point I want to make. You will put down 100,000, 100,000 voters in an election throughout the territory at a general election. Now if 100,000 voters go to the polls and vote, under the scheme as proposed now, if 35,001 vote affirmatively for an amendment to the Constitution, that amendment carries, 35,001, that's what it means. Now 100,000 people go to the polls, and

35,001 affirmatively for a matter can carry so long as not more than 70,000 have voted on the constitutional amendment. Now the amendment that is proposed would mean this, that so long as there was a majority vote of those voting on the constitutional amendment, that they would have to have at least 25,001. Now I think if 100,000 people go to the polls, if the people don't want to vote on the constitutional amendment, if they are not interested in having it, I don't think that 25,001 out of 100,000 should be able to put the idea over. I think there should be more affirmative support built up for a proposition than is advocated under the last amendment. I think the proposition as submitted by the committee to be a liberal one. You need only a majority of the votes cast on the constitutional amendment in a general election so long as that majority is equal to 35 per cent of the total votes cast. It seems to me a very liberal provision, and I don't agree with the 25 per cent figure which has been advocated in the amendment.

* * *

ROBERTS: When you say 35 per cent of the votes cast, is it 35 per cent of the votes cast on the amendment?

PORTEUS: Thirty-five thousand votes, 35 per cent of the votes that were cast at that general election. That's what the provision says.

* * *

WIRTZ: There's one other thing I'd like to point out about the feature that I think is liberal in the proposal as submitted by the committee. You will notice it says "a majority of all the votes tallied." That eliminates spoiled ballots, unmarked ballots, and everything; whereas the limitation of 35 per cent is on the total votes cast.

HEEN: I rise to a point of information. By using the word "tallied" in one place and the word "cast" in another place, is it supposed that there is a difference in the meaning of the two words?

WIRTZ: Is that question directed towards me?

CHAIRMAN: Would you be willing to answer the question?

WIRTZ: Yes, it was the concensus [sic] of the committee that "tallied" were the actual votes "yes" or "no" on a proposition and that were actually tallied in the booth, whereas votes cast included -- the total number of votes cast included spoiled ballots and so on.

HEEN: That's the way it's treated in the returns. If you will look at these official returns, you'll find one column says total votes cast and if you'll look at the number of votes cast in the various precincts, they tally, they come out the same.

WIRTZ: As I understand it, maybe the chairman would like to answer this, but my understanding was that we were going under the impression that spoiled ballots and blank ballots were counted as ballots cast in the election.

CASTRO: Recall that this section deals with the general election, and the supposition is that more votes will be cast for candidates than will be cast in the square relating to the amendment, so the majority refers to the tally upon the question, but the 35 per cent refers to the votes at the election. So that if 85,000 people voted on candidates, but only 70,000 people voted on the question, the 35 per cent would refer to the 85,000 rather than the 70,000.

FUKUSHIMA: I'd like to add a little to what Judge Wirtz has said. I think when you go to the polls, and you give your name and your name is scratched out, that is counted as a vote cast. Now, whether you submit a blank ballot or whether your ballot is checked off as being an illegal ballot, nevertheless, it's still a vote cast. I think that's correct. Is it or not?

SHIMAMURA: May I ask if that distinction is clearly brought out in the committee report so that there won't be any difficulty in interpretation and construction. I've been trying to look for that page but I can't locate it.

FUKUSHIMA: That is stated on page 6 of Committee Report No. 48.

* * *

FUKUSHIMA: It's page 5 and 6 [of Committee Report No. 48]. "The reason for using the term 'votes tallied,' is to exclude blank ballots and spoiled ballots on the ratification question only, thus requiring the majority of the votes actually tallied for or against ratification."

APOLIONA: To me there is a great difference between the word "tally" and the word "vote" -- I mean the word "cast." For instance, a lot of voters will go to the polls to have their votes cast. That means they go in there, accept a ballot and have their name registered in the book as having cast their votes. But a lot of people do not vote, they give in a blank ballot, in order so that they save their name on the register for the next election. There's a big difference there.

* * *

LOPER: May I rise to a point of information? I'd like to ask the chairman of the committee if the committee considered the advisability of basing it only on the total votes on the question, but requiring more than a simple majority. For example, counting only those voting for and against but requiring 60 per cent or two-thirds to carry it. Did the committee consider that?

FUKUSHIMA: I believe the committee did and we felt that the proposition as we advanced would be more feasible; more liberal, too, Dr. Loper.

* * *

ROBERTS: I'd like the delegates to very seriously consider this question before the vote is taken. I think this is one of the most serious questions which has come before the Convention, even though its present impact is not felt. The question of constitutional amendment goes to the very heart of the things we are working on. Most of the states provide a majority of those voting on the question. That to me is a preferable procedure. What we're proposing here is an actual requirement of an affirmative vote. It may be true that the way the ballots are presently counted, all peoples' ballots when they are thrown in the box are counted. When we go to mechanical counting, that will not be the case.

I'd like to point out a very simple illustration in the case of the State of Illinois. They tried for years to bring about certain constitutional amendments. They were unable, even though substantial numbers of people went to the polls and voted on the question. They finally got to the point in 1932 when they tried to get a proposal to amend the amending provisions of the constitution, and they obtained a total vote in the affirmative on that constitutional amendment of over one million votes. There were only 200,000 against the amendment or a positive vote of 80 per cent in favor of changing the amending provisions of the constitution. But it required, on the basis of a majority of those voting in the general election, 1,700,000, and that amendment did not carry.

It seems to me, that this problem is extremely serious and we ought to have a procedure which would provide the opportunity for rectifying any mistakes which we may make, and I don't think that our Constitution is going to be so perfect that we want to tie the hands of future generations and future constitutional conventions to amend it.

ANTHONY: I am in accord with the statement of the last speaker. One of the greatest vices of state constitution is the inflexibility of amendments,

notably in Illinois, that was spoken of yesterday and again by, I believe, the last speaker. But in Illinois, they have been trying to get away from the system of elective judges for the last 40 years, and they can't even get enough people to pass on the constitutional amendment. Now I would favor a simple majority of those voting on the question, and I think an appropriate amendment should be drafted that will conform to that.

* * *

CHAIRMAN: Will you restate the amendment offered, Delegate Heen?

HEEN: Amend the clause "a" to read, "At a general election, by a majority of all the votes cast upon the question"; then delete the rest of the language there in that clause "a."

* * *

WIRTZ: Before we vote on the question, I'd like to state the sentiments of the committee, that we wished it to be flexible, that is the process of amendment. However, we did not want to make it so easy that the process became simply similar to amending a statute. Now we've heard a lot about Illinois, and I think in fairness to this Committee of the Whole, the delegate from the fourth district should point out that this provision as submitted is much more liberal than Illinois'. That is the proposition as proposed by the committee, and it was put in this way to take care of that situation of Illinois. Now it's the feeling of the committee that a substantial number of people should be interested to amend their Constitution, otherwise the amendment is really not necessary.

LAI: I think the amendment made by Delegate Heen is a little too liberal, and I think is too dangerous. Do you realize that if you have say, 20,000 votes cast on a question, and it takes only 10,001 to pass an amendment and I think that's too dangerous. We don't want anybody to amend our Constitution that way.

TAVARES: It's just been pointed to me that we don't even allow a minority in the legislature to pass an ordinary law. Here we are going to allow any kind of minority, no matter how small, so long as it's more than the people voting against, to change our basic law. I submit that if we are going to profit by the experience of other states, we must bear this in mind also. First, if an amendment to the Constitution, a proposed amendment, is very controversial, and there is reason for argument on both sides, strong arguments, a lot of people are going to get awfully confused by the arguments pro and con. They are going to be so confused that they are going to refuse to vote, and it means then that a very small minority can, in many cases, put through an amendment as to which many of the people, perhaps a large majority, have serious doubts.

I believe in a territory or in a state this small, we can educate our people sufficiently to see that we have the requisite majority and the requisite minimum number. This is a small state and our record of turnouts to elections is unusually high. I think that's another thing to be borne in mind in connection with the comparison with other states. Our people do take a greater interest in elections, on the average, than most states, and I'm sure than Illinois. And I believe that because of the smallness of this territory, it will be possible for us to do a better job of educating than it is in a large state with so many million people, like Illinois. I, therefore, believe that some sort of a minimum is reasonable and proper, and if 35 is too high, let's bring it down to 30. Perhaps that would be a good compromise, but I don't think we should go below that. I hope, therefore, that the motion to amend will not be adopted.

We note parenthetically that the studies of the 1968 and 1978 Constitutional Conventions indicate lengthy discussions and debates regarding the ratification process for constitutional amendments and revisions. The 1978 Studies on Article XV, Revision and Amendment, read on page 36:

"Amending or revising constitutions, whether at the state or federal level, is not easy . . .

In Hawaii, Minnesota, and New Hampshire the ratification process is particularly difficult because the majorities required for ratification by the electorate are extraordinary . . . This extraordinary requirement for ratification was debated at the Hawaii Constitutional Conventions of 1950 and 1968."

We further note that the 1968 Studies on Article XV, Revision and Amendment, assert the legislative rationale and objectives for the extraordinary requirement, on page 41, as follows:

Proponents of extraordinary majority requirements contend that such requirements contribute to constitutional stability; they preserve the fundamental nature of the document by encouraging the use of the legislative process for enacting social, economic and political change. In addition, supporters submit the value proposition that some minimum number of the total electorate ought to be required for alteration of the fundamental law.

Finally, our research on the legislative history of the constitutional provision in question reveals that the requisite percentage amount was recently increased by a constitutional amendment submitted to and ratified by the electorate at the 1980 General Election. Said constitutional amendment which increased the requisite percentage amount from thirty-five per cent to fifty per cent, was initially proposed and adopted by the legislature (Senate Bill No. 578 (1979) and Senate Bill No. 1703 (1980)).

The Senate Judiciary Committee's Standing Committee Report No. 440 on Senate Bill No. 578, 1979 Senate Journal at page 1184 is indicative of the legislative purpose and provides:

The purpose of this bill is to amend Article XVII, Section 2, of the Constitution of the State of Hawaii to raise the percentage of voters who must ratify an

amendment or revision from thirty-five per cent to fifty per cent of all votes cast at the particular election.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. 578 and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Based on the foregoing, we believe that the recent increase in the requisite percentage amount reaffirms the rationale and objectives espoused in the 1968 Constitutional Convention Studies and the history of the constitutional provisions.

In conclusion, we find that ratification of the proposal for a constitutional amendment requires first the approval by a majority of all the votes tallied upon the question, and second, that the majority constitutes at least fifty per cent of the total vote cast at the election.

With respect to the proposal in question, approximately 152,154 votes were received in favor of its ratification and 126,110 votes were received in opposition to its ratification. Since the proposal received more votes in favor of its ratification than in opposition to its ratification, we find that the proposal has received a majority of all the votes tallied upon the question and that the first requirement has been satisfied.

The second requirement for ratification of the proposal prescribes that the majority, or 152,154 votes, must constitute at least fifty per cent of the total vote cast at the election. As stated hereinabove, the total votes cast at the 1982 General Election, including blank and spoiled ballots, were approximately 325,274 votes. Fifty per cent of 325,274 is 162,637. Accordingly, since the majority of votes tallied upon the question (152,154 votes) fails to constitute at least fifty per cent of the total

votes cast at the General Election (162,637 votes), the proposal has not been ratified as required by Article XVII, Section 2 of the Hawaii State Constitution.

Very truly yours,

Francis Paul Keeno

FRANCIS PAUL KEENO
Deputy Attorney General

APPROVED:

TANY S. HONG
Attorney General