Opinion No. 18

Legislature — Resolutions — Governor's Veto Power

HELD: 1. Under Article V, Section 40 of the Montana Constitution, only resolutions, legislative in character, need be sent to the Governor for approval.

2. The separation of power doctrine pronounced by Article VI of the Montana Constitution, prohibits the Governor from invalidating a joint resolution of the legislature that is an expression of legislative opinion only.

June 4, 1955.

Honorable Sam W. Mitchell
Secretary of State
Capitol Building
Helena, Montana

Dear Mr. Mitchell:

You ask whether the Governor may veto a joint resolution or memorial passed by the Montana Legislative Assembly. You state that pursuant to Rule 16 of the joint rules of the Senate and House of Representatives, House Joint Resolution No. 4 of the Session of 1951, was vetoed by Governor Bonner, and that pursuant to the same Rule 16, House Joint Memorial No. 12 was disapproved by Governor Aronson.

Joint Rule 16 is a literal copy of Article V, Section 40 of the Montana Constitution. It provides:

> "Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, be repassed by two-thirds of both houses, as prescribed in the case of a bill."

There have been no Montana cases touching on this constitutional provision, so we must resort to other sources to determine its operation and effect. The same provision appears in many state constitutions, and appears as Art. I, Sec. 7, Cl. 3 of the Federal Constitution, with the exception, of course, that the President rather than the Governor is referred to as having the power of approval or disapproval.

History tells us that the purpose of this clause was to prevent the enactment of laws under the guise of orders and resolutions in disregard of the President.

The authorities are unanimous in agreeing that this Federal constitutional provision requires presidential approval only when the resolution is legislative in character.

Professor Edward Corwin, in his work, "The Constitution", page 21, states that the order, resolution or vote must be submitted to the President only when necessary to give it the force of law, but need not be submitted when the resolution simply expresses congressional opinion.

Professor Willoughby, in his work "The Constitutional Law of the United States" under Section 368 on resolutions says:

> "In the Fifty-fourth Congress, 2d Session, the Senate Committee on the Judiciary was requested to report whether a certain resolution mentioned in a law should be in the form of a 'joint resolution,' and whether it was necessary that 'concurrent resolutions' should be submitted to the President of the United States.
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> In its report the committee, while admitting that Clause 3, Section VII of Article I of the Constitution, literally applied, would make it necessary that every joint or concurrent resolution of Congress, whatever its substance or intent, would have to be submitted to the President for his approval, went on to say that the Constitution must look beyond the mere form of a resolution, to its subject-matter, and that the words 'to which the concurrence of the Senate and House of Representatives may be necessary' are to be construed to relate only to matters of legislation to which the concurrent action of both Houses is by the Constitution made absolutely necessary; in short, only to legislative measure. Thus, in general, joint resolutions need to be sent to the President; concurrent resolutions do not. Of these latter the committee said: 'For over a hundred years . . . they have never been so presented. They have uniformly been regarded by all Departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative decisions proper, and hence have never been deemed to require executive approval. This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction with which no court will interfere.' "

This view is reflected by Hinds in "Precedents of the House of Representatives" (see Volume IV, Sections 3483 and 3484).

That this construction applies to like state constitutional provisions

is to be expected. The editors of Corpus Juris (83 C.J.S., Statutes, Section 59) find the rule to be that only resolutions and orders, legislative in character, need be submitted for approval to the Governor. In a memorandum opinion the Attorney General of New York states the phrase "legislative in character" as being the controlling test. (New York, Opinions of the Attorney General, 1921, p. 424.)

Legislative, as used here, pertains to the making or giving of laws; to the function of lawmaking or to the process of enactment of laws.

A reading of House Joint Memorial No. 12, for form, shows it to be a resolution labelled a memorial on the subject of the Bob Marshall Wilderness Area. The Memorial begins with the language, "Be it resolved".

Reading it for substance, it does not authorize or forbid road building into the area; it requires no maintenance of the area; it prescribes no rules of conduct regarding the area. It expresses none of the mandatory characteristics of law. It does express the Legislature's recommendation to the Secretary of Agriculture and the Montana Representatives in the national House and Senate that the Federal Government continue the Bob Marshall Wilderness Area in its present primitive state and expressing its opinion why that is desirable.

Considering the substance rather than the form, there is no doubt that the resolution is not "legislative in character" as contemplated in law and that it is without legal effect. Therefore, I am of the opinion that it need not have been sent to the Governor for approval.

Lacking the power under Article V, Section 40, Montana Constitution, to invalidate the formal expression of legislative opinion, the question arises whether the Governor does not have the power because it is not otherwise forbidden by the Constitution. Here Article VI of the Montana Constitution, providing for the separation of governmental powers, intervenes. This historical doctrine on governmental powers forbids the extension of the powers of one department to another. Interference with the legal function of one department by another is unwarranted and violates the doctrine.

It is therefore my further opinion that the Governor lacks authority to disapprove an order, resolution or vote that does not have the effect of a law.

For these reasons I advise you to forward the House Joint Memorial No. 12 ,to the persons to whom it is addressed as requested by the Legislature. As a matter of courtesy the Governor's veto should accompany it. There is no reason why he cannot express his objections to the memorial, so long as he does not prevent its dissemination.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.