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April 28, 1969

Senator Jack Strong
Chairman
Senate Committee on
Privileges and Elections
Capitol Building
Austin, Texas

Opinion No. M-384

Re: Constitutionality of S.B. No. 107 relating to the election of presidential electors and amending sections under the Election Code.

Dear Senator Strong:

You have requested our opinion concerning the constitutionality of Senate Bill No. 107. The caption to the bill provides that it is An Act

> "relating to the election of presidential electors from congressional districts and from the state at large, and binding all presidential electors to vote according to the plurality which elected them; amending the Texas Election Code as follows: amending section 170a, as amended (Article 11.01a, Vernon's Texas Election Code); adding section 171a; amending section 172 (Article 11.03); amending section 173, as amended (Article 11.04); amending section 174 (Article 11.05); and declaring an emergency."

For brevity's sake, we will summarize the sections.

Section 1: Amends section 170a of Texas Election Code by adding section 3, which states that a political party's presidential electors shall be nominated for each congressional district and as many electors at large as there are Senators and Congressmen at large.

Section 2: Adds section 171a to Texas Election Code which states that the presidential elector candidates who receive the plurality of votes in each district or at large shall represent that district or the state at large at the state meeting of presidential electors.

Section 3: Amends Section 172, Texas Election Code, to state that the canvass of the votes for candidates for President and Vice-President and their returns shall be the same as those for the candidates for district and at large electors of the same party, rather than for the same party generally.

Section 4: Amends Section 173 to include district and at large presidential electors in the certification of candidates, rather than electors in general.

Section 5: Amends Section 174 of Texas Election Code to state that district and at-large presidential electors shall cast their votes in accordance with the plurality vote for President and Vice-President in the district and state at large, respectively, which they represent and no other way. Also, this section provides the means by which a person is appointed to replace an elected presidential elector who by death, disabling cause, or disqualification is unable to attend the meeting of electors. Further, it states that any person so appointed must vote for the same candidate as the person he is substituting for was bound to vote for.

Article II, Section 1, United States Constitution, provides as follows:

> "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the United States, shall be appointed an Elector."

Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required on the same day throughout the United States. Otherwise, the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons. McPherson v. Blacker, 146 U.S. 1 (1892). The Supreme Court stated at page 27 of that opinion:

> "The State also acts individually through its electoral college, although by reason of

> the power of its legislature over the manner of appointment, the vote of its electors may be divided.
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> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

States have considerable freedom in the selection of presidential electors. Gray v. State of Mississippi, 233 F.Supp. 139 (N.D. Miss. 1964). Congress may not interfere with the method designated by the State Legislature for appointment of presidential electors. Commonwealth ex rel Dummit v. O'Connell, 298 Ky. 44, 181 S.W.2d 691 (1944). Williams v. Rhodes, 89 S.Ct. 5 (1968). The Constitution leaves it to the state legislature exclusively to define the method of effecting the vote of electors. Cf. McPherson v. Blacker, 146 U.S. 1, 27 (1892); In re Green, 134 U.S. 377 (1890).

The question under consideration was discussed by the Supreme Court of the United States in Ray v. Blair, 343 U.S. 214 (1952). The Supreme Court held as follows:

> "The applicable constitutional provisions on their face furnish no definite answer to the query whether a state may permit a party to require party regularity from its primary candidates for national electors. The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the Federal Constitution. Neither the language of Art. II, §1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party. Unless such a requirement is implicit, certainly neither provision of the

> Constitution requires a state political party, affiliated with a national party through acceptance of the national call to send state delegates to the national convention, to accept persons as candidates who refuse to agree to abide by the party's requirement. (343 U.S. 224)
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> ". . .
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> ". . .A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party. It is an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose. . . . (343 U.S. 227)
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> ". . .
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> "We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge. (343 U.S. 231)
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> ". . ."

Although the Alabama Supreme Court had earlier ruled unconstitutional a state statute providing that the electors shall cast their ballot for the nominee of the National Convention of the party by which they were elected (Opinion of The Justices, 34 So.2d 598 (1948)), it is doubted whether the Supreme Court would so hold in view of its 1952 decision in Ray v. Blair, supra.

Other state cases supporting the constitutionality of the proposed legislation in question here are Thomas v. Cohen, 262 N.Y.S. 320 (1933); Markham v. Bennion, 252 P.2d 539 (1953); Sprechels v. Graham, 194 Cal. 516, 228 P. 1040 (1923).

The Texas Constitution contains no provision relative to presidential electors and in our opinion, if the Legislature enacts Senate Bill No. 107 into law, it will be constitutional.

S U M M A R Y

Senate Bill No. 107 is not unconstitutional in providing for the election of presidential electors by congressional districts as well as from the state at large, and in providing that such electors must cast their ballots in accordance with the plurality vote within such congressional districts or the state at large, as the case may be.

Very truly yours,

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