

November 19, 1996

Mr. Dwayne D. Yoshina
Chief Election Officer
Office of Elections
802 Lehua Avenue
Pearl City, Hawaii 96782

Dear Mr. Yoshina:

Re: Calculating a Majority on the Question Calling for a Constitutional Convention

This responds to your request of November 6, 1996, requesting our opinion as to the calculation of a majority on the ballot question that called for a constitutional convention.

The question that was placed on the ballot at the 1996 general election was, "Shall there be a convention to propose a revision of or amendments to the Constitution?" We understand that 369,357 ballots bearing the pre-printed question were deposited by the voters during the 1996 general election. Of the 369,357 total ballots, 163,869 ballots bore "yes" votes, 160,153 ballots bore "no" votes, 45,245 ballots were left blank, and 90 ballots bore both "yes" and "no" votes and are considered "over votes" or spoiled ballots. For the reasons discussed below, we believe that the 163,869 ballots bearing "yes" votes constitute a majority of the "ballots cast upon such a question." In reaching this result, we conclude that the blank ballots and over-votes are not counted.

The requirements to convene a constitutional convention are set forth in Article XVII of the Constitution of the State of Hawaii. Section 2 of Article XVII provides as follows:

CONSTITUTIONAL CONVENTION

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election. ([top](#))

. . . .

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate; provided that each amendment shall be submitted in the form of a question embracing but one subject; and provided further, that each question shall have designated spaces to mark YES or NO on the amendment.

. . . .

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.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation. [Emphases added.] ([top](#))

Section 2 of Article XVII has remained unchanged in all relevant aspects since first proposed by the Constitutional Convention of 1950. Under Section 2 of Article XVII, the legislature may submit to the electorate at any general or special election the question of whether there should be a constitutional convention. If a nine-year period has elapsed during which the question has not been submitted, the lieutenant governor is required to certify the question at the first general election following the expiration of the time period. The last time such a question was posed to the electorate was in 1986.¹ Therefore, the lieutenant governor certified the question and placed it on the 1996 general election ballot.

The Supreme Court of Hawaii has stated the following principles for construing constitutional provisions:

The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. This intent is to be found in the instrument itself.

When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument.

However, if the text is ambiguous, extensive aids may be examined to determine the intent of the framers and the people adopting the proposed amendment. ([top](#))

. . . .

Another established rule of construction is that a court may look to the object sought to be accomplished . . . along with the history of the times and state of being when the provision was adopted[,] . . . the understanding of the voters who adopted the constitutional provisions, and the legislative implementation of the constitutional amendment. (citations omitted). ([top](#))

State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314-15 (1981).

In gleaning the intent of the framers and the people, "an examination of the debates, proceedings and committee reports [of the Constitutional Convention] is useful." *Id.* at 204, 638 P.2d at 316. In analyzing the proper scope and weight of debates as to legislation, our United States Supreme Court has noted that debates express the views and motives of individual members and are not a safe guide in ascertaining the meaning and purpose of the law-making body. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 318 (1897). But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Duplex*, 254 U.S. 474; *Binns v. United States*, 194 U.S. 486, 495 (1904). ([top](#))

The initial starting point to this inquiry is, of course, the language of the Constitution itself, that is, what the words "ballots cast upon such a question" mean. This question arises because there is language in Article XVII of our Constitution relating to the ratification of amendments proposed at a constitutional convention that requires the inclusion of blank and spoiled ballots in calculating whether a majority of the votes cast upon the question must constitute at least fifty per cent of the total vote cast at the election, as we discussed in our Opinion No. 82-7. However, the language in Article XVII for the convening of a constitutional convention is different and is limited

to a majority of votes cast on the question, and we conclude that, based upon the language of Article XVII, its structure, and policy reasons, the calculation of a majority for the convening of a constitutional convention was intended by our framers to be different from and less stringent than the calculation of a majority for the ratification of amendments proposed by a convention. We believe that the phrase "majority of the ballots cast upon such a question" was meant by the framers of the constitution to mean a majority of the "yes" and "no" ballots, but excluding the blank ballots and over-voted ballots. ([top](#))

When the language of the Constitution itself is unclear, the best source for interpreting the intent of the framers is their own specific and contemporaneous commentary. In Standing Committee Report No. 48, the 1950 Constitutional Convention's Committee on Revision, Amendments, Initiative, Referendum and Recall, stated in relevant parts: ([top](#))

Revision or Amendment by Constitutional Convention

Section 2 provides for the submission to the people by the legislature at any time on the question, "Shall there be a convention to propose a revision of or amendments to the constitution?." [sic] If the legislature does not submit the question to the people within any period of ten years then the state officer, whose duty it is to certify state-wide public questions for submission to the people, is required to certify the question to be voted on by the people at the first general election after the expiration of ten years from the date of the last submission. Your Committee felt that the 20 year period between mandatory submission provided for in Proposal No. 34 was too long and that a shorter period of ten years, together with the liberal and flexible machinery provided for proposing legislatively initiated amendments and for ratification, would provide sufficient assurance of opportunity by the people to adapt the constitution to new conditions within a reasonable time, if the legislature should fail to do so in the face of popular demand.

Section 2 also provides that if a majority of the ballots tallied upon the question favors the holding of a convention, delegates shall be chosen at the next regular election unless the legislature provides for a special election for that purpose.

. . . .

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 or 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. . . .

. . . .

Recommendations ([top](#))

Subject to the foregoing qualification by the minority of your Committee, your Committee submits Committee Proposal No. 9, attached to this report, and recommends passage of the same.

Your Committee, having considered Proposals Nos. 34, 104, 119, 170 and Article X of Proposal No. 88, returns all of said proposals with the recommendation that they be placed on file for the following reasons:

(a) Proposals Nos. 34 and 119 have been largely incorporated in Committee Proposal No. 9 herewith submitted.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 187-88 (1960) (emphases added).

The relevant provision contained in Committee Proposal No. 9 relating to the question of the convening of a constitutional convention provided as follows:

If a majority of the ballots cast upon such question is in the affirmative, delegates shall be chosen at the next regular election unless the legislature shall provide for election of the delegates at a special election.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 189 (1960).

The language of the provision relating to the question of convening a constitutional convention that was discussed and recommended for passage by the Committee on Revision, Amendments, Initiative, Referendum and Recall, is similar to that which is contained in Article XVII of our Constitution. It appears from the Committee's report that the words "cast" and "tallied" were intended to be interchangeable and have the same meaning. Accordingly, we believe that the statements contained in Standing Committee Report No. 48 clarify that "majority of the ballots cast upon such a question" is meant to mean the same as "majority of the ballots tallied upon the question." And, when used in this context, we believe that the framers' intention was that the words "tallied" or "cast" mean that blank and spoiled ballots are to be excluded in the calculation for determining whether a majority vote exists for holding a constitutional convention. ([top](#))

While we recognize that comments made by an individual member are not a safe guide in determining the meaning and purpose of a constitutional provision, we note that comments made by Delegate Yasutaka Fukushima during debates of the Committee of the Whole of the Constitutional Convention of 1950 are consistent with our conclusion. Delegate Fukushima stated:

Section 2 deals with, specifically, revision or amendment by constitutional convention. There it provides that the question, "Shall there be a convention to propose a revision of or amendments to the Constitution" be submitted to the people by the legislature at any time. If the legislature fails to do this, then, within a period of ten years, automatically the State officer whose duty it is to submit such questions will certify the question to the public. That same section also provides that if the majority of the ballots tallied upon the question favors the holding of a convention, the delegates shall be chosen at the next regular election, unless the legislature provides for a special election for the election of delegates. ([top](#))

2 Proceedings of the Constitutional Convention of Hawaii 1950, at 744 (1960).

We believe that the structure of Article XVII supports our conclusion that the words "majority of the ballots cast upon such a question" do not include blank ballots and over voted ballots. We believe that the framers of our Constitution envisioned a two-part test for amendments to the Constitution by a constitutional convention. By its structure, we believe that Article XVII provides for a different degree of difficulty for the calling of a constitutional convention than for the ratification of amendments proposed by a convention. The framers at the 1950 constitutional convention were particularly concerned about the process of ratification of amendments proposed by a convention and focused much of their attention to that process. It appears to us that if the calling of a convention were intended to be as strict as the ratification process, there would have been similar attention and discussion given to that provision of the Constitution, and similarly extensive discussions as to the justification of requiring an extraordinary majority for both the convening of a convention and the ratification of amendments generated by a convention would surely have occurred. We believe the fact that the extensive discussions and debates focused primarily on the ratification process supports the conclusion that the framers were comfortable with a moderate method for the calling of a convention so long as there was a more extraordinary method for the ratification of amendments. This two-part process makes sense and is consistent with the balance we believe the framers intended to strike between the competing interests of making the Constitution relevant and flexible and that of maintaining constitutional stability. In Standing Committee Report No. 48, the framers recognized this concern: ([top](#))

This article provides the necessary machinery for revising and amending our State Constitution. Your Committee was mindful, during its deliberations, that the amending procedure should not be made too easy, since undue ease of amendment impairs the respect of the public for its basic law, tends to unduly lengthen and burden the constitution with legislative matters and minutiae, and encourages attempts by visionaries and selfish pressure groups to advance impracticable schemes and proposals. On the other hand, your Committee felt that it should not be so cumbersome as to render amendment practically prohibitive or impossible. ([top](#))

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 186 (1960).

Consistent with our interpretation of Article XVII, we note that by memorandum issued to the public on November 1, 1996, the Office of Elections evidenced its understanding of the calculation of the majority on the ballot question when it stated that "to determine whether the constitutional convention will be held, more than 50% of the voters must vote YES. Spoiled, blank, and invalid ballots are not included in the calculation of a majority for this question." Office of Election's Fact Sheet: Calculating a Majority on the Question of a Constitutional Convention, (November 1, 1996) (emphasis added). The Office of Elections relied upon both Section 2 of Article XVII of the State Constitution and section 11-151, Hawaii Revised Statutes, to evaluate a vote to affirm the convening of a constitutional convention. Section 11-151 provides in pertinent part:

§11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

. . . .

(3) If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of constitutional amendment. [Emphases added.]

([top](#))²

The Legislative Reference Bureau's review of Section 2 of Article XVII of the Hawaii State Constitution, with comparable provisions from other state constitutions, indicated that Hawaii's requirement of a simple majority of the "ballots cast upon such a question" does not include

spoiled or blank ballots. The report stated:

Of the 35 states which require popular approval of the convention call, three states do not specify the majority required, 13 require a majority of those voting in the election, and 19, including Hawaii, and the Model State Constitution specify a majority of those voting on the question. Nine of the states requiring periodic submittal of the convention question, including Hawaii, specify a majority of those voting on the question at such election . . .
([top](#))

Judy E. Stalling, Legislative Reference Bureau, Hawaii Constitutional Convention Studies, Article XV: Revision and Amendment, at 6 (July 1968) (citations omitted).

Blank and ambiguous ballots may or may not be considered to be "cast" at the election for purposes of determining votes cast at the election but they cannot be deemed to be "cast upon such a question."

Similarly, scholars outside of Hawaii have noted that:

Unfortunately, constitutional issues generally attract less voter participation than do electoral contests. Therefore, when the constitutional issues are presented at the same time as elections for public office, the number of people voting in the election will exceed the number voting on the constitutional issue. A majority voting in the election then, in effect, becomes an extraordinary majority. Amendments, and also votes on such questions as the calling of a constitutional convention, have actually received a majority of the votes cast on the issue in a number of instances but have failed to carry because the majority did not constitute a majority voting in the election. Such a requirement is an unreasonable limitation on popular power and should be avoided. ([top](#))

Committee on State Government, National Municipal League, Model State Constitution 108 (5th ed. rev. 1948) (emphasis added).

And finally, we note that the general view is that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.

There is some conflict among the cases as to whether illegal, rejected, and blank ballots shall be counted in determining the total votes cast. The general view is that a qualified voter who succeeds in getting his name on the poll list and a ballot in a ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.

26 Am. Jur. 2d, Elections § 410 (1996) (footnotes omitted); Republican Party of Hawaii v. Waihee, 68 Haw. 258, 259-60, 709 P.2d 980, 981 (1985) (per curiam). ([top](#))

Based on all of the above, we believe that "majority of the ballots cast upon such a question" means a majority of the "yes" and "no" ballots, but excludes blank ballots and over-voted ballots. Should you have questions, please call us.

Very truly yours,

Russell A. Suzuki
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

¹In 1986 the results were as follows: Yes 137,236, No 173,977, Blank 32,473, and Over Vote 187. A constitutional convention was not called and the method of calculating a majority was not an issue because there were more "No" votes than "Yes" votes. ([back to document](#)) ([top](#))

² We recognize that the provisions of Section 2 of Article XVII are self-executing. However, "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." See, *Smiley v. Holm*, 285 U.S. 355, 369 (1932). ([back to document](#))