



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-140

January 12, 2015

The Honorable Warwick Sabin
State Representative
Post Office Box 250508
Little Rock, Arkansas 72225-0508

Dear Mr. Sabin:

I am writing in response to your request for my opinion on the following question:

Given that Amendment 94 expressly directs the General Assembly to empower the Arkansas Ethics Commission to promulgate rules necessary to implement and administer Sections 28, 29, and 30 of Article 19 of the Arkansas Constitution, may the General Assembly provide by law that a commission rule promulgated under that grant of authority requires the review and approval of a legislative committee so charged by law under Amendment 92?

RESPONSE

In my opinion, the answer to your question is "yes."

Amendment 92 adds to Article 5 of the Arkansas Constitution a new section, which provides in pertinent part:

(a) The General Assembly may provide by law:

- (1) For the review by a legislative committee of administrative rules promulgated by a state agency before the administrative rules become effective; and

- (2) That administrative rules promulgated by a state agency shall not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules under subdivision (a)(1) of this section.¹

This section arguably qualifies the separation-of-powers doctrine set forth elsewhere in the constitution² by conditioning upon legislative approval, if the General Assembly so chooses, the executive branch's adoption of administrative rules.

At issue is whether this right of approval extends to rules and regulations adopted by the Arkansas Ethics Commission in pursuit of its charge under Amendment 94 § 2, which added to Arkansas Constitution Article 19 the three ethics sections – numbered 28, 29 and 30³ – referenced in your statement of background facts. Specifically, you note that each of these sections “requires the General Assembly to provide by law for the respective section to be ‘under the jurisdiction of the Arkansas Ethics Commission.’”

Each of the sections just referenced contains the following pertinent provisions:

(d)(2) [T]he General Assembly shall provide by law for this section to be under the jurisdiction of the Arkansas Ethics Commission, including without limitation authorization of the following actions by the Arkansas Ethics Commission:

- (A) Promulgating reasonable rules to implement and administer this section as necessary;
- (B) Issuing advisory opinions and guidelines on the requirements of this section; and

¹ Ark. Const. art. 5, § 42. Amendments 92 and 94 were simultaneously adopted in the November 2014 general election.

² Ark. Const. art. 4, §§ 1 and 2.

³ These sections respectively impose restrictions on political contributions, registration of lobbyists and gifts from lobbyists.

(C) Investigating complaints of alleged violations of this section and rendering findings and disciplinary action for such complaints.⁴

Each section further contains the following provision empowering the General Assembly to alter the amendment's terms:

(e)(1) Except as provided in subdivision (e)(2) of this section, the General Assembly, in the same manner as required for amendment of laws initiated by the people, may amend this section so long as such amendments are germane to this section and consistent with its policy and purposes.

(e)(2) The General Assembly may amend subsection (d) of this section by a majority vote of each house.⁵

These provisions of Amendment 94 are noteworthy not only in that they permit the General Assembly potentially to modify the Ethics Commission's enforcement authority, but further in that they allow the legislature to do so by mere majority vote. By comparison, the amendment empowers the General Assembly to modify each section's substantive ethical strictures only by supermajority vote,⁶ subject to the condition that any such modification be "germane" to the section and "consistent with its policy and purposes." Amendment 94 thus renders it relatively difficult for the General Assembly to modify the voter-approved ethical constraints but relatively simple for it to modify the provisions whereby those constraints will be enforced, including the provision assigning jurisdiction to the Ethics Commission.

Nothing in Amendment 94 strikes me as inconsistent with the proposition that the General Assembly might exercise oversight over the Ethics Commission in its

⁴ Ark. Const. art. 19, §§ 28(d), 29(c) and 30(c).

⁵ *Id.* at §§ 28(e). Although numbered differently, identical provisions appear in §§ 29 and 30. Each of these subsections further assigns criminal liability for violating the respective section's substantive provisions.

⁶ As noted in my text, Amendment 94 authorizes the legislature to amend the measure's substantive ethical provisions "in the same manner as required for amendment of laws initiated by the people" – i.e., by a two-thirds majority vote of the General Assembly. Ark. Const. art. 5, § 1.

administration and implementation of the measure's ethical strictures.⁷ Indeed, in according the General Assembly the power to amend the provisions relating to the Ethics Commission, Amendment 94 authorizes the legislature to do by majority vote precisely what the people have authorized in adopting Amendment 92 – namely, to condition the issuance of Ethics Commission regulations upon first obtaining legislative approval. It thus defies logic, in my estimation, to suggest that the General Assembly's new grant of authority under Amendment 92 to approve administrative rules and regulations does not extend to rulemaking under Amendment 94.⁸

I find no basis, in short, for any implied suggestion that the people, in adopting Amendment 94, intended to invest the Ethics Commission with what they deemed a necessary autonomy in the adoption of rules and regulations. On the contrary, as reflected in the texts of both Amendments 94 and 92, the people, whether wisely or not, have invested the General Assembly with significant potential control over

⁷ This conclusion is consistent with the accepted principle of construction that constitutional provisions must be reconciled whenever possible. The rules of construction applicable to constitutional amendments are the same as those governing the construction of statutes. *Berry v. Gordon*, 237 Ark. 547, 554, 376 S.W.2d 279 (1964) (and citations therein). The common aim is to ascertain and give effect to the intent of those who drafted and enacted the provision at issue. *Ragsdale v. Hargraves*, 198 Ark. 614, 129 S.W.2d 967 (1939). It is a rule of "universal application" that the constitution and its amendments must be read and construed together as a whole. *Id.* See also *Parkin Printing & Stationary Co. v. Arkansas Printing and Lithographing Co.*, 234 Ark. 697, 706, 354 S.W.2d 560 (1962) ("[A]n Amendment to the Constitution becomes a part of the whole document for the purpose of uniform construction."). All sections must be read together, in light of every other section on the same subject, "with a view of the harmonious whole." *Smith v. Cole*, 187 Ark. 471, 475, 61 S.W.2d 55 (1933). An amendment to the existing constitution "fits into that organic body," displacing only that which is necessarily repugnant to or in irreconcilable conflict with the amendment. *Priest v. Mack*, 194 Ark. 788, 790, 109 S.W.2d 665 (1937). No interpretation of an amendment should be allowed that would conflict with any other provision of the constitution unless it is absolutely necessary to give effect to the amendment. *State v. Donaghey*, 106 Ark. 56, 152 S.W. 746 (1912). See Op. Att'y Gen. 2014-134 (articulating and applying these principles).

⁸ It further appears to defy the accepted rule that simultaneously adopted laws be interpreted, if at all possible, as consistent with each other and mutually capable of being given effect. See *Sutherland on Statutory Construction*, § 23.17 (5th Ed., 1993); *Adams v. Arthur*, 969 S.W.2d 598, 333 Ark. 53 (1998); *Horn v. White*, 225 Ark. 540, 284 S.W.2d 122 (1955). As a general proposition, legislative enactments that are alleged to be in conflict must be reconciled, read together in a harmonious manner, and each given effect, if possible. *Gritts v. State*, 315 Ark. 1, 864 S.W.2d 859 (1993); *City of Fort Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993). Repeal by implication is not favored and is "never allowed except where there is such an invincible repugnancy between the former and later provisions that both cannot stand together." *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994). This is especially so in the case of acts passed during the same session of the General Assembly. *Uilkie v. State*, 309 Ark. 48, 827 S.W.2d 131(1992); *Love v. Hill*, 297 Ark. 96, 759 S.W.2d 550 (1988). As noted above, these principles apply equally to constitutional construction.

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the Ethics Commission's rulemaking authority. Should it elect to exercise such control in this instance, the General Assembly of course will remain constrained by an obligation disinterestedly to promote implementation of the Amendment 94 ethical strictures. As noted above, however, the General Assembly remains free to amend the substance of those strictures by supermajority vote.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

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