Opinion No. 42-4111

July 3, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Honorable John E. Miles Governor of New Mexico Santa Fe, New Mexico

*{*211}* I have your letter of even date wherein you request our opinion as to whether Section 1, Article VII of the New Mexico Constitution may be repealed in part by a proposal adopted at a special session of the Legislature, or whether such a proposal at a special session and having such effect would be an amendment to the Constitution requiring such proposal to be made at a regular session of the Legislature as set out under Section 1, Article XIX of the Constitution.

In propounding the above question you have also submitted to us a memoranda of opinion prepared by Judge Bryan G. Johnson relative to the matter.

Judge Johnson, in his opinion, apparently concedes that no "amendment" could at this time be proposed by reason of the provisions of Section 1, Article XIX of the Constitution, but contends that a portion of Article VII, Section 1, may be "repealed", which procedure would not involve an "amendment" to the Constitution. Judge Johnson expresses himself in his manner: We quote from his opinion.

"The proposal submitted does not contemplate an amendment to the Constitution. It proposes to **repeal,** not amend, such parts of the constitution as make it necessary for all persons, including, soldiers and sailors and others to be present in person in their respective precincts before they can vote."

We have given considerable study to the views expressed by Judge Johnson and although we entertain the greatest respect for his views, after carefully weighing the entire matter, we feel that we must hold, contrary to our personal desires, that the requirements of Section 1, Article XIX of the Constitution must be observed whether the amendment to the Constitution is by way of addition thereto or repealing or striking portions thereof.

Let us review the pertinent portions of Section 1, Article XIX of our Constitution, which reads as follows, to-wit:

"Any amendment or amendments to this constitution may be proposed in either house of the legislature **at any regular session thereof."**

We do not know just what portion of Section I of Article VII of the Constitution Judge Johnson purports to repeal, but I cannot see that it would make any legal difference whatsoever insofar as complying with the above quoted portion of the Constitution is concerned.

In view of the theory advanced by Judge Johnson and the pertinent provisions of Section 1, Article XIX of the Constitution, it occurs to me that the question to be finally determined comes down to this: If a portion of Article VII, Section I of the Constitution is stricken or repealed, in such action in effect an amendment to the Constitution? If so, then such a proposal must, in my opinion, be adopted at a regular session of the Legislature and all of the provisions of Section 1, Article XIX of our Constitution strictly followed.

We have been able to find abundant authority to sustain the theory that every proposal which effects a change in the Constitution, *{*212}* or adds to or takes away from it, is an amendment, and we found none to the contrary. For example, the Supreme Court of the State of Montana in State vs. Cooney, 225 P. 1007, in defining the word "amendment" had the following to say:

"Generally speaking, an amendment repeals or changes some provision of a preexisting law or adds something thereto. Board of Public Instructions vs. Board of Commissioners, 58 Fla. 391, 50 South, 574.

The word 'amendment' is clearly susceptible to a construction which would make it cover several propositions. all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as to the construction that every proposition which effects a change in the Constitution, or adds to or takes from it, is an amendment. Words and Phrases, 'Amendment'; State ex rel. Hudd vs. Timme, 54 Wis. 318, 11 N.W. 785; People ex rel. Elder vs. Sours, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34."

Also to the same effect see 16 C. J. S., Page 31; 11 Am. Jur. 629; State vs. Fulton, 124 N. E. 172; Downs vs. City of Birmingham, 198 So. 231; Ex Parte Kirby, 205 P. 279.

In view of the foregoing authority. I cannot escape the conclusion that such a proposal as suggested would be an amendment to the constitution and within the provisions of Section 1, Article XIX, supra, and can therefore only be proposed at a regular session of the Legislature.

To my mind, the above is the true conclusion that was desired by the framers of the Constitution. A study of other provisions and the Constitution as a whole, independent of the authority above quoted, points to the same inescapable conclusion.

If a change by repealing or striking out any portion of the Constitution is not an "amendment thereof" within the terms of the instrument, then let us hasten to ascertain what could happen to the following Constitutional provisions, the same being Article XII, Section 10:

"Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state and they shall never be classed in separate schools,

but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment."

Or what could happen to that portion of Article VII, Section 3, which reads:

"The right of any citizen of the state to vote, hold office, or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or col or, or inability to speak, read or write the English or Spanish languages * * *"

This is what could happen to the above quoted Constitutional provisions under such a construction: If the word "amendment" as used in the Constitution does not include changes by repeal, then the latter two sections may be repealed by a proposal on the part of the Legislature at any time by a majority vote of the Legislature and a mere majority vote of the *{*213}* people and this, despite the restrictions so carefully enacted by the framers of the Constitution, which for so many years the people of New Mexico have believed to be a strong guarantee against dangers anticipated by the Constitution makers of the State, and for that matter, even the Congress of the United States.

I cannot lead myself to believe that men of the caliber who carefully framed our Constitution ever entertained the thought that such a construction would ever, then or now, be placed on the word "amendment".

Judge Johnson seems to contend that the maxim "expressio unius est exclusio alterius" does not apply to the language found in Article XIX, Section 1, of our Constitution. In support of this view, he cites the case of In re Opinion to the Governor, 178 Atl. 433.

We have given considerable study to the decision rendered by the Supreme Court of Rhode Island in the latter case. In this case the question was before the Supreme Court of Rhode Island as to whether or not it was in the prerogative of the Legislature to call a Constitutional Convention to revise or amend the Constitution of the state. The Constitution of Rhode Island contained no mention of a Constitutional Convention nor of any method of constitutional change, except on a proposal by the General Assembly, etc. In this case it was argued that the maxim above quoted applied and that it was exclusively within the power of the General Assembly to amend the Constitution. This view was not sustained by the Court and we think correctly so. The Supreme Court of Rhode Island in arriving at this conclusion quoted with approval Jameson's Work on Constitutions, as follows:

"After discussing other questions as to the changing of Constitutions, Jameson, at page 601, puts this question, 'When the Constitution makes no provision, then, for amendments, save in the legislative mode, can a Convention be lawfully called?' He refers to numerous instances in which conventions have been called under these

circumstances and discusses the question on principle. Then he discusses the Massachusetts and Rhode Island advisory opinions and some of the cases already discussed in this present opinion and the maxim above referred to, and says at page 610; 'Obviously, as we have before remarked, while it may, with out absurdity, be claimed that the maxim operates to prohibit the doing of the **same** thing in a different way from that prescribed by law, it cannot be claimed to prohibit the doing of a **different** thing in a different way. * *"

Can it be logically argued in view of the foregoing authority and in the face of the provisions of Section 1, Article XIX of our Constitution above quoted, that to allow a special session of the Legislature to propose a repeal of a portion of the Constitution is not proposing to amend the Constitution in the **same way** but in a **different manner** than that as specifically set out in the Constitution? We think not. This, in our opinion, if done by a special session of the Legislature would be doing the same thing as could be done by a regular session, but in a different way from that described and set forth by the Constitution and is clearly within the maxim. This being true, any such proposal as suggested by a special session would be in clear violation of the Constitution and void, even if adopted by the people.

It is well settled that the people, as well as the Legislature, are bound by constitutional provisions. Irwin vs. Nolan, 217 S. W. 837; Johnson vs. Kraft, 87 So. 375; Oakland vs. Hilton, 11 P. 3; 12 C. J. 688.

In like manner as Judge Johnson, we entertain the sincere desire to preserve the right of suffrage *{*214}* to all of our soldiers, sailors and other away from their homes on election day, but, notwithstanding that fact, this office must rule conscientiously respecting this and all other matters before it in the light of the law as we find it.

In conclusion, I personally pledge the assistance of this office in every way possible at the next regular session of the Legislature to provide proper amendments to the Constitution in the manner required and laws which will properly safeguard the use of absentee ballots in the state which may be authorized by an amendment to the Constitution.