

## Opinion No. 49-5232

June 30, 1949

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mrs. Alicia Romero Secretary of State Santa Fe, New Mexico

**Re:** Referendum Petitions, Senate Bill No. 89, 19th Legislature.

### OPINION

{\*63} Reference is made to your letter dated June 13, 1949, wherein you make inquiry as to the duties and powers of the Secretary of State in connection with the referendum petitions now in your office, relative to the suspension of Senate Bill No. 89.

You have inquired as to your authority concerning many matters pertaining to the petitions and the law in relation thereto, which inquiries may be grouped as follows:

1. It is my duty to check and examine the signatures on the petitions to determine their validity?
2. Do I have any power to throw out signatures if they do not appear genuine?
3. If one person signs any name other than his own, can said name be discarded from the petition? How do I determine which is the person who signed said petition? If they are not qualified electors, can their names be discarded from the petition?
4. Should I certify to the valid signatures on the petitions that were filed in this office? What is the latest date on which said certificate may be made?

In the consideration of the questions involved here, it is first necessary to examine that section of the Constitution of the State of New Mexico which reserves to the people the power by petition to disapprove, suspend and amend {\*64} any law enacted by the Legislature, with certain exceptions. I quote Article 4, Section 1 of the New Mexico Constitution:

"The legislative power shall be vested in a senate and house of representatives which shall be designated the Legislature of the state of New Mexico, and shall hold its sessions at the seat of government.

"The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws.

Petitions disapproving any law other than those above excepted, enacted at the last preceding session of the legislature, shall be filed with the secretary of state not less than four months prior to the next general election. Such petitions shall be signed by not less than ten per centum of the qualified electors of each of three-fourths of the counties and in the aggregate by not less than ten per centum of the qualified voters of the state, as shown by the total number of votes cast at the last preceding general election. The question of the approval or rejection of such law shall be submitted by the secretary of state to the electorate at the next general election; and if a majority of the legal votes cast thereon, and not less than forty per centum of the total number of legal votes cast at such general election, be cast for the rejection of such law it shall be annulled and thereby repealed with the same effect as if the legislature had then repealed it, and such repeal shall revive any law repealed by the act so annulled; otherwise, it shall remain in force unless subsequently repealed by the legislature. If such petition or petitions be signed by not less than twenty-five per centum of the qualified electors under each of the foregoing conditions, and be filed with the secretary of state within ninety days after the adjournment of the session of the legislature at which such law was enacted, the operation thereof shall be thereupon suspended and the question of its approval or rejection shall be likewise submitted to a vote at the next ensuing general election. If a majority of the votes cast thereon and not less than forty per centum of the total number of votes cast at such general election be cast for its rejection, it shall be thereby annulled; otherwise, it shall go into effect upon publication of the certificate of the secretary of state declaring the result of the vote thereon. It shall be a felony for any person to sign any such petition with any name other than his own, or to sign his name more than once for the same measure, or to sign such petition when he is not a qualified elector in the county specified in such petition; provided, that nothing herein shall be construed to prohibit the writing thereon of the name of any person who can not write, and who signs the same with his mark. The legislature shall enact laws necessary for the effective exercise of the power hereby reserved."

The applicable portion of Section 1, Article 4 reads as follows:

"If such petition or petitions be signed by not less than twenty-five per centum of the qualified electors under each of the foregoing conditions, and be filed with the secretary {\*65} of state within ninety days after the adjournment of the session of the legislature at which such law was enacted, the operation thereof shall be thereupon suspended and the question of its approval or rejection shall be likewise submitted to a vote at the next ensuing general election."

In view of the fact that the Constitution request that a certain percentage of the qualified electors must sign the petitions, and that said petitions must be filed with the Secretary of State within the permitted time, it next becomes important to examine the statutes of the State of New Mexico for the purpose of ascertaining what duty or duties the Secretary of State is charged with, and whether those duties are judicial, executive or ministerial in their performance and limitation.

The Constitution and the statutes of the State of New Mexico remain silent as to the specific duties of the Secretary of State. However, Section 3-103 of the 1941 Compilation provides as follows:

"The assistant secretary shall have power, in the absence of the secretary, to file all instruments required by the laws of New Mexico to be filed in the office of the Secretary of State, and to certify to copies thereof, under his hand and the Great Seal of the State, with the same force and effect as if the same had been filed or certified by the Secretary of State. (Laws 1903, ch. 75, § 2; Code 1915, § 5317; C.S. 1929, 134-203)."

Powers can only be derived from the statutes by specific grants or charges. A delegation of power to a person holding a state office must be specifically set out in the law creating the office, or thereafter granted in subsequent statutes; it cannot be inferred.

A careful study of the laws pertaining to the office of the Secretary of State forces this office to the conclusion that the Secretary of State of the State of New Mexico has been granted authority to perform two duties, aside from the acceptance of service of summons, namely:

1. To file all instruments required by the Laws of New Mexico.
2. To certify copies thereof under his hand and the Great Seal of the State of New Mexico.

A ministerial duty as distinguished from an executive duty or judicial duty has been held in the case of *Mississippi v. Johnson* (former President of the United States) in 18 L. Ed. 437 to be a duty in respect to which nothing is left to the discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury v. Madison*, 1 Cranch 137 (U.S.S. Ct.) furnishes an illustration. A citizen had been nominated, confirmed and appointed a justice of the peace for the District of Columbia. His commission had been made out, signed and sealed, and nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus, it being clearly a ministerial duty.

Corpus Juris, in discussing the duties of the Secretary of State, says:

"The Secretary of State is an executive or ministerial officer and possesses no judicial powers. \* \* \* The secretary of state possesses no substantive powers except such as are enumerated in constitution or statute, cannot perform functions not falling within the authorized scope of his official duties. \* \* \*" 59 C.J. 116.

{\*66} In general, many of the questions that you asked are answered in a similar case in Attorney General's Opinion No. 1669, page 116, Report of the Attorney General, 1937-38, dealing, among other things, with the duty or authority of the Secretary of State to:

1. Determine whether signers of any petitions are duly qualified electors.
2. How shall I determine whether signatures on a petition are genuine?
3. Where am I to get funds with which to make an investigation of the genuineness of the signatures?
4. When and how am I to announce my findings as to whether the petitions contain the necessary number of valid signatures?

The Attorney General held in his opinion:

1. That no duty is imposed on the Secretary of State to make a determination as to qualified electors, such a determination being a judicial function, that the duties imposed on the Secretary of State are ministerial and not judicial.

2. In reference to the determination of the genuineness of the signatures appearing on the petition, the Attorney General stated that no duty and no authority is imposed on you in that respect, quoting Corpus Juris:

"A petition purporting to be signed in compliance with the statutory (constitutional) requirements is prima facie proof of the genuineness of the signatures, and the burden is on him who attacks this genuineness to prove that they are not genuine." 59 C.J. 698.

3. No funds were provided to the Secretary of State to make an investigation for the reason that no duty was imposed upon her to make an investigation.

4. In reference to the time for the Secretary of State to announce whether or not the petitions contained the necessary number of valid signatures, the Attorney General said:

"No announcement is required on your part; the duty imposed on you is to file the petitions when presented. If petitions are filed within time, and with the requisite number of signatures of electors the Constitution suspends the operation of the law."

In view of the importance of the matter herein involved to the people of the State of New Mexico, this office has made a thorough study of the statutes and the cases pertaining to the authority vested in you. I want to especially call your attention to the case of Thompson v. Vaughn, 159 N.W. 65, 192 Mich. 512. This case dealt with a similar situation. Section 1, Article 5 of the Constitution of the State of Michigan provided, in part, as follows:

"Upon presentation to the secretary of state within ninety days after the final adjournment of the Legislature, of a petition certified to as herein provided, as having been signed by qualified electors equal in number to five per cent of the total vote cast for all candidates for Governor at the last election at which a Governor was elected, asking that any act, section or part of any act of the Legislature, be submitted to the electors for approval or rejection, the secretary of state, after canvassing such petition as above required, and the same is found to be signed by the requisite number of electors, shall submit to the electors for approval or rejection such act or section or part of any act at the next succeeding general election; and no {\*67} such act shall go into effect until and unless approved by a majority of the qualified electors voting thereon. \* \*

On a mandamus proceeding the questions were raised as to the authority of the Secretary of State to conduct investigations as to the apparent gross frauds appearing on the petitions; as to the genuineness of the signatures of the electors in the petitions.

The court there held that the duties charged upon the Secretary by the referendum section of the Constitution are purely ministerial, and his action must be based upon the face of the petition as it is received at his office. Other evils of a serious nature might result if initiative and referendum petitions could be held up pending investigations of uncertain length, and those evils were undoubtedly in mind when the constitutional amendment was framed and adopted without making provision for such an investigation. The duties of the Secretary of State being ministerial and not discretionary, the secretary may be required to perform those duties by the issuance of the writ of Mandamus. This principle was affirmed in the case of *Leininger v. Alger*, 26 N.W.2d 350, although the facts were slightly different because of an amendment to the Constitution subsequent to the case of *Thompson v. Vaughn*.

The Court further held that similarity of handwriting is so much a matter of opinion and so indefinite that the Secretary of State cannot act upon the question.

In view of the law and the many decisions it is the opinion of this office that your duties are purely ministerial, see also *Flournoy v. City of Jeffersonville*, 17 Ind. 169; 79 Am.Dec. 468; *State v. Loechner* 91 N.W. 874; *Mechems Public Officers*, Sec. 655.

Acting as a ministerial officer it is your duty to file the petitions as received within the prescribed time with the limitation that the names of the electors appearing upon the petitions must be written signatures. "Signature" has been defined as "the act of writing one's name upon a deed, note, contract, or other instrument; the name of a person as written or set down by himself."

It is further the opinion of this office that (1) you have no authority to check, examine, or make a determination as to the validity of the signatures appearing on said petitions.

(2) You have no authority to throw out signatures if in your judgment they do not appear to be genuine, nor to call in examiners of questioned documents for expert opinion.

(3) You have no authority to conduct investigations or make determinations as to whether or not the signatures appearing on said petitions are the signatures of qualified electors.

(4) Where the name or names of the electors appearing on the petition or petitions are not written signatures coming within the definition of "signature" as above given, you have the authority to throw out or not count said name in your canvass, such as, for example, typewritten, printed or incompleted names appearing on said petitions.

5. If petitions are filed within time, and with the requisite number of signatures of qualified electors, the Constitution suspends the operation of the law.

Trusting the foregoing sufficiently answers your various inquiries, I am