Opinion No. 55-6167

May 19, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mrs. Natalie Smith Buck, Secretary of State, State Capitol Building, Santa Fe, New Mexico

In your letter of April 27, 1955, you request an opinion concerning the question as to whether or not Section 12, Article IV, of the Constitution of New Mexico is mandatory.

Section 12, Article IV of the New Mexico State Constitution reads as follows:

"All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the years and nays on any questions shall, at the request of one-fifth of the members present be entered thereon. The original thereof shall be filed with the Secretary of State at the close of the session, and shall be printed and published under his authority."

The word "shall" in this section makes this section mandatory.

The following is quoted from 81 C.J.S., under the heading of States, Section 41, Journals of Legislature:

"The journal of a legislature is the official record of what is done and passed in the legislative assembly. Under provisions of the constitutions, the keeping by the legislature of journals of its proceedings may be required, and constitutional and statutory provisions governing the copying, printing, and publishing of the journals of legislative bodies have been construed and applied."

"It is generally required that the secretary of state shall be the custodian of the journal of each house, and, on delivery of the journal to the secretary of state, the clerk has no custody of, or control over it, with no right to possession, except for the purpose of copying it for the printer. Reports and public documents which make up the appendix are included in, and form a part of, the journal, in the same manner as the daily proceedings, and the governor's message returning a bill becomes a part of the journal entry.

"The only official journal is the one filed in the office of the secretary of state in accordance with law, and in case there is a discrepancy between such journal and the journal printed for the information of the public, the former must govern and when the house approves the journal of the previous day, such journal is the only authorized one of that day's proceedings."

In the case of **Kelley vs. Marron,** State Treasurer, 21 N.M. 239, wherein Chapter 32, Laws of 1915, provided for the creation of an Armory Board of Control, and for the construction of an armory building in the Village of Carlsbad, and authorized an issue of bonds to pay for such building, and by Chapter 46, Laws of 1915, like provisions were made for an armory building in the Village of Deming in said State. The State Treasurer was proceeding to advertise and sell such bonds when an action was instituted in the Court Below to enjoin said State Treasurer from proceeding with sale of the bonds. The invalidity of the Act was challenged as well as the right of the Treasurer to proceed with the sale on the grounds that the said pretended Legislative Acts were not legally enacted, and that the journal of the House of Representatives does not show a compliance with Section 20, Article IV of the Constitution.

In affirming the judgment of the Lower Court the Supreme Court stated:

"Every suit before every court, where the validity of a statute may be called in question as affecting the right of a litigant, will be in the nature of an appeal, or writ of error, or bill of review, for errors, apparent on the face of the legislative records, and the journals must be explored to determine, if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law is to be declared by the court. It must inform itself as best it can what is the law. If it may be beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the Constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court will, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested . . . ."

In the case of **Smith et al. vs. Lucero et al.,** 23 N.M. 411, Sections 12 and 20 of Article IV, and Section 1 of Article 19 of the State Constitution was interpreted by our Supreme Court and in affirming the case the Court said:

"It is to be observed that proposed constitutional amendments are to be entered in the journal, together with the yea and nay vote thereon. This provision is special to such matters, and there is no such requirements in regard to any other legislative action. All bills and resolutions passed by the Legislature are to be enrolled and engrossed, publicly read and signed in open session, and the reading and signing thereof noted on the journal. This provision is general and refers to all action taken by the Legislature. The two articles are not so separate in scope and subject matter as to prevent the application to one of the general provisions in another. In one particular, at least, they are connected in terms, in that a proposed amendment, provided for in one article, is required to be entered in the journal, the keeping of which is provided for in the other article."

In view of the language of Section 12, Article IV and the importance of the preparation and publication of the journal as shown in the hereinbefore quoted texts, and the two Supreme Court cases, it is the opinion of this office that Section 12, Article IV of the Constitution of the State of New Mexico, is mandatory.

In your same request you inquire as to how you as Secretary of State can effect compliance with such constitutional requirement, in view of the fact that no appropriation exists for such purpose. From our research on this point, we find that in the case of **State ex rel Lucero vs. Marron,** 17 N.M. 304, which case is a mandamus against the Secretary of State, it appeared that during 1912 there were some deficiencies in the 61st, 62nd and 63rd fiscal years of the Territory of New Mexico, and among such appropriations there was appropriated the sum of $ 2,625.00 for the salaries of the Secretary of State from the time of the organization of the state government to the end of the current fiscal year, which was the 63rd fiscal year. The relator alleges that the respondent, State Treasurer, had failed to execute the certificates and issued them as required by the Act, and prayed for the issuance of a Writ of Mandamus against the State Treasurer.

It was stated in this case:

"If the constitutional provision is to be literally construed this authority to use the surplus of other funds or to borrow money would be void. Similar provision, or provisions which would likewise be objectionable in such an act, under this construction, are to be found in sections 2, 5, 6, 12, 13, 14, 18, 21, 25, and other sections not necessary to enumerate, and if the construction contended for could be sustained, then separate acts, covering each of these incidental matters would necessarily be required, making legislation cumbersome in the extreme, and requiring endless detail work on the part of the law-makers, which we can not believe was contemplated by the framers of the constitution. What vice or evil can there be in making provisions in such an act, which are incidental to the main fact of the appropriation? The limitation was imposed upon the main act of the appropriation and not the matters of detail connected with such appropriation.

Also at page 325 is found the following:

"Section 7 of Article IX of the constitution gives the state the power to borrow money, not exceeding the sum of $ 200,000.00 in the aggregate to meet casual deficits, or failure in revenue, or for necessary expenses. It does not limit the power to expenses, heretofore incurred. It is true that many of the items included in the bill are for salaries up to the end of the current fiscal year; **salaries fixed by the constitution,** and as to these items there can be no doubt that they are fully incurred. And these and all other items for which provision is made by the issue of the certificates, the legislature has determined to be necessary expenses and it is to be assumed that there are no revenues now available, or which will be available during the current fiscal year out of which to meet such requirements. It is to be borne in mind that we had no session of the legislature in 1911, and that the expenses of the current year have been necessarily

increased by reason of the change from a territorial to a state government, and that no money was available to meet the increased expense. The inadequacy of the appropriations made by the legislature of 1909 must have been apparent to the first state legislature. If the contention of the respondent is correct and if the legislature has no authority to borrow money to pay the deficiencies in the revenue of the territory, then, with no session of the territorial legislature since 1909, and the consequent impossibility of having legislation to meet exigencies which could not have been foreseen at the time of that session and which therefore were not then provided for, we would be left helpless as to meeting deficiencies or failure in revenue during the past three years, and, as well, the increased expenses incident to the change of government."

Again the Supreme Court in the case of **State ex rel vs. Sargent,** 18 N.M. 272, stated:

"The question of whether resort can not be had to the act of 1905 and whether that act created a continuing appropriation such as will justify a writ of mandate directed to the State Auditor requiring him to make a levy of $ 12,000.00 for the support and maintenance of the Mounted Police is therefore presented.

"It is contended by appellee in support of this proposition that it has been held that where the Constitution of a State creates an office and prescribes the salary for such office, that the necessity for legislative appropriation for such office is dispensed with on the ground that such provision in a State Constitution is proprio vigore. (citing cases)

* * *

"It has been generally conceded and frequently held that the rule, last referred to, is not violative of a constitutional provision similar to that of ours (Sec. 30 of Art. IV) that 'except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature.'

"In recontinuing appropriations, (Col.) 32 Pac. 272, With the principles, or rules, enunciated we fully agree and believe them to be fully supported by the great weight of authority."

In an annotation found in 164 A.L.R., at page 928, statutes of other states which have a constitutional provision similar to the one in question have held that it is a continued appropriation and that a Legislature cannot, by failure to appropriate, repeal a constitutional provision.

In the case of **State ex rel Bryan L. Prater, et al., vs. State Board of Finance, et al.,** No. 5859, dated February 9, 1955, not yet reported, in reversing the Trial Court the Supreme Court said:

"There can be no question that but for the restraining influence of Const., Art. 4, § 16, or like provisions in the Constitution or laws of sister states, the appropriation on which administrative boards . . . depend for existence and operation could be so reduced in a

general appropriation bill as to put it out of business as effectively as if repealed. If it has this effect, it violates this constitutional proviso."

It is therefore the opinion of this office that since the statute is mandatory and in view of the authorities hereinabove cited, that you should proceed to print and publish the Journal which the law says you shall do. This appropriation is a continuing appropriation and no action of the Legislature is necessary to pay the cost of printing.

I trust that this fully answers your inquiries.

By: Hilario Rubio

Assistant Attorney General