

Opinion No. 57-77

April 22, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General

TO: The Honorable J. D. Hannah, State Auditor, Santa Fe, New Mexico

QUESTIONS

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Is House Bill No. 320, Chapter 252 of the 1957 New Mexico Session Laws, which provides for a change in the duties of the State Auditor, constitutional?

CONCLUSION

Yes.

OPINION

ANALYSIS

The Legislature, in House Bill 320, which is Chapter 252 of the 1957 Session Laws of the State of New Mexico, removes from your office the power to disburse public funds and transfers such duties to an appointive officer under the Chief Executive.

At the time the Constitution was adopted, the disbursing duties were contained in your office. The Constitution, so far as the State Auditor is concerned, provides no duties specifically, but merely provides that he is a member of the Executive Department of the State Government, sets out certain qualifications and provides an initial salary for the first ten years after passage of the Constitution.

There have been two views expressed by the Courts on this matter. One is best exemplified by the case of *Hudson v. Kelly*, 76 Ariz. 255, 263 P. 2d 262. wherein the Arizona Supreme Court held that a State Auditor could not be shorn of duties which he had at the time the Constitution was adopted in that State as the Constitution makers impliedly provided him with such duties. This view is also expressed in the following cases: *Wright v. Callahan*, 61 Ida. 167, 99 P. 2d 961; *People ex rel. Brown v. Green*, 5 Daly, N.Y. 194; *State ex rel. Gaston v. Black*, 199 Ala. 321, 74 So. 387; *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84.

The other view is expressed by our Supreme Court in the case of *State v. Davidson, et al.*, 33 N.M. 664, 275 P. 373, wherein the Attorney General of this State contended that he had the powers granted to the Attorney General at common law and also that he retained the power constitutionally that he had at the time the Constitution was adopted.

This Court, citing an earlier case of the New Mexico Supreme Court, *State ex rel. Clancy v. Hall*, 23 N.M. 422, 168 P. 715, said:

"It is next contended that the act in question is in violation of the constitution of the state, in that it attempts to transfer the duties of the attorney general of the state to undesignated individuals, who are not law officers of the state of New Mexico. There is no merit in this contention. The state constitution does not prescribe the duties of the attorney general, and it must be evident that the legislature, unless limited by some direct constitutional provision, has the power to direct how, when, where, and by whom the state shall be represented in all matters, whether of litigation or otherwise."

and further held that the Attorney General had no common law powers since that office was a creature of statute from its inception from territorial days.

Thus, the two views are expressed and this office, of course, is bound by the expression of our Court. However, the case of *Hudson v. Kelly*, cited above, and the cases cited therein, appears to be the weight of authority and further appears to contain the better reasoned authority. That case recognized the danger of legislating a free and independent officer out of existence and provided that such could not be accomplished under the Arizona Constitution. It would appear that the New Mexico case would not in any way prohibit such a radical result.

It is the feeling of this office that the case of *State v. Davidson* (N.M.) permits the Legislature to exceed reasonable bounds in dealing with the Executive Department. Hence, a second test, particularly since the Arizona case is much more recent, having been decided in November, 1953, and further in view of the close parallel of the histories of the two States, would probably be in order.

However, in view of the present status of the law in New Mexico, as pronounced by the Supreme Court in the *Davidson* case and in the case of *State ex rel. Clancy v. Hall*, *supra*, we must hold that the enactment of Chapter 252 is valid under the constitutional Auditor.