

## Opinion No. 37-1669

June 8, 1937

**BY:** A. M. FERNANDEZ, First Assistant Attorney General

**TO:** Mrs. Elizabeth F. Gonzales Secretary of State Santa Fe, New Mexico

{\*116} Your letter containing eight questions with reference to your duties in connection with referendum petitions has been handed me by Attorney General Patton for attention.

Unless such petitions are filed in your office, then, of course, answers to your questions would be wholly unnecessary, but upon your assumption that such petitions will be filed, and at your request, I undertake to give an opinion as to each of those questions.

After first answering each of the eight questions propounded by you, I shall proceed to state briefly the reasons for my conclusions.

### **1. "Is Chapter 117 of the Laws of 1937 a special law, and, therefore, not subject to referendum?"**

It is not a special law and is not exempt from referendum as a special law.

This term has a well defined meaning in constitutional law. Our Supreme Court has defined it in a number of cases (see list in 59 C. J. 729, note 41), and has from the early history of the state clearly set out the distinction between a special and a general law. It is first stated in the early case of Territory v. Cutinola, 4 N.M. 305, as follows:

"A general statute is defined to be one which affects all the people, or all of a particular class. When it concerns a class in distinction from individuals, it is treated as general. A private or special statute, (and these words appear to be used interchangeably,) is one which affects only particular individuals or things."

And "the fact that an act is limited as to its time of duration does not make it a special act." 59 C. J. 736.

The act in question provides for a special election to be held throughout the state "for the purpose of approving or rejecting **any and all** proposed amendments to the Constitution of the State of New Mexico which shall have been submitted to the people by the Thirteenth Legislature". It provides what may be paid to all election officials by the counties, and in addition appropriates \$ 6,500.00 for the expenses incurred by your office in connection therewith. It applies to all of the people and to all amendments submitted by the last legislature.

Though I have diligently searched the authorities from this and other states, I have not found any holding that such a statute can be classified within the legal definition of "special law". The weight and reasoning of the authorities clearly indicate that a law is special when it is a private law, such as, for example, one appropriating money to pay for the injuries of a particular member of the militia, or authorizing the conveyance of a particular piece of land by a municipality or by the state.

"A special statute is as much the antithesis of a public statute as it is of a general statute." 59 C. J. 736.

Furthermore, we are considering here an exception to the right of referendum, and such exceptions {\*117} must be always strictly construed in favor of the right. I quote from 59 C. J. 690:

"As a general rule all legislative matters in which the voters have an interest are subject to the referendum unless they are especially excepted . . . . Exceptions to the right of referendum should be strictly, but reasonably construed, and should not be denied the people unless the act in question is plainly included in one of the excepted classes."

## **2. "How shall I determine whether signers of any petition are duly qualified electors?"**

Such a determination is a judicial function. The duties imposed on you as Secretary of State are ministerial and not judicial. No duty and no authority is imposed on you in that respect.

"In counting the names on an initiative or referendum petition the secretary of state has no discretion, as he acts in a purely ministerial character." -- 59 C. J. 700.

## **3. "How shall I determine whether signatures on a petition are genuine?"**

No duty and no authority is imposed on you in that respect.

"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 their genuineness, to prove that they are not genuine." -- 59 C. J. 698.

In Corpus Juris, 59 C. J. 700, note 79 (a), it is said:

"Similarity of handwriting is so much a matter of opinion and so indefinite that the secretary of state cannot act upon it in counting signatures. -- Thompson v. Vaughn, 159 N. W. 65, 192 Mich. 512."

The last two questions above discussed were considered in the case of Thompson v. Vaughn, 159 N. W. 65, and I quote briefly from that opinion:

"It is averred by relators that the referendum petition was the subject of many gross frauds and irregularities before it was finally received and placed on file in the office of the secretary of state; that people were allowed to sign it who were not electors, and that many names were appended to it by interested parties without the knowledge or consent of those whose names were so appended; and the serious consequences to the state are pointed out if it should be held that the secretary is required to act upon such petition without making an investigation into the alleged frauds and irregularities. The gravity of these charges is fully recognized, but the law must be construed as it stands. It is clear that the secretary of state is not given authority to enter upon such an investigation. This was practically held in *Thompson v. Vaughn*, supra, and we are obliged to adhere to the view taken in that opinion. 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 provisions for such an investigation."

Chapter 107 of the Laws of 1937, referred to in your letter, making it an offense to forge the name of any person to a petition, is a criminal {*\*118*} statute. It provides a severe penalty and is intended to safeguard the public from spurious signatures. It is of no more assistance, insofar as your duties are concerned, than a criminal statute providing penalties for illegal voting would be in assisting you or counting judges in canvassing the vote at an election. A vote to be deducted from the return at an election would have to be raised by an action in court, and likewise any question as to genuine signatures, or legal qualifications of signers, involves a judicial determination upon a contest of the petition properly filed in court.

**4. "Where am I to get funds with which to make the investigation of the genuineness of the signatures?"**

No funds are provided, since, as stated above, no duty is imposed on you to make such investigation.

**5. "When and how am I to announce my findings as to whether the petitions contain the necessary number of valid signatures?"**

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, just as by force of the constitution such law would be put into effect without announcement in the absence of such a petition at the expiration of ninety days from adjournment.

In considering the last four questions, and those which follow, it must be remembered that the legislature has not passed any laws supplementing the provisions of the constitution as to the referendum, and that, therefore, we must look to such provisions

as that instrument contains to guide us. In the case of *State v. Perrault*, 34 N.M. 438, the Supreme Court held that Article IV, Section 1, of the Constitution is self-executing, and that the omission of the legislature to pass laws regulating the filing of the petition is a decision by the legislature that no further legislation is necessary with regard thereto.

This article in effect provides that if a petition or petitions signed by not less than twenty-five per centum of the qualified electors of each of three-fourths of the counties, and in the aggregate by not less than the same percentage of the qualified electors of the state, are filed with the Secretary of State within ninety days after the adjournment of the session of the legislature which passed the law, "the operation thereof shall be thereupon suspended". It does not delegate to anyone any of the judicial powers to pass on the validity of signatures. That remains with the courts.

**6. In your sixth question you refer to the direction of the constitution to the effect that proposed amendments "shall be voted upon at the next regular election held in said state after the adjournment of the legislature proposing such amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as the legislature may BY LAW provide."**

Article IV of the Constitution recites that the people reserve the right to disapprove, **suspend**, and annul any law, and, as stated above, it provides that upon the filing of petitions complying with the conditions in said Article stated, the operation of the law "shall be thereupon suspended". As stated in *Todd v. Tierney*, 38 N.M. 15, the referendum petition operates in two ways dependent upon the timeliness of filing of the petition and the number and percentage of signatures attached thereto.

If filed within the time and complying only with the first provision of Article IV of the Constitution which requires only the signatures of ten per cent of the electors, it merely refers the question of whether {\*119} the law should be annulled at the next general election; if filed within ninety days from the adjournment of the legislature, with the signatures of twenty-five percent of the electors as provided in the second provision of that Article, it effectively suspends the operation of the law.

If the law be so suspended, then the constitutional provision would govern, and your duty would be to follow the mandate of the Constitution itself requiring the submission of the amendments to a vote of the people at the general election.

**7. "If a person has signed a referendum petition, does that party have the right to withdraw his name and, if so, how and when?"**

In *Corpus Juris*, Vol. 59, at page 700, in discussing referendum petitions, the rule is stated thus:

**"After due filing.** The secretary of state cannot permit the withdrawal of names on petitions after they have been received and preliminarily filed in his office."

This statement of the law refers specifically to referendum petitions. It must be borne in mind that there are two classes of petitions: Those with respect to which a duty is imposed on the officer or tribunal to whom they are addressed to act, and with respect to which the officer has quasi judicial powers; and, second, those with respect to which the officer to whom they are addressed has no duty to act, and no discretion or quasi judicial powers. State v. Bateman, (S. D.), 244 S. W. 357; Coghlin v. Caskelly, (N. D.) 244 N. W. 41.

A referendum petition filed within ninety days from the adjournment of the legislature and carrying the requisite number of signatures of electors to suspend the operation of the statute, falls within the second class.

The secretary of state is given no judicial powers and no authority to pass on withdrawals. If it is charged that signatures have been procured by fraud, misrepresentation or coercion, the parties in interest so complaining can only have a determination of their charges in a court of proper jurisdiction. You have no authority at the request of any individual or otherwise to alter any petition filed in your office.

"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.

Our Supreme Court, though it has passed on the right to withdrawals as to the first class of petitions, has not passed on the right to withdrawals from the second class such as referendum petitions. Other states have passed on the question however.

In Beecham v. Burns, 168 P. 1058, the Supreme Court of California stated:

"The remaining question in this case is based upon the claim that certain signers of the recall petition requested the clerk to withdraw their names therefrom after the petition was filed with the clerk and before that officer had certified the result of his examination as required by statute. \* \* \* \* The clerk is not clothed with authority to alter the petition when it has been filed; he is not authorized to receive extraneous evidence of its contents, or to base his certificate upon statements made to him by electors who have signed it. \* \* \*

In our opinion, the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed."

{\*120} **8. You state, "Assuming there is some doubt about the answers to the questions which I have submitted to you, I would like your suggestions as to the most direct route in having them passed upon by the Supreme Court."**

There is no action which you as Secretary of State may file for a determination of any of these matters by the Supreme Court. If petitions are filed containing the required

number of signatures and within the time specified by the Constitution for suspension, your duty is imperative to refrain from calling the election provided by the law being suspended, or from expending any monies under its authority; and I so advise you. The law in such event is suspended.

If then any proper parties desire to attack the right of the people to referendum, the validity or sufficiency of the petitions, or the right to withdraw signatures from petitions which have been signed, they will no doubt attempt to have the Supreme Court of the State of New Mexico take original jurisdiction and seek its writ of mandamus to direct you to call the election, and thereby have our own Supreme Court pass upon these questions. This assumes, of course, that there may be proper parties contending the election should be called despite the filing of the petitions authorized by the Constitution.

If the Supreme Court, which often is very reluctant to take original jurisdiction in a case where much evidence will be taken and many questions of fact litigated which would require many days of trial, should not take original jurisdiction, then, in that event, such proper parties may seek their remedy in the proper district court where all questions may first be passed upon and any party may appeal from such decision.