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January 11, 1960
Opinion No. 60-12

REQUESTED BY: HONORABLE BILL STEPHENS, State Representative

OPINION BY: WADE CHURCH, The Attorney General

- QUESTIONS:
1. Does the Legislature of the State of Arizona have the authority to enact legislation that may be in conflict with the Enabling Act?
 2. Do the provisions in the Enabling Act take precedence over the provisions contained in the State Constitution?

- CONCLUSION:
1. See body of opinion.
 2. See body of opinion.

Question No. 1

The Act of Congress of June 20, 1910, usually designated as the Enabling Act, sets forth certain conditions and limitations upon which the territory of Arizona was admitted into the Union of States. Sections 19 and 20 of that Act provided for the election of delegates to a constitutional convention and empowered the delegates to form a constitution and provide for a state government for the State of Arizona. Pursuant to that Enabling Act, the government for the State of Arizona was formed and the State of Arizona was admitted into the Union of States on February 12, 1912.

Section 20 of the Enabling Act contains this provision:

"And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state--
* * * "

Immediately thereafter follow nine specific restrictions and limitations upon the State of Arizona which, in substance, were accepted by the State of Arizona by Article XX of the Constitution, entitled "ORDINANCE". The Ordinance of the Arizona Constitution contains thirteen paragraphs covering the following subjects:

First: Toleration of religious sentiment.

Second: Polygamy.

Third: Introduction of intoxicating liquors into Indian country which was amended in 1954 by consent of the Congress

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so as to terminate that provision as of July 1, 1957.

Fourth: Public lands and Indian tribal lands which disclaimed on behalf of Arizona any right or title to Indian tribal lands or lands of the United States, situated in Arizona.

Fifth: Taxation. Securing equality of taxation to all citizens residing without the state and prohibiting taxation of lands within an Indian reservation owned by Indians but permitting taxation of lands owned by Indians situated without Indian reservations.

Sixth: Territorial debts and liabilities which are assumed by the State of Arizona.

Seventh: Public school system and suffrage which establishes a system of public schools free from sectarian control, and guaranteeing the right of suffrage without condition of race, color, or previous condition of servitude.

Eighth: English language, the knowledge of which is a necessary qualification for state officers and members of the State Legislature.

Ninth: Location of the Capital at the City of Phoenix which was prohibited from being changed prior to December 31, 1925.

Tenth: Appropriation of receipts from the sale of public lands for the reclamation of public lands under an act of Congress which was repealed by consent of Congress, effective June 27, 1927.

Eleventh: Prohibiting the introduction of liquor upon lands allotted to Indians for the period of twenty-five years after such allotment which was repealed by the consent of Congress, effective November 23, 1954.

Twelfth: Lands granted to the State of Arizona whereby the State of Arizona and its people consent to the provisions of the Enabling Act relating to such lands.

Thirteenth: Ordinance as part of the Constitution of Arizona which provides that the foregoing Ordinance is made a part of the Constitution of Arizona and that no amendment shall be made to it without consent of Congress.

The prefatory words of Article XX of the Arizona Constitution adopting the provisions of the foregoing Ordinance recite:

"The following ordinance shall be irrevocable without the consent of the United States or people of this State."

Thus it appears from explicit words that the limitations and restrictions placed upon the State of Arizona by Section 20 of the Enabling Act are irrevocable without the consent of the United States or the people of this State. However, the question has arisen in other States whether, notwithstanding such words of restriction or limitation, these recitals in an Enabling Act can superimpose themselves upon matters of purely state concern. The question is treated in the case of Coyle v. Smith, 221 U.S. 559, 55 L. Ed. 853, 31 S. Ct. 688, which considered the Constitution of Oklahoma and the Enabling Act of Congress of June 16, 1906, under which Oklahoma was admitted to the Union of States. That Enabling Act provided that:

"The capital of said state shall temporarily be at the City of Guthrie * * * and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen * * * "

Notwithstanding that provision of the Oklahoma Enabling Act, the Legislature of Oklahoma enacted a law which provided for the removal of the capital from the City of Guthrie to Oklahoma City prior to the time the Enabling Act permitted the capital to be removed. The constitutionality of the Act was attacked and notwithstanding the limitation contained in the Enabling Act, the Oklahoma Supreme Court sustained the validity of the Act enacted by the Oklahoma Legislature. The provision of the Oklahoma Enabling Act restricting the removal of the capital was adopted as a part of the Ordinance in the Oklahoma Constitution, thus disclosing parallel situations between the Constitution and Enabling Act of Oklahoma and the Constitution and Enabling Act of Arizona. In discussing the question, the Supreme Court of the United States said:

"The efficacy of this ordinance as a law of the state conflicting with the removal act of 1910 was, of course, a state question. The only question for review by us is whether the provision of the enabling act was a valid limitation

upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it possesses, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to 'every state in this Union a republican form of government'. The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original states'.

The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. That provision is that, 'new states may be admitted by the Congress into this Union'. The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by

the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states'.

The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution, --a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted 'as a new and entire member of the United States of America'. 1 Stat. at L. 191, 189, chaps. 7, 4. Emphatic and significant as is the phrase admitted as 'an entire member', even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at L. 491, chap. 47) as the third new state, it being declared to be 'one of the United States of America', 'on an equal footing with the original states in all respects whatsoever', --phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states.'

The power is to admit 'new states into this Union'.

'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of

Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission."

Coyle v. Smith, supra, referred to other cases of the Supreme Court of the United States construing the Constitution and Enabling Acts of other States which had been admitted to the Union, including the case of Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565, involving the Alabama Enabling Act. In reference to that case the Supreme Court of the United States in Coyle v. Smith, above cited, said:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertains to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the union, which would not be valid and effectual if the subject of congressional legislation after admission."

Again the Supreme Court in Coyle v. Smith, supra, said:

"No good can result from a consideration of the other cases cited by plaintiff in error. None of them bear any more closely upon the question here involved than those referred to. If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new state have complied with the terms of the act, that it shall be the duty of the President to issue his proclamation, and that 'thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, on an equal footing with

the original states.' The proclamation has been issued and the Senators and Representatives from the state admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot." (Emphasis supplied).

Therefore, from an authoritative source, we may make these deductions:

FIRST: Arizona, like Oklahoma, was admitted into the Union of States on an equal footing with the original states. Because of that equality which was inherent in the federal constitutional concept, therefore it was emphasized and guaranteed by Section 23 of the Arizona Enabling Act, which provides that upon the issuance of the proclamation of the President of the United States admitting the State of Arizona into the Union, that thereupon the "State of Arizona shall be admitted by the Congress into the Union by virtue of this act on an equal footing with other states." (Emphasis supplied).

Question No. 2

SECOND: Question No. 1 and Question No. 2 are inter-related. An answer to one answers the other, in effect.

The conclusion is that whenever a conflict occurs between the Constitution and laws of the State of Arizona and the Enabling Act admitting Arizona into the Union of States, each conflict must be considered separately. Matters of purely state concern remain in the state and matters of purely national concern remain in the national government. Thus matters affecting Indians residing upon Indian reservations, matters affecting public lands the title to which is vested in the national government, and matters affecting navigable interstate streams, and the like, are subject to control by the national government. Removal of the Oklahoma capital is a typical case. Notwithstanding the Oklahoma Enabling Act placed a time restriction upon removal of the State capital which the Constitution of Oklahoma accepted, the Legislature of Oklahoma ignored that restriction and removed the capital which was upheld by the Supreme Court of the United States on the constitutional concept that it was a matter of purely

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state concern, and to deny Oklahoma that authority would deprive Oklahoma of admission into the Union of States upon an equal footing with other states.

Thus, we are required to appraise each situation as it arises and find the answer by consulting the Constitution of the State of Arizona, the Enabling Act admitting Arizona into the Union of States, the Constitution of the United States, and the decisions of the Supreme Court of the United States which have considered and resolved similar situations.

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