March 1, 1939.

Honorable R. T. Jones,
Governor of Arizona,
Phoenix, Arizona.

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ARIZONA ATTORNEY GENERAL

Dear Governor:

You have requested an opinion as to the validity of Senate Bill No. 21 entitled "An Act relating to pardons and paroles; imposing conditions with respect thereto, and amending Chapter 138, Revised Code of 1928, by adding Section 5320a."

We will first consider the act so far as it places limitations on the power of parole. In the case of State v. Superior Court, 30 Ariz. 332, 246 Pac. 1033, generally known as the Sims case, our Supreme Court held that the governor has no power to release prisoners on parole as the parole power rested exclusively in the hands of the Board of Pardons and Paroles. For brevity this latter governmental agency will be referred to in the course of this opinion as the Board. The power to parole was vested in the board under Sections 1450, 1451 and 1452 Penal Code of 1913, reenacted as Sections 5320, 5321 and 5322 Revised Code of 1928. All these sections are ordinary legislative enactments and are not initiative or referendum measures approved by the people. Hence the legislature may amend the same from time to time and legislate generally as to the board's power with reference to paroles.

However, when we consider the limitations attempted to be placed by the legislature in Senate Bill No. 21 on commutations, a more serious question arises. The word commutation is defined by Bouvier's Law Dictionary as "the change of a punishment to which a person has been condemned into a less severe one." In Ex Parte Janes, 1 Nev. 319, 321, the court defined a commutation as follows:

> "A commutation is a change of one punishment known to the law for another and different punishment also known to the law."

Under our constitution the power of commutation is vested in the governor. Section 5 of Article V, Arizona Constitution reads:

"The Governor shall have power to grant reprieves, commutations and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law."

In 1914 at the general election there was adopted by the people a referendum measure known as House Bill No. 1 (Third Special Session, First Legislature). This referendum enactment created a board of pardons and paroles, defined its powers, and imposed limitations on the governor's right to grant commutations, reprieves and pardons. It provided that this board should be comprised of the attorney general, the superintendent of public instruction, and a citizen member who should be chairman. The portion of the referred measure designated therein as 1280 reads:

"The Governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the regulations provided in this chapter."

Section 1285 of the referendum measure, with reference to the board of pardons and paroles so created, provides:

"Said board shall have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons, and no reprieve, commutation, parole or pardon shall be granted by the Governor unless the same has first been recommended by said board. All applications made for reprieves, commutations, paroles and pardons made to the Governor shall be at once transmitted by the Governor to the chairman of the said board, and the said board shall return the same with their recommendation to the Governor.

Sections 1286, 1287, 1288 and 1289 deal particularly with the procedure necessary to be followed by the board and the governor in granting pardons. Section 1290 provides the board shall have the power to make such rules and regulations not inconsistent with law as it may deem proper for the conduct of its business.

All of the 1914 referendum measure is printed without any change in the Revised Code of 1928, same appearing there as Chapter 131, Section 5215 to 5223 inclusive. The fact

that no change was made at the time of the adoption of the 1928 Code indicates that the Code Commissioner and the 1927-28 legislature were fully advised that the 1914 measure was not subject to revision or amendment by the legislature.

In the general election of 1914 the people adopted a constitutional amendment which now appears in the constitution as Section 6, Part 1, Article IV of said constitution. Said Section 6 reads as follows:

> "The vote power of the Governor, or the power of the Legislature, to repeal or amend, shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors."

In the case of Willard v. Hubbs, 30 Ariz. 417, 248 Pac. 32, our Supreme Court had under consideration the effect of this constitutional amendment of 1914. Chapter 82 of the Special Session of 1912 was before the court. This chapter had been a referendum measure adopted by the people November 5, 1912. The referendum act of 1912, however, had been reenacted by the legislature in the 1913 Penal Code and it seems that there was no limitation on the power of the legislature to amend or appeal a referendum or initiative measure until the adoption of Section 6, Part 1, Article IV which adoption became effective December 8, 1914. Therefore as the legislation involved in that case existed on December 8, 1914 by virtue of the reenactment by the legislature rather than under the original authority of the people, the court held that it could be amended, repealed or changed subsequent to 1914. So far as relative to our discussion however, the court makes the following very significant statement with respect to said Chapter 82 adopted by the people in 1912:

> "The act of 1912 derived its authority from the vote of the people on November 5th of that year, and, had such act remained in force until December 8th, 1914, there is no question it could not have been changed by the legislature."

It is therefore clear from the Willard case that this constitutional amendment of 1914 forbidding a legislature to amend or repeal a referendum measure protected all referendum measures adopted prior to 1914 which were still in effect when the constitutional amendment was adopted December 8, 1914. It follows

that as referendum measures prior to the 1914 constitutional amendment and still in effect are protected by it from amendment that a measure such as the pardon and parole measure adopted by the people in November 1914 at the same election that this constitutional amendment was adopted is protected by the amendment. We are therefore of the firm opinion that the amendment of 1914 (Section 6, Part 1, Article IV Ariz. Const.) protects the pardon and parole board law from amendment or repeal by the legislature.

Some reference to Section 6, Part 1, Article 4, of Arizona Constitution is made in case of McBride v. Morby, 260 Pac. 435 (Ariz.) In that case the Court in discussing Section 14 of Part 1, Article 4, of our constitution, said:

> "It (Section 14) does not apply to initiated or referred measures approved by the voters, for subdivision 6 expressly deprives the Legislature of the right to enact measures <u>affecting</u> them."

The only question remaining is: Does Senate Bill No. 21 adopted by the 1939 legislature amend this original pardon and parole board law approved by the people in 1914?

We desire to call particular attention to Section 1285 in the 1914 law above quoted. As before stated under Section 5, Article V of Arizona Constitution the governor has a right to grant commutations, reprieves and pardons subject to only such limitations as may be imposed by law. Section 1285 imposes as the sole limitation on this power that the board of pardons and paroles must first recommend to him such reprieve, commutation or pardon. The power of the people to impose such a limitation on the constitutional right of the governor in the premises was upheld by our Supreme Court in the case of Laird v. Sims, 16 Ariz. 521, 147 Pac. 730. It will be noted that the people by their deliberate enactment have placed no limitations on the governor except that the board of pardons and paroles must first make a recommendation that the action be taken. The last sentence of Section 1285 has particular significance in this case. It provides all applications made for reprieves, commutations, paroles and pardons made to the governor shall be at once transmitted by the governor to the chairman of said board, and the said board shall return the same with its recommendation to the governor. It is the clear intention of this section we believe that applications

for reprieve, commutation or pardon shall be at once presented to the board and it shall immediately proceed to consider the matter and make a recommendation to the governor.

Under the referendum act of the people in 1914 the board of pardons and paroles is created and by said Section 1285 given unlimited power to recommend commutations, paroles, reprieves and pardons to the governor. Our Supreme Court has held that the reference to paroles is not properly in the legislation as the governor has no power of parole and hence Section 1285 applies only to reprieves, commutations and pardons. State v. Superior Court, 30 Ariz. 332, 246 Pac. 1033. We are of the firm opinion that Senate Bill 21 constitutes an amendment of Section 1285 of the referendum measure of 1914 by reason of the fact that it takes away the power of the board of pardons and paroles to recommend commutations until the expiration of the minimum term fixed by the court in the judgment and sentence rendered by it against the person whose release or commutation is sought. Furthermore, Senate Bill 21 amends the section by preventing the board from giving immediate consideration to applications for commutations made to the governor and at once transmitted by him to the board for consideration. A definite portion of the power granted by the people in Section 1285 of the referred measure of 1914 to the board of pardons and paroles to make recommendations is abrogated by this new legislation.

Furthermore, the governor's power is immensely curtailed by Senate Bill 21 in this: The governor under the 1914 law may not grant a commutation unless it is recommended by the board and Senate Bill 21 expressly prohibits the board from making such a recommendation at all until the minimum term fixed by the court has expired. Therefore indirectly the governor's constitutional power is suspended altogether to make any commutation in any case until such minimum term has been served. This certainly affects the powers granted to both the governor and the board under Section 1285 of the 1914 law and makes substantial amendment thereof. Under Section 1280 of the 1914 law, the governor is affirmatively given by the people full power to grant reprieves, commutations and pardons "subject to the regulations provided in this chapter." We respectfully submit that the legislature may not amend the laws to make the governor's power in this respect subject to other regulations and limitations not contained in the 1914 law without the approval of the people.

We furthermore call attention to the last two sentences of subdivision (a) of Senate Bill No. 21, which read:

> "Any member of the board of pardons and paroles who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction imprisoned in the county jail not more than six months, fined not more than one thousand dollars, or both. His office shall also be declared vacant, and he shall forever be ineligible to hold any public office."

In our opinion these provisions make a member of the board of pardons and paroles guilty of a misdemeanor for exercising the powers expressly conferred by the 1914 referendum act adopted by the people. Such provisions also provide a further penalty that the member's office be declared vacant and he shall be forever ineligible to hold any public office if he violates the provisions of the act. It is our opinion that Senate Bill No. 21 certainly does affect the 1914 law adopted by the people and is an amendment thereto as well as an abrogation of a portion thereof.

We therefore are of the opinion that Senate Bill No. 21 by reason of its application to commutations contravenes the provisions of Section 6, Part 1, Article IV of Arizona constitution in that it amends the referendum measure of 1914 creating the board of pardons and paroles and defining its powers and granting the governor unlimited power to make commutations on a recommendation of such board. It is our further opinion that the referendum measure of 1914 may be only amended or repealed by the vote of the people.

It appears to us also that the title of said act is defective in that it is stated to be an act relating to pardons and paroles and imposing conditions with respect thereto. Nothing is stated in the title as to commutations. We are therefore of the opinion that the title of the act violates the provisions of Section 13, Part 2, Article IV of Arizona Constitution in that the body of the act deals with a subject not expressed in the title. The act also embraces a subject other than one expressed in the title in that it imposes certain penal provisions for a violation of the act, while the title to the act makes no reference to a violation of the provisions of said Senate Bill 21.

Trusting this opinion may be of some service in the matter, we are

Very truly yours,

JOE CONWAY,
Attorney General

LIN ORME, JR.,
Assistant Attorney General

EARL ANDERSON,
Special Assistant
Attorney General.