

January 23, 1948

Miss Lorna E. Lockwood,  
Chairman, Judiciary Committee,  
Arizona State House of Representatives,  
Phoenix, Arizona

**LAW LIBRARY**  
**ARIZONA ATTORNEY GENERAL**

Dear Miss Lockwood:

Your committee has requested the opinion of this office on the following question:

"May the state legislature convened in special session, propose an amendment of the Constitution of the state pursuant to Article 21, section 1 of the Arizona Constitution, when the proposal of such amendment or of any amendment has not been included in the Governor's call of the session?"

Article 4, part 2, section 3 of the Constitution provides as follows:

"(Legislative sessions.) - The sessions of the legislature shall be held biennially at the capitol of the state, and except as to the first session thereof, shall commence on the second Monday of January next after the election of members of the legislature. The first session shall convene not less than thirty nor more than sixty days after the admission of the state into the Union. The governor may call a special session whenever in his judgment it is advisable. In calling such special session, the governor shall specify the subjects to be considered at such session, and at such session no laws shall be enacted except such as relate to the subjects mentioned in such call."

We have been unable to find any constitutional provision from another state identical to the language used in the Arizona Constitution. The California Constitution provides that a special session of the legislature shall have "no power to legislate on any subjects other than those specified in the proclamation".

The precise question here involved was raised in the case of People v. Curry, (1900), 62 Pac. 510. The Supreme Court of California decided that the legislature did not have the power to propose a constitutional amendment under such circumstances:

"The attorney general contends that proposing constitutional amendments is not 'to legislate on any subjects other than those specified in the proclamation', and therefore does not fall within this provision of the constitution. It may be admitted that proposing constitutional amendments is not legislation in the sense of passing statutory laws, but it is nevertheless performing a legislative function. It is one of the modes pointed out to initiate the enactment of constitutional law. The performance of such a duty is neither executive nor judicial, but purely legislative".

Furthermore, there is some authority to the effect that the power "to legislate" is synonymous with the power "to enact laws". Travelers' Ins. Co. v. Industrial Commission, 208 Pac. 465 (Colo.); State v. Louisiana Board of Education, 182 So. 676. However, the language of the Arizona Supreme Court in the case of Clements v. Hall, 23 Ariz. 2, 201 Pac. 87, would tend to establish that there is a very real distinction between the power to enact laws and the power to propose amendments to the Constitution. The Arizona Supreme Court said:

"We think the courts all concur in holding, where the question has arisen, that the two branches of the legislature, in proposing amendments to the Constitution, under provisions like ours, are exercising delegated powers and acting as agents in a sense and are not functioning in a legislative capacity. The text on the question in 6 R.C.L. 28, section 19, is as follows:

"The power of the Legislature to initiate changes in the existing organic law is a delegated power, and one which is generally to be strictly construed under the limitations by which it has been conferred. In submitting proposi-

tions for the amendment of the Constitution, the Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the Governor, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and it cannot be extended by the Legislature to any other object, or enlarged beyond these terms".

With respect to the power of the Arizona legislature the rule has been clearly established that the powers of that body are plenary, subject only to the restrictions found in the Constitution, that is, the legislature may act in every case except where the Constitution specifically forbids it to act. Earhart v. Frohmler, 178 Pac. (2d) 436; State ex rel. De Concini v. Sullivan, No. 5058, (not yet reported).

In view of these cases, we believe that the inhibition contained in the Constitution that "no laws shall be enacted except such as relate to the subjects mentioned in such call" must be literally construed, and certainly the Clements case is direct authority for the proposition that the proposal of a constitutional amendment is not the "enactment of a law".

One other feature of the California case is worthy of note. In the case of Hatch v. Stoneman, 6 Pac. 734, a question was presented to the California Supreme Court quite similar to the question presented to the Arizona Supreme Court in the Clements case, and the decision of the California Supreme Court was similar to the holding of the Arizona Supreme Court in the Clements case. The California Supreme Court, in People v. Curry, distinguished the Hatch case by saying that its total holding was that "the proposal of amendments to the Constitution is not made by the legislature as in the ordinary enactment of a law". You will note from the above-quoted portion of the case of People v. Curry that the Supreme Court of California conceded that the act of the legislature in proposing the constitutional amendment is not legislation, but held, nevertheless, that such act is the performance of a legislative function. We would not feel justified in giving our Constitution so strict an interpretation, particularly in view of the Clements case, in which the reasoning

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Jan. 23, 1948  
Page 4

of the California court is rejected.

It is our opinion, therefore, that the legislature may propose amendments to the Constitution while assembled in special session, even though the matter of amendment of the Constitution was not included in the Governor's call.

Very truly yours,

EVO De CONCINI,  
Attorney General

CHAS. D. McCARTY,  
Assistant Attorney General

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