

Opinion No. 67-21

February 9, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Thomas B. Hoover State Representative Legislative-Executive Building
Santa, Fe, New Mexico

QUESTION

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Would it be possible to establish absentee voting in New Mexico by adding a new section to Article VII, of the Constitution, thereby avoiding the stringent provisions of Section 3 thereof?

CONCLUSION

Only if the necessary extraordinary vote requirements can be met.

OPINION

{*26} ANALYSIS

As you know, our Supreme Court in the Case of **Chase v. Lujan**, 48 N.M. 261, 149 P.2d 1003 held that an absentee voting statute enacted by our legislature was unconstitutional -- basically because Article VII, Section 1 of our Constitution regarding qualifications of voters contains the phrase "offers to vote." Our Court said this provision contemplates personal presence of the voters at the polling place.

Actually the case was the third on the subject, the others being **Thompson v. Scheier**, 40 N.M. 199, 57 P.2d 293 and **Baca v. Ortiz**, 40 N.M. 435, 61 P.2d 320.

The legislature, recognizing that New Mexico is one of the few states, if not the only one, that does not have an absentee ballot (except for Federal offices) attempted to alleviate this situation {*27} by proposing constitutional amendments to authorize absentee voting in 1955, 1957, 1961 and 1963.

Each of these proposed amendments was defeated for the reason you mentioned in your question, i.e., the highly restrictive amendment procedure for changing the constitutional elective franchise provisions.

The legislature decided to try **by statute** once again and enacted another absentee voting law (Laws 1955, Chapter 256). Again the question came before the Supreme

Court in **State v. Thomas**, 62 N.M. 103, 305 P.2d 376 (Dec. 1956) wherein the decision stated:

"We are now, for the third time asked to reverse our holding in the above cited cases, to the extent each holds that the constitution, Article VII, Section 1, requires the personal presence at the polls of an otherwise qualified elector when he offers to vote, and to adopt the dissenting opinions in Chase v. Lujan, supra. This we decline to do. After a careful review of the above cases, in which every material question here presented is exhaustively discussed, we are still of the same opinion, and hold that Chapter 256, Laws of 1955 is unconstitutional."

Now we turn to the crux of your specific question. If implicit therein is the proposition that a simple majority of the voters voting on the issue could avoid the stringent provisions as to amending Article VII, Section 1, the answer is no.

The reason is not singular. Article VII, Section 3, states that the right to vote as provided in Article VII, Section 1 (and this is the provision that the Court has consistently said must meet the extraordinary vote requirement) states that the provisions of Article VII, Section 1 "shall never be amended except upon a vote of the people of this state in an election in which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment."

This alone is most difficult to accomplish as past history proves. But there is also Article XIX, Section 1 of our Constitution which states as follows in the last proviso thereto:

"That no amendment shall apply to or affect the provisions of **Section one and three of article VII hereof** on elective franchise. . . **unless it be proposed by vote of three-fourths of the members elected to each house** and be ratified by a vote of the people of this state in an election **at which at least three fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.**" (Emphasis added).

To further complicate the matter, Article XIX, Section 5 provides that the above provision "shall not be changed, altered, or abrogated in any manner except through a general convention called to revise this constitution as herein provided."

So we see that an amendment of the extraordinary vote requirement to amend the elective franchise provisions (Article VII, Sections 1 and 3 and Article XIX, Sections 1 and 5) not only require the extraordinary vote requirement, but also that Article XIX, Section 1 requires an extraordinary vote requirement by the legislature to even propose it.

There is considerable material which will be of interest to you in this matter in the 1964 Report of the Constitutional Revision Commission to the members of the Twenty-

Seventh New Mexico Legislature, particularly the articles and comments on pages 44 and 52 thereof.

By: Oliver E. Payne

Deputy Attorney General