

## Opinion No. 42-4043

March 13, 1942

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. Guy Shepard Democratic State Chairman Santa Fe, New Mexico

{\*168} Receipt is acknowledged of your letter dated March 1, 1942, requesting an opinion from this office relative to the constitutionality of Chapter 194, Laws of 1941. I am also in receipt of a request from Mr. Joe B. Garcia, State Senator from Los Lunas, relative to the same law. Due to the fact that you, as State Chairman are in a position to give the opinion wide publicity in each county of the state, I am addressing the opinion to you and sending a copy to Mr. Garcia.

Chapter 194, Laws of 1941, which amended Section 33-4203 of the 1929 Compilation by providing that each of the three county commissioners shall be nominated at the primary election by the qualified electors of the district wherein such commissioner resides and except for this amendment the previous law remained unchanged. If the law, as amended, is valid it will mean that additional expense will be involved in holding primary elections due to the fact that separate ballots will be required for each commissioner's district, and there will be additional confusion relative to this law due to the fact that the present commissioner's districts in some cases do not follow precinct lines, and a redistricting may be necessary in order that precincts would not be split resulting in a part of the residents in a precinct being required to vote in one commissioner's district and the balance of the residents being required to vote in another district, When perhaps only one set of election officials can legally be appointed for such precinct.

A commissioner's district is not a political sub-division such as is contemplated under Article V, Section 13 of the Constitution, and such a district can only be compared with a ward within a municipality, as to which the Supreme Court has held that the same is not a political subdivision. *Gibbany vs. Ford*, 29 N.M. 621. If this be true, since the next smallest political subdivision is the county and all three county commissioners are county officers rather than officers of the commissioner's district, then it is possible for all three commissioners to reside in one commissioner's district and {\*169} be candidates as commissioners from any of the three districts designated according to their individual desires. In the event that all three commissioners should reside in one commissioner's district, under Chapter 194, Laws of 1941, only the qualified electors of the districts in which said commissioners reside would be eligible to vote in the primary election for such commissioners, and there is thus the possibility that electors in two out of three commissioner's districts would be completely disfranchised insofar as voting in the primary election for county commissioners is concerned. Article VII, Section 1 of the State Constitution enumerates the qualifications a person must have in order to be a qualified elector, and said section states that persons having such qualification "shall be qualified to vote at **all elections** for public officers."

The Legislature is without authority to restrict or enlarge the qualifications set forth in the Constitution regarding voters at all elections. Klutz vs. Jones, 20 N.M. 230, 148 Pac. 494. If the term "all elections" includes or embraces primary elections, then it follows that the Legislature cannot enlarge or restrict the qualifications of voters in a primary election any more than the same may be done insofar as a general election is concerned.

In construing the provisions of Section 1, Article VII, requiring school elections to be held at different times from other elections, the Supreme Court has stated that the term "other elections" is all embracing and is broad enough to include "all elections" or "any other election". Roswell Municipal School District No. 1 vs. Patton, 40 N.M. 280 58 P. (2d) 1192. Thus, we may safely assume that the Supreme Court will, if called upon, construe the term "all elections" as being broad enough to cover primary elections, and if that is the case, the Legislature has no authority to restrict the right of any or all voters in a county in the exercise of that right in connection with voting in a primary election for county officers including the three county commissioners.

The authorities in other states regarding the question whether elections in general include primary elections are somewhat divided. The following cases are more or less uniform in holding that constitutional provisions pertaining to elections are broad enough to embrace primary elections, Spier vs. Baker, 120 Cal. 370, 52 Pac. 659, 41 L.R.A. 196; People vs. Deneen, 247 Ill. 289, 93 N. E. 437; State vs. Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L.R.A. 170; Heath vs. Rotherham, 79 N.M.L. 22, 77 A. 520; Leonard vs. Commonwealth, 112 Pa. 607, 4 A. 220; Anderson vs. Ashe, 62 Tex. C. A. 262, 130 S. W. 1044; People vs. Board of Election Commissioners, 221 Ill. 9, 77 N. E. 321; Johnson vs. Grand Forks County, 16 N. D. 353, 113 N. W. 1071.

To the contrary are such cases as State vs. Johnson, 87 Minn. 221, 91 N. W. 604, 840; Norton vs. Letton, 271 Ky. 353, 111 S. W. (2d) 1053, together with other cases from Indiana, Washington, Tennessee, Oklahoma, North Dakota, New York, Nevada, Missouri.

It is apparent that authorities in other states are about evenly divided. However, the Supreme Court in this state has already indicated, as above set forth, the probable trend of its construction on this matter should the same be brought before the court in a proper case, and in view of these authorities, I am of the opinion that Chapter 194, Laws of 1941, is unconstitutional and as a result thereof that the original law which this chapter attempted to amend is still in full force and effect, and that county commissioners from each of the commissioners' districts should still be nominated at the primary election as well as elected in the general election by the qualified electors of the entire county.

Trusting the same will satisfactorily {\*170} answer your inquiries, I am,

By C. C. McCULLOH,

Asst. Atty. General