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FEB 28 1973

cc: Files  
Mrs. Gauf ✓  
Mr. Ulman  
Mr. Siegel

*Picked up by White*  
MEMORANDUM FOR THE HONORABLE DAVID G. WILSON  
Associate Counsel to the President  
*Messing*  
*5:30 pm 2/28/73*

Re: Rescission of Ratification of Constitutional  
Amendment by a State Prior to its Adoption

This is in response to your telephone inquiry as to the status of the question whether a State which ratifies an amendment may thereafter rescind its ratification.

Our information on the matter is as follows:

1. A State cannot rescind its ratification after the amendment has been adopted through ratification by the legislatures of "three fourths of the several States," as required by Article V of the Constitution.

2. As to the question whether a State may rescind its ratification prior to adoption of the amendment, there is no Supreme Court decision. Nor are we aware that this Department or this office has ever taken a formal position on the question.

3. In Wise v. Chandler, 270 Ky. 1 (1937), it was held a State may not change its action rejecting an amendment to approval. This decision has been referred to as one "which has received small support." Orfield, Amending the Federal Constitution (1942), 70.

A petition for certiorari was filed in the Supreme Court to review this decision (upon reaffirmance by the Kentucky Court of Appeals, 271 Ky. 252). After granting the petition for certiorari, the Supreme Court dismissed the case on a jurisdictional ground without reaching the merits. Chandler v. Wise, 307 U.S. 474 (1939).

4. In Coleman v. Miller, 146 Kan. 390 (1937), the question was whether a State legislature which has rejected an amendment may later reconsider its action and give its approval. The Supreme Court of Kansas held that it could. But in the course of its opinion it stated that "when a proposed amendment has once been ratified, the power to act on the proposed amendment ceases to exist." 146 Kan. at 403. 1/ The Supreme Court on review refused to pass on the merits of the question as to whether a State's rejection of an amendment barred subsequent ratification, taking the position that it was a political question which was not for the judicial branch to decide. Coleman v. Miller, 307 U.S. 433 (1939). In this connection, the Court said (Id., 450):

"\* \* \* the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."

The Solicitor General in his brief for the United States, Amicus Curiae, submitted in the Coleman and Wise cases, stated the following (p. 26):

"It is perhaps enough to say that distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications." 2/

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1/ Since the question as to whether a State which ratifies an amendment may thereafter rescind its ratification was not before the Kansas court, it may be argued that what it said about this question should be regarded as dicta.

2/ In support of this statement the Solicitor General's brief cites a lengthy footnote, which is attached hereto. It may be noted, as indicated in the footnote, that there are contrary views.

In a note in the Boston University Law Review (18 Boston U. L. Rev. 169, 180 fn. 37), it is stated that "Attorney General W. D. Mitchell believed either section (sic) [that is, ratification or rejection] should be revocable, Methods of Amending the Constitution, 25 Lawyer and Banker 265 (1932)." <sup>3/</sup> Orfield points out: "Not to allow reversal of an acceptance may cause a cautious legislature not to act." Orfield, op. cit., supra, at 72. See also Rottschaefer, Constitutional Law (1939), 394-395.

5. The Ervin bill in the 91st Congress, S. 623, section 13, provided that a State may rescind its ratification before the amendment is adopted. This Department, in reporting on the bill, made no comment on this provision. The Senate passed S. 623, but the House took no action on the bill.

Leon Ulman  
Deputy Assistant Attorney General  
Office of Legal Counsel

Attachment

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<sup>3/</sup> This article is not available in our library. A copy may be obtained from the Library of Congress.

## A P P E N D I X

<sup>12</sup> See the communications from George Ticknor Curtis, Senator Reverdy Johnson of Maryland, and William O'Connor of New York, included in the address of C. H. Winfield in the New Jersey Senate, February 19, 1868, in support of the resolution to withdraw the assent of New Jersey to the proposed Fourteenth Amendment (privately printed, Jersey City, 1868). See also New Jersey Laws 1868, p. 1225; Congressional Globe, 40th Cong., 2d Sess., p. 878. Senator Winfield and Mr. O'Connor argued specifically that the power to withdraw a ratification was necessary to prevent adoption of an outdated amendment by the supplementary action of a few States.

New Jersey and Ohio purported to withdraw their ratifications of the Fourteenth Amendment (see p. 15, *supra*), and New York its ratification of the Fifteenth (16 Stat. 1181). The inclusion of these States, particularly the first two, in the list of ratifying States is, of course, a consideration weighing against the validity of the withdrawals; but, unlike the case of the States which first rejected and then ratified the Fourteenth Amendment, the exclusion of these States would not deprive the amendments of the necessary three-fourths majority, though in respect of the Fourteenth Amendment it would move forward the date of adoption. See Note, 30 American Law Review 894.

The following writers take the view that a ratification cannot be rescinded: Jameson, pp. 630-633; Ames, p. 229; Burdick, pp. 43-44; Watson, p. 1318; Willoughby, pp. 593-594; Dodd, 30 Yale Law Journal at 347; Garrett, 7 Tennessee Law Review at 294; Miller, 60 American Law Review at 182; Wheeler, 20 Case and Comment at 548; Compare Orfield, 25 Illinois Law Review at 439 (all *supra*, p. 21); See also Cockerell, J., dissenting in *Crawford v. Gilchrist*, 64 Fla. 41, 63-64.