

## Opinion No. 69-82

July 30, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

**TO:** John B. Irick, Chairman, Constitutional Convention Steering Committee, 334 State Capitol, Santa Fe, New Mexico

### QUESTIONS

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1. Is the Constitutional Convention limited to the sixty day session provided by Section 15, Chapter 134, Laws of 1969?
2. If the answer to question 1 is yes, how may the sixty days be counted?
3. Is Section 17, Chapter 123, Laws of 1969 controlling insofar as it prescribes the priority of business to be conducted by the convention upon the convening of the convention?

#### CONCLUSIONS

1. No, see analysis
2. See analysis.
3. No, see analysis.

### OPINION

#### {\*128} ANALYSIS

Section 15, Chapter 134, Laws of 1969 provides that

The constitutional convention shall convene at the capitol in Santa Fe, New Mexico at twelve o'clock noon on August 5, 1969 and shall continue in session for a period not to exceed sixty calendar days.

Roger Sherman Hoar in his treatise Constitutional Conventions, Their Nature Powers and Limitations, pointed out that the weight of authority with respect to conventions authorized by the constitution is that the legislature cannot, or at least ought not to be permitted to, restrict the convention in advance. More simply stated a constitutional convention has full control of all its proceedings. See Hoar, **Constitutional**

**Conventions, Their Nature Powers and Limitations**, 103, 179 (1917). The basic reason for this rule is that the convention is responsible to the people of the state directly and not to the legislature. If the convention fails to live up to its responsibilities, its work will be for naught as the people may reject any or all of its work. Furthermore, it is argued that a convention is apt to be equally as competent to exercise the limited powers granted to them as is the legislature to instruct the convention as to what it shall or shall not do or how it shall do it. A constitutional convention is less likely to abuse its powers in the drafting and submission of a constitution than is the legislature in placing limitations upon the convention. See also **Loomis v. Jackson**, 6 W.Va. 613, 708 (1873).

More recent authorities have tended to grant legislatures some power to control constitutional conventions. See, 158 ALR 512. However, a review of these authorities will reveal the presence of one of the two factors not present in New Mexico.

The first such factor appears to be resolved around what the constitution provides in the way of powers of the legislature and the convention. In **Wells v. Bain**, 75 Pa. 39, 15 Am. R. 263 (1873), the Supreme Court of Pennsylvania considered the power of the legislature to restrict the Pennsylvania Constitutional Convention under a constitution which contained {\*129} no provision for its revision by way of a constitutional convention. The Supreme Court of Pennsylvania held that the Pennsylvania legislature under such circumstances had the power to provide the method of voting for or against the constitution submitted to the people. Since the Pennsylvania Convention was wholly a legislative rather than a constitutional creation, the convention was responsible to its creator, the legislature.

It is interesting to note that in **Wells v. Bain**, supra, the actual question was whether the convention had the power to pass an ordinance, having the present force of law, and the instant power to proclaim a constitution binding without ratification by the people. See **Wood's Appeal**, 75 Pa. 59, 69 (1874). The Pennsylvania Convention erroneously believed that it was the sovereign and that it was responsible to no one, not even the people.

The other factor, present in some states which allow the legislature to impose restrictions on a constitutional convention, is whether the law which limits the powers of a constitutional convention has been approved directly or indirectly by the people. The law may be approved indirectly by the people if it is enacted before the vote of the people for the calling of a constitutional convention on the theory that if the law was enacted prior to the calling, it is presumed that the people voted for the convention under the limitations prescribed by the legislature. See **Cummings v. Beeler**, 223 S.W.2d 913, 921 (Tenn. 1949) and **Re: Opinion to Governor**, 55 R.I. 56, 178 A. 433 (1935).

Neither of the above factors exist in New Mexico. First of all Article XIX, Section 2 of the New Mexico Constitution provides for the calling of a constitutional convention as follows:

Whenever, during the first twenty-five years after the adoption of this Constitution, the legislature, by a threefourths vote of the members elected to each house, or, after the expiration of said period of twenty-five years, by a two-thirds vote of the members elected to each house, shall deem it necessary to call a convention to revise or amend this Constitution, they shall submit the question of calling such convention to the electors at the next general election and if a majority of all the electors voting on such question at said election in the state shall vote in favor of calling a convention **the legislature shall, at the next session, provide by law for calling the same.** Such convention shall consist of at least as many delegates as there are members of the house of representatives. The Constitution adopted by such convention shall have no validity until it has been submitted to and ratified by the people. (As amended November 7, 1911.) (Emphasis added)

Thus the constitution is not the creation of the legislature as in **Wells v. Bain**, supra. Similarly, since Chapter 134, Laws of 1969 was enacted pursuant to the provisions of Article XIX, Section 2 of the New Mexico Constitution, it was enacted subsequent to the vote of the people in favor of the convention. Thus it cannot be argued that the people directly or indirectly ratified the restrictions placed on the convention by Chapter 134, Laws of 1969. From the provisions of Article XIX, Section 2, it is clear that legislative authority over the convention is limited to providing "for calling the same."

From the foregoing, it is the opinion of this office that certain restrictions placed on the Constitutional Convention by the enactment of Chapter 134, Laws of 1969 by the First Session of the Twenty-Ninth Legislature are not binding on the Convention. In reaching this conclusion we look to the New Mexico Supreme Court decision in **Hutcheson v. Gonzales**, 41 N.M. 474, 71 P.2d 140 (1937) which seems to adopt the rationale of Roger Hoar as set forth above. We do not wish to infer by this conclusion that the restrictions placed on the convention by Chapter 134, Laws of 1969 are in any way unreasonable or should not be followed. We merely conclude that some of the restrictions need not be considered as binding by the convention. The question, remains what restrictions in Chapter 134, Laws of 1969 are not binding.

First of all we were asked if the Constitutional Convention is limited to the sixty day session provided by Section 15, Chapter 134, Laws of 1969. This question was answered by Chief Justice Grant of the Michigan Supreme Court in **Carton v. Secretary of State**, 151 Mich. Rep. 337, 115 N.W. 429 (1908) as follows:

The Constitution clearly leaves this convention free from, and untrammelled by, any other department of government. The legislature cannot fix the time the convention may continue in session.

The Michigan Supreme Court pointed out that the restriction of time placed on the convention was the amount of compensation provided for the delegates. Since it is better reasoned, and almost unanimous, view at this time that a convention may not appropriate itself money, (See *Hutcheson v. Gonzales*, supra.), we must conclude that the only restriction of time placed on the New Mexico Constitutional Convention results

from a limitation on money. The legislature appropriated \$ 250,000 to the Constitutional Convention and various other sums to the secretary of state to conduct elections incidental to the calling of the convention and the approval or rejection of its work. These appropriations will revert at the end of the fifty-eighth fiscal year (June 30, 1970) if not spent. The legislature made it quite clear that the convention could not pledge the good faith or credit of the State of New Mexico beyond the \$ 250,000 appropriation by stating in Section 29, Chapter 134, Laws of 1969 that this appropriation constitutes the total amount of public money authorized for use by the Constitutional convention.

It is interesting to note that in **Carton v. Secretary of State**, supra, a majority of the Supreme Court of Michigan could not agree on whether a constitutional convention has the authority to fix a date for submission of a proposed revision to the people other than the one fixed by the legislature. Id. at 348. Because we find no controlling authority on this issue, we recommend that proposed amendments be submitted to the people pursuant to the provisions of Chapter 134, Laws of 1969.

From the foregoing our answer to question one is the Constitutional Convention is not limited to the sixty day session provided for in Section 15, Chapter 134, Laws of 1969, other than by considerations of compensation to its members for an additional days spent in their work. Question two is therefore moot. However, because the Convention may wish to follow the provisions of Section 15, we will briefly discuss the rules of statutory construction relevant to construing the sixty day limitation.

Two legislative rules of statutory construction should be mentioned at this point when construing the above statutory provision. The first rule is set forth in Section 1-2-2 H N.M.S.A., 1953 Compilation (Laws 1969, ch. 132, § 1), as follows:

In computing the time that a legislative session shall end, the word "day" shall mean a twenty-four hour period from 12:00 o'clock noon on one calendar day to 12:00 o'clock noon on the next.

This rule is limited to the computation of time for legislative session and therefore does not apply when construing Section 15, Chapter 134, Laws of 1969.

{\*131} The second legislative rule of statutory construction relevant here is found in Section 1-2-2 G, N.M.S.A., 1953 Compilation (Laws 1969, ch. 132, § 1), which provides as follows:

In computing time the first day shall be excluded and the last included, unless the last falls on Sunday, in which case, the time prescribed shall be extended to include the whole of the following Monday.

This legislative rule of statutory construction obviously assumes that in computing periods of time set forth in legislative enactments, it is intended that days be counted consecutively. We suggest that this is a proper guideline for the Convention.

Last of all, in construing Section 15, Chapter 134, Laws of 1969, it should be remembered that "calendar day" is normally defined as the space of time that elapses between two successive midnights. **Booker v. Chief Engineer**, 324 Mass. 264, 85 N.E.2d 766, 767 (1949). From the foregoing rules of statutory construction it appears that the constitutional convention would adjourn at midnight October 4, 1969 if Section 15, Chapter 134, Laws of 1969 is to be followed.

Finally, we are asked if Section 17, Chapter 134, Laws of 1969 is controlling insofar as it prescribes the priority of business to be conducted by the convention. Section 17 A, Chapter 134, Laws of 1969 provides in part as follows: "The convention shall be called to order by the governor and shall immediately proceed to elect a president and other officers of the convention." While we believe this to be an orderly way to proceed, we must conclude from the authorities set forth above that the convention need not follow the above quoted portion of Section 17 A. If the convention proceeds in a manner other than that prescribed by the legislature and fails to accomplish its desired goal within the time, i.e. monetary, limitations placed on it, its responsibility is to the people of this State and not to the legislature.