

OPINION
70-67

August 31, 1970(OPINION)

Mr. R. J. Bloedau
Republican Chairman of the
38th Legislative District
Mott, ND

RE: Constitution - Convention - Legislators May Be Delegates

This is in response to your request for an opinion on the following questions:

1. Are members of the Forty-first Legislative Assembly eligible to be elected or to serve in the proposed constitutional convention?
2. Could senators and representatives elected to serve in the Forty-second Session which will convene in January be eligible delegates to the proposed constitutional convention?

You call our attention to Section 37 and 39 of the North Dakota Century Code, obviously with the purview that these provisions apply to the foregoing questions. They provide as follows:

"Section 37. No judge or clerk of any court, secretary of state, attorney general, register of deeds, sheriff or person holding any office of profit under this state, except in the militia or the office of attorney at law, notary public or justice of the peace, and no person holding any office of profit or honor under any foreign government, or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of \$300, shall hold any office in either branch of the legislative assembly or become a member thereof?"

"Section 39. No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected."

We recognize that the questions you submitted have statewide interest and will be helpful and informative, and for that reason we will honor the request for an opinion.

The Legislature, in addition to submitting to the Electorate of this state the question of whether or not a constitutional convention shall be called, also provided, in Chapter 462 of the 1969 Session Laws, the mechanics for the constitutional convention if the first question is favorably acted upon by the Electorate.

The North Dakota Supreme Court in *State v. Dahl*, 6 N.D. 81, 682 N.W. 418, held that the Legislature has the inherent power to submit the question of calling a constitutional convention to the people.

It is a recognized principle of law succinctly set out in Cooley's Constitutional Limitations, 8th edition, page 354, et. seq., that the Legislature has plenary powers except as limited by the State Constitution or the Federal Constitution. The same authority also sets forth that the people may amend their constitution and revise it within the limitations of the federal constitution, of which one is that the government or constitution of the state must always be a republican form of government as guaranteed under the Federal Constitution.

In the case of *Blount v. Board of Supervisors of Elections*, 230 A.2d. 639 (1967 Maryland) it was held that the Legislature had general power to provide the mechanics of holding a constitutional convention including residency qualifications of the delegates. This case involved residency qualifications. The Court observed that the State Constitution was silent on this subject and no conflict existed; therefore, the only real question remained whether or not the residency qualifications were reasonable.

We would likewise observe that the North Dakota Constitution is silent on both the constitutional convention and the qualifications of its delegates. By merely projecting the legal concepts mentioned earlier, it can be concluded that the Legislature has the authority to prescribe the qualifications of the delegates to the convention. The test would be one of reasonableness.

While we recognize that the authority of changing or revising the Constitution reposes in the people of this state; nevertheless, it becomes physically impossible for the people themselves to determine where and when to meet. Agents are designated for such purposes. The delegates are, in fact, agents of the people. The Legislature, in Section 2 of Chapter 462 set forth the qualifications of the delegates and provided that a delegate shall possess the same qualifications required by law for a member of the House of Representatives and shall be a qualified elector of the district from which he is elected. The qualifications of a representative are set forth in section 34 of the North Dakota Constitution which provides as follows:

"Section 34. No person shall be a representative who is not a qualified elector in the district from which he may be chosen, and who shall not have attained the age of twenty-one years, and have been a resident of the state or territory for two years next preceding his election."

Section 37 is a limiting provision or a disqualifying provision, rather than a qualification provision. Similarly, section 39 is one which relates or prohibits a member of the Legislative Assembly from accepting certain offices or employment. We do not believe that the Legislature meant to include all of the prohibitions and limitations and disqualifying provisions of the Constitution when it provided that the delegates to the constitutional convention shall possess the same qualifications required by law for a member of the House of Representatives. We must assume that the Legislature had in mind those qualifications set out in Section 34, and none other.

As pointed our earlier, the North Dakota Constitution is silent as to constitutional conventions, and no reference is made to delegates to such convention.

Delegates to a convention are elected for the purpose of framing organic laws for the body politic. In *State v. Doyle*, 70 So. 322 (Louisiana 1916) the Court said that "such delegates are agents of the people, chosen to represent their constituents for a particular public purpose. They have never been styled officers, and hold no office in the sense of the Constitution.

A constitutional convention is not a coordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and

propose amendments which have no governing force as long as they remain propositions."
(Underscoring ours)

In *Chenault v. Carter* 322 S.W. 2d., 623 (Kentucky 1960), the Court said:

"Delegates to the convention are the agents, not of the Legislature, but of the people themselves. As a principal may limit the authority of his agent, so may the sovereign people of the state limit the authority of their delegates."

It thus becomes clear that a delegate to a constitutional convention does not exercise a governmental function of any of the branches of the government. He is, in fact, a delegate to prepare proposals for consideration by his principal, the people of this state.

In *Baker v. Moorhead*, 174 N.W. 430, (Nebraska 1919) page 432, the Court had the following observation to make:

"We are also of opinion that members of the constitutional convention are not officers intended to be embraced in the provisions of section 13 (which contains similar provisions found in North Dakota sections 37 and 39). They are not constitutional officers in a strict sense; they are officers who create a constitution, rather than officers who are created by the constitution. Section 13, read in connection with section 14, which has to do with terms of office, would indicate that those provisions have to do only with officers elected who have fixed terms of office, and should be elected at an election called with reference to the time of the beginning of their terms. The members of the convention have no fixed term of office, and by the Constitution itself the convention may be called at any time within three months after the election of its members."

"The drafting of a new Constitution is likely to enlist the attention of the entire people as much as or more than any proposition that would come before them. There are good reasons why the members should be elected at an election, freed from party politics, freed from what might be the sinister influences of other candidacies, and freed from anything that might distract the attention of the voter from those qualifications needed in a member who is to perform so important a function."

Here the Court fully recognizes that delegates to a constitutional convention are not officers in the ordinary meaning of such term.

Very few cases have dealt with this question directly. However, in the case of *Board of Supervisors of Election v. Attorney General*, 229 A. 2d. 388, the Court had a similar question under consideration and on page 400 said:

"Certainly a delegate to a constitutional convention performs a highly important public duty of great dignity. However, the position he holds was not, under the principles which we see as controlling, one created by law as the term law is used in the definition."

Significantly the Court held that members of the Legislature were not barred from being a delegate to the Constitutional Convention. The constitutional provisions were substantially the same as those under consideration here. It makes the further observation that a delegate to a convention is like the male honey bee, who mates and dies.

The Court quoted from Maurice Maeterlinck on the life of the bee, 1964 edition page 194 as follows: "The Unique kiss of an instant that shall wed him to death no less than to happiness." The Court continues to characterize a delegate with a male honey bee to the extent that he forms his creative duty and then ceases to exist as a public functionary since the position of the delegate to the convention of which he is a member ends with the convention. The Court further observes that the idea of continuity contemplated by the ordinary test for an office is lacking in the case of a delegate to a convention.

The same case further points out, which we consider to be of great importance, that a delegate does not exercise any part of sovereign power of the state, for it is commonly delegated by the people through their constitution to the executive, legislative or judicial branches of government. The sovereign power the delegate exercises is the power retained by the people and committed to him as a delegate to help create a new constitution.

As pointed out earlier, the Court in *State v. Doyle*, said a constitutional convention is not a coordinate branch of government. The delegate to a constitutional convention exercises no sovereign power but merely devotes his attention to a proposal (amendments or revisions to the existing constitution), which will remain nothing but a proposal until affirmatively approved by the people, his principal. Delegates are officers who create a constitution for approval rather than officers who are created by the constitution.

We must assume that the legislature did not wish to impose any limitations or disqualifying factors because of position, economic status, political beliefs, or other similarly related factors or combinations thereof. We must further assume that the constitutional convention shall be representative of all the people of the State of North Dakota without disqualifying one group or the other or giving a preference to one group or the other. Such concept is in complete harmony with the principles of our government which were succinctly stated by Abraham Lincoln, when he said "It is government of, by, and for the people."

It is therefore our opinion in direct response to your first question that members of the Forty-first Legislative Assembly are eligible to be elected and to serve as delegates in the proposed constitutional convention if such convention is approved the Electorate.

It is our further opinion that senators and representatives elected to serve in the Forty-second Session to convene in January of 1971 will be eligible to serve as delegates to the proposed constitutional convention.

The answers to the foregoing questions are made on supposition that such members of the Legislative Assembly are duly elected as provided for in Chapter 462 of the 1969 Session Laws.

It is our further opinion that sections 37 and 39 of the North Dakota Constitution do not apply to delegates to the Constitutional Convention.

Helgi Johanneson
Attorney General