FOLDER NO.

180/

204.3

Constitutional Convention
Committee on Ordinances and
Transition
December 14, 1955

R. J. McNealy, Esq.
Chairman of the Committee
on Ordinances and Transition

Dear Sir:

MANNER OF ADMISSION

Under provisions of the federal constitution new states may be admitted by Congress subject to certain prohibitions which may tend to impair the existance of any other state. It is usually left to the discretion of Congress to determine the circumstances under which a state shall be admitted and the steps to be taken by the people of the prospective state to secure such admission.

See Anderson v. Tyree as reported in 42 Pacific Reporter, page 201. This action arose from a Writ of Mandamus directing the appelent as a registrar of voters with respect to the November election of 1895 which was to be held for the ratification or the rejection of the constitution and for the election of State officers for the proposed State of Utah. The question also brought up was to test the right of women to vote in the 1895 election. P. 204.

> "The contention that congress cannot define the qualifications of voters for the first state officers, elected conditionally, while the territorial condition continues, because no such power exists as to the states, is clearly erroneous. It is too much like comparing the authority of a parent before and after the majority of his child. While the territorial condition continues, whatever political power its people exercise must be by authority of congress. In all governmental affairs, whatever the people of a territory do must be authorized, and they must abstain from

doing what is forbidden. Their elections, even on subjects relating to statehood, are territorial elections, and their voters are the electorate of the territory. In the compact for statehood, the people of the territory act for themselves and their successors, the people of the future state, and the latter are bound by the conditions accepted by the former; and it seems like stumbling on a small obstacle to say the people of the territory may bind the state forever to all the conditions and limitations to preserve the authority of the general government, and cannot, by the acceptance of a permission to elect the first state officers in advance of statehood, bind the state to this temporary and comparatively unimportant thing. If this cannot be done, the result is not that the people of the territory are sovereign as to this, but that the state will not be bound."

Under all circumstances it seems to be the unanimity of the authorities that it is absolutely necessary that Congress expresses its assent before a state can enter the Union and that a state does not come into existance until such assent is given.

This has been very fully covered in the case of People v. Brittle, 2 Nebraska Reports, p. 138; and has been cited in numerous jurisdictions. The case specifically held that the people of the territory cannot confer statehood upon themselves by the mere adoption of the proposed constitution.

There was some early authority which held to the effect that when a State was admitted to the union on the approval of Congress its constitution took effect from the date of ratification by the people (Scott v. Detroit Young Men's Society 1 Douglas, Page 119 Court of Michigan). The later cases however held that such principle was not applicable to Territories which are deemed to be under control of Congress until their admission to the Union and

that the time of taking effect of their constitution is ascertained from the construction of the enabling act.

Some authorities however hold that the constitution becomes operative upon the adoption of same by the people of the territory.

The Court of Appeals of Missouri in July 1910 has in unequivocal language made a distinction between constitutions taking effect upon ratification by the people as applicable to states and as applicable to territories. The case arose incident to the fellow servant rule governing personal injury actions. The Court stating on page 375 summarized its findings as follows: Farrar v. St. Louis & San Francisco Railroad, 130 Southwestern Reporter, p. 374.

> "The Constitution was adopted on September 27, 1907, at a general election held by the people for that purpose. The question is as to when the Constitution became effective, and it is to be determined by the enabling act of Congress (Act June 16, 1906, c. 3335, 34 Stat. 267), which provides that, in case a Constitution and state government shall be formed in compliance with the provisions of such act, the convention forming the same shall provide by ordinance for submitting such Constitution to the people of such proposed state for ratification or rejection; and it was further provided in said enabling act that; "If the Constitution and government of said proposed state are republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of such election and the statements of the votes cast thereon and a copy of said Constitution, articles, propositions and ordinances, to issue his proclamation announcing the result of said election, and thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States."

"The accident therefore occurred at a date between the adoption of the Constitution and the date of the proclamation of the President, and the proposition does not seem open for difference of view that under the express terms of the enabling act, when the President issued his proclamation announcing the result of the vote and adoption of the Constitution, the proposed state of Oklahoma was admitted as a member of the Union of states, and that the territories then, and not until then, passed into the condition of statehood.

The general rule that Constitutions and constitutional amendments take effect upon their ratification by the people, unless otherwise provided in the instrument itself or the resolutions submitting them, applies to sovereign states possessing within themselves the power to make and unmake Constitutions, but can have no application to territories which, under our system of government, do not possess the power within themselves to initiate a separate form of government. The territories are under the absolute control of Congress, and can only become states and form for themselves laws or Constitutions in the manner pointed out in the enabling acts. Hence, the accident having happened on the 2d day of November, 1907, and the President's proclamation having been issued under the enabling act, on November 17, 1907, the defendant's liability is to be determined by the law in force in the Indian Territory at the time of the accident."

MANDAMUS AND EXTRAORDINARY WRITS

A case was instituted for a declaratory judgment incident to a Writ in Tennessee where Cummings, as Secretary of State, applied to the court for a declaratory judgment prior to enjoining the state Comptroller and the County Election Commission against releasing and paying funds for a constitutional convention to be held for the revision of the state constitution. The court in passing upon the question inter alia held as follows: (223 Southwest (2) Pg. 913; Tennessee Superior Court) Page 918

"There is no question in our mind but that if the Secretary of State had refused to carry out the requirements of the Act in question that then mandamus would lie to require him to submit to a vote of the people the question of the proposed amendments proposed by the Legislature. What can be the difference when the Secretary of State wanting to carry out his duties filed a suit himself against the necessary parties who have questioned the Act? As we view it the situation must meet the same answer provided the requisites hereinbefore set out are met in the proceeding."

Pg. 922 and 923

"The Legislature is merely the channel through which the proposed constitutional amendments are proposed for the peoples' consideration. The Legislature does not call the convention. The people call the convention. The controlling element in a situation of the kind before us, that is, when the Legislature proposes that the people have a right to vote on certain proposed propositions in amending their Constitution, is the popular approval of the legislative proposal. The legislative proposal becomes controlling only when it has the approval of the people by a majority vote. In State ex rel. McCready v. Hunt, 1834, 2 Hill, law, S.C., 1, 223 the court said: "It is true, the legislature cannot limit the convention; but if the people elect them for the purpose of doing a specific act or duty pointed out by the act of the legislature, the act would define their powers. For the people elect in reference to that and nothing else."

And as said in the case of Wood's Appeal 75 Pa.59, at page 72: "The right of the people to restrain their delegates by law cannot be denied, unless the power to call a convention by law, and the right of self protection, be also denied. It is, therefore, the right of the people and not of the legislature to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval. *** To estop them from their right to accept or reject the work of the convention, there must be an evident channel pointed out through which their power passed to the convention to ordain at pleasure a constitution or binding ordinances."

Daniel Webster in his argument before the Supreme Court of the United States in the case of Luther v. Borden, 7 How. 1, 12 L.Ed. 581, in arguing that the Legislature might propose to the people and the people

vote constitutional amendments, when there was no provision in the Constitution for it, after speaking of the established American doctrine of popular sovereignty, he said: "Another American principle growing out of this, and just as important and well settled as is the truth that the people are the sourde of power, is that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation *** It is enough to say that, of the old thirteen states, the constitutions, with but one exception, contained no provision for their own amendment. ***Yet there is hardly one that has not altered its Constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of legislative power. *** We see, therefore, from the commencement of the government under which we live, down to this late Act of the State of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically." Works of Daniel Webster, VI, 227-229. (Italics ours).

Further implementing what is said above the framers of our Constitution have provided by Section 1 of the Declaration of Rights: "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper." This may be found at page 179 of Volume 1 of the Code.

(13) The power to "alter, reform or abolish" the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority. The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States. Cooley's Const. Limitations, 8th Ed., Vol. 1, page 84.

It is not the legislature who limit the scope of a convention but it is the people themselves who by their vote under the terms of this act limit the scope of the

"convention. The Constitutional provision above quoted does not prohibit the revision or amendment of a part of the Constitution by the convention method. The purpose of the Act here is to revise or amend the Constitution in the particulars indicated provided the convention called concludes that it is necessary to so amend and then if they so conclude the people have another right to vote as to whether or not these amendments, as set forth in a convention called, shall be a part of our Constitution. The thing that the people call a convention for is not to revise or to write a new Constitution but only a part thereof. The people having thus voted to circumscribe the limits of their elected convention delegates, in the particulars as provided for in the Act, bind these delegates within these limits."

Chamber of Admission

The limitations, powers, and scope of constitutional convention has been ably discussed in a mandamus proceeding instituted in Missouri upon which the Supreme Court passed in banc. The case of State ex rel. News Corporation v. Smith, State Auditor, 184 South Western Reporter 2d Series p. 598 held: (Page 599 & 600)

"On September 29 a committee report, including an attached exhibit, was adopted. The exhibit was styled: "Ordinance. Manner of holding election submitting the proposed constitution of Missouri to the electors and fixing the date of said election."

The ordinance fixed the date of election, method of giving notice, method of conducting the election and making returns thereof. An appropriation was made to pay the cost of printing the "Address to the People" in pamphlet form and its publication in newspapers."

(1,2) On the first contention counsel argues that the manner of submission was completely and exclusively provided for in the ordinance and that the previous adoption of a committee report recommending publication of the "Address" cannot be considered as any part of the plan or manner of submission, In making this argument, we apprehend that counsel is confused by the constitutional restrictions imposed upon the General Assembly

"requiring it to act in a particular way. There is nothing in the Constitution requiring the Convention to proceed in any particular manner, that is, by bill or ordinance, nor is there any requirement that its plan for submission of its work must be merged into one ordinance or resolution. We see no inconsistency in the duly adopted committee report authorizing the publication of the "Address" and the ordinance providing the method of holding the election. They treat different phases of the same general subject and each is a part of the plan or "manner" in which the Convention purposed to submit its work to the voters.

In support of this contention counsel calls our attention to the manner in which various propositions are submitted to the voters by the General Assembly and to the provisions of Section 2 of Article XV of our Constitution governing the submission of constitutional amendments either by the General Assembly or by the initiative. But Section 3 of Article XV permits the Convention to submit its work in such manner as it may provide which means, of course, that it may adopt a different method from that provided for the submission of other propositions.

(5) Some effort is made to define the word "submit". It is contended that to submit means to present and leave to the judgment of the voters. Noland v. Hayward, 69 Colo. 181, 192 P. 675. That is true, but a proposition may be presented or submitted in various ways. A case is submitted to a court when it is finally left with the court for its decision, but it may be submitted, (1) on the pleadings, (2) on the pleadings and evidence, (3) on the pleadings, evidence and argument. Either of those methods constitutes the manner of submission.

We get little help from cases decided in other jurisdictions because they are based upon constitutional or statutory provisions which differ from ours, but so far as the cited authorities are pertinent they support the idea that to "submit" may include more than leaving the bare document to the will of the voters. For instance: In re Norton, 75 Misc. 180, 134 N.Y.S. 1030, 1032, says: "In this election everything necessary to reach the judgment of the qualified voters is a part of the submission; that is, all the proceedings preparatory to the election,

"the proceedings upon election day, including the count of the ballots, and the return." Hoar on Constitutional Conventions, p. 213 says: "* * * the general authority of the Convention over the manner of submission will include the date of election, the election officials" etc.

It is contended: (1) That the life of committees could not be extended beyond the final adjournment of the Convention; that when the Convention adjourned sine die its members became private citizens without power to incur indebtedness on behalf of the Convention; (2) that a suit now pending in the circuit court wherein a taxpayer seeks to enjoin respondent and another official from recognizing the validity of the voucher now under consideration bars us from jurisdiction in the instant suit.

(7) We concede the correctness of the abstract proposition that the life of a committee cannot be extended beyond the life of the body which created the committee. That is not the question here. If, as we hold, the Convention had the power to submit its work to the voters in such manner as it may decide, it had the power to appoint the persons to complete and carry out such submission. Although such persons are designated as a committee of the Convention, they are in reality agents of the State or of the public to supervise the expenditure of public money which has already been legally appropriated for a definite purpose. The General Assembly has, by law, created what it termed a Legislative Research Committee with functions after final adjournment. The Convention has, by proceedings which have the force of law, created a so-called committee to perform the public function of submitting its work to the voters in the manner provided by the Convention.

(8) The election to vote on the proposed constitution has been set for February 27. No final decision can be rendered before that date in the injunction suit pending in the circuit court. Due to the urgency for a speedy decision, that case not only fails to afford, but actually denies, adequate relief, to relator in the instant mandamus suit. We have jurisdiction.

On oral argument it was conceded that the Convention had power to publish the entire proposed constitution in

> newspapers. We hold that it also had the power, as a part of its plan of submission, to publish the explanatory matter which constitutes the "Address to the People." The people granted that extensive power to the Convention by the adoption of Section 3 of Article XV of the Constitution. Whether that provision is wise or otherwise is not for us to say.
>
> (9) The voucher having been issued in accordance with law, the respondent State Auditor is without discretion to refuse to approve it and to issue his warrant.

The proceeding in the case cited supra was commenced to compel the respondent, the State Auditor, to approve vouchers and issue payment warrants by the executive committee of the constitutional Convention in payment for publishing an article which was adopted by the convention called: "Address to the People".

This article was explanatory of the proposed constitution, was approved and provision made by the executive committee for the publication and also for the appointment of a Committee of Revision to complete the work of the convention when the convention adjourned sine dic. Mandamus was granted.

There are a number of decisions on Mandamus, Writs of prohibitions, quo waranto and injunction following both, adoptions of constitutions as well as in cases where complete revisions have been made as a result of constitutional conventions. If I were to indulge in copious excerpts from the decisions, it would assume library proportions, it is therefore suggested (with the kind approval of your committee) that I merely accumulate the references to these citations as to volume and page numbers, so it may be used in the event an

occasion arises when some of these problems will probably be tested out in the courts.

I also have carefully studied the very brief 3-paragraph Act by which the State of California was admitted as a state and also the opinion of the Attorney General in 1855 reported in the early 5 California Reports commenting on such transition which was not in strict conformity with the other methods used by the various Territories in the Enabling Acts.

I shall await your committee's instructions on any further research you desire me to do.

Respectfully submitted,

Lazar Dworkin