

Opinion No. 55**Legislative Council—Constitutional Law—Unconstitutionality, Effect of Declaration of**

Held: The powers of the legislative council under Section 79-902, RCM, 1947, (Ch. 197, Laws of 1953) attached only to the legislative council created by Ch. 143 of the Laws of 1953 and expired when that body was declared to be unconstitutional.

June 10, 1958

Mr. Eugene C. Tidball
Executive Director
Legislative Council
Capitol Building
Helena, Montana

Dear Mr. Tidball:

You have requested my opinion as to whether Section 79-902, RCM, 1947, requires the Legislative Council to pass upon applications by state departments, boards, commissions and institutions for authorization of emergency expenditures. The questioned portion of Section 79-902, *supra*, reads as follows:

"Emergency expenditures in excess of appropriations, when allowed. If it shall at any time appear to the state board of examiners that due to an unanticipated increase in the number of inmates or patients of any penal, custodial or charitable institution, or that due to any unforeseen and unanticipated emergency in the case of such institutions, or that due to any unforeseen and unanticipated emergency in the case of any other state institution, educational institution, department, board, commission or bureau, the amount appropriated for the maintenance and operation of any state institution, educational institution, department, board, commission or bureau, with all other income of the institution, if any, will be insufficient for such purposes during the year for which the appropriation was made, on written application to the legislative council setting forth in detail the reasons therefor, the said legislative council shall, after careful study and examination of the request, forward such request, together with the council recommendations thereon, to the state board of examiners . . ."

The reference in the statute to the legislative council was inserted by Chapter 197 of the Laws of 1953. Prior to that enactment this section

applied only to the Board of Examiners. Chapter 197 was a companion enactment to Chapter 143 of the Laws of 1953 which created the legislative council referred to in Chapter 197.

The legislative council created by Chapter 143 was subsequently declared to be unconstitutional by the Montana Supreme Court in the case of State ex rel. Mitchell vs. Holmes, 128 Mont. 275, 274 Pac. (2d) 611.

In 1957 the present legislative council was created by Chapter 34 of the Laws of 1957. The Montana Supreme Court in the case of State ex rel. James vs. Aronson,Mont....., 314 Pac. (2d) 849, held that this council is constitutional.

Your question, therefore, is this. Is the present legislative council the same legislative council referred to in Section 79-202, or is it a distinct and separate entity which has no powers or duties under that section? The legislative council which was declared unconstitutional in the case of Mitchell vs. Holmes was composed of eight members—4 from the House of Representatives and 4 from the Senate. The present legislative council is composed of 12 members,—6 from each house. Other differences between the two bodies were cited in the case of James vs. Aronson which said:

"There are several differences between the statute above set forth, and chapter 143, Session Laws of 1953, which was condemned by this court in Mitchell v. Holmes, supra. In the 1953 Act, membership on the Council continued on throughout the legislative session, which the court held extended the term of office of a member of the House of Representatives beyond the constitutional limitation of two years in violation of Section 2, Article V of the Constitution. The 1957 Act specifically provides that membership on the Council expires upon termination of the member's legislative terms, and in no event may continue beyond December 31 of the year following appointment to the Council.

"Also, the 1953 Act permitted the Council to receive grants of money which the court, in Mitchell v. Holmes, held violated Section 1, Article XIX of the Constitution. No such provision is found here."

The Supreme Court has thus pointed out that there are distinct differences in the composition, term and powers of the two legislative councils. The council created by Chapter 143 of the Laws of 1953 was a completely different and distinct legal entity than the presently existing council. When the council created by Chapter 143 was declared to be unconstitutional and void it ceased to function and to exist.

Our Supreme Court said in State ex rel. Johnson vs. District Court 130 Mont. 103, 295 Pac. (2d) 1042:

". . . 'An unconstitutional statute is void, and a void thing is as nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to

observe it. In contemplation of law it is as inoperative as though it had never been passed.'"

The conclusion is inescapable that the powers granted to that council by Chapter 197 of the Laws of 1953 were applicable to that particular body only and ceased to exist when that body expired.

It is, therefore, my opinion that the powers of the legislative council under Section 79-902 (Chapter 197, Laws of 1953) were created and attached only to that particular interim legislative council created by Chapter 143 of the Laws of 1953 and that those powers expired when that council was declared to be unconstitutional in the case of State ex rel. Mitchell v. Holmes, 128 Mont. 275, 274 Pac. (2d) 611.

Very truly yours,
FORREST H. ANDERSON
Attorney General