

1. **CONSTITUTION - CONSTITUTIONAL CONVENTION - PUBLIC OFFICERS - LEGISLATORS - DELEGATES: Who may serve.**

HELD: Because members of the legislature are prohibited from holding other public office during the term for which they are elected, they may not serve as delegates to the constitutional convention.

2. **CONSTITUTION - CONSTITUTIONAL CONVENTION - PUBLIC OFFICERS - EXECUTIVE OFFICERS - DELEGATES: Why may serve.**

HELD: Because members of the executive branch are prohibited from holding other public office during their term of office, they may not serve as delegates to the constitutional convention.

3. **CONSTITUTION - CONSTITUTIONAL CONVENTION - PUBLIC OFFICERS - JUDGES - DELEGATES: Who may serve.**

HELD: Because members of the judiciary are prohibited from holding other public office while they remain in the office for which they are elected or appointed, they may serve as delegates to the constitutional convention if they resign their present position before assuming the duties of delegate to the convention.

4. **CONSTITUTION - CONSTITUTIONAL CONVENTION - PUBLIC OFFICERS - DELEGATES: Who may serve.**

HELD: Other public officers may not serve as delegates to the constitutional convention if they are prohibited by the constitution or statutes from holding other public office, either (a) during the term for which they are elected, or (b) during their term of office.

5. **CONSTITUTION - CONSTITUTIONAL CONVENTION - PUBLIC OFFICERS - DELEGATES: Who may serve.**

HELD: Because public officers may not serve as legislators (or delegates), they may serve as constitutional delegates only if they resign their previous office before assuming the duties of delegate to the convention.

6. **CONSTITUTION - CONSTITUTIONAL CONVENTION COMMISSION - DELEGATES: Who may serve.**

HELD: Members of the constitutional convention commission may not serve as delegates to the constitutional convention.

June 4, 1971

Honorable Frank Murray
Secretary of State
State Capitol
Helena, Montana 59601

Dear Mr. Murray:

The calling of the constitutional convention by the 42nd legislative assembly has raised certain questions concerning the eligibility of public officers to serve as delegates to the convention. Article XIX, section 8, Constitution of Montana, states in part:

“The qualifications of members (delegates) shall be the same as of members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly.”

The Constitution of Montana further provides, in Article V, section 7:

“No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office.”

In **42nd Legislative Assembly v. Lennon**, 481 P.2d 330, the Montana Supreme Court stated at page 333:

“Any state and local officers who are prohibited by the constitution or laws of Montana from holding more than one office may not serve as delegates to the constitutional convention.”

The court continued, stating the extent of this prohibition as it applied to certain constitutionally mentioned officers:

“Constitutional prohibitions against certain officers holding more than one office include state senators and representatives ‘**during the term for which (they) shall have been elected**’ (citing authority); the governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, and superintendent of public instruction ‘**during (their) term of office**’, (citing authority); and justices of the

supreme court and district judges ‘while (they) remain in the office to which (they have) been elected or appointed,’ (citing authority.)” (Emphasis supplied.)

1. The limitation placed upon the legislative branch is “during the term for which (they) have been elected.” Generally the courts, when confronted by a similar constitutional or statutory prohibition, have held that the prohibition extends during the entire period for which the person was elected and is not affected by the incumbent’s resignation. See: **Rowe v. Tuck**, 99 S.E. 303, 5 A.L.R. 113; **Baskin v. State ex rel. Short**, 107 Okla. 272, 232 Pac. 388, 40 A.L.R. 941; **Chenoweth v. Chambers**, 33 Cal. App. 104, 164 Pac. 428; **Forman v. Bostwick**, 123 N.Y. Supp. 1048; **State ex rel. Reynolds v. Howell**, 70 Wash. 467, 126 Pac. 954. Members of the 42nd legislative assembly, therefore, may not serve as delegates to the constitutional convention.

2. The restriction placed upon certain members of the executive branch of government named in the **Lennon** case is “during (their) term of office”. The Montana Supreme Court in **State ex rel. Morgan v. Knight**, 76 Mont. 71, 245 Pac. 267, stated at page 76:

“ ‘Term of office’ is a phrase used to describe the period of time during which one regularly chosen by election or appointment and inducted into office is entitled to hold the same, perform its functions, and enjoy its privileges and emoluments.”

See also: **State ex rel. Sandquist v. Rogers**, 93 Mont. 355, 18 P.2d 617. Finally, the court in **Bonner v. District Court**, 122 Mont. 464, 206 P.2d 166, in quoting from **Corpus Juris**, stated at page 471:

“Again in 46 C.J., Officers, sec. 97, pp. 963, 964: ‘The phrase “term of office” is one generally used to mean the fixed period of time for which the office may be held, although it is also used to designate the period for which the office is actually held.’ ”

Since the court in **Bonner** was dealing with an office where no “term of office” was fixed we must assume that the citation of the exact language of **Corpus Juris** is merely dictum and the decisions in **Morgan** and **Sandquist** stand as the law of Montana. “Term of office” in Montana, then, means a fixed period of time during which the office may be held. Members of the executive branch of government, named in the decision of the court in **Lennon**, may not be delegates to the constitutional convention during the fixed period of time for which their office may be held.

3. The judicial branch of government, justices of the supreme court and district court judges, have an altogether different limitation

placed upon them. Their limitation is “while (they) remain in the office to which (they have) been elected or appointed.” Thus, the only restriction against the judicial branch is a prohibition of holding another public office while they are members of the judiciary. Members of the judicial branch of government may serve as delegates to the constitutional convention if they resign their position in the judiciary before assuming the office of delegate. It is not, however, necessary for members of the judiciary to resign to qualify as a candidate for election as delegate to the constitutional convention.

4. The court in **Lennon** spoke of specific offices with specific limitations but, in so doing, the court also gave direction as to the limitations placed on other public officers. The restrictions applied by the court in **Lennon** to the constitutionally mentioned officers of the legislative, executive and judicial branches of government will be applied in the same manner to other public officers having similar constitutional or statutory prohibitions against dual office holding. All public officers who are prohibited from holding other public office either (a) “during the term for which they are elected” or, (b) “during their term of office” are precluded from being delegates to the constitutional convention.

All public officers who are prohibited from holding other public office “while they remain in the office to which they are elected or appointed” are eligible to serve as delegates to the constitutional convention if they resign their previous office before assuming the position of delegate. It is not necessary that those officers who are prohibited from holding another public office while they remain in the office to which they are elected or appointed resign their former office to qualify as a candidate for election to the office of delegate to the constitutional convention.

5. Although many public officers are not specifically prohibited by the constitution or statutes from dual office holding per se, the constitution does provide a prohibition concerning their ability to serve as a legislator. This prohibition in turn affects their ability to serve as a delegate since delegates to the convention must meet the same qualifications as members of the legislature. Article XIX, section 8, supra. This prohibition is found in Article V, section 7, supra, which states in part:

“ . . . no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office.”

This provision is a general restriction as to public officers’ ability to serve as legislators (or delegates), and it does not contain the additional

restriction applicable to the legislative, executive, and judicial offices mentioned in the **Lennon** case. Since the right to hold office is a valuable one and this right should not be restricted except by plain expression of law, prohibitions against dual office holding should be construed in favor of eligibility. 42 **Am. Jur.**, Public Officers, sec. 61. With this presumption in mind, most courts have held that the acceptance of a second public office acts as a resignation or forfeiture of the first office. **Gibson v. Crowder**, 196 Okla. 406, 165 P.2d 628, 42 **Am. Jur.**, Public Officers, sec. 78. The Supreme Court of Montana made reference to this doctrine in dictum in **Gullickson v. Mitchell**, 113 Mont. 359, 374, 126 P.2d 1106. Although the court decided **Gullickson** on a different basis there are indications that the court recognized the doctrine and accepted it as pertinent law. Public officers not burdened with added legal infirmities, such as those found in offices enumerated in the **Lennon** decision, may serve as delegates to the constitutional convention. However, if they are elected and qualified they must resign their present office before assuming the office of delegate.

The restrictions and limitations heretofore enumerated apply only to public officers as defined by the Montana Supreme Court in **State ex rel. Barney v. Hawkins**, 79 Mont. 506, 528, 257 Pac. 411:

“After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they may be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional.” 79 Mont. 528.

The court in the **Lennon** case cited the requirements set forth in **Barney** and reiterated the fact that all five elements must be present. If any one of the elements is not present then the position will not be a public office.

The constitutional convention may be deprived of the experience of veteran public officials, but I believe the constitution and the decision of the supreme court in **Lennon** dictate that the constitutional

convention be a people's convention. It is not a novel idea that the basic law of a governmental unit should come from the laymen. Our present constitution provides that all power emanates from the people (Art. III, sec. 1, Constitution of Montana) and well it should be that the people themselves, unhindered by potential self-serving motives, should chart the course that we are to follow. In **42nd Legislative Assembly v. Lennon**, *supra*, at page 334, the court states:

“The purpose of the Montana constitutional restrictions against certain officers serving as delegates to a constitutional convention is readily apparent. It is to insure independent consideration by the delegates of the provisions of the new constitution, to reduce the concentration of political power at the constitutional convention by eliminating as delegates incumbent office holders, and to foreclose the possibility of such officers creating new offices for themselves or increasing the salaries or compensation of their own offices. See **Kederick v. Heintzleman**, 132 F. Supp. 582, for the expression of similar principles in prohibiting a state senator from filing for the position of delegate to the Alaskan constitutional convention.”

This opinion is consistent with the reasoning set forth above. Certain public officers are precluded from serving as delegates while other forfeit their current office upon election and qualification as a delegate. Since delegates will hold no other public office during their tenure as delegates, the temptation to enrich the public office for their own sakes will be absent. The delegate will have to meet the challenge of the electorate before assuming any office which he may have assisted in creating or enriching, and the electorate is a sufficient buffer to protect the interests of the people.

6. A final matter must be considered to insure that this convention is a people's convention: May members of the constitutional convention commission serve as delegates to the constitutional convention? It is my opinion that they may not.

Members of the constitutional convention commission are charged with certain duties under Extraordinary Chapter No. 1, Session Laws of 1971, and more particularly in section 20 thereof, which states in part:

“(7) It shall be the duty of the commission, in order to prepare for the constitutional convention: to undertake studies and research; to compile, prepare and assemble essential information for the delegates, without any recommendation.”

The basic research and data gathering process will be performed by the commission and in essence the commission can control the flow of information to the convention delegates. The court in **Lennon** stated:

“The purpose of the Montana constitutional restrictions against certain officers serving as delegates to a constitutional convention is readily apparent. **It is to insure independent consideration by the delegates of the provisions of the new constitution. . . .**” (Emphasis supplied.) At page 334.

Sound public policy dictates that in order to insure independent consideration of the provisions of the new constitution that those who provide the information for the delegates to the convention should not themselves serve as delegates. In the process of gathering the necessary information for the convention it is possible that commission members may dampen their ability to give independent consideration to the matters before the convention. The ineligibility of commission members to serve as delegates will provide a sufficient buffer between the informational source and deliberating body to insure the independent consideration suggested by the supreme court.

THEREFORE, IT IS MY OPINION that:

1. Members of the legislature are prohibited by the constitution from holding other public office “during the term for which they are elected” and therefore precluded from serving as delegates to the constitutional convention.
2. The governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, and superintendent of public instruction are prohibited by the constitution from holding other public office “during their term of office” and, therefore, are precluded from serving as delegates to the constitutional convention.
3. Justices of the supreme court and district court judges are prohibited by the constitution from holding other public office “while they remain in the office to which they have been elected or appointed” and, therefore, may serve as delegates to the constitutional convention if they resign their present office before assuming the office of delegate. It is not necessary, however, for such officers to resign their present office to qualify as a candidate for the office of delegate.
4. All public officers who are prohibited by the constitution or statutes from holding other public office, either (a) “during the term for which they are elected” or (b) “during their term of office” are precluded from serving as delegates to the constitutional convention.
5. All other public officers, not burdened with legal infirmities similar to those heretofore described, may serve as delegates to the constitutional convention but must resign their present office

before assuming the office of delegate. It is not necessary, however, for such officers to resign their present office to qualify as a candidate for the office of delegate.

6. Members of the constitutional convention commission may not serve as delegates to the constitutional convention.

Very truly yours,

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Attorney General