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May 18, 1962
Opinion No. 62-22

REQUESTED BY: Hon. C. O. Sonny Biles
Hon. Emmett S. "Bud"
Walker, members of the
Twenty-Fifth Legislature
of Arizona.

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Does House Resolution
No. 15, Second Regular
Session, Twenty-Fifth
Legislature, establishing
a house committee for the
purpose of making a study
relating to the laws of
mines constitute a suffi-
cient enactment to estab-
lish the existence of this
committee beyond the date
of the adjournment of the
Second Regular Session of
the Twenty-Fifth Legisla-
ture?

CONCLUSION: No.

House Resolution No. 15 was adopted by the Arizona House of Representatives on March 20, 1962, and filed in the office of the Secretary of State on the same date. The resolution was not concurred in by the Arizona Senate, and the Twenty-Fifth Legislature adjourned sine die on March 21, 1962.

House Resolution No. 15 creates a Mine Study Committee, consisting of five (5) members of the House of Representatives appointed by the Speaker of the House with one member designated as Chairman, for the purpose of studying and reviewing the Laws of the State of Arizona relating to mines and making recommendations regarding statutory changes in the mining laws. Although the resolution does not establish any time in which the committee is to function, it clearly indicates that the committee will act subsequent to the date of the March 21, 1962, adjournment of the Twenty-Fifth Legislature as the committee is required to

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submit a prepared report ". . . to the Speaker of the House of Representatives and a copy to the President of the Senate no later than the second week of the First Regular Session of the Twenty-Sixth Legislature. . . ." This is also inferrable from the fact that the resolution was adopted by the House on March 20, 1962, and the adjournment of the Twenty-Fifth Legislature occurred the following day. It might be added that this situation is distinguishable from the appointment of a committee to act subsequent to the adjournment of the First Regular Session of the Legislature with the committee required to report to the Legislature during its Second Regular Session.

The Mine Study Committee is not a Standing Committee of the House. (See Rule 7 of the Rules of the House of Representatives, Twenty-Fifth Legislature, 1961 to 1962, State of Arizona); therefore, Art. 3, Ch. 7, Title 41 (A.R.S. §§41-1131 to 41-1133 inclusive) does not apply. A Standing Committee is generally defined as a committee appointed whereby matters are referred to it during the life of the body. (See Black's Law Dictionary definition of "committee" and Webster's New International Dictionary, 2nd Edition, unabridged, definition of "standing committee" and Arizona statutory provisions: A.R.S. §41-1131 et seq.)

A short resume of some of the Arizona constitutional provisions governing the legislative power may assist in the proposed question. Legislative power is vested in a Legislature consisting of a Senate and a House of Representatives with the reservation to the people to adopt laws by initiation or referendum or to amend the constitution. (Art. 4, Pt. 1, §1) The regular session of the Legislature is held annually at the State Capitol and begins on the second Monday of January of each year, (Art. 4, Pt. 2, §3), and each branch of the Legislature determines its own rules of procedure (Art. 4, Pt. 2, §8). The term of office of legislative members is two years (Art. 4, Pt. 2, §21), and the compensation and reimbursement for expenses of members of the Legislature is provided for in Art. 4, Pt. 2, §1, as amended 1958.

With the aforementioned facts surrounding the adoption of House Resolution No. 15 and a brief description of some of the Arizona constitutional provisions, the question to determine is: "Does a single branch of a bicameral legislature have power to create, without the concurrence

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of the other body of the legislature, a committee authorized to act subsequent to the sine die adjournment of the Legislature itself, which, if its acts are challenged judicially, in exercising any investigatory powers can withstand an attack of unconstitutionality; or, more specifically, if the Mine Study Committee established by House Resolution No. 15 exercises powers of investigation is it subject to a challenge of being unconstitutionally created.

It is to be noted that the question does not involve the power of the Legislature to enact a statute establishing a committee to act after its sine die adjournment; or whether the Legislature could by joint resolution create a committee to act after its sine die adjournment; or whether a single body of a bicameral legislature can establish a committee to act while it is in session or during its recess period.

With this in mind, to answer the question it is necessary to examine some of the judicial principles and decisions regarding the proper method of the appointment of legislative committees.

The appointment of legislative committees with investigatory powers has generally been upheld upon the basis that the power of investigation is auxiliary or incidental to the power to legislate, or conversely, that legislative power includes by implication the power to investigate by committee. In People ex rel McDonald v Keeler, 99 N.Y. 463, 52 Am.Rep. 49, 2 N.E. 615 (1885); McGrain v Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927); Herlands v Surpress, 14 N.Y. Supp. 2d 312, 171 Misc. 914, affirmed 16 N.Y. Supp. 2d 454, 258 App. Div. 275, affirmed 26 N.E.2d 800, 282 N.Y. 647 (1940).

It is axiomatic that the legislative power to appoint a committee to act while the Legislature is in session may be accomplished either by a concurring resolution of both Houses or by a separate resolution of one branch of the Legislature. See Annotation, 28 A.L.R. 1154, Formalities and requisites of the creation of legislative committees; 49 Am.Jur., States, Territories and Dependencies, §41; and 87 C.J.S., States, §42.

The appointment of legislative committees by properly enacted statutes with authority to act after

adjournment has been upheld whenever the powers of created committees have been attacked constitutionally. People v Bacher, 113 Misc. 400, 185 N.Y.Supp. 459 (1920); State ex rel Herbert v Ferguson, 142 Ohio 496, 52 N.E.2d 980 (1944); State ex rel Hamblen v Yelle, 29 Wash.2d 68, 185 P.2d 723 (1947).

There is a divergence of authority as to whether a Legislature can by joint resolution create a committee to act subsequent to the date of adjournment. The following cases stand for the proposition that legislative committees can be created by joint resolution with powers to act subsequent to adjournment. In re Falvey, 7 Wils. 630 (1858); Branham v Lange, 16 Ind. 497 (1851); Commercial and Farmers' Bank v Worth, 117 N.C. 146, 23 S.E. 160, 30 LRA 261 (1895); In re Davis, 58 Kan. 368, 49 Pac. 160 (1897); Terrel v King, 118 Tex. 237, 14 S.W.2d 786 (1929); State ex rel Robinson v Fluent, 30 Wash. 2d 194, 191 P.2d 241 (1948).

Other decisions state that such committees cannot be legally created by joint resolution. Dickinson v Johnson, 117 Ark. 582, 176 S.W. 116 (1915); Fergus v Russell, 270 Ill. 304, 110 N.E. 130 (1915).

Art. 4, Pt. 2, §2 of the Arizona Constitution which states the procedure for the adoption of bills contains language regarding the vote on "...final passage of any bills or joint resolutions." The phrase "or joint resolutions" indicates that joint resolutions are expressly authorized. There is no Arizona decision regarding the creation of a committee to act subsequent to adjournment by the enactment of a joint resolution.

The great weight of authority is that neither house of a bicameral legislature can appoint an interim committee to function subsequent to sine die adjournment of the Legislature whenever the validity of such committee has been challenged. Tipton v Parker, 71 Ark. 193, 74 S.W. 298 (1903); Ex Parte Caldwell, 61 W. Vir. 49, 55 S.E. 910 (1906); State v Guibert, 75 Ohio St. 1, 78 N.E. 931 (1906); Brown v Brancato, 321 Pa. 54, 184 Atl. 89 (1936); In re Southard et al, 83 P.2d 932, affirmed upon rehearing, 13 Cal.2d 497, 90 P.2d 304 (1939). In dictum the following cases: Fergus v Russell, 270 Ill. 304, 110 N.E. 130 (1915); State v Childers, 90 Okla. 11, 215 Pac. 773 (1923); Swing v Riley, 83 P.2d 938, affirmed upon rehearing, 13 Cal.2d 513, 90 P.2d 313 (1939); State ex rel

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Robinson v Fluent, 30 Wash.2d 194, 191 P.2d 241 (1948).

The theory of the cases is that the power of investigation is related to the power to legislate and that upon sine die adjournment since the power to legislate ceases neither branch of the Legislature acting alone can extend the power beyond the sine die adjournment date. This rule was stated in the case of In re Southard et al, supra, at pages 935 and 936 in the following language:

"The overwhelming weight of authority is to the effect that neither house of a legislature may lawfully appoint a committee by single house resolution with power to sit after adjournment sine die, in fact, every state court that has considered this problem has so held. . . .

"The theory of the above-cited cases holding that a single house resolution cannot lawfully create a legislative investigating committee with power to sit after the legislature adjourns sine die seems to us to be unanswerable. Although stated in different ways, it is basically this: Under the various state constitutions, including that of California, the legislature, with the approval of the governor, has the power to legislate - that is the power to make laws; each house of the legislature has the power to initiate legislation; incidental to and implied from this power to legislate, each house has the implied and auxiliary power to appoint committees for the purpose of aiding it in the proper performance of this function; this power to appoint committees exists by implication, only because of the existence of the express power to legislate; consequently, when the power to legislate ceases, then the power to investigate for the purpose of aiding the legislature in exercising this power ceases, or stated another way, when the main power of legislating dies the incidental or implied power dies with it; that upon adjournment sine die the legislative powers of both houses of the legislature

cease; that thereafter the members of the legislature have no legislative powers unless a special session is called which can only be done at the call of the governor, and at which only those matters set forth in the call may be considered; that during a session each house can function separately as to the introduction of bills, but it has no such power after adjournment; that each regular session of the legislature is composed of a different body from its predecessor; that the only lawful purpose of a committee is to investigate the facts and to report back to the body creating it; that the power conferred on a committee is a delegated power, and the legislature cannot lawfully delegate power that it itself does not possess; that neither house has the power to appoint a committee to function when the legislature itself could not act in the premises."

That particular case, which was affirmed upon rehearing, involved the creation of a number of committees, including the Assembly Interim Committee on Public Morals, which was established by a resolution of the California House of Representatives. The California Senate did not concur in the resolution. At the time of the decision in the above mentioned case a companion case arose in California, Swing v Riley, supra, which held that the California Legislature by a concurrent resolution at a special session could not create a committee to act subsequent to the adjournment date of the California Legislature. As a result of the two aforementioned California cases, the people of California amended its Constitution. There is now an express constitutional provision which provides that either branch of the California Legislature can appoint committees to act while the Legislature is in session or after adjournment (Art. 4, §37, California Constitution.) See a recent California decision, The Board of Education of the City of Los Angeles v Eisenberg, 277 P.2d 943, (1954) wherein the Supreme Court of California held that a committee appointed by a Senate Resolution was valid, resting expressly on the then enacted Art. 4, §37, California Constitution. Arizona has no comparable constitutional provision.

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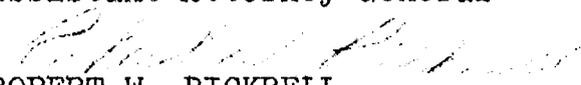
In two high state court decisions wherein the legality of a legislative committee was attacked, the defense to the action raised the issue that committees had been created in this manner over a period of time, and in both decisions (In re Southard et al and Fergus v Russell, supra) the courts of California and Illinois held that legislative indulgence in creating committees over a period of time did not give them any constitutional sanction; in other words, custom in establishing committees did not give them constitutional validity.

This problem recently arose in the State of Oregon in 1957. The Senate of the Oregon Legislature adopted two resolutions: first, in a regular session, and then in a special session, neither of which was concurred in by the House. After adjournment sine die of the special session, the authority of the senate interim committee was challenged in a taxpayer's suit. In a lower court decision, Lewis v Hatfield, Circuit Court for Marion County, Case No. 42243 (1957), the trial court held that the senate resolutions were unconstitutional. See Keith Skelton's "Legislative Interim Committees Created by Resolution", 38 Ore. L.Rev. 97, Feb. 1959, for history of case and general analysis of legality of legislative committees.

CONCLUSION

This office does not have any authority to declare statutes or resolutions of the Legislature or a branch thereof unconstitutional as this would be a violation of Article III of the Arizona Constitution, an invasion of the province of the judiciary, but this office advises you based on our research that the overwhelming weight of decisions is that neither house of a bicameral Legislature has authority to create an interim committee to function after the sine die adjournment of the Legislature by a separate resolution which is not concurred in by the other branch of the Legislature; therefore, in answering your question our conclusion is in the negative.

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