

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS
Internet Conference Meeting (Zoom.us)
November 23, 2020

68. Call to Order and Opening Prayer

Commission Chairman Dr. George Gude called the meeting to order with all members present, opened with prayer, and introduced the single item on the meeting agenda as follows.

69. Synod Convention Deferral Vote under Const. Art. XI B 8 (20-2960)

By a memorandum of November 12, prepared at the request of the President of the Synod and leadership of the Council of Presidents, the Secretary of the Synod requested the commission's opinion on the following questions.

Background: With a coronavirus pandemic continuing to significantly impact gatherings and accommodation planning for the foreseeable future in most parts of the country, many districts are either experiencing difficulty scheduling and obtaining facilities for any reasonable district convention compliant with the Constitution and Bylaws of the Synod and CCM Op. 20-2938, "District Conventions, Circuit and Advisory Meetings, and Coronavirus Contingencies," or are dissatisfied with the arrangements they have made or understand themselves likely to be able to make. Some district presidents have expressed uncertainty that their own districts will be able, within calendar year 2021, to convene at all, or to facilitate an accustomed and salutary churchly deliberative assembly that will be well attended by the pastoral and lay representatives of district congregations and parishes. Others have expressed concern for districts other than their own, that prevailing circumstances should not be allowed to preclude any district from likely meeting in regular convention during this triennium.¹ The extensive preparations required for district and Synod conventions, and their lengthy prior processes, have also been noted—preparations complicated at present by significant timeline uncertainties (some districts already have multiple possible convention dates laid out, accounting for lower-than-usual probabilities of successfully convening and achieving quorum).

It has therefore been suggested that the 2022 Synod convention be delayed one year, stretching the 2019–22 triennium to 2019–23, and that the window for district conventions to meet prior be extended from calendar year 2021 to include also calendar year 2022, to allow selection of meeting dates apparently more likely to be realized without significant complications.

The Constitution and Bylaws of the Synod do not provide specific, explicit mechanisms for the rescheduling of a scheduled convention or for the alteration of the triennial schedule laid down for the Synod in Const. Art. VIII A 1: "The Synod convenes every three years for its regular meeting," and for the districts in Const. Art. XII 13: "The regular sessions of the districts are held in the year immediately preceding the general convention of the Synod." Moreover, no provision is made for alteration of the Constitution or Bylaws outside of a convention or its specific direction (Const. Art. XV; Bylaw section 7). Finally, it is unrealistic to suggest the calling of a special session (Const. Art. VIII B 2) to amend the Constitution or Bylaws to craft a remedy, as such a session would be impossible timely to conduct, being subject to the same in-person attendance requirements as a regular convention (Op. 20-2938).

However, the Constitution of the Synod does make provision for the member congregations to take action outside of a convention on specific matters that are "of such a nature that action thereon cannot be delayed until the next convention." This provision is as follows:

¹ As was observed in Op. 20-2938, while it is incumbent on districts to make every reasonable effort to meet in the district convention year, it is not *necessary* to the holding of a Synod convention that all districts have succeeded in meeting the year prior.

Article XI Rights and Duties of Officers

B. Duties of the President

8. When matters arise between meetings of the Synod in convention which are of such a nature that action thereon cannot be delayed until the next convention, the President is authorized to submit them to a written vote of the member congregations of the Synod only after full and complete information regarding the matter has been sent to member congregations by presidential letter and has been published in an official periodical of the Synod. If such matters are related to the business affairs of the Synod, such a vote shall be conducted only after the President has consulted with the synodical Board of Directors. In all cases at least one-fourth of the member congregations must register their vote.

In 1944 this provision was used to authorize postponement of the Synod convention due to the government's wartime urging to conserve fuel. By a majority vote the congregations approved delaying the convention that had, three years before, been scheduled to meet that year. (Circumstances ultimately changed and the convention was—the vote to postpone notwithstanding—held in 1944; the first act of the convention was to ratify and confirm the president's calling of the convention on schedule.)² In 1944, the agreed-upon (but ultimately reversed) deferral of the Synod convention would not have impacted the schedule of the prior district conventions (though there is some evidence in that period of districts at least contemplating an inability to meet on schedule due to wartime fuel restrictions). In the present situation, the timing of both district and Synod conventions is involved; indeed, the full accommodation of the former is the principal impetus for the questions posed.

At present, it would be impossible to complete a vote of the congregations before the first district convention may open in January 2021. Some districts may now or, by that time, will have made definite arrangements to meet in calendar year 2021 that may yet succeed. Thus, it has been suggested that instead of deferring all district conventions to 2022 (the year before a Synod convention rescheduled to 2023), district conventions be allowed to occur any time in calendar 2021 and 2022, as noted above.

Implications of the Articles of Incorporation and Missouri Non-profit Law (RSMo. 355) have been explored separately in an opinion from Synod's legal counsel. The commission is now asked to determine whether the measure proposed is compatible with the Constitution and Bylaws of the Synod.

Question 1: Is it consistent with the Constitution and Bylaws for the President of the Synod to submit to a written vote of the congregations of the Synod, as detailed in Const. Art. XI B 8, the following: Shall the upcoming convention of the Synod be delayed one year, in effect stretching one triennium to four years' duration?

² The first act of the 1944 convention (*Proceedings*, pp. 2–3; see also BOD Minutes, Mar. 6 and May 15, 1944) details this use:

The following resolution was adopted in the first session on June 21, 1944, having been drawn up by our Synodical Attorney, Mr. George Eigel:

WHEREAS, The Office of Defense Transportation urged all associations and organizations to cancel their conventions for the year 1944 on account of the transportation problem; and

WHEREAS, In compliance with said request the President of the Evangelical Lutheran Synod of Missouri, Ohio, and Other States did request all congregations to vote on the question of postponing their convention for the year 1944; and

WHEREAS, A majority of the congregations did vote in favor of canceling and postponing said convention; and

WHEREAS, It did later develop that the convention could be held, and as a consequence thereof the President notified all congregations that the convention would be held at the time and place decided upon at the 1941 convention, to wit, June 21 to June 30, 1944, in the City of Saginaw, Michigan: therefore be it

Resolved by the delegates in convention assembled, being, a majority of all delegates elected to said convention, and representing all of the congregations of the Evangelical Lutheran Synod of Missouri, Ohio, and Other States, that we do hereby ratify and confirm the action of the President in calling said convention as agreed in the resolution at the convention of 1941, and we agree that the convention may proceed with its regular business in due course in accordance with said call.

Opinion: It is the opinion of the commission that the question whether to delay the upcoming convention of the Synod by a year is self-evidently a “matter of such a nature that the action cannot be delayed until the next convention” and therefore falls within the standard set by Const. Art. XI B 8. Such a question may, consistent with the requirements of Const. Art. XI B 8, be put to the congregations for their vote. The congregations in response have the right to approve or reject any proposal made by the President, a determination that involves not only the substance of the question put to them but also their assessment of whether the facts and circumstances necessitate action without delay.

Question 2: Is it consistent with the Constitution and Bylaws of the Synod for the congregations, through such a vote as described in Question 1, and under circumstances as described, to extend the length of a triennium?

Opinion: An action of the member congregations under Const. Art. XI B 8 must be otherwise constitutional. Const. Art. VIII A 1 specifies a three-year duration to the triennium. The purpose of this provision is to preserve the right of the member congregations to govern the Synod and its agencies with the desired regularity and periodicity.

Circumstances could conceivably and ultimately, as a matter of probabilities the commission is neither equipped nor empowered to assess, subject to futility the member congregations’ meeting in regular convention either as a Synod within the triennial schedule or as their respective districts within the allotted calendar year of that triennium. Looking back from such an outcome, mechanical submission of the congregations to the triennial meeting provision might be found to have more significantly impaired their right to govern their Synod and their districts than it would have to have offer them the ability, by the proposed vote, to manage the risk that they would be unable to meet on schedule by expanding the triennium. While it is possible, on the other hand, that expanding the triennium may ultimately delay the member congregations’ governance of Synod or of their respective districts—perhaps, ultimately, unfavorably or unnecessarily—their rights under the Constitution are not diminished by granting them the choice, under the properly-actuated mechanism provided in Const. Art. XI B 8, of how best to maintain that right in the face of a risk not contemplated in the constitutional language—namely, the risk that their inability to meet legally, prudently, and reasonably on schedule could submit their triennial governance opportunity, at least on the district level, to futility.

When unforeseen circumstances arise that threaten the member congregations’ ability to realize, legally, prudently, or reasonably, regular conventions (Synod or district) on the triennial schedule, it is consistent with the purpose of Const. Art. VIII A 1 for the member congregations of the Synod, using the mechanism of Const. Art. XI B 8, to manage that threat by reaching the determination and effecting the outcome proposed.

Question 3: Is it consistent with the Constitution and Bylaws of the Synod for the congregations, by such a Const. Art. XI B 8 vote, also to extend the interval of an expanded triennium within which the districts of the Synod are allowed to hold their district conventions to include the two calendar years prior to the deferred Synod convention, thereby not invalidating any potentially actionable and desirable convention plans already made, while extending the window of possibility for all districts?

Opinion: Such an action, given the above and that Const. Art. XII 13 explicitly contemplates exceptions to the rule that “regular sessions of the districts are held in the year immediately preceding the general convention of the Synod” as capable of being made “by the Synod,” is consistent with the Constitution and Bylaws of the Synod.

Guidance on implications of the above three questions:

The commission notes that if the question of deferring the 2022 Synod convention to 2023 and extending the window for prior district conventions to include calendar years 2021 and 2022 is put to the congregations, and especially if the vote is in the affirmative, this will necessitate many decisions about the

proper application of pre-convention timelines both at the Synod and at the district levels. These will have to accommodate convention schedules that may be shifted after significant processes have already begun. Likewise, processes may also need to be initiated while there is still great uncertainty about the potential deferral of the related convention.

Specific provisions and circumstances may require various approaches to maintaining as equitable and effective the mechanisms by which congregations effect the pre-convention phase of their governance of districts and the Synod. Without examining specific language and circumstances, it is impossible to address these situations. Responsible officers need to take care that the fundamental rights of congregations and other members to participate in all aspects of pre-convention and in-convention governance of their districts and their Synod are protected, and that the exercise of such rights is facilitated by especially clear and timely communication.

With regard to the Synod convention, for example, the 18-month call for nominations is about to be issued in January, with nominations due in the Office of the Secretary of the Synod no later than “nine months prior to the convention of the Synod” (Bylaw 3.12.2.4 [b]). The opening of the process cannot at this point reasonably be delayed, as nominators must be provided their 18 months to nominate, should the convention of the Synod be held on schedule in 2022—a possibility that must be prepared for unless and until the congregations finally vote to defer it. Should the convention be deferred, the close of nominations cannot reasonably be terminated after the usual nine months’ duration but must be held open until “nine months prior to the convention.”

Similar considerations will have to be made with much greater urgency in the districts of the Synod. Care must be taken to preserve the integrity of each district pre-convention process. Furthermore, materials and reports designed to support 2021 district conventions must—while acknowledging that further developments may occur in an additional year of discussion—be available for the consideration of districts that are able to convene without delay.

Postponing the convention would also impact elections and terms of office for elected and appointed offices at the Synod and district levels. Bylaw 3.2.4 (f) provides that incumbents “shall serve until their successors assume office.” In effect, were the convention to be deferred by a year, one year would be added to each term of the 2019–23 “triennium” on the Synod level and, depending on the year in which each district convention is held, either in the 2018–22 district “triennium” or the 2021–25 district “triennium.”

The proposed mechanism would impact the length of the current triennium but not that of any future triennium. Subsequent regular district conventions would, in any case, occur in 2025, and the subsequent Synod convention, in 2026, according to the normal triennial cycle.

It is incumbent upon the President to communicate clearly in the “full and complete information regarding the matter” not only the question itself but especially the consequences of adoption and rejection, providing the congregations with the requisite information to make an informed decision.

70. Adjournment and Upcoming Meetings

Having concluded its single-item agenda the commission adjourned with closing prayer. The commission remains tentatively scheduled to meet in person January 15–16, 2021, and April 9–10, 2021, in St. Louis.

John W. Sias, *Secretary*