

CONSTITUTIONAL LAW:  
REFERENDUM:  
TAXATION (INCOME):

1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly, if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum. 2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

OPINION NO. 131

April 15, 1971

Honorable Don Owens  
State Senator  
Room 432, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Owens:

This is in response to your request for an opinion from this office on whether the legislature has the right to prevent a referendum on any tax proposal as outlined in the recent tax measure. The tax measure to which you refer is House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly which repealed Sections 143.010 and 143.030, RSMo, relating to the income tax law, and enacting two new sections relating to the same subject with an emergency clause.

The question submitted is whether House Bill No. 3 is subject to a referendum under Article III, Section 52(a) of the Constitution of Missouri.

House Bill No. 3 repeals Sections 143.010 and 143.030, RSMo, which provided for the collection of an income tax on individuals and corporations and enacted two new sections providing for the collection of an income tax from individuals and corporations. It provides for a graduated income tax according to the net income. It provides an emergency clause as follows:

"Because there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of state government, this act is

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necessary for the immediate preservation of the public peace, health and safety, and an emergency exists within the meaning of the constitution. This act shall become effective January 1, 1971, or upon final passage and approval, whichever occurs latest."

Article III, Section 52(a) of the Constitution of Missouri provides:

"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded."

Article III, Section 29 of the Constitution of Missouri provides:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

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All laws passed by the legislature are subject to referendum under Article III, Section 52(a) unless they come within one of the exceptions as provided therein. The above constitutional provisions must be considered together in determining whether the statute comes within one of the exceptions. Before an act comes within exception the legislature must declare, and set forth in the preamble or body of the act, the fact or facts that bring it within the exception. The mere declaration by the legislature that an act is an emergency measure cannot make it so, but it is for a court in a traditional procedure to determine whether the act in fact is an emergency measure within the means of these constitutional provisions. State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S.W. 641 (1921). State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 S.W. 327 (1920). State ex rel. Tyler v. Davis, 443 S.W.2d 625 (1969).

In discussing jurisdiction the court in these matters in Westhues v. Sullivan, supra, the court stated, l.c. 589-599:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum, by a mere declaration of 'immediate preservation of the peace, health or safety,' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yard stick of the Constitution, and determine whether or not the law-makers breached the Constitution in making the declaration. In the recent case of Attorney General v. Lindsay, 178 Mich. l. c. 531, the court said:

"Courts have never refused to review acts of the Legislature in the exercise of a discretion, unless it explicitly appears that the grant of such discretion was exclusive, and the right to determine, in such a case, the question as to whether the exercise of such discretion by the Legislature has been a proper one is inherent in the court as the final arbiter of consti-

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tutional and statutory construction. This case is no other or different from any other case which involves constitutional construction, and it must be decided upon well-known principles of law and the application of the ordinary rules of such construction.'"

No one can seriously contend that the act under consideration is an appropriation act and exempt from referendum for that reason. The act repeals two statutes which provided for the rate of income tax to be paid by individuals and corporations, and enacted two new sections which increased the income tax rate to be paid by individuals and corporations. Taxes collected by virtue of these statutes are not levied or collected for any particular purpose or agency of the state but become general revenue. The act does not appropriate any money for any particular purpose or agency of the state. Therefore, it is not exempt from referendum as an appropriation act under Article III, Section 52(a), supra. State ex rel. Harvey v. Linville, et al., 318 Mo. 698, 300 S.W. 1066 (1927).

The question is whether the act is exempt from referendum under the above constitutional provision as a "law necessary for the immediate preservation of the public peace, health and safety."

The legislature declared in the emergency provision that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government, and that the act is necessary for the immediate preservation of the public peace, health and safety. As heretofore stated, whether the legislature has declared in the act itself facts, which if true, constitute an emergency, and whether such facts as stated are true is a matter for the courts to decide. The declaration made by the legislature in the Act is not conclusive. State ex rel. Westhues v. Sullivan, supra.

In Board of Regents v. Palmer, 204 S.W.2d 291, the Supreme Court of Missouri said l.c. 295:

". . .Section 10 of the act expresses the emergency thus: 'Because of the great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, there is an immediate need for the authority granted by this Act, and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency

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exists within the meaning of the Constitution of the State of Missouri. . . ."

In deciding this was a sufficient statement of facts which, if true, would constitute an emergency, the court stated l.c. 295:

". . . Certainly it cannot be said that this declaration is such a mere conclusion as to invalidate the act as an improper expression of an emergency. . . ."

We believe the declaration made by the legislature in the Act under consideration that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government is a sufficient declaration of fact, which if true, would create an immediate emergency within the meaning of the above constitutional provision.

Whether the declaration made by the legislature in the Act under consideration is true and correct cannot be determined from the face of the Act itself but must be determined by evidence and other information submitted in support thereof. All that this office is authorized to do under the present circumstances is to express our opinion, which, we have done, on whether the emergency declaration in the Act states facts, and which facts, if true, would be an emergency within the meaning of that term as used in Article III, Section 52(a) of the Constitution.

#### CONCLUSION

It is the opinion of this office that:

1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum.

2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,



JOHN C. DANFORTH  
Attorney General