

GENERAL ASSEMBLY: Pay increase of legislators effective  
PUBLIC OFFICERS:  
LEGISLATION: 90 days after passage. Emergency clause  
CONSTITUTIONAL LAW: invalid. Later of two conflicting constitutional provisions will prevail.

January 27, 1961

Honorable John W. Schwada  
Comptroller and Budget Director  
State Capitol  
Jefferson City, Missouri



Dear Sir:

We have your letter of recent date, which reads as follows:

"By constitutional amendment approved by the voters on November 8, 1960, the General Assembly of Missouri is authorized to fix the salary of its members. Pursuant to the amendment the 70th General Assembly met in extraordinary session on December 19, 1960, and by House Bill No. 1, established legislative salaries at \$4,800 per year. Appended thereto is an emergency clause.

"These questions relating to the bill are raised for your consideration:

1. In view of Section 13, Article VII of the Missouri Constitution, may members of the General Assembly whose terms extend from January, 1958, to January, 1962, now receive the salary provided by House Bill No. 1, noted above?

2. Does the matter contained within House Bill No. 1, noted above, constitute an emergency within the meaning of Section 29, Article III, of the Missouri Constitution and thereby authorize payment of the new salary rate prior to the expiration of 90 days?"

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The two questions contained in your request may be restated as follows: What is the effective date of House Bill No. 1 both as to incumbent senators and as to other members of the General Assembly?

It is the opinion of this office, as elaborated herein, that the effective date of the salary increase provided for by House Bill No. 1, Extraordinary Session, 70th General Assembly, as to all senators and representatives will be ninety days after the adjournment of the special session.

Constitutional Amendment No. 2, approved in the general election of November 8, 1960 (and now Sec. 16 of Art. III), empowers the General Assembly to fix the salaries of its members. To the extent here applicable, the amendment reads as follows:

"Senators and representatives, until otherwise provided by law, shall receive from the state treasury as salary the sum of one hundred and twenty-five dollars per month. No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted."

Pursuant to the authority granted by the amendment, the 70th General Assembly, meeting in extraordinary session, enacted House Bill No. 1, increasing legislators' salaries to \$4,800 per year.

Your first question is whether the so-called "holdover" senators are entitled to receive the amount of compensation fixed by House Bill No. 1 during their present terms. Necessarily as part of the question is the effect, if any, of Section 13 of Article VII of the Constitution of 1945, which contains general prohibitory language against increasing the compensation of state officers during their terms of office. This section provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

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The newly adopted amendment, in mandatory language, provides that senators and representatives "shall receive" the amount of their present salary "until otherwise provided by law." Upon the effective date of a law so providing, the salary they "shall receive" is necessarily the amount fixed by law. Unless such new rate is effective as to all members of the General Assembly, then such of those who are excepted from the new rate would be receiving the former amount after the law otherwise provided, contrary to the constitutional mandate that the old rate shall apply only "until" otherwise provided by law.

The clear intent of the voters, as expressed in the amendment, is that when a law is passed setting a new salary rate, then this amount so fixed is to have the same effect as though it had initially been incorporated in the amendment itself. That is to say, when House Bill No. 1 changing the compensation became effective, the amendment would have the same meaning as though it had expressly provided that "senators and representatives . . . shall receive . . . the sum of \$4,800 per year."

The amendment does not limit the phrase "senators and representatives." All are necessarily included. In the absence of any limiting phrase, the amendment must be deemed to express the unequivocal intent of the voters that all senators and representatives "shall receive" not merely the sum initially fixed as salary, but any other sum subsequently established. It would be unreasonable to attribute an intent to the voters to discriminate as to some legislators. On the contrary, the intent is clearly expressed to establish a rate of compensation uniformly applicable to all legislators which all "shall receive" as and when the rate is changed by law.

The new amendment deals exclusively with the compensation of legislators. Section 13 of Article VII contains a general prohibitory provision against increasing the compensation of state and other officers. Any conflict between the two constitutional provisions must be resolved in accordance with established principles of constitutional construction. One such rule is that whenever possible, seemingly conflicting provisions should be harmonized so as to give effect to both. State ex rel. Crutcher v. Koeln, 332 Mo. 1229, 61 SW2d 750.

However, the express provision of the amendment that senators and representatives "shall receive" a certain sum "until" the effective date of a new law cannot be harmonized with the general prohibition of Section 13 of Article VII. If the general prohibition were to apply, it would mean that

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some legislators would receive the lesser sum after the effective date of House Bill No. 1, contrary to the command of the recent amendment that the old rate be applicable only "until" a new law is effective. There is no way the two provisions may be harmonized. Only one of the two may be given effect. In such a situation, the rule is that the amendment, being more recent in point of time, must prevail.

The Supreme Court was faced with a similar problem in the case of State ex inf. McKittrick v. Bode, 342 Mo. 162, 113 SW2d 805. In that case a constitutional amendment passed the previous year established a Conservation Commission and provided that the Commission "shall determine the qualifications of the director." Section 10 of Article VIII of the Constitution of 1875 (now Sec. 8 of Art. VII of the 1945 Constitution) provided that no person shall be appointed to any office in this state who shall not have resided in this state for one year next preceding his appointment. The Commission appointed Bode as director although he had not resided in the state for the one year next preceding his appointment. The Supreme Court held that the quoted provision of the amendment which authorized the Commission to fix the qualifications of the director was irreconcilable with the residence requirement of the original Constitution and that said provisions cannot be harmonized. So holding, the Court applied the principle that the more recent amendment must prevail over the previously existing section as an exception thereto. The Court used the following language (113 SW2d 1.c. 808-9):

"We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' In other words, we are without authority, absent an ambiguity, to resort to interpolation. In this situation, 'the rule as to harmonizing inconsistent provisions' is without application. The rule is stated as follows: 'Many troublesome questions of constitutional construction arise in the interpretation of constitutional amendments with reference to the earlier constitutional provisions to which they have been added. In accordance with the general rule that harmony in constitutional construction should prevail whenever possible, generally

an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law. A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to the new Constitution, but such a provision should be read in the light of the former law and existing system. Amendments, however, are usually adopted for the express purpose of making changes in the existing system. Hence it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. In such a case the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned on the ground that it conflicts with pre-existing provisions. If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions. If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded.' 11 Am. Jur. § 54, pp. 663, 664.

\* \* \* \*

"The paragraph under consideration and said section 10 are in direct conflict, and said paragraph is a limitation on section 10 to the extent of authorizing the commission to determine the necessary qualifications of a director."

The applicable principle has recently been stated in State ex rel. Board of Fund Commissioners v. Holman, Mo. Sup., 296 SW2d 482, 1.c. 491, as follows:

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"And of course 'a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it.' 16 C.J.S., Constitutional Law, § 26, p. 99; State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017, 1020."

An opinion of this office to E. G. Armstrong, Comptroller, under date of October 4, 1946, ruled on a similar question concerning the effective date of a salary increase insofar as it pertained to incumbent circuit judges. The specific constitutional provision there involved (Sec. 24, Art. V, Constitution of 1945) read, in part, as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law. . . ."

In ruling that this provision could not be harmonized with Section 13 of Article VII, it was the opinion of this office that the specific provision prevailed over the general prohibitory provision, and that the salary increase should be paid to the incumbent judges as of the effective date of the law providing therefor.

The foregoing necessitates the conclusion that senators whose terms extend from January, 1958 to June, 1962, are entitled to and shall receive the compensation provided by House Bill No. 1 as of the effective date of said law.

Implicit in our reasoning on this question is the assumption that members of the General Assembly are "state officers" within the meaning of Section 13 of Article VII. Inasmuch as there are no authoritative decisions on the point, and since the conclusion reached herein does not require a determination of that question, this is merely a working assumption and should not be construed as an official opinion on the question of whether or not members of the General Assembly are "state officers."

*But not apply to judges!*

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Your second question presents for our consideration the effect of the emergency clause contained in Section 3 of House Bill No. 1. Two sections of the Constitution must be considered in determining the validity of such emergency clause. These are Sections 29 and 52 of Article III, as follows:

"Section 29. 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 the laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

"Section 52. 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 per cent 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. \* \* \* \* Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

While Section 29, supra, provides that an act may go into effect sooner than ninety days after the adjournment of the Legislature "in case of an emergency," Section 52 provides that all laws except those "necessary for the immediate preservation of the public peace, health or safety" (and some others not material to our discussion here) shall be subject to referendum at any time within ninety days after the adjournment of the Legislature. As we shall hereinafter point out, our Supreme

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Court has always construed these two constitutional provisions together and has held that the emergency referred to in Section 29 must be such as makes it "necessary for the immediate preservation of the public peace, health or safety" that a statute go into effect sooner than ninety days after the adjournment of the Legislature. Our Supreme Court has consistently held that a legislative declaration of emergency is subject to judicial scrutiny. In State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 SW 327, l.c. 338, the Court said:

"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 yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration."

The ruling in the Sullivan case has been followed by our Supreme Court. In the later case of State ex rel. Pollock v. Becker, 289 Mo. 660, 233 SW 641, the decision in the Sullivan case was attacked for several reasons, but the Court expressly approved its holding on the question of the validity of an emergency clause in a legislative act and of the power of the Court to question such validity. The principal opinion in the Becker case said (233 SW l.c. 644):

"There is but a single legal proposition presented by this record to this court for determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, 'This enactment is hereby declared necessary for the immediate preservation of

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the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri'? \* \* \* This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of State ex rel. v. Sullivan, 224 SW 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case."

The Sullivan case was also cited with approval on the same question in State ex inf. Barrett v. Maitland, 296 Mo. 338, 246 SW 267, and Fahey v. Hackmann, 291 Mo. 351, 237 SW 752. Also, in the case of State ex rel. Harvey v. Linville, 318 Mo. 698, 300 SW 1066, the Court, at l.c. 1068, said:

"It was held in the case of State v. Sullivan, 283 Mo. 546, 224 SW 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect."

From the above we think it is clear that even though a legislative act declares that an emergency exists and that the act is "necessary for the immediate preservation of the public peace, health or safety," the courts are not bound by such declaration, but may and should look at the whole act to determine whether in fact such an emergency is set forth in the act as will authorize the Legislature to cause the act to become effective sooner than ninety days after the adjournment of the Legislature. With this principle in mind, we turn to the act under consideration to see if it declares an emergency within the meaning of the Constitution which would authorize the effective date of January 4, 1961, the date set out in House Bill No. 1.

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The emergency clause of House Bill No. 1 reads:

"Because the people of Missouri recognized the total inadequacy of the compensation provided for the members of the general assembly, the constitutional amendment authorizing this act anticipated that the provisions contained herein would become effective on the first day of the regular session of the general assembly next following the session at which this act is enacted, and because the ordinary effective date of this act would be several weeks subsequent to that date, an emergency is declared to exist within the meaning of the Constitution and this act shall be in full force and effect from and after its passage and approval."

The clause states that an emergency exists because the people of Missouri recognize the total inadequacy of the compensation paid legislators and, further, that the constitutional amendment authorizing a pay raise anticipated that it would take effect on the first day of the regular session next following the session at which the increase was voted. Nowhere in the emergency clause is it stated that the act is necessary for the immediate preservation of the public peace, health or safety. Nowhere in the clause or the body of the act itself are facts stated which would justify a judicial determination that the public, peace, health or safety would be seriously imperiled were not the act to be given immediate effect. Whether or not the pay of members of the General Assembly is increased, that body will continue to function. To postpone the operation of House Bill No. 1 may cause inconvenience to some; perhaps even hardship to a few, but still an emergency situation within the meaning of Section 52 of Article III is not presented by the act.

In *Fahey v. Hackmann*, 291 Mo. 351, 237 SW 752, 1.c. 761, the Supreme Court was concerned with a veteran's benefit bill carrying an emergency clause which read:

"The fact that many of the beneficiaries of this act are not employed and in dire need of the partial compensation sought to be provided for them in this act creates an emergency. . . ."

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Ruling that an emergency clause is proper only with respect to laws necessary for the immediate preservation of the public peace, health or safety, the Court held that the emergency clause was ineffective, saying:

"It is by virtue of this clause that proposed action under the law at this time is threatened. We regret to postpone the disposition of this fund, so richly deserved by the beneficiaries thereof, for even the short space of six or seven weeks, but we feel that the heroes entitled to the fund would not ask us to run counter to former judicial determinations in order to save this short space of time."

In *State ex rel. v. Sullivan*, supra, the Court stated the principle which still guides judicial analysis of a purported emergency clause as follows (224 SW 1.c. 339):

"So that in the case at bar, had the law makers in section 81 of the measure actually declared such measure to be necessary for the 'immediate preservation of the peace, health or safety,' we would hold such section void upon a comparison of the measure as a whole with the constitutional provisions of section 57 of article 4 of the Constitution. The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the Constitution. Many acts may be necessary to public peace, health, and safety, yet not be 'necessary for the immediate preservation of the public health, peace or safety.'"

In the light of these and many other court decisions invalidating emergency clauses which state on their face an even greater threat to the public peace, health or safety than is contained in the bill under consideration, our conclusion must be that the emergency clause in House Bill No. 1 is ineffectual. *Inter-City Fire Protection Dist. of Jackson County v. Gambrell*, 360 Mo. 924, 231 SW2d 193; *State ex inf. Barrett v. Maitland*,

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296 Mo. 338, 246 SW 267; State ex rel. Kolen v. Southwestern Bell Telephone Co., 316 Mo. 1008, 292 SW 1037; Hollowell v. Schuyler County, 322 Mo. 1230, 18 SW2d 498.

The constitutional amendment approved on November 8, 1960, contains the following sentence:

"No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted."

Absent the foregoing language, the act would unquestionably become effective ninety days after the adjournment of the special session, unless the emergency clause were valid. Section 29, Article III of the Constitution. What then is the effect of such language? It is the opinion of this office that the amendment may not reasonably be construed as making mandatory in all instances the first day of the next regular session after enactment of the statute as the effective date thereof. To so construe the amendment would render it in irreconcilable conflict not only with Section 29 but with Sections 49 and 52 of the Constitution. Section 29, as above noted, provides that "no law . . . shall take effect until ninety days after the adjournment of the session at which it was enacted." Section 49, so far as here relevant, reserves to the people the power to approve or reject by referendum any act of the general assembly, and Section 52 provides a period of ninety days after adjournment of the session for the filing of referendum petitions. There is no language whatever in the amendment of November 8, 1960, which would indicate an intention to exclude from the referendum provisions of the 1945 Constitution an act fixing salary for members of the General Assembly.

Under our Supreme Court decisions no bill subject to referendum may become effective until the expiration of the ninety-day period within which referendum petitions may be filed. To this effect are the cases of State ex rel. Moore v. Toberman, 363 Mo. 245, 250 SW2d 701, and State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 SW 327. In the Toberman case it was expressly ruled (250 SW2d 1.c. 706):

"Moreover, § 52(b) clarifies beyond question the intendment and scope of the referendum provided in § 52(a). It provides: ' \* \* \*

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Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise,' This is a clear declaration that the referendum provided for in 52(a) is not intended to apply to laws that have become effective."

And in the Sullivan case (224 SW 1.c. 335), the Court stated the rule as follows:

"That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment which reads, 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,' clearly means that a law upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for 90 days after the adjournment of the session or its approval by vote."

The conclusion is inescapable, therefore, that if, as we believe, acts passed pursuant to the amendment of November 8, 1960, are subject to the referendum, House Bill No. 1 cannot take effect until ninety days after the adjournment of the special session.

It does not follow, however, that the provision that no bill passed pursuant to the amendment shall not take effect until the first day of the next regular session is meaningless. The sentence is couched in negative terms, and may readily be reconciled with Section 29. Where possible in cases of seeming conflict, both provisions of the Constitution should be harmonized so that both may be made operative. State ex rel. v. Koeln, supra (61 SW2d 1.c. 755). Applying this rule of construction, it is our opinion that any act passed pursuant to the amendment would take effect ninety days after the adjournment of the session at which it was passed (or the beginning of a recess) unless such date is prior to the first day of the next regular session of the Legislature. In the latter event, the effective date of the act would be postponed to the first day of the next regular

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session. In the present situation, since the next regular session after passage of the act was within the ninety-day period, then the act necessarily becomes effective at the end of such ninety-day period.

It should be noted that Section 29, providing that no law shall take effect for ninety days after adjournment, has never been construed as mandatory, and thereby making all laws effective at the expiration of such ninety-day period. Our Supreme Court has ruled that the effective date of a law may be postponed beyond the ninety-day period. Construing the similar language of the 1875 Constitution, the Court held in *State ex rel. Brunjes v. Bockelman*, 240 SW 209, that the Constitution "places no inhibition upon the Legislature as to fixing a future date for a law to become effective." That is to say, the provision that no law shall become effective until ninety days after adjournment means simply that except as to emergency and other specified legislation, a law may become effective on any date fixed by the Legislature unless such date is less than ninety days after adjournment, in which event the ninety-day period governs. Applying the same principle and harmonizing the two constitutional provisions, the clear intent of the amendment is simply to prohibit any change in legislators' salary from becoming effective before the first day of the next regular session even if such day is more than ninety days after adjournment.

The foregoing conclusion does not mean that the special session served no useful purpose. Had the special session not been called, no bill fixing legislators' salaries could have been enacted until the present session. No bill enacted at this session could go into effect until the first day of the next regular session, which is almost two years hence. Therefore, by enacting House Bill No. 1 at the special session, the salary increase will take effect in the near future during the present session of the Legislature. It is only because the period between adjournment of the special session and the first day of the present session is less than ninety days that the salary increase may not become effective on the first day of this session.

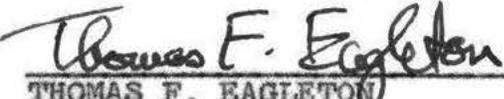
For the reasons above set forth in answering your first question, this salary increase will take effect as to all senators and representatives under the express provision of the constitutional amendment even though the effective date of the increase is during the term for which all such legislators were elected.

CONCLUSION

It is the opinion of this office (1) that the salary provision of House Bill No. 1 is equally applicable to all senators and representatives, including holdover senators, (2) that the emergency clause of House Bill No. 1 is ineffective, and (3) that House Bill No. 1 will take effect as to all senators and representatives ninety days after the adjournment of the special session at which it was passed. Until that date, the rate of \$125 per month continues in effect.

The foregoing opinion which I hereby approve, was prepared by my assistants James J. Murphy and Joseph Nessenfeld.

Yours very truly,

  
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THOMAS F. EAGLETON  
Attorney General