

CONSTITUTIONAL LAW: Legislature at a special session can act
GOVERNOR: only upon subject within scope of Governor's
EXTRAORDINARY SESSION: proclamation.
LEGISLATURE:
GENERAL ASSEMBLY:
REAPPORTIONMENT:

Opinion No. 360

October 20, 1965

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Dear Sirs:

This is in answer to your letter of recent date in which you submit the following opinion request:

"If and when the subject of reapportionment of the Missouri House of Representatives is submitted by the Governor to the General Assembly, is the General Assembly required to follow the views of the Governor as contained in the call, or is the General Assembly authorized to legislate upon the matter or subject in any way that it sees fit?"

The Governor under date of October 8, 1965, issued his proclamation convening an extraordinary session of the General Assembly of Missouri for October 18, 1965. The first three paragraphs of such proclamation relate to apportionment of the State Legislature and provide as follows:

"Paragraph One. To adopt a joint resolution submitting to the qualified voters of this State, for adoption or rejection, an amendment to the present Constitution of Missouri, fixing the number of the Senate and the House of Representatives of the General Assembly and providing the method and times for reapportionment of the Senate and House of Representatives by separate bi-partisan commissions in a manner that will comply with recent decisions of the

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United States Supreme Court interpretive of the Constitution of the United States as related to apportionment of the state legislatures.

"Paragraph Two. Enactment of legislation that would repeal those sections of Chapter 22, RSMo., 1959, relating to apportionment in multi-district counties and the City of St. Louis, and that section of said chapter fixing the number of the House of Representatives in accordance with the present provisions of Section 9 of Article III of the Constitution, which I believe to be constitutionally invalid because of the 'one man-one vote' decision of the Federal Court decision regarding apportionment of state legislatures.

"Paragraph Three. Enactment of legislation that would provide that a candidate for election to the House of Representatives of Missouri file his declaration of candidacy in the office of the Secretary of State and that his fee for filing be paid to the Treasurer of the State Central Committee of his party."

Section 9, Article IV of the Constitution of Missouri provides:

"The governor shall, at the commencement of each session of the general assembly, at the close of his term of office, and at such other times as he may deem necessary, give to the general assembly information as to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter on which action is deemed necessary."

Article V Section 9 of the Constitution of 1875 respecting Special Sessions is identical. Section 39 (7) of Article III of the Constitution of Missouri provides:

"The general assembly shall not have power 'To act, when convened in extra session by the governor, upon subjects other than those specially designated in the proclamation calling said session or recommended

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by special message to the general assembly after the convening of an extra session.'"

Article IV Section 55 Constitution of 1875 is almost identical except the wording has been somewhat rearranged but not materially so.

The general rule regarding the power of the General Assembly to enact legislation at an extraordinary session is found in Paragraph 10 (b), 82 C.J.S., Page 27, which provides in part, as follows:

"Under constitutional provisions limiting legislation at special or extra sessions, the call or proclamation may contain many or few subjects according to the governor's conception of the public need, and, within his discretion, he may confine legislation to the subjects specified, which may be done by his proclamation alone, or by special message after the legislature has convened on call, or by both. The governor may limit the consideration of a general subject to a specified phase of it, but he cannot restrict the details springing from such subject, and his authority over the legislature is limited to his recommendation. The governor may make suggestions with respect to the disposition of the subject matter of the proclamation or call, but suggestions are merely advisory and not binding, and specific instructions on the subject matter of the call can, at best, be regarded only as advisory and not as limiting the character of the legislation that might be had on the general subject. Thus, where a general object is described, the legislature is free to determine in what manner such object shall be carried into effect, since, while the legislature must confine itself to matters submitted, it need not follow the views of the governor or legislate in any particular way, but may act freely and legislate on all or any of the subjects specified or on any part of a subject, provided a new subject unrelated to those stated is not acted on."

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Unquestionably the General Assembly cannot act on a subject not included in the Governor's proclamation or in a message from the Governor. In the case of *Smith v. Curran*, 268 Michigan 366, 256 N.W. 453, a leading case on the subject, the Supreme Court of Michigan held invalid an act passed at a special session of the legislature providing for validation of bonds that had been issued without a vote by the people or without authority of law by city councils when the subject of the Governor's proclamation was the validation of bonds issued under authority of law, but issued irregularly.

In *Sims v. Weldon*, 165 Arkansas 13, 263 S.W.2d 42, the Supreme Court of Arkansas held invalid a statute passed at a special session of the legislature which levied a sales tax on cigars and cigarettes when the proclamation of the Governor called for enactment of an income tax statute.

In *State v. Woolen*, 128 Tennessee 456, American Cases 1915C465, 161 S.W. 1006, the Supreme Court of Tennessee held invalid an appropriation for the "National Exposition Company" a private corporation when the proclamation of the Governor provided for appropriations for state institutions, offices and departments.

In *State v. Adams*, 323 Missouri 729, 19 S.W.2d 671, the Missouri Supreme Court held that the legislature was without authority to enact a provision at a special session providing that "the jury shall decide which punishment shall be inflicted," when the Governor's message authorized the legislature to consider the repeal of the statute abolishing capital punishment and reenactment of such a statute in lieu thereof.

In *State ex rel. Rice v. Edwards*, 241 S.W. 945, decided by the Missouri Supreme Court, the Governor's message authorized the division of cities over 600,000 into justice of the peace districts. The court held invalid an act relating to justice of the peace districts and constable districts because the subject of constable districts was not included in the Governor's message. This case was overruled by *State v. Adams*, supra, only insofar as this case held the entire act providing for justice of the peace districts and constable districts to be unconstitutional but was not overruled as to its holding that the legislature has no authority to act on a subject not included within the Governor's proclamation or in a message by the Governor.

In *State ex rel. Carpenter v. City of St. Louis*, 318 Missouri 870, 2 S.W. 2d 713, an act at a special session of the legislature

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was held invalid by the Supreme Court of Missouri because such act related to libraries but the Governor's proclamation related to roads and road bonds.

In *Schlafly v. Baumann*, 108 S.W. 2d 363, decided by the Supreme Court of Missouri, the Governor's proclamation authorized the legislature at a special session to repeal a section relating to limitation of actions concerning back taxes and repeal of a section providing a limitation period for sale of property for back taxes. The Court held a provision enacted at such special session would be invalid if it attempted or purported to change the date of sale of real property for delinquent taxes.

In *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 15 L.R.A. 47, 19 S.W. 530, the Supreme Court held mandatory the provisions of the constitution providing that matters acted on by the legislature at an extraordinary session must be included in the proclamation of the Governor or in a message by the Governor. The court held that the proclamation therein involved authorized action only relating to railroad rates and held unconstitutional and invalid legislation providing for safety measures relating to railroad switches enacted for the prevention of accidents.

It is also clear that the Governor has power only to state in a proclamation or message the subject of legislation and cannot restrict the legislative authority to act in any way the legislature sees fit in relation to such subject. Any attempted restriction by the Governor in his proclamation or message limiting the power of the legislature to act in a particular way on the subject of the proclamation or message is ineffective and at most is advisory only.

In *Timmer v. Talbot*, 13 F. Supp. 666, a Federal District Court in Michigan held that a statute enacted at a special session of the legislature was valid which statute related to chattel mortgages generally, even though the Governor's proclamation provided only for legislation relating to installment mortgages on livestock and farm products. The court said i.c. 668:

"Hence the primary consideration is: What was the subject submitted in the Governor's message? A narrow view would be that the only subject so submitted was that of installment mortgages on livestock and farm produce, that the problem to be solved was that of federal loan agencies in their determination of the amount of liens, and that the only permissible solution was to provide

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for the filing of chattel mortgages with the register of deeds instead of with township clerks.

"[1] The reasonable deduction from the authorities, however, is that while the Governor may control the subject-matter of legislation to be enacted at a special session, he may not restrict boundaries within the natural range of that subject or dictate methods of dealing with it, or limit the class of those to be benefited."

In the case of *In re Opinions of the Justices*, 233 Ala. 185, 171 So. 902, the Supreme Court of Alabama held that the Governor's proclamation calling a special session of the legislature cannot restrict the discretion of the legislature as to the particular manner in which the legislature is to act concerning the subject set out in the proclamation. In that case the Governor's proclamation was in part as follows:

"'6. To regulate the manufacture and sale of spirituous, vinous or malt beverages through State owned and operated stores or other State supervision, and to provide for a referendum thereon to the electors of Alabama.'"

The court held a proposed act would be valid such act providing for state liquor stores without providing for a referendum thereon. The court said So., l.c. 903:

"We are of opinion the subject here designated is the regulation of the manufacture and sale of spirituous, vinous, or malt beverages in this state.

"The matter of a referendum, vel non, is within this subject, and a matter for the determination of the Legislature. The reference to a referendum in the proclamation is to be treated as advisory merely."

In *Ex parte Fulton*, 86 Cr. 149, 215 S.W. 331, the Court of Criminal Appeals of Texas held valid a local option law making it unlawful "to have or keep" intoxicating liquor for personal use in a public road or other public place. The court said S.W., l.c. 334:

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"In his proclamation calling the special session, the Governor called on the Legislature to pass a law prohibiting the sale of intoxicating liquors within ten miles of any army camp; also to prohibit sale or gift to soldiers throughout the state. Elaborating his objects in subsequent communications, the Governor attached correspondence between himself and the Secretary of War, in which it is made plain that the design was to prevent intoxicants reaching the soldiers who were training at various localities in the state, and the means suggested was to designate zones in which such liquors 'shall not be allowed.'

"[4,5] We are of the opinion that the Governor, in his proclamation and messages submitted to the Legislature the subject of legislation to restrict the liquor traffic and render such liquor inaccessible to the soldiers. It is not contemplated that the Governor shall state the details of legislation in order to give the Legislature jurisdiction to consider it at a special session. *Brown v. State*, 32 Tex. Cr. R. 132, 22 S.W. 596. He must submit the subjects, but the methods are within the discretion of the Legislature. *Long v. State*, 58 Tex. Cr. R. 209, 127 S.W. 208, 21 Ann. Cas. 405.
* * *"

In *State Tax Commission v. Preece*, 1 U. 2d 337, 266 P. 2d 757, the Supreme Court of Utah upheld the validity of an increased tax on cigarettes imposed at a special session of the legislature. The Governor's proclamation was on the subject of school retirement, finance and taxation and recommended that the necessary moneys for school purposes be raised by borrowing from certain funds and an increase of taxes on local property. The court said, P. 2d 1.c. 760:

"It seems clear that the Governor's objective was to avoid the imposition of any new state tax and to see that the added expense of the new program was supported from other sources, primarily by the local districts, as these comments show: 'There are certain requisites to a changed financing law that will be met in my proposal including better equalization among the districts and greater local responsibility and control. It is essential that we

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increase local board responsibilities * * * ,
if we are ever to bring taxing and spending
into line. Those who decide on expenditure
policies should bear the political respon-
sibility for raising the necessary funds."

The court said further, l.c. 761:

"We believe that the message here was of suf-
ficient breadth that it presented the problem
of school financing and the providing of funds
therefor. Normally it is both the duty and re-
sponsibility of the Legislature to determine
how this shall be done. We are then confronted
with the question whether the Governor can call
a Special Session to deal with the subject of
financing our public schools, and by limiting
the agenda to definite proposals as to how it
shall be handled, formulate the policy with
respect thereto. The answer to this proposi-
tion is found in the quite universally accepted
rule, hereinbefore stated, which we approve:
That while the Governor may limit the legislative
agenda as to the purpose or subject matter to
be considered, he cannot restrict it as to the
means it pursues in solving a problem presented
as a subject for legislative action. It is true,
of course, that the Governor may make such recom-
mendations as he sees fit, but these are not
binding on the Legislature; they may exercise
their discretion in following the recommendations
or seek alternative methods in dealing with the
'subject' presented."

In *Commonwealth v. Liveright*, 308 Pennsylvania 35, 161 A.
699, the Supreme Court of Pennsylvania upheld the validity of an
act providing for an appropriation to the Department of Welfare for
payment to local political subdivisions for relief of the poor
under a proclamation for the special session of the legislature
at which such law was enacted calling for an enactment of laws
to relieve unemployment, the court holding that employment relief
means poor relief. The court said, A., l.c. 704:

"*State v. Woolen*, 128 Tenn. 456, 161 S.W.
1006, see note 2 below, an authority stressed
by both sides, best sums up the general rules,
stating: 'All [the cases] provide that the
Governor may confine the legislature, called

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in a special session to such subjects of legislation as he may prescribe, which limitations he may make operative * * * All the cases agree that, while the Governor may so limit the subjects of legislation, he cannot dictate to the Legislature the special legislation they shall enact on those subjects. In all of them the inquiry is finally reduced to the ascertainment of the subject or subjects embraced in the call * * * determined by an analysis and construction of that paper as in the case of any other written instrument, and by a like analysis and construction of the legislation drawn in question for the purpose of deciding whether it is embraced within the call, or message.'

* * * * *

"The Governor having designated a channel of legislation through the subjects submitted to the Legislature, that body need not, in keeping within these subjects, be bound in the manner, method, or means of accomplishment as stated or implied in them (Likins' Petition, supra), but may, within a prescribed subject, add thereto, or modify or enlarge it, so that, not losing its intimate relation with the subject designated, it may accomplish the purpose set forth in the particularization of the general subject designated in the call. State v. Pugh, 31 Ariz. 317, 252 P. 1018."

In the case of In re Likins, 223 Pa. 456, 72 A. 858, the Supreme Court of Pennsylvania upheld the validity of a provision enacted at a special session providing for audit of accounts of expenses of candidates for office when a petition requesting such audit was filed. The proclamation of the governor in such case was for legislation regarding the use of moneys by candidates and for filing statements of expenditures by such candidates. The court said, A., l.c. 861:

"* * * No one could read either the proclamation of the Governor or the title of the act without meeting the subject referred to in both--the use of money in elections--and, as we said in Commonwealth v. Jones, 4 Pa. Super. Ct. 362: "The subject may have but one object, while the means necessary for the attainment of that object may necessarily embrace separate subjects differing in their

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nature and particular effect, yet all contributing to it and comprised within the principal subject. Everything which the language of the subject of a title reasonably suggests as necessary or appropriate for the accomplishment of its express purpose is sufficiently enacted by its title"--and either the proclamation or the title is sufficiently clear and explicit to invite an inquiry into the body of the bill. Nor is the requirement of the law satisfied by anything short of an examination of the whole body of the act when an inquiry is once invited by a sufficient title, and the same reasonable rule applies to the sufficiency of the proclamation. * * *
*1"

In the case of State Note Board v. State, 186 Ark, 605, 54 S.W. 2d, 696, the Supreme Court of Arkansas held valid a statute enacted at a special session of the legislature which authorized the issuance of short term notes by the State Note Board even though the proclamation of the governor authorized legislation only for the issuance of revenue bonds. The court said, l.c. 698:

"As has been observed, the purposes, as indicated in the proclamation, for the calling of said extraordinary session of the General Assembly, were for the three reasons above set forth. The use of the language authorizing the Legislature to issue revenue bonds was merely a suggestion as to how to dispose of the subject-matter designated in the call, and, while the Governor may make such suggestions, such suggestions or directions are not binding on the Legislature or restrictive of the legislative power, and the action of the Governor in prescribing in his call the character of bonds to be issued to bring about the necessary legislation is treated as being merely advisory. 25 R. C. L. 805.

"It was never contemplated by the Constitution that the Governor should restrict the Legislature as to details, methods, or manner in bringing about the end sought. Ex parte Fulton, 86 Tex. Cr. R. 149, 215 S. W. 331.

"Specific instructions on the subject-matter in the call can, at best, be regarded only as advisory and not as limiting the character of legislation that might be had upon the general subject. People v. District Court, 23 Colo. 150, 46 P. 681"

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In the case of State Road Commission of West Virginia v. West Virginia Bridge Commission, 112 W. Va. 514, 166 S. E. 11, the Supreme Court of Appeals of West Virginia said, S. E. 1.c. 13:

"* * * But the purpose of the proclamation in counseling both the revision of salaries and the passage of a revenue measure was mainly to secure a balance of the budget. That balance was an important end to be achieved, and the revision of salaries and the revenue measure were but suggested means to that end. It is therefore apparent that balancing the budget was in fact a business stated in the proclamation. True it is, that his Excellency contemplated effecting such balance only through the reduction of salaries and the revenue measure. But it is settled law that the contemplation or recommendation of a Governor is 'regarded as advisory only,' which the Legislature may accept or reject at its discretion. People ex rel. v. District Court of Arapahoe County, 23 Colo. 150, 46 P. 681. In authorizing a Governor to state the business of an extraordinary session, and in limiting legislative action to that specific business, the Constitution does not confer on him one jot of legislative power. The Constitution vests that power exclusively in the Senate and House of Delegates, whether the session be regular or extraordinary."

The doctrine that the legislature is authorized to legislate upon the subject of the governor's proclamation or message in any way it sees fit was succinctly stated by the Supreme Court of Missouri in the case of State ex rel. Rice v. Edwards, supra, in which case the court said, 1.c. 948:

"In discussion of the question as to whether or not the General Assembly remained within the limits of the matter or subject submitted to it for legislative action by the message of the Governor, we want to first say that we find no fault with those cases which hold that when the subject or matter is submitted to the Legislature, the Legislature is authorized to legislate upon the subject or matter in any way that it sees fit. It does not have to follow the views of the Governor, and legislate in a particular way upon the submitted subject. But this rule does not change the rule that the Governor can limit the subject-matter for consideration, and for legislative action. The matter to be legislated upon at a special session is within the discretion of

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the Governor. If he wants legislation upon certain matters pertaining to railroads, or their employees, he must specifically designate it and when he has specifically designated it, the lawmakers are not permitted to ramble through the whole domain of corporation law. Their legislation must be within the narrow bounds of the subject or matter submitted. *Wells v. Ry. Co., supra.*"

In *Ex parte Seward*, 299 Mo. 385, 31 A.L.R. 665, 253 S.W. 356, the Supreme Court of Missouri, en banc in discussing the provisions now contained in Section 39 (7) of Article III of the Constitution of Missouri, S.W., l.c. 357:

"It is true that section 55 of article 4 is a limitation upon the powers of the General Assembly in extra session and is mandatory. *Wells v. Railway*, 110 Mo. loc. cit. 296, 297, 19 S.W. 530, 15 L.R.A. 847. What it commands, however, depends upon what it means. The power it denies is the power to act upon any subject, unless that subject is designated in the convening proclamation or 'recommended by special message to its consideration,' etc. There is no implication that it is necessary for the Governor to favor one sort of act rather than another with respect to a subject he 'recommends' by special message.

"The General Assembly does not have to legislate upon the special matter just as the Governor may desire, or as he might indicate in an ill-advised message, but such body must confine itself to the matter submitted by the Governor. It cannot go beyond the matter submitted.' *State ex rel. Rice v. Edwards* (Mo. Sup.) 241 S. W., loc. cit. 948.

"The effect of this is to say that whatever action upon the subject the Governor may favor, the sole effect of his recommendation or submission is to bring that subject within the legislative power as a subject of legislation. This is the clear meaning of the section, since it is the 'subject' alone which is required to be 'recommended' before action be taken upon it. * * *"

Examination of these cases establish certain principles:

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The Missouri cases make clear that if legislation is enacted at a special session that is outside the "subject" of the Governor's call or proclamation or message it is void.

The Missouri cases make clear that the Governor must specifically designate in his call or proclamation for a special session the "subject" or "matter" that is to be considered by the legislature.

That the Governor may in his recommendations spell out in detail his ideas and proposals for consideration by the legislature although the legislature is not bound by the specific detail so spelled out by the Governor.

The Missouri cases have not made clear the line of demarcation in the Governor's call or proclamation between a call which is too specific and a call which is too general. We do have some aid in the resolution of this problem by the cases in other states.

The crux of the problem then seems to be what is the "matter on which action is deemed necessary" (Art. IV, Sec. 9 Constitution) or what are the "subjects" designated in the proclamation. (Art. III Sec. 39 (7) Constitution). We believe that "matter" and "subjects" as used in these two provisions of the Constitution are synonymous. It does not seem possible to define these terms satisfactorily or to explain their meaning except when applied to particular fact situations. We therefore deal with the facts of present situation only.

It is our view that the matter or subject of the first paragraph of the governor's proclamation is the fixing of the number of the members of the Senate and of the House of Representatives of the General Assembly of Missouri and providing the method and times for reapportionment of the Senate and House of Representatives and that the General Assembly may enact such measures as it deems proper concerning this subject or the General Assembly may refuse to act on such subject or matter. The provision in Paragraph One of the Proclamation that the General Assembly can act on the subject of the number of members and the times and method of reapportionment of the Senate and House of Representatives only by a joint resolution submitting a constitutional amendment to the people and the provision that reapportionment of the Senate and House of Representatives must be by separate bipartisan commissions, are not part of the "subject" of the Governor's proclamation and cannot restrict the authority of legislature to act as it sees fit on the subject of the proclamation. Such provisions are advisory only.

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The General Assembly can, under Paragraph 2 of the Governor's proclamation, act or refuse to act on the subject of repeal of those sections of Chapter 22, Revised Statutes of Missouri relating to apportionment in multi-district counties and the City of St. Louis and fixing the number of the House of Representatives in accordance with the present provisions of Section 9 of Article III of the Constitution of Missouri.

The General Assembly can under Paragraph 3 of the Governor's proclamation act or refuse to act on the subject of a candidate for the House of Representatives filing his declaration of candidacy in the office of the Secretary of State and paying his filing fee to the State Treasurer of his political party.

We are not in this opinion making any holding as to the areas of the subject of the proclamation which must be acted upon by constitutional amendment and which may be acted upon by constitutional amendment or by statute.

CONCLUSION

The legislature in a special session is authorized to act or not act upon the subject or matter within the scope of the Governor's proclamation or call.

Very truly yours,


NORMAN H. ANDERSON
Attorney General