

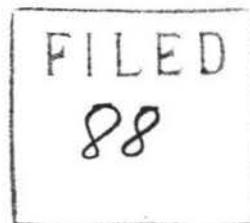
CIRCUIT JUDGES:  
LEGISLATORS:  
CONFLICT OF INTEREST:

The prohibition contained in Article III, Section 12, of the Constitution of Missouri, renders a state senator ineligible to accept an "appointive office" but such section does not preclude him from accepting an appointment to fill a vacancy in an elective office. For the purposes of Article III, Section 12, the office of circuit judge, even in a county under the nonpartisan court plan, is an elective office. Therefore, Article III, Section 12, of the Constitution of the State of Missouri does not preclude a member of the legislature from accepting nomination and appointment as a judge of the circuit court in a county under the nonpartisan court plan.

OPINION NO. 88

April 20, 1973

Honorable Jack E. Gant  
Senator - 16th District  
9517 East 29th Street  
Independence, Missouri 64052



Dear Senator Gant:

This is in response to your request for an official opinion of the Attorney General upon the following question:

"Does Article 3, Section 12, of the Constitution of the State of Missouri, preclude a member of the Legislature (specifically a member of the Senate), from accepting an appointment as a Judge of the Circuit Court in a county under the non-partisan court plan. (Namely Jackson County)"

Article III, Section 12, of the Constitution of Missouri, provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative.

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During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."  
(Emphasis added).

Because resolution of your question is determined by the meaning to be attributed to the phrase, "during the term for which he was elected no senator . . . shall accept any appointive office . . . the emoluments of which are increased during such term," we begin our analysis with reference to the constitutional history of this section, and the constitutional debates.

### I. Constitutional History

Article III, Section 16, of the Constitution of 1820, provided:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased during his continuance in office, except to such offices as shall be filled by elections of the people." (Emphasis added).

That provision, with only minor additions, appeared in the Constitution of 1865 as Article IV, Section 15, which provided:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased, during his continuance in office as a senator or representative, except to such offices as shall be filled by elections of the people." (Emphasis added).

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That provision was substantially altered in the Constitution of 1875. Article IV, Section 12, provided:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof, (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress." (Emphasis added).

It was against this constitutional history that the delegates to the constitutional convention considered what provision, if any, should be included in the proposed Missouri Constitution of 1945.

## II. The Constitutional Debates

What is now Article III, Section 12, was initially submitted to the convention as Section 11 of File 17, which provided:

"No person holding any lucrative office under the United States of this State or any municipality thereof (members of the organized militia, justices of the peace, and notaries public excepted) shall be eligible to either House of the General Assembly; and no senator or representative shall during the term for which he shall have been elected, be appointed to any office under this State, or receive remuneration or accept employment under any official or department of the State; any senator or representative violating any provision of this Section shall forthwith forfeit his office in the General Assembly." (Emphasis added) Page 4720.

Mr. McReynolds, handling the file on behalf of the committee, stated the purpose of the proposed section:

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"Mr. President, the present section is Section 12, the one which appears in the Constitution of '75. The section has been elaborated some in this fashion; 'No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under this state or receive remuneration or accept employment under any official or department of the State.'

"Now, the reason for that modification was that a practice has grown up in the General Assembly where members of the General Assembly have, in the past accepted employment from the state and since they are called upon to vote upon appropriations and other matters which affect the policy of the particular departments, it was felt that a proper safeguarding of the rights of the departments and of the state in protection of itself and its interest should disqualify the members of the General Assembly from holding office of that kind or accepting employment or remuneration of that kind. That's the primary change which was made. I move the adoption of the section." Page 4720.

However, as soon as the committee proposal had been read by the clerk, and the explanatory statement made by Mr. McReynolds, Mr. Phillips of Jackson County proposed a substitute amendment for the committee's proposal, Section 11. The Phillips' amendment provided:

"No senator or representative, during his incumbency in office, shall be elected or appointed to any office under the United States, this state or any municipality thereof. No member of Congress or person holding any lucrative office under the United States or this state or any municipality thereof, shall be eligible to either House in the General Assembly. Any senator or representative accepting an office under the United States, this state or any municipality thereof, shall be deemed

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to have resigned as a member of the General Assembly and shall exercise no further rights therein or receive further compensation as such member. The provisions of this section shall not apply to the members of the organized militia, members of the school board, and notary public.'" (Emphasis added) Page 4721.

Minor amendments were submitted and debated, but consideration of whether the committee proposal or the Phillips' substitute should be adopted was deferred. Subsequently, debate focussed upon the respective differences and merits of this section as embodied in the committee draft and the Phillips' amendment.

The committee proposal constituted a complete disqualification of a senator or representative from any office or employment during his term. The Phillips' amendment provided for no such disqualification upon a senator or representative and required only that he resign before accepting another office or employment. The conflicting positions and arguments may be illustrated by excerpts from the debates:

"MR. BROWN (OF CHRISTIAN): Judge, while you're working over this section it strikes me that the language used in the fifth or sixth line, I believe it is these words 'and no senator or representative shall, during the term for which he shall have been elected at the course of two years for a representative' -- do you mean by that that in case a representative, he should resign from his office at the end of a twelve month period that he would still be disqualified for twelve more months before he might accept an appointment?

"MR. FORD: My amendment doesn't deal with that phase of it at all.

"MR. BROWN (OF CHRISTIAN): But I am asking you if you care to say what your idea is of the meaning of the section. It strikes me that that is a little bit harsh in this, that if a man should desire to resign from an office and accept a place on the Supreme Bench or some other place that he ought to be permitted to do so. I don't think that he ought

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to be made to serve in case he didn't want to for a period of two years. I am asking you what your opinion is of the meaning of that particular set of words.

"MR. FORD: The great temptation is for a man to serve in the Legislature and favor some certain measure with the expectation that when his time is out or when the bill is passed why then he can resign and get a good job and that was the purpose in making a man that serves in the Legislature surrender any right to serve in some other capacity." Page 4816.

Mr. Phillips was called upon to explain the difference between his substitute proposal and the committee proposal:

"MR. PHILLIPS (OF JACKSON): Well, the present Constitution is in conflict for the reason that the first sentence of it was taken from the Constitution of 1865. If you will refer to your Revised Statutes of 1939 and to Section 12 under Article 4 of the Constitution you will find this information. The first sentence reads this way, 'No senator or representative, shall, during the term for which he shall have been elected, be appointed to any office under this state or any municipality thereof'. The first sentence is taken from Section 15, Article 4 of the Constitution of 1865. The last sentence and that reads, 'And no member of Congress or person holding any lucrative office under the United States or any state or any municipality thereof, exception noted, shall be eligible to either house of the General Assembly or remain a member thereof after having accepted such office'. That was taken from Section 11 of Article 4 of the Constitution of 1865. The two sections were put together but the Convention of 1875 added, 'Or any municipality thereof'. I am reading still from the Constitution in the 1939 statutes. This section apparently contains conflicting provisions as the latter portion, that is the sentence as taken from Section 11, authorizes a ballot acceptance of another position during the term

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for which elected under penalty of no longer remaining a member of the General Assembly while the first sentence is an imperfective prohibition against the acceptance of any office during the term for which you're elected.

"The present Constitution then reads that you can validly accept another position according to the last clause because it says if you accept it it bars you from remaining a member, but the first clause explicitly prohibits (sic) you from doing it. Therefore the conflict. Now the committee evidently overlooked that part because the report had the identical language. 'No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this state', and then it adds as the committee had, 'or receive remuneration under any official department of the state', but it still has the conflict that if you accept a position you can no longer remain a member and then it says, 'during the term to which you are elected you shall not accept it.'

"Now the substitute which I have offered attempts to handle it in a different way. It starts out by saying, 'No Senator or Representative, during his incumbency in office shall be elected or appointed to any office under the United States, this state, or any municipality thereof.' As long as the duties of the office are incumbent upon him he is prohibited from holding this position. Then it again says in the section which I am offering, 'No member of Congress or person holding any lucrative office under the United States, or this state, or any municipality thereof, shall be eligible to either house of the General Assembly.' That's for the purpose of letting him be elected even while he is holding some subsequent position but he must not be holding the position at the time he qualifies either in the Senate or the House, but the main difference between the two is with respect to the conflicting provisions that

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are in the present Constitution, that remain in the Committee report. Under the substitute which I am offering a Senator or Representative cannot, during his incumbency in office, accept any other position but he may, and Judge Mayer I think made a very eloquent speech for the facility for which a man may accept a public position. We need men in public positions so much that if he wants to become Mayor of his town while he has yet three months to serve here in the General Assembly with no chance of its, of a special session, he ought to be permitted to become a Mayor of his town, to be elected, the Mayor of his town. It does say under the amendment I have that when he is ready to qualify for Mayor, he must not have incumbent upon him, this office.

"Now, I am trying to add that facility so that the men come here and gain some training and facility in government and you may use them in your county, in your city or in some other position and I do not think that it is ever intended by the present Constitution, but when it is that he qualifies for any other position he no longer remain a member. I don't think it is ever intended to bar him.

"MR. DEASON: Mr. Phillips, under either one of these sections or under this section that is proposed by the Committee over your substitute, would it be possible for me as a member of the Legislature, if I had three or four friends on a close vote, to support a proposition of some kind to establish a new department or a bureau or a commission with the thought of resigning my place in the Legislature and being appointed to head that said bureau or commission?

"MR. PHILLIPS (OF JACKSON): Well Mr. Deason, it would be possible but it is not probable that you or any other member who takes his oath very seriously in the General Assembly would stoop to that. Men just don't do those thing and I don't think you would.

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"MR. DEASON: Well, I have been in the Legislature because I live in a Democratic county, but I was just wondering about the possibilities of it. It seems to me, Mr. Phillips, that under your section, or under your substitute that a man could resign from the Legislature to take over or handle a job like that.

"MR. PHILLIPS (OF JACKSON): Well, you would have to be appointed by the Governor or someone and I think the remoteness of that - the situation I am trying to reach is in your county you got your county court. A man frequently wants to become a county judge but he is still a member of the General Assembly. He never intended to return. The vacancy comes in August and the Governor now can appoint him legally without this section staring him in the face and the Governor sometimes don't appoint him. Judge Clark of the Supreme Court again had an unexpired term. He had not filed from the Senate from his district. He had filed in the Supreme Court. A member of the Supreme Court died along in the summertime and the Governor wanted to appoint him. He should have been appointed but the net result was that this section stared them in the face and they were afraid to appoint him as a judge as it was written. In the present Constitution it would conflict. The committee Report does not clarify it but I am saying that I am of the opinion that the way I handle it does clarify it and I hope it will be adopted so that there will be no more difficulty over a matter of that character.

\* \* \*

"MR. COLEMAN: Mr. Phillips, . . . and now you want to leave it possible for him, by resigning, to make it eligible, is that it?

"MR. PHILLIPS (OF JACKSON): As long as the duties of the officer is incumbent upon him he is precluded from accepting a mayorship or a council position or any local position, any

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county position or any state or United States position, but if he is appointed to such a position then he should be permitted to resign. I never heard of a rule that a man couldn't resign from the Supreme Court of the United States or any other position and I don't think that it was ever intended in 1875 when they threw those sections together that they should prevent a man from resigning, because in the very next sentence it says that if he does take a position in Congress or any place he should be deemed to vacancy.

\* \* \*

"MR. COLEMAN: Mr. Phillips, isn't there a pretty good reason for provisions with respect to legislative officers shall not be eligible to accept any such appointments for the reason that has been stated here, and thereupon resign to accept the appointment?

\* \* \*

"MR. PHILLIPS (OF JACKSON): Yes, there is a possibility I know of no reason why we should write a constitutional provision preventing it. Page 4820-4823.

\* \* \*

"MR. PHILLIPS (OF JACKSON): It is in the next sentence, that no senator or representative, during the term which he shall have been elected to be appointed to any office under this state, or receive remuneration or accept employment under any official department of the state. It is the term that I am explaining.

"MR. CRANE: In other words, you want the Legislature to either accept an appointment under any department of the state government by resigning his office.

"MR. PHILLIPS (OF JACKSON): Well, the city government or county government or any place where he would need it.

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"MR. CRANE: Well, your substitute of course permits him also to resign from the Legislature and take a position under the state government, doesn't he?

"MR. PHILLIPS (OF JACKSON): Yes, and there might be a very good reason for that, like Senator Clark was still a member of the Senate and he would have been appointed a Supreme Judge and he had not filed for the Senate and his term was not yet out. It was in August when the vacancy occurred in the Supreme Court and his term continued in August until December 31st and I would like to rectify that situation.

"MR. CRANE: Mr. President, I think Mr. Phillips is also interested in the other feature of it which was objected to in the Committee. Now, my recollection is that Mr. Phillips had the very same proposal before the Committee and the matter of whether or not the person elected to the Legislature could resign during his term of office and take another job with the state government was fairly discussed. When I voted for the Committee Report I voted for it on the basis that a member of the Legislature couldn't resign from the Legislature and be appointed to any office under the state government in consideration for any service he might have performed while a member of the Legislature in order to obtain such appointment. I think to the best of my mind that there is very great distinction on that one issue. Now, the matter he speaks of as to rendering any one of those in office, a municipality or any other division of government, anything that prevents him from being eligible to run for election, why I would have no objection, but on the other hand I think it was a very fundamental issue that was discussed in the Committee and we had this same discussion there offered by Mr. Phillips and we decided in there, as I remember it, that we didn't want anyone in the Legislature to accept employment under the state government during the term for which he had been elected to the Legislature. Pages 4826-4827.

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"MR. SHEPLEY: Mr. President and fellow delegates, it seems to me that this provision that we're discussing goes a little further than the question of the creation of an office by a member of the Legislature or through his influence and then his resigning to accept appointment to that office. It seems to me that we're dealing now with a branch of the government that writes the ticket for the state, makes all the appropriations, enacts all of the laws other than those enacted by the people, and what they are trying to do is to take away, to remove any factors which might have an influence on a member's judgment in voting on the various questions that are brought before the General Assembly. In other words, it would not be necessary to create a new office. I might be a member of the General Assembly and the question might come up concerning an appropriation for one of the departments. If I wanted a pretty good job in that particular department that was open, I think naturally I would be inclined to be generous with my vote for the appropriations. I should imagine there would be a great many occasions when a man's judgment to some extent might be swayed by a selfish interest if he could be eligible himself to benefit as a result of the vote and I think it's a good thing. After all man serves for two years in the Lower House and four in the Senate and if he accepts that and runs for election and offers himself to the people, just as Governor Park has mentioned, I think the people have a right to expect him to continue in that office, rather than to resign to take some other appointive job, whether he is instrumental in creating it or not. Page 4830.

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"MR. FORD: Mr. President, I agree in principle with what Mr. Opie has said. Members of the Legislature, while the office you might say is of not so much importance, the things

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with which they are dealing affects everybody in the State of Missouri and in their legislative capacity they are a very important official and what they do lasts long after they have gone home and for that reason they ought not to be submitted to the temptation of doing anything of that particular kind that might be detrimental to the interests of the people in order to further their own individual interests. Now, we're worrying too much about the fellow that is holding the office and not enough about the people whom he is serving. This provision is not put in there solely as a penalty on the fellow that is holding the office, but it is to protect the people themselves against his action which he might think at the time would not affect a man because he is thinking of his own personal interest and any man who accepts the position of a Legislator in the state, the people expect him to give his whole-hearted attention to that and not allow his personal ambitions to interfere. I think the Committee's original section with the slight amendments that clarify it, is the better section and that it should be adopted and the Phillips amendment defeated. Page 4831.

\* \* \*

"PRESIDENT: Further discussion of the substitute?

"MR. CLAYTON: Mr. President, I hope the substitute will be defeated. It seems that the proponents have cited individual cases here on the floor this afternoon where certain ones were prevented from being appointed to certain offices or accepting appointment by reason of this provision. It seems that they apparently are overlooking the points brought out by Governor Park and Delegate Shepley that when they are elected by the people of their county or district, whichever the case may be, they are accepting a responsibility that they should carry out to the end. It doesn't seem to me that we should change this proviso that pro-

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hibits this sort of thing. As the section now reads it does not prevent an employee of the municipality from resigning (sic) and accepting employment. The main thing that the proponents of the substitute wish eliminated is the provision that a member of either the House or Senate cannot accept another position with the state during the term for which he was elected.

". . . He runs for office subject to the present provision in the Constitution and I think that it would be very unwise to adopt the substitute." Page 4833.

Debate was concluded and on a roll call vote, the Phillips' substitute was defeated, and the committee proposal adopted.

Subsequently, the Phillips substitute was brought up for reconsideration when there was greater attendance at the convention. Again there was debate upon the two conflicting proposals.

Again Mr. Phillips was called upon to explain the purpose of his substitute:

"MR. PHILLIPS (OF JACKSON): Senator, you were not here the other day I am sure when the matter was up for discussion and I call attention to the fact that the present Constitution has a very serious conflict, but in one place in the present Constitution it prohibits a Senator or Representative, during the term of office for which he is elected, from accepting a position with the United States, this state, or any municipality. While in another section of the present Constitution, there is, at least there is implied authority for him to accept the office, but under the penalty of no longer remaining a member of the General Assembly. In other words, the present Constitution is clearly in conflict for the reason one place there are words of absolute prohibition, while in the next sentence, which comes from a different original source, there is an acceptance which applied a valid acceptance of the other office, but under the penalty of no longer remaining a member of the General As-

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sembly. Now, that's the condition of the present Constitution. Now, the Committee, though, reported a section which in my opinion is an absolute prohibition against a Senator or Representative, during the term for which he has been elected, and then I made the point that there would be no longer any doubt about it under the Committee Report. Under the Constitution as it is now, it is only a colorable doubt. They go ahead and do it. They go ahead and resign and accept other positions when the positions occur, but under the Committee's report there would be an absolute prohibition and I made the point the other day that Mr. Mayer made a splendid talk on the, almost the necessity of men of qualification being permitted to be harnessed up and used for positions of advancement wherever they may come and I called attention to the fact that a man serving in the General Assembly, frequently in one term or two terms, find the facility to become a valuable officer in some other capacity and he should not have to let it go by. That is about the purport of the argument the other day, Senator.

"MR. MC REYNOLDS: Thank you, sir. Now, I understand, Mr. President, that the purpose behind Mr. Phillips' amendment is to authorize a member of the General Assembly, during his term of office, to accept other employment. Of course he has to resign and get out, but he can accept it. There is no prohibition. Now of course there is a prohibition in the section prepared by the committee. It was the intention that it should carry that prohibition. The section reads: 'No Senator or Representative shall during the term for which he shall have been elected be appointed to any office under this State, or receive remuneration or accept employment under any official or department of the State.' . . .  
Page 5202.

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"MR. DEASON: Mr. President, I am opposed to the Phillips' substitute and I don't agree with the answers that Senator McReynolds gave to Delegate Jones. As I read Line 7, Page 5, it says, 'be appointed to any office under this state'. Now I may be wrong, but I can't find in there where it says that they can't be a candidate and elected. Now, I know that we have a very distinguished gentleman who is a member of the state Senate now, a candidate for Governor, and I don't see how that this section in the Constitution would prevent some other distinguished Senator some day from being a candidate for Governor because it says that 'And no Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this state or receive remuneration or accept employment under any official or department of the state. I can't see there that it would prevent a Senator from offering himself to the people for an elective office.'" Page 5211.

Prior to the vote, Mr. Phillips summarized his position:

"MR. PHILLIPS (OF JACKSON): Mr. President, I am not going to go over what I said the other day in detail. There was a small house here. Twenty-one members voted one way and twenty-seven, as I recall it, the other way. We have a much larger assembly here today, but I stated then that it was purely a matter of policy involved. . . .

". . . Then we have left the broad public policy. Shall the executive department and shall the judicial department be permitted, during the terms for which they are elected, to resign whenever the incumbent desires to accept a better position or the people desire to call him to a better position? I should say, by all means, yes.

"The other day I cited the situation in which our own Governor Park resigned from the other Constitutional Convention to become a circuit

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judge and then resigned as a circuit judge to become the Governor of this state. Now, those are instances and you can multiply the instances in which there has been advancement of men in public service by resigning from the previous positions which they have handled. Now, why that limitation should be imposed on the legislative department which would probably desire to get the best ability we can, I am not able to see, and I think if this Committee report is adopted and the section which I proposed is not, it will be written down in history that this Convention was so afraid of the fact that there would be some evil arise out of it that it adopted what is an unworkable public policy. . . .

". . . Many a time you will cause the field of good candidates for office or good selections to be narrowed because you have a constitutional prohibition, and during the term of office a very available man is constitutionally prohibited from being considered for that position.

". . . I think it is an advance in government and I hope that the Convention will adopt it."  
Pages 5222-5223.

The Phillips' substitute, as a result of several amendments, now provided that:

"No Senator or Representative during his incumbency in office shall qualify and hold any office or employment under the United States, this state or any municipality thereof. No member of Congress or person holding any lucrative office under the United States, this state or any municipality thereof, shall qualify as a member of either house of the General Assembly. Any Senator or Representative accepting an office or appointment under the United States, this state or any municipality thereof, shall be deemed to have resigned as a member of the General Assembly and to exercise no further rights therein nor receive further compensation as such member.

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The provisions of this section shall not apply to members of the organized militia, reserve corps, members of the school boards and notaries public." (Emphasis added).

Upon a roll call vote, the substitute was adopted, and the committee proposal was defeated. Later, with no debate, an amendment was added to Section 11 of File 17.

"MR. MC REYNOLDS: Now, Mr. President, I overlooked the fact that we did not close Section -- the section which was under consideration at the time of the recess. I think it was 11. I asked the Chair to defer the announcement on that until I could check the language of it, and I found that the amendment I had in mind has already been inserted. Therefore, so far as I am concerned the section can be closed.

"PRESIDENT: Are there further amendment to Section 11?

"MR. MORTON: Mr. President, I have an amendment which I have listed as 11a rather than trying to amend the File or ask that it be opened up.

"PRESIDENT: By adding an additional section?

"MR. MORTON: By adding a new section, yes, sir.

"PRESIDENT: Is it much the same subject matter as Section 11?

"MR. MORTON: The subject matter is the same but it doesn't affect the subject.

"PRESIDENT: If this is an entirely unrelated section, Mr. Morton . . .

"MR. MORTON (Interrupting): No, it is not unrelated. It should be a part of the section.

"PRESIDENT: The section is still open for amendments, Mr. Morton.

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"MR. MORTON: All right, I will then submit it as an amendment by adding to the present section.

"(Amendment submitted.)

"PRESIDENT: Mr. Morton, would you consent to the Clerk making certain corrections here in order to make it conform?

"MR. MORTON: I have another amendment here.

"PRESIDENT: Would you add this to the end of the section?

"MR. MORTON: Yes, sir.

"PRESIDENT: And then will you authorize the Clerk to frame it so that it will be an addition to it, added on the end of Section 11?

"MR. MORTON: Yes, sir, I may add in explanation, Mr. President, that I submitted that to Mr. Phillips and Mr. Phillips accepted it, and I showed it to Senator McReynolds and he was agreeable to it, and so I am submitting it now and all I want to say is it is part of the federal Constitution on this matter and I move its adoption.

"MR. SHEPLEY: Mr. President, before it is read, may I ask Mr. Morton so that we may not have confusion, whether his addition should not be inserted in the third to last line of the Phillips substitute rather than at the end of the section?

"MR. MORTON: If you say so, yes.

"PRESIDENT: May the Chair suggest that as far as the placement of that matter is concerned, that the Phraseology Committee can straighten it out when it gets there. I think the Clerk has written the amendment now so that it will be an addition at the end of Section 11. (to Clerk) Put it that way and the Phraseology Committee can straighten it out.

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"(Clerk read as follows:)

"AMENDMENT NO. 43. Amend File No. 17, Page 5, Section 11 by adding to end of Section 11, as amended, the following language:

"No member of the General Assembly shall during the time for which he was elected be eligible to hold any appointive civil office, or position, under the authority of the State which shall have been created or any appointive state civil office or position, the emoluments whereof shall have been increased during such term." (Emphasis added)  
Pages 5238-5240.

The amendment was adopted and the section was finally perfected.

Reference to the constitutional debates demonstrates that it was the intent of the delegates to the constitutional convention that as between a complete prohibition or no prohibition upon a senator's or representative's eligibility for another office during his term, there should be no such prohibition. Therefore, it is our view that any limitation upon such eligibility should be severely limited and strictly construed.

### III. Application of the Rules of Construction and Case Authority

Article III, Section 12, of the Constitution of Missouri, provides, in part, as follows:

". . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. . . ."  
(Emphasis added).

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As stated in your opinion request, the question which arose as a result of your nomination as one of three names on a panel submitted by a nonpartisan judicial commission to the Governor for selection to fill a judicial vacancy in the Sixteenth Judicial Circuit of Missouri, is whether an appointment for the unexpired term is prohibited by Article III, Section 12, of the Missouri Constitution. During your present term as state senator, the General Assembly passed Act 105, Seventy-Sixth General Assembly, Second Regular Session. That act, which became effective on August 13, 1972, provided for an increase in the compensation payable to all judicial officers of the state. Included within the judicial officers who receive an increase in compensation were the judges of the Circuit Court of Jackson County, Missouri. Thus, the emoluments of office were increased during the term for which you were elected. Therefore, the critical issue is the meaning of the phrase, ". . . no senator . . . shall accept any appointive office . . ."

To illustrate, does the disqualification contained in Article III, Section 12, extend to any office for which the emoluments have been increased during the legislator's term? Or, does such disqualification extend only to certain offices? Or, does such disqualification extend to the method by which any office is obtained? As suggested, the issue is the meaning of the phrase, ". . . no senator . . . shall accept any appointive office. . .," and the specific question is the meaning of the word "appointive" in the context of Article III, Section 12.

Construction of a constitutional provision is generally subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the constitution as the charter of popular government and intent of organic law is the primary object to be attained in construing it. State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo. 1966); Wring v. City of Jefferson, 413 S.W.2d 292 (Mo. 1967). The intent and purpose of the constitutional provision is required to be determined primarily from the language used. Chaffin v. County of Christian, 359 S.W.2d 730 (Mo. 1962). Consequently, in construing a constitutional provision, nontechnical words are to be taken in their natural and ordinary meaning. State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11 (Mo. 1968).

It has been recognized that the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship, and constitutes an implied attribute of citizenship and any curtailment of the right to hold office should not

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be considered prohibited except by plain provisions of law. Carter v. Commission on Qualifications of Judicial Appointments, 93 P.2d 140 (Calif. 1939); 63 Am.Jur.2d, Public Officers and Employees, Section 64.

Does the phrase ". . . no senator . . . shall accept any appointive office . . ." preclude a senator from accepting any office, the emoluments of which are increased during his term, regardless whether that office is obtained by appointment or election. Such a construction has previously been held to be improper. Opinion of the Attorney General, Manford, No. 59, June 18, 1968. That opinion held that a member of the general assembly can become a candidate at an election for the office of circuit judge even though such office was established by the general assembly in which such member sits.

There are only two other possible interpretations which may be attributed to the phrase ". . . no senator . . . shall accept any appointive office . . ." The phrase either means that a senator may not accept any appointive office or it means that a senator may not accept any office when that acceptance is based upon an appointment.

We conclude that the proper interpretation of the phrase, ". . . no senator . . . shall accept any appointive office . . ." precludes a senator from accepting an "appointive office" but does not preclude a senator from accepting an elective office even though that acceptance is based upon an appointment.

The committee proposal, which was rejected, provided that ". . . no senator or representative shall during the term for which he shall have been elected, be appointed to any office under this state, . . ." The Phillips' substitute amendment, which was adopted, contained no such prohibition, provided the senator or representative first resigned as a member of the general assembly. The subsequent amendment prohibited acceptance of "an appointive office."

The word "appointive," as found in Article III, Section 12, is an adjective, and thus modifies and qualifies the noun office. Used as an adjective, it is to be distinguished from its use as a noun, i.e., the act of appointing or designating for an office or position, or as a verb, to name or select for an office or position.

Therefore, because of the language employed in this provision, the intent of the drafters as expressed through the debates,

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and applying the usual rules of construction, we conclude that the limitation that is expressed in Article III, Section 12, of the Constitution of Missouri, extends only to "appointive offices." If it had been the intent of the drafters of the constitution to prohibit entirely the appointment of legislators to any office, it would have been a simple matter to employ language to express that intent. Carter v. Commission on Qualifications of Judicial Appointments, supra. That was the intent expressed in the Committee's proposed section which prohibited "appointment to any office" but such proposal was defeated, and rather, the present language which prohibits the senator or representative from accepting "any appointive office" was adopted.

The disqualification extends to the nature of the office, i.e., whether an elective or appointive office, and not to the method by which a vacancy in office is filled. Many offices, which are elective offices, provide for filling the vacancy by appointment. See: Sections 105.030 and 105.050, RSMo 1969. For example, the Office of Attorney General is an elective office, however, a vacancy is filled by appointment. Section 105.050, RSMo 1969. The Office of Senator of the United States is an elective office, however, a vacancy is filled by appointment. Section 105.040, RSMo 1969. Reference to these situations is made to demonstrate that the classification of an office as an appointive office or an elective office is dependent not upon the manner in which a vacancy is filled, but rather the basic method by which a person is selected to fill such office for a full term.

The question then becomes whether the office of circuit judge in the Sixteenth Judicial Circuit is an appointive or elective office. An appointive office is one which is acquired by appointment in the exercise by the appointing authority of a delegated power, while an elective office is acquired by election as a direct choice of all of the members of the class or body from which the choice can be made. See: State ex rel. Smith v. Bowman, 170 S.W. 700 (Mo.App. 1914).

A substantially identical issue was before the Supreme Court of California in Carter v. Commission on Qualifications of Judicial Appointments, supra. That case involved a mandamus proceeding against the Commission to compel it to consider and act upon Carter's qualifications for the office of associate justice of the Supreme Court of the State of California. Carter had been appointed by the governor to the office of associate justice of the Supreme Court to fill a vacancy created by the death of the incumbent, and the governor submitted his name to the Commission

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on Qualifications for confirmation pursuant to their constitutional provision. The commission refused to consider the name on the basis that he was ineligible for office by virtue of Article IV, Section 19, of the California Constitution. Their constitutional provision provided that:

"No Senator or Member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people."

The court concluded that such office was an elective office rather than an appointive office. The court stated:

". . . The method of filling vacancies by appointment by the governor under the new procedure is not materially different from the old. The method of nomination has been materially changed, and the candidacies for the office have been restricted to persons who occupy the offices or to persons who have theretofore been nominated by the governor. But the names of the candidates continue to be 'placed upon the ballot for the ensuing general election', and the electors vote on the question whether such candidate shall 'be elected to said office'.

"The language of the new section 26 and of the older sections of the same article which were left undisturbed indicate without question that the Justices of the Supreme Court hold and continue to occupy their offices only at the will of the electorate. . . ."  
93 P.2d at 145. (Emphasis added).

The Circuit Court of Jackson County, Missouri, is subject to the nonpartisan court plan. Article V, Section 29 (a), Constitution of Missouri, as amended, 1970. That section provides, in part:

"Whenever a vacancy shall occur in the office of judge of . . . the circuit . . . courts within . . . Jackson county, . . . the governor shall fill such vacancy by appointing one of three persons possessing the qualifications

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for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."

While the vacancy is filled by nomination and appointment, it is only for a limited time. Article V, Section 29 (c) provides that:

"Each judge appointed pursuant to the provisions of sections 29 (a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. . . . Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 29 (a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. . . . If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote . . . If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist . . . ; otherwise, said judge shall, . . . remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed." (Emphasis added).

A circuit judge under the nonpartisan court plan who is a candidate to succeed himself under the provisions of the Missouri nonpartisan court plan is required pursuant to the provisions of Section 120.345, RSMo 1969, to file his declaration of candidacy in person with the Office of the Secretary of State unless he

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satisfies certain statutory exceptions. Opinion of the Attorney General, Kirkpatrick, No. 359, July 10, 1970. That section defines the method by which candidates for various elective offices shall officially declare their candidacy.

#### CONCLUSION

Therefore, we conclude that the prohibition contained in Article III, Section 12, of the Constitution of Missouri, renders a state senator ineligible to accept an "appointive office" but such section does not preclude him from accepting an appointment to fill a vacancy in an elective office. For the purposes of Article III, Section 12, the office of circuit judge, even in a county under the nonpartisan court plan, is an elective office. Therefore, Article III, Section 12, of the Constitution of the State of Missouri does not preclude a member of the legislature from accepting nomination and appointment as a judge of the circuit court in a county under the nonpartisan court plan.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jack E. Gant". The signature is written in a cursive style with a large initial "J" and a long, sweeping tail.