

OFFICERS: Discussion of question of appointment of  
LEGISLATORS: legislators to positions in state departments.

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July 29, 1943



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of  
July 13, 1943, as follows:

"Since the Constitution has been changed paying the members of the legislature \$125.00 a month straight time whether the legislature is in session or not, I would like an opinion from your office as to whether a member of the legislature could be employed by any department of the state government, thereby receiving money from two different sources from the state treasury for the same period of time.

"I would also like an opinion as to whether or not a member of the legislature could be employed as a clerk during the Constitutional Convention."

On November 8, 1937, in an opinion to the Honorable Lloyd C. Stark, we had occasion to consider this question. In that opinion we concluded that nothing prevented a member of the General Assembly from holding another position in the State Government provided such position was an "employment" as distinguished from an "office". A copy of said opinion is enclosed. That opinion, however, did not involve the precise question now presented nor did it consider the terms of Article 3 and Section 15 of Article 4 of the Constitution. Then, the legislators, being on a per diem only during sessions, if employed by a state department at a time when the General Assembly was not in session (which, in fact, was the

only time any were employed), were not drawing compensation from two departments or branches of the state government at the same time.

On November 3, 1942, the Constitution was amended with respect to the compensation of a member of the General Assembly, changing said compensation from a per diem during sessions to a flat sum per month throughout the term for which the legislator was elected. That provision is now Section 16, Article 4 of the Constitution which is as follows:

"The members of the General Assembly shall severally receive from the State Treasury for their services a monthly salary of one hundred and twenty five dollars per month commencing as of January 1st next following the adoption of this Section, and upon certification by the President and Secretary of the Senate, and by the speaker and chief clerk of the House of Representatives, as to the respective members thereof, the State Auditor is hereby directed and empowered to audit and the State Treasurer to pay such compensation without legislative enactment. The members of either house shall also receive the sum of one dollar (\$1.00) for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route."

All departments of the State have power, either by statute or necessary implication (59 C. J. p. 128, Sec. 188), to appoint necessary assistants and personnel. Also, the Constitutional Convention by Section 3, Article 15 of the Constitution is given express power "to appoint such officers, employees and assistants as it may deem necessary." There is, however, a general limitation, applicable to all appointing power, whether derived from the people through their representatives, the General Assembly, or directly through Constitutional provisions. This limitation appears in Section 12, Article 4 of the Constitution, providing:

"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 background of this limitation appears in other Constitutional provisions. Section 15, Article 4 of the Constitution requires each legislator to swear that:

"\* \* \* I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office; and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

The United States Constitution, Section 4, Article 4, guarantees to every State "a republican form of government" which implies that each shall have a government democratic in form, with Constitutional protection for minority rights, in which the system of checks and balances is operative through division of the government into three branches, none of which is to exercise the powers committed to another branch. Missouri has such government, the division into three branches being specified in Article 3, which, after specifying the separation, states:

"\* \* \* no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, \* \* \* \* \*

It clearly was this provision, which has for its purpose to insure that we will have a republican form of government with its systems of checks and balances, that evoked the

adoption of Section 12, Article 4. Perhaps the writers of that instrument, in formulating the provisions incorporated in Article 3 and Sections 12 and 15 of Article 4, were aware of the truisms that: "The man who gives me employment, which I must have or suffer, that man is my master" (Social Problems, H. George, Ch. 5); and that: "No man can serve two masters" (Matthew 6:24). At least the provisions to which we have referred are admirably suited to prevent a member of the executive branch of the government from becoming the master of a member of the legislative branch through the simple expedient of giving him a job, and, by reason of being his master, prevent him from faithfully performing the duties of his office, which he swears to do. A servant, being subject to the will of the master, would not be the free legislator contemplated by the Constitution when dealing with legislation affecting his master. Nor could the master, in the executive branch of government, perform his duties with efficacy because of inability to command complete obedience of his servant, who, being in the legislative branch, holds the purse strings on his master.

In such a situation lies the destruction of our government of checks and balances in which each branch checks the others and is in turn checked by them.

Another implied limitation on the power to appoint springs from the rule of public policy that no person can hold two positions in the state government, the duties of which are incompatible. State ex rel. Smith v. Bowman, 184 Mo. App. 549; State ex rel. Walker v. Bus, 135 Mo. 325. Whether that principle has application to the present situation, we do not stop to consider, for we are of the opinion that the appointment of legislators to positions in the other branches of government makes possible the destruction of the doctrine of separation of the powers of government with its system of checks and balances, and thus the question is too grave for the Attorney General to resolve.

We have made an exhaustive search for some judicial pronouncement on this question but find none in this or other jurisdictions. In view of the absence of an analogous judicial decision on the extent of the ban, on appointing legislators to positions in state departments, that arises from provisions like Article 3 and Sections 12 and 15 of Article

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4, we feel that the question should be left to the courts to settle, when and if the question is presented in a proper case.

What we have said, however, cannot be applied to the appointment of a legislator as a Clerk in the Constitutional Convention. While the Convention's power to appoint assistants and employees is subject to the limitations provided in Section 12 of Article 4, the Convention is not one of the three branches of government created in Article 3. Further, the fact that a member of the Convention might, by reason of giving employment to a legislator, become his financial master, can in no way lead to destruction of our government of checks and balances. The Constitutional Convention is not dependent upon the General Assembly for any legislation, nor does the General Assembly hold the purse strings on the Convention. Thus there would be no time when the legislator would have to consider legislation affecting his financial master. And since the General Assembly does not hold the purse strings on the Convention, the member of the Convention would not be hampered in demanding obedience from his servant, the legislator.

The question of whether a legislator may be a Clerk in the Convention turns upon whether the position to which the member of the General Assembly is appointed is an employment or an office. The tests for determining this question as formulated in the enclosed opinion are, (1) the taking of an oath; (2) the giving of a faithful performance bond; (3) definite duties involving the exercise of some portion of the sovereign power; (4) continuing and permanent nature of the duties enjoined; (5) right of a successor to the powers, duties and emoluments, and (6) whether accountable for misfeasance or non-feasance.

While it is said that the presence or absence of a single one of these indicia is not conclusive, and that no definite test can be stated that will cover every situation that may arise, we are of the opinion that a clerk (in the sense that we understand the term to mean a position similar to that of a clerk of the General Assembly) in the Constitutional Convention does not hold an office, and consequently a member of the General Assembly is not prohibited from being appointed to or from holding such position.

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CONCLUSION

Therefore, while we are of the opinion that a member of the General Assembly may serve as a clerk in the Constitutional Convention, we express no opinion on whether said member may be appointed to a position in another branch of the State government.

Respectfully submitted,

LAWRENCE L. BRADLEY  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

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