GOVERNOR: Senate Bill No. 5 which attempts to create a Revision Commission is unconstitutional for four reasons

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Honorable Lloyd C. Stark
The Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Stark:

This will acknowledge receipt of your letter of recent date requesting an opinion from this Department. Your letter reads as follows:

> "Some members of the General Assembly have raised the question of whether or not members of the House and Senate are eligible, under the State Constitution, to serve under Senate Bill No. 5 as members of the Commission to revise the statutes of the State. Will you please advise me as soon as practicable.
>
> "Senate Bill No. 5 has passed both Houses of the General Assembly and is before me for signature."

Section 1 of Senate Bill No. 5 provides:

> "That a Statute Revision Commission, to consist of sixteen (16) members is hereby created; seven (7) of whom shall be appointed by the President Pro Tem of the Senate, and seven (7) of whom shall be appointed by the Speaker of the House;

> providing that not more than five (5) of each seven (7), shall belong to the same political party, together with the President pro tem of the Senate and the Speaker of the House."

The first question we desire to discuss is; did the present legislature have the power to legislate on the subject matter of revising the statute laws of the State.

Section 41, Article IV, of the Constitution of Missouri, as amended at the election of November 8, 1932, and appearing at page 479 of the Session Acts of 1933, provides:

> "In the year 1939 and every ten years thereafter all the statute laws of a general nature, both civil and criminal, shall be revised, digested and promulgated in such manner as the General Assembly shall direct. Provided, that after the expiration of 70 days of such revision sessions no measure other than appropriation bills and such bills as the General Assembly may determine by an express statement therein contained to be revision bills shall be considered by the General Assembly, except such as may be recommended by special message to its consideration by the Governor. Provided, further, that all revision bills shall take effect and be otherwise considered as are other bills."

It is certain that the passage of the constitutional amendment at the November election, 1932,

vested in the Legislature of 1939 the sole power to revise, digest and promulgate the statute laws in such a manner as the General Assembly of 1939 directs. The 59th General Assembly has no power whatever to direct the manner in which the revision of the statute laws shall be made. The constitutional amendment prohibits any General Assembly other than the Sixtieth General Assembly, and every ten years thereafter, to direct, in any manner, the revising, digesting and promulgating of the statute laws. The language of the amendment is clear and unambiguous and does not permit any construction other than that the 1939 General Assembly shall direct the manner in which the statute laws shall be revised. To construe the language of the amendment to mean that the Fifty-ninth General Assembly shall have the power to direct the manner in which the laws are to be revised is to distort the plain meaning of the words contained in the amendment. The fact that Senate Bill No. 5 limits the power of the Commission to preparing and submitting Bills to the Sixtieth General Assembly in the form of proposed legislative enactments condensing the Revised Statutes by eliminating duplicate, obsolete, conflicting, unconstitutional and ambiguous statutes and to harmonizing and revising the statutes, is not sufficient to escape the Constitutional inhibition for the reason that the Fifty-ninth General Assembly has no power to create a Statute Revision Commission nor to vest said Commission with any duties pertaining to the revision of the statutes of Missouri. The duty of revising the statutes is vested in the legislature to be assembled "in the year 1939 and every ten years thereafter."

Therefore, we are of the opinion that Senate Bill No. 5, creating a Revision Commission, is contrary to and conflicts with Section 41, of Article IV, of the Constitution of Missouri, and, therefore, is unconstitutional.

The next question we shall consider is; whether or not members of the proposed revision commission are officers within the meaning of Section 12, of Article IV, of the Constitution of Missouri. Many

definitions of "public office" are found in the text-books and decisions of the courts. A generally accepted definition is found in Meecham on Public Offices, pages 1 and 2, paragraph 1, wherein it is said:

> "A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

And, further, in Section 4, it is said:

> "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of the government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit."

The above definitions have been accepted by the courts of this State in many decisions. State v. Truman, 64 S. W. (2d) page 105.

In order to determine whether or not members of the proposed Revision Commission are officers it is necessary to examine the provisions of Senate Bill No. 5. Said Bill creates a Revision Commission to consist of sixteen (16) members; their powers are designated and their duties defined by the Act; they are appointed for a definite term and their compensation is fixed by the Act; they are to exercise a share of the powers of the civil government and are required to take an oath of office, which is the same oath required of the members of the General Assembly. The oath reads:

> "I do solemnly swear, or affirm, 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."

We think that it is apparent from the Act that it was the intention of the Legislature to make the members of the proposed Commission civil officers. If, however, it is contended that it was not the intention of the Legislature to create offices and that the text of the Bill is not clear and unambiguous as to the intention of the Legislature, then we may consider the title of the Bill which clearly establishes that it was the intention of the General Assembly to create the offices of commissioners.

In the case of In re Graves, 30 S.W. (2d) 129, the court, en banc, in an opinion by Judge Atwood, l. c. 152, said:

> "When the language of a statute is ambiguous, recourse may be had to the title in order to ascertain the true meaning of

> the act. 25 R. C. L. p. 1031, sec. 267; Straughan v. Meyers, 268 Mo. 580, 588, 187 S. W. 1159; Strottman v. Railroad, 211 Mo. 227, 252, 109 S. W. 769; State ex rel. v. Fort, 210 Mo. 512, 527, 109 S.W. 737. "

In the title of Senate Bill No. 5 it is stated:

> "To provide for the tenure of office of said Commission."

The title shows beyond peradventure that the legislative intent was to create offices.

The act in question provides that the President pro tem of the Senate and the Speaker of the House are to be members of the proposed Commission, and that the Speaker is to appoint seven (7) members and the President pro tem of the Senate seven (7) members.

If the Commissioners that are to be appointed under the Bill are civil officers, then, answering the question of whether or not members of the legislature can hold such offices, we are of the opinion that they can not for the reason that it would be a violation of Section 12, of Article IV, of the Constitution of the State of Missouri, which provides:

> "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;"

By reason of the above Constitutional inhibition no senator or representative, during the term for which he has been elected, shall be appointed to any office.

In the case of State v. Clausen, 182 Pac.610, the Supreme Court of Washington had before it the constitutionality of a law which provided that the Governor shall appoint a Commission of five citizens of the State, one of whom shall be a member of the Senate and one a member of the House of Representatives, to be known as the "Industrial Code Commission; " the pay of each commissioner was fixed at ten dollars ($10.00) per day while actually employed in the work of the commission and necessary expenses incurred in the performance of his duties. It was the duty of the Commission to investigate the evils existing in industrial life and the means and methods of remedying the same and to prepare and present to the Legislature a proposed act or acts upon such subjects.

Section 13, of Article II, of the Washington Constitution was as follows:

> "No member of the Legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected."

The members of the General Assembly appointed contended that their appointment did not contravene the above section of the Constitution, in that it was not an appointment to a civil office but rather was a mere employment. The court, in holding that the appointment of members of the Legislature to such Commission was invalid, said, l. c. 613:

"Section 12, art. 2, of the Constitution does not prohibit a member of the Legislature during the term for which he was elected from being appointed or elected to office, generally, in the state. The preclusion extends only to any office which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected. Of course,the purpose of the rule is obvious. It is, as was stated in Fyfe v. Mosher, 149 Mich. 349, 112 N. W. 725, in construing a similar constitutional provision, as follows:

" 'The purpose of these provisions is "to preserve a pure public policy," or, as we said in Ellis v. Lennon, 86 Mich. 468, 49 N.W. 308, speaking through Justice McGrath, "to prevent officers from using their official position in the creation of offices for themselves or for the appointment of themselves to place." '

"The commission is created by, and the members derive their powers from, an act of the Legislature. The term of service is fixed. It uses the process of the state to compel the attendance of witnesses and the production of books and papers. Its members administer oaths. It has at its disposal $25,000 of the state's money for carrying out the purposes of the act. On behalf of the state, of its own independent motion and will, it makes investigations and holds hearings within the state, when, where, and for whatever length of time it pleases. It defined duties are under the direction and control of no superior; and each

> member, in addition to his expenses, receives compensation for each day's actual service."

In the case of People v. Tremaine, 168 N.E. 817, the Court of Appeals of New York had before it the question of whether the designation of the chairman of the Senate finance committee and the chairman of the assembly ways and means committee to approve the segregation of lump sum appropriations, amounted to the making of civil appointments by the Legislature. The court, at l. c. 821, said:

> "The words 'any civil appointment' as thus used are very broad, and include any placing in civil office or public trust, pertaining to the exercise of the powers and authority of the civil government of the state, not reasonably incidental to the performance of duties of a member of the Legislature, as distinguished from a military office or a mere employment or hiring in contract, express or implied."

And, further, at l. c. 821 it was held:

> "That the designation of the chairman of the Senate finance committee and the chairman of the Assembly ways and means committee to approve the segregation of lump sum appropriations amounts to the making of civil appointments by the Legislature cannot be seriously disputed. The positions are created and filled by the Legislature; the incumbents possess governmental

> powers; the powers and duties of the positions are defined by the Legislature; such powers and duties are performed independently; the positions have some degree of permanency and continuity. Their power is not exhausted by a single act, but is a general supervisory power over a large group of appropriations, amounting to nearly $9,000,000, to be exercised whenever the occasion arises. Unless the oath of a member of the Legislature is sufficient, the appointee should take the constitutional oath of office. Const. art. 13, sec.1. Their appointment was on behalf of the government in a station of public trust not merely transient, occasional, or incidental. It was 'a continuing power to be exercised whenever occasion shall arise."

In the case of State ex rel. Attorney General v. Valle, 41 Mo. 29, the defendant, during the time that he was a member of the House of Representatives, was appointed as a member of the board of water commission for the City of St.Louis, which commission was created by the legislature during the time the defendant was a member. The Supreme Court held that the appointment was in violation of Section 12, Article IV of the Constitution of Missouri, for the reason that the water commission was a civil office in this state and a Representative is ineligible to be appointed to any civil office.

In view of the above, it is our opinion that the proposed members of the Statute Revision Commission are officers, and that Senate Bill No. 5 which attempts to designate the President pro tem of the Senate and the Speaker of the House members of said Commission is unconstitutional and void for the reason that Section 12, Article IV of the Constitutipn, supra, prohibits

the appointment of any senator or representative to any office during the term for which he is elected.

From another Constitutional standpoint we believe that the Act in question is unconstitutional; Article III of the Constitution provides:

> "The powers of government shall be divided into three distinct departments - the legislative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

In the case of State ex inf. Hadley v. Washburn, 166 Mo. 680, l. c. 692, the Supreme Court said:

> "A public officer exercising a function of the state government is an agent or servant of the sovereign people of the State, and must derive his authority either by election by the people or appointment by that tribune to whom the people have confided the power of appointment.

> It is, therefore, necessary that he should trace his title to the office to the department of the state government to which, under Article III * * * * * the power to confer title to such an office is committed."

The court, in passing upon the right of the Legislature to require the Governor to appoint members of the board of election commissioners for Kansas City from lists of eligible citizens named by the central city committees of political parties to which they belong, at l. c. 692, said:

> "But we are concerned now with the question of the power of the Legislature to compel the Governor to make the appointment from one of the three named by the committee and we are asked to say that the Governor, by force of this act, can not do otherwise than register the will of the committee.
>
> "If that is the law, then, in reality, what would be the source of an appointment under it?"

> "We are referred to section 9 of article 14 of the Constitution which is: 'the appointment of all officers not otherwise directed by this Constitution shall be made in such manner as may be prescribed by law.' And it is contended that that section confers authority on the General Assembly for this act. That section expressly authorizes the General Assembly, acting within its legitimate capacity, to pass a law prescribing the manner in which an appointment shall be made, but it does not authorize the General Assembly to make the appointment itself nor to authorize any one unconnected with the government to do so. To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive. The Constitution authorizes the Legislature to do the one, but not the other."

In passing upon a similar question the Court of Appeals of New York, in the case of People v. Tremaine, 168 N. E. 817, supra, at l. c. 822, said:

> "The Legislature has not only made a law - i. e., an appropriation - but has made two of its members ex officio its executive agents to carry out the law; i. e., to act on the segregation of the appropriation. This is a clear and conspicuous instance

> of an attempt by the Legislature to confer administrative power upon two of its own members. It may not engraft executive duties upon a legislative office and thus usurp the executive power by indirection. Springer v. Philippine Islands, 277 U. S. 189, 48 S. Ct. 480, 72 L. Ed. 845. "

The Legislature, under the provisions of Senate Bill No. 5, attempts to create a commission whose members are civil officers and then appoints the Speaker of the House and the President pro tem of the Senate as members of the Commission, and, under the above authorities, it is clear that the Legislature is attempting to exercise the executive power of appointing civil officers, in violation of Article III of the Constitution, supra, which prohibits the Legislature from exercising executive functions.

If it is contended that Senate Bill No. 5 creating the Commission is not a creation of civil offices and the commissioners are not officers but are only employees or agents of the Fifty-ninth General Assembly to assist the Sixtieth General Assembly in revising the statutes, nevertheless, we believe that the act would be unconstitutional. We concede that the General Assembly has the power and authority to appoint such officers or agents or employees that are necessary to carry out the functions of the Legislature; it is a necessary and inherent power to preserve the independence of the legislative policy. There can be no question that the legislature possesses the requisite power to appoint such employees and officers within the limitations of the Constitution. However, even if the members of the proposed commission be considered officers or employees of the legislature, Senate Bill No. 5 would violate Section 16 of Article IV

of the Constitution, which provides, in part:

> "* * *and no allowance or emolument, for any purpose whatever, shall ever be paid to any officer, agent, servant or employee of either house of the General Assembly, or of any committee thereof, except such per diem as may be provided for by law, not to exceed five dollars."

Section 9 of SenateBill No. 5 provides:

> "Each member of the commission shall receive compensation at the rate of ten dollars per diem * * * and an allowance not to exceed five dollars per diem while actually engaged in performing the duties prescribed for such commission on account of traveling and subsistence expenses, payable in monthly installments. * * * "

The above provision of the Act is clearly contrary to the express limitation of Section 16 of Article IV of the Constitution as to the compensation that officers and agents and employees of the Legislature may receive per diem.

CONCLUSION

In view of all the above, it is the opinion of this office that Senate Bill No. 5 is unconstitutional and void, for the reasons:

1. That the provisions of Section 41, Article IV of the Constitution, as amended by the people at the November election, 1932, vested in the General Assembly of 1939 the sole and exclusive power to revise, digest and promulgate the statute laws of this State in such manner as the General Assembly of 1939 shall direct, and, therefore, the present General Assembly has no authority to create a Revision Commission to assist in the revision of the statute laws.

2. That the members of the Statute Revision Commission are officers and that said Bill, which attempts to appoint the President pro tem of the Senate and the Speaker of the House members of the Commission, is in violation of Section 12, of Article IV, which prohibits the appointment of any Senator or Representative to any office during the term for which he is elected.

3. That the appointment by the General Assembly of two of its members as members of the Revision Commission is an attempt on the part of the Legislature to exercise the executive power of appointment, which is a violation of Article III of the Constitution which prohibits the Legislature from exercising any executive functions.

4. If the members of the proposed Commission are officers or employees of the Legislature, the Act is in conflict with Section 16 of Article IV of the Constitution which limits the compensation

of officers, agents and employees of the Legislature to five dollars per diem.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
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