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The Question

Can the governor remove issues from his proclamation convening a special session of the General Assembly after the legislature has convened?²

The Answer

A preliminary analysis of the structure and case law of the Missouri and other state constitutions lead to the conclusion that the governor may not remove subjects from his call to convene the general assembly once they have begun meeting.³ A Missouri

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² The question is a hypothetical one in Missouri but it has historical roots. In 2003, Governor Bob Holden called a special session to consider several vetoed appropriations bills. See Journal of the Senate, First Extraordinary Session, 92nd General Assembly, June 2, 2003. He subsequently sent a second message removing the first six items of his earlier seven item message. See Journal of the Senate, First Extraordinary Session, 92nd General Assembly, June 18, 2003. The General Assembly did not respond to the second message.

³ While the federal constitution is mentioned here there was no federal case law this author could locate that dealt with the specific issues addressed by this paper.

governor may make suggestions or other recommendations, such as *recommending* that the legislature drop an issue from consideration, but the General Assembly is not required as a matter of law to heed such a recommendation.

Under Article III Section 9 of the Missouri Constitution, the governor of Missouri has the power to convene the legislature *only* upon extraordinary circumstances. This is to be done by proclamation stating specifically what subject(s) the general assembly may consider and legislate upon during the special session.⁴ The legislature may not consider any topic other than those placed before it.⁵ While the governor has the agenda setting authority, he may not bind the general assembly to a particular course of action with regard to those issues contained in his call even when he attempts to limit legislative activity with a very narrow call.⁶

These provisions all point to the conclusion that the governor's power over the general assembly ceases once it has convened, thus he may not revoke issues from his proclamation convening the general assembly once it has so convened.

Analysis

The conclusions summarized above are based upon an analysis of the Missouri Constitution and caselaw from Missouri and other jurisdictions.

1. The Missouri Constitution

The separation of powers doctrine sets the limits of the governor's legislative authority. No branch of the government may exercise the power of another branch unless

⁴ V.A.M.S Mo. const. art. IV § 9.

⁵ V.A.M.S Mo. const. art. III § 39 cl. 7.

⁴ *Rice v. Edwards*, 241 S.W. 945 (Mo. 1922); *Wells v. Railroad Co.*, 19 S.W. 530, 532 (Mo. 1892); 360 Op. Mo. Att'y Gen. 5 (1965); e.g. *State Tax Comm'n v. Preece*, 1 U. 2d 337, 266 P.2d 757, 760 (1954).

⁶ *Rice v. Edwards*, 241 S.W. 945 (Mo. 1922); *Wells v. Railroad Co.*, 19 S.W. 530, 532 (Mo. 1892); 360 Op. Mo. Att'y Gen. 5 (1965); e.g. *State Tax Comm'n v. Preece*, 1 U. 2d 337, 266 P.2d 757, 760 (1954).

so provided within the constitution.⁷ Article IV vests the governor with executive authority while legislative power in the state of Missouri is vested in the House and the Senate.⁸ The governor, being the head of the executive department, may not exercise legislative authority other than those granted to him by the constitution.

The constitution grants the governor the authority to convene the legislature when he determines an extraordinary occasion has arisen,⁹ he is also given the authority to veto legislation,¹⁰ and he has partial, line-item veto authority over appropriations bills.¹¹

Almost every state grants the governor powers that are thought of as legislative in character, including those listed above. The reasons for allowing the governor to call special sessions were so clear as to not even elicit debate during the constitutional conventions of Missouri¹² or the United States.¹³ The Colorado Supreme Court however, issued an advisory opinion to its House of Representatives late in the nineteenth century which sheds some light on why the provision has been adopted in the various states of the union.¹⁴ The Court concluded that fear of over legislation persuaded the framers of the Colorado Constitution to limit the amount of time the legislature could be in session.¹⁵ As a direct result, should a state of emergency or other crisis requiring

⁷ V.A.M.S Mo. const. art. II § 1.

⁸ V.A.M.S. Mo. const. art. III § 1.

⁹ V.A.M.S. Mo const. art. IV § 9.

¹⁰ V.A.M.S. Mo const. art III § 31.

¹¹ V.A.M.S. Mo const. art IV § 26.

¹⁰ Isidor Loeb, Debates in Missouri Constitutional Convention of 1875, 481 (1920).

¹¹ Madison's notes from 1787 Philadelphia constitutional convention, September 8, 1787. The members present passed the section allowing the President to convene Congress upon extraordinary circumstances without debate.

¹⁴ In re Governor's Proclamation, 19 Colo. 333, 35 P. 530 (1894). The House sought to determine whether a proposed bill would be considered outside the subject of the Governor's proclamation. In stating that the executive could limit the scope of the special session to a particular subject matter, the Court concluded that any attempt to constrain legislative action within that subject was outside the boundaries of the Governor's power.

¹⁵ Id.

legislation arise, the power to convene the state assembly was placed with the executive and limited to extraordinary circumstances.¹⁶

The convening and adjourning of the General Assembly is a constitutional function. The occasions that the legislature may lawfully convene and adjourn are very carefully spelled out in the Constitution. They may meet in regular session,¹⁷ upon which they must adjourn by the second Friday of May each year.¹⁸ The legislature may convene itself in special session with a proclamation signed by three-fourths of the members of both houses if it specifically describes what subjects are to be considered. At any time during regular or special sessions (whether called by the governor or the legislature) the legislature may adjourn itself on a majority vote of both houses.¹⁹ Although the governor may call a special session, the legislature convenes and adjourns that session.

The constitutional provisions thus far described show the power to convene the legislature rests with the General Assembly. Therefore, the legislative authority granted to the governor by Article IV is limited and should be narrowly construed. Allowing the governor to withdraw items from his call would be granting him legislative powers in contravention of the separation of powers doctrine.

A simple hypothetical example illustrates the above point. If the governor issued a proclamation containing only one subject, allowing him to withdraw that subject from consideration after the General Assembly had convened would be to allow him to effectively adjourn the special session himself – that is, exercise a legislative power not granted in the constitution.

¹⁶ Id.

¹⁷ V.A.M.S. Mo. const. art. III § 20.

¹⁸ V.A.M.S. Mo. const. art. III § 20(a).

¹⁹ *See generally* V.A.M.S. Mo. const. art. III §20.

2. Missouri caselaw

The following issues are well settled in Missouri constitutional law. While they are not per se on point, they are very instructive as to the nature and extent of the governor's authority under Article IV § 9.

First, that it is within the sole discretion of the governor to determine whether an "extraordinary occasion" has arisen necessitating legislative action.²⁰ Second, in order to convene the General Assembly the governor must issue a proclamation specifically stating the matters to be acted upon.²¹ Third, that the legislature may not act outside those subjects contained in the governor's call.²² Subsequent gubernatorial approval of legislation beyond the scope of the proclamation will not render it constitutional.²³ Finally, the legislature is not bound to any particular action prayed for by the governor.²⁴

The governor's order is mandatory under the extraordinary session clause as is the legislature's duty to only act upon the subjects contained therein.²⁵ Any subsequent action by the governor is strictly in an advisory role as the legislature is vested with all its Article III powers within the confines of that proclamation.

3. Cases from other Jurisdictions

The question posed by this report is one of first impression in Missouri and perhaps in any other state. However, the Supreme Court of Nebraska and the Kentucky Court of Appeals have rendered decisions on a similar question: whether the governor may revoke his proclamation calling the legislature into an extraordinary session before

²⁰ State v. Adams, 19 S.W.2nd 671, 674 (1929).

²¹ Id.

²² Rice v. Edwards, 241 S.W. 945, 948 (1922); *see also*, In ex parte Seward, 253 S.W. 356 (1923); Wells v. Railroad Co., 19 S.W. 530, 532 (1892).

²³ Id.

²⁴ Rice, 241 S.W. at 948; Wells, 19 S.W. at 532.

²⁵ Id.

the legislature has actually convened.²⁶ The courts have split on the answer to that question.

In Nebraska the court determined that the governor's discretionary power did not end until the legislature convened.²⁷ Therefore he may withdraw his proclamation convening the legislature before it meets. This, reasoned the court, would allow him to save the state vast expense if the occasion which existed at time of his proclamation had since dissipated.²⁸ The Arkansas and Pennsylvania Supreme Courts have both followed Nebraska's lead in Parker.²⁹

On the other hand, the Kentucky court determined that once the proclamation was issued the governor's power had ended as the legislature's had ripened.³⁰ As a result, the Kentucky Court of Appeals reasoned, the separation of powers doctrine barred the governor from recalling his proclamation even though the legislature had yet to convene.³¹ The Kentucky view seems to be the minority rule on this particular issue.

Significantly, implied in both the Nebraska and Kentucky opinions is the notion of finality of the governor's discretionary power. Once the governor's power ends, whether after issuing the call or upon the convening of the legislature, his constitutional grant of legislative authority concludes. The governor's power over the "form and subject [matter] of his proclamation continues and is plenary until the legislature has actually convened."³²

²⁶ People v. Parker, 3 Neb. 409, 19 Am. Rep. 634 (1872); Royster v. Laffoon, 258 Ky. 146, 79 S.W. 2d 707 (1935).

²⁷ Parker, 3 Neb. 409.

²⁸ Id.

²⁹ See Foster v. Graves, 168 Ark. 1033, 275 S.W. 653, 655 (1925); Case of Pittsburgh's Petition, 217 Pa. 227, 66 A. 348 (1908).

³⁰ Royster, 258 Ky. 146.

³¹ Id.

³² Foster, 275 S.W. at 655.

Similarly, Florida’s constitution authorizes the governor to call an extraordinary session which once convened activates the legislative process.³³ Then the legislature, by “the very nature of the legislative power,” controls calling recesses and adjourning the body.³⁴ Taking the contrary view would allow the executive to wield unconstitutional legislative authority. The power to convene a body necessary implies the power to prevent convention *before* it has accomplished that goal.³⁵

Conclusion

Missouri courts would likely find that the power to remove items from his call for a special session is *not* an inherently executive power within the meaning of Article IV, and thus not within his discretionary authority as the supreme executive of the state.³⁶

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³³ In re Advisory Opinion to the Governor, 206 So2d. 212, 215 (Fla. 1968) (The governor may not limit the number of days the legislature has to consider the issues in his proclamation convening extraordinary session.)

³⁴ In re Advisory Opinion to the Governor, 206 So. 2nd 212, 215 (Fla. 1968); *see also*, Opinion of the Justices, 275 Ala 102, 152 So. 2d 427 (1963).

³⁵ Parker, 3 Neb. 409 (emphasis added).

³⁶ Royster, 79 S.W. 2d at 709.