FORTY-SIXTH

# BIENNIAL REPORT

AND

OFFICIAL OPINIONS

OF THE

# ATTORNEY GENERAL

OF THE

STATE OF WEST VIRGINIA

FOR THE FISCAL YEARS BEGINNING JULY 1, 1954, AND ENDING JUNE 30, 1956

---

JOHN G. FOX
*Attorney General*


CHARLESTON, WEST VIRGINIA

No. 75 March 30, 1955

REQUESTED BY: Ralph J. Bean, President
West Virginia Senate
Moorefield, W. Va.

OPINION BY: John G. Fox, Attorney General

This is in reply to your letter of March 14, 1955, as follows:

"In giving consideration to certain problems confronting me as President of the Senate, I would like to obtain your advice on at least two points.

"First, in the event that the Legislature would convene in Extraordinary Session, by the method provided in the Constitution, on call of three-fifths of the members of the Legislature, just what procedure should be followed in doing so? In this connection, would the document to be signed by the members in which the Extraordinary Session is called necessarily have to set out specifically the objects for which the session is being called?

"Assuming that the session should be called for purposes of providing pay for teachers and the call should also provide that the program be financed through the consideration and adoption of a 3% sales tax, could the Legislature then consider other tax measures to be used in financing the program?

"I would like you to also give me your thoughts as to just what matters can be considered at the thirty-day session to be held in 1956. Since the next session will be the first one under the new Constitutional amendment, it seems to me that I should become definitely familiar with the limitations on the work that can be transacted.

"Would appreciate your giving prompt consideration to these problems as it is necessary that I act upon some of them within the near future."

The principal provisions of the *Constitution of West Virginia* dealing with the convening of the Legislature are as follows:

*Article VI, Section 18:*

"*Time of Assembly of Legislature.*—The Legislature shall assemble annually at the seat of government, and not oftener, unless convened by the Governor. Regular sessions of the Legislature shall commence on the second Wednesday of January of each year. Notwithstanding any other provisions of the Constitution, the board of public works shall, on and after the effective date hereof, submit to the Legislature an annual budget prepared as otherwise required by the Constitution."

*Article VI, Section 19:*

"The Governor may convene the Legislature by proclamation whenever, in his opinion, the public safety or welfare shall require it. It shall be his duty to convene it, on application in writing, of three-fifths of the members elected to each House."

*Article VI, Section 22:*

"*Length of Legislative Sessions.*—The regular session of the Legislature held in the year one thousand nine hundred fifty-five and every second year thereafter shall not exceed sixty days, and the regular session held in the year one thousand nine hundred fifty-six and every second year thereafter shall not exceed thirty days. During any thirty day session the Legislature shall consider no other business than the annual budget bill, except such as may be stated in a proclamation issued by the Governor at least ten days prior to the convening of the session, or such business as may be stated by the Legislature on its own motion in a concurrent resolution adopted by a two-thirds vote of the members elected to each house. All regular sessions may be extended by the concurrence of two-thirds of the members elected to each house."



*Article VII, Section 7:*

"The Governor may, on extraordinary occasions convene, at his own instance, the Legislature; but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together."

Sections 18 and 22 of Article VI formerly provided for one sixty day regular session of the Legislature biennially. These sections were amended at the general election held in November, 1954, to read as set forth above.

Consequently, there are now five distinct methods set forth in the Constitution for the convening of the Legislature, and I assume that your first question relates to the method prescribed in Section 19 of Article VI. The requirements of this section are (1) an application in writing (2) signed by three-fifths of the members elected to each house (3) filed with the Governor. Upon the filing with the Governor of such an application in writing, it then becomes the mandatory duty of the Governor to call the Legislature into session. It would appear that there are two ways in which this might be accomplished.

(1) First, each member of the Legislature who desires that it be convened could file a letter or writing, with the Governor, requesting him to call the Legislature into session. The only requirement under this method would be that the signatures on these letters be properly authenticated for the information and guidance of the Governor, so that it might be clearly established that it was, in fact, the request of the particular member of the Legislature, and that there be a clear showing that the request so written was filed with the Governor.

(2) The second alternative would be in the form of a petition which would be signed by the requisite number of members, and requesting that the Legislature be convened. The signatures on said petition should be properly authenticated and filed with the Governor.

Under either method, care should be taken to authenticate the signatures of the members and to make a clear delivery to the Governor, in order that the record may demonstrate the compliance with the Constitution.

I have examined the available records with reference to the sessions of the Legislature since the formation of West Virginia and have found that in only one instance has the Legislature been convened on application in writing of the members thereof.

Under the Constitution of 1863, the section corresponding to Section 19 provided:

> "It shall be his duty to convene them, on application of a majority of the members elected to each branch."

In 1868, Governor A. J. Boreman called an extraordinary session of the Legislature, and his proclamation recites that on the 4th of March, 1868, a majority of the members elected to each branch of the Legislature adopted a resolution requesting the Governor "to convene the Legislature in Extra Session on the first Tuesday of June next, with a view of considering and determining upon the Code of West Virginia." I might point out that the Constitution of 1863 was superseded, of course, by the Constitution of 1872. Also, I might point out that in the call of Governor Boreman for this session, the following was contained:

> "* * * to consider and determine such measures as in their wisdom, the public interest may demand."

See *Journal of the Senate,* 1868, p. 2.

Incidentally, I think it would be well to point out that in determining the actual number of the members required to sign the petition, the question may well arise as to whether or not the required number would be three-fifths of the total number of the members elected to the Legislature or whether it would be three-fifths of the Senators elected and three-fifths of the Delegates elected. I think that the language, "three-fifths of the members elected *to each house,*" indicates that the number would be determined separately for Senators and Delegates. In other words, under the present apportionment, the signatures of 20 Senators and 60 Delegates would be required. *Wood* v. *Gordon,* 58 W.Va. 321, 52 S.E. 261 (1905); *State ex rel. Burnquist, Attorney General* v. *Welter, et al.,* 296 N.W. 582 (Minn. 1941); *State ex rel. Peterson, Attorney General* v. *Hoppe,* 260 N.W. 215 (Minn. 1935); *State ex rel. Kohlman* v. *Wagner,* 153 N.W. 749 (Minn. 1915); *State of Minnesota ex rel. Eastland* v. *Gould,* 31 Minn. 189, 17 N.W. 276 (1883); *Hobgood, et al.* v. *Police Jury of Catahoula Parish,* 147 La. 279, 84 So. 656 (1920); *Constitution of West Virginia,* Article VI, Section 32.

Your next question is whether the petition signed by the members would necessarily have to set out specifically the objects for which the session is being called.

It is my opinion that the petition would not have to set out specifically the objects for which the session is being called, and that when the Governor calls the session pursuant to the second sentence of Section 19 of Article VI, the Legislature is in plenary session and can act upon any subject "not interdicted by the Constitution itself." *State* v. *Blevins,* 131 W.Va. 350, 48 S.E. (2d) 174; *State ex rel. Cashman* v. *Sims,* 130 W.Va. 430, 43 S.E. (2d) 805, 172 A.L.R. 1389; *State* v. *Harrison,* 130 W.Va. 246, 43 S.E. (2d) 214; *Blue* v. *Tetrick,* 69 W.Va. 72, 72 S.E. 1033; *Blue* v. *Smith,* 69 W.Va. 711, 72 S.E. 1038; 11 Am. Jur., Constitutional Law, Sec. 18.



You will notice that said Section 19 prescribes no limitation whatever on the subject matter on which the Legislature may act, while, on the other hand, Section 22 of the same article, as amended by the voters at the last general election, places a distinct limitation on the subjects which may be acted upon by the Legislature at the regular biennial thirty day session. At the same time, Section 7 of Article VII contains the emphatic language, "but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together." No such limitation being in Section 19, it would therefore appear that it is not the intent of the Constitution to limit the scope of the action of the Legislature. *State* v. *Blevins, supra; State ex rel. Cashman* v. *Sims, supra; State* v. *Harrison, supra; Blue* v. *Tetrick, supra; Blue* v. *Smith, supra;* 11 Am. Jur., Constitutional Law, Sec. 18.

Your next question is repeated:

> "Assuming that the session should be called for purposes of providing pay for teachers and the call should also provide that the program be financed through the consideration and adoption of a 3% sales tax, could the Legislature then consider other tax measures to be used in financing the program?"

The answers to your first and second questions render this question moot inasmuch as the session called under Section 19 would not be limited. However, should the Legislature be called into session by the Governor through the exercise of his power under Section 7 of Article VII, and the proclamation calling said session would so limit the business to be considered, your question would then be material.

The "no business" portion of Section 7 of Article VII has been construed in at least five cases by the Supreme Court of Appeals of West Virginia, and I think that a review of said cases would be beneficial in order to demonstrate the tenor of the Court's interpretation of said section.

In *State* v. *Shores,* 31 W.Va. 491, 7 S.E. 413 (1888), the constitutionality of Chapter 6, Acts of the Legislature of 1887, Extraordinary Session, was questioned because the act was passed at an extraordinary session of the Legislature convened by the Governor pursuant to Section 7, Article VII, by a proclamation which contained, among other business, the purpose "to protect the public treasury against unnecessary expenditures by regulating the costs, charges, and proceedings in criminal cases before justices of the peace and Circuit Courts." The act in question established a procedure for the selection of juries in felony cases. The Court held that this was a part of the regulation of "the costs * * * and proceedings in criminal cases * * *" and, therefore, within the scope of the business stated in the proclamation.

In the next case, *State Road Commission* v. *West Virginia Bridge Commission,* 112 W.Va. 514, 166 S.E. 11 (1932), the issue was raised as to whether an act abolishing the West Virginia Bridge Commission, passed at the extraordinary session of the Legislature convened on

July 12, 1932, was within the scope of the call stated in the Governor's proclamation. Item 8 of that proclamation was as follows:

> *"Eighth:* An emergency revenue measure to balance the state budget, and to raise an additional sum of five hundred thousand dollars, or such part thereof as may be deemed proper, to be applied to the relief of unemployment over a specified period, and to pay the expenses of this session, such revenue to be raised by indirect taxation by a special tax on cigarettes and/or other forms of tobacco, and other luxuries, no part of the revenue for such purposes to be raised by a direct property tax."

The Court held that since the abolishment of the Bridge Commission would reduce expenditures, it was an indirect method of reducing the budget and would tend to "balance the State budget" and, therefore, the act was constitutional.

From the next West Virginia case on this subject, *Bedford Corporation* v. *Price,* 112 W.Va. 674, 166 S.E. 380 (1932), the following is quoted:

> "We are of the opinion that the said first ground of constitutional challenge of the act, namely, that portions thereof are not within the purview of the governor's call, is not well taken. The fifth item of business which the governor summoned the legislature to consider and act upon, was: 'A bill authorizing semi-annual and quarterly payment of all property taxes levied by the state and its subdivisions.' That municipalities are subdivisions of the state is not questioned, but it is said that there is nothing in the said item five of the chief executive's call nor in any other item thereof which would authorize legislation at the extraordinary session providing for a discount on taxes for prompt payment thereof. This proposition is too narrow and restricted. The enactment of a law providing for the semi-annual payment of taxes was of course within both the spirit and the letter of the said item five of the governor's call. The details of the manner of payment and collection of semi-annual installments of taxes were of course not attempted by the governor in his message. Those matters were properly left for legislative discretion. As an incident to the main matter, it was plainly for the legislature to determine whether there should be a discount on promptly paid taxes. And this is especially true in the light of the fact that for many decades it has been the policy of the state to allow such discount. The same system has obtained in at least some of the municipalities of the commonwealth. *When, in a proclamation convening a legislature in extraordinary session, certain items of business are specified by the governor, there can be no successful challenge of the legislature's right to deal with such items in the manner it sees fit,* so long as it does not violate any organic law. *State Road Commission of West Virginia* v. *West Virginia Bridge Commission et al.,* 112 W.Va. 514, 166 S.E. 11, decided at this term of court." (Emphasis supplied.)

In *Carver* v. *City of Charleston,* 113 W.Va. 518, 169 S.E. 521 (1933), it was held that where the proclamation calling the special session of the Legislature contained the following purposes, among others—"The revision of salaries paid all *public officials* now fixed or authorized by general or special statute"—such language was broad enough to cover an act of that Legislature reducing the salaries or wages of *public employees,* as well as public officials. After quoting in its entirety the Governor's proclamation, the Court said the following:



> "A consideration of the foregoing as an entirety, reveals the fact of an economic emergency calling for reduction in the costs of government. The enactment of legislation to meet this emergency is necessarily comprehended within the broad scope of the call.
>
> "We held in *State Road Commission* v. *West Virginia Bridge Commission,* decided this term, that the Legislature in effecting the purpose disclosed by the proclamation of balancing the budget was not limited to the enactment of an emergency revenue measure as stated in the call, but was at liberty, in accomplishing the object, to reduce governmental costs to the extent of abolishing public offices. Accordingly, we are of opinion, in this case, that the Legislature, in reducing the costs of government, was not confined to a revision of the salaries of public officials, but could also reduce the salaries or wages of public employees."

In *Brewer* v. *City of Point Pleasant,* 114 W. Va. 572, 172 S.E. 717 (1934), the following was said:

> "The gubernatorial proclamation called for legislation to meet the existing emergency 'by permitting municipalities to borrow money from the Reconstruction Finance Corporation for self-liquidating projects.' It is our duty to hold the Act to be within the proclamation if by 'any reasonable construction of the language of the proclamation the subject legislated upon * * * is embraced therein.' *State* v. *Shores,* 31 W.Va. 491, 498, 7 S.E. 413. Accord: *Road Com.* v. *Bridge Com.,* 112 W.Va. 514, 517, 166 S.E. 11. It is true that the proclamation specified a loan from the Reconstruction Finance Corporation, and the Act makes no reference thereto but merely provides for financing the project by funds derived from 'the issuance of revenue bonds of the municipality.' The paramount idea in the proclamation, however, was that permission should be granted municipalities to finance 'self-liquidating projects.' In other words, the projects themselves were assuredly of more importance to the gubernatorial mind than the identity of who should underwrite the projects. We are of opinion that reasonable construction would include the Act within the purview of the proclamation."

Generally, if the action of the Legislature is reasonably germane to the business set forth in the proclamation by the Governor, it would be constitutional. I might point out that I feel that this is a difficult question to answer in the abstract, because the answer would depend, to a great degree, on the circumstances. For example, if the Governor's proclamation would state the business of the extraordinary session to be to provide revenue for an increase in teachers' salaries, the foregoing cases seem to make it clear that the Legislature could act upon any otherwise constitutional revenue measures. However, I think if such revenue measures were not dedicated to the aforesaid purpose, the acts would fail.

On the other hand, if the call only states the business to be the adoption of a "3% sales tax," I believe the Legislature could not constitutionally adopt any other measures.

If the "business" is stated in general terms, any legislation even indirectly carrying out the purpose of the "business" would be sustained. If the "business" is stated specifically, legislation not reasonably conforming thereto would not, in my opinion, be upheld. 49 Am. Jur., States, Territories, and Dependencies, Sec. 49.

There now follows a discussion of your final question, to-wit, "* * * what matters can be considered at the thirty-day session to be held in 1956."

The limitation on the Legislature at the thirty day session is expressed in the following portion of Section 22 of Article VI of the Constitution:

> "* * * During any thirty day session the Legislature shall consider no other business than the annual budget bill, except such as may be stated in a proclamation issued by the Governor at least ten days prior to the convening of the session, or such business as may be stated by the Legislature on its own motion in a concurrent resolution adopted by a two-thirds vote of the members elected to each house. * * *"

Section 51 of Article VI of the Constitution, commonly referred to as the "Budget Amendment," provides that after the budget bill has been finally acted upon by both houses, the Legislature may then pass "supplementary appropriation bills." The question may well be raised as to whether, at the regular biennial thirty day session, the Legislature, after passing the annual budget bill, may pass a supplementary appropriation bill.

Supplementary appropriation bills are clearly separate and distinct from the budget bill. See *Constitution of West Virginia,* Subsection C, Section 51, Article VI. They must provide a tax to pay the particular expenditure, unless a surplus of revenue appears from the estimate of the Board of Public Works, and must be for a specific "object, work or purpose." *State ex rel. Trent, et al.* v. *Sims,* 138 W.Va. 244, 73 S.E. (2d) 122 (1953). Such a bill is not a part of nor incidental to the "annual budget bill." *State ex rel. Bond* v. *Key,* 94 W.Va. 255, 118 S.E. 276 (1923). Therefore, I conclude that supplementary appropriation bills cannot be considered at the regular biennial thirty day session.

I think there can be no doubt that the Legislature at such session cannot enact any bill except the budget bill in the absence of having other business stated by the Governor or by concurrence of two-thirds of the members elected to each house. See *State* v. *Shores, supra; State Road Commission* v. *West Virginia Bridge Commission, supra; Bedford Corporation* v. *Price, supra; Carver* v. *City of Charleston, supra; Brewer* v. *City of Point Pleasant, supra.*

This is particularly true because the same section clearly expresses the conditions under which other business may be considered. If the



Legislature could consider other bills at such session, the excepting clause would be meaningless. Also, I think the maxim hereinbefore mentioned, *expressio unius est exclusio alterius,* would apply. The mention of the budget bill, even in the absence of the restrictive language, would exclude the consideration of other bills. *Downey* v. *Sims,* 125 W.Va. 627, 26 S.E. (2d) 161 (1943); *Taylor* v. *Taylor,* 66 W. Va. 238, 66 S.E. 690, 19 Ann. Cas. 414 (1909); *State* v. *Gilman,* 33 W. Va. 146, 10 S.E. 283, 6 L.R.A. 847 (1889).

The language, "no other business," as contained in Section 22 of Article VI is almost identical to the language of Section 7 of Article VII which provides, in part, as follows:

> "* * * it shall enter upon no business except that stated in the proclamation * * *"

Since the language is identical, the construction and interpretation of one would necessarily control the other. Section 7 of Article VII has been construed as being exclusive. *Broadwater* v. *Booth,* 116 W.Va. 274, 180 S.E. 180 (1935); *Hockman, et al.* v. *Tucker County Court,* 138 W.Va. 132, 75 S. E. (2d) 82 (1953).

However, does the "no business" restriction apply to all "matters" which may be considered by the Legislature at such regular biennial thirty day session? As you know, each house of the Legislature has certain functions it can perform, when in session, independent of the other house. See *Ex parte Caldwell,* 61 W.Va. 49, 55 S.E. 910 (1906).

One of such functions is the confirmation and consent by the Senate to gubernatorial appointments and nominations. Can the Senate act upon such nominations and appointments at the thirty day session, in view of the "no business" provision? It seems to me that an answer to this question will provide a criterion to answer the larger question stated in your letter.

Section 9 of Article VII of the *Constitution of West Virginia* provides:

> "In case of a vacancy, during the recess of the Senate, in any office which is not elective, the Governor shall, by appointment, fill such vacancy, *until the next meeting of the Senate,* when he shall make a nomination for such office, and the person so nominated, when confirmed by the Senate, (a majority of all the Senators elected concurring by yeas and nays) shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. No person, after being rejected by the Senate, shall be again nominated for the same office, during the same session, unless at the request of the Senate; nor shall such person be appointed to the same office during the recess of the Senate." (Emphasis supplied.)

There would appear to be a conflict between the language, "next meeting of the Senate," and the "no business" provision. If "next meeting" is applied literally, then nominations should be acted upon at the budget session. However, if the "no business" clause is construed to be

directed against the Senate, the Senate could not act on such nominations and appointments.

Since the language of Section 22 of Article VI is so similar to the language of Section 7 of Article VII, I have examined the records of the extraordinary sessions of the Legislature of this State to determine what has been the legislative and administrative interpretation of this conflict. Such interpretation, if uniform and consistent, is often used by the courts to resolve such questions. See *State* v. *Harden,* 62 W.Va. 313, 323 et seq., 60 S.E. 394 (1907); *Simms* v. *County Court,* 134 W.Va. 867, 61 S.E. (2d) 849 (1950); *Brandon* v. *Board of Control,* 84 W.Va. 417, 100 S.E. 215 (1919); 50 Am. Jur., Statutes, 319.

The first extraordinary session of the Legislature of this State after the adoption of the Constitution of 1872 was called by Governor E. W. Wilson, by proclamation dated March 5, 1887 (pursuant to Section 7, Article VII), which contained, among other items the language, "for the Senate to act upon executive nominations for office." The Senate did in fact act upon executive nominations for office at that session. At the extraordinary sessions of the Legislature of 1890, 1893, 1904, 1905, 1907, 1908, 1911, 1913, February 1915, May 1915, 1916, February 1917, May 1917, and 1920, the question of confirmation was not mentioned in the proclamation calling such sessions, nor did the Senate at those sessions act on gubernatorial appointments. An examination of the records of the period covered by the aforementioned extraordinary sessions of the Legislature shows that there were, indeed, interim appointees of the Governor who otherwise would have been subject to Senate confirmation.

At the extraordinary session of the Legislature beginning September 14, 1920, called by Governor John J. Cornwell pursuant to Section 7, Article VII, the Senate did consider gubernatorial appointments, even though mention of the matter was not in the call for the session. At the extra session starting April 29, 1925, there was no mention in the call and no action was taken on the matter of gubernatorial appointments. At the extraordinary session starting May 3, 1927, the proclamation issued by Governor Gore included, among other things, the purpose, "to consider and pass upon persons nominated by the Governor to fill the respective offices established by the Constitution, or created by law, as provided in Sections 8 and 9 of Article VII of the Constitution of West Virginia." The Senate at that session did act upon the Governor's appointments.

At the extraordinary session starting November 20, 1929, called by Governor William G. Conley, the proclamation did not mention confirmation of appointments. However, the Governor did submit nominations to the Senate and that body considered them. The same is true of the extraordinary sessions of 1930, 1932, April 1933, November 1933, June 1936, December 1936, 1944, 1946, and 1947. At each of these extraordinary sessions, the Senate considered confirmation of appointments, but the proclamations calling said extraordinary sessions did not mention this subject. The last extraordinary session of the Legislature was held in June of 1953 and confirmation of appointments was not considered, nor was it mentioned in the proclamation calling said session.



It is interesting to note that there was a period in the history of our State, between 1887 and 1920, in which the matter was not mentioned in the call for the extraordinary sessions, nor did the Senate act on confirmations when there were appointments outstanding which they had not confirmed. By the same token, it is interesting to note that during the period beginning with the extraordinary session of 1929, through and including the extraordinary session of 1947, the Governor's proclamation did not mention the subject, but at each of these sessions gubernatorial nominations and appointments were considered by the Senate.

It would therefore appear that there has been no uniform or consistent legislative and administrative interpretation in this State to aid in the construction of the two conflicting constitutional provisions.

There are only two other states in the Union which have the constitutional provisions identical to West Virginia. Our Sections 7, 8, and 9, of Article VII correspond exactly to Sections 8, 10, and 11, of Article IV of the Constitution of Nebraska, and Sections 8, 10, and 11, respectively of Article V of the Constitution of Illinois.

Inquiry of the Attorney General of Illinois reveals that the legislative and administrative interpretation and practice in the State of Illinois has been to construe the "no business" provision of Section 8 of Article V of the Illinois Constitution to be a limitation upon the action of the Senate and to construe the words, "next meeting of the Senate," to mean next regular session of the Legislature. It appears that the Senate of Illinois has not acted upon gubernatorial nominations and appointments at extraordinary sessions of the Legislature of that State.

However, in Nebraska the Legislature does act upon gubernatorial nominations and appointments at extraordinary sessions. (By constitutional amendment in 1934, Nebraska does not have a Senate, but has a unicameral Legislature which performs the functions formerly performed by each house.)

By opinion dated August 28, 1946, the Attorney General of Nebraska ruled that the confirmation by the Senate of gubernatorial appointments was not a legislative act, but an administrative act, and, as such, was not prohibited by the "no business" provision of the Nebraska Constitution. I think it is pertinent to quote the following language of that opinion:

> "It seems clear that the phrase 'the next meeting of the senate' must be construed to refer to special as well as to regular sessions of the Legislature, and that it was the intention of the framers of the Constitution and of the people who adopted it that interim appointments by the Governor to fill vacancies

should be presented to the next meeting of the senate, whether or not such business was included in the Governor's proclamation calling the Legislature together. The object and purpose of the provision requiring confirmation by the senate is to provide a certain check and control over the Governor's power of appointment, and this object would be defeated rather than advanced by the view that the Governor, by omitting such business from the call, might delay the confirmation until the next regular session."

It would therefore appear that the two other states which have the identical constitutional provisions have adopted opposite views of this problem.

Other states have similar, but not precisely the same, constitutional provisions as those here under consideration, and some of these have been the subject of judicial construction. There follows a discussion of such cases, in order to demonstrate the manner in which the question has been handled.

The *Constitution of Florida* provides, in Section 8 of Article IV thereof, the following:

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to be convened, and *the Legislature when organized shall transact no legislative business* other than that for which it is especially convened, or such other legislative business as the Governor may call to its attention while in session, except by a two-thirds vote of each House." (Emphasis supplied.)

In *Advisory Opinion to the Governor*, 64 Fla. 16, 59 So. 782 (1912), the Supreme Court of Florida held that the confirmation by the Senate of gubernatorial appointments was not "legislative business" within the meaning of that constitution provision and that, therefore, the Senate could act upon such appointments and that it was the duty of the Governor to transmit to the Senate his nominations at an extraordinary session.

The *Constitution of California*, in Section 9 of Article V thereof, provides:

"He may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, and when so convened *it shall have no power to legislate on any subjects other than those specified in the proclamation*, but may provide for the expenses of the session, and other matters incidental thereto." (Emphasis supplied.)

In *People* v. *Blanding*, 63 Cal. 33 (1883), the Supreme Court of California held that the Senate could act on the confirmation of gubernatorial appointments at an extraordinary session of the Legislature, even though such matter was not mentioned in the proclamation calling such session. In its opinion, the Court said:

"'In our view of the matter, it is not necessary to consider whether the governor could constitutionally convene the legislature in extra session for the sole purpose of having the Senate consent to his appointments. Nor is it necessary to inquire whether that was one of the subjects specified in the proclamation by which he convened the legislature at that time. The fact that the legislature was lawfully convened on that occasion, and that while so convened the Senate consented to the appointment of the relator, is not disputed. The legislature had no power to act on that subject whether it was specified in the proclamation or not, and the constitutional prohibition is limited to subjects upon which the legislature would have power to legislate in the absence of any prescribed limitation. *The prohibition applies only to acts of legislation, and it was wholly unnecessary to prohibit legislation by the Senate, because the Senate alone could not legislate.* It might pass any number of bills, but until concurred in by the other House, and approved by the governor, they would have no validity. Therefore, the constitutional limitation on the power of the legislature to legislate, when convened in extra session, does not apply to this case, and the Senate had the same power to consent to the appointment of the relator that it would have had if the Constitution had authorized the governor to call an extra session of the legislature whenever he should deem it advisable to do so, without imposing any other limitations upon its power to legislate when so convened than are imposed on its power to legislate when convened in regular session.'" (Emphasis supplied.)



In *State* v. *Dowling*, 167 La. 907, 120 So. 593 (1929), the Supreme Court of Louisiana said that the submission of names to the Senate at an extraordinary session was optional with the Governor. This was a split decision, but the entire Court agreed that if the Governor submitted the nominations, the Senate could act, even though the Louisiana Constitution provides "the power to legislate * * * shall be limited to the objects stated in the call for the special session." It should be noted that the dissent in this case contended that there was a duty upon the Governor to send the names to the Senate. It is significant, I think, that the Constitution of Louisiana does not contain any language corresponding to that portion of Section 9 of Article VII of the West Virginia Constitution which provides that the Governor "shall * * * next meeting of the Senate." Immediately after the decision in the *Dowling* case came *State* v. *Irion*, 169 La. 481, 125 So. 567 (1929), where the Supreme Court of Louisiana reaffirmed the *Dowling* case in another split decision.

The *Constitution of Missouri*, in Section 55 of Article IV thereof, provides:

"The General Assembly *shall have no power*, when convened in extra session by the Governor, *to act upon subjects other than those specially designated* in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor after it shall have been convened." (Emphasis supplied.)

In *State ex rel. Sikes* v. *Williams*, 222 Mo. 268, 121 S.W. 64, 17 Ann. Cas. 1006 (1909), the Supreme Court of Missouri held that the Senate

could consider confirmation of gubernatorial appointments at special sessions of the Legislature even though such matters were not mentioned in the proclamation by which the session was called.

The rule that the Senate can consider gubernatorial appointments at extraordinary sessions of the Legislature is founded upon the following considerations.

1. Consideration of gubernatorial appointments is an executive or administrative function. *People* v. *Blanding, supra; State ex rel. Sikes* v. *Williams, supra; Advisory Opinion to the Governor, supra; State* v. *Dowling, supra.* See, also, 42 *American Jurisprudence* Public Officers, Sec. 113.

2. The Constitutional limitations on extraordinary sessions are directed to legislative functions; that the limitations are directed to the Legislature as a unit, not to one house thereof. *People* v. *Blanding, supra; Walker* v. *Baker,* 196 S.W. (2d) 324 (Texas 1946).

In this connection it is pertinent to quote from *Road Commission* v. *Bridge Commission, supra,* wherein the Supreme Court of Appeals of West Virginia apparently took the view that the "no business" provisions of Section 7 of Article VII of the West Virginia Constitution applied only to joint action:

> "* * * The language of this section is without ambiguity, and its purpose *to prevent enactments* not germane to subjects stated in the call is too plain for controversy. * * *" (Emphasis supplied.)
>
> "* * * In authorizing a governor to state the business of an extraordinary session and in *limiting legislative action* to that specific business the constitution does not confer on him one jot of legislative power. * * *" (Emphasis supplied.)

3. Where two constitutional provisions conflict, the courts will adopt, if possible, the construction that will give force and effect to both. *Flesher* v. *Board,* 138 W.Va. 765, 77 S.E. (2d) 890 (1953); *State ex rel. Trent* v. *Sims,* 138 W.Va. 244, 77 S.E. (2d) 122 (1953).

The Court of Appeals of New York construed the Constitution of New York where there were two apparently conflicting provisions. One provision required that the Assembly must make an apportionment at the first session thereof after an enumeration had been taken. Another provision stated that at extraordinary sessions of the Assembly "no subject shall be acted upon" except that stated in the call for such session. In *People* v. *Rice,* 135 N.Y. 473, 31 N.E. 921 (1892), the Court held that even though the matter of apportionment was not in the call for a special session of the Legislature, the Assembly acted constitutionally when it made an apportionment at such session, for the reason that the provision requiring the apportionment to be made at the first session after the enumeration would be defeated, if such was not permitted at an extraordinary session.



4. Where the words "next session" are used without further limitation, they will be taken to mean the first session thereafter, whether extraordinary or regular. *State* v. *Williams* 20 S.C. 12 (1883); *Bell* v. *Sampson,* 232 Ky. 376, 23 S.W. (2d) 575 (1930); See, also, *Taylor* v. *Hebden,* 24 Md. 202 (1865).

In *Bell* v. *Sampson, supra,* where a statute provided that the Senate should consider certain gubernatorial appointments "at its first session held thereafter," the Court interpreted this to mean the next session, whether regular or extraordinary. The Constitution of Kentucky provides, in part, "when he shall convene the General Assembly, it shall be by proclamation, stating the subjects to be considered, and no others shall be considered."

5. The policy of the law is to favor the completion of the appointment process at the earliest possible time, and the confirmation of gubernatorial appointees being necessary to complete such process, the courts will adopt the construction of constitutional provisions which will complete such process at the earliest time. *State ex rel. Fox* v. *Brewster,* 84 S.E. (2d) 231 (W.Va. 1954); *State ex rel. Downey* v. *Sims,* 125 W.Va. 627, 26 S.E. (2d) 161 (1943); *Broadwater* v. *Booth,* 116 W.Va. 274, 180 S.E. 180 (1935); *Marbury* v. *Madison,* 1 Cranch. 48, 2 L.ed. 135 (1803).

It is my view that if the "no business" provisions of Section 22 of Article VI and Section 7 of Article VII are construed to be limitations on the actions of the Senate, then the language of Section 9 of Article VII becomes meaningless. If, however, Section 22 of Article VI and Section 7 of Article VII are construed to be limitations directed toward the Legislature as a unit, prohibiting *legislative action,* then those sections and Section 9 of Article VII can all be given meaning and force.

If the framers of the Constitution intended for the Senate to act on gubernatorial appointments only at regular sixty day sessions, why did they use the language, "next meeting of the Senate"? When prescribing functions to be performed at regular sessions, the Constitution clearly says "regular session." See Sections 6 and 18 of Article VII and Sections 18, 22, and 24 of Article VI of the *Constitution of West Virginia.*

The confirmation power of the Senate over gubernatorial appointments is not a *legislative* power. It is an executive power confided to the Senate as a part of the constitutional system of checks and balances. It does not seem reasonable to say that this power could not be exercised when the Senate is lawfully convened. See *State ex rel. Fox* v. *Brewster,* decided by the Supreme Court of Appeals of West Virginia at the September, 1954, Term. Also, see *State ex rel. Downey* v. *Sims,* 125 W.Va. 627, 26 S.E. (2d) 161 (1943).

I therefore conclude that the Senate may act upon gubernatorial appointments and consent to gubernatorial nominations at extraordinary sessions of the Legislature or at the regular biennial thirty day session thereof.

The other constitutional functions of each house of the Legislature must now be considered, and I believe the criteria developed in the

matter of gubernatorial appointments will serve as a guide on those functions.

Some of the separate functions of each house are expressed in *Ex parte Caldwell*, 61 W.Va. 49, 55 S.E. 910 (1906), as follows:

> "* * * The Constitution does in terms confide to each branch separately certain powers, as for instance, to punish or expel its own members, to provide for its own safety and against disturbance of the transaction of its work, obstruction of the proceedings of itself or officers, or assault, threat or abuse of its members, preferring impeachments, trying them, and confirming gubernatorial nominations. * * *"

Under the rule that the "no business" limitation applies only to joint or concurrent action, it is my opinion that the above mentioned functions can be performed by the respective houses at the regular biennial thirty day session of the Legislature.

The amendment of Section 22 of Article VI may have created a new rule with reference to the election of the President of the Senate. Section 24 of Article VI provides:

> "A majority of the members elected to each House of the Legislature, shall constitute a quorum. But a smaller number may adjourn from day to day, and shall be authorized to compel the attendance of absent members, as each House may provide. Each House shall determine the rules of its proceedings and be the judge of the elections, returns and qualifications of its own members. The Senate shall choose, from its own body, a President; and the House of Delegates, from its own body, a Speaker. Each House shall appoint its own officers, and remove them at pleasure. The oldest Delegate present shall call the House to order, at the opening of each new House of Delegates, and preside over it until the Speaker thereof shall have been chosen, and have taken his seat. The oldest member of the Senate present at the commencement of each regular session thereof, shall call the Senate to order, and preside over the same until a President of the Senate shall have been chosen, and have taken his seat."

You will note the language: "The oldest member of the Senate * * * at the commencement of each *regular session* thereof * * *"

Prior to the recent amendment of Section 22, the Constitution designated only the biennial sixty day sessions as "regular" sessions—all others were either extraordinary or adjourned sessions. However, the 1954 amendment, which rewrote Sections 18, 22, and 33 of Article VI, established *annual regular* sessions. Consequently, if Section 24 is read together with the amended versions of Sections 18 and 22, the result is compelling that the Senate must choose a President each year.

However, this does not seem to apply to the Speaker of the House of Delegates because Section 24 provides that the Speaker shall be chosen at the opening of "each *new* House of Delegates," which would mean that it would be done at the regular session following the biennial election of Delegates, which would coincide with the regular sixty day biennial session.



This discussion may well be immaterial for the reason that Section 24 clearly provides that all of the officers of each house shall serve at the pleasure of their respective houses, but I thought it should be mentioned so that the formalities might be called to your attention. *Luther* v. *McClaren*, 87 W.Va. 133, 104 S.E. 294 (1920).

The same Section 24 also provides that each house shall determine the rules of its proceedings and be the judge of the election, returns, and qualifications of its own members. There can be no question that such matters can be considered by the respective houses at the regular biennial thirty day session. I think, also, that joint rules may be adopted, so long as they are necessary to the organization and operation of the Legislature and do not purport to cover legislative matters not incident to the consideration of the annual budget bill. See *Charleston National Bank* v. *Fox*, 119 W.Va. 438, 194 S.E. 4 (1937); *State* v. *Heston*, 137 W.Va. 375, 71 S.E. (2d) 481 (1952); *State* v. *Thornburg*, 137 W.Va. 60, 70 S.E. (2d) 73 (1952).

Section 11 of Article VII of the Constitution provides:

> "The Governor shall have power to remit fines and penalties in such cases and under such regulations as may be prescribed by law; to commute capital punishment and, except where the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; but he shall communicate to the Legislature at each session the particulars of every case of fine or penalty remitted, of punishment commuted and of reprieve or pardon granted, with his reasons therefor."

The question may well arise as to whether the Governor should communicate the information above set forth at the thirty day session, and if so, whether the Legislature could consider the same.

Florida has an almost identical provision in its Constitution, and in *Advisory Opinion to the Governor*, 64 Fla. 16, 59 So. 786 (1912), the Supreme Court of Florida held that the Governor of Florida did not have to transmit to the Legislature at an extraordinary session the aforementioned constitutional report. The reasoning of the Court was that such information was in the nature of "legislative business" and under the Florida rule that the "no business" section of their Constitution prohibited only legislative business, it was held that the Governor need not communicate such report except at the biennial regular session.

Applying the Florida opinion to our situation, I am inclined to the view that such communication need not be transmitted by the Governor of West Virginia, nor can it be considered by the Legislature except when in plenary session. In addition to the theory that this is "legislative business" under the Florida theory, there is a further reason for my conclusion. The matter required by this constitutional section to be communicated is information for the use of general legislation, not

legislation particularly confined to, or relevant to, budgetary matters. Since the annual biennial thirty day session is for the sole purpose of considering the budget, it would not seem to be a proper consideration at that session.

However, you will notice that Section 18 of Article VII of the Constitution provides:

> "The subordinate officers of the Executive Department and the officers of all the public institutions of the State, shall, at least ten days preceding each regular session of the Legislature, severally report to the Governor, who shall transmit such report to the Legislature; and the Governor may at any time require information in writing, under oath, from the officers of his department, and all officers and managers of State institutions, upon any subject relating to the condition, management and expenses of their respective offices."

Coupling the language "regular session" with the fact that such reports would be material and germane to the consideration of the budget bill, it would appear that such reports would have to be transmitted to the Legislature and would be a matter which could be considered by it at the regular biennial thirty day session.

---

No. 76 March 31, 1955

REQUESTED BY: Homer W. Hanna, Jr., Chairman
Public Service Commission
Charleston 5, W. Va.

OPINION BY: John G. Fox, Attorney General
Fred H. Caplan, Assistant

We have your letter of March 22, wherein you request an opinion on the following questions:

> "1. Is the operation of a motor vehicle with the expectation of receiving compensation sufficient to bring the operator within the Motor Carrier Law?
>
> "2. Is the mere acceptance of a 'tip', 'gratuity', or any sum of money sufficient to cause the operator of a motor vehicle to be in violation of the Motor Carrier Law?"

It is apparent that before the jurisdiction of the Public Service Commission can be invoked, with regard to the transportation of passengers and property over our highways, it must be determined that such passengers or property were carried *for hire*. In other words, the operator of the carrier in either of the above events must have so acted for the purpose of being reimbursed for his labor. The key to our problem, therefore, is whether or not one is rendering a service *for hire*.

Let us now consider the situation described in your letter. It is our thought that one, to fulfill the "for hire" requirement, need not necessarily make a definite charge for his service. A tip or gratuity given by the passenger may be a sufficient basis therefor. Solicitation, in any manner, of a tip or gratuity for transporting a passenger constitutes, in our opinion, the rendering of a service for hire. We believe that the facts set out in your letter fulfill the "for hire" requirements. In an instance where a tip or gratuity is voluntarily offered and given by a passenger without any solicitation whatever, the problem presents greater difficulty. There is, however, a line of authorities which hold that a tip or gratuity, even though voluntarily given, is, in fact, payment for services rendered. *Roberts* v. *C. I. R.*, 176 F. 2d 221 (1949); *U. S.* v. *McCormick*, 67 F. 2d 867 (1933); 26 U.S.C.A. 22(a) (b) (3). Money so received is considered income and must be so reported in one's income tax return. Our research has failed to reveal any cases directly on the point involved (voluntary tips). We therefore feel that any matter arising which involves this question would have to be determined from the evidence obtained in each case. We are inclined to believe that a stronger case is presented for invoking the jurisdiction of the Motor Carrier Division where it is shown that the drivers are acting in concert and are holding themselves out to the public as common carriers.



In answer to your first question, we are of the opinion that the mere expectation of receiving compensation is not sufficient to bring the operator within the provisions of the Motor Carrier Law. As stated hereinbefore, the test is whether one is actually operating for hire. To prove one's expectation would require a subjective test, and it would be most difficult to prove one's intention, independent of his prior or subsequent acts.

Your second question, we believe, is answered in the above discussion of tips or gratuities. However, summarizing this point, we are of the opinion that any solicitation of a tip or gratuity implies operating for hire. The acceptance of a tip voluntarily given, without any solicitation on the part of the operator or driver, presents a closer question, which, we believe, must be decided from the evidence obtained.

---

No. 77 April 1, 1955

REQUESTED BY: Orel J. Skeen, Warden
West Virginia Penitentiary
Moundsville, W. Va.

OPINION BY: John G. Fox, Attorney General
Cletus B. Hanley, Assistant

We are in receipt of your letter of March 17, 1955, in which you ask the following question:

> "Suppose an offender with three consecutive 1 to 10 year sentences should seriously violate prison regulations, after he