

BACKGROUND

This case deals with S.B. 7, passed during the first extraordinary session of the 96th Missouri General Assembly and signed by the Governor on October 21, 2011. S.B. 7 is a bill to “repeal sections 196.1109, 196.1115, 348.251, 348.253, 348.256, 348.261, 348.262, 348.263, 348.264, 348.271, and 348.300, RSMo, and to enact in lieu thereof fourteen new sections relating to science and innovation, with a contingent effective date.”

Normally, bills become effective “ninety days after the adjournment of the session ... at which it was enacted.” Art. III, § 29, Mo. Const. The first extraordinary session adjourned on October 27, 2011. There was no vote to invoke the emergency clause provision and change the date. So unless something delayed that effective date, S.B.7 took effect on January 25, 2012.

S.B. 7 has two sections. Section A contains all the substantive provisions. Section B does just one thing: it purports to change the effective date of Section A:

Section B. Section A of this act relating to science and innovation shall not become effective except upon the passage and approval by signature of the governor only of senate bill no. 8 relating to taxation and enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly.

Section B looked much like an “emergency clause” that modifies the effective date of a statute. *Cf. State v. Downing*, --- S.W.3d ---, 2011 WL 5041187 (Mo. Ct. App. W.D. 2011), and Section B of H.B. 1715 (2008) quoted therein.

S.B. 8, introduced in the first extraordinary session, was not a bill “relating to science and innovation.” Its title demonstrates that it is a tax bill: “To repeal sections 32.115, [etc.], RSMo, and to enact in lieu thereof forty-two new sections relating to taxation, with an emergency clause.” S.B. 8 was not passed by the General Assembly.

When it became apparent that the executive branch intended to implement S.B. 7 on its normal effective date, rather than wait for S.B. 8 to be signed by the Governor, Plaintiffs sued for a declaratory judgment that S.B. 7 was invalid, and have sought an injunction barring its implementation. The Court hereby rules that Section B is invalid as a matter of law.

THE VALIDITY OF SECTION B OF S.B.7

The Missouri Constitution gives the Governor the authority, through his veto power under Art. III, § 31, to decide whether a bill passed by the general assembly will become law:

Every bill which shall have passed the house of representatives and the senate shall be presented to and considered by the governor, and, within fifteen days after presentment, he shall return such bill to the house in which it originated endorsed with his approval or accompanied by his objections. If the bill be approved by the governor it shall become a law.

Section B of S.B.7 cannot be reconciled with that authority. Through it, the legislature purported to be able to pass S.B. 7, present S.B. 7 to the Governor for his signature, have him approve the bill – and yet have it *not* “become a law.” The General Assembly thus attempted to retain for itself the ability to decide later whether the Governor’s signature accomplished what the constitution specified: if the General Assembly chose not to pass S.B. 8 and present it to the Governor for his signature (or, apparently, if the legislature passed S.B.8, the Governor vetoed it, and the legislature overrode the veto), S.B. 7 would never become law. The Missouri Constitution simply does not permit the legislature to interfere with gubernatorial authority in that fashion.

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The importance of preserving the veto authority was discussed by the Missouri Supreme Court in *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994), its seminal “single subject” opinion. There, the court was applying the “single subject” provision of Art. III, § 23. The court observed that such procedural requirements are imposed on the legislature, in part, to prevent the legislature from giving the Governor improper choices:

Because the governor may not employ a line item veto over legislation generally, the effect of the Constitution's single subject rule is to prevent the legislature from forcing the governor into a take-it-or-leave-it choice when a bill addresses one subject in an odious manner and another subject in a way the governor finds meritorious. Thus, by limiting the subjects a bill may address to one, the Constitution maintains appropriate checks by the governor over legislative action and effectively provides a line item analog for general legislation.

877 S.W.2d at 102. Here, S.B.7 and S.B. 8 deal with different subjects, and to effectively incorporate the subject of S.B. 8 into S.B. 7 via Section B of S.B. 7 would seem to violate the single-subject provision. But this Court does not reach that conclusion, because the approach chosen in Section B violates the constitutional definition of the veto power and its delegation to the Governor even if the cross-referenced bill dealt with the same subject.

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SEVERENCE OF SECTION A FROM SECTION B

Because Section B is not a valid exercise of legislative authority, the Court must then address whether that provision can be severed, and Section A remain in force.

The General Assembly itself has set out the rule to be applied when a portion of a statute is declared invalid:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140, RSMo 2000. The Missouri Supreme Court applied that standard most recently on February 14, 2012, stating:

In this case, severance is appropriate. This Court is convinced beyond a reasonable doubt that the sections relating to campaign finance, ethics and keys to the

Plaintiffs argue otherwise, citing cases in which contingent clauses in legislation were upheld. In cases such as *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. banc 1996), and *State ex rel. Barrett v. Dallmeyer*, 245 S.W. 1066, 1068 (Mo. banc 1922), the Missouri Supreme Court considered contingencies that do not resemble the one set out in Section B of S.B. 7. In neither instance did the General Assembly place a bill on the Governor's desk for signature but retain for itself the option of deciding whether that signature would be effective.

In *Dallmeyer*, the court was considering "two statutes [that were] in pari material and must be considered together": statutes that provided, in turn, for "the abolition of one office and the transfer of powers and duties of the office being abolished to another" – statutes that were "inseparable." 245 S.W. at 1068. The provisions of S.B. 7 and S.B. 8 are certainly not "inseparable." Their connection is not one of substance but apparently of some legislative strategy.

In *Akin*, the court expressly rejected the "contingent referendum provisions" of the bill, despite the legislature's ability to "enact laws to take effect on the happening of a future event." 934 S.W.2d at 299-300. The Court thus declined to allow the General Assembly to use the referendum process to alter the constitutionally established means of enacting statutes. This Court cannot find in *Akin* support for the proposition that the legislature modify the constitutionally established enactment process by keeping for itself the power, after presenting a bill to the Governor, to effectively invalidate the resulting statute by declining to pass another.

capitol dome are not essential to the efficacy of the properly enacted provisions pertaining to procurement.

The properly enacted provisions pertaining to procurement are complete and are capable of being executed in accordance with the legislative intent.

Legends Bank v. State, No. SC91742, slip op. at 6 (Feb. 14, 2012).

Here, however, severance is not “appropriate.” As stated in Judge Fischer’s concurring opinion in *Legends Bank*, the judicially created practice of severance effectively violates the separation of powers protected by the United States Constitution and by article II, § 1, of the Missouri Constitution. Having faulted the legislature for violating the separation of powers principle, the Court must not be guilty of the same fault and therefore must decline to judicially sever Section B and, instead, rule that SB 7 is unconstitutional in its entirety.

As set forth in Judge Fischer’s concurring opinion, in relevant part, when a court does not invalidate an entire bill that has been enacted and severs only a portion of the bill, it risks subverting the legislative process and allowing legislation to survive that otherwise might not have passed. *Legends Bank*, No. SC91742 at pp. 9-10 (Fischer, J., concurring). These are exactly the circumstances found here. Accordingly, regardless of whether the practice of judicial severance should be abolished (as favored by Judge Fischer), the cogent logic of Judge Fischer’s opinion—encouraging the “principled, constitutional behavior” of bill-sponsoring legislators—persuasively argues against the severance of Section B of SB 7 here.

Yet, even if severance would be fitting, Section B is not severable, and SB 7 is therefore unconstitutional in its entirety. “When the procedure by which the legislature enacted a bill violates the constitution, severance is appropriate only when a court ‘is convinced beyond a reasonable doubt’ that the specific provisions in question are not essential to the efficacy of the bill and that the legislature would have passed the bill without the additional provisions.” *Legends Bank v. State*, No. SC91742, slip concurring op. at pp. 7-8 (Mo. banc Feb. 14, 2012) (Fischer, J., concurring) (citing *Hammerschmidt*, 877 S.W.2d at 103-04).¹

Here, even if severance was a possibility, the Court would not sever Section B from SB 7 because the Court is convinced beyond a reasonable doubt that the legislature would *not* have passed SB 7 without Section B. (*See* Plaintiffs’ Amended Petition, ¶¶ 29-32.) That the legislature would not have passed SB 7 without Section B is shown most clearly by SB 7’s very subject, which expressly includes the phrase “with a contingent effective date.” (*Id.*) Thus, on the face of SB 7, it cannot be said beyond a reasonable doubt that SB 7 would have passed without the contingency. It was a part of the bill’s very subject. (*Id.*)

Moreover, every single version of SB 7 before the version finally passed did not contain the contingency and failed to pass. This is also true for every predecessor version of the bill that the Missouri Senate and House of Representatives attempted to pass, in both general and special session. (*See id.*; *see*

¹ Mo. Rev. Stat. § 1.140 (statutory severability) does not support the practice of severability of bills enacted in violation of the procedural mandates of article III, section 23 and is thus inapplicable to this case. *Legends Bank*, No. SC91742, at p. 8 n.5 (Fischer, J., concurring) (citing *Hammerschmidt*, 877 S.W.3d at 103).

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also prior versions of Senate Bills 7 and 8 (96th General Assembly, First Extraordinary Session) and House Bills 467 and 468 (96th General Assembly, First Regular Session).² The Court thus is not convinced beyond a reasonable doubt that SB 7 would have passed without Section B. Indeed, Section B may well have been a last-ditch attempt to garner enough votes to pass SB 7. Accordingly, Section B is not severable from SB 7, and this Court’s ruling that Section B is unconstitutional renders SB 7 unconstitutional in its entirety.³ Even if this Court applies the judicial doctrine of severance, the result would be the same, and the Court would still grant Plaintiffs’ motion for judgment on the pleadings.

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² The history of SB Nos. 7 and 8 and their predecessors was incorporated by reference in the pleadings of this case. (*See, e.g.*, Plaintiffs’ Amended Petition, ¶¶ 29-32.); *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010) (“Matters quoted in, attached to, or incorporated by reference into the pleadings may be considered” on a motion for judgment on the pleadings.). Additionally, Defendants consented to this procedure for resolving this case.

³ The boilerplate “severability” provision contained in Section A of SB 7 does not alter this conclusion. First, the subject of the bill itself, which expressly refers to “a contingent effective date,” and the bill’s history, in which it failed to pass without the inclusion of the contingency provision, belie the boilerplate severability language. Second, the Supreme Court has recognized that such self-inserted severability provisions are not controlling. *Preisler v. Calcaterra*, 362 Mo. 662, 669, 243 S.W.2d 62, 66 (Mo. banc 1951) (disregarding the clause, inserted by the legislature, that it “would have passed the Act and each section, subsection, sentence, clause and phrase, ‘irrespective of the fact that any one or more other sections, subsection, sentences, clauses or phrases be declared unconstitutional” in ruling the act in question unconstitutional). This is only logical, in that if boilerplate severability clauses were determinative, it would effectively usurp the judiciary’s limited role in deciding the constitutionality of laws passed by the legislature. Further, all prior versions of SB 7 and the House bills also had the boilerplate severability clause, so it cannot be said that the severability clause was added at the same time as the contingency clause to address the presence of the contingency clause. The facts demonstrate just the opposite.

CONCLUSION AND PERMANENT INJUNCTION

For all of the reasons stated above, the Court GRANTS Plaintiffs' Motion for Judgment on the Pleadings and:

- (1) Declares that SB 7 violates article III, § 23, of the Missouri Constitution, cannot be severed under the facts of this case, and therefore SB 7 is unconstitutional in its entirety;
- (2) Permanently enjoins Defendants, and each of them, and all those in active concert or participation with them, from taking any action, including but not limited to the use of public funds, to implement or otherwise effectuate any provision of SB 7;
- (3) Orders Defendants, and each of them, to rescind all actions taken to implement or otherwise effectuate any provision of SB 7; and
- (4) Denies all other pending motions as moot.
- (5) Each party to bear their own costs.

Dated: 2/20/12



Daniel R. Green
Circuit Judge, Division II