

MOTOR VEHICLES: Highway Patrol unauthorized to keep slow
HIGHWAY PATROL: moving, heavily loaded motor vehicles off
highways.

September 4, 1941

Missouri State Highway Patrol
Jefferson City, Missouri

Attention: Captain W. J. Ramsey
Acting Superintendent

Gentlemen:



This will acknowledge receipt of your letter under date of August 19, enclosing a copy of a letter from Captain Lewis B. Howard of Troop "C" at Kirkwood, Missouri, requesting the following opinion.

"1. Please refer to Section 12, page 234, Laws 1931, State Highway Patrol Law, which is quoted in part: 'Duties of the Highway Patrol: It shall be the duty of the patrol to police the highways constructed and maintained by the Commission, to regulate the movement of traffic thereon.....'"

"2. Please refer, also, to Section 15, page 235, entitled 'Must Stop on Signal of Member of Patrol - Penalty.'

"3. The opinion of the Attorney General as to whether or not members of the patrol, under these sections, would be within their authority in requiring slowly moving trucks to stay off of narrow, crowded highways during the hours of congested traffic whenever their slow movement constitutes a serious hazard is requested. It is granted that

these trucks have complied with the Motor Vehicles Law and the Bus and Trust Law and are guilty of no specific offense, but because of their slow movement pack up behind them long strings of automobiles from which some drivers attempt to cut out and pass at hazardous locations. If it is possible to deny these trucks the use of certain highways during a seven to eight hour period of congestion on weekends, the movement of traffic will be considerably expedited and a real hazard removed."

The Highway Patrol was created by the legislature and has no authority except that granted it by the legislature. (Lamar Township v. City of Lamar, 261 Mo., 1.c. 189.)

The two provisions mentioned in your request are now Sections 8358 and 8361, R. S. Missouri 1939, and read as follows:

"8358. It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any im-

proved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

"8361. It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. Any person who wilfully fails or refuses to obey such signals or directions or who wilfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

It will be noted that Section 8358, supra, provides that it shall be the duty of the Highway Patrol to regulate the movement of traffic on the highways constructed and maintained by the Commission. This is not all that is required of the Highway Patrol under this provision of the law. It further requires the Patrol to enforce and prevent thereon the violation of laws relating to size, weight, and speed of commercial motor vehicles. Section 8383 R. S. Missouri 1939 provides what speed motor vehicles shall be driven in this State and reads as follows:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: Provided, however, that no person shall operate a solid tire commercial motor vehicle having a rated live load capacity of two (2) tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two (2) tons and not more than five (5) tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five (5) tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

While Section 8358, supra, does authorize the Highway Patrol the right to regulate the movement of traffic upon the highways, this does not by any stretch of the imagination direct the Highway Patrol to regulate the movement of traffic to such an extent as to exceed or violate any provision of the law. To permit that would in fact be permitting the Highway Patrol to legislate and not merely administer the act as passed by the legislature.

It is fundamental that there are three distinct branches of the government, the legislative, executive and the judicial, and under judicial construction by the courts of this state none can infringe upon the duties of any other branch of the government. (Article III, Constitution of Missouri.)

In *Clark v. Austin*, 101 S. W. (2d) 977, l.c. 981, the Supreme Court en banc in speaking on the separation of departments and powers in this State said:

"In *re Richards*, 333 Mo. 907, 914, 63 S. W. (2d) 672, 675. Speaking to a like question in *State ex inf. v. Washburn*, 167 Mo. 680, 691, 67 S. W. 592, 594, 90 Am. St. Rep. 430, this court en banc said: 'All governmental powers are in their natures either legislative, executive, or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned.'"

In *Sawyer v. U. S.* 10 Fed. (2d) 416, l.c. 420, the United States Court of Appeals laid down a general proposition of law regarding regulations, which reads as follows:

"Authority to make rules and regulations necessary for carrying out the purposes of legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right given by the act."

In *State ex rel. Kaser v. Leonard*, 129 A. L. R. 1125, l.c. 1135, the court said:

"The following language which we have taken from *Maryland Casualty Co. v. United States*, 251 US 342, 40 S Ct 155, 157, 64 L. ed 297, is much quoted: 'It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.'"

In *Marsh v. Bartlett*, 121 S. W. (2d) 737, l.c. 744, the court in construing the word "regulate" as contained in the constitutional amendment creating the Conservation Commission of the State of Missouri said :

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. *Sluder v.*

St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L.R.A., N.S., 186. Regulation and legislation are not synonymous terms. In re Northwestern Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65, 70.

42 C. J., page 619, Section 22 lays down the general principle of law regarding regulation by certain public officers or boards.

"The power of supervising and making rules and regulations as to administrative matters, in carrying out the statutory regulations of motor vehicles, may be conferred upon designated public officers or boards, such as upon the state highway commission, or, within a city, upon police or traffic officers. Such officers or boards may make rules and regulations only as to matters within the powers delegated; and they are presumed not to be vested with power to make a regulation in a matter already regulated by statute. But if the rules and regulations adopted by them are within the general purpose of the authority granted and tend to make it effective, they are not subject to the criticism that they are an unlawful delegation of authority. The legislature, however, cannot delegate to such officers or boards its legislative functions, and therefore cannot confer upon them power to establish a maximum rate of speed, less than the rate established by law, over a particular part of the highway. Thus, where the state highway commission, under its power to regulate, establishes a maximum rate of speed over

a bridge, at a rate less than that allowed by law, such regulation if viewed as an attempt to legislate is unauthorized and void; or if viewed as a regulation, is unenforceable, where the legislature has fixed no penalty for its violation."

See also *State v. Smith*, 49 S. W. (2d) 74, l.c. 76. In other words the legislature is the only branch of the government that may enact laws. The executive department merely administers acts passed by the legislature. The legislature may delegate power to the executive branch to promulgate rules and regulations or regulate traffic as in the instant case, but not to exceed the law as enacted by the legislature. Such regulations are merely for the purpose of carrying out the provisions of the act.

Your request states that it is granted that these trucks have complied with the motor vehicle act and the bus and truck law and are guilty of no specific offense. Therefore any regulations of traffic which would require such trucks to abandon a highway constructed and maintained by the Commission would be in direct violation of the law permitting the use of such highways, and such a regulation would in fact exceed the law and be invalid.

Section 8383, supra, in part requires certain trucks to travel over the highways in this State at a rate of speed not to exceed six, ten, fifteen or twenty miles per hour depending upon the capacity of said trucks. Certainly, we cannot hold that the Highway Patrol can ignore such a law and in lieu thereof exercise their authority to enforce regulations of traffic upon the highways of this State and thereby keep these trucks off the highways for the reason said trucks travel so slowly that it creates a hazardous condition by reason of the fact certain drivers of motor vehicles will take chances and pass a long line of cars at hazardous locations. Such reckless drivers attempting to pass slow moving motor vehicles at hazardous locations should be apprehended under the law and not the truck drivers who are complying with the law in every respect.

Section 8383, supra, further provides that persons operating motor vehicles on the highways of this State shall drive the same in a careful and prudent manner, and shall

exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, and further provides that a rate of speed in excess of twenty-five miles per hour for a distance of one-half mile shall be considered as evidence presumptive, not conclusive, of driving at a rate of speed which is not careful and prudent. There are many things to be taken into consideration as to whether said motor vehicles are being driven in a careful and prudent manner, such as the time of the day, the amount of vehicular and pedestrian traffic, conditions of the highway and the location with reference to intersecting highways, curves, residences and schools.

In Booth v. Gilbert, 79 Fed. (2d) 790, l.c. 794, the court quotes from many of the Missouri appellant courts' decisions that a person driving a motor vehicle upon the highways may be guilty of driving at an excessive speed even though driving at a rate of speed less than twenty-five miles an hour. The test of excessive speed is not whether the driver has or has not driven at a rate in excess of twenty-five miles per hour, but whether he drove his car in a careful and prudent manner exercising in so doing the highest degree of care, having due regard, we repeat, to his situation and surroundings.

"(9,10) It will be noted that this statute fixes no definite limit, in miles per hour, of the speed at which a car may lawfully be driven on the public highways of Missouri. (In passing, it may be observed that no ordinance of the city of St. Louis is involved, because no such ordinance is either pleaded or proved.) The statute simply requires that a car shall be driven in a careful and prudent manner; that the driver shall exercise the highest degree of care; and that the rate of speed shall not be such, or so great, as to endanger the life, limb, or property of others. True, the statute does say that a speed in excess of twenty-five miles an hour, when

maintained for a distance of one-half a mile, shall be presumptive evidence, but not conclusive evidence, of the lack of care and prudence. But even if the rate of speed so named be exceeded, the statute says the burden is still on the prosecution to show, by proof of the surroundings and situation--which may include, weather, time of day or night; intersections with other highways; curves in the highway, or lack thereof; density of population, and of pedestrian and vehicular traffic, and condition of the road--that the speed exercised was not, the time and place regarded, careful and prudent, and was therefore excessive. On the other hand, it seems fairly plain, from the language of this statute, that a driver may be guilty of driving at an excessive speed, even though he shall drive at a speed less than twenty-five miles an hour. *Wilson v. Spuhler* (Mo. App.) 20 S. W. (2d) 556. The statutory test of excessive speed, *vel non*, is therefore not whether the driver has, or has not, driven at a rate in excess of twenty-five miles per hour, but the test is whether he drove his car in a careful and prudent manner exercising in so doing the highest degree of care, having due regard, we repeat, to his situation and surroundings, or some of them above set out. (Cases cited.) * * "

Therefore, it is the opinion of this Department that the Highway Patrol may regulate traffic, but not to such an extent that said regulation goes beyond the law and in fact attempts to repeal said law; that under Section 8383, *supra*, the Highway Patrol may not by regulation restrict those trucks from using the highways of this State as provided

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by law. Since the statute provides that certain trucks of certain capacity shall travel over the highways at a specified rate of speed, such trucks may continue to travel at that rate of speed and no regulation should prevent their use of the highways. This is a matter for the consideration of the legislature and cannot be adjusted by regulation.

We realize that often-times slow moving motor vehicles on the highway do tie up traffic and certain persons who are in a hurry grow impatient and take chances, thereby endangering the property and lives of many other persons. But as long as these motor vehicles are complying with the law in every respect, as you stated they are doing, then the only possible way to remove such slow moving motor vehicles from the highways of this State is for the legislature to amend or repeal the present law and enact legislation restraining them from the use of the highways. Under the present law the provision authorizing the Highway Patrol to regulate traffic upon the highways is not sufficient authorization to prohibit such slow moving motor vehicles from operating upon the highway so long as they are being operated in a careful and prudent manner and at a rate of speed not to endanger the property and lives of other persons.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED: . . .

VARE C. THURLO
(Acting) Attorney General

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