

GOVERNOR: The governor must submit recess appointments
OFFICERS: for confirmation to the senate of the 61st
RECESS APPOINTMENTS: General Assembly in special session.

November 10, 1942

FILED NO. 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your letter of October 28, 1942 as follows:

"There is attached hereto a list, with certain data, of appointments to office made in vacation of the Sixty-First General Assembly, subject to the approval of the Senate.

"Your opinion is respectfully requested on the following question:

"Which, if any, of said appointments should be transmitted to the Senate of the Sixty-First General Assembly in extra session?"

The attached list sets forth appointments requiring us to review twenty-seven different statutory requirements on confirmation by the Senate, and therefore, in order that each may be dealt with separately, we will first set forth the general rules on this subject.

Directing our attention first to the question of whether at a special session of the General Assembly, the Senate may confirm or reject appointments, we find the following:

In 46 C. J. p. 953 Section 68, it is stated:

"* * * In the absence of Constitutional restriction a confirmation by the legislature of an executive appointment may be at a special session, * * *."

In 42 Am. Jur. p. 963 Section 111, it is stated:

"* * * The act of confirming an appointment to office is * * * the exercise of an executive function, and since it is not legislative in character, it need not be performed at a regular session. * * *"

In 42 Am. Jur. p. 964 Section 113, it is stated:

"* * * confirmation by the senate of appointments made by the governor is not a legislative act. Consequently, such confirmation may be made as well at a special as at a regular session, and it is immaterial for what purpose the legislative body may have been called in session for whenever that body is lawfully convened for legislative purposes, it has the right to act for administrative purposes, even without mention of such purposes in the call for a special session"

So far as Missouri is concerned, this question has been set at rest in State ex inf. Major ex rel. Sikes v. Williams 222 Mo. 268, 121 S. W. 64, 17 Ann. Cas. 1006. In this case it was contended that the Senate had no authority to confirm an appointment of the Governor at a special session. In answer to this contention, the court stated in 222 Mo., 1.c. 275:

"* * * We are unwilling to give our assent to this insistence. The confirmation by the Senate of appointments made by the Governor are not legislative acts, and in our opinion can be made as well at a special session as a regular session. Such acts by the Governor concerning appointments are merely administrative and can be confirmed by the Senate whenever that body is in session, and it is immaterial for what purpose the legislative body may have been called in session. In other words, whenever the body is lawfully convened for legislative purposes it has the right to act for

administrative purposes, even without mention of such purpose in the call for a special session. * * *"

The next question which presents itself is: The Senate having authority to confirm appointments at special sessions of the General Assembly, must the Governor submit such appointment for confirmation at such time?

In 46 C. J. p. 953 Section 68, it is stated:

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had; * * * *."

This rule was applied in this state in the case of Schulte v. City of Jefferson, 273 S.W. 170 (Mo. App.) as respects city officers appointed by the Mayor and to be confirmed by the council. There the court stated, l. c. 172:

"It is well settled --

'Where the appointment is made as the result of a nomination by one authority and confirmed by another, the appointment is not complete until the action of all bodies concerned has been had, * * * *.'"

Of course, these rules do not mean that the Governor cannot make recess appointments, but simply mean that the appointees' titles are not complete until confirmation. State ex inf. Major ex rel. Sikes v. Williams, supra, l. c. 283, 284 of 222 Mo. The general rule is stated in 17 Ann. Cas. 1012 as follows:

"A vacancy, caused by death, resignation, removal, or other cause, so that there is no one to perform the duties of the office, may be filled by appointment during a recess of the confirming body."

While there is some authority contra to the above rule (42 Am. Jur. p. 962 Sec. 111; 17 Ann. Cas. 1012) we think the general rule as above stated has been adopted in Missouri by the Williams case and especially should this be true when consideration is given to Section 11, Article V of the Missouri Constitution, providing:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, * * * * *"

Returning now to our question, we find it stated in 46 C. J. p. 954 Sec. 68:

"Where there is a failure to confirm on the part of the confirming body, it is the duty of the nominating power to make a new appointment. * * * * *"

In the Williams case, supra, (222 Mo. 1. c. 284) the court in speaking of the recess appointment had this to say:

"* * * In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. * * * * *"

The above statements have dealt with the question from the standpoint of what must transpire if, when an appointment is submitted for confirmation, it is rejected or there is a failure to confirm. It seems that our problem is, what must transpire if the Governor fails to submit the appointment for confirmation? We think the rule is that failure to obtain confirmation constitutes a revocation of the appointment even though that failure results from failure to submit the appointment for confirmation. Reason would seem to indicate that this is the correct view, for otherwise a Governor could defeat the right of the Senate to confirm by simply refusing to submit a list of his

appointments for confirmation. Such reasoning was employed in *People v. Sohmer*, 143 N.Y.S. 216, in a similar case. The court held there, that where a vacancy occurred during a session of the Senate, the Governor must fill the same before adjournment rather than wait until after adjournment of the Senate and then make a recess appointment. The court, at l. c. 219, said:

"If this conclusion is not correct, the lawful power of the Senate to give its advice and consent upon executive appointments could be defeated in many, if not most cases, and the executive would exercise the power of appointment independent of the Senate in many cases where the law provides that such appointments can be made only by the Governor by and with the advice and consent of that body."

In *State v. Williams*, 20 S.C. 12, the statute provided that the Governor was to make the appointment by and with the consent of the Senate, if in session, and if not in session, subject to the approval of the Senate at its next session. The court, in speaking of a recess appointment, stated at l. c. 15:

"That is, the (recess) appointment made by the governor is provisional merely, and, unless approved by the senate at its next session, terminates with such session."

For present purposes, it is sufficient to state that the statutes pertaining to confirmations of all the listed appointments, state in effect that the Governor, by and with the advice and consent of the Senate, shall appoint a person or persons to fill the named positions. Recess appointments, under the case law, may be acted upon by a special session of the Senate. Thus, it appears the Governor is under a statutory duty to have his recess appointments approved and failure of the Senate to approve, constitutes a revocation of the appointment. Under the general rule, it appears that where a duty is imposed and results or consequences are prescribed for failure to perform that duty, then it is held that the duty to act is mandatory. As was said in *Ousley v. Powell*, 12 S. W. (2d) 102, 103 (Mo. App.):

"* * * When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."

As stated in Sutherland Statutory Construction (2d Ed.) page 1114:

"The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results."

In further support of our view, we call attention to the fact that at the four special sessions of the Senate that we have checked, we find that recess appointments were submitted for confirmation. See: First Extra Session, 51st General Assembly 1921, Senate Journal page 1208; Second Extra Session 51st General Assembly 1921, Senate Journal page 1568; Extra Session 57th General Assembly 1933-1934, Senate Journal page 26; Extra Session 60th General Assembly 1940, Senate Journal pages 12 to 18 inclusive, 22, 23, 24 and 30. The foregoing reflects an executive construction of long standing to the effect that it is necessary that recess appointments be submitted to a special session of the Senate. Such action and practice is strong evidence of the true meaning to be given the law. Barber Asphalt Paving Co. v. Merservey, 103 Mo. App. 186, 1. c. 194; Venable v. Wabash Western Ry. Co., 112 Mo. 103, 125.

Thus our view is that, (1) a special session of the Senate has power to pass upon and confirm or reject recess appointments of the Governor; (2) the Governor must submit such appointments for confirmation at such special session, otherwise the appointment is revoked at the close of such session.

Of course, this conclusion must be tentative until the statutes relating to the appointment and confirmation of these officers are reviewed. It must be kept in mind in connection with the following, that the appointments dealt with were all made after the adjournment of the 61st General Assembly on July 12, 1941.

We next take up the appointments and statutes involved.

1. State Administrator of the Social Security Commission appointed to fill a vacancy caused by resignation. Section 9400 R. S. Mo., 1939, provides:

"The Governor, by and with the advice and consent of the Senate, shall appoint * * *."

While the statute is silent as to the power of the Governor to fill a vacancy in this office, nevertheless, Section 11 Article V of the Constitution supplies this deficiency. However, the statute requires the appointment to be made with the advice and consent of the Senate. That, as yet, has not been done and we see nothing that indicates this appointment should not be submitted at this time. As indicated at the close of our resume of the general rules on this subject, we think the appointment must be submitted to the Senate in special session. If it is not submitted, the Senate will adjourn without approval of the same and that will constitute a revocation of the appointment.

2. Member of the State Social Security Commission appointed to a place created by the expiration of a term. Section 9398 R.S. Mo., 1939, provides:

"The State Commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of the Senate * * *."

Our conclusion on this is the same as that indicated at the close of our resume of the general rules on this subject and as stated on the State Administrator of the Commission, which we shall hereinafter refer to as (1) supra.

3. Three members of the Board of Election Commissioners of the County of St. Louis, one to fill a place created by the expiration of a term, one to fill a vacancy created by death, and one to fill a vacancy created by resignation. Section 11928 R.S. Mo., 1939, provides:

"* * * the governor, by and with the advice and consent of the senate shall appoint * * *. In case of a vacancy in said board from any cause whatsoever, it shall be filled in the same manner and subject to the confirmation by the Senate as is the case of the original appointment, * * * *."

Our conclusion on this appointment is the same as that reached on (1) supra.

4. Six members of the Board of Managers of the Eleemosynary Institution, three to fill places created by expiration of terms and three to fill vacancies created by resignations. Section 9259 R.S. Mo., 1939, provides:

"The * * * institutions * * * shall hereafter be under the * * * management * * * of one board of managers consisting of six persons to be appointed by the governor, by and with the consent of the senate, * * * *."

Section 9262 R. S. Mo., 1939, also provides:

"* * * All members appointed when the senate is not in session shall hold their offices for the unexpired term, subject to the approval of the senate at its first session after such appointment."

These statutes make it clear that these appointments must be submitted at the present special session of the Senate.

5. Member of the Board of Managers of the Missouri School for the Blind, appointed to fill a place created by the expiration of a term. Section 10846 R. S. Mo., 1939, provides:

"The government of each of these schools shall be vested in a board of managers, composed of five members, appointed by the governor with the consent of the senate. * * *"

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Our conclusion on this is the same as that reached on (1) supra.

6. Two members of the Board of Pharmacy, one appointed to fill a vacancy created by resignation and one to fill a place created by the expiration of a term. Section 10010 R.S.Mo., 1939 provides:

"The board of pharmacy * * * shall be appointed by the governor, with the approval of the senate, * * *."

Our conclusion on this is the same as that reached on (1) supra.

7. Member of the Board of Police Commissioners of St. Joseph appointed to fill a vacancy created by resignation. Section 6486 R.S. Mo., 1939, provides:

"The governor of the state of Missouri shall, * * * * appoint three commissioners, the senate concurring therein, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

8. Five members of the Board of Examiners and Registrars of Nurses, all appointed to fill places created by the expiration of terms. Section 10025 R.S.Mo., 1939, provides:

"* * * Upon the expiration of the term of office of any member in office the succeeding member or members to be appointed, in any year, shall be chosen by the Governor, with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

9. Two members of the Board of Police Commissioners of Kansas City, one appointed to fill a vacancy created by resignation and one to fill a place created by expiration of a term. Section 7646 R.S.Mo., 1939, provides:

"The governor of the state of Missouri, by and with the consent of the Senate, shall appoint the four commissioners * * *. In

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case of vacancy in said board from any cause whatever, it shall be filled by appointment for the unexpired term, in the same manner as in the case of original appointments. * * *

Our conclusion on this is the same as that reached on (1) supra.

10. Two members of the Board of Probation and Parole, each appointed to fill places created by the expiration of terms. Section 9158 R. S. Mo., 1939, provides:

"* * * Immediately after the taking effect of this article it shall be the duty of the Governor by and with the approval and consent of the Senate to appoint two members of said Board, each of whom shall hold office for a term of four years and thereafter until his success or is appointed and qualified. * * *"

Our conclusion on this is the same as that reached on (1) supra.

11. Three members of the State Highway Commission, two appointed to fill places created by the expiration of terms and one to fill a place created by resignation. Section 8743 R. S. Mo., 1939, provides:

"The state highway commission shall consist of four members, who shall be appointed by the governor, by and with the advice and consent of the Senate, * * *."

Our conclusion on this is the same as that reached on (1) supra.

12. Two commissioners of the Department of Penal Institutions, each appointed to fill places created by the expiration of terms. Section 8973 R. S. Mo., 1939, provides:

"Immediately after the taking effect of this law it shall be the duty of the governor, by and with the consent and approval of the senate, to appoint three commissioners, * * * each of whom, * * * shall hold office for a term of four years, and thereafter until his successor is appointed and qualified.* * *"

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Our conclusion on this is the same as that reached on (1) supra.

13. Seven members of the State Board of Registration for Architects and Professional Engineers, each appointed to fill places created by the creation of the offices. Section 4 Laws of Missouri 1941 page 656, provides:

"The State Board of Registration shall consist of seven members who shall be appointed by the Governor with the advice and consent of the Senate, * * *. All vacancies occurring in said Board shall be filled by appointments by the Governor with the advice and consent of the Senate, and any such appointments so made while the Senate is not in session shall be submitted for confirmation at its next ensuing session. * * *"

The language of this section makes it clear that these appointments are to be submitted for confirmation at the present special session of the Senate.

14. Three members of the Missouri Real Estate Commission, each appointed to fill places created by the creation of the offices. Section 4 Laws of Missouri 1941, page 426, provides:

"* * * Such commission shall be appointed by the Governor with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

15. Member of the Missouri Dental Board appointed to fill a place created by the expiration of a term. Section 10062 R. S. Mo., 1939, provides:

"* * * the Governor shall appoint by and with the advice and consent of the Senate * * *"

Our conclusion on this is the same as that reached on (1) supra.

16. Four members of the Board of Election Commissioners of Jackson County, three appointed to fill places created by the

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expiration of terms and one appointed to fill a vacancy created by resignation. Section 11884 R. S. Mo., 1939, provides:

"* * * the governor, by and with the advice and consent of the senate shall appoint * * *. In case of a vacancy in said board from any cause whatsoever it shall be filled in the same manner and subject to the confirmation by the senate as in the case of original appointment, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

17. The Grain Warehouse Commissioner, appointed to fill a vacancy created by resignation. Section 4 Laws of Missouri 1941 page 375, provides:

"It shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, * * *. Any vacancy occurring by removal, resignation or death shall by and with the consent of the Senate be filled by the Governor * * *."

Our conclusion on this is the same as that reached on (1) supra.

18. Adjutant-General of the State, appointed to fill a vacancy created by resignation. Section 15016 R. S. Mo., 1939 provides:

"There shall be an adjutant-general of the state, to be appointed by the governor by and with the advice and consent of the senate, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

19. Six members of the State Board of Health, all appointed to fill places created by the expiration of terms. Section 9733 R. S. Mo., 1939, provides:

"The governor, by and with the advice and consent of the senate, shall appoint seven

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persons, * * *. All vacancies occurring in the board shall be filled by the governor of the state, and when made, when the senate is not in session, will be subject to confirmation at the next ensuing session of the senate."

This statute makes it clear that such appointments must be submitted for confirmation to the present special session of the senate.

20. Superintendent of the Missouri State Highway Patrol, appointed to fill a place created by resignation. Section 8348 R.S. Mo., 1939, provides:

"The superintendent of the Missouri state highway patrol shall be appointed by the governor by and with the advice and consent of the senate * * * *."

Our conclusion on this is the same as reached on (1) supra.

21. Five members of the Boards of Regents of the State Teachers Colleges, one to fill a vacancy created by resignation, two to fill vacancies created by death, and two to fill places created by the expiration of terms. Section 10755 R. S. Mo., 1939, provides:

"In the year 1919 and every two years thereafter, and during a regular session of the general assembly, the governor shall, by and with the advice and consent of the senate, appoint two regents for each state teachers college; and whenever a vacancy occurs in either of said boards by death, resignation, removal from the district or by operation of law or otherwise, the governor shall, in a like manner immediately appoint some competent person to fill such vacancy, and communicate his action thereon to the senate at the next

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session of the general assembly thereafter. The person so appointed shall hold his office subject to the confirmation of the senate, for the unexpired term: * * * *."

This statute makes it clear that these appointments are subject to confirmation by the present special session of the Senate.

22. Superintendent of the Insurance Department, appointed to fill a place created by the expiration of a term. Section 5781 R. S. Mo., 1939, provides that he shall:

"* * * be appointed by the governor, by and with the advice and consent of the senate, * * *. If a vacancy shall at any time occur, the same shall be filled by the governor, by appointment, subject to the confirmation of the senate, if in session; if not, then at its next session. * * * *"

This statute would seem to clearly require that this appointment must be submitted at the present special session of the Senate.

23. Member of the State Board of Optometry, appointed to fill a place created by the expiration of a term. Section 10110 R. S. Mo., 1939, provides:

"The governor, with the advice and consent of the senate, shall appoint five persons * * * who shall constitute the state board of optometry. * * *. All vacancies, however occurring, shall be filled by appointment by the governor, with the advice and consent of the senate, and appointments made when the senate is not in session shall be confirmed at its next ensuing session. * * *"

This statute clearly requires the appointment to be submitted to the present special session of the Senate.

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24. Three members of the Board of Trustees of the Confederate Soldiers Home at Higginsville, each appointed to fill places created by the expiration of terms. Section 15129 R. S. Mo., 1939 provides that said persons:

"* * * shall be appointed by the governor, by and with the advice and consent of the senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

25. Three members of the Board of Curators of Lincoln University, each appointed to fill places created by the expiration of terms. Section 10775 R.S. Mo., 1939, provides:

"The Board of Curators of Lincoln University of Missouri, * * * shall be appointed by the Governor, by and with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

26. An assistant to the Commanding General of the First Infantry Brigade of the Reserve Military Force of Missouri with the rank of Brigadier General, appointed to fill an original vacancy. Section 15027 R. S. Mo., 1939, provides:

"* * * the commanding general of the national guard and all general officers shall be appointed by the governor, by and with the advice and consent of the senate, * * * *."

By force of Section 15021 R. S. Mo., 1939, this statute applies to the Reserve Force and our conclusion on this appointment is the same as that reached on (1) supra.

27. Member of the Public Service Commission of Missouri, appointed to fill a vacancy created by resignation. Section 5580 R. S. Mo., 1939, provides:

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"The Commission shall consist of five members who shall be appointed by the governor, with the advice and consent of the senate, * * *."

Our conclusion on this appointment is the same as that reached on (1) supra.

Respectfully submitted,

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