

THE CHAIRMAN: The amendment having been seconded, the Chair recognizes Delegate Mitchell to speak to the amendment.

DELEGATE MITCHELL: Mr. President and fellow Delegates: Delegate Gill had also prepared an amendment similar to this, and wishes to join in the authorship of this amendment. We wish the record to so state.

THE CHAIRMAN: Please mark your copies "Amendment 26, submitted by Delegates Mitchell and Gill."

Delegate Mitchell, you may proceed.

DELEGATE MITCHELL: Mr. Chairman, under the provisions of this amendment, beginning at line 45, section 5.14, where the Committee recommendation would read, "The governor shall appoint one of the nominees within 60 days after receiving the list," the rest is deleted.

I believe that this government was founded on the cardinal principle of separation of powers; that there be three co-equal branches, each being a check on the other, in order that the will of the people would not be thwarted; and one of the problems in any government is the abuses of power.

We believe that to place a judge on the nominating commission, or to provide that if the governor fails to appoint one of the nominees within 60 days after receiving the list his power to make the appointment shall end and the chief judge of the Court of Appeals shall appoint one of the nominees is in violation of the constitutional mandate that there shall be separation of powers.

Not only is that principle a cardinal principle of our federal government, but in Article VIII of our present Constitution there is a mandate. There is not only the provision of the separation of powers between the legislative, the executive and judicial branches of government, but there is this wording: "And no person exercising the functions of one of said departments shall assume or discharge the duties of any other."

Now, in the Personal Rights and Preamble recommendations will come the recommendation for repetition of Article VIII in the Constitution which we shall finally adopt, and therefore, it is our considered judgment that to put the alternative power of appointment into the hands of the chief judge of the Court of Appeals, if the governor should fail to act, is a violation of

that expressed mandate; and further, that it is highly irregular and contrary to our system of government to have a judge selecting or appointing another judge.

We believe that the people have the check through the governor on the action of the selection and appointment of the judges, and therefore for those reasons we recommend that this amendment be adopted.

THE CHAIRMAN: Delegate Mudd.

DELEGATE MUDD: Mr. Chairman, ladies and gentlemen of the Committee: I first respectfully suggest to the proponents of this amendment that adding the word "shall" in line 45 in my judgment adds nothing to section 5.14. I call attention to the fact that in line 38, the first line of the section, 5.14, we say, "The governor shall fill a vacancy". We feel that that is as obligatory as we can make it.

The last sentence of section 5.14 was not added by the Committee in an effort to jeopardize or take away from the governor or any branch of the government the appointive power. The sole purpose of this last sentence to section 5.14 was to provide some alternate measure of appointment so that a vacancy might not continue indefinitely.

I respectfully suggest that the proposed amendment is vulnerable to this argument, that it proposes no alternative provisions. It is improbable but it is possible that a governor, notwithstanding the word "shall", may fail to make an appointment. Our objective is to provide for it in the event he fails.

It is not the objective of the Committee to give more power to a judge or to take anything away from the governor. Our objective is to supply a void.

The section would be incomplete without that sentence, and in our humble judgment, hanging, if the Governor did not do what we say he shall do; and may I also suggest to the proponents of this amendment that the last state of the union, namely Utah, adopted the merit system or the Missouri plan for selection and tenure of judges. It did constitutionally adopt this identical provision, which says that the judge shall appoint in the event of the failure of the governor to do as he is required.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Would you yield to a question?

DELEGATE MUDD: Gladly.