

that that was the case, but I am particularly anxious that the record of this Convention show that these writs will not lie in discretionary areas, whether it is with regard to the legislature or with regard to the executive.

THE CHAIRMAN: Delegate Grant, do you wish to speak in opposition?

DELEGATE GRANT: I will speak in opposition.

THE CHAIRMAN: Just a moment.

Does any delegate desire to speak in favor of the amendment?

Delegate Mitchell.

DELEGATE MITCHELL: Mr. President and fellow delegates: I think that I would like to repeat the language because some of the delegates have recently just come in. Beginning with line 45 —

THE CHAIRMAN: I think they all have the amendment before them, Delegate Mitchell. It is Amendment No. 26.

DELEGATE MITCHELL: The amendment would provide that the governor shall appoint one of the nominees within sixty days after receiving the list, and it ends there.

It would then set a time limit. I would say again that the check on the executive is the people, and I think we are safe with that check on the executive obligation.

THE CHAIRMAN: The Chair recognizes Delegate Grant to speak in opposition to the amendment.

DELEGATE GRANT: I hope that the two cases I referred to a few days ago have not misled Delegate Mitchell. Here essentially what I referred to was the *Marbury v. Madison* rule, which I am sure she is familiar with, that does not allow one branch of the federal government; the executive to be mandamus.

Of the two cases in Maryland that came up, one involved obtaining a written mandamus against the constitution. In that case the constitution had established a salary of \$2,500 a year for the comptroller. The legislature did not make the appropriation, so the article was adopted because nothing could be taken from the public treasury to pay the comptroller's salary. The court held that since that was a ministerial act directed by the constitution, any inferior officer could do it.

The other case I referred to is known as *Herrick v. Swann* and it started in Gov-

ernor Swann's term, finished under Governor Bowie's term, whose picture is on the back of the wall.

In that case there was an election in which Mr. Herrick was elected as judge. This was in the transition from the 1864 to 1867 Constitution.

What happened there was that Governor Swann, because of political considerations, refused to issue his commissions to the judge. They attempted to rely on the *Marbury v. Madison* rule, and they held that it did not apply; this was a ministerial act. It would be very simple for the governor to issue the commission to the judge, and they mandamusd him to do so. In fact, if I recall correctly, I believe they mandamusd the secretary of state to issue it in the governor's name.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Would Delegate Grant yield to a question?

THE CHAIRMAN: Delegate Grant, do you yield to a question?

DELEGATE GRANT: Yes.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Delegate Grant, are you familiar with the provision in Article VIII of the present Constitution that no person exercising the functions of one of the said departments shall assume or discharge the duties of any other?

THE CHAIRMAN: Delegate Grant.

DELEGATE GRANT: Yes, in a separation of powers. I am familiar with that, but I want to bring out that it was in the case of two ministerial duties, one on the legislature, one on the executive, that writs of mandamus were issued, not in the discretionary area. This case was again brought up in the reapportionment article in Maryland, and as Judge Henderson explained, they felt there was sufficient ministerial duty in reapportionment, and could not get into the judgment area to a sufficient extent.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Would you consider that language a mandate?

THE CHAIRMAN: Which language?

DELEGATE MITCHELL: No person exercising the functions of one of said departments shall assume or discharge the duties of any other?