

DELEGATE MUDD: If we did not have that provision in and the governor stood by and did not appoint, you could have a vacancy that was never filled.

DELEGATE MITCHELL: Not if there is a mandate that he shall appoint within sixty days. Did you consider language that would give a mandate to the governor to appoint within sixty days?

DELEGATE MUDD: Yes, line 38 says the governor shall fill a vacancy.

THE CHAIRMAN: Do you have a further question, Delegate Mitchell?

DELEGATE MITCHELL: But then you qualify it by your sixty-day limit. "The governor shall fill a vacancy within sixty days," it seems to me it should be. Did you consider phrasing it that way?

DELEGATE MUDD: I think it implies it in the over-all consideration of the section but may I yield to Judge Henderson.

THE CHAIRMAN: Delegate Henderson, can you reply further to the inquiry?

DELEGATE HENDERSON: I should like to add this briefly. I think our attention was brought to a case in one of the other states in which an impasse developed where the governor was displeased with the nominees specified by the commission and simply refused to appoint. There was no way to compel him to do so.

This provides an alternative so that if the governor does not appoint, the duty devolves upon the chief judge of the Court of Appeals.

I think that is a very unusual thing. If I might say one other word about the alleged impropriety of a judge appointing a judge. In the whole English system which has existed for centuries and is recognized as one of the best in the world, I believe, all of the judges except one are appointed by the chief judge of their highest court, so it is not without precedent. It would be a rare occurrence.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Would Judge Henderson answer a further question?

DELEGATE HENDERSON: Yes.

DELEGATE MITCHELL: England does not have a constitution and does not provide for the same separation of powers as we have provided.

Is this not a violation of the doctrine of separation of powers?

THE CHAIRMAN: Delegate Henderson.

DELEGATE HENDERSON: I do not believe it is. Actually the separation of powers is not such an inflexible system as we sometimes imagine. In other words, the administrative agencies attached to the executive are given rule-making power in many instances which is of a quasi-judicial character. We can see there are shared powers throughout all the different departments. In this one small particular it is merely providing an alternative in case the governor fails to perform his duty. It is something like a mandate to the court to do it if the governor does not. It is very much like the enforcement provision of reapportionment, I suggest.

DELEGATE MITCHELL: I have a further question of Delegate Mudd. Does 5.16 contemplate a trial court nominating commission in each district?

DELEGATE MUDD: The number and composition of commissions and terms of members shall be prescribed by law; that is left to the legislature.

THE CHAIRMAN: Delegate Mitchell.

DELEGATE MITCHELL: Did your Committee contemplate that there would be a trial court nominating commission in each district?

THE CHAIRMAN: What do you mean by district, Delegate Mitchell?

DELEGATE MITCHELL: In which the trial courts shall sit.

DELEGATE MUDD: Not necessarily. We did not contemplate that there would be a nominating commission for every political subdivision if that answers your question.

DELEGATE MITCHELL: It is evident that some of your districts will comprise more than one political subdivision.

DELEGATE MUDD: It is entirely possible that some of the districts set up by the legislature may comprise more than one county, yes.

DELEGATE MITCHELL: Therefore, did your Committee contemplate one trial court nominating commission chosen from all of the State to nominate candidates for a position in a certain district?

DELEGATE MUDD: No, we envisioned more than one for the State.

THE CHAIRMAN: Delegate Mitchell.