

question that Delegate Mitchell asked that I would like to follow up. I was told the other day that the judiciary could not compel the legislature to carry out a mandate of the constitution. Nor could the judiciary enact laws in the absence of any action on the part of the legislature.

Now the question is: does that principle of law and constitutionality still hold in this case, that is, if the governor refuses or fails to act on the mandate of the constitution that a judge shall be appointed within a certain number of days? I was told the only recourse is the ballot. Is that true in this case?

DELEGATE MUDD: No, because we have provided here as pointed out by Delegate Mitchell, Delegate Pullen, that if the governor fails to appoint within the 60 days, the chief judge of the Court of Appeals shall have the power of appointment.

THE CHAIRMAN: Delegate Pullen.

DELEGATE PULLEN: Is not that an invasion of the powers of the executive?

DELEGATE MUDD: I can only cite you the reasoning advanced by Delegate Henderson in whose judgment I have implicit confidence and he says no.

THE CHAIRMAN: Delegate Pullen.

DELEGATE PULLEN: Judge Henderson, the same principle would apply? If the legislature failed to act on a mandate of the constitution, could the judiciary take action?

THE CHAIRMAN: Delegate Henderson, can you reply to the question put by Delegate Pullen?

DELEGATE HENDERSON: I think the only instance I recall in which such a situation developed was over reapportionment. That, of course, is a very exceptional case.

This business of saying that where an office must be filled, it can be filled in the alternative by someone else is, I think, not a departure from general principle. I think that is not an unusual provision to provide against the possibility of having a stalemate and impasse so that a vital office remains unfilled. That situation occurred in at least one state where such an impasse developed and is the reason we sought to cover it here.

THE CHAIRMAN: Delegate Pullen.

DELEGATE PULLEN: I do not think we ought to argue this case, but I cannot see the difference in logic.

THE CHAIRMAN: You have opportunity to debate it later, Delegate Pullen.

DELEGATE PULLEN: May I put it in the form of a question?

THE CHAIRMAN: State your question.

DELEGATE PULLEN: What is the difference in the courts acting in one case and not in another, one in which the governor is concerned and one in which the legislature is concerned.

THE CHAIRMAN: Proceed, Delegate.

DELEGATE MUDD: I think it is clear, Delegate Pullen, that in one instance you are speaking of the court's enacting the law and in the other you are speaking of the court exercising the appointive function. I think there is quite a difference.

THE CHAIRMAN: Delegate Chabot.

DELEGATE CHABOT: Section 5.24 forbids a judge running for elective office other than the judicial office he then holds. Would that forbid a judge from running for constitutional convention delegate, too?

DELEGATE MUDD: You raise most interesting questions, sir. Are we going to have another one within our lifetime? I will not answer it if we are.

THE CHAIRMAN: Delegate Chabot.

DELEGATE CHABOT: I believe that there is a likelihood that this constitution will contain a provision for the people to determine every twenty years or so whether or not there shall be a Convention.

DELEGATE MUDD: Did the Attorney General not define our position before we ran for election with respect to legislators or judges? I do not know what his determination was, whether this was a political office we hold or not.

THE CHAIRMAN: The term was somewhat different. The term there was "office of profit or trust." The term here is "elective office."

DELEGATE MUDD: Do you agree that the position of delegate is not a position of profit?

*(Laughter.)*

THE CHAIRMAN: Delegate Chabot.

DELEGATE CHABOT: I am concerned with the fact that you used a different term. You used "office of profit" several places in this group of sections and in fact I believe you used it later on in this very