

PROSECUTING ATTORNEYS. : Commission to Prosecuting  
: Attorneys elected to new  
: terms, beginning January 1,  
: 1945, may issue now.

November 17, 1944

Honorable Gregory C. Stockard  
Secretary of State  
Jefferson City, Missouri

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Dear Sir:

On November 7, 1944 at the general election held in Audrain County, Missouri, according to the official count, Mr. Adams was elected prosecutor. After the official canvass of votes was made, the county clerk certified to the Secretary of State the results of the election for Prosecuting Attorney, in the form of an abstract of the votes given for each candidate for the office. However, this abstract was included as a part thereof, in the official certification of the votes on all offices up at the general election. The abstract respecting the election for Prosecuting Attorney was sealed in the envelope along with the abstract on the offices designated in Sections 11463 and 11466, R. S. Missouri, 1939, and sent to the Secretary of State.

Section 11466 seems to indicate that this envelope cannot be opened until all the returns are in, for it provides:

"Within fifty days after such general election, and as much sooner as all the returns shall have been made, the secretary of state, in the presence of the governor, shall proceed to open the returns and cast up the votes given for all candidates for any office, except governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, railroad and warehouse commissioners and superintendent of public schools, and shall give to the persons having the highest number of votes for members of congress, from each district, certificates of their election, under his hand, with the seal of the state affixed thereto, and shall certify to the governor the names of the candidates having received the highest number of votes for the offices of judges of the supreme court, circuit courts, and St. Louis and Kansas City courts of appeals."

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Assuming that such is the correct view and that the law is that none of these certified abstracts may be opened until every county has made its certification, it would appear that the Governor could not issue a commission to Mr. Adams for he will have nothing upon which to base his action until the certified abstract is available to form the basis for the Secretary of State's certificate to the Governor of the name of the person elected.

However, that situation exists by reason of an irregularity on the part of the clerk in making the certification respecting the prosecutor's election. Reading of sections 11463 and 11466 clearly show that the abstract of the votes for prosecutor is not to be included in the certificate which the latter section requires to remain unopened until all returns are certified into the Secretary of State.

The certificate respecting the vote for prosecutor is governed exclusively by Section 12937, R. S. Missouri, 1939, which provides:

"The clerk of the county court of each county shall transmit to the secretary of state an abstract of the votes given for each candidate for prosecuting attorney in his county."

Section 12938, R. S. Missouri, 1939, provides:

"The secretary of state shall compare the votes given for the respective candidates, and shall certify to the governor the persons elected, respectively, to the offices of prosecuting attorney and assistant prosecuting attorney."

And section 12988 R. S. Missouri, 1939, provides:

"The attorney-general, prosecuting attorneys, the circuit attorney, the prosecuting attorney and assistant prosecuting attorneys for the City of St. Louis shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified."

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We are informed that Mr. Adams has presented to the Secretary of State a separate abstract of the votes of Audrain County on the race for prosecuting attorney, certified to by the Clerk of that county. This is as contemplated by section 12937. There is no provision requiring this to be held for any period of time before the Secretary of State performs his duty under section 12938 and certifies to the governor the person elected. When that is done the Governor may, if he chooses, immediately issue a commission to the person elected, since there is no period fixed within which such commission may not be issued.

Respectfully submitted

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Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

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