

GOVERNOR:  
EXECUTIVE DEPARTMENTS:  
PUBLIC OFFICERS:

The Governor can designate a person to perform the duties of the office of the head of an executive department, such person not being

appointed to the office or claiming title to the office. Such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed.

OPINION NO. 293

June 25, 1969

Honorable Robert A. Young  
State Senator, District 24  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Young:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"I would like to have an early opinion from your office on the following, which is set forth in Article IV, Section 17 of the Constitution of Missouri:

'The heads of all the executive departments shall be appointed by the governor, by and with the advice and consent of the senate.'

"I would like your opinion as to how long an executive department head can be appointed and serve as 'acting director'. I realize that the Governor can and must make appointments to executive departments while the Senate is not in session, but it is my impression that if an appointment is made while the Senate is in session it must be immediately submitted to the Senate for its advice and consent. If an appointment is made while the Senate is not in session, it is my opinion that the appointment should be submitted at the next regular or special session."

We understand the question under consideration relates to the situation where the Governor has designated or will designate a so called "acting director" to perform the duties of a department head

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instead of appointing a person as director or head of one or several of the executive departments as such. In other words the Governor has not appointed a person as the head of the department as required by Section 17, Article IV, Constitution of Missouri, but has designated a person to perform the duties of such office. The question is whether such designations of "acting directors" are legal and whether such "acting directors" can perform the duties of the office, and as requested in your letter, how long such "acting directors" can serve.

Section 17, Article IV, Constitution of Missouri, which you have quoted in part, specifically empowers the Governor to appoint the heads of all executive departments, reading in part as follows:

" . . . The heads of all the executive departments shall be appointed by the governor, by and with the advice and consent of the senate.  
 . . . "

The executive departments that are appointed by the Governor pursuant to Section 17, Article IV, are those designated in Section 12, Article IV, Constitution of Missouri, and are as follows:

" . . . a department of revenue, department of education, department of highways, department of conservation, department of agriculture and such additional departments, not exceeding five in number, as may hereafter be established by law. . . . "

Five additional departments have been established, being: Department of Public Health and Welfare, Department of Business and Administration, Department of Corrections, Department of Community Affairs, and Department of Labor and Industrial Relations.

Thus, the Governor has the exclusive power to appoint the heads of the executive departments listed above. See State ex rel. Harvey v. Wright, 251 Mo. 325, 158 S.W. 823. We understand your question to relate only to such departments. However, the Governor not only has the power to appoint such department heads, the Governor has the mandatory duty to make such appointments. The constitutional provision imposes the duty by providing that the appointments "shall" be made by the Governor. In the context of this constitutional provision the general rule of construction is that "shall" is mandatory. State v. Wurdeman, 295 Mo. 566, 246 S.W. 189.

Your letter refers to "appointments to executive departments while the Senate is not in session," suggesting that such "appointments" can be made but must then be submitted to the Senate for

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confirmation at the next regular or general session. Your impression as to such "appointments" is correct and we have so held in Attorney General Opinion No. 24, November 10, 1942, Donnell (copy attached). However, such opinion only relates to appointments of directors or heads of the departments and does not deal with the question here of the legality of designating the so called "acting directors."

While the Governor has the duty to appoint department heads under the procedure set forth in Article IV, Section 17 of the Constitution of Missouri, his failure to make such appointments is not the ground for a mandamus action against him. State ex rel. Robb v. Stone, 120 Mo. 428, 25 S.W. 376, 23 L.R.A. 194, 41 Am. St. Rep. 705.

If the Governor fails to make appointments of department heads as required by Section 17, Article IV, it must be determined whether persons can be designated to carry out the functions of department heads in the absence of persons duly appointed. It is our view that any such authority is derived from the general constitutional provisions relating to the powers and duties of the Governor.

Section 1, Article IV, Constitution of Missouri, provides as follows:

"The supreme executive power shall be vested in a governor."

Section 2, Article IV, Constitution of Missouri, provides as follows:

"The governor shall take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state."

It is clear from these constitutional provisions that the Governor has the responsibility of seeing that the laws of the state are carried out and that the functions of the executive offices are performed. Thus, it is our opinion that these constitutional provisions empower and obligate the Governor to make certain that the functions of these ten executive departments are carried on so that a lapse in the operation of such departments does not occur.

Obviously, the Governor himself cannot perform all the actual duties or functions of the various offices. Therefore, it being necessary for these departments to continue to operate, the Governor may designate someone to run the department until such time as the Governor performs the duty imposed on him by Section 17, Article IV.

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The designation of "acting director" under similar circumstances is recognized by the courts by the application of the doctrine of locum tenens.

Black's Law Dictionary defines locum tenens as:

"Holding the place. A deputy, substitute, lieutenant, or representative."

The leading case on the doctrine is *Fraser v. United States*, 16 Ct. Cl. 507, the court stating on page 514 not only the doctrine but the facts as well, saying:

"The Secretary did not intend to appoint the claimant to the office of Supervising Architect. The letter to him is not in the language of an appointment. It is addressed to him as 'superintendent of the construction of the new building for the Bureau of Engraving and Printing,' and directs him merely 'to take charge of the office and perform the duties of Supervising Architect during the suspension of Mr. Hill from duty.'"

"That such was the clear understanding of all parties at the time is manifest from their acts. Mr. Hill's name continued to be borne on the pay-rolls from month to month as still in office, and his salary was regularly paid to him. Of this the Secretary must have been cognizant. The claimant not only knew it, but he assented to it and certified to its correctness.

"He did not then claim the title and the full enjoyment of the office. He invariably styled himself 'Acting Supervising Architect,' a form of expression in constant use and well understood in all the executive departments of the government as designating, not an appointed incumbent, but merely a locum-tenens who is performing the duties of an office to which he does not himself claim title." (emphasis supplied)

Thus, in *Fraser*, as here, there was no intention to make an appointment to the office but there was a designation of someone to perform the duties of the office. It was held that such person could legally perform such duties as locum tenens.

In *State ex rel. Gossett v. O'Grady*, 137 Neb. 824, 291 N.W. 497, the Supreme Court of Nebraska applied the doctrine as follows:

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"Lloyd Kelly, the duly elected and qualified county attorney, was absent from the state of Nebraska from June 23 to July 4, 1936. Before leaving he requested William P. Mullen to take care of the duties of the county attorney's office, and Mullen expressly assented to such request. Attorney Mullen thereupon, after this authorization, without taking an oath or giving bond, prepared, signed, swore to and filed this information as Acting County Attorney in the district court for Hall county on June 27, 1936. The district court thereupon caused the record to be made as hereinbefore set forth. The word 'acting' in this connection has been employed to designate a locum tenens who is performing the duties of an office to which he does not himself claim title.

"The supreme court of Iowa in State Bank of Williams v. Gish, 167 Iowa 526, 149 N.W. 600, 601, in discussing the term 'acting officer', employed the following language:

'The phrase "acting officer" is used to designate, not an appointed incumbent, but merely a locum tenens, who is performing the duties of an office to which he himself does not claim title. 1 Am. & Eng. Enc. of Law, 577 (2d Ed.); 1 Cyc. 632. Both these authorities cite the same case (Fraser v. United States, 16 Ct.Cl. [507] 514).'

For further discussion see State Bank of Williams v. Gish, 167 Iowa 526, 149 N.W. 600, and Maystrik v. City of New York, 165 Misc. 327, 300 N.Y.S. 479.

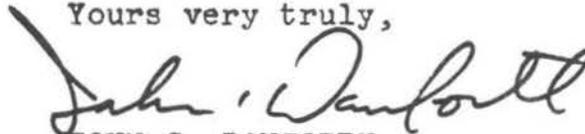
#### CONCLUSION

It is the opinion of this office that the Governor can designate a person to perform the duties of the office of the head of an executive department, such person not being appointed to the office or claiming title to the office. Such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed.

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the typed name.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 24  
11-10-42, Donnell