

IN THE
SUPREME COURT OF MISSOURI

DUPLICATE
OF FILING ON
MAY 24 2004

IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI ex rel.)
JEREMIAH W. (JAY) NIXON,)
Attorney General,)
Relator,)
vs.)
HONORABLE MATT BLUNT,)
Secretary of State for the State of Missouri)
Respondent.)

No. **086013**

SUGGESTIONS IN SUPPORT OF WRIT OF MANDAMUS

The Attorney General of the State of Missouri, Jeremiah W. (Jay) Nixon, files these Suggestions in Support of his Petition for Writ of Mandamus and states as follows:

The Respondent Secretary of State, misapprehending the law, is refusing to perform clear and present legal duties. This Court must issue a Writ of Mandamus to compel that performance and effectuate the clear provisions of the Missouri Constitution.

Article XII, Section 2(a) of the Missouri Constitution provides in its entirety:

Constitutional amendments may be proposed at any time by a majority of the members-elect of each house of the general assembly, the vote to be taken by yeas and nays and entered on the journal.

Pursuant to this provision, Senate Joint Resolution (SJR) 29 received the constitutional majorities in the Senate and House on March 1 and May 14, 2004, respectively. Those votes

were entered on page 500 of the Senate Journal and page 2016 of the House Journal. (See Writ Petition Exhibits B (p.12) and C (p.101). Thus, every legislative act contemplated by the Missouri Constitution as necessary for a proposed constitutional amendment has occurred.

Once the General Assembly has proposed a constitutional amendment, Article XII, Section 2(b) provides that the matter go before the people for a vote at the next general election or “or at a special election call by the governor prior thereto” Acting pursuant to this constitutional authority, Governor Holden, on May 19, 2004, issued a Proclamation calling for special election on August 3, 2004, and setting forth the constitutional amendment proposed by SJR 29 to be voted upon. (See Writ Petition Exhibit E (p.114)).

Once the Governor called this special election, the Respondent Secretary had a clear and present legal duty to do everything within the power of his office to effect the August 3, 2004, special election. Specifically, pursuant to §116.160, RSMo 2000¹, Respondent is obligated to begin the process of preparing a ballot title. Respondent, however, has refused to perform these duties. Rather, the Respondent Secretary sent a letter to Governor Holden, dated May 19, 2004, explaining his reasons for refusing to proceed with his duties pursuant to §116.160 (see Writ Petition Exhibit F (pp.115-16)), and has offered additional reasons for the same to the circuit court.

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

1. Respondent's assertion that he cannot act on SJR 29 because it has not been signed as required by Art. III, §30, must be rejected because such signatures are not a condition precedent to ballot title preparation, nor is a joint resolution proposing a constitutional amendment required to be treated as a bill pursuant to Art. IV, §8.

In the Respondent Secretary's letter Secretary Blunt suggests that he cannot begin his ballot preparation duties because SJR 29 has not been "signed by the presiding officer of each house in open session," an alleged condition precedent pursuant to Art. III, §30. This section provides in relevant part:

No bill shall become a law until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same When a bill has been signed, the secretary, or the chief clerk, of the house in which the bill originated shall present the bill in person to the governor on the same day on which it was signed and enter the fact upon the journal.

According to this constitutional provision, and assuming for the moment that a joint resolution proposing a constitutional amendment is a bill for the purpose of Art. III, §30, the "bill" need only be signed before it becomes law. There is no hint in this provision that the Respondent Secretary may avoid his statutory responsibilities regarding an official ballot title

until signatures are obtained. The “bill” will not become law until it is approved by the voters. At which time, the absence of the signatures of the presiding officers of the House and Senate – even if they were required by Article XII, Section 2, which they are not – would be irrelevant. *See Brown v. Morris*, 290 S.W.2d 160 (Mo. banc 1956).

More importantly, SJR 29 cannot be considered a bill for the purposes of Art. III, §30, because it is a joint resolution proposing a constitutional amendment. Such is the clear directive of Art. IV, §8, which provides in relevant part:

Every resolution to which the concurrence of the of the senate and house of representatives may be necessary, *except* on questions of adjournment, going into joint session, and the *amending of this constitution*, shall be presented to the governor, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill, except that no resolution shall have the effect to repeal, extend, or amend any law.² (Emphasis added.)

In short, joint resolutions amending the constitution do not proceed in the manner of a bill and, consequently, the signature provisions of Art. III, §30, pertaining to a “bill” do not apply. See generally, *Bohrer v. Toberman*, 227 S.W.2d 719, 723 (Mo. banc 1950) (“it is not

² Respondent’s counsel, without mentioning this provision, readily conceded at argument before the circuit court that presentment to the Governor was not required.

the public policy of this state that all special state-wide elections for the purpose of submitting proposals to the electors for their approval or rejection shall be called only by statute," citing Art. XII, §2).

Failing the foregoing, an examination of §116.160 undermines the integrity of the Respondent Secretary's assertion. Section 116.160 does not require the General Assembly or any of its officers to do or deliver anything. On matters referred to a vote of the people, the Missouri Supreme Court has held that the signatures of the Speaker and President Pro-Tem are not necessary so long as the fact that the bill passed both houses can be deduced from other evidence, including the Journals. *See Brown v. Morris*, 290 S.W.2d 160 (Mo. banc 1956).

Although the plain reading of the Constitution is sufficient to rebut the Respondent Secretary's assertion that signatures are required on resolutions proposing constitutional amendments, the staggering practical effects of his position must also be considered. This argument, if adopted, would allow the presiding officer of either house to forestall any proposed amendment to the Constitution. By withholding signatures until the constitutionally mandated May 31 adjournment, these officers (acting alone in or concert) would have the power to stop any proposed amendment or, as here, frustrate the Governor's prerogative to set a special election. The Constitution's framers did not invest the presiding officers of the legislative houses with such power to control with the process of amending the constitution as the Secretary suggests.

2. The Secretary's duties under Section 116.160 are triggered by "receipt" of SJR 29, which has now occurred numerous times.

The Secretary is refusing even to begin complying with his duties under Section 116.160 because he insists upon waiting for the Speaker and the President Pro-Tem to deliver the original of that resolution to him bearing their signatures. As noted, no such requirement exists in the Constitution. Moreover, no such requirement exists in Section 116.160 either. The Secretary's duties under Section 116.160 are triggered upon "receipt" of the resolution. This "receipt" occurred on May 19, when Governor Holden delivered his Proclamation setting forth the provisions of SJR 29 as adopted by constitutional majorities in both houses and reflected in the Journals. If that were not sufficient, the Secretary was in "receipt" of SJR 29 no later than May 20, when a copy of the petition for writ of mandamus below, including as an exhibit a copy of the Truly Agreed and Finally Passed SJR 29, was delivered to him. Similarly, by service of this Petition, and the Exhibit D thereto, the Secretary today received the Truly Agreed and Finally Passed SJR 29, certified and authenticated by the Honorable Terry Speiler, Secretary of the Senate.

Accordingly, the Secretary can no longer credibly claim that he is not in "receipt" of SJR 29. He has received it from every direction. He is left only insisting that he has not received it in the form he would prefer, or from the party he would prefer. But nothing in the Constitution or Section 116.160 speaks to the manner in which he need receive the proposal or the form in which it must be presented – provided that it is accompanied by

evidence that the proposal received the constitutional majorities in both house. This he has, and his further refusal to perform his duties cannot be countenanced.

3. Because the General Assembly did not draft an official ballot title for SJR 29 and now cannot do so, the Secretary's fallback excuse for delay cannot be sustained.

The Respondent Secretary's letter, referencing §116.155, suggests that should the General Assembly prepare the official summary statement and fiscal note summary, his office has no obligation to prepare the same. While it is true that §116.160 alleviates the Secretary's responsibilities regarding an official ballot title when the General Assembly has prepared the same, it is indisputable that the General Assembly has not done so here. SJR 29 does not contain an official ballot title. Section 116.155.1 provides:

The general assembly may *include* the official summary statement and a fiscal note summary *in any state-wide ballot measure that it refers to the voters.* (Emphasis added.)

Even a cursory examination of SJR 29 readily demonstrates that the legislature did not *include in the measure either an official summary statement or a fiscal note summary.* Hence, the power the legislature had to draft either of these summaries, together comprising the official ballot title (see §116.155.2), has been lost. Nevertheless, even if the power to do so had not otherwise been lost, the time to do so has expired. The legislature can no longer draft either component of the official ballot title as we are now in that time period when the

legislature's time "shall be devoted to enrolling, engrossing, and signing in open session by officers of the respective houses [the] bills passed" Art. III, §20(a).

Any contrary reading of this provision would allow the Respondent Secretary to wait indefinitely for ballot language to arrive from the general assembly, as no other limitation on providing the same -- for either a special election or the general election -- can be found in the statutes. The law does not envision allowing any Secretary of State to avoid his responsibilities regarding the official ballot title waiting for the delivery of an official ballot title from the general assembly that, at this moment in time, it lacks any mechanism to deliver.

4. As all the state-wide elected officials with responsibilities regarding the preparation of the official ballot title are committed to acting with all deliberate haste in the discharge of their respective responsibilities, the time frames permitted by §§116.170, .175, and .180 do not present an impediment to the prompt preparation of the official ballot title.

In the Respondent Secretary's letter, he notes the various time frames available to each of the various state-wide elected officials in the process of preparing official ballot titles. These time frames do not present an impediment in the current circumstance. In argument before the circuit court, the Respondent Secretary's counsel indicated his belief that the Secretary's responsibilities could be accomplished in the matter of a few hours. He, in fact, recalled an earlier occasion involving the same state-wide elected officials in the last election

cycle where the entire ballot preparation process was accomplished in a matter of hours with all three state-wide elected officials cooperating to accomplish their various responsibilities.

In addition to the Respondent Secretary's commitment to expeditiously discharge his responsibilities, the State Auditor by way of Exhibit G (p.114) attached to the Writ Petition, and the Attorney General by way of this document, are committed to completing their various responsibilities as quickly as possible. These various commitments are proper and all in keeping with their various constitutional and statutory responsibilities to ensure that the voters of this state have an opportunity to vote on the proposed constitutional amendment consistent with the process for amending the constitution as set forth in Art. XII.

5. The Respondent Secretary's assertion before the circuit court that Art. XII, S2(b)'s incorporation of certain laws into the constitutional amendment process permits an interpretation of such laws that would effectively amend Art. XII, §2(b) by removing the Governor's power to call a special election to vote on a proposed constitutional amendment must be rejected as it is not the office of laws to effectively repeal a provision of the constitution.

The General Assembly, acting directly in a single law or by the passage of numerous laws operating in combination and with or without various legislative maneuvers, may not amend the Constitution of Missouri. The only mechanism to accomplish an amendment of the Constitution is found in Art. XII.

Article XII, §2(b) sets forth the process to amend the constitution following a majority vote in each house of the General Assembly, recorded in their Journals. It provides in relevant part:

All amendments proposed by the general assembly or by initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election call by the governor prior thereto, at which he may submit any of the amendments.

Below the Respondent Secretary, highlighting the “as may be provided by law” portion of this provision, suggested that the Governor’s constitutional power to call a special election could be obviated if the multitude of provisions relating to both ballot title and other election procedures were impossible to timely comply with. But in no event may the laws enacted by the General Assembly be elevated in importance over the constitutional provisions enacted by the people of this state. *See State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515 (Mo. banc 1991) (finding that certain statutes purporting to limit the people’s right to submit initiative petitions proposing a constitutional amendments could not alter the effect of constitutional provisions relating to the same subject matter and rejecting a claim that the “as may be provided by law” language of Art. XII, §2(b) incorporated law obviating the relevant constitutional provisions).

This constitutional impasse is readily avoided, however, because the “as may be provided by law” language in Article XII, Section 2(b) is subject to a ready construction that avoids the Respondent Secretary’s implicit assertion that statutes can alter the provisions of the Constitution. The Court can easily construe the “as may be provided by law” language to incorporate only those laws regarding submission of the measure by official ballot titles. That would appear to be the intent of the framers. Those provisions do not in anyway interfere with the Governor’s constitutional power to call special elections.

And, finally, the impact of the various election laws are not currently before the Court. Relator seeks from this Court, at this time, only a directive to the Respondent Secretary to undertake his responsibilities under §116.160, upon a finding that his asserted conditions precedent have either been met or do not otherwise prevent his discharge of those responsibilities. Here, we have, certified, the final, printed, Truly Agreed and Finally Passed version of SJR 29, as well as the pages of the House and Senate Journal clearly establishing that SJR 29 received the necessary constitutional majorities. No one contests this, nor does anyone contest the Governor’s power to call a special election. Yet, the Respondent Secretary contends he can frustrate the Constitution’s clear empowerment of the Governor by refusing to do what the law *does* requires while waiting for signatures the law *does not* require. Respectfully, the Court must issue a Writ of Mandamus to put an end to this gamesmanship.

CONCLUSION

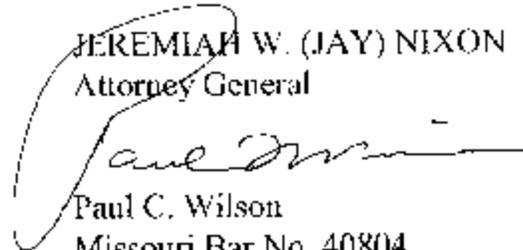
This Court must act. If the Secretary's decision not to act based on his interpretation of the statutes (and the General Assembly's failure to formally sign and deliver SJR 29 despite its having held a technical session yesterday) prevents the ballot from being certified and distributed by close of business next Tuesday, May 25, 2004, as required by Section 116.240, this issue is over and the Governor's call for a special election will have been frustrated. Moreover, under the Secretary's construction, the General Assembly would be able to prevent the Governor from sending constitutional amendments to the people at a special election in every even-numbered year – a result that cannot have been intended and cannot stand.

Although additional litigation may ensue challenging the constitutionality of the May 25 deadline in Section 116.240, that litigation cannot be between these parties – Secretary Blunt must abide by all of the statutes and the Constitution, and the Attorney General will abide by his constitutional duty to defend the Secretary and the statutes. But, that litigation – by whomever brought and on whatever theory – can be avoided now by this Court's Writ ordering the Secretary to act.

WHEREFORE, the Attorney General prays that a Writ of Mandamus issue ordering the Respondent Secretary to comply with the legal duties set forth in the Petition.

Respectfully submitted,

HEREMIAH W. (JAY) NIXON
Attorney General



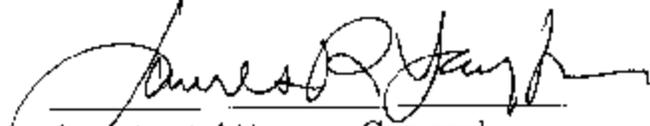
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by hand delivery or U.S. Mail, postage prepaid, on this 24th day of May, 2004, to:

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