



Legislator's Guide

A Legislator's Guide to Gubernatorial Appointments

The Role of the General Assembly

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Overview

The Constitution of Virginia and the Code of Virginia task the Governor with making hundreds of appointments to executive branch offices and entities, from Secretaries and department heads to board members, giving the Governor a substantial role in choosing the officials who will carry out the work of the government."

The Governor's appointment power does not go unchecked, however, as these appointments are subject to confirmation by the General Assembly or as prescribed by the General Assembly, and the Constitution of Virginia makes it clear that the legislature's confirmation power is significant. Pursuant to Article V, Section 11 of the Constitution of Virginia, if the General Assembly refuses to confirm a person appointed by the Governor, that person is prohibited from serving or continuing to serve in the role or from later being appointed again to the role.

The purpose of this Guide is to aid the members of the General Assembly in understanding the scope and significance of their role in the gubernatorial appointment process so that they are able to effectively exercise their constitutional duty.

Gubernatorial Appointments and the Legislature

The Role of the Governor: Appointment

Article V, Section 10 of the Constitution of Virginia makes it the responsibility of the Governor to appoint "each officer serving as the head of an administrative department or division of the executive branch," except as may otherwise be provided in the Constitution. The Code of Virginia further directs the Governor to appoint the Governor's Secretaries¹ and members to "boards, commissions, councils, or other collegial bodies created by the General Assembly" in the executive branch.

Article V, Section 7 of the Constitution of Virginia sets out the Governor's authority to fill certain kinds of vacancies in an office of the Commonwealth. The Governor has the authority to fill a vacancy in an office when the law does not provide for how a vacancy in that office is to be filled. When a vacancy occurs in an office that is filled by the General Assembly and the General Assembly is not in session, the Governor has the authority to fill that vacancy. This interim

¹ Section 2.2-200 of the Code of Virginia. Subsection E defines "Governor's Secretaries" to mean the Secretary of Administration, the Secretary of Agriculture and Forestry, the Secretary of Commerce and Trade, the Secretary of Education, the Secretary of Finance, the Secretary of Health and Human Resources, the Secretary of Labor, the Secretary of Natural and Historic Resources, the Secretary of Public Safety and Homeland Security, the Secretary of Transportation, and the Secretary of Veterans and Defense Affairs.

appointment is limited, however; it expires 30 days after the next session of the General Assembly commences. Similarly, when a vacancy occurs in an office that is filled by the Governor but subject to confirmation by the General Assembly, the Governor's interim appointment to fill the vacancy expires 30 days after the next session of the General Assembly commences. To put it another way, the appointee temporarily holds office until 30 days after the commencement of the next session of the General Assembly.¹ A majority of the appointments made by the Governor are for a statutorily specific term of office, and a majority of those terms of office begin and end during the summer months, when the General Assembly is not in session, meaning a majority of the Governor's appointments are interim appointments that will expire if not confirmed by the thirtieth day of the next session of the General Assembly.

The Role of the General Assembly: Confirmation

The General Assembly's role in the gubernatorial appointment process is significant: it is responsible for confirming the appointments made by the Governor over his four years in office, from his Secretaries² and Chief of Staff³ to members of the Potato Board.⁴

Article V, Section 10 of the Constitution of Virginia provides that the heads of administrative departments and divisions of the executive branch are "subject to confirmation as the General Assembly may prescribe." Section 2.2-106 echoes this, declaring that each administrative head and Secretary shall be subject to confirmation by the General Assembly. Further, all members appointed by the Governor to boards, commissions, councils, or other collegial bodies in the executive branch are subject to confirmation by the General Assembly.⁵

Unlike at the federal level, where presidential appointees are subject to confirmation by the Senate only, both houses of the General Assembly have a role in the confirmation process.

The Constitution of Virginia dedicates an entire section to the effect of the General Assembly not confirming an appointment, reflecting the significance of the body's role. Article V, Section 11 prohibits any person who is appointed to any office by the Governor, subject to confirmation by the General Assembly, from "enter[ing] upon, or continu[ing] in" office after the General Assembly refuses to confirm the appointment. This prohibition is also found in the Code of Virginia.

This authority to confirm—or reject—an appointment is discussed further in **Refusal vs. Failure to Confirm** later in this Guide.

The Confirmation Process

In Law

The specifics of how the General Assembly confirms gubernatorial appointments are provided for by law. As part of the confirmation process for each administrative head and Secretary⁶ and all gubernatorial appointees to boards, commissions, councils, and other collegial bodies,⁷ the Secretary of the Commonwealth is required to provide to the chairs of the House and Senate

¹ Section 2.2-2830 of the Code of Virginia.

² Section 2.2-200 (A) of the Code of Virginia.

³ Section 2.2-100 (B) of the Code of Virginia.

⁴ Section 3.2-1801 of the Code of Virginia.

⁵ Section 2.2-107 of the Code of Virginia.

⁶ Section 2.2-106 (B) of the Code of Virginia.

⁷ Section 2.2-107 (B) of the Code of Virginia.



Committees on Privileges and Elections certain paperwork for each appointee. This paperwork includes a copy of the Statement of Economic Interests or Financial Disclosure Statement filed by the appointee pursuant to the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq. of the Code of Virginia), which requires appointees to file the form as a condition to assuming office. Secretaries, agency heads, and other appointees to an office or position of trust are required to submit the Statement of Economic Interests, or the "long form," while the Governor's appointees to boards, commissions, and councils are required to submit the Financial Disclosure Statement, or the "short form."

The Governor's appointees for Secretariats and administrative heads are required by law to be available for interviews by the House and Senate Committees on Privileges and Elections or other applicable standing committee.⁸ Typically, these interviews occur during the session following a gubernatorial election and are done by the applicable standing committee; for example, the Secretary of Transportation would be interviewed by the House and Senate Committees on Transportation, while the Secretary of Administration would be interviewed by the House and Senate Committees on General Laws.

Both §§ 2.2-106 and 2.2-107 of the Code of Virginia establish a special joint subcommittee for the purpose of reviewing the resumes and statements of economic interest of the gubernatorial appointments, but this joint subcommittee is not typically convened for this purpose. Interestingly, it was a 2004 study by a joint subcommittee into "the appropriate balance of power between the legislative and executive branches to support a two-term Governor" that led to this requirement.

The paperwork for administrative heads and Secretaries must be provided to the chairs of the House and Senate Committees on Privileges and Elections (P&E) within a specified period of time, depending on when the appointment of such person occurs. If the appointment is made between January 1 and the adjournment *sine die* of the regular session of the same year, the Secretary of the Commonwealth must provide to the P&E chairs the resume and statement of economic interests within seven days of the appointment. If the appointment is made after adjournment *sine die* of a regular session, through the end of the same year, the Secretary of the Commonwealth must provide the resume and statement of economic interests within 30 days of the appointment, or January 7, whichever time is earlier.

As discussed earlier, a majority of gubernatorial appointments are made during the interim period between sessions of the General Assembly, which means such appointments expire 30 days into the next session. Given the volume of appointments to be confirmed and the limited amount of time for the General Assembly to review and consider the appointees, § 2.2-406 was enacted with the goal of providing notice to the P&E chairs of the many appointments to be confirmed at the next session in advance of that session. This section requires the Secretary of the Commonwealth to "present" to the chairs of the House and Senate Committees on Privileges and Elections a list of gubernatorial appointments by June 1, August 1, October 1, and December 1 of each year. The list is required to contain the names of all persons appointed since adjournment or the last required report, in addition to the position to which they are being appointed and the person whom they will succeed.

In Practice

In practice, the Secretary of the Commonwealth communicates the Governor's appointments in a letter to the General Assembly. This letter is sent via email to the chairs of the House and

⁸ Section 2.2-106 (B) of the Code of Virginia.



Senate Committees on Privileges and Elections, the Division of Legislative Services staff attorneys for those committees, and the Clerks of the House of Delegates and the Senate of Virginia. The letter is accompanied by a list of all persons appointed since the last communication, organized by the entity to which the person is appointed, and sorted by Secretariat or general area of government. As required by § 2.2-406, this list sets out the position to which the appointment is being made and the person being succeeded by the appointee.

In the olden days, copies of the resumes and financial and economic interests disclosure forms required pursuant to subsection B of § 2.2-106 and § 2.2-107 were provided at the beginning of session. Boxes filled with copies of the requisite paperwork would be delivered to the Privileges and Elections attorneys with the Division of Legislative Services and those boxes would then be circulated to members of the Privileges and Elections Committees for review. Today, the Secretary of the Commonwealth provides this paperwork simultaneously with the communication of the appointment. Sometimes it is provided in a ZIP file attachment, sometimes by the delivery of a thumb drive, but the days of hard copies are long past. This paperwork is delivered to the P&E staff attorneys who review the paperwork on behalf of their committee chairmen to ensure a resume and the appropriate financial statement have been provided for each appointee. The paperwork is maintained by the Division of Legislative Services and is provided to any legislator upon request.

A joint resolution is the vehicle for confirming gubernatorial appointments. These resolutions are organized to separate the numerous interim appointments into categories, typically by Secretariat, and then organized further within each category by the collegial body. Custom and tradition call for a Senate Joint Resolution, introduced by the chair of Senate P&E, as the appointments are considered by the Senate first. After action by the Senate, the resolutions go to the House of Delegates for consideration.

Prior to the committees' consideration of the appointments during session, committee counsel informs the committee members whether all required paperwork was provided for each appointee and notifies the members that the paperwork of any particular appointee or the paperwork for all appointees will be provided upon request.

Refusal vs. Failure to Confirm

Refusal to Confirm

Article V, Section 11 of the Constitution of Virginia prohibits any person appointed by the Governor, whose appointment is subject to confirmation by the General Assembly, from entering or continuing in such position after the General Assembly has refused the confirmation. Furthermore, the Governor cannot later appoint such person to fill the position, vacant as a result of the General Assembly's refusal to confirm.

The refusal to confirm is typically effectuated by a line amendment to the joint resolution to remove the name of the appointee being refused confirmation or by a vote on a particular appointee separate from the other appointees in the appointment resolutions.

Failure to Confirm

What happens, though, if instead of taking a specific action on an appointment, the General Assembly simply fails to confirm the appointment? Is the failure to confirm equivalent to the refusal to confirm, including the prohibition on a later appointment?



An Attorney General opinion from 1982 suggests that it is. A question was raised to the Attorney General about the status of two appointments that the General Assembly had failed to confirm before adjournment. The resolution containing the two appointments was introduced, the House Democratic Caucus agreed to not take up any further confirmations, the Senate Committee on Privileges and Elections did not report the resolution, and ultimately, the General Assembly adjourned *sine die* without either house having passed the resolution. Attorney General Baliles stated that "[u]nder the circumstances, it is clear that the members of the General Assembly were aware of the existence of the pending resolution at the time of the General Assembly's adjournment. Such a failure to pass is tantamount to a refusal of the General Assembly to confirm the appointments."

In 1994, Governor Allen requested an opinion of the Attorney General on whether the General Assembly may act to clarify that its failure to act upon an appointment prior to adjourning *sine die* should not be construed as a refusal to act under Article V, Section 11 of the Constitution of Virginia. An informal Attorney General opinion stated that whether or not the failure of the General Assembly to act upon an appointment prior to adjournment *sine die* constitutes a refusal to confirm is a question of legislative intent and that there would appear to be no bar to the General Assembly taking action to clarify its intent.

The General Assembly has, on occasion, done just that. The failure-to-act issue is particularly salient in the context of a special session, where there is not always a predictable adjournment *sine die*, making it difficult to ensure an appointment resolution will make it through both houses in time. For this reason, it has been in special sessions that we have seen the General Assembly take action to clarify its intent.

The following language was included in the procedural resolutions for special sessions in 1998, 2004, and 2009⁹

That the Special Session shall not consider the confirmation of any person appointed to office by the Governor, whose appointment is subject to confirmation by the General Assembly. The failure to consider any appointment shall not be deemed a refusal to confirm such appointment.

During the 2006 Special Session I, a separate resolution was introduced to address the issue specifically. The special session had been convened in March of 2006 and several appointment resolutions had been acted upon by the General Assembly. As the special session wound down, though, there were outstanding appointment resolutions before the General Assembly. Senate Joint Resolution No. 5056 was introduced on September 27, 2006, and was agreed to by both bodies by the following day. The resolution stated that the 2006 Special Session I would not consider the confirmation of any appointments communicated to the General Assembly after September 15, 2006, and that the failure to consider the appointments was not a refusal to confirm. It went on to say that the confirmation of any such appointment would be considered at the next regular session of the General Assembly.

Conclusion

Each year of a Governor's term in office, he will appoint hundreds of people to numerous positions throughout state government. The persons appointed by a Governor to departments,

⁹ HJ 1501, 1998 Special Session I, establishing a schedule for the conduct of business coming before the 1998 Special Session of the General Assembly of Virginia; HJ 6002, 2004 Special Session II, limiting legislation to be considered by the 2004 Special Session II of the General Assembly; HJ 5003, 2009 Special Session I, limiting legislation to be considered by the 2009 Special Session I of the General Assembly.



agencies, boards, councils, and other entities in the executive branch will impact regulations, policies, and decision-making. They are selected by the Governor to interpret and carry out the objectives of the laws passed by the General Assembly, and so, each year of a Governor's term in office, each of his appointments are put before the General Assembly for its careful consideration and, if the General Assembly so elects, confirmation.

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