GOVERNOR: Construction of act authorizing governor to appoint executive officers, employees and servants.

March 15, 1933.

Hon. Wayne Coy,
Under Secretary to Governor,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for a construction of that provision of section 6 of chapter 4 of the Acts of 1933 which authorizes and empowers the governor to appoint and commission each and every officer, employee or servant of the executive, including the administrative department of the State of Indiana except constitutional officers.

The section referred to is as follows:

"Sec. 6. That the governor, being vested with the executive powers of the state, be and he is specifically authorized and empowered to appoint and commission each and every officer, employee or servant of the executive, including the administrative, department of the State of Indiana, except as hereinafter stated; and the tenure of office, employment or service of each and every officer, employee or servant of the executive, including the administrative, department shall continue at the pleasure and discretion of the governor, except in the appointments of the deputy secretary, the deputy auditor, the deputy treasurer of state, the deputy state superintendent of public instruction, and the secretary to the lieutenant-governor. Any officer, employee or servant defined above, otherwise eligible, shall be eligible for reappointment, but in no case shall the tenure of office, employment or service exceed four years, except upon reappointment." (Our italics.)


Your request is limited to the single question as to whether the governor in making appointments is required also to commission "each and every officer, employee or servant" appointed by him pursuant to said act.

I think it is proper, at the outset, to call attention to the clear line of distinction which has been recognized as differentiating an officer from an employee. I quote from the case of State v. Nattkemper, 86 Ind. App. 85 at page 88. The court said:
"An office differs from an employment in that the former implies a delegation of a portion of the sovereign power to and the possession of it by the person filling the office. In SHELMAINE v. CITY OF ELKHART (1921), 75 Ind. App. 493, 129 N. E. 878, the court said: 'A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.'"

Section 11598 of Burns Annotated Indiana Statutes of 1926, provides that,

"All officers, except members of the general assembly, (who are) specially designated in the constitution, or who are elected by the general assembly or appointed by the governor, and all judges, shall be commissioned by the governor."

Chapter 4 of the Acts of 1933, supra, does not expressly repeal the above provision. It is apparent, moreover, that there is no such conflict as would result in an implied repeal. It follows, therefore, in my opinion, that the governor is required to commission all officers appointed by him within the meaning of the term as heretofore defined pursuant to the provisions of section 11598, supra. This conclusion is based upon the provisions of said section 11598, wholly without reference to any requirement of section 6 of the act of 1933, supra.

There is no such requirement, however, as to commissioning employees as distinguished from officers unless the provisions of section 6, supra, must be thus construed. It will be observed that the provision of said section 6, as to the appointment and commissioning of officers and employees, is a grant of authority rather than the statement of a mandatory duty. Moreover the term "commission" is a term of doubtful significance as applied to an employee of the state. It can add nothing to his rights, duties or obligations, which are usually evidenced by a contract either oral or written. Possessing no portion of the sovereign power, he has no need for a "com-
mission” to evidence an authority which he does not have. In other words, I think a “commission” issued by the state to one of its officers, in the commonly accepted sense of the term, and certainly as that term is used in the Constitution, is not a contract at all such as might properly evidence the rights, duties and obligations of an employee, but is a written evidence of the delegation of a portion of the sovereign power. Being such, it is fitting as required by section 6 of Article 15 of the Indiana Constitution, that it be issued in the name of the state, signed by the governor, sealed by the state seal and attested by the secretary of state. Burns Annotated Indiana Statutes of 1926, section 235. But no reason can be given for requiring such a document to evidence an ordinary employment. As already stated, the provision of section 6 of chapter 4, supra, as to the issuance of commissions is an authority rather than a mandate, and for that reason, and for the further reason that no useful purpose can be served by evidencing the appointment of an employee by a “commission,” in my opinion the governor is not required by said section to “commission” employees or servants appointed by him pursuant to said act.

GOVERNOR: Duties of “State Commission on Clemency”; custody of prisoners released by commission and placed on probation. March 16, 1933.

Hon. Wayne Coy,
Under Secretary to the Governor,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an opinion as to the duties of the “State Commission on Clemency” created by chapter 117, of the Acts of the General Assembly of 1933, the specific question concerning which you inquire being the question as to who shall have the custody of prisoners released by the commission and placed on probation for a definite period of time.

An examination of the above act reveals the fact that said commission is an advisory commission only, charged with the duty of carefully and thoroughly examining into the merits “of every petition which may be presented to the governor