STATE OF MAINE

Inter-Departmental Memorandum Date July 29, 1975

To Joseph M. Hochadel, Assistant Dept. Executive

From S. Kirk Studstrup, Ass't Dept. Attorney General

Subject Posting of Candidate for Superior Court Bench

SYLLABUS:

The Governor may post a nominee to replace a retiring Justice of the Superior Court before the actual retirement of the Sitting Justice. Confirmation of the nomination and formal appointment of the Justice designate should await creation of a vacancy on the Bench through retirement of his predecessor.

FACTS:

Stated in the question.

QUESTION AND ANSWER:

The question is asked ". . . whether a nominee for Superior Court judgeship may be posted prior to the actual retirement of the judge sitting, but subsequent to that judge's announced intention to retire"? The answer is a qualified yes.

REASONS:

Article V, Part First, Section 8, of the Maine Constitution requires the Governor to nominate and, with the advice and consent of the Executive Council, appoint all judicial officers. This section has been interpreted to mean that the Governor must fill all judicial vacancies. State v. Harmon, 115 Me. 268, 98 A. 804 (1916). The question is when the Governor may begin this process.

As a general rule, executive power of appointment may not be exercised unless and until a vacancy in office exists. Prior opinions of the Attorney General have followed this general rule. An opinion to Governor John H. Reed dated December 15, 1964, concerning the validity of a reappointment to the State Board of Barbers, stated that there could be no appointment if there was no vacancy. However, this 1964 opinion concerned a situation where legislative action had extended the tenure of a member of the Board for over two years beyond the date when his tenure under his original appointment would have expired. Therefore, his reappointment at the end of the old term was void because there would be no vacancy, either real or anticipated, for at least two years, a situation quite different from the one giving rise to the present opinion. Similarly, an informal opinion to Governor Kenneth M. Curtis dated June 20, 1974, concerning appointments to a new Milk Commission, stated that the Governor could not appoint or even post candidates until a vacancy existed. This 1974 opinion was based on the fact that the Legislature had created an entirely new commission and the Governor could not post nominees until the legislation giving authority for the commission became effective, a point not in issue in the present question. Therefore, both these earlier opinions, though stating the general rule, may be distinguished from this opinion on the basis of their facts.

One other informal opinion following the general rule was given to Councilor Charles Jacobs on May 22, 1975. The opinion concerned appointment of a new trustee for the University of Maine, and stated that the Executive Council should not confirm a nominee until the predecessor's term had expired and a genuine vacancy existed. Since this opinion is not easily distinguished from the present one and there is an apparent conflict, the opinion to Councilor Jacobs is overruled for the reasons stated immediately below.

Having stated the general rule, it should be noted that there is a widely recognized exception which has been termed "prospective appointment". This exception was utilized at an early date in Maine in the case of Pattangall v. Gilman, 115 Me. 344, 98 A. 936 (1916). The question before the Supreme Judicial Court was whether an appointment to the Board of Dental Examiners by Governor William T. Haines, during the waning days of his administration, was valid. The appointee, a Mr. Payson, was posted to and approved by the Executive Council, was appointed, and took the required oath, all prior to the existence of an actual vacancy on the Board. The Court stated:

> "The real question is when the term of office of Gov. Haines expired, for the authorities are unanimously in favor of the proposition that, if the term of the appointing power extends beyond the point of time when the vacancy arises, a prospective appointment may be made; and, conversely, that if the term of the appointing power does not extend until a vacancy arises in the appointive office, no appointment, prospective or otherwise, may be made by that appointing power. (98 A. 937)

And the Court concluded:

> "As before stated, the appointing power has the right to make a prospective appointment when a vacancy will occur during his term of office, and, as the Governor cannot make an appointment without the advice and consent of his council, it necessarily follows that they may advise and consent to a prospective appointment. . . (98 A. 938)

The concept of "prospective appointment" was also noted in an early leading treatise on the general field (Mechem on Public Offices and Officers, pp. 66, 67; § 133 entitled "When vacancies anticipated may be filled"), and has been favorably recognized and utilized in several other states, among them Florida (Tappy v. State, 82 So. 2d 161 (Fla. 1955)); Ohio (State v. Cowen, 117 N.E. 238, 240 (Ohio 1917)); West Virginia (State v. Thompson, 130 S.E. 456, 458 (W. Va. 1925)); Montana (State v. Stafford, 34 P. 2d 372 (Mont. 1934)); and Connecticut (State v. Clark, 89 A. 172, 176 (Conn. 1913) and State v. Satti, 54 A. 2d 272 (Conn. 1947)).

The Constitution and the Revised Statutes are both silent as to whether the Governor may post his nomination for an existing judicial office prior to an actual vacancy in that office. However, in light of the Court's acceptance of the concept of "prospective appointment" in Pattangall v. Gilman and the support for that concept found elsewhere, it is logical that the Governor may post his nomination in advance of the actual retirement of a sitting judge. This answer must be qualified by the observation that regardless of when a nomination for judicial appointment is posted, the appointee may not assume the duties and powers of office until an actual vacancy exists for him to fill. In addition, posting of the nomination should probably not be made if the prospective vacancy is anticipated to occur close to the end of Governor's term, in order to avoid problems of conflicting claims to office.

Research on this question has also indicated a need for some restraint in taking anticipatory action to fill prospective vacancies. While such action would advance the public needs in expediting the administration of justice, in the case of a judgeship, it may also raise awkward legal questions. For example, in 1934 the Supreme Court of Florida had to give its opinion on a situation where a clerk of court tendered his resignation, the Governor appointed a new clerk, and then the incumbent withdrew his resignation. The Court decided that the incumbent was entitled to retain office since there was never an actual vacancy for the new appointee to fill. Advisory Opinion to the Governor, 158 So. 441 (Fla. 1934).

Kirk Studstrup

S. KIRK STUDSTRUP
Assistant Attorney General

SKS:jg
cc: Executive Council