

# MAINE STATE LEGISLATURE

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Appointments: Timing

June 9, 1976

Honorable Carl E. Cianchette  
Chairman, Executive Council  
Council Chambers  
State House  
Augusta, Maine 04333

Dear Councillor Cianchette:

This letter responds to a memorandum dated June 2, 1976, from yourself and Joseph M. Hochadel, Esquire, requesting an opinion of this office concerning the prospective reappointment of Justice Charles A. Pomeroy to the Supreme Judicial Court. Justice Pomeroy's present term expires on July 2, 1976, and Governor Longley posted his name for reappointment on June 1, 1976. You have asked the following questions:

- "1. May the Executive Council confirm Justice Pomeroy on a day prior to the expiration of his current term and confirm by designating that the reappointment shall not become effective until after the actual expiration of his current term?"
- "2. Must the Executive Council conduct a hearing to consider Justice Pomeroy before voting on his reappointment?"

The answer to the first question is affirmative and to the second question is negative.

The constitutional provisions which apply to these questions read, in pertinent part, as follows:

"[The Governor] shall nominate, and, with the advice and consent of the Council, appoint all judicial officers . . . and every such nomination shall be made 7 days, at least, prior to such appointment." Art. V., Part First, § 8, Constitution of Maine.

"All judicial officers shall hold their offices for the term of seven years from the time of their respective appointments . . . and no longer, unless reappointed thereto." Art. VI, Section 4, Constitution of Maine.

The first of the foregoing constitutional provisions requires the Governor to post his nomination for appointment of a judicial officer at least seven days prior to the date that the appointment will be made. Two prior opinions of this office dated July 29, 1975, and August 21, 1975, advised that the Governor may post his nominee for judicial office prior to the actual date when such appointment could be lawfully made. These opinions were based upon the concept of "prospective appointment" which was recognized in Maine in the case of Pattangall v. Gilman, 115 Me. 344, 98 A. 936 (1916). This concept is an exception to the general rule that executive power of appointment may not be exercised unless and until a vacancy in office exists. Although these prior opinions concern the act of the Governor in "posting" his nominations, we believe the same rationale may be extended to confirmation of the nomination by the Executive Council. This logical extension of "prospective appointment" also was considered by the Supreme Judicial Court in Pattangall v. Gilman, as follows:

"As before stated, the appointing power has the right to make a prospective appointment when a vacancy will occur during his term in 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, emphasis provided)<sup>1/</sup>

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<sup>1/</sup> The opinion dated August 21, 1975, indicated that the confirmation by the Council of the appointment of a retiring justice as an Active Retired Justice should await qualification of the nominee by his retirement. This limitation appears necessary in light of the specific wording of 4 M.R.S.A. § 104 and would not be applicable in the case of reappointment of a sitting justice of the court, which is the subject of the present opinion.

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Confirmation of the nomination by the Council prior to the end of the Justice's current term would also advance the public interest of maintaining continuity within the judicial system. There would be no interim period during which the Court would be forced to operate with less than its full complement of justices.

It should be noted parenthetically that an opinion of this Office dated June 3, 1976, would not be applicable to the present case. That opinion stated that the Governor and Council could appoint a new Chairman of the Board of Voter Registration for the City of Auburn to fill a vacancy for the remainder of the present unexpired term, but could not prospectively reappoint the individual to a successive full term. The legal background for the opinion was quite different since there were involved both a statutory direction for filling interim vacancies and the fact that the Governor and Council will not have authority to make such reappointment at the expiration of the present term, due to a statutory amendment. Neither of these factors is present in the case of Justice Pomeroy's reappointment.

In light of the foregoing, it is our opinion that the Executive Council may confirm the Governor's nomination of Justice Pomeroy for reappointment to the Supreme Judicial Court on a day prior to the expiration of the Justice's present term. The second part of your first question concerned the method of confirmation, specifically whether the confirmation should designate that the reappointment shall not become effective until after the actual expiration of Justice Pomeroy's current term. Such condition upon the confirmation is not legally necessary. However, we believe that such statement by the Executive Council would be helpful in that it would provide additional evidence of the date of reappointment. It should be made very clear that the reappointment will not become effective until the expiration of the Justice's current term in order to avoid any later questions concerning the exact date of such reappointment.

Your second question asked whether a hearing would be required before the Executive Council considers Justice Pomeroy's reappointment. The Council could hold such hearing if it wished; however, there is no constitutional or statutory requirement that a hearing be held. Legislation has been enacted which would require the Executive Council to hold a public hearing on the nomination of Commissioners of Departments other than the Commissioner of Indian Affairs and the Adjutant General. P.L. 1975, c. 524; 5 M.R.S.A. § 47. However, this requirement would not extend to the nomination of a judicial officer, such as a Justice of the Supreme Judicial Court.

Honorable Carl E. Cianchette

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Please continue to call on us whenever we may be of assistance.

Sincerely,

JOSEPH E. BRENNAN  
Attorney General

JEB:mfe

cc: Governor James B. Longley  
Armand A. Dufresne, Jr., Chief Justice  
Charles A. Pomeroy, Justice  
Joseph M. Hochadel, Esquire

# STATE OF MAINE

Inter-Departmental Memorandum Date June 2, 1976

To Honorable Joseph E. Brennan

Dept. Attorney General

From Carl E. Cianchette, Chairman  
Joseph M. Hochadel

Dept. Executive Council  
Executive

Subject Prospective Appointments

The term of Justice Charles A. Pomeroy expires on July 2, 1976. This past Tuesday, June 1, 1976, Governor Longley posted the name of Justice Pomeroy for reappointment to the Supreme Judicial Court.

As with all judicial appointments and reappointments, continuity on the bench is a critical concern. We have discussed this matter as it relates to the Executive Council's role in considering and confirming appointments.

Consequently, we are asking the following questions:

1. May the Executive Council confirm Justice Pomeroy on a day prior to the expiration of his current term and confirm by designating that the reappointment shall not become effective until after the actual expiration of his current term?
2. Must the Executive Council conduct a hearing to consider Justice Pomeroy before voting on his reappointment?

Recent memos from Assistant Attorney General S. Kirk Studstrup have provided guidance with respect to the posting of candidates prior to the existence of an actual vacancy (See Formal A.G. Opinion dated July 29, 1975; and Informal A.G. Opinion dated August 21, 1975). Although the Formal Attorney General Opinion of July 29 makes reference to the prospective appointment problem, the question asked in that Opinion and the specific facts involved were more limited in scope.

Due to the time constraints, your early attention to this matter would be most appreciated. Thank you for your assistance.