Governor's Appointment Authority
Advisory Boards; Representation of Interests
9-A MRSA § 6.301

STATE OF MAINE

Inter-Departmental Memorandum Date March 21, 1977

To John E. Quinn, Superintendent Dept. Bureau of Consumer Protection

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Council of Advisors on Consumer Credit

This responds to your request of February 14, 1977, that this office review the Governor's appointments to the Council of Advisors on Consumer Credit to determine whether the appointments comply with the statutory requirement set forth in 9-A M.R.S.A. § 6.301 that:

> "In appointing members of the Council, the Governor shall seek to achieve a fair representation from various segments of the consumer credit industry and the public."

Initially, in responding to the question you have posed, it is important to determine the proper scope of review of such appointments which may be undertaken as a matter of law. Basically, the standard for legal review is not whether the legal reviewer would have made the same appointments, or whether the appointments are "good" or "bad" according to a particular person's policy outlook. Rather, it must be determined whether, within the very broad discretion the Governor has to make appointments, that discretion has been abused to a sufficient extent to make the appointments subject to legal challenge. We conclude that in this instance, the Governor has not abused his discretion and that the appointments made would not be subject to successful legal challenge.

In developing this opinion, we have reviewed materials regarding the backgrounds of the membership of the Council of Advisors on Consumer Credit which you provided, and we have also reviewed resumes submitted by the Governor's Office.

We would point out that the issue most often raised in challenges to appointments, whether an individual appointee has a conflict of interest or otherwise meets qualifications for the office set out in the law, is not a factor in this opinion. All appointees, on an individual basis, appear qualified to hold the office to which they have been appointed.

The issue here is whether all of the appointments taken together meet the standard specified in § 6.301. Our review of the decisions indicates that the question addressed is somewhat unique and has not been substantially dealt with in the past in available legal precedent. Accordingly, the

standards by which the mix of these appointments must be reviewed must be developed by analogy to past decisions involving executive decisions to appoint or dismiss individual public officers.

In the area of appointments the Chief Executive has broad discretion:

> "The appointment of a public officer involves the exercise of discretion, which, unless abused, the courts will not attempt to control." People v. Redfern, 197 N.E.2d 841, 846 (Ill. App., 1964).

The broad discretion of the executive in hiring and firing matters and the limited extent to which courts will review the exercise of that discretion has been long recognized in the law.

> "The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervisory power." Keim v. United States, 177 U.S. 290, 293 (1900).

Recent cases interpreting statutes and administrative regulations relating to hiring and firing have continued to recognize the principle articulated in Keim as an accurate principle of general law, although the doctrine articulated in Keim has been amended to recognize that broad executive discretion is subject to specific statutes and administrative regulations which may have been promulgated relating to hiring, Sampson v. Murray, 415 U.S. 61, 69-70 (1974); United States v. Testan, 424 U.S. 392, 406-407 (1976); Brown v. Macey, 340 F.2d 115 (5th Cir., 1965); Hargett v. Summerfield, 243 F.2d 29 (D.C. Cir., 1957).

Further, the limited scope of judicial review and thus the limited potential of successful judicial challenges remains a valid principle of law:

> "The general rule is that the appointment and removal of executive employees are matters of discretion left to the executive branch which are not here reviewable on the merits." Jenkins v. Macey, 357 F.2d 62, 67 (8th. Cir., 1966).

Within the State of Maine, there is broad executive authority to make appointments under Article V, Part First, Section 8 of the Maine Constitution. (C.F. Opinion of the Justices, 340 A.2d 25 [Me., 1975]) Further, Maine Courts have raised serious questions as to the extent to which they may become involved in executive decision-making relating to appointments, having expressly stated that they will not permit themselves to be made appointing authorities, Curtis v. Cornish, 109 Me. 384 (1912) and that they will not issue orders to the executive which may directly involve the courts in mandating exercise of executive prerogatives. Kelley v. Curtis, 287 A.2d 426 (Me., 1972).

Thus, it is clear that in this area judicial review would be undertaken only with the greatest reluctance, if it were undertaken at all.

Addressing the particular appointees, based on the facts provided with your opinion request and the additional materials contained in the resumes of the appointees, it is clear and undisputed that there are some appointees who represent certain segments of the consumer credit industry and that there is at least one member who represents the public. Thus, the outer parameters of representation specified in § 6.301 are met. The question then focuses on what representation is "fair." Here the issue particularly focuses on those appointees who are currently retired but who in the past had connection with retail businesses and those appointees who currently perform services, as lawyers or lobbyists, for many interests including some which might be characterized as "public" and some which might be characterized as "consumer credit industry." With regard to these appointees, we would note a doctrine that in cases where there is doubt, ambiguity or dispute regarding characterization of qualifications of public officials in relation to statutory requirements, doubt should be resolved in favor of eligibility for the public office in question, Ervin v. Collins, 85 So.2d 852 (Fla., 1956).*

Thus, we do not believe that the Governor has acted outside of the scope of his reasonable discretion in his selection of the membership of the Council of Advisors on Consumer Credit.

Joseph E. Brennan
JOSEPH E. BRENNAN
Attorney General

JEB/ec
cc: Hon. James B. Longley

* Ervin involved qualifications to run for elective office.