

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 29, 1977

To: Honorable James B. Longley, Governor of Maine
From: Joseph E. Brennan, Attorney General
Re: Appointments under New Confirmation Procedures

This responds to the recent memorandum from your office asking our opinion on several questions related to the filling of certain appointive State positions by the new procedures set forth in Article V, Part One, Section 8 of the Maine Constitution,^{1/} and Title 3 M.R.S.A. Sec. 151.

Article V, Part One, Section 8, provides:

(The Governor) shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers except judges of probate and justices of the peace, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for.

Succeeding paragraphs outline the confirmation procedure, define a voting requirement for statutes enacted pursuant to this section, establish authority to call special Senate sessions for confirmation purposes, provide for appointment of justices of the peace, and require nomination at least seven days prior to appointment.

^{1/} Effective January 4, 1977.

Title 3 M.R.S.A. Sec. 151 provides:

The nomination and confirmation of all judicial officers whose confirmation by the Legislature is required by the Constitution and of all other civil and military officers whose confirmation by the Legislature is required by law shall be according to the procedure provided in this section.

The purpose and effect of the new provisions is to predicate the Governor's authority to make certain appointments on completion of a two-part process by which the Governor nominates and the Legislature, through action by Joint Committees and the Senate, confirms a nomination.

You have asked about the operation of these provisions in the situation where the Senate is scheduled to hold a special session to act on a number of nominations for positions which are now or by the date of the Senate session will be vacant. The Governor's authority to make appointments to these positions, subsequent to completion of the nomination-confirmation process, is unquestionable.

You also raised the question of whether appointments to certain positions which will not be vacant until after the special session but before the next planned regular or special session may be made following nomination prior to and confirmation at the same special session.^{2/}

In our opinion,^{3/} the doctrine of "prospective appointments" applies to the situation you describe.^{3/} Under this doctrine, an appointing authority may make

^{2/} Although you have not specifically raised the question, we would note that, all conditions thereto being met, the doctrine of "prospective appointments," see discussion, infra, would appear to apply to permit nomination, confirmation and appointment during a regular legislative session to a position due to become vacant after that session but prior to the next regular session. Indeed, at least one court, by analogy to elections held several months prior to the taking of office and without reference to the prospective appointments doctrine, has held that where a position is to become vacant between regular sessions, the session next preceding the date of the vacancy is the proper time to make the appointment. Landis v. Bird, 163 So. 248, 262 (Fla., 1935).

^{3/} The doctrine was accepted in Maine in Pattangall v. Gilman, 115 Me. 344, 98 A. 936 (1916). With respect to your second numbered question, "Does the holding of Pattangall on the right to make prospective appointments and the confirmation of prospective appointments apply to Gubernatorial appointments in general?", we give an affirmative answer with the caveat that the "right" to make prospective appointments exists only where there is no constitutional or statutory provision explicitly or by reasonable implication to the contrary. The ability to make any prospective appointment is circumscribed by the duration of the appointor's authority, see text, infra, and, possibly, by time limitations, see fn. 2, infra.

an appointment in advance of a vacancy, subject to the proviso that his own authority to appoint does not expire before the appointment becomes effective^{4/}. Under the Maine constitutional and statutory provisions, quoted above, appointment may only follow on nomination and confirmation. If the prospective appointments doctrine is to be effective under these provisions, prospective nomination and confirmation must also be permitted.^{5/} If they were not, prospective appointments could be made only to those positions to which the Governor may appoint unilaterally. As there appears to be no reasonable basis for a distinction between unilateral and consensual appointments, so that prospective appointments may be made to the former but not to the latter, and because the ability to make prospective appointments contributes to continuity and stability of governmental operations and functions, we conclude that nomination, confirmation and appointment may take place in advance of an actual vacancy^{6/}, where no explicit or reasonably implied prohibition exists and where the authority to appoint does not expire before the effective date of the appointment.^{7/}

You have inquired specifically whether

the Governor (may) make a prospective judicial appointment in September for a vacancy which will occur in October and can the Senate confirm the prospective appointment in September?

Since the Governor may make a prospective appointment to fill the expected October vacancy, he may at this time prospectively nominate and the Senate, at its September special session, may prospectively confirm, a nominee.

^{4/} There is strong indication of a second, undiscussed, general proviso, that a prospective appointment may only be made a reasonable amount of time prior to the existence of a vacancy. Uniformly, the cases deal with appointments made a few days or weeks in advance of and in expectation of an imminent vacancy.

^{5/} See 98 Atl. at 938.

^{6/} Our opinion of July 29, 1975 cautions against unrestrained use of prospective appointments, the making of which may be thwarted or undercut by changed minds or other intervening circumstances negating the appointment or necessitating a second appointment.

^{7/} See also fn. 4, supra.

You have also inquired whether

The Governor (may) fill an unexpired term and make a prospective appointment to a commission such as the Public Utilities Commission and have both confirmed by the Senate at the same time with only one public hearing?

and

If statutory language limits appointment to the remainder of the unexpired term only (emphasis yours), is the Governor precluded from also nominating the same person to a full term by means of a prospective appointment?

Appointment to the Public Utilities Commission is governed by the above-quoted constitutional and statutory provisions and by 35 M.R.S.A. Sec. 1, which provides:

The Public Utilities Commission, as heretofore established, shall consist of 3 members appointed by the Governor, subject to review by the Joint Standing Committee on Public Utilities and to confirmation by the Legislature from time to time upon the expiration of the terms of the several members, for terms of 7 years. . . . Any vacancy occurring in said commission shall be filled by appointment for the unexpired portion of the term in which such vacancy occurs.

The majority rule is that where a statute provides for appointment to fill an unexpired term, the appointment may be for no longer than the remainder of that term. We have taken this position in an Opinion of June 3, 1976, citing Maine cases supportive of the majority rule.^{8/}

In the circumstances you describe, however, nomination, confirmation and appointment to the unexpired term are clearly in order at the September session and, moreover, the situation is one in which, the unexpired term aside, a prospective full-term appointment to the unexpired term and that to the full term would each separately be proper, the first as a present appointment and the second as prospective;^{9/} where the two are


^{8/} In the fact situation to which that Opinion was addressed, the full-term appointment was not effective until after expiration of the authority to appoint. We reiterate here that an appointment to the unexpired remainder of a term and to a full term may not be joined to in effect, create a single appointment to a term longer than that authorized by law.

^{9/} In these circumstances, the limitation that a prospective appointment may only be made a reasonable time before a vacancy exists would be of particular importance. See fn. 4, supra.

clearly demarcated as separate throughout the nomination-confirmation and appointment process; and where, in effect, two branches of government must concur in the making of each appointment, there would seem to be nothing in law or reason which would prevent the nomination and confirmation of a single individual simultaneously to an unexpired and a full term, providing that nomination to each and confirmation thereof were separately proposed and discussed and explicitly separately voted.^{10/}

Thus the answer to your third and fourth questions is a carefully qualified affirmative, which may well not apply beyond the present fact situation of a resignation closely followed by the expiration of the term, with a legislative session intervening, and the existence of a requirement that both the unexpired and the full-term appointment be made only after legislative confirmation of a gubernatorial nomination.

We close by noting that questions of appointive authority and procedure are matters of constitutional and statutory construction, with the assistance of a few gap-filling rules. Accordingly, answers usually pertain to particular fact situations only and are rarely to be generalized beyond a specific situation.



JOSEPH E. BRENNAN
Attorney General

JEB/ec

^{10/} We see no reason why the legislative committees and the Senate could not consider both the unexpired and full-term appointments in single sessions, provided the two were always separately considered and voted. The Legislature could, of course, confirm or deny for one or both appointments.