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DEPARTMENT OF THE ATTORNEY GENERAL
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December 14, 1979

Honorable Nancy N. Masterton
36 Delano Park
Cape Elizabeth, Maine 04107

Dear Representative Masterton:

We hereby respond to your request for an opinion from this office regarding the status of the power of the Governor to appoint justices of the peace under existing constitutional and statutory provisions. In light of the many, and often confusing, amendments to the relevant statutes and constitutional provisions regarding the Governor's power to appoint justices of the peace, it appears that the critical question to be addressed is whether clarifying legislation is advisable in this area. For reasons which will appear more fully in this opinion, we recommend that amendatory legislation be sought.1/

I.

A review of the history of the Governor's power to appoint justices of the peace will serve to clarify the issues addressed in this letter. Prior to November of 1974, the State Constitution did not specify the appointment process for justices of the peace, but, since they were considered to be "judicial officers," they

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1/ We understand that such clarifying legislation will be introduced in the upcoming legislative session.

were appointed pursuant to Me. Const., art. V, pt. 1, § 8,[2/] by the Governor and confirmed by the Executive Council. Opinion of the Justices, 119 Me. 603 (1921). In November, 1974, the voters adopted an amendment to art. V, pt. 1, § 8 which limited the Governor to appointing justices of the peace to an initial term only with renewals to be made "as provided by law." 1973 Constitutional Resolutions, c. 4. After that amendment, the section read as follows:

> He shall nominate, and, with the advice and consent of the Council, appoint all judicial officers (except judges of probate), coroners, and notaries public, except that he shall appoint justices of the peace and notaries public for an initial term only, and additional terms of these officers shall be by renewal of commission, as provided by law; and he shall also nominate, and with the advice and consent of the Council, appoint all other civil and military officers, whose appointment is not by this Constitution, or shall not by law be otherwise provided for, except the land agent; and every such nomination shall be made seven days, at least, prior to such appointment.
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> Me. Const., art. V, pt. 1, § 8 [Nov. 1974-Nov. 1975 version].

The intent of this resolution, as found in its Statement of Fact, was to implement one of the recommendations of the Maine Management and Cost Survey by placing the responsibility for renewals of justices' commissions with the Secretary of State. 1973 Report of Maine Management and Cost Survey, at 8. Legislation to accomplish this end was passed in 1975, granting the Secretary of State the authority to renew commissions for notaries public and justices of the peace. P.L. 1975, c. 87, § 2.

2/ Prior to November, 1974, that section read as follows:

> He [the Governor] shall nominate, and, with the advice and consent of the Council, appoint all judicial officers (except judges of probate), coroners, and notaries public; and he shall also nominate, and with the advice and consent of the Council, appoint all other civil and military officers, whose appointment is not by this Constitution, or shall not by law be otherwise provided for, except the land agent; and every such nomination shall be made seven days, at least, prior to such appointment.
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> Me. Const., art. V, pt. 1, § 8 [pre-November 1974 version]

The next change occurred in November, 1975 in connection with the abolition of the Executive Council. 1975 Constitutional Resolutions, c. 4. The adoption of that resolution effected no substantial change in art. V, pt. 1, § 8 for purposes of the appointment of justices of the peace beyond reorganizing the section.[3] The language of this amendment, however, is significant in that it adds justices of the peace to the list of those judicial officers excepted from the Governor's appointing power and then, in a later paragraph, restates the amendment's previous language granting the Governor power to appoint justices of the peace for the initial term.[4]

3/ It did, however, eliminate the office of notary public from the constitutional appointment process.

4/ After the 1975 amendment, the provision read as follows:

> He 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.
>
> The procedure for confirmation shall be as follows: an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. The committee recommendation shall be reviewed by the Senate and upon review shall become final action of confirmation or denial unless the Senate by vote of two thirds of those members present and voting overrides the committee recommendation. The Senate vote shall be by the yeas and nays.
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> All statutes enacted to carry out the purposes of this section shall require the affirmative vote of two thirds of the members of each House present and voting.
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> Either the Governor or the President of the Senate shall have the power to call the Senate into session for the purpose of voting upon confirmation of appointments.
>
> He shall nominate and appoint justices of the peace for an initial term only, and additional terms of these officers shall be by renewal of commission, as provided by law.
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> Every nomination by the Governor shall be made seven days at least prior to appointment of the nominee.
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> Me. Const., art. V, pt. 1, § 8. [Nov. 1975-Dec. 1978 version]

Subsequent legislation directed towards the abolition and replacement of the Executive Council changed 5 M.R.S.A. § 82 to provide statutorily that the Governor had power to appoint justices of the peace for an initial term only. P.L. 1975, c. 771, § 31-A. The legislative history of this amendment indicates that it was intended to implement further the original 1974 constitutional amendment, see Statement of Fact, Committee Amendment "A" (H-1115)(1976), but the necessity of making the Governor's authority to appoint for initial terms a matter of statute must be open to question where the Constitution was already explicit in this regard.

The final and critical amendment to the Constitution became effective on December 7, 1978, and had the intent, if not the effect, of removing justices of the peace as constitutional officers. 1977 Constitutional Resolutions, c. 1. Specifically, this amendment removed the fifth paragraph of art. V, pt. 1, § 8 which gave the Governor power to make initial appointments of justices of the peace, but the language excepting justices of the peace from the Governor's general power to appoint judicial officers was retained. Thus, the section now reads as follows:

> He 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.
>
> The procedure for confirmation shall be as follows: an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. The committee recommendation shall be reviewed by the Senate and upon review shall become final action of confirmation or denial unless the Senate by vote of two thirds of those members present and voting overrides the committee recommendation. The Senate vote shall be by years and nays.
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> All statutes enacted to carry out the purposes of this section shall require the affirmative vote of two-thirds of the members of each House present and voting.
>
> Either the Governor or the President of the Senate shall have the power to call the Senate into session for the purpose of voting upon confirmation of appointments.
>
> Every nomination by the Governor shall be made seven days at least prior to appointment of the nominee.
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> Me. Const., art. V, pt. 1, § 8. [present version]

II.

There presently exists a facial conflict between the Governor's statutory power to appoint justices of the peace for an initial term and the apparent constitutional bar to his appointing justices of the peace at all. Because there are at least two possible routes a resolution of this conflict might take, we are of the opinion that legislative clarification of this area is necessary.

In light of the facial conflict between the Constitution and the statute, a court might find that the statute authorizing the Governor to appoint justices of the peace for an initial term is unconstitutional. Article V, pt. 1, § 8, by its very terms, excepts justices of the peace from the category of judicial officers which the Governor is entitled, by the Constitution, to nominate and appoint. The legislative history of the resolution which proposed the current version of art. V, pt. 1, § 8 is not inconsistent with the view that the Legislature intended to remove the power to appoint justices of the peace from the Constitution and from the Governor altogether. The resolution was titled "Resolution, Proposing an Amendment to the Constitution to Eliminate the Office of Justice of the Peace as a Constitutional Officer." 1977 Constitutional Resolutions, c. 1. The Legislature apparently believed that if this resolution were accepted by the voters, no procedure would exist for the initial appointment of justices of the peace until one could be enacted in a later session. 1 Me. Leg. Rec. 719 (1977) (remarks of Representative Curran). One purpose of the amendment seems to have been to eliminate the constitutional appointment procedure preliminary to placing the appointment power with the Secretary of State, as was done with notaries public. Id. at 647 (remarks of Representatives Birt Mitchell and Churchill), 719 (remarks of Representative Curran). Thus, it could be concluded by a court that the acceptance by the voters of this resolution rendered that part of 5 M.R.S.A. § 82 unconstitutional which empowered the Governor to appoint justices of the peace for an initial term.

The problem with such an interpretation is obvious: it would throw open to question the validity of the appointment of any justice of the peace named by the Governor after December 7,

1978.[5/] This possibility, taken together with our courts' long-standing reluctance to find statutes unconstitutional where there is any interpretation under which they might be found valid, see, e.g., Portland Pipe Line Corp. v. Environmental Imp. Comm'n., 307 A.2d 1 (Me. 1973); In re Stubbs, 141 Me. 143 (1944); Hamilton v. Portland Pier Site Dist., 120 Me. 15 (1921), might well lead a court to uphold the Governor's statutory power to appoint for a number of reasons.

5/ Should it be determined that justices of the peace named by the Governor subsequent to December 7, 1978, were appointed without proper constitutional or statutory authority, it should be noted that the validity of the official acts of these officers as justices of the peace would not be subject to questioning or re-opening by third parties or the public because of the doctrine of de facto officers. See, generally, Johnson v. McGinty, 76 Me. 432 (1884). This rule, which is one of long standing in Maine and other jurisdictions, generally holds that the acts of any officer who acts under color of law and/or with the acquiescense of the public are valid as to third parties and the public even where the person so acting was not actually an officer at the time of the acts as a result, for example, of the unknown expiration of his commission, procedural flaws in his appointment or his appointment under an invalid or unconstitutional law. Brown v. Lunt, 37 Me. 432 (1854); Kimble v. Bender, 196 A. 409 (Md. App. 1938). The rationale for such a rule is to protect and promote the public reliance on this officer's qualifications by those using his service. Id.

Finally, there are also statutes in Maine which validate certain actions of officials the questioning of which might undercut strong public policies protecting institutions such as marriage. E.g., 19 M.R.S.A. § 122 (validates marriages by an unqualified officer if either party to marriage believes he or she is lawfully married).

In light of the above rules, a judicial declaration or finding that certain justices of the peace were improperly appointed should not result in significant consequences relating to the validity of the official acts of the justices.

The removal from art. V, pt. 1, § 8 of all references to justices of the peace except the language taking them out of the category of judicial officers, may have been intended by the Legislature only to remove their appointment from the constitutional process set up in art. V, pt. 1, § 8, which includes confirmation by recommendations of a legislative committee and acceptance or rejection of those recommendations by the Senate. Such an intent would be consistent with the title of the resolution and the legislative history cited above. The plain language of art. V, pt. 1, § 8 could also be reconciled with this goal by reading the exception language as relating only to that specific constitutionally-provided for confirmation procedure. It is apparent from the legislative history of the resolution that an effort was being made to allow justices of the peace to be appointed statutorily, e.g., 1 Me. Leg. Rec. 647 (1977)(remarks of Representative Mitchell), and such a result would have been impossible if the constitutional procedure were retained. The possibility alluded to above that the Legislature meant eventually to make justices of the peace subject to the same appointment process as notaries does not necessarily require a different view. The Legislature did not enact such a statutory procedure after the resolution had passed and, in fact, has still not done so. It is therefore at least arguable that, once the constitutional procedure was eliminated, the Legislature, now free to enact a new statutory procedure, chose to continue to have the Governor make the initial appointment by statute. The failure of the Legisalture to enact, in the last regular session, a bill which would have placed justices of the peace and notaries on the same footing lends some support to this argument.6/

Support for the view that the Governor's statutory power to appoint justices of the peace is valid notwithstanding the apparent prohibition in art. V, pt. 1, § 8 may also be found by analyzing as a parallel provision the procedure for selection of judges of probate, the other group specifically excepted from the category of judicial officers by art. V, pt. 1, § 8. Judges of probate have been elected, pursuant to Me. Const., art. VI, § 6 since 1856, and have been specifically excepted from the appointment procedure of art. V, pt. 1, § 8 since that time. 1855 Resolves, c. 273. It is clear that the reason for their exception from art. V, pt. 1, § 8 was the adoption of an independent constitutional procedure for their selection. Justices of the peace, however, are newly-excepted from the procedures set out in art. V, pt. 1, § 8. It might be suggested that, in the absence of a new independent constitutional procedure for their appointment, the Legislature has full power to set up statutory selection procedures and that they have

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6/ L.D. 118, introduced into the First Regular Session of the 109th Legislature and later withdrawn, had this purpose. See Statement of Fact, L.D. 118 (109th Legis., 1st Reg. Session 1979).

exercised such powers by retaining in 5 M.R.S.A. § 82 the Governor's power to appoint. Absent a specific procedure set out in the Constitution similar to that governing probate judges, then, a court might decide that the Legislature had not gone beyond its power in granting the Governor the statutory power to appoint justices of the peace for an initial term.

One further argument buttresses the position that the statute allowing the Governor to appoint justices of the peace is constitutionally valid. Over the history of amendments to art. V, pt. 1, § 8 and the relevant statutes discussed above, the Legislature has never evidenced an intent to prohibit the Governor altogether from making appointments of justices of the peace. The most recent amendment to art. V, pt. 1, § 8 which appears to have that effect can also be read as an effort to remove the justices of the peace appointment procedure totally from the Constitution, while leaving the Legislature free to enact a statutory procedure. The long history of experimentation with this section indicates the lack of satisfaction of the Legislature with the various amendments. And the failure of the Legislature to remove the excepting language for justices of the peace can be explained, at least in part, as a recognition by the Legislature that in the absence of a provision excepting them, justices of the peace would still be considered judicial officers and hence subject to the procedures set out in art. V, pt. 1, § 8. See Opinion of the Justices, 119 Me. 603 (1921). Thus, the Legislature was presented with the difficult problem of removing justices of the peace as constitutional officers while also ensuring that they did not come back into the Constitution through a quirk of interpretation. To have left the critical language of exception in art. V, pt. 1, § 8 is not an unreasonable response to this problem, nor does it appear to have been retained in order to prohibit the Governor from making the appointments by statute.

If nothing else, the above analysis attempting to harmonize the Governor's appointment power in 5 M.R.S.A. § 82 with Me. Const., art. V, pt. 1, § 8 demonstrates the confusion which pervades this area. While a court might be able to reconcile the two provisions, using one or more of the above three rationales, the validity of the relevant portion of § 82 is nonetheless in question. For that reason, and in order to facilitate the clarification of the appointment procedure for justices of the peace, we conclude that further legislative action would be advisable.

We hope that this information addresses your concerns. If you have any questions, problems or comments, please feel free to contact this office.

Very truly yours,

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Assistant Attorney General

PFM/ec
cc: Bill Brown