

# MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

December 27, 1990

Senator Charles P. Pray  
President, Maine Senate  
State House Station #3  
Augusta, ME 04333

Representative John L. Martin  
Speaker, Maine House of Representatives  
State House Station #2  
Augusta, ME 04333

Dear President Pray and Speaker Martin:

I am writing to confirm advice which was rendered by this Department earlier this year concerning the power under the Maine Constitution of the Governor to appoint to executive office a person who has been elected to the Senate or House of Representatives, but before that person assumes his or her seat. For the reasons which follow, it is the Opinion of this Department that the Governor may make such appointments.

The appointment of members of the Legislature to the executive branch is governed by Article IV, Part 3, Section 10 of the Maine Constitution, which provides:

No Senator or Representative shall, during the term for which the Senator or Representative shall have been elected, be appointed to any civil office of profit under this State, which requires the approval of the Legislature for appointment or which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people.

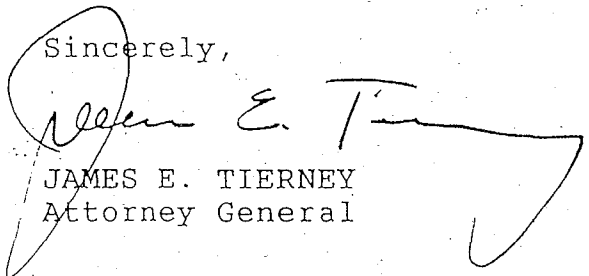
It does not appear that this section has been the subject of any interpretation with regard to the question posed either by the Supreme Judicial Court or this Department. There is, however, some authority bearing on the question deriving from a similar provision of the United States Constitution. Article I, Section 6, Paragraph 2 of that document provides, in pertinent part:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time;

The reason for the inclusion of this provision in the Federal Constitution was "to take away, as far as possible, any improper bias in the vote of the Representative, and to secure to the constituents some solemn pledge of his disinterestedness." J. Story, Commentaries on the Constitution of the United States, § 864 (1833). See also Atkins v. United States, 556 F.2d 1028, 1070 (Ct. Cl. 1977). Thus, it would appear that, so long as a prospective Senator or Representative had not actually assumed his or her seat, there would be no barrier to his or her appointment to executive office, since the person in question would not be susceptible to having his or her legislative actions influenced by the possibility of appointment. The Attorney General of the United States reached this conclusion in 1874 when he ruled that "a Representative in Congress, in my opinion, does not become a member of the House until he takes the oath of office as such Representative; therefore he may lawfully hold any office from his election until that time." 14 Op.Att'y Gen. 406, 408 (1874). Consequently, there is no constitutional impediment to a newly elected Senator or Representative assuming executive office and simply declining to assume the legislative office for which he or she had been elected.

I hope the foregoing makes clear the view of this Department on this important constitutional question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

  
JAMES E. TIERNEY  
Attorney General

JET/ec  
cc: Governor John R. McKernan