Opinion No. 50-5324

November 22, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Thomas J. Mabry Governor of New Mexico Santa Fe, New Mexico

*{*186}* I am writing to you pursuant to your oral request of Mr. Dunleavy in this office in which you inquire as to your right to appoint members of the boards of regents for the educational institutions in the State of New Mexico.

It is my understanding that all the members of the boards of regents of the educational institutions throughout the state are the same now as those who served prior to January 1, 1950. In the special election of 1949 the electorate approved Amendment No. 7, under the provisions of which the control and management of each of the educational institutions was vested in a board of five members. The act gave you the authority to nominate and appoint with the consent of the Senate the members of such boards of regents. The act further provided that the members should serve for a term of six years, except for the first appointments. Of the five first appointments, two were to serve for two years, two for four years, and one for six years.

The act further provided as to the method of removal of the boards of regents and conferred exclusive original jurisdiction on the Supreme Court. The important phase of the act insofar as your inquiry, provides: "This amendment shall become effective on January 1st next following its adoption and the Governor shall then immediately appoint the members of the boards".

On January 1, 1950 Amendment No. 7 became operative and *{*187}* at that time you as Governor were vested with the right to make interim appointments until such time as the Legislature met. The effect of your failure to make new appointments was to continue in office as both de jure and de facto the members of the boards of regents. At the present time you are authorized to make appointments for the staggered terms provided for the Amendment No. 7. These appointments will, of course, be subject to approval by the Senate when it convenes in 1951.

The principle is well settled that where the appointment is a recess appointment or one made to fill a vacancy in the office while the Senate is not in session, the appointee is entitled to the office until the Senate acts adversely upon his nomination. State ex rel Saint vs. Eirion, 169 La. 481, 125 So. 567; State ex rel Sikes vs. Williams, 222 Mo. 268, 121 S.W. 64; State ex rel Nagle vs. Stafford, 97 Mont. 275, 34 P.2d 372. In the present case we have a situation where the constitutional amendment has created an office and provided for the making of the first appointment thereto when the Legislature is not in session. The authority to make the appointment by the appointing authority is sustained in a similar situation in the case of State ex rel Sikes, supra.

I trust the foregoing adequately answers your inquiry.