Opinion No. 61-17

February 8, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General

TO: Honorable Tibo Chavez, State Senator, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. If the Governor appoints a public officer while the Senate is in session, may that officer, under the Constitution of New Mexico, assume his duties prior to the consent of the Senate?

2. What is the meaning of the words "by and with the advice and consent of the Senate", as used in the Constitution of New Mexico?

CONCLUSIONS

1. No.

2. See analysis.

OPINION

ANALYSIS

It should be noted that in writing this letter we are speaking generally and with reference only to the constitutional provisions, and not with particularity to any specific office, since such would require an independent analysis of the authorities creating that office.

In considering your first question, it appears that the pertinent constitutional provision is Article V, Section 5. This section provides in part that "the Governor **shall nominate,** and, by and with the consent of the Senate, appoint all officers whose appointment or election is not otherwise provided for * * *". The conclusion which must be drawn from the choice of language used by the constitutional draftsmen is that, unless the appointment or election of an officer is otherwise provided for by law to the exclusion of requiring the consent of the Senate, the Governor shall nominate, and when the Senate is in session, the officer nominated must receive the consent of the Senate prior to entry upon the performance of his duties. The above distinction as to when the Senate is in session is made necessary because of the provisions of Article XX, Section 5 of our Constitution. That section provides for interim appointments by the Governor until such time as the Senate next is in session.

The only New Mexico case found which would appear to be in conflict with the above analysis is Conklin v. Cunningham, 7 N.M. 445. However, this case can clearly be distinguished in that the appointment therein contested was that of a county sheriff whose appointment did not require the consent of the Senate.

The Constitution of the United States, Article II, Section 2, contains language almost identical to our Constitution as it relates to the appointment of public officers. In construing the section in **Marbury v. Madison,** 1 Cr. 137 (1803), Chief Justice Marshall observed that the Constitution contemplated three distinct steps in the appointment of public officers. First, the nomination. Second, the appointment. Third, the commission. He observed that while the appointment is the act of the President, it can only be performed by and with the advice and consent of the Senate, indicating that without that advice and consent there was no appointment. Later authorities generally support the view that the Senate shares in the appointing power of public officers and that no appointment is effective until the consent of the Senate. See 1 Kent's Comm. 310; 2 Story Comm., § 1539; **Ex parte Hennen,** 13 Pet. 225, 259 (1839).

The meaning of the term "by and with the advice and consent of" was considered by the Supreme Judicial Court of Massachusetts In re Opinion of the Justices, 78 N.E. 311, 190 Mass. 616, which said:

"Where the Constitution declares that the power to act is in the Governor or that the act may be done by the Governor 'by and with the advice of council' or 'by and with the advice and consent of the council', we are of the opinion that the responsibility rests primarily upon the Governor to determine, as the supreme executive magistrate, whether any action is called for and what act, if any, is desirable, and that the provision for advice of council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective. We do not think that these different phrases, used in different parts of the Constitution, namely, 'by and with the advice of council', 'by and with the advice and consent of the council', 'with the advice and consent of the council', 'with advice of council', and 'with advice of the council', differ at all in legal effect. They all recognize the fact that the act first of all, and afterwards for all time, is to be the act of the Governor. The only connection that the council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment. Inasmuch as the responsibility for his determination, with or without advice, must rest upon him, both in the beginning and forever after, the natural course of proceeding would seem to be that he would seek such aid as he might desire from any proper source and not be obliged to ask advice, in the first instance, from an official body whose opinion could never relieve him from the duty of deciding."

Therefore, it is our conclusion that under our applicable constitutional provisions, when a public officer is appointed while the Senate is in session, the Governor has the prerogative of nominating the prospective office holder, but that such office holder can neither assume the duties nor exercise the powers of his office until the consent of the Senate is given. We are of the further opinion that in providing for "the advice and

consent of the Senate" in making an appointment, it was not the intention of our constitutional draftsmen to permit the Senate to instruct or otherwise assert the prerogative of the Governor in making the nomination. To the contrary, the nominating authority is vested exclusively in the Governor, but his appointing power is shared with the Senate. It is our view that the word "advice" is permissive. That is, the Governor can seek it if he sees fit, and the Senate may give it if it so desires; but the word "consent" is mandatory, and no appointment is complete without it.