

Opinion No. 70-10

January 29, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable Odis Echols, Jr. New Mexico State Senator Legislative-Executive Building Santa Fe, N.M. 87501

QUESTIONS

FACTS

This concerns the matter of confirmation of J.E. Baker under his appointment as Secretary of Corrections by Governor Cargo last year. Mr. Baker was appointed April 21, 1969, to take office July 1, 1969, when the Corrections Act (§ 42-9-1, et seq., N.M.S.A., 1953 Comp.; Ch. 226, Laws of 1969) went into effect. Mr. Baker accepted the appointment and entered upon his duties.

Section 42-9-5, supra, provides that the Secretary of Corrections "shall be appointed by the governor, with the consent of the senate" and "shall hold office at the pleasure of the governor."

QUESTIONS

1. May the senate lawfully consider confirmation of gubernatorial appointments during a short session of the Legislature?
2. If so, must the governor submit pending appointments for confirmation during the session of the senate next following the appointments?
3. If the appointments must be submitted, must the senate act on them during the session at which they are submitted?

CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.

OPINION

{*15} **ANALYSIS**

Article IV, Section 5 of our Constitution, as amended, provides for an additional "regular" session of the Legislature in even-numbered years. This is the short, 30-day session now in progress. Its purpose is limited as follows:

"B. Every regular session of the **legislature** convened during an even-numbered year shall consider only the following:

- (1) budgets, appropriations and revenue bills;
- (2) bills drawn pursuant to special messages of the governor; and
- (3) bills of the last previous regular session vetoed by the governor." (Emphasis added.)

We have emphasized the word "legislature" to point up the fact that this provision, by its terms, applies to the entire Legislature, not to one of its constituent houses. The Senate is not the "legislature", clearly. We think it is also clear that the limitation applies only to the legislative function. Article IV of the Constitution deals solely with the legislative department of our government and nowhere in Section 5 B. is there any mention of nor limitation on other functions of either house.

Article V of the Constitution covers the executive department. Section 5 of that Article provides for the appointive ^{*16} power of the governor "by and with the consent of the senate" under some circumstances. In the "miscellaneous" section of the Constitution, Article XX, Section 5 provides for interim appointments by the governor while the senate is not in session to offices requiring the "advice and consent" of the senate.

This function of the senate is not part of its legislative duties. It is an administrative function given to the senate as part of the system of checks and balances in our government. It is a power which exists whenever the senate is in session and may be exercised whether the session is a regular-long, regular-short or special one. **State ex rel. Sikes v. Williams**, 222 Mo. 268, 121 SW 64 (1909); **State v. Sims**, (W. Va., 1955) 90 S.E.2d 288. We quote from the **Williams** case, supra:

"The confirmations by the Senate of appointments made by the Governor are not legislative acts, and in our opinion can be made as well at a special session as a regular session. Such acts by the Governor concerning appointments are merely administrative, and can be confirmed by the Senate whenever that body is in session, and it is immaterial for what purpose the legislative body may have been called in session. In other words, whenever the body is lawfully convened for legislative purposes, it has the right to act for administrative purposes, even without mention of such purpose in the call for a special session."

We find no time limitations in our Constitution or elsewhere on the authority of the senate to exercise its confirmatory function and we therefor conclude in answer to question (1) that the senate may do so whenever it is in session.

We also think it is clear that the governor is under a constitutional duty to submit appointments of officers to positions requiring the advice and consent of the senate at the next session of that body following the appointment. We believe this necessarily follows from the language of Article XX, Section 5 of the New Mexico Constitution:

"If, while the senate is not in session, a vacancy occur in any office the incumbent of which was appointed by the governor by and with the advice and consent of the senate, the governor shall appoint some qualified person to fill the same **until the next session of the senate**; and shall **then** appoint by and with the advice and consent of the senate some qualified person to fill said office for the period of the unexpired term." (Emphasis added.)

While this section in terms applies only to vacancies in office occurring while the senate is not in session, the requirement applies as well to initial appointments to offices created by the Legislature to be filled while the senate is not in session. The Secretary of Corrections is such an office. The plain intent of this section of the Constitution is that such appointments will be submitted for confirmation at the "next session" of the senate after the appointment has been made by the governor. **State ex rel. Sikes v. Williams**, supra. "Next session," in our opinion means any "next session" -- regular-long, regular-short or special, and the present session is such "next session."

For the same reasons, it is apparent that the senate has a constitutional duty to act on submitted appointments whenever it is next in session. Implicit in this shared responsibility of the chief executive and the upper house is the duty on the part of the governor to submit appointments in time for reasonable consideration by the senate and the corresponding duty of the senate to take action in time for the governor to make a substitute appointment for anyone rejected by the senate.

It should be noted that, if the senate rejects an appointment, the same person may not later be appointed to the same office under a recess appointment. (§ 5-1-1, N.M.S.A., 1953 Compilation).

For the reasons stated, it is our opinion that the appointment of Mr. Baker as Secretary of Corrections must be submitted by the Governor to the Senate during its current session and that the Senate is authorized to act thereon and has a constitutional duty to do so.

By: Justin Reid

Assistant Attorney General