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Montana Legislative Services Division

Legal Services Office

LEGAL MEMORANDUM

TO: Sheri Scurr on behalf of the State Administration and Veterans' Affairs Committee

FROM: K. Virginia Aldrich, Staff Attorney

RE: Appointment Power

DATE: June 10, 2013, UPDATED

Question Presented

This memorandum was prepared for the State Administration and Veterans' Affairs Interim Committee in response to a request for information by Ms. Scurr regarding the ability of the Legislature to change the appointment process for the Commissioner of Political Practices. Specifically, the following question was asked:

> Can the Legislature delegate the appointment of the Commissioner of Political Practices from the Executive Branch to another branch?

Short Answer

With respect to the Legislative Branch, the Legislature may have some discretion in providing for the Commissioner of Political Practices. The Montana Constitution allows broad authority to the Legislature, but this authority must be harmonized with the balance of powers provision within the Montana Constitution.

With respect to the Judicial Branch, the Legislature likely cannot delegate appointment authority for an executive power to that branch.

Discussion

I. Executive Nature of the Commissioner of Political Practices

The office of the Commissioner of Political Practices is an office created by statute. Mont. Code Ann. § 13-37-102. The office of Commissioner of Political Practices is administratively attached to the Secretary of State, and it performs traditional Executive Branch duties, including monitoring, investigating, and enforcement of campaign and lobbying disclosure laws. Mont. Code Ann. §§ 13-37-111, 13-37-113, 13-37-121, 13-37-124. The office also fulfills quasi-judicial responsibilities. Mont. Code Ann. § 13-37-115. However, the Judicial Branch is empowered to review orders of noncompliance issued by the commissioner. Mont. Code Ann. §§ 13-37-121, 13-37-122. The Constitution of the State of Montana provides that all officers

provided for in the constitution or by law whose appointment or election is "not otherwise provided for" shall be appointed by the governor, subject to confirmation by the senate. Mont. Const., Art. VI, sec. 8(2). The appointment of the commissioner is subject to this constitutional provision.

II. Legislative Branch Appointments to the Executive Branch

The question of whether the Legislature has the authority to appoint Executive Branch members turns on the application of two constitutional provisions – the Executive Branch's appointment power and the separation of powers clause.

The first provision grants appointment power to the Executive Branch, but it is broadly worded. The critical sentence within the Montana Constitution provides that "[t]he governor shall appoint, subject to confirmation by the senate, all officers provided for in this constitution or by law whose appointment or election *is not otherwise provided for*." Mont. Const., Art. VI, sec. 8(2) (emphasis added). The exception clause appears to allow the Legislature some discretion with respect to designing and providing for the appointment of executive branch entities not considered "departments"; although Article VI, section 8(1) also gives extensive leeway to the Legislature in the matter of department head appointments, arguably subject to even more gubernatorial appointment authority. This is confirmed by discussions during the Constitutional Convention in 1972. On behalf of the Constitutional Convention's Executive Committee, Delegate Joyce discussed the executive appointment power clause, stating:

> [T]he principal heads of these departments – of course, that's where they're not elected – shall be of single executives appointed by the Governor unless otherwise provided by law. The Legislature, of course, can put a board a head of any of these departments or the Legislature can provide for an elected official to be a head of any of these boards, but if they don't do that, then they'll be a single executive. A single executive will have to be confirmed by the Senate. . . . [T]he Governor shall make the appointment of the heads of the departments, subject to confirmation by the Senate – that is, if their appointment or election or their term is not otherwise provided for by law. So the Legislature, of course, could still create an office or a board, make it elective, and could give it a definite term.[1]

[1] *Montana Constitution Convention, Verbatim Transcripts,* Vol. IV, 944-946.

Notably, delegates rejected an extensive Executive Article that included a stringent appointment power clearly left in the hands of the Governor. *See Montana Constitutional Convention, Verbatim Transcripts,* Vol. I, 230. These considerations reveal that Constitutional Convention delegates considered that the Legislature could provide for alternative methods of selecting the heads of departments or agencies; but the boundaries of legislative power with respect to the executive appointments are not clear from the delegates' conversations. The delegates did not discuss or appear to consider legislative appointment of Executive Branch officers.

Legal research did not reveal any opinions interpreting whether Article VI, section 8 would allow a legislative appointment under the 1972 Constitution.[2] However, because the 1972 Constitution adopted similar text[3] to the 1889 Constitution, cases before 1972 are instructive. In 1906, the Montana Supreme Court held that the Legislature had the power to provide for the appointment of bounty hunters, exercising the executive power of enforcement, in each county. The Court succinctly stated that "the power to appoint or delegate the appointing power is reserved to the people, acting through the legislature, in every instance, except in those enumerated in the Constitution." *In re Terrett*, 34 Mont. 325, 86 P. 266 (1906).[4] This early Montana precedent suggests that the Legislature may be empowered to appoint certain positions with Executive Branch responsibilities. However, there is no further case law defining the boundaries or prohibitions that may stem from balance of power concerns.

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[2] In 2009, the Department of Commerce questioned whether legislative leadership could appoint four members of the six-member Research and Commercialization Technology Board. The Attorney General's office declined to give an official opinion on the subject, stating "[p]redication of the outcome in the case you present is . . . not possible" because there was no bright line test enumerated by the Montana Supreme Court regarding the separation of powers, especially as it applied to the appointive power. 2009 Mont. AG Lexis 3. However, the letter of advice pointed to several legislative voices on executive boards, including the Public Defender Commission, Economic Advisory Council, Council on Developmental Disabilities, Gaming Advisory Council, and Board of Investments (non-voting members). *Id.*

[3] The pertinent text of the 1889 Constitution is similar to the current appointment power text; however, there are some differences. The 1889 text read: "Sec. 7. The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. . . ." The pertinent part of the current constitution under Article VI, section 8, adopted substantively the same language in subsection (2) and added new language in subsection (1). It currently reads: "(1) The departments provided for in section 7 shall be under the supervision of the governor. Except as otherwise provided in this constitution or by law, each department shall be headed by a single executive appointed by the governor subject to confirmation by the senate to hold office until the end of the governor's term unless sooner removed by the governor. (2) The governor shall appoint, subject to confirmation by the senate, all officers provided for in this constitution or by law whose appointment or election is not otherwise provided for. They shall hold office until the end of the governor's term unless sooner removed by the governor." Elison and Snyder contend that the additional language inserted into subsection (1) "probably adds nothing of substance." Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 131 (Greenwood Press 2001).

[4] This early Montana decision has been criticized by constitutional scholars for its "circumvention of the limits on government placed there by the power of the people." Elison & Snyder at 131.

The question of the legislative ability to appoint the Commissioner of Political Practices also invokes the separation of powers clause that limits legislative power. The Legislature has plenary power, so the Constitution is "a limitation of power, and the legislature of the state has the power to do as it pleases, save and except as limited expressly or by necessary implication by some constitutional provision." *Mulholland v. Ayers*, 109 Mont. 558, 567-568, 99 P. 2d 234, 239-240 (1940). *See also State v. Aronson*, 132 Mont. 120, 127, 314 P. 2d 849, 852, *Armstrong v. State*, 1999 MT 261, ¶ 61, 296 Mont. 361, 381, 989 P. 2d 364, 384. However, the Montana Supreme Court has stated that the Legislature cannot exercise powers that properly belong to another branch. *State v. Johnson*, 75 Mont. 240, 243 P. 1073 (1926), *State ex rel. Pub. Serv. Commn. v. Dist. Ct.*, 107 Mont. 240, 242, 84 P.2d 335, 335-336 (1938), *State ex rel. Grant v. Eaton*, 114 Mont. 199, 211, 133 P. 2d 588, 593 (1943), *State ex rel. Judge v. Legis. Fin. Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975). This limitation relies on the separation of powers clause: "[t]he power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const., Art. III, sec. 1. In interpreting this section, the Montana Supreme Court has stated that the separation of powers provision "effects an absolute separation of the three departments of our government, 'but while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists; it has never been entirely true in practice.'" *State ex rel. Judge*, 168 Mont. 470, 477, 543 P.2d 1317, 1321 (1975) (citations omitted). Citing Justice Holmes, the Court noted that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." *Id.* at 479, 543 P. 2d at 1322 (citations omitted). The Court has interpreted the doctrine to mean that "the powers properly belonging to one department shall not be exercised by either of the others." *Powder River Co. v. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, 232, 60 P. 3d 357, 380 (citations omitted). "The doctrine is designed to prevent a single branch from claiming or receiving inordinate power, not to bar cooperative action among the branches of government." *Id.* at ¶ 114, 312 Mont. at 232, 60 P. 3d at 381 (citations omitted). Hence, while the separation of powers clause would appear to prevent all legislative intervention in Executive Branch power, the Court has suggested that separation of powers questions must be considered contextually. Case law from other jurisdictions also suggests that when interpreting the separation of powers principle with respect to the appointment power, a court will likely consider a number of factors.

Other jurisdictions have grappled with similar balance of power questions concerning appointments by the Legislature to intragovernmental ethics panels, election oversight boards, and lobbying commissions.[5] Under federal law, legislative appointments to executive agencies are prohibited by the appointments clause in the U.S. Constitution. *Buckley v. Valeo*, 424 US. 1, 96 S. Ct. 612 (1976). *See also Metro. Wash. Airport Auth. v. Noise Abatement Ctr.*, 501 U.S. 252 (1991). However, state courts (and federal courts issuing decisions on state law) have had a

[5]Notably, all the cases involving governmental structures similar to the Commissioner of Political Practices involved a board or commission; none of the pertinent cases involved a single appointee.

wide variety of responses to whether and when legislative appointments are permissible. The threshold question in each case is the constitutional text at issue in each jurisdiction. Aside from differences in state constitutions, various courts considering separation of powers challenges to legislative appointments have evaluated the degree of subsequent legislative control over appointees, the nature and scope of executive power at issue, the jurisdiction of the ethics board or commission, the objective sought by the legislature, the practical result of intermingled branch powers, and the makeup of board or commission members, among other issues. *See, e.g., Camacho v. Civ. Serv. Commn.*, 666 F. 2d 1257 (9th Cir. 1982);[6] *Parcell v. Govtl. Ethics Comm.*, 639 F. 2d 628 (10th Cir. 1980);[7] *La. v. Green*, 566 So. 2d 623 (1990);[8] *Marine Forests Socy. v. Cal. Coastal Com.*, 36 Cal. 4th 1, 113 P. 3d 1062 (2005);[9] *Seymour v. Conn. Elections*

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[6] The Ninth Circuit affirmed a Northern Mariana Islands decision invalidating legislative appointment of six members of a seven member Civil Service Commission holding power over government employees in the executive branch. 666 F. 2d at 1263. The Northern Mariana Islands' Constitution directed the legislature to "provide for" the Civil Service Commission, and the Northern Mariana Islands' Constitution explicitly adopted the separation of power principles. The Ninth Circuit noted that language to "provide for" the commission fell short of giving appointment power to the Legislature, and stated that giving discretion to the Legislature "merely raises the possibility of depriving the Governor of direct appointment power. Perhaps it was intended that a lower executive officer would make the appointment or that the Governor would appoint a blue-ribbon panel to make the selections." *Id.* at 1264. The Ninth Circuit added that the plaintiff did "not claim that the Commonwealth legislature has no power of appointment, only that the present allotment of the appointment power clearly violated the separation of powers requirement." *Id.*

[7] In a case challenging the makeup of the Kansas Governmental Ethics Commission, the Tenth Circuit upheld the constitutionality of a majority of legislative appointments because the Commission had no enforcement powers and was required to refer enforcement matters to Executive Branch officials. 639 F. 2d at 632. The Court applied four factors to determine whether one branch had usurped the power of another branch or significantly inferred with another branch, including the essential nature of the power being exercised, the degree of control by the Legislature in the exercise of power, the nature of the objectives sought by the Legislature, and the practical result of the blending of branch powers. *Id.* (citations omitted). *See also Sedlak v. Dick*, 256 Kan. 779 (1995).

[8] The Louisiana Constitution provides that the Governor has the power to appoint the heads of executive departments and members of executive boards unless "otherwise provided by [the Louisiana] constitution or by law." 566 So. 2d at 624. The Louisiana Supreme Court considered whether legislative appointment of the Board of Ethics for Elected Officials violated either this provision or the separation of powers principle because the Board could exercise an Executive Branch duty by bringing actions in court. *Id.* The Court found that the exercise of an executive function violated the separation of powers principle but on rehearing reversed itself and found that "[t]he mere fact that the Legislature has appointed the board's members does not violate separation of power principles, as long as (1) the appointment of the members by the Legislature was constitutionally valid and (2) the appointees are not subject to such significant legislative control that the Legislature can be deemed to be performing executive functions through its control of the members of the board in the executive branch." *Id.* Appointees held staggered 6-year terms, could only be removed for cause, and were appointed by the Governor, House of Representatives, and Senate; therefore, the Court found that appointees were not subject to significant legislative control and upheld the appointment scheme. *Id.* at 625-626.

[9] In California, the Legislature created the Coastal Commission, a body with enforcement ability, and allocated eight members for appointment by legislative bodies and four members for appointment by the Governor. 36 Cal. 4th at 20-21, 113 P. 3d at 1070-1071. The court found that the Constitution did not preclude all legislative enactments to appoint an executive officer and that the appointments did not operate to defeat or materially impair the Executive Branch's exercise of its constitutional functions; although the court cautioned that "it does not follow that the

Enforcement Comm., 1998 Conn. Super. Lexis 3590 (1998);[10] *Caldwell v. Bateman*, 252 Ga. 144 (1984);*Com. Cause v. Ind.*, 691 N.E. 2d 1358 (1998).[11]

Here, the constitutional muster of a legislative appointment likely depends on a number of factors. A court would likely evaluate the executive functions exercised by the Commissioner and whether the Legislative Branch was seeking to usurp the executive power of enforcement of the law. "It is the exclusive power of the executive branch to enforce the laws as enacted, subject only to the limitations which are contained in the Montana Constitution." *Powder River Co.*, 2002 MT 259 at ¶ 115, 312 Mont. 198, 232, 60 P. 3d 357, 381. A court would also likely evaluate whether the Legislature minimized its subsequent power over the Commissioner through the length of the appointment term and with respect to removal provisions. Thus, several factors depend on legislation that structures the appointment. Because the Constitution provides a broad exception clause allowing the Legislature to modify aspects of the appointment power, because the Commissioner exercises powers clearly allocated to the executive realm, and because there is not yet any final legislation altering the appointment, it is not clear whether the Legislature could allocate the appointment power of a single appointee as head of an executive agency to the Legislative Branch.

III. Judicial Branch Appointments to the Executive Branch

The waters regarding judicial appointment of Executive Branch officers are much clearer. Under binding precedent, judicial officers are likely prohibited from appointing officers exercising executive functions.

In 1945, the Montana Supreme Court declared void portions of a legislative act that delegated authority to the judiciary to compel the appointment of an applicant for a discretionary executive appointment. *Application of O'Sullivan*, 117 Mont. 295, 158 P. 2d 306 (1945). The Court found that the power of appointment is an executive function that cannot be delegated to the judiciary. *Id.* at 301, 302, 158 P. 2d at 309. The Court stated that "appointment to an office is an executive function . . . . Judges of courts created by the constitution should not be burdened with executive or administrative duties. They should, as nearly as possible, be freed from everything not judicial in character . . . . let the three co-ordinate departments of government be preserved

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California separation of powers clause places *no* limits on such legislation" (emphasis in original). *Id.* at 43-45, 113 P. 3d at 1087.

[10] Connecticut's constitution does not provide an appointments clause, and based upon a separation of powers challenge, the Superior Court of Connecticut upheld a commission that had a majority appointed by the Legislature. 1998 Conn. Super. Lexis 3590.

[11] An Indiana Court of Appeals upheld the establishment of a commission overseeing legislative lobbying that was appointed by the Indiana legislature because "the legislature has the ability to appoint 'officers and employees whose duties are an incident to its legislature function.'" 691 N.E. 2d at 1360 (citations omitted). *But see Tucker v. Ind.*, 218 Ind. 614, 35 N.E. 3d 270 (1941).

intact." *Id.* at 302, 158 P. 2d at 309 citing *State ex rel. White v. Barker*, 116 Iowa 96, 89 N.W. 204, 209 (1902)). *See also Jensen v. Dept. of Labor & Indus.*, 213 Mont. 84, 92, 689 P. 2d 1231, 1235 (1984) (stating "the legislature cannot place the power of appointment in the judiciary"); *In re Weston*, 28 M 207, 72 P 512 (1903). Hence, under the precedent of *O'Sullivan* and *Jensen*, the Legislature likely cannot delegate to the Judicial Branch the authority to appoint an executive officer. However, as a caveat, judicial appointment to a board exercising executive enforcement powers over judicial officers may not be barred and would require a separate legal analysis.

IV. Conclusion

While not binding on Montana, case law from other jurisdictions that have grappled with similar questions regarding the appointment of intragovernmental ethics boards suggests that if the Legislature wishes to alter the present appointment scheme for the Commissioner of Political Practices, it should consider a variety of factors. As noted above, courts have considered the degree of subsequent legislative control over appointees, the nature and scope of executive power at issue, the jurisdiction of the ethics board or commission, the objective sought by the legislature, the practical result of intermingled branch powers, and the makeup of board or commission members. While some of the factors are specific to commissions (such as staggering appointments and allowing the Executive Branch to make the majority of appointments), some of the factors relate to appointees, whether or not serving in an individual capacity, such as minimizing the subsequent power of the Legislative Branch over the individual's Executive Branch authority through the appointment term length and removal provisions. Taking these factors into consideration can strengthen the case for legislative appointment. However, as noted above, under Montana precedent, judicial appointment of an officer to the head of an Executive Branch agency is likely prohibited.

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