



Montana Legislative Services Division
Legal Services Office

LEGAL MEMORANDUM

TO: State Administration and Veterans' Affairs Interim Committee
FROM: K. Virginia Aldrich, Staff Attorney
RE: Confirmation of Commissioner of Political Practices
DATE: January 16, 2014

Question Presented

This memorandum was prepared for the State Administration and Veterans' Affairs Interim Committee in response to a request for information by Chairman Dee Brown concerning the Commissioner of Political Practices. Specifically, the following question was asked:

May the Senate State Administration standing committee hold interim hearings on a Commissioner of Political Practices nominee, make a recommendation regarding the confirmation of the nominee, and allow the Senate to vote on the confirmation of the appointment in the interim by mail ballot?

Short Answer

No, under current law, the Senate State Administration Committee may not meet during the interim to hold confirmation hearings on a nominee for the office of Commissioner of Political Practices in order to make a recommendation regarding the confirmation of the nominee and then refer the confirmation to a vote of the Senate by mail ballot. A meeting of the Senate State Administration Committee during an interim for purposes of confirmation hearings on a Commissioner of Political Practices nominee would require changes in state law and Senate rules. In addition, mail balloting for purposes of confirmation may potentially pose constitutional questions. However, the Legislature likely may consider a nominee to the office of Commissioner of Political Practices during a special session.

Discussion

I. Statutory Prohibition of Standing Committees Meeting During Interim

In 2003, by request of the Legislative Council, the Legislature enacted section 5-2-205, MCA. Under that section, a standing committee "may not meet during the interim between regular legislative sessions". However, before or during a special session, standing committees are authorized to meet during the interim with approval of the President of the Senate or the Speaker of the House of Representatives. *Id.* In addition, certain pre-session activity by standing committees is authorized. *See* section 5-2-202, MCA.

The confirmation of a nominee to the office of Commissioner of Political Practices is not an exception authorized under section 5-2-205, MCA. Therefore, under current law, the Senate State Administration Committee likely would not be allowed to meet for the purposes of confirmation hearings on the Commissioner of Political Practices.

However, until 1999, the Legislature specifically vested authority in standing committees not formally discharged prior to the preceding session to meet during the interim. Sec. 10, Ch. 431, L. 1973; Sec. 19, Ch. 19, L. 1999. An Attorney General's opinion from 1990 supports this idea, noting that "[u]nder the clear constitutional authority of Article V, section 10(4), the Legislature in 1973 vested its regularly-appointed standing and select committees with the power to sit during the interim". 43 A.G. Op. 60 (1990). The Constitution specifically allows the establishment of interim committees, and through statute, the Legislature directs which committees comprise those interim committees. Art. V, sec. 10(4), Mont. Const. Thus, if section 5-2-205, MCA, was amended, under current legal authority and under previous practice, a standing committee such as the Senate State Administration Committee could meet to take testimony and gather information on any matter under its jurisdiction.

Nevertheless, nominations must also conform to Senate rules. Current Senate rules require the introduction and first reading of nominations before being referred to a committee. Senate Rule S70-20 (2013). Therefore, regardless of whether the Senate State Administration Committee met in the interim for a hearing on the Governor's nominee, under current rules, it would have to convene again during a regular or special session for a hearing on the nominee.

II. Mail Balloting

The Montana Constitution allows mail balloting of legislators under Article VI, section 10(4)(a):

If the legislature is not in session when the governor vetoes a bill approved by two-thirds of the members present, he shall return the bill with his reasons therefor to the secretary of state. The secretary of state shall poll the members of the legislature by mail and shall send each member a copy of the governor's veto message. If two-thirds or more of the members of each house vote to override the veto, the bill shall become law.

In addition to constitutionally authorized veto polling, by law, legislators may be polled for purposes of calling a special session or determining the intent of the Legislature concerning an administrative rule for purposes of admitting that intent as evidence in court. Sections 5-3-106, 2-4-403, MCA. However, calling a special session by a poll is primarily an administrative (rather than substantive) use of the polling mechanism, and polling concerning administrative rules allows evidence to be presented to a court of law as conclusive evidence of the Legislature's intent. However, neither of these polls authorized by statute implicate the Senate's confirmation power or broader legislative powers, generally.

Although nothing in the Constitution expressly forbids the Legislature from using polling for other purposes, statutory interpretation suggests that using polling for the confirmation of nominees may pose potential constitutional questions. Under the legal canon *expressio unius est*

exclusio alterius, the Montana Supreme Court interprets the expression of one thing to imply the exclusion of another. See e.g. *Pesarik v. Perjessy*, 2008 MT 337, 346 Mont. 236, 194 P.3d 665; *McCormick v. Brevig*, 2007 MT 195, 338 Mont. 370, 169 P.3d 352. Thus, because the Constitution specifies one type of mail balloting, it necessarily excludes other types of mail balloting by the Legislature. This is consistent with the idea that the Constitution "is a limitation upon the power of the legislature and not a grant of power to that body". *St. ex rel. James v. Aronson*, 132 Mont. 120, 314 P.2d 849 (1957) (citations omitted).

Furthermore, Senate rules provide that if a vacancy occurs in any office subject to Senate confirmation, "the Governor shall appoint some fit person to discharge the duties of the office until the next meeting of the Senate, when the Governor shall nominate a person to fill the office". Senate Rule S70-10(2) (2013). A mail ballot may not conform with current Senate rules requiring a "meeting of the Senate".

III. Consideration of Commissioner Nominee -- Appointments Effective Until End of Session -- Interim Hearings by SAVA

Under current law, an interim appointment to the office of Commissioner of Political Practices is effective until the end of the "next session". The office of Commissioner of Political Practices was created by section 2-15-411, MCA, and the Commissioner is appointed under section 13-37-102, MCA. If a vacancy occurs in that office, "a nomination made while the senate is not in session is effective as an appointment until the end of the next session". Section 13-37-104, MCA. Therefore, this section of current law would also likely bar confirmation voting via mail balloting because no "session" occurs.

However, the Constitution provides only that following an interim vacancy in the office, "the governor shall appoint a qualified person to discharge the duties thereof until the office is filled by appointment and confirmation". Art. VI, sec. 8(3), Mont. Const. The Constitution does not specify that the confirmation process must occur during a session. Nevertheless, certain decisions are necessarily exercised by the Legislature, sitting as a body, rather than by delegation to a committee. See *St. ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975) (holding that the Legislative Finance Committee could not be granted final approval authority over budget amendments).

Notably, section 13-37-104 does not specify whether the session must be a regular session or a special session. Therefore, the Legislature likely may consider the confirmation of a Commissioner of Political Practices during a special session.

Because the State Administration and Veterans' Affairs Interim Committee has "monitoring functions" for the office of the Commissioner of Political Practices, there does not appear to be a prohibition preventing the State Administration and Veterans' Affairs Interim Committee from holding hearings to determine whether or not to recommend a special session concerning the nominee's confirmation. Section 5-5-228, MCA.

CI0134 4016gafa.