STATE OF KANSAS

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April 4, 1975

Opinion No. 75- 151

The Honorable Robert F. Bennett
Governor of Kansas
2nd Floor - State Capitol Building
Topeka, Kansas 66612

Dear Governor Bennett:

I write, pursuant to our recent conversation, to set forth my views and opinion regarding legal steps necessary to effect valid and lawful executive appointments. These questions have arisen as a result of the decision of the Secretary of Administration, since rescinded, to withhold payment of salary due the Director of the Kansas Bureau of Investigation for the pay period ending March 17, 1975. K.S.A. 75-711, which authorizes that particular appointment, provides that "[t]he director of the bureau shall be appointed by the attorney general, with the consent of the senate." This statutory language is similar to that found in numerous other provisions authorizing gubernatorial appointments. Thus, at the outset, it is necessary to review the nature and role of senatorial consent to executive appointments, and to determine whether provisions for such appointments violate the constitutional separation of powers inherent in the Kansas Constitution. In an opinion to Governor George Docking, dated January 8, 1958, Attorney General John Anderson, Jr., considered the question whether the Kansas Senate could legally consider appointments by the governor during the budget session. He concluded that consideration of gubernatorial appointments during such session was within the authority of the Senate convened for a budget session, on the ground that the approval of executive appointments is not an exercise of legislative power. At 63 Am. Jur. 2d, Public Officers and Employees, § 110, the writer states thus:

> "The act of confirming an appointment to office is not the exercise of an executive function, and since it is not legislative in character, it need not be performed at a regular session."

In State ex inf. Major, ex rel. Sikes v. Williams, 222 Mo. 268, 121 S.W. 65 (1909), the court stated thus:

> "The confirmation 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."

A similar conclusion was reached in Walker v. Baker, 196 S.W.2d 324 (Tex.Sup.Ct. 1946), wherein the court held that the Senate of the State of Texas could not lawfully convene itself, on its own motion, to consider recess appointments by the governor, on the ground that the constitution prescribed the manner in which the senate could act on appointments by the governor, and that these provisions did not permit action at a session such as that in question. The court stated in very pertinent part thus:

> "[T]he [Texas] Constitution provides . . . that 'the Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas,"' which means all legislative power -- the power to make, alter and repeal laws -- not expressly or impliedly forbidden by other provisions of the State and Federal Constitutions. [Citations omitted.] . . . But that rule applies to legislative power to be exercised by the Legislature, not to a nonlegislative power to be exercised by the Senate. Confirmation or rejection of the Governor's appointments is an executive function expressly delegated to the Senate. . . . . [Cita-

> tions omitted.] To that extent it represents a permitted invasion by one branch of the Legislature of that field of power which is confided to the executive department by Art. II, Sec. 1, of the Constitution. Under those circumstances there is no ground for relator's contention that the power asserted in this case exists because not expressly prohibited. It being a power ordinarily and intrinsically belonging to another department of the government . . . , and the means and time for its exercise being provided in Art. III, Sec. 5, supra, no other or different means can be implied. . . . In other words, since the Constitution specified the circumstances under which the Senate may defeat the Governor's appointments, there is an implied prohibition against its power to add to these circumstances." [Emphasis by the court.]

Similarly, in In re Advisory Opinion to the Governor, 64 Fla. 16, 59 So. 782 (1912), it was held that senate action on appointments by the governor could be taken at an extraordinary session while in recess from regular session, on the ground that such action was not "legislative business." See also State ex rel. Wayne v. Sims, 90 S.E.2d 288 (W.Va. 1955).

If, as is clearly the case, consideration of gubernatorial and other executive appointments entails the exercise of merely executive or administrative power, and is not legislative in nature, the question arises whether that power may be vested by law in either house of the legislature. In State ex rel. Anderson v. State Office Building Commission, 185 Kan. 563, 345 P.2d 674 (1959), the court held the vesting of executive powers in the State Office Building Commission, to which the law, then G.S. 1957 Supp. 75-3601, provided that "[o]nly members of the legislature shall be appointed," was unconstitutional and void for violating the constitutional separation of powers. The court pointed out the constitutional nature of the doctrine of separation of powers:

> "Under the state constitution, the only power granted by the people to the legislature in Article 2 is legislative power. The legislature

may exercise all legislative power possessed by the state, but can the legislature provide that its members may exercise executive or judicial power? If so, then under our constitution the legislature may change the government of this state to one which will conform to the government of the United Kingdom.

* * *

"There can be no question but that this court has always held that the legislature has all legislative power possessed by the state under our system of federal government. But defendants have failed to note that it is only legislative power which is conferred upon the legislature by the state constitution. There is no grant of executive power or of judicial power to the legislature. Those powers are granted to other departments of the state government by the state constitution, and the executive department and the judicial department represent the people of the state in the use of those powers just as the legislature does in its exercise of legislative power.

If the above propositions be true, and we earnestly believe them to be, the legislature of either the federal government or of the state of Kansas may not pass legislation conferring upon the legislature executive or judicial power.

* * *

Turning . . . to the state constitution, we find that the framers of that constitution understood perfectly that by a division of the powers granted to the different departments of government, they had created a government in which the well-known American system of separation of powers existed (Wyandotte Convention of 1859, p. 128 to 130, inclusive).

All of the decisions of this court including all of the opinions in State, ex rel., v. Kansas Turnpike Authority and State, ex rel., v. Fadely,

> both supra, have taken for granted that the rule of separation of powers between the three great departments of the state government was inherent in our constitution. Some of the other cases may be cited, although most of them were referred to in the opinions of the Turnpike and Fadely cases . . . . [Citations omitted.]" [Emphasis by the court.]

Article 15, § 1 of the Kansas Constitution states thus:

> "All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."

A similar provision is now found at Art. 2, § 18. The court pointed out that the constitutional principle of separation of powers limits the legislature in the exercise of this power, and likewise, and that these provisions did not, of themselves, authorize violation of that principle.

In State ex rel. Fatzer v. Kansas Turnpike Authority, 176 Kan. 683, 273 P.2d 198 (1954), the court considered an objection to a statutory provision requiring that two of seven members of the Authority be chairmen of certain legislative committees. The court stated thus:

> "While the legislature cannot interfere with nor exercise any powers properly belonging to the executive, it may engage in activities which may properly be regarded as incidental to and within the scope of its legislative duties, and it is not an encroachment on the executive for the legislature to create a commission and to designate its members to perform delegable legislative duties. . . . A power of appointment is not an exclusive function of the executive, nor has it ever been so considered . . . [I]f it were fully so this court would be without authority

> to appoint its own clerk and reporter."
> 176 Kan. at 695.

The question here, of course, does not concern members of the legislature serving upon statutory boards or commissions vested with substantially executive duties, although that is clearly not permissible under the State Office Building decision, if the board or commission is composed wholly of legislative members. The question here is whether a legislative body itself may constitutionally legislate unto itself the right to share in a clearly and inherently executive function, that of appointment of officers of the state, by reserving to itself the right to approve or disapprove of such appointments.

In State ex rel. Standish v. Boucher, 56 N.W. 142 (N.D. 1893), the court observed, although expressly not so holding, that such a sharing of executive power by the legislative branch was permissible, stating thus:

> "We do not think that all power to appoint to office resides with the governor of a state as an implied executive function in cases where the constitution is silent upon the question." 56 N.W. at 144.

As is clear from the foregoing, we have no such constitutional silence in the State of Kansas concerning the separation of powers. Similarly, the authority is clear that the approval of appointments by a legislative body is not, indeed, legislative business.

Misleading analogies have been drawn to provisions of the federal constitution. Article II, § 2 of the United States Constitution provides that the President

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consults, Judges of the Supreme Court, and all other Officers of the United States, whose

> Appointments are not herein otherwise provided for, and which shall be established by law."

In Barrett v. Duff, 114 Kan. 220 (1923), the court pointed out the difference between the federal and state constitutional provisions:

> "It is apparent that appointments are made in two entirely different ways. Under the constitution of the United States the president sends his nominations to the senate. If the senate consents the president then appoints. Except in article 7, referring to trustees of benevolent institutions, Kansas has no constitutional provision comparable to Article II, section 2 of the constitution of the United States." 114 Kan. at 225.

I cannot but conclude that save and except for members of the state board of regents, the legislature, or either branch thereof, has no constitutional voice in the approval of appointments vested by law in the executive branch. Thus, I conclude that any appointment which is duly made by yourself, as Governor, is effective at the time of execution thereof, and that no gubernatorial or other executive appointment which is duly and lawfully executed is subject to either validation or termination by subsequent action or inaction by the Senate.

Our discussion of the handling of executive appointments of several days ago was based upon the implicit assumption that senate approval or disapproval of certain executive appointments was a valid and lawful exercise of legislative power. Upon consideration of the entire question, however, I find that senatorial review of executive appointments is not a legislative function at all. In view of the decisions of the Kansas Supreme Court referred to above, as well as other authorities cited, it is necessary to conclude that such review is unnecessary to validate or invalidate a lawfully executed appointment.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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