



DEPARTMENT OF LAW  
OFFICE OF THE  
**Attorney General**  
STATE CAPITOL  
Phoenix, Arizona 85007

April 7, 1976

R 76-170

BRUCE E. BABBITT  
ATTORNEY GENERAL

76-106

Honorable Raul Castro  
Governor of Arizona  
West Wing, State Capitol  
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

My dear Governor Castro:

You have asked our advice whether your power to appoint members of the Board of Regents conferred by Article 11, Section 5, of the Arizona Constitution carries with it a requirement of Senate confirmation by the Arizona Senate, calling our attention to the provisions of A.R.S. § 15-721, which purport to require Senate confirmation of such appointments.\*

Article 11, Section 5, of the Arizona Constitution provides as follows:

The regents of the University, and the governing boards of other State educational institutions, shall be appointed by the Governor, except that the Governor shall be, ex-officio, a member of the board of regents of the University.

A review of other provisions of the Arizona Constitution indicates quite clearly that the Constitutional Convention distinguished in the text of the Constitution itself between gubernatorial appointments not specifying Senate confirmation (such as the provision here considered) and gubernatorial appointments specifically requiring Senate confirmation. For example, Article 22, Section 18, of the Constitution provided for the appointment of a State Examiner who "shall be appointed by the

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A.R.S. § 15-721.B provides in pertinent part that "Appointive members [of the board of regents] shall be appointed by the governor pursuant to § 38-211." A.R.S. § 38-211, in turn, provides in pertinent part that "When it is provided by law that a state officer shall be appointed pursuant to this section, the governor shall nominate and with the consent of the senate appoint such officer as prescribed in this section."



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Governor, by and with the advice and consent of the Senate, for a term of two years."\*\* Thus, the question posed is whether the gubernatorial right of appointment, in the context of a Constitution providing for appointments, both with and without confirmation, may be qualified by subsequent legislation requiring Senate confirmation.

Article 11, Section 5, is clearly self-executing, not by its terms requiring legislation to put the provision into effect. In Direct Sellers Association v. McBrayer, 109 Ariz. 3, 503 P.2d 951 (1973), the Supreme Court considered whether the self-executing referendum provisions of the Constitution could be legislatively qualified with a requirement that a circulator of referendum petitions be "a qualified elector of the State of Arizona." In upholding the statutory provision as a reasonable elaboration of the Constitutional referendum provisions, the Court stated the general rule thus:

We hold that the fact that a constitutional provision is self-executing does not forever bar legislation on the subject. If such legislation does not unreasonably hinder or restrict the constitutional provision and if the legislation reasonably supplements the constitutional purpose, then the legislation may stand.

Applying this rule, the Arizona Supreme Court has held that the Legislature cannot abolish a constitutional office or modify constitutional powers and functions of that office. Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362 (1953). Compare Shute v. Frohmler, 53 Ariz. 483, 90 P.2d 998 (1939). In another area, the Court has, in a series of decisions elaborating the Constitutional rate-making powers of the Corporation Commission, held that the Legislature cannot infringe upon such constitutionally granted powers. Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948); Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946).

Recently, the Arizona Supreme Court considered the applicability of the provisions of A.R.S. § 38-211 to an appointment to the State Board of Education, the Constitution, Article 11,

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The constitutional office of the State Examiner is no longer extant, having been abolished by the voters in the 1958 election.

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Section 3, specifically providing that such appointments be made "by the Governor with the consent of the Senate." In Harris v. Maehling, \_\_\_ Ariz. \_\_\_, 545 P.2d 47 (1976), Governor Williams nominated Harris to succeed himself as a member of the State Board of Education and forwarded the nomination to the Senate for confirmation. However, the Legislature adjourned sine die without the Senate having taken any formal action on the Harris nomination. Thereafter, Governor Williams purportedly confirmed the Harris appointment pursuant to A.R.S. § 38-211.B, which provides that if the Senate takes no formal action on a nomination during the session in which the nomination is submitted for confirmation, the Governor may appoint the nominee after the close of the session. Because Ariz. Const. Art 3, § 3, specifically required Senate confirmation, the Court held that A.R.S. § 38-211.B was not applicable. The Court said:

[T]he power of the legislature is plenary and unless the power is limited by express or inferential provisions of the Constitution, the legislature may enact any law which in its discretion it may desire. [Citation omitted.] The legislature may not enact a statute which is in conflict with a provision of the Arizona Constitution. In light of Ariz. Const. Art. 11, § 2, [sic] we must conclude that A.R.S. § 38-211 (B) does not apply to this office. Its application must be limited to offices wherein the method of appointment is not constitutionally provided. 545 P.2d at 48.

The question here posed, then, is whether the requirement of Senate confirmation is properly characterized as legislation reasonably supplementing a constitutional purpose or legislation that in fact limits or frustrates the Constitutional plan. The power of confirmation, which amounts to a legislative sharing of the executive power to appoint, is a well-known, historic part of the system of checks and balances adopted by the Federal Constitutional Convention and carried into state constitutions. Buckley v. Valeo, 44 Law Week 4127 (Jan. 30, 1976). The particular legislative check on executive power here considered would thus be a specific exception to the general constitutional principle of separation of legislative, executive, and judicial powers. That principle is explicitly set forth in Article III of the Arizona

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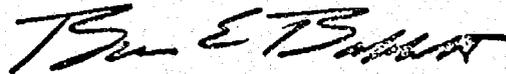
Constitution, which provides as follows:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

See Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969).

If such exceptions could be created at will by one branch, in this case the Legislative, the entire Constitutional plan of separation of powers, modified by constitutionally designated checks and balances, would be jeopardized. Accordingly, considering that the Constitutional Convention clearly distinguished between offices requiring Senate confirmation and those not requiring confirmation, considering the Separation of Powers mandate of Article III of the Constitution, and upon reviewing the decisions of the Arizona Supreme Court, we believe that A.R.S. § 38-211 cannot be read to require Senate confirmation of the Governor's appointments to the Board of Regents.

Sincerely,



Bruce E. Babbitt  
Attorney General

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