

December 2, 1993

The Honorable Roger Madsen
Idaho State Senate
7842 Desert Avenue
Boise, ID 83709

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Judicial Council Involvement in Selecting Judges

Dear Senator Madsen:

In your letter to this office, you asked two questions regarding the Judicial Council. First, you inquired whether the Idaho Judicial Council's involvement in selecting judicial candidates violates any Idaho constitutional provisions. You then asked a secondary question--whether there is a constitutional problem with the Chief Justice of the Idaho Supreme Court acting as the presiding member of the Judicial Council.

Upon review, this office concludes that there is no constitutional problem either with the Judicial Council's involvement in selecting judicial candidates or with the Chief Justice's role as the presiding member of the Judicial Council. This correspondence will address each of your questions in turn.

1. The Role of the Judicial Council

As background, a description of the Judicial Council's role in selecting judicial candidates may be useful. The Judicial Council is created by Idaho Code § 1-2101. It consists of "seven (7) permanent members, and one (1) adjunct member." *Id.* Of the seven members, there are "three (3) permanent attorney members, one (1) of whom . . . [is] a district judge" and "three (3) permanent non-attorney members." Idaho Code § 1-2101(1). The "seventh member and chairman of the judicial council" is the "chief justice of the Supreme Court." *Id.*

The Judicial Council has a number of duties, including conducting studies for the improvement of the administration of justice, making reports to the Idaho Supreme Court and legislature, and recommending the removal, discipline and retirement of judicial officers. Idaho Code § 1-2102. Most important, for the purposes of this analysis, when there is a "vacancy in the office of justice of the Supreme Court, judge of the court of appeals, or district judge," the Judicial Council must "submit to the governor the names

of not less than two (2) nor more than four (4) qualified persons," and the governor must make his appointment from this list. *Id.* Thus, while the governor does still retain the ultimate appointment power, when there is a vacancy in the office of justice of the Idaho Supreme Court, judge of the Idaho Court of Appeals, or district court judge, the governor's appointment power is, nevertheless, limited by Idaho Code § 1-2102's requirement that the governor select a candidate from the list provided by the council.

2. Governor's Appointment Power

You first ask whether this limit on the governor's appointment power over these judicial officers violates the Idaho Constitution. It is this office's opinion that it does not.

The governor's appointment power is found in art. 4, sec. 6, of the Idaho Constitution, which provides:

Governor to appoint officers.--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. If during the recess of the senate, a vacancy occurs in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of a justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, as provided by law, and the appointee shall hold his office until his successor shall be selected and qualified in such manner as may be provided by law.

Importantly, the appointment power given to the governor under art. 4, sec. 6, is not absolute. As a preliminary matter, the Idaho Supreme Court has held that if an office is not provided for by the constitution but is, instead, created by the legislature, the legislature, in the absence of a constitutional provision to the contrary, may provide the method for filling that office and may also limit the power of the chief executive in making those appointments. In *Ingard v. Barker*, 27 Idaho 124, 147 P. 293 (1915), for example, the supreme court reviewed a statute which provided that the State Horticulture Association should make non-binding recommendations to the governor for appointments to the State Board of Horticulture. Examining this scheme under the provision of art. 4, sec. 6, that "the governor . . . appoint all officers whose offices . . . may be created by law, and whose appointment or election is not otherwise provided for," the court upheld the statute, stating:

The framers of the constitution could not foresee what offices might be created by laws subsequently enacted and so they provided that such offices should be filled by the Governor unless the appointment or election should be otherwise provided for. The legislature, in enacting the statute in question, has exercised its constitutional right in naming and designating the officer or officers who shall make these particular appointments.

....

The power to create an office, unless otherwise provided by the constitution, is vested in the legislative department of the government. The method of filling the office is to be determined by the legislature in the absence of constitutional provisions.

27 Idaho at 130-31 (emphasis added). Thus, at a minimum, under art. 4, sec. 6, an office created by the legislature may also be filled, absent an express constitutional provision to the contrary, according to the legislature's directive.

Unlike the supreme court and district courts, the Idaho Court of Appeals is not created by the Idaho Constitution, but is, instead, established by statute. *See* Idaho Code § 1-2403. Consequently, unless there is an express constitutional provision to the contrary, the legislature has the power to determine how vacancies on the court of appeals are to be filled. The constitution does not speak to vacancies on the court of appeals and, therefore, the legislature does have the authority to determine how appointments to that court should be made. It has done so by providing for the Judicial Council's involvement in the appointment process. *See* Idaho Code §§ 1-2102(3) and 1-2404. According to supreme court precedent, this procedure does not violate the governor's appointment power under art. 4, sec. 6.

Unlike the court of appeals, the supreme court and district courts are constitutionally established. *See* art. 5, secs. 6 and 11, Idaho Constitution. Moreover, art. 4, sec. 6, expressly addresses vacancies on these courts, stating "[i]f the office of a justice of the supreme or district court . . . shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, as provided by law . . ." (Emphasis added.) It is the opinion of this office that this provision of art. 4, sec. 6, authorizes the legislature to limit the governor's appointment power over vacancies on the supreme and district courts. This the legislature has done by enacting the Judicial Council provisions of Idaho Code § 1-2102.

Art. 4, sec. 6, did not always allow the legislature to limit the governor's appointment authority over supreme and district court vacancies. As originally adopted, this constitutional provision stated that "[i]f the office of a justice of the supreme or district court . . . shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment" The phrase "as provided by law" was not included in the original provision.

This was a significant omission. In Budge v. Gifford, 26 Idaho 521, 144 P. 333 (1914), the Idaho Supreme Court reviewed a statute shortening the term limit for a supreme court justice appointed by the governor to fill a vacancy on the court. The court first noted that art. 5, sec. 19, of the Idaho Constitution stated that vacancies in judicial offices are to be "filled as provided by law." The court reasoned that if art. 5, sec. 19, were the only constitutional provision involved, the legislature would have "plenary power" to fill supreme court vacancies in any manner it chose. However, the court went on to hold that art. 4, sec. 6, was an absolute grant of appointment power to the governor over supreme and district court vacancies and was controlling of the issue. The court held that art. 4, sec. 6, was self-enacting and served to invalidate the term restriction statute:

Under that provision of the constitution, whenever a vacancy occurs in the office of the justice of the supreme court, it becomes the duty of the governor to fill the same by appointment. This is an absolute grant of appointive power to the governor by the constitution itself and does not depend upon legislative action or legislative sanction. That power given the governor is not limited or controlled in any manner by the provisions of said section 19 of art. 5. If that were so, the legislature might provide that when a vacancy occurs in the office of a justice of the supreme court, or any other office named in said section 6, such vacancy should be filled by special election or by the legislature or in any other manner than by appointment by the governor, and thus deprive him of that power, the exercise of which is not merely permitted but is made mandatory by the provisions of said section.

26 Idaho at 529 (emphasis added). Thus, the governor originally did have absolute appointment power over supreme and district court vacancies, and had the Judicial Council provisions of Idaho Code § 1-2102 been enacted when the original art. 4, sec. 6, was in effect, they probably would have been unconstitutional as to supreme and district court appointments.

However, art. 4, sec. 6, was amended in 1968, and the phrase "as provided by law" was added to the governor's appointment authority. This key language now allows the legislature to circumscribe the process by which appointments to supreme and district court vacancies shall occur. The legislature has done this by providing for Judicial Council participation and recommendations. This Judicial Council involvement does not violate the governor's appointment power under art. 4, sec. 6, as that power is no longer constitutionally absolute.

In short, the Judicial Council's involvement in the appointment process of supreme court justices and court of appeals and district court judges does not violate the governor's appointment power under the Idaho Constitution.

2. Separation of Powers

As a subsidiary question you have also asked whether it violates the separation of powers principles contained in art. 2, sec. 1, of the Idaho Constitution to have the Chief Justice of the Idaho Supreme Court acting as the presiding member on the Judicial Council. It is not surprising that you find this arrangement unusual. Certainly, when we consider our federal system, we could not imagine Chief Justice Rehnquist recommending to President Clinton who should serve on the United States Supreme Court. Moreover, separation of powers is always an important consideration, as the accumulation of all powers--legislative, executive and judiciary--in the same hands can easily lead to abuse and tyranny. For that reason, we have a separation of powers provision in the Idaho Constitution, art. 2, sec. 1, and the Idaho Supreme Court has always applied this constitutional protection carefully. *See, e.g., Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962).

Nevertheless, it is our opinion that the Chief Justice's position on the Judicial Council does not raise separation of powers concerns. Importantly, the Idaho Supreme Court has held that the appointment power does not properly belong to any one branch of government. In *Elliot v. McCrea*, 23 Idaho 524, 130 P. 785 (1913), the court upheld against a separation of powers attack a statute providing that a district judge should make appointments to the drainage commission. Later, in *Ingard v. Barker*, 27 Idaho at 131, the supreme court elaborated upon its *Elliot* holding, stating:

Primarily the rule is well settled by numerous authorities that in the absence of a constitutional provision to the contrary, any one of the three departments of government may, under the authority of the statute, appoint for any class of office in any of the three governmental departments.

Thus, in Idaho, while the appointment power may be vested in the executive branch, any of the three branches may exercise the appointment power if the legislature so provides and if there is no express constitutional provision to the contrary. Here, as noted, art. 4, sec. 6, of the Idaho Constitution allows the legislature, by statute, to circumscribe the appointment process over supreme court, court of appeals and district court vacancies. The legislature's decision to statutorily involve the Chief Justice of the Idaho Supreme Court in the appointment process is within the constitutional authority granted to it under art. 4, sec. 6, and violates no separation of powers principles.

3. Conclusion

Your letter correctly notes that Idaho's system for appointing judicial officers to fill vacancies is strikingly different from the federal system. More than anything, this appears to be an anomaly of history. The drafters of the Idaho Constitution seem to have envisioned a system whereby judicial officers would, for the most part, be elected. The reality is that most are initially appointed and are only rarely challenged at general elections. Along with this development is the 1968 amendment to art. 4, sec. 6, allowing the legislature to circumscribe the appointment procedure. Almost by default, because of the modern practice not to challenge judicial officers through election, the legislatively created Judicial Council has garnered significant influence and power through its statutory involvement in the appointment process. This system is constitutional. The process is largely controlled by the legislature and can also be changed by the legislature. The legislature, under art. 4, sec. 6, remains free to determine the process by which the governor shall fill vacancies on the supreme court, court of appeals and district courts.

Currently, the legislature has established a Judicial Council with the Chief Justice of the Idaho Supreme Court acting as the presiding member. This legislatively established system does not violate any Idaho constitutional provisions.

I hope this information is of assistance. Please let me know if you have further questions.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General