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NO. S-771

**OFFICERS:**

**Power to Appoint and Confirm  
Appointment after Act Becomes  
Law but Prior to Effective Date**

Honorable Frank M. Ozinga  
State Senator, 8th District  
First National Bank Building  
3101 W. 95th Street  
Evergreen Park, Illinois 60642

Dear Senator Ozinga:

I have your letter wherein you state:

"As chairman of the Senate Executive Committee  
I am compelled to ask your official opinion of  
the following question which has arisen in re-  
gard to confirmation of members of the new  
State Lottery Board which will become effective  
on July 1, 1974:

Can the Senate advise and consent to an appoint-  
ment by the Governor before the term of the  
appointee legally begins? Or stated another  
way, can members of the State Lottery Board be

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confirmed by the Senate prior to the Senate's June 30 adjournment even though the law creating their positions does not go into effect until July 1?"

The distinction between when an Act becomes law and its effective date has long been recognized in Illinois. (Board of Education v. Morgan, 316 Ill. 143.) The Illinois Lottery Law (Ill. Rev. Stat., 1973 Supp., ch. 120, par. 1151 et seq.) has become law but will not be effective until July 1, 1974. Section 6 of the Illinois Lottery Law (Ill. Rev. Stat., 1973 Supp., ch. 120, par. 1156) provides in pertinent part:

"§ 6. There is hereby created an independent board to be known as the Lottery Control Board, consisting of 5 members, all of whom shall be citizens of the United States and residents of this State and shall be appointed by the Governor with the advice and consent of the Senate. \* \* \*

Section 9(a) of article 5 of the Illinois Constitution of 1970 provides in pertinent part:

"(a) The governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for. \* \* \*

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The Constitutional Convention of 1970, in adopting the above provision, did not consider the question raised by your letter. III Record of Proceedings, 1320 - 1324; V Record of Proceedings, 3725, 3748.

However, the Illinois Supreme Court in People v. Inglis, 161 Ill. 256, did consider the question. In that case, an act was passed establishing a state college and providing for the appointment by the Governor, by and with the advice of the Senate, of not more than five trustees. On the same day that the act was passed by the General Assembly, it was approved by the Governor. Subsequent to the date on which the Act became law, but prior to the Act's effective date, the Governor appointed and the Senate confirmed five individuals as trustees. In upholding the validity of the appointments, the court said at pages 262, 263:

"Section 10, article 5, of the constitution, provides: 'The Governor shall nominate, and by and with the advice and consent of the Senate \* \* \* appoint, all officers whose offices are established by this constitution or which may be appointed by law and whose appointment or election is not otherwise provided for, and no such officer

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shall be appointed or elected by the General Assembly.' This confers the appointing power on the Governor, and when the office was created by the legislature by the passage of an act which received the approval of the executive, then the Governor was authorized to appoint the trustees, although the act did not take effect until the first day of July after its passage. The trustees, however, could do nothing to carry out the provisions of the act until the law took effect."

Since the Inglis case, there have been no Illinois cases dealing with the question of the validity of appointments under an act at a point in time subsequent to the act's becoming law but prior to its effective date. Consequently, the Inglis case is still controlling on this question.

In People ex rel. Ogilvie v. Lewis, 49 Ill. 2d 476, the Illinois Supreme Court considered the question of whether the legislature has the power to enact legislation to anticipate and be tested by an already ratified but not yet effective constitution even though the legislation may not have been valid if tested by the constitution in effect at the time of its passage. In that case, during the period between the date of ratification of the Illinois Constitution of 1970 and its effective date, the General Assembly passed the Transportation

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Bond Act. One day after the effective date of the new constitution, the Governor approved the Act, and it thereby became law. The Governor sought a writ of mandamus to compel the Secretary of State to sell transportation bonds pursuant to the Act. The respondent contended that the validity of the Transportation Bond Act must be determined by the Constitution of 1870 in effect at the time the Act was passed by the General Assembly and not by the Constitution of 1970 in effect at the time the Act became law. The Court held that the legislature had the power to enact the Transportation Bond Act in anticipation of the effectiveness of the 1970 Constitution and that the validity of the Act must be determined thereunder.

The reasons which the Court cited in support of its holding are relevant to your question. The Court stated at pages 483, 484:

"Practical considerations also indicate the desirability of anticipatory and implementing legislation in advance of the effective date of a new constitution. Such legislation is necessary in some cases to supplement new constitutional provisions which are not self-executing and in other cases to insure an orderly and efficient transition from the old to the new constitution and a continuity in the operation of government."

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The Court discussed a second reason at page 484:

"Accordingly, the General Assembly enacted the Transportation Bond Act to anticipate a particular enabling provision of the 1970 constitution which was certain to become effective on July 1, 1971. There is no justification in law or reason to require the General Assembly to wait until its next session to pass this legislation."

In regard to appointments under an act at a point in time subsequent to the act's becoming law but prior to its effective date, practical considerations likewise indicate the desirability of anticipatory appointments. Such appointments will tend to insure a more efficient commencement for the operations of the State Lottery Board. Moreover, there is no justification for requiring the General Assembly to wait until its next session to confirm the appointments to the State Lottery Board.

It should be noted that the Illinois rule as set forth in Inglis is in accord with the rule in other jurisdictions. State ex rel. Shirley v. Lutz, 226 Ala. 497, 147 So. 429; Pashman v. Friedbauer, 4 N.J. Super. 123, 66 A. 2d 568; State ex rel. Schara v. Holmes, 130 Mont. 108, 295 P. 2d 1045.

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Thus, in answer to your question, it is my opinion that the Senate can confirm an appointment to the State Lottery Board pursuant to the Illinois Lottery Law, supra, which has become law but which is not yet effective.

Very truly yours,

ATTORNEY GENERAL