affect the fact that such a religious exercise is repugnant to the First Amendment and that the primary purpose of the exercise is not "child benefit". Accordingly, we conclude that the Netcong resolution and the exercises implementing it are unconstitutional.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey
By: VIRGINIA LONG ANNICH
Deputy Attorney General

1. We have so been informed by the Superintendent of Schools of Netcong.
2. See Appendix A which contains, chronologically, twenty-three opening "remarks" by Chaplains from the Congressional Record for the month of October 1969. Although we have not been able to ascertain which volumes of the Congressional Record have been read by the student volunteers thus far, this appendix was compiled as an example of the type of material from which the readings are taken.

October 6, 1970

HONORABLE PAUL T. SHERWIN
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION 1970—NO. 1

Dear Secretary Sherwin:

You have requested our opinion as to when the terms of office of the various state officers appointed pursuant to the New Jersey Constitution begin to run. It is our conclusion that the terms of office of these officers begin as of the date of the commission issued by the Governor and that the issuance of a commission rests within the sole discretion of the Governor.

The New Jersey Constitution expressly states that terms of office commence as of the date of the commission:

> "The term of office of all officers elected or appointed pursuant to the provisions of this Constitution, except as herein otherwise provided, shall commence on the day of the date of their respective commissions; but no commission for any office shall bear date prior to the expiration of the term of the incumbent to said office." Art. VII, § 1, par. 5.

While this paragraph provides that the date of a commission may not antedate the expiration of the term of the incumbent, it does not otherwise specify what date a commission shall bear. To answer this question, therefore, it is necessary to consider

the function of a commission within the framework of the New Jersey Constitution.

The procedure for the appointment of officers and issuance of commissions is provided by Art. V, § 1, par. 12 of the Constitution:

> "... [The Governor] shall grant commissions to all officers elected or appointed pursuant to this Constitution. He shall nominate and appoint, with the advice and consent of the Senate, all officers for whose election or appointment provision is not otherwise made by this Constitution or by law."

The relationship between executive appointment and the issuance of commissions was set forth in the landmark case of *Marbury v. Madison,* 5 U.S. 137 (1803). Chief Justice Marshall, speaking for the Court, described the federal appointive process as consisting of three parts: nomination, confirmation and appointment. The actual power of appointment is in the hands of the President alone, who may, after his nominee has been confirmed by the Section, act upon this advice and appoint the nominee. The issuance of the commission is conclusive evidence of the appointment. Therefore, an officer's term does not begin when he is confirmed by the Senate because at the moment of confirmation, the officer has not yet been appointed:

> "Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission." 5 U.S. at 157.

While there is a minor difference in phraseology between the pertinent provisions of the United States and New Jersey Constitutions, a long line of cases decided since *Marbury v. Madison* have established that, irrespective of particular constitutional phraseology, the appointment of an officer is an independent executive act, evidenced by the commission, which must be performed subsequent to legislative confirmation to complete the appointive process. *E.g. United States v. Le Baron,* 60 U.S. 525 (1856); *Draper v. State,* 175 Ala. 547, 57 So. 772 (1911); *State ex rel. Coogan v. Barbour,* 53 Conn. 76, 22 A. 686 (1885); *Johnson v. Sampson,* 232 Ky. 648, 24 S.W. 2d 306 (1930); *People ex rel. Babcock v. Murray,* 70 N.Y. 521 (Ct. App. 1877); *Conger v. Gilmer,* 32 Cal. 75 (Sup. Ct. 1867). In *People ex rel. Babcock v. Murray, supra,* where a mayor had the power of appointing certain officers, the court said:

> "The act of signing the commission completes the appointment as well as perpetuates the evidence of it .... The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, 'evidenced by an unequivocal act.' " 70 N.Y. at 526-527.

And in *Conger v. Gilmer, supra,* the court said:

"Until the last act has been performed the whole matter is *in fieri*, and within the control of the person or persons by whom the appointment is to be made, and there is nothing to prevent them from changing their minds and appointing some other person other than the one first selected. Suppose the Governor should be called upon to fill a vacancy and should determine in his own mind to appoint a particular individual. Undoubtedly he may change his mind as often as he may please until he has finally signed a commission to some particular individual. Until then he has not acted." 32 Cal. at 79.

The case of *Harrington v. Pardee*, 1 Cal. App. 278, 82 P. 83 (1905) is particularly instructive concerning the nature of such an appointive process. The Governor of California nominated the plaintiff to an office and sent the nomination to the state senate, which confirmed it. The Governor failed to issue a commission before he left office and, when his successor refused to issue one, a mandamus proceeding was brought. It was urged that the statute under which the plaintiff's name had been submitted to the legislature drew no distinction between "nomination" and "appointment", merely stating that the officer be "appointed by the Governor with the advice and consent of the senate," and that the appointment was therefore completed when the name was submitted to the legislature. Nevertheless, the court found that a three-part appointive procedure had been intended:

"In all such appointments the first step to be taken is the suggestion by the Governor to the Senate of the name of a person for the office, and to ask the advice of the Senate, and for its consent for him to appoint such person; the second step is the advice and consent of the Senate, which is manifested by a resolution certified to the Governor and to the Secretary of State; and the third and last step is the issuing of the commission signed by the Governor, and this is the evidence of such appointment.

"Plaintiff contends that 'nominate' and 'appoint' are synonymous terms and mean the same thing, and that therefore, when the Governor has nominated, he has appointed. Doubtless there are some instances where these terms may be used to mean one and the same thing, but by no process of reasoning can it be true that in 'nominating' to the Senate the Governor is 'appointing' the person to the office, because he cannot appoint without the advice and consent of the Senate. The 'appointment' is not made until the 'commission' is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive, and not a ministerial, act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment." *Harrington v. Pardee, supra,* at 279-280.

Compare *State v. Governor*, 25 N.J.L. 331 (Sup. Ct. 1856) which involved the issuance of a commission to an elected officer.

We have been advised that some commissions have been dated as of the day the officer takes his oath and it has been suggested that all commission should be automatically dated as of that date. It is well established, however, that the oath required by the New Jersey Constitution (Art. VII, § 1, par. 1) simply "qualifies" any state

officer appointed pursuant to the Constitution to enter upon the execution of his duties. In *Haight v. Love,* 39 N.J.L. 14 (Sup. Ct. 1876) *aff'd* 39 N.J.L. 476 (E.&A. 1877), the Court of Errors and Appeals, in determining that the term of office of an appointed municipal tax collector began on the date of appointment and not the date of taking the oath, stated as follows:

> "It is apparent that if [the term in question] did not begin to run until he was qualified, he could, in the absence of any restraining legislation, have prolonged his prior term indefinitely by his own failure to qualify. Public policy would forbid the adoption of a rule under which such a result is possible. *It would make the beginning of an official term to depend upon the will of the appointee, instead of the will of the appointing power. . . .*" 39 N.J.L. at 478 (Emphasis added).

Although there is therefore no basis for automatically dating commissions as of the day on which an officer takes his oath, it should be emphasized that the Governor, in his discretion, may grant a commission at any time between confirmation and the administration of the oath, even on the same day as the oath itself.

We have also been advised that some commissions bear the date of confirmation of the officer and it has been suggested that commissions might automatically bear this date. It is our opinion that it is appropriate to grant a commission on the date of confirmation only if the Governor, in his discretion, decides to make the appointment on that date and thereupon grants the commission. Otherwise, if a commission were automatically issued immediately upon confirmation, this would place the final power of appointment in the senate, contrary to the provisions of the New Jersey Constitution which confer upon the Governor the power to make appointments and to grant commissions.

Therefore, it is our opinion that the term of office of state officers appointed pursuant to the constitution commence as of the date of the commission issued by the Governor, and that the commission may bear whatever date the Governor selects from the date of confirmation to the date on which the oath is taken, provided it is not prior to the expiration of the term of the incumbent to the office.

We further advise you that in determining the date of termination of any particular term of office, you should refer to the specific constitutional or statutory provisions which govern that office. Where the applicable constitutional or statutory language indicates that an appointment shall be made to fill an unexpired term or provides a specific date of termination of a term of office, the appointment shall be only for the period thus indicated. In all other situations, the date of termination of a term of office may be determined by the length of the term provided by law, commencing on the date of the commission issued by the Governor.

Very truly yours,

GEORGE F. KUGLER, JR.
Attorney General