

# MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04330  
March 26, 1975

Senator Phillip L. Merrill  
Senate Chamber  
Augusta, Maine 04330

Dear Senator Merrill:

This is in response to your request for the opinion of this office on the constitutionality of a legislative proposal by which the functions of the present Legislative Ethics Committee would be transferred to a commission, independent of the Legislature and appointed in a manner that would insure its freedom from extraneous influence. In addition to the duties presently assigned the Legislative Ethics Committee, you contemplate that the commission might be empowered to conduct adjudicative hearings on alleged conflicts of interest and other breaches of legislatively prescribed ethical standards, determine the truth of the charges, and either assess penalties ranging from censure to expulsion, or report its findings to the Legislature for action.

I conclude that such a commission could be authorized to investigate the conduct of legislators and report its findings to the House or Senate, as the case might be, but could not constitutionally be given the power to impose a penalty. The power to judge the qualifications of members of the Legislature and to discipline or expel them belongs solely to the House in which those members sit. Two years ago, in Lund ex rel. Wilbur v. Pratt 308 A2d 554 (Me., 1973), the Law Court held that this power is exclusive and plenary and continues throughout a legislative session. Power to make the ultimate decision may not be delegated to any other body. Thus, the Lund opinion relied upon and quoted an 1878 opinion of the Supreme Court of Kansas holding that the power to expel a legislator may not be transferred to any other tribunal or officer. The Kansas Court was confident that the Legislature might delegate the task of investigating and reporting findings to a committee of the Legislature, and possibly to a person or commission outside the Legislature, but only so long as the decision whether to discipline and the choice of disciplinary measures were retained by the Legislature itself.

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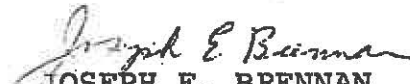
Federal authorities reach the same conclusion, e.g. Barry v. U.S. ex rel. Cunningham, 279 U.S. 597. It is likewise clear from the Law Court's Opinion, and Sections 3 and 4 of Article IV, Part 3, of the Maine Constitution, that each House of the Legislature exercises its power independently.

I think it follows from these principals that the Houses of the Legislature, acting together, may create an independent commission empowered to render advisory opinions interpreting statutory standards of ethical conduct, investigate allegations of breaches of these standards, and report its findings to the House having power to act against any member concerned. It is equally clear, however, that no such advisory opinions or findings would be binding on either House of the Legislature in determining whether or not to discipline one of its members.

The manner of appointment of the commission involves somewhat different but related considerations. It would seem that the power of appointment cannot be assigned to any member of the Judicial branch of government without violating the doctrine of separation of powers as interpreted by the Maine courts. Nor may any present member of the Supreme Judicial Court or Superior Court sit on the commission, including active retired justices, since they remain members of the Court while in that status. See Curtis v. Cornish 109 Me. 384 (1912). I think the power of the Legislature to use the assistance of agents is such that a commission appointed entirely or partially by the Governor might constitutionally perform the functions described above, but the doctrine of separation of powers would, in my opinion, preclude requiring the Governor to make these appointments by statute. He may not be compelled to participate in discharging the Legislature's duty of self-discipline, one of its most intimate functions, any more than he may judge the validity of ballots cast for members of the Legislature. Opinion of the Justices, 143 Me. 417 (1952).

I trust this answers the questions you raised; if not, please advise me.

Yours very truly,

  
JOSEPH E. BRENNAN  
Attorney General

JEB/sr