

MAINE STATE LEGISLATURE

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September 10, 1975

The Honorable Rodney S. Quinn
House of Representatives
State House
Augusta, Maine

Dear Rod:

This is a reply to your letter of August 19, 1975, inquiring whether it would be constitutional for the Legislature to appropriate contingency funds to the Legislative Council, giving the Council authority to approve or disapprove the Executive Department's expenditure of the funds as the Council sees fit. The answer is No.

Since the power under 5 M.R.S.A. § 1507 to allocate moneys from the contingent account in accordance with the limitations stated therein, is clearly one belonging to the Executive Department, its provisions may not be legally amended by substituting the Legislative Council in the place of the Executive Council. This violates M.R.S.A. Const. Art. III, § 2.

Under such proposal the Legislative Council would be given authority to expend the funds as they see fit and for non-legislative purposes.

The rule is stated as follows:

"It is a fundamental principle of American governmental system that the legislature cannot usurp the powers of the executive department by exercising functions of the latter . . . Thus, a state legislature may not confer purely executive power on a committee of its own members." 16 Am. Jur. 2d § 231, P. 481.

As was said by Pound, J., in People v. Tremaine, (New York 1929) 168 N.E. 817, where the court had before it the constitutionality of a lump sum appropriations enactment which conferred power on the committee chairmen of the finance and the ways and means committees of the Legislature to participate with the Governor in approving the segregation of the appropriations:

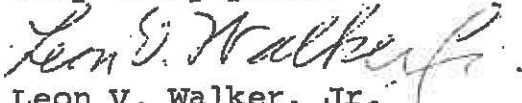
"....This is a clear and conspicuous instance of an attempt by the Legislature to confer administrative power upon two of its members. It may not engraft executive duties upon a legislative office and thus usurp the executive power by indirection."

In State v. Fadely (Kans. 1957), 308 P.2d 537, citing Tremaine, it was held that legislative power is the authority to make laws but not to enforce them. The court said:

"The latter are executive functions. The legislature may not do indirectly what it cannot do directly. It cannot create executive offices and appoint its members to such offices." See Opinion of Justices (Mass.) 19 N.E. 2d 807, 1939.

For the Legislature to appropriate the money to the Legislative Council for expenditure as they see fit infringes on the Executive Department in that by conferring that power, it in effect is appointing the Legislative Council to an office with non-legislative powers. This power of appointment is inherent in the Executive Department, and cannot under Const. Art. III, § 2, be exercised by either of the other departments. See Curtis v. Cornish, 109 Me. 384, holding that under this Article of the Constitution, the Chief Justice cannot appoint a judge of an inferior court.

Very truly yours,


Leon V. Walker, Jr.
Assistant Attorney General

LWVJr/mf