Legislature: Control of Appointments
Separation of Powers
Appointment Authority

5 MRSA § 6002 et seq
Me. Const. Art 3
Me. Const. Art 5 Pt 1 Sec. 8

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Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine 04333

Re: Maine-Canadian Exchange Advisory Commission

Dear Governor Longley:

We are responding to the memorandum from your office which requested our opinion on questions relating to the Maine-Canadian Exchange Advisory Commission. That Commission and the Maine-Canadian Exchange Office are established by 5 M.R.S.A. Chapter 351, as enacted by P.L. 1975, Chapter 485 and amended by P.L. 1977, Chapter 579, Section J. Your questions are:

"1. May members of the Legislature serve on the Maine-Canadian Exchange Advisory Commission?

"2. Can the Legislature make appointments whether of Legislators or other persons, either directly or indirectly, to the Maine-Canadian Exchange Advisory Commission or to the position of director of the Maine Canadian Exchange Office?

The answer to both of your questions is negative for the reasons stated below. To be more specific, these provisions are not consistent with the separation of powers doctrine, Maine Constitution, Article III, and the appointments clause, Maine Constitution, Article V, Part First, Section 8. We will discuss first, the statutory provisions relating to the Commission, and, second, the law which is applicable.

Title 5 M.R.S.A. § 6002 states the general legislative policy and purpose of pursuing common goals and strengthening relations between Maine and its neighboring Canadian provinces. The last

985

sentence of that section reads, "The Legislature further declares that the multiplicity and complexity of such relations calls for direction and coordination by the Executive Department." (emphasis provided) A Maine-Canadian Exchange Office is created with a Director who is given the general powers and duties of studying, evaluating, and strengthening cooperation and exchanges between Maine and the Canadian provinces. Among these duties is that of administering funds which may be available for the purpose of pursuing this goal. 5 M.R.S.A. § 6005(6). The duties of the Commission are to "advise" and "assist" the Director in carrying out his powers and duties. 5 M.R.S.A. § 6008. The Commission is also charged with appointing the Director and fixing his salary. 5 M.R.S.A. § 6004. The Commission is to have 9 members, 3 of which are to be appointed by the Governor, 3 by the President of the Senate and 3 by the Speaker of the House. It is this appointment power for the President of the Senate and the Speaker of the House, together with the appointment authority of the Commission and the possibility raised in your question that members appointed to the Commission could be members of the Legislature, which raise constitutional problems.

Those provisions of the Constitution of Maine which are pertinent to this examination read as follows:

> "The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial." Article III, Section 1.
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> "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Article III, Section 2.
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> "He (the Governor) shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers except judges or probate and justices of the peace, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for." Article V, Part 1, Section 8.

These constitutional provisions will be considered together for purposes of this opinion. It has been decided in Maine that "The Legislature may create offices and provide for the manner of appointment, tenure, and the like, subject only to the restraint of the Constitution." Ross v. Hanson, 227 A.2d 606, 611 (Me., 1967). However, neither this decision nor the ". . . shall not

by law be otherwise provided for." language of Article V, Part First, Section 8, should be interpreted to grant the Legislature authority to make appointments of officers performing executive functions. Opinion of the Attorney General dated June 30, 1977; Opinion of the Justices, 72 Me. 542 (1881). Indeed, as noted in the June 30, 1977, opinion of this office, the Supreme Judicial Court has found a law authorizing judges to make appointments to inferior or special courts to be in violation of both the separation of powers clause and the appointments clause. Curtis v. Cornish, 109 Me. 384 (1912). On the other hand, it is also clear that some legislative appointments and some legislative functions which go beyond the limited legislative process are constitutionally permissible. Cf. Buckley v. Valeo, 424 U.S. 1, 138 (1976). In order to seek the bounds of these constitutionally permissible functions, it is necessary to examine decisions on this question made in other jurisdictions.

The United States Supreme Court has dealt with this question several times, most recently in the case of Buckley v. Valeo, supra. The Buckley case concerned a challenge to the constitutionality of the Federal Election Campaign Act of 1971 and the Federal Election Commission created thereunder. Part of the challenge concerned the Commission's powers, which the Court divided into three categories: (1) investigation and information gathering functions for legislative purposes, (2) rulemaking and compliance activities, and (3) administrative hearings and litigation. The Court concluded the first of these categories was a permissible power of the Commission, more than half of whose members are appointed by the President of the Senate and the Speaker of the House, because these functions are ones which the Congress could delegate to one of its own committees in furtherance of its legislative activities. But the Court continued its opinion by stating that the wide-ranging rulemaking and enforcement powers of the Commission are powers ". . . that cannot possibly be regarded as merely an aid of the legislative function of Congress." 424 U.S. 1, at 138. Therefore, the Court concluded that these functions could not constitutionally be performed by persons who are not "Officers of the United States," i.e., members appointed by the President. In reaching its decision, the Court also commented at length on the importance of the fundamental principle of separation of powers as it applies to the appointments clause. The conclusion was that this constitutional provision was also violated by the manner in which the Commission was composed, i.e., of appointees of both the officers of the legislative houses and the chief executive.1/

1/ For a similar examination of an election commission at the state level see: Guidry v. Roberts, 331 S.2d 44 (La., 1976).

The decision in the Buckley case is based upon a number of previous federal cases in which the doctrine of separation of powers and the appointments clause have been strictly construed. Of these, perhaps the most important are Springer v. Philippine Islands, 277 U.S. 189 (1928), and Myers v. United States, 272 U.S. 52 (1926), in which Mr. Chief Justice Taft gave extensive treatment to the history of the separation of powers clause as it applies to appointments and removals from office. [See also: Municipality of St. Thomas and St. John v. Gordon, 78 F. Supp. 44 (D.C. Virgin Islands, 1948)]. The holdings of these two cases may be summarized by the following quotations from the Springer opinion:

> "Legislative power, as distinguished from executive, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."
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> "Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive."

This question has also been the focus of numerous judicial decisions on the state level. It has been recognized that the separation of powers doctrine does not prevent legislative inquiry into the method which is being used by executive agencies to enforce legislation. NAACP v. Committee on Offenses, 101 S.E.2d 631 (Va., 1958). Also, the Legislature may constitutionally create a position of "post auditor," with appointment to that position by legislative leadership when the duties of that position were primarily to inform the Legislature and guide that body in preparing legislation and appropriations. Lockwood v. Jordan, 231 P.2d 428 (Ariz., 1951). The same result was reached with regard to appointment of a law and legislative reference librarian by the Legislature where the primary function of the position is legislative assistance. Dunbar v. Cronin, 164 P. 477 (Ariz., 1917). And generally, a legislature may engage in non-legislative functions only to the extent that such functions are incidental to the full and effective exercise of its legislative powers. Ashmore v. Greater Greenville Sewer District, 44 S.E.2d 88 (So. Car., 1947).

In other state cases, an act creating a "congress center authority" which provided that 6 of its 20 members were to be from the General Assembly was held unconstitutional since the Legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and retain some control over implementation by appointing legislators to this governmental body. Greer v. State, 212 S.E.2d 836 (Ga., 1975). The same result has been reached with regard to a state office building commission which would be made up of members of both the executive and legislative branches, noting that the separation of powers doctrine must be strictly enforced and that legislators may not perform duties which are administrative or executive in nature. State v. Bailey, 150 S.E.2d 449 (W. Va., 1966). See also: Book v. State Office Building Commission, 149 N.E.2d 273 (Ind., 1958). A particularly pertinent judicial statement on this question was made by the Justices of the Massachusetts Supreme Judicial Court in advising the General Court on legislation which would create a special recess commission to approve the Governor's expenditure of non-appropriated funds for emergency purposes. One version of the legislation would have the President of the Senate and the Speaker of the House make appointments to this special recess commission. The Court stated that the power to appoint officers is in its very nature an executive power, and that the authority to appoint members of a commission which performs an executive function is itself an executive power. The Court concluded that legislation which allowed such appointments by legislative leadership would be unconstitutional. In Re Opinion of the Justices, 19 N.E.2d 807 (Mass., 1939).

It should be noted that decisions in at least two jurisdictions have departed somewhat from what appears to be the majority position with regard to separation of powers and legislative encroachment upon an executive function. At least one decision in California has indicated that the separation of powers doctrine does not require classification of incidental governmental duties, and functions which are normally associated with one branch may be properly executed by appointees of another branch. Parker v. Riley, 113 P.2d 873 (Cal., 1941). Another enlightening series of cases has resulted from a Kansas statute which establishes a state emergency fund and a state finance council to administer the fund. The council is composed of the Governor, Lieutenant Governor, President of the Senate, Speaker of the House, and other legislative leaders. These statutory provisions were held constitutional in one case with very limited discussion, but with a very strong dissent based upon the principles set forth in Springer v. Philippine Islands, supra; Anderson v. Fadley, 308 P.2d 537 (Kan., 1957). Later, this same question was considered again with an extended treatment of the two different

approaches to the separation of powers problem which have been used in Kansas. State ex rel. Schneider v. Bennett, 547 P.2d 786 (Kan., 1976). In the Schneider decision, the Court said that a modified doctrine is required in modern times in recognition of the fact that there is no pure separation of powers except in political theory. The Court stated that a strict application of the doctrine is inappropriate in complex state government today, where administrative agencies often blend the functions of all three branches of government. It was felt that some flexibility was needed in order to experiment with governmental forms. However, even in this case the Court said that the power of the joint state finance council to supervise operations of the department of administration were essentially executive and therefore unconstitutional, while the power to authorize expenditures from the emergency fund was a cooperative exercise and therefore presented no constitutional problem. While the approach of the California and Kansas courts in these cases is interesting, and may reflect the practical realities existing in state government today, they are decidely a minority position and presumably would not be adopted in Maine if the question is further litigated.

To conclude this opinion, it is necessary to examine the Maine-Canadian Exchange Advisory Commission and its membership and functions in light of the bounds of the separation of powers doctrine examined above. It is quite clear from the concluding sentence of 5 M.R.S.A. § 6002 previously quoted, that the Legislature intended efforts toward further cooperation with the Canadian provinces should be a function of the Executive Department. Furthermore, the duties and powers of the Exchange Office are typically executive in nature, particularly the administration of funds to assist in development of improved relations between Maine and Canada. Since the Maine-Canadian Exchange Advisory Commission appoints the Director, which is an executive function in itself, and advises and assists the Director in carrying out his executive functions, it is clear that the functions of the Commission are also executive in nature. If the duties of the Commission were limited to investigating and providing information for the Legislature in furtherance of its legislative function, the result might be different. But in light of the executive functions of the Commission, including its authority to appoint the Director, it is our opinion that it is essentially executive in nature and members of the Legislature may not constitutionally serve on the Commission. For this same reason, appointment of Commission members by the President of the Senate and the Speaker of the House of Representatives would also be contrary to the separation of powers provisions of Article III and the appointments clause provisions of Article V, Part First, Section 8 of the Maine Constitution.

Very truly yours,

Joseph E Brennan

JOSEPH E. BRENNAN
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