

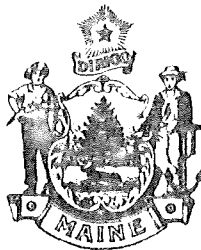
# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

JAMES E. TIERNEY  
ATTORNEY GENERAL



STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

May 19, 1981

Honorable Dana C. Devoe  
Maine State Senate  
State House  
Augusta, Maine 04333

Dear Senator Devoe:

This will respond to your letter of May 8, 1981 in which you raise a series of questions concerning the authority of the Legislative, Executive and Judicial Departments of Government to exercise disciplinary power over members of the Judiciary. Since you have specifically requested a prompt response to your inquiries, our answers to them will be rather conclusory in nature.

QUESTION NO. 1

"What power, if any, does the Legislature have to discipline judges aside from those enumerated in art. IX, §5 of the Maine Constitution?"

It is our opinion that the Legislature has no constitutional authority to discipline a judge except to the extent of removing him from office by impeachment or by recommending his removal by the Governor upon the address of both Houses of the Legislature.

Pursuant to art. VI, §4 of the Constitution of Maine,

"[a]ll judicial officers shall hold their offices for the term of seven years from the time of their respective appointments (unless sooner removed by impeachment or by address of both branches of the Legislature to the executive ...)."

See also Me. Const., art. IX, §5 ("...every person holding any office, may be removed by the Governor on the address of both branches of the Legislature..."). The Constitution confers upon the House of Representatives "the sole power of impeachment," (Me. Const., art. IV, pt. 1, §8), while the Senate possesses

"the sole power to try all impeachments...." Me. Const., art. IV, pt. 2, §7). The Governor has no authority to remove a judicial officer except "on the address of both branches of the Legislature." Me. Const., art. IX, §5. See also State v. Harmon, 98 A.804, 115 Me. 268, 271 (1916). In view of the foregoing, "[i]t is...apparent that, pursuant to our Constitution, the ...removal of judges is committed to the political departments of the government...." In Re Ross, Me., A.2d slip op. at 19 (Supreme Judicial Court, Opinion Issued April 23, 1981).

The fact that the power to remove a judge has been granted, by the Constitution, to the Legislative and Executive Departments of Government does not necessarily mean that those Departments possess the additional power to take disciplinary action against a judge short of removal from office. With the exception of removal from office by impeachment or address, the Constitution does not contain an express grant of authority to any branch of government to otherwise discipline judges. Consequently, we must determine whether an inherent or implied power to discipline judges for misconduct resides in any of the departments of government.

Each department of government possesses implied or inherent powers which arise by virtue of the fact that each is "severally supreme within [its] legitimate and appropriate sphere of action." Ex Parte Davis, 41 Me. 28, 53 (1856). As explained by the Law Court in Board of Overseers of the Bar v. Lee, Me., 422 A.2d 998, 1002 (1980):

"It is a fundamental principle of constitutional law that each department in our tri-partite scheme has, without any express grant, the inherent right to accomplish all objects necessarily within the orbit of that department when not expressly allocated to, or limited by the existence of a similar power in, one of the other departments."

Pursuant to Article VI, §1 of the Maine Constitution, the judicial power of the State of Maine is "vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." Our Law Court has recently held that, as the only constitutionally created court, "it is incumbent upon the Supreme Judicial Court to exercise that part of the judicial power involved in prescribing the conduct of judges and imposing discipline upon them for misconduct....[T]he power of the Supreme Judicial Court to discipline judges for misconduct finds its source in the Constitution's grant of judicial power to the Court...." In Re Ross, supra at 19, 20.<sup>1</sup> That the authority to discipline

---

1. The Supreme Judicial Court recognized that its disciplinary power over judges does not extend to the removal of a judge from office. In Re Ross, supra at 20. The Court declined to determine whether its inherent disciplinary power over judges includes the power to impose a suspension without pay. Id. at 21. See also Me.Const., art., VI, §2.

judges is an inherent power of the Judicial Branch of government, absent a constitutional provision to the contrary, has been widely recognized in other jurisdictions. See, e.g., In Re Mussman, 112 N.H. 99, 101-02, 289 A.2d 403, 404-05 (1972); In Re De Saulnier, 360 Mass. 787, 807-09, 279 N.E. 2d 296, 307-08 (1971). See generally, Annotation, Power of Court to Remove or Suspend Judge, 53 A.L.R. 3d 882 (1973) (and cases cited therein). We conclude, therefore, that the Supreme Judicial Court possesses the inherent judicial power to take disciplinary action against a judge for misconduct.

Having concluded that the Supreme Judicial Court possesses inherent power to discipline a judge for misconduct, we must now consider whether the existence of this power in the Court precludes the exercise of a similar power by the Legislature. To resolve this issue, we must examine the doctrine of the separation of powers, which has been explicitly embodied in Article III, §§ 1 and 2 of the Maine Constitution.

"Section 1. The power of the government shall be divided into three distinct departments, the legislative, executive and judicial.

Section 2. 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."

While the separation of powers doctrine does not require "three airtight departments of government" (Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977)), it does operate "to prohibit one branch of government from unduly impeding the operation of a coordinate branch of government." Duplantier v. United States, 606 F.2d 654, 667 (5th Cir. 1979). As an integral part of our constitutional system of checks and balances, the separation of powers doctrine seeks to preserve the independence of each branch of government and to protect each from undue interference by the others.

With respect to the power to discipline judges for misconduct, we believe that the Supreme Judicial Court must be able to exercise its inherent power without intrusion by the other departments of government. In our view, the inherent power of the Supreme Judicial Court to discipline members of the Judiciary is essential to the functioning of the Court as an independent and co-equal department of government. It seems self-evident to us that the ability of the Judicial Department to operate effectively, and thereby fulfill its constitutional mandate to exercise the "judicial power" of the State, would be largely frustrated if its members were subject to discipline by the Legislature. Moreover, to conclude that the Legislature may exercise disciplinary power over judges, other than the ultimate power of removal from office, would, in our view, seriously threaten the independence of the Judiciary, which is "peculiarly essential in a limited constitution." Ex Parte Davis, 41 Me. at 51 quoting Federalist No. 78. Accordingly, it is our opinion that the power to discipline judges for misconduct

is one "properly belonging" to the Judicial Department of government and cannot constitutionally be exercised by either of the other two departments, except as expressly directed or permitted by the Constitution, such as in the case of removal from office. See Me. Const., art. III, §2.

QUESTION NO. 2

"Does Maine Constitution Article III, Section 2, the Separation of Powers Article, preclude the Legislative or Executive Branches of government from exercising disciplinary powers over the Judicial Branch which are not specifically granted to the Legislative or Executive Branches by the Maine Constitution?"

For the reasons stated in response to your first question, we answer your second question in the affirmative.

QUESTION NO. 3

"Does the existence of impeachment and removal by address powers granted by the Maine Constitution, Article IX, Section 5 grant by implication other disciplinary powers over judges to the Legislative or Executive Branches of government?"

For the reasons stated in response to your first question, we answer your third question in the negative.<sup>2</sup>

QUESTION NO. 4

"May the Legislature expand or limit the powers of any branch of government to discipline judges beyond those specifically granted to those branches by the Maine Constitution?"

As noted earlier, the power to remove a judge by impeachment has been committed, by the Constitution, to the Legislative Department of government. Similarly, the power to remove a judge by address resides in the Governor who may act only upon the address of both branches of the Legislature. Finally, the authority to otherwise

---

2. It is interesting to note that there is some authority for the proposition that the power to remove a judge from office carries with it the authority to suspend a judge from office during the pendency of a removal proceeding. See Martin v. Dodge County, 146 Minn. 129, 178 N.W. 167 (1920); Maben v. Rosser, 24 Okla. 588, 103 P.674 (1909); Griner v. Thomas, 101 Tex. 36, 104 S.W. 1058 (1907). See generally Judges, 46 Am.Jur.2d §20 at 108 (1969). We emphasize, however, that this suspension power is not viewed as disciplinary in nature, but rather as incidental to an ongoing

discipline a judge is part of the inherent power of the Judicial Department. Consequently, we do not believe that the Legislature may statutorily "expand or limit" these constitutional powers of the three "great" Departments of government. Board of Overseers of the Bar v. Lee, 422 A.2d at 1002. We wish to emphasize, however, that we do not mean to imply that the Legislature may not enact legislation recognizing and implementing these constitutional powers. See In Re Ross, slip op. at 19-20; Board of Overseers of the Bar v. Lee, Me., 422 A.2d at 1002-03; Application of Feingold, Me., 296 A.2d 492, 496 (1972).

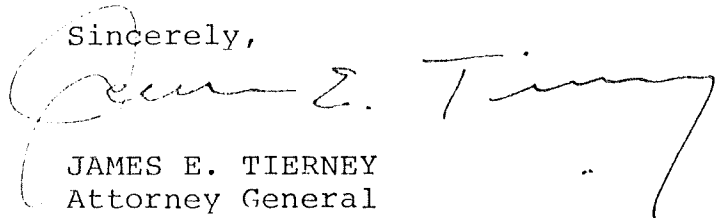
QUESTION NO. 5

"Does the Supreme Judicial Court have the inherent power as a separate but co-equal branch of government to discipline its own members and the power to create its own judicial disciplinary agency to assist it in exercising that power?"

For the reasons stated in response to your first question, we believe that the Supreme Judicial Court does have inherent power to discipline judges, but that such inherent power does not extend to the removal of judges from office. See In Re Ross, supra at 19-20. We also believe that in order to implement this inherent power, and as incidental thereto, the Supreme Judicial Court has the authority to create its own judicial disciplinary agency.

I hope this information is helpful to you. Please<sup>3</sup> feel free to call upon me if I can be of further assistance.

Sincerely,



JAMES E. TIERNEY  
Attorney General

JET:sm

---

removal action. Since the question has not been raised in your letter of May 8, 1981, we intimate no opinion as to whether the Legislature possesses such a suspension power under the Maine Constitution.

3. You have orally advised us that you wish to withdraw the sixth question contained in your letter of May 8, 1981.