

# MAINE STATE LEGISLATURE

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JAMES E. TIERNEY  
ATTORNEY GENERAL



86-4

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

January 27, 1986

Honorable John N. Diamond  
Chairman, Legislative Council  
State House Station #2  
Augusta, Maine 04333

Honorable Judith C. Foss  
Maine House of Representatives  
State House Station #2  
Augusta, Maine 04333

Dear Representative Diamond and Representative Foss:

You have jointly inquired with this Department, on behalf of the Legislative Council and as sponsor of the proposed legislation in question, respectively, whether it would violate Article VI, Section 2 of the Maine Constitution for the Legislature to pass a bill directing Mr. Earl J. Wahl, a former member of the Maine District Court, to repay to the State the compensation which he received as a judge of that Court during the period when he was suspended therefrom because he was under indictment on federal criminal charges. For the reasons which follow, it is the Opinion of this Department that such legislation would be unconstitutional.

Mr. Wahl assumed office as a judge of the Maine District Court on April 6, 1982. In December of 1984, he was indicted in the United States District Court for the District of Maine on various criminal charges relating to the payment of his federal income taxes. Shortly thereafter, he was suspended with pay by the Supreme Judicial Court of Maine from his position as District Court Judge, pursuant to that Court's constitutional and statutory powers to prescribe the conduct of

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judges of all Maine courts. Me.Const. art. VI, § 1; 4 M.R.S.A. §§ 1, 7, 9-B. In January, 1986, Mr. Wahl was convicted of the federal criminal charges, and on January 17, 1986, he resigned his office as District Court Judge. Consequently, for a period of approximately thirteen months, Mr. Wahl received the compensation provided by statute for the position of District Court Judge, although he discharged no judicial functions during that time. Accordingly, Representative Foss wishes to introduce a bill directing that Mr. Wahl repay to the State the compensation which he received during the period of his suspension, and both she and the Legislative Council have inquired whether such a bill would be constitutional.

Article VI, Section 2 of the Maine Constitution provides that:

The Justices of the Supreme Judicial Court and the Judges of other courts shall, at stated times receive a compensation, which shall not be diminished during their continuance in office; . . .

By its plain language, this provision appears to bar the type of legislation at issue here; so long as a judge remains in office, his compensation may not be diminished. Research discloses no instance of the application of the judicial compensation clause of the Maine Constitution (or of a nearly identical clause in the United States Constitution, U.S.Const. art. III, § 1) to an effort by the Maine Legislature (or the United States Congress) to seek retroactive reimbursement of a judge's compensation upon his removal from office because of his conviction of a crime or for any other reason. Nonetheless, such judicial authority as does exist concerning the interpretation of the compensation clause appears clearly to suggest that it operates as a complete bar to the Legislature's altering the compensation of a particular judge in any manner.

In 1985, the Supreme Judicial Court of Maine discussed, for the first time, the respective powers of the Legislature and the Judiciary in imposing monetary sanctions upon sitting judges of the Maine courts. In the Matter of Benoit, 487 A.2d 1158 (Me. 1985). In that case, the Court held:

It is apparent that the compensation clause constitutes a constitutional mandate that the legislature fix salaries to be payable to judges "at stated times" and that the

legislature not diminish that compensation during their continuance in judicial office. Article VI, section 2 prohibits only legislative action. Id. at 1172 (emphasis in original).

The Court then went on to hold that the clause may not be read to operate as a limitation on the inherent power of the Supreme Judicial Court to discipline judges, and indeed, the Court directed the forfeiture of a monetary amount from the pay of the judge whose behavior it was reviewing in that case. Accord Op.Me.Att'y.Gen. 81-49 (a copy of which is attached), citing In the Matter of Ross, 428 A.2d 858 (Me. 1981) and Board of Overseers of the Bar v. Lee, 422 A.2d 998 (Me. 1980).

The basis for the Court's interpretation that the compensation clause prohibits any legislative action which would adversely affect the salary of a sitting judge is the strong public policy underlying the clause that the judiciary be insulated from political interference. As the Court noted, quoting from Alexander Hamilton in Federalist Paper No. 79:

In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. In the Matter of Benoit, 487 A.2d at 1173 (Emphasis Hamilton's).

The Legislature's sole power with regard to the disciplining of judges is to remove them by impeachment or by address of both branches to the executive. Me.Const. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7; art. VI, § 4; art. IX, § 5. There is, however, no legislative power to affect adversely a judge's compensation, or to impose any other monetary sanction, since if such a power were to exist, the potential for misuse against a judge who might for any reason incur the disfavor of a majority of both houses is too great.

This result entails the conclusion that the phrase "continuance in office" in the Maine compensation clause cannot be read to exclude periods during which a particular judge has been under suspension by the Supreme Judicial Court. Such a reading would mean that the action of the judiciary in

suspending a judge would create constitutional authority in the Legislature to attack his salary, a result which would be inconsistent with the Court's ruling in the Benoit case that the Legislature has no authority in this area.

It is worth noting that the phenomenon of judges continuing to draw judicial salaries while under indictment is not without precedent. For example, Otto Kerner, Jr., who became a United States Circuit Judge for the Seventh Circuit on May 20, 1968, continued to hold office during the period of his indictment on various criminal charges, through his conviction on those charges on February 19, 1973, and at least through the date of the decision of the Seventh Circuit affirming his conviction on some of the charges on February 19, 1974. United States v. Isaacs, 493 F.2d 1124, 1140 (7th Cir. 1974). See also Pfingst v. State, 393 N.Y.S.2d 803 (App. Div. 1977) (judge continued to serve with pay until conviction but suspended without pay thereafter and removed following the exhaustion of all appeals).<sup>1/</sup>

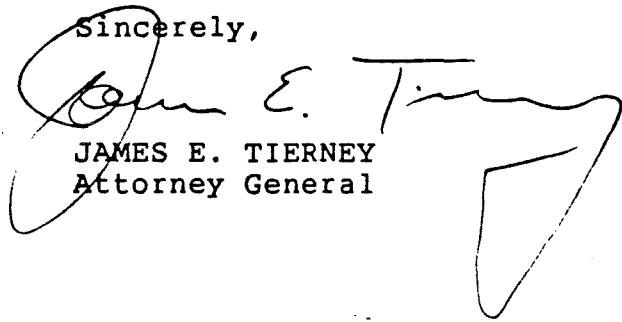
For the foregoing reasons, therefore, it is the Opinion of this Department that the Legislature may not seek to recoup the judicial salary of Mr. Wahl during the period of his suspension, notwithstanding the fact that he performed no judicial duties during that time. This result is compelled by Article VI, Section 2 of the Maine Constitution, and in reaching it, this Department, of course, expresses no view as to whether, as a matter of public policy, it is appropriate for Mr. Wahl to retain compensation paid him for work which he did not do. If any power to seek recoupment of that compensation exists, it resides exclusively with the Supreme Judicial Court of Maine.

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<sup>1/</sup> The New York Constitution provides an instructive method for dealing with problems of this kind. Article VI, Section 22 thereof provides for the establishment of a "Court on the Judiciary," consisting of the incumbents in various designated positions throughout the judiciary of the state. This Court has the power to not only remove judges, but also to suspend them with or without pay. This latter power was upheld in the Pfingst case, notwithstanding the presence in the New York Constitution of two diminution clauses similar to Article VI, Section 2 of the Maine Constitution. As in the Benoit case, those clauses were interpreted to restrict only the Legislature.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A handwritten signature in cursive script, appearing to read "James E. Tierney". The signature is written in dark ink and is positioned above the typed name. To the right of the signature, there is a large, hand-drawn triangular shape, possibly a checkmark or a stylized flourish.

JAMES E. TIERNEY  
Attorney General

JET/ec  
cc: Legislative Council

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

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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

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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).

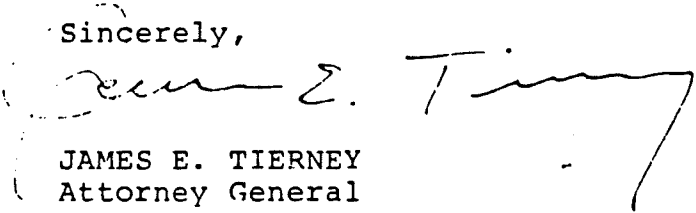
QUESTION NO. 5

"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 feel free to call upon me if I can be of further assistance.<sup>3</sup>

Sincerely,

  
JAMES E. TIERNEY  
Attorney General

JET:sm

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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.