

# 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)



MICHAEL E. CARPENTER  
ATTORNEY GENERAL

LENDEAN V. VAFIADES  
CHIEF DEPUTY

Telephone: (207) 626-8800  
FAX: (207) 289-3145

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

PLEASE REPLY TO:

96 HARLOW ST., SUITE A  
BANGOR, MAINE 04401  
TEL: (207) 941-3070

59 PREBLE STREET  
PORTLAND, MAINE 04101-3014  
TEL: (207) 879-4266

June 3, 1992

Representative Patrick E. Paradis  
18 Laurel Street  
Augusta, ME 04330

Dear Representative Paradis:

You have inquired whether it is a violation of the separation of powers provisions of the Maine Constitution, Article III, Sections 1 and 2, for members of the Legislature who are also members of the Special Committee on the New Capitol Area Master Plan to vote on requests by State agencies for hardship exceptions from a legislatively imposed moratorium on the transfer of real property in the City of Augusta. For the reasons which follow, it is the Opinion of this Department that, while there is no constitutional difficulty with members of the Legislature serving on the Special Committee to the extent that the Committee is acting in an advisory capacity, it would violate the constitutional provisions in question for such members to vote on exemptions for executive agencies from the moratorium.

The Special Committee was established by the Legislature in 1989. Resolves, 1989, ch. 60. It is composed of twenty-five members, six of whom are members of the Legislature. Id., § 4(A), (I), (J), (K), and (L). The Special Committee's essential function is to select a master planner to develop a new Capitol Area Master Plan, to assist the planner in developing the plan, and to submit the completed plan to the Legislature. Id. at §§ 6, 7. In order to ensure that the State retains possession of all land which it owns which might be affected by the plan, the Legislature imposed a moratorium on the conveyance of real property by agencies of the State in the City of Augusta, until the plan is approved by the Legislature. Id., § 10. The Legislature further provided, however, that:

Exceptions for hardship may be granted only if a specific exemption is recommended by the master planner and approved by a 2/3 majority of the membership of the special committee. Id.

Your question is whether the participation by the legislative members of the Special Committee in a decision whether to grant such an exception violates the separation of powers provisions of the Maine Constitution, Art. III, §§ 1, 2. Those sections provide:

The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, . . .


This Department has consistently advised over the years that these clauses prohibit the exercise of executive power by members of the Legislature. See Op. Me. Att'y Gen. 80-154 (legislator may not serve as member of Insurance Advisory Board, since the Board exercises executive function of purchasing insurance); Op. Me. Att'y Gen. (Mar. 31, 1978) (legislator may not be member of proposed State House Commission); Op. Me. Att'y Gen. (Sept. 16, 1977) (legislator may not be member of Maine-Canadian Exchange Advisory Commission, since Commission is denominated as part of the Executive Branch). Copies of these Opinions are attached. These Opinions conclude that if an agency is advisory in nature only, there is no constitutional difficulty with members of the Legislature serving on it. If, on the other hand, the agency discharges executive functions in any way, a legislator may not participate in the discharge of such functions.

The question which you present, therefore, resolves into whether the Special Committee is discharging any executive functions. As set forth above, its basic function is to develop a plan for the Capitol area and to provide that plan to the Legislature for further legislative action. Since this function is clearly advisory in nature, there is no difficulty with members of the Legislature participating in it. By imposing a moratorium on the conveyance of real property by State agencies in the City of Augusta, however, and by establishing a provision for exemptions from that moratorium to be granted by the Special Committee, the Legislature has also given the Committee a specific power over the actions of the

Executive Branch. The discharge of this power, therefore, must be regarded as executive in nature. Consequently, the legislative members of the Committee are constitutionally barred from exercising it.

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

Sincerely,

  
MICHAEL E. CARPENTER  
Attorney General

MEC:sw

cc: Jon S. Oxman, Esq.  
Chairman, Special Committee  
Senator Charles P. Pray  
Senator Charles M. Webster  
Senator Beverly M. Bustin  
Representative John L. Martin  
Representative Walter E. Whitcomb  
Representative Sumner H. Lipman  
Legislative Members, Special Committee

## CHAPTER 60

H.P. 1172 - L.D. 1626

## Resolve, Concerning the Development of a New Master Plan for the Capitol Area

Emergency preamble. Whereas, Acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, a new master plan is urgently needed to guide future development of the capitol area which is held in trust for the people of Maine; and

Whereas, this plan must serve as a blueprint for the future, recognizing reasonable growth with a commitment to protect and preserve our valued inheritance; and

Whereas, the district plan requires active participation from the highest levels of the city government and each of the 3 coequal branches of State Government to inspire the best usage and appreciation; and

Whereas, it is desired to select a master planner through a competitive search; and

Whereas, a special committee is necessary to oversee the selection of the master planner and the development of the first new master plan for the capitol area in 20 years; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

**Sec. 1. Committee established. Resolved:** That there is established the Special Committee on the New Capitol Area Master Plan; and be it further

**Sec. 2. Master plan; development. Resolved:** That work on the development of a new master plan for the orderly development of future state buildings, grounds and traffic routes in the capitol area of Augusta shall be initiated as soon as possible after the passage of this resolve; and be it further

**Sec. 3. Master planner. Resolved:** That a nationally recognized master planner shall be selected and engaged for the purpose of developing a master plan for submission to the Governor and the Legislature in accordance with this resolve. Selection of this planner shall be made by means of a competitive search with no geographic limitation for entrants. Members of the Special Committee on the New Capitol Area Master Plan shall participate in the screening of applicants and shall approve the selection of the master planner. The master planner shall take into consideration in the development of the new master plan the concurrent planning efforts within the capitol area; and be it further

**Sec. 4. Membership; appointment. Resolved:** That the special committee shall consist of the following 25 members:

A. One Senator to be appointed by the President of the Senate and one member of the House of Representatives to be appointed by the Speaker of the House of Representatives, both of whom represent the capitol planning district;

B. The Mayor of the City of Augusta or a permanent designee;

C. Four members of the State Capitol Commission appointed by the commission chair;

D. The Executive Director of the Maine Historic Preservation Commission;

E. The Director of the State Capitol Commission;

F. The chair and 3 additional members of the Capitol Planning Commission, one who lives in the capitol planning district, a city councilor representing the capitol planning district and a member-at-large;

G. A licensed architect appointed by the Governor from nominees proposed by the Maine State Board for Licensure of Architects and Landscape Architects;

H. The Governor or a permanent designee;

I. The President of the Senate or a permanent designee;

J. The Speaker of the House of Representatives or a permanent designee;

K. The minority leader of the Senate or a permanent designee;

L. The minority leader of the House of Representatives or a permanent designee;

M. A permanent designee of the Chief Justice of the Supreme Judicial Court;

N. Three public members who reside in the City of Augusta, one of whom is to be appointed by the Governor, one by the President of the Senate and one by the Speaker of the House of Representatives;

O. The Director of the Bureau of Public Improvements; and

P. The Commissioner of Transportation or the commissioner's designee.

All other agencies in State Government shall cooperate fully with the special committee and provide or develop relevant information upon request; and be it further

**Sec. 5. Chair. Resolved:** That the Chair of the Capitol Planning Commission shall serve as chair of the special committee and shall call the first meeting of the committee as soon as all appointments have been made. The chair shall call all subsequent meetings of the special committee; and be it further

**Sec. 6. Duties of the special committee. Resolved:** That the duties of the special committee shall be as follows:

A. Oversee the competition for selection of a master planner who will develop a proposed new capitol area master plan and participate in all aspects of the selection process, including review of criteria for selection, screening and final selection of candidates for this role; and

B. Provide assistance to the master planner in the development of the new master plan; and be it further

**Sec. 7. Committee report. Resolved:** That the special committee shall present a progress report no later than January 1, 1990, to the Governor and the Legislative Council. This report shall describe the progress of, and any recommendations proposed by, the special committee. The committee shall submit a preliminary report that includes a workplan for completion of the master plan to be transmitted to the Governor and the Legislature no later than April 1, 1990. This report shall include a cost estimate sufficient to complete the detailed design of the master plan, and any necessary implementing legislation. The committee shall submit a final report that includes the detailed design of the master plan and any necessary implementing legislation to the First Regular Session of the 115th Legislature, no later than January 15, 1991; and be it further

**Sec. 8. Staff. Resolved:** That the special committee shall be authorized to hire staff who shall work under the direction of the chair. Additional assistance from the legislative staff may be requested from the Legislative Council; and be it further

**Sec. 9. Compensation. Resolved:** That all members of the special committee, except the employees of State Government, shall receive reimbursement for travel and other necessary expenses upon application to the Executive Director of the Legislative Council. Members of the special committee who are Legislators shall receive the legislative per diem as defined in the Maine Revised Statutes, Title 3, section 2, for each day's attendance at committee meetings; and be it further

**Sec. 10. Review of construction, sale or lease. Resolved:** That notwithstanding any other provision of law, with respect to state-owned land within the City of Augusta, no state agency may sell, grant, lease, transfer

or otherwise convey any real property, engage in any construction of any new facility or any substantial addition to an existing structure, or establish any new public ways or widen any existing way abutting such state-owned land until the Legislature has approved a new master plan. Exceptions for hardship may be granted only if a specific exemption is recommended by the master planner and approved by a 2/3 majority of the membership of the special committee. Exceptions for the Secretary of State may be granted by the Legislative Council. This section is not intended to prohibit state agencies from entering into leases as lessees of space and facilities to carry out their mission; and be it further

**Sec. 11. Acquisition of land. Resolved:** That the Department of Administration shall ascertain, on the most favorable terms possible, the costs associated with the acquisition of certain parcels of real estate in the City of Augusta, more particularly described as follows:

Parcel 1

Apparent owner: Upper Ganneston Development Corporation

Lots 21 through 75, inclusive, of Upper Ganneston Park Subdivision, being a subdivision located in Augusta, County of Kennebec, State of Maine, and being recorded in the Kennebec County Registry of Deeds on March 8, 1989, as File Nos. E-89049 through E-89055, inclusive.

Parcel 2

Apparent owner: Sumner H. Lipman

"Reserve lot," so-called in the northeast of Upper Ganneston Park Subdivision, as more particularly described in the deed from Lipman and Gall Real Estate to Sumner H. Lipman, dated February 19, 1989, and recorded in Kennebec County Registry of Deeds at Book 3500, Page 232.

The Department of Administration shall submit a report to the Legislature on its findings concerning acquisition of both parcels of land described in this section prior to January 1, 1990; and be it further

**Sec. 12. Appropriation. Resolved:** That the following funds are appropriated from the General Fund to carry out the purposes of this resolve.

|  |          |
|--|----------|
|  | 1989-90  |
| ADMINISTRATION, DEPARTMENT OF  |          |
| Public Improvements - Planning -   |          |
| Construction - Administration  |          |
| All Other  | \$90,000 |
| Provides funds to contract with a master planner to provide assistance to the Special Committee on the New Capitol Area Master |          |

R.  
DI  
TC  
LE  
Sp  
Ar  
LE  
TC  
TC  
ci  
ar  
P  
Pr  
tr  
C  
k  
T  
S

Plan. These funds shall not be expended for this purpose until the special committee has voted to approve the selection of the master planner. The Bureau of Public Improvements shall prepare a detailed budget for the expenditure of these funds and submit it to the special committee for review and approval no later than September 1, 1989. Any expenditures which deviate from the approved budget shall require an affirmative vote of the special committee. The Bureau of Public Improvements shall provide the chair and members of the special committee with a report of expenditures to date at least monthly. These funds shall not lapse but shall carry forward to June 30, 1991.

Beginning at an iron pipe standing at the intersection of Maple and Fourth Streets which marks the northeasterly corner of land herein described; thence southerly along the westerly bounds of Fourth Street for a distance of 200 feet to an iron pipe set as a property corner; thence South 61° 40' West and parallel to Maple Street for a distance of 95 feet to an iron pipe set as a property corner; thence North 28° 10' West along the easterly line of other land of the Grantor for a distance of 200 feet to an iron pipe standing on the southerly bounds of Maple Street; thence easterly along said bounds of Maple Street for a distance of 95 feet to the point of beginning.

DEPARTMENT OF ADMINISTRATION \$90,000  
TOTAL

LEGISLATURE

Special Committee on the New Capitol Area Master Plan

All Other \$10,000

Provides funds to hire one staff person on a contractual basis and for the meeting, advertising and printing costs of the special committee. These funds shall not lapse, but remain in this account until expended for the purposes described.

LEGISLATURE \$10,000  
TOTAL

TOTAL APPROPRIATIONS \$100,000

The above described parcel contains 19,000 square feet and is the easterly 95 feet of lots 197, 198, 199 and 200 as described in a deed to the Oxford County Association for Retarded Children recorded in book 518 on page 463 in the Oxford County registry of deeds in South Paris, Maine.

Effective November 21, 1989.

Emergency clause. In view of the emergency cited in the preamble, this resolve shall take effect when approved.

Effective August 23, 1989.

CHAPTER 61

H.P. 1306 - L.D. 1810

Resolve, to Allow the Oxford County Commissioners to Release Interest in Land to the Oxford County Association for Retarded Children

Oxford County Commissioners; transfer of property. Resolved: That, notwithstanding any other provision of law, the Oxford County Commissioners may release any interest they may have acquired in the following described parcel of land to the Oxford County Association for Retarded Children of Rumford, Maine:

A certain lot or parcel of land with buildings thereon located at the corner of Maple and Fourth Streets in the town of Mexico, Oxford County, State of Maine and particularly located and described as follows:

80-154

RICHARD S. COHEN  
ATTORNEY GENERAL



STEPHEN L. DIAMOND  
JOHN S. GLEASON  
JOHN M. R. PATERSON  
ROBERT J. STOLT  
DEPUTY ATTORNEYS GENERAL

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

December 8, 1980

H. W. McKowen, Executive Director  
Maine Insurance Advisory Board  
State Office Building  
Augusta, Maine 04333

Dear Mr. McKowen:

You have asked whether a person may serve as a State Legislator and a member of the Maine Insurance Advisory Board. It is our opinion that an individual may not hold these two offices simultaneously.

Article III, § 2 of the Maine Constitution prohibits a Legislator from exercising any of the powers properly belonging to the Executive Department. Accordingly, the answer to your question turns upon whether a member of the Board would be considered to be exercising such powers.

A general review of the applicable statutes [5 M.R.S.A. §§ 1725-1736] reveals that the appointment and removal of Board members lies solely in the hands of the Governor. The Board's duties and responsibilities are of an important character involving the exercise of governmental discretion. These duties include reporting annually to both the Governor and the Commissioner of Finance and Administration on insurance as it applies to all State property and activities. The Board is also called upon to purchase insurance for State agencies and to set premiums for the State's reserved fund for self-insured retention losses. Because a Board member is called upon to exercise his independent judgment and discretion in carrying out these important executive duties, there is no doubt that he is exercising executive powers.

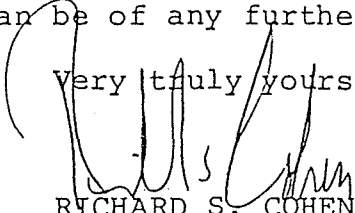


Page 2

In light of the constitutional prohibition against holding legislative and executive offices simultaneously, a person may not be a member of the Maine Insurance Advisory Board while serving in the State Legislature.

Please let me know if I can be of any further service.

Very truly yours,



RICHARD S. COHEN  
Attorney General

RSC/ec

cc: Representative Robert Dillenback

*Executive Power: Separation From Legislature -  
Maine Const Art III  
Maine Const Art V sec. 1  
Maine Const Art V sec. 8*

JOSEPH E. BRENNAN  
ATTORNEY GENERAL



RICHARD S. COHEN  
JOHN M. R. PATERSON  
DONALD G. ALEXANDER  
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333  
March 31, 1978

To: Andy Brown, Executive  
From: Donald G. Alexander, Deputy Attorney General  
Re: L.D. 2172 - State House Commission Legislation

This responds to your memorandum of March 29. By that memorandum you raise questions as to whether L.D. 2172 presents any constitutional problems. L.D. 2172 creates a commission to make decisions regarding improvement and alteration of the State House and State House grounds. The Commission would be headed by the Maine Historic Preservation Director with six other decision-making members appointed by the Legislative Council.

In light of the necessity of a prompt response because of the deadlines within which the Governor must act on legislation, we have not been able to perform extensive research on this matter. However, it would be our view that L.D. 2172 does appear to present a constitutional problem involving at least the separation of powers clause, Article III, or the executive powers clause, Article V, of the Maine Constitution.

Article III of the Maine Constitution reads as follows:

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

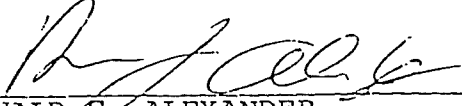
"Section 2. No person or persons, belonging to one of these departments, shall exercise any of the power properly belonging to either of the others, except in the cases herein expressly directed or permitted."

Thus, Article III prohibits any person who is with one branch of government from performing functions which are within the province of either of the other two branches of government.

L.D. 2172 is subject to differing interpretations which this opinion does not resolve. However, either interpretation would appear to present problems under the Maine Constitution. Under one interpretation, L.D. 2172 would continue the present status of administrative jurisdiction over the State House as a function of the executive branch of government. (See: 5 M.R.S.A. § 1742, sub-§ 15). If that were the case, then the capacity of the Legislature to appoint members to a commission which will have final decision-making authority on an executive matter would appear inconsistent with the provisions of Article III and also of Article V, Section 1 of the Constitution which vests executive power with the Governor. There may also be a problem with Article V, Section 8 of the Constitution, which reserves executive appointive powers to the Governor, subject to certain exceptions. A greater discussion of the general problem is provided in the opinion of this office relating to the Maine-Canadian Exchange Advisory Commission dated September 16, 1977, a copy of which is attached.

L.D. 2172 may also be construed as a legislative decision making a basic change in operations of the State Capitol. That is, the State Capitol itself is to be considered primarily a legislative building, thus subject to the jurisdiction and control of the Legislature, rather than the ultimate jurisdiction of the executive branch. There is ample precedent for such legislative jurisdiction as, for example, the Congress of the United States, not the executive branch, controls the United States Capitol and the adjacent office buildings. Further, if the building was deemed primarily legislative, there would be no problem with control of the building and the grounds being exercised under the jurisdiction of the Legislature as the administration and supervision of legislative properties, although similar to functions of the executive, is still a proper legislative function. However, if L.D. 2172 is construed in this manner, designation of the Maine Historic Preservation Director as permanent chairman of the State House Commission likewise runs afoul of Article III of the Maine Constitution, since, as an executive official, the Director would be barred from performing legislative functions if control of the building is to be deemed essentially a legislative matter. In such case, of course, the other appointees to the Commission by the Legislature would be valid. Further, there would be no problem with the membership on the Commission by the Director of the State Museum, the Arts and Humanities Bureau, the Bureau of Public Improvements since these officials would appear to serve the Commission in an advisory, rather than determinative, role and, serving in an advisory role, do not create problems under Article III.

I hope this information is helpful. If you need further information, we will try to provide it.

  
DONALD G. ALEXANDER  
Deputy Attorney General

DGA/ec

cc: Hon. John L. Martin  
Hon. Joseph Sewall  
Hon. David Huber

*Legislature! Control of Appointments  
Separation of Powers  
Appointment Authority*

*5 M.R.S.A. § 6002 et seq  
Me. Const. Art 3  
Me. Const. Art 5 Pt 1 sec. 8*

RICHARD S. COHEN  
JOHN M. R. PATERSON  
DONALD G. ALEXANDER  
DEPUTY ATTORNEYS GENERAL

PHILIP E. BRENNAN  
ATTORNEY GENERAL



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

September 16, 1977

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

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.

"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.

"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.<sup>1/</sup>

---

<sup>1/</sup> 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."

"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 decidedly 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

Attorney General