STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#92022

STATE OF NEBRASKA
OFFICIAL
FEB 18 1992
DEPT. OF JUSTICE

DATE: February 13, 1992

SUBJECT: Impact of the Separation of Powers Doctrine as explained in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991) upon judicial branch officers and employees.

REQUESTED BY: Joseph C. Steele, Court Administrator, Administrative Office of the Courts/Probation

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

On July 26, 1991, the Nebraska Supreme Court issued its opinion in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991). In that opinion, the court indicated that Gerald Conway, a member of the Nebraska legislature, could not continue to serve both in the legislature and as an assistant professor at Wayne State College on the basis of Article II Sec. 1 of the Nebraska Constitution which requires the separation of governmental powers. In your capacity as Court Administrator, you subsequently requested our views on a number of questions concerning application of the Conway decision to judicial branch officers and employees, and from your correspondence, it is apparently "...the opinion of the Court that it is appropriate that [this office] formally respond to the inquiries ..." which you made. Therefore, our responses to your various questions are set out below.

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Article II Sec. 1 of the Nebraska Constitution provides, in pertinent part:

> The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others,...

In the Conway case, Senator Gerald Conway served both in the legislature, and also as an assistant professor at Wayne State College. The court indicated that this situation violated Article II Sec. 1 of the Constitution because Senator Conway was an officer in the Legislative branch of government and also a member of the executive branch of government through his employment at the college. In the course of its opinion, the court stated the following rule which governs the application of Article II to the various fact situations you described in your correspondence:

> ...article II prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch.

Id. at 782, 472 N.W.2d at 412.

In your opinion request, you presented us with a number of questions asking us to apply the court's rule in Conway to judicial branch officers and employees. We will consider your various questions in the order in which they were presented.

1. You first note that you are an appointed (but not statutory) member of the Nebraska Commission on Law Enforcement and Criminal Justice (Crime Commission). By this we assume that you mean that you were appointed to that Commission but your membership is not otherwise required by statute. You ask, "Must I resign?"

In your capacity as Court Administrator, you are obviously an employee of the Judicial branch of state government. Therefore, under the Conway rule stated above, you cannot simultaneously be an officer of either the executive or the legislative branches of state government.

Conway defines a public office as "...a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power." Id. at 771, 772, 472 N.W.2d at 407. The court

has also previously indicated that an office is a public station, conferred by the appointment of government, and that it embraces the ideas of tenure, duration, emolument, and duties. State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N.W. 524 (1936). Since you were apparently appointed to the Crime Commission for a specific term, and since you have statutorily prescribed duties as a result of that appointment, we believe that you are a public officer in connection with your service on the Crime Commission.

There are only three branches of government. Conway at 786, 472 N.W.2d at 414. By the nature of its duties, the Crime Commission does not seem to be a part of the Judicial branch. See Neb.Rev.Stat. §81-1423 (Reissue 1987). Consequently, you appear to be currently serving in two separate branches of government contrary to the rule established in Conway. Thus, under Conway, you must resign either from the Crime Commission or from your position as Court Administrator.

We should also note, with respect to this question, that our views concerning your dual service on the Crime Commission and as Court Administrator are consistent with our previously expressed position on proposed statutes which would require a member of the Legislature to serve on boards or commissions of state government which exercise primarily an executive or administrative function. Among other things, we have indicated that such proposed dual service would violate Article II Sec. 1 of the Nebraska Constitution. See Opinion of the Attorney General No. 91016, March 13, 1991.

2. You state that Neb.Rev.Stat. §81-1417 (Reissue 1987) provides that a district court judge must be a member of the Crime Commission. You are concerned that such service by a district judge is in conflict with the Constitution as a result of Conway.

For the reasons stated above, we believe that the individuals on the Crime Commission are public officers of either the legislative or executive branches of state government. As a result, a district judge on that Commission would be in violation of the rule announced in Conway.

3. You next state that, "[t]here are a plethora of advisory committees of various types" which involve both judges and judicial branch staff members. By way of example you reference "the recently created task force on prison issues," and the Juvenile Justice Advisory Committee which is apparently required by federal law to have judicial branch representation. You ask if Conway prevents such service.

It is our understanding that the Juvenile Justice Advisory Committee is a committee created by executive order of the Governor to evaluate and assess various grant programs. As a result, we can find no statutes which create duties for the Committee, which create terms of office for its members or provide for their salaries or employment. We assume that their duties are advisory only. Therefore, we do not believe that members of the Committee are employees or officers of the executive branch, and judges and judicial branch staff members could serve on the Committee without problem under Conway. Since we can find no statutory reference to the prison task force you describe, we assume that the same analysis would apply to it.

Beyond the specific examples you listed, it should be obvious from our analysis of your situation with the Crime Commission that it is possible for an individual employee or officer of the Judicial branch to run afoul of the Conway prohibition if his service on an advisory committee or board makes him either an officer or employee of the executive or legislative branches of state government. However, the very fact that there are a "plethora" of advisory committees involving judges and judicial branch staff members makes the statement of any general conclusion with respect to that involvement beyond the obvious necessity for application of the Conway rule most difficult. A number of questions are relevant in each case. For example, is the particular advisory committee in question created by statute, rule or by some form of executive order? Do its members have statutory duties and statutory terms? What are those duties? Are members of the committee officers or employees, and are they paid? Without specific information about each particular advisory committee in question, we must simply suggest to you that you do as we would do in analyzing any particular fact situation. The Conway rule is set out above. Under the standards we described previously, is the individual involved an officer or employee of the executive or legislative branches through his service on the committee or board?

4. You next describe a number of instances where judicial branch officers or employees are involved with local level executive or legislative activities. For example, an employee in a court office is on a local city council, or in the smallest counties, the county clerk is the ex officio clerk of the district court. You ask if these situations present a problem under Conway.

The Conway case and its holding involved a member of our state legislature who was employed full-time at a state college. This employment involved two branches of our state government, and clearly fell under the proscription of Article II Sec. 1 of the

state Constitution. Since Conway involved state officers, however, it offers little guidance as to how, if at all, Article II Sec. 1 might apply to local governmental subdivisions. Nor are we aware of other Nebraska cases which deal with that issue. While this uncertainty exists with respect to Article II Sec. 1, it is clear that other constitutional provisions which reference the state apply equally to local governmental subdivisions. For example, in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957), the court indicated that Article XIII, Sec. 3 of our state constitution which prohibits lending the credit of the state applies to the State and all political subdivisions thereof. As a result, we do not believe there are clear answers to your questions in this area at this time, and any attempt to answer them would simply involve speculation on our part as to how the court might deal with these issues. We must respectfully decline to engage in such speculation.

5. Your next series of questions involves Judges and teaching, and you pose those various questions with respect to teaching at a "public institution." For the reasons stated in response to your question number 4 above, our answers must focus on teaching at state institutions such as the state colleges or the University of Nebraska. We prefer not to speculate as to the application of Conway to local school districts.

You first ask if a judge may teach under contract for pay. It appears highly likely to us that this situation would involve the judge as an employee of the college or university, and we believe this would not be allowed under Conway for the reasons stated above.

You next ask if a judge may teach under contract, pro bono. So long as the terms of the contract do not otherwise create an employment relationship between the educational institution and the judge or do not grant the judge such authority as would make him or her an "officer," we believe that this situation would be permissible. See Opinion of the Attorney General No. 91092, November 13, 1991.

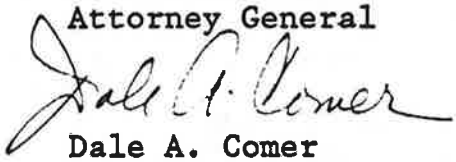
Finally, you ask if a judge may serve as an occasional guest lecturer, pro bono. We see no problem with this arrangement.

6. Your final question is, "[m]ay a judge teach a class of police recruits for the Omaha Police Department?" Again, an answer to this question would require us to speculate as to the application of Conway to local governmental subdivisions which we

cannot do for the reasons discussed above.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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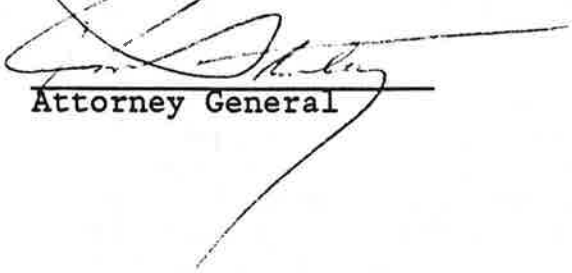

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