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

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#92115

REC.
STATE OF NEBRASKA
OFFICIAL
OCT 5 1992
DEPT. OF JUSTICE

DATE: October 1, 1992

SUBJECT: Service by Nebraska Supreme Court Judges on Judicial Nominating Commissions in Light of State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991)

REQUESTED BY: Senator Dianna R. Schimek
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have requested our opinion regarding the construction of Article II, Section 1, and Article V, Section 21, of the Nebraska Constitution in light of State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991). You are concerned about potential separation of powers violations created by the Nebraska Supreme Court's involvement in judicial nominating commissions. Specifically, you have asked about the constitutionality of Nebraska Supreme Court Judges sitting as presiding members of judicial nominating commissions and the Nebraska Supreme Court's promulgation of rules regarding procedures to be followed in the judicial nominating process. Based on the following analysis, we conclude that the Nebraska Supreme Court's participation in the judicial nominating process in these ways does not violate the separation of powers provision of the Nebraska Constitution.

I. Applicable Law

The Nebraska Constitution provides:

> The powers of the government of this state are divided into three distinct departments, the legislative,

L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

> 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, <u>except as hereinafter expressly directed or permitted</u>.

Neb. Const. art II, § 1 (emphasis added).

Article V, Section 21, of the Nebraska Constitution states in part:

> In the case of any vacancy in the Supreme Court . . ., such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission. . . .
>
> . . . .
>
> There shall be a judicial nominating commission for the Chief Justice of the Supreme Court and one for each judicial district of the Supreme Court . . . . <u>Each judicial nominating commission shall consist of nine members, one of whom shall be a Judge of the Supreme Court</u> who shall be designated by the Governor and shall act as chairman, but shall not be entitled to vote. . . .

(Emphasis added.)

The Nebraska Legislature has further defined the functions and makeup of judicial nominating commissions in Neb. Rev. Stat. §§ 24-801 to 24-812.1 (Reissue 1989). In addition, Neb. Rev. Stat. § 24-812.01 (Reissue 1989) requires the Nebraska Supreme Court to promulgate rules regarding nominating procedure.

Also relevant to your inquiry is <u>State ex rel. Spire v. Conway</u>, 238 Neb. 766, 472 N.W.2d 403 (1991), in which the Nebraska Supreme Court held that a senator in the Nebraska Legislature who was also an assistant professor at Wayne State College was "a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution." <u>Id</u>. at 787, 472 N.W.2d at 403. The <u>Conway</u> court also interpreted the separation of powers provision in Article II, Section 1, of the Nebraska Constitution to prohibit "members of one branch from exercising the powers of a coordinate branch and therefore prohibits any member of one of the three branches--whether it be an officer or employee--from being an officer in another branch." <u>Id</u>. at 788, 472 N.W.2d at 415-16.

II. Analysis

You are concerned that, in light of State ex rel. Spire v. Conway, supra, members of judicial nominating commissions who assist the Governor in making judicial appointments are part of the executive branch of government; therefore, Article II, Section 1, of the Nebraska Constitution would preclude Nebraska Supreme Court Judges from serving as members of these commissions.

As quoted above, Article II, Section 1, of the Nebraska Constitution requires separation of legislative, executive, and judicial powers "except as hereinafter expressly directed or permitted." The Nebraska Supreme Court has determined that entities authorized by the Nebraska Constitution which have multiple governmental powers fit within this exception to Article II. See School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972) (Industrial Commission created by Neb. Const. art. XV, § 9); Swanson v. Sorensen, 181 Neb. 312, 148 N.W.2d 197 (1967), cert. denied, 389 U.S. 825, 88 S. Ct. 62 (1967) (State Railway Commission (now Public Service Commission) authorized by Neb. Const. art. IV, § 20); School Dist. No. 8 v. State Bd. of Educ., 176 Neb. 722, 127 N.W.2d 458 (1964) (State Department of Education created by Neb. Const. art. VII, § 14, since repealed).

In State ex rel. Spire v. Conway, supra, the court noted that the above exceptions to Article II of the Nebraska Constitution involved agencies which were constitutionally authorized to exercise the powers of more than one governmental branch, not individuals who were so authorized. While the constitutional provisions creating exceptions to Article II authorize certain agencies to exercise multiple governmental powers, these provisions do not require such agencies "to employ personnel who exercise power in another governmental branch." State ex rel. Spire v. Conway, supra at 785, 472 N.W.2d at 414.

In contrast, Article V, Section 21, of the Nebraska Constitution expressly directs that Supreme Court Judges, personnel who obviously exercise power in the judicial branch, be members of judicial nominating commissions, which assist the Governor in performing the designated executive function of filling judicial vacancies. This constitutional provision requires judges who exercise power in one governmental branch to be members of another branch, thus creating an exception to the separation of powers provision contained in Article II, Section 1, of the Nebraska Constitution.

III. Conclusion

Construing the Nebraska Constitution as a whole, Banner County v. State Bd. of Equal. and Assessment, 226 Neb. 236, 411 N.W.2d 35 (1987), we conclude that Article V, Section 21, of the Nebraska Constitution, which requires Nebraska Supreme Court Judges to serve on judicial nominating commissions, creates an exception to the separation of powers provision contained in Article II, Section 1, of the Nebraska Constitution. Therefore, the Nebraska Supreme Court's involvement in the judicial nominating process, including chairing nominating commissions and promulgating procedural rules, does not violate Article II, Section 1, of the Nebraska Constitution.

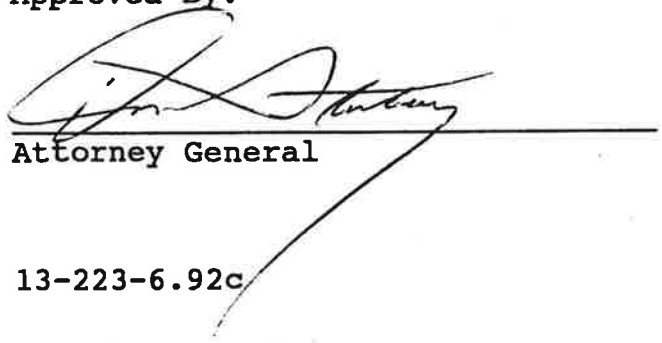
Sincerely,

DON STENBERG
Attorney General

Jan E. Rempe
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



Attorney General

13-223-6.92c