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FEB 19, 1993
DEPT. OF JUSTICE

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DATE: February 17, 1993

SUBJECT: LB 355; Constitutionality of proposed government committees made up of representatives from different branches of state government which would study government efficiency.

REQUESTED BY: Senator Kate Witek
Nebraska State Legislature

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

LB 355 contains the State Government Assessment Act. The Act would create committees at several levels of state government which would study the operations of state government, and make reports and recommendations concerning improvement of those operations to members of the Executive Branch, to the Legislature and to the public. In several instances, the bill places members of different branches of state government on the same committee, so you have requested our opinion as to whether this aspect of the legislation violates the Separation of Powers provision or other portions of the Nebraska Constitution. Our conclusions are set out below.

LB 355 contemplates the creation of a three-tiered system for the study of the efficiency of existing state government. An Executive Steering Committee, comprised of the Governor, the Auditor of Public Accounts, the Chairpersons of the Legislature's Appropriations and Revenue Committees and three additional persons appointed by the Governor in compliance with various restrictions would be at the top of the system. That committee would "set the overall direction, provide leadership on raising funds, and approve recommendations submitted by the working committee."

The Working Committee, in turn, would be comprised of nine members appointed by the Executive Steering Committee including a staff director, a deputy staff director from a different branch of government than the staff director, and seven team leaders of functional teams identified as "excellent leaders in management and

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innovation in an area." The Working Committee would "review the work products of the functional teams and prepare and present substantive recommendations to the executive steering committee."

The final tier of the system would be the seven Functional Teams, each made up of ten members appointed by the Working Committee. Those Functional Team members would be "knowledgeable, competent, employees from the office of the Auditor of Public Accounts, the legislative branch, the executive branch, the judicial branch, and the private sector if possible." The Functional Teams would perform various tasks including functional and organizational analysis, financial analysis, service analysis, administrative systems analysis, and analysis of alternative delivery systems. Each of the seven Functional Teams would study one of seven broad categories of state government including education, health and human services, environment and natural resources, public safety and criminal justice, transportation, general government and regulatory agencies and cross government agencies and issues. The Functional Teams would work with and under the direction of the Working Committee so as to prepare draft recommendations and implementation plans for submission to the Executive Steering Committee. Ultimately, after notice to and consultation with the state agencies involved, the Executive Steering Committee would issue reports and recommendations for improvement to all members of the Legislature and to the public. LB 355 requires the Executive Steering Committee to issue final recommendations and implementation plans no later than July 1, 1995.

Article II, Section 1 of the Nebraska Constitution provides that:

> 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, except as hereinafter expressly directed or permitted.

Since LB 355 requires each of the various government assessment committees to be made up of representatives of different branches of government, there is some question as to whether the bill would violate Article II, Section 1. We assume that concern was partially the reason for your opinion request.

The Nebraska Supreme Court most recently dealt with Article II, Section 1 of the Nebraska Constitution in ***State ex rel. Spire v. Conway***, 238 Neb. 766, 472 N.W.2d 403 (1991). In the ***Conway*** case, the court held that state Senator Gerald Conway could not both serve in the Legislature and also act as an assistant

professor at Wayne State College. The court indicated that such dual service violated Article II, Section 1 since Senator Conway was an officer in the Legislative branch of government and also an employee within the Executive branch of government through his employment at Wayne State. In the course of the ***Conway*** opinion, the court set out the following rule which governs the application of Article II, Section 1 to the activities of government officials:

. . . 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.

While the application of the ***Conway*** rule is clear in the factual context of that case, application of the rule in other situations can be more problematic. As a result, we have issued several opinions subsequent to ***Conway*** which deal with application of the rule to various fact situations. *See* Op. Att'y Gen. No. 92115 (October 1, 1992) (Supreme Court Judges could serve on Judicial Nominating Commissions); Op. Att'y Gen. No. 92076 (June 3, 1992) (Members of the Judicial branch could serve on the Youth Services Planning Committee but not on the Juvenile Services Grant Committee); Op. Att'y Gen. No. 92073 (May 28, 1992) (Judges could serve on the Judicial Resources Commission); Op. Att'y Gen. No. 92022 (February 18, 1992) (Judicial branch employees could serve on the Juvenile Justice Advisory Committee but not on the Crime Commission). Apart from these opinions specifically dealing with the effect and application of the ***Conway*** rule, we have also written numerous other opinions, before and after the ***Conway*** decision, dealing generally with members of the Legislature serving on boards or committees of another branch of government. *See* Op. Att'y Gen. No. 92046 (March 19, 1992) (Members of the Legislature cannot serve on the Nebraska School Accountability Commission); Op. Att'y Gen. No. 91016 (March 13, 1991) (Members of the Legislature cannot generally serve on commissions, boards or committees housed in the Executive branch of state government); Op. Att'y Gen. No. 86038 (March 21, 1986) (Members of the Legislature could serve on an educational service unit planning committee); Op. Att'y Gen. No. 69 (April 23, 1985) (The Chair of the Legislature's Revenue Committee could not serve on a Agricultural Land Valuation Advisory Board); Op. Att'y Gen. No. 37 (April 4, 1983) (Members of the Legislature could not serve along with the Governor and the Tax Commissioner on a State Tax Board which would take the place of the State Board of Equalization); 1967-68 Rep. Att'y Gen. 120 (Opinion No. 86, July 7, 1967) (State Senators could not serve as members of the Nebraska Coordinating Council for Higher Education).

It obviously is difficult to generalize the application of the *Conway* rule to all the various fact situations which have developed or may develop in state government. However, most often, the acceptability of a particular statutory plan which combines members of more than one branch of government on the same body seems to turn on whether the proposed body creates new state officers, as that term is legally defined, within a particular branch of government. If the members of the newly created governmental body are state officers, then there are potential problems with the *Conway* rule. On the other hand, if the new body does not create state officers, then, in most instances, the positions created do not involve an employment relationship, and there is no problem under *Conway*.

The Nebraska Supreme Court has indicated that an office is "a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument and duties." *State ex rel. O'Connor v. Tusa*, 130 Neb. 528, 535-536, 265 N.W. 524, 528 (1936). Indicia of a public office include: 1. creation by constitution or a statute, 2. a continuing position not occasional or contractual, 3. a fixed term of office and 4. the official has an independence beyond that of employees. *Eason v. Majors*, 111 Neb. 288, 196 N.W. 133 (1923). With respect to the authority of public officers, the Court in *Conway* stated, "[i]t may be said that the almost universal rule is that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state." 238 Neb. at 771, 772, 472 N.W.2d at 407. As a result, a public office is "a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power." *Id.* In order to respond to your opinion request concerning the propriety of the proposed State Government Assessment Act, we will consider each of the committees involved in the three-tiered structure of the Act in light of the court's definitions of public office.

The top committee in the evaluation system proposed by the State Government Assessment Act is the Executive Steering Committee, to be made up of the Governor, the State Auditor, two members of the Legislature and three other individuals to be appointed by the Governor. It can be argued, as you did in your opinion request letter, that this committee is advisory only, as the Executive Steering Committee would have no authority to implement particular plans for increased government efficiency, and could only recommend changes to the Legislature and to the public. In addition, committee members would have no set term of office, and the bill requires the committee's task to be completed by July 1, 1995, so the committee is not a continuing entity. All of these considerations would seem to indicate that members of the Executive Steering Committee would not be state officers as a result of that membership.

On the other hand, the Executive Steering Committee would appoint the members of the Working Committee, and would assemble a support team to provide clerical services, fiscal analysis, drafting of legislation and other support services. Moreover, the Executive Steering Committee would also have the power to administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of documents, and the committee would be required to keep minutes of its meetings and records and books of its accounts. In our view, these are all attributes of an entity which exercises a portion of the sovereign power of the state.

All things considered, we believe that the members of the Executive Steering Committee would be state officers by virtue of their service on that committee, separate and apart from the other offices which they might hold. This is true, in part, because the doctrine of Separation of Powers has been strictly construed in the State of Nebraska. ***See State ex rel. Meyer v. State Board of Equalization and Assessment***, 185 Neb. 490, 176 N.W.2d 920 (1970); Op. Att'y Gen. No. 69 (April 23, 1985). Since service on the Executive Steering Committee would involve an "office," LB 355 would necessarily violate Article II, Section 1 of the Nebraska Constitution because it includes officers from more than one branch of government as officers on the same committee.[1] This is true whether the committee is considered a part of the Executive, or the Legislative branch. For example, if the Executive Steering Committee is considered a part of the Executive branch, the legislator members would be officers in two branches of state government. Alternatively, if the Executive Steering Committee is considered a part of the Legislative branch, the Governor and State Auditor would be officers in two branches of state government. For these reasons, it appears to us that the Executive Steering Committee envisioned by LB 355 would violate the Nebraska Constitution.

Quite similar considerations affect the constitutionality of the second tier of the State Government Assessment plan, the Working Committee. Again, it could be argued that the Working committee is advisory only, that there is no term of office, etc. However, like the Executive Steering Committee, members of the Working Committee would make appointments to other positions, and could issue subpoenas, compel the attendance of witnesses, and so

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[1]If members of the Executive Steering Committee are officers, LB 355 would also violate Article IV, Section 10 of the Nebraska Constitution since it would involve a legislative appointment. ***See Neeman v. Nebraska Natural Resources Commission***, 191 Neb. 672 at 676, 217 N.W.2d 166 (1974); Op. Att'y Gen. No. 69 (April 23, 1985).

forth. They also would keep minutes of their meetings and books and records of their accounts. While this is a closer question than the status of the Executive Steering Committee because these individuals would form the second tier of the organization, we believe that members of the Working Committee would also be state officers. Consequently, that portion of LB 355 would also be unconstitutional to the extent it requires officers or employees of one branch of government to serve as officers in a separate branch.

The final level of the State Government Assessment system involves the various Functional Teams. Those teams would actually do the analysis and study of state government operations, and make recommendations for improvement and reports in the form of implementation plans. The work product of the Functional Teams would be reviewed by the Working Committee and, ultimately, by the Executive Steering Committee. The Functional Teams would make no appointments, would not have the power to subpoena witnesses or otherwise compel testimony, and would not maintain minutes of their meetings or books of their accounts.

In our view, the Functional Teams would have significantly less authority than either the Executive Steering Committee or the Working Committee contemplated by LB 355, and their task would be more advisory in nature. As a result, we do not believe that members of the Functional Teams described in LB 355 would be state officers. Therefore, those teams could include members from several different branches of government.

In your opinion request letter, you also state:

> If, in your opinion, you hold this section to be unconstitutional, allow me to also ask if the situation could be remedied in one of two ways:
>
> (1) Removing the two Senators;
>
> (2) Labeling this a Legislative Task Force, removing the Governor, the State Auditor, and naming the other committee members through selection of (1) the committee or (2) the Legislature's Executive Board

Removing the two state senators from the Executive Steering Committee proposed under LB 355 would solve the constitutional problems with that entity since the only remaining members would be executive branch officers or private persons, and the appointment of other committee members would be done by the governor. On the other hand, your second proposed solution could create problems under Article IV, Section 10 of the Nebraska Constitution which prohibits appointments of officers by the Legislature, since the

other committee members would be appointed by the Legislature. Neither of your proposed solutions would address the constitutional problems with the Working Committee discussed above.

Sincerely yours,

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cc. Patrick O'Donnell
Clerk of the Legislature

APPROVED BY:

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