STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93012

NO. STATE OF NEBRASKA
OFFICIAL
MAR 4 1993
DEPT. OF JUSTICE

DATE: March 4, 1993

SUBJECT: Constitutionality of LB 579, a proposal to restrict the authority of the Auditor of Public Accounts.

REQUESTED BY: John Breslow, Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's Opinion concerning "the constitutionality of several bills that have been introduced by the Legislature to restrict or relieve the duties of the Auditor of Public Accounts." Of the bills identified as being of concern, only LB 579 has been forwarded from committee. We will, therefore, limit this opinion to LB 579, as amended. The constitutional principles applicable to this bill are, of course, equally applicable to similar bills.

Legislative Bill 579

LB 579, as amended by AMO 434 and AMO 549, provides, in pertinent part as follows:

> Section 1. It shall be the sole responsibility of the Executive Board of the Legislative Council to provide for an audit of the books, accounts, vouchers, records, and expenditures of the Legislature. A certified audit shall be made at such time as the board shall determine and shall be made at least once during each biennium.

David K. Arterburn
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 Wald
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

The Executive Board of the Legislative Council may contract with the Auditor of Public Accounts or contract with a licensed public accountant or certified public accountant or firm of such accountants to conduct the audit and shall be responsible for the cost of the audit pursuant to the contract. . . .

If the person the Executive Board of the Legislative Council has contracted with pursuant to this section has reason to believe that statutes relating to the use of public property for personal use are being violated, he or she shall provide such information and records to the Executive Board of the Legislative Council for confidential review.

The records used and compiled pursuant to this section shall not be considered public records for purposes of section 84-712 to 84-712.09.

The Executive Board of the Legislative Council shall, at the conclusion of the audit performed, prepare a report detailing the amount of expenditures of public funds made by each member of the Legislature, the total amount of long-distance phone calls made by each member of the Legislature, and the total amount of such calls designated by a member as sensitive or confidential in nature. Such report shall be reviewed by the member of the Legislature for accuracy and correctness. After such review, the report, including the information relating to long-distance phone calls, shall be made public by the Executive Board of the Legislative Council.

For purposes of this section, Legislature shall include the Legislative Council, the Executive Board of the Legislative Council, and members of the Legislature.

Sec. 2 . . . (3) Notwithstanding any other provision of law, the executive board may contract to obtain legal, auditing, accounting, or other professional services or advice for or on behalf of the executive board, the Legislative Council, or the Legislature . . . the work product resulting from such contracts shall not be subject to review or approval by any other entity of state government.

. . .

Sec. 3. . . (3) A member of the Legislature, at his or her own sole discretion, may designate any long-distance call as sensitive or confidential in nature. If a long-distance call is designated as sensitive or confidential in nature, any long-distance call record used in an audit shall contain only the date the long-distance call was made and the cost of the call. In no case shall the person conducting the audit have access to a long-distance call number designated as sensitive by the member without the written consent of the member.

No calls made to or by a member of the Legislature which are sensitive or confidential in nature shall be required to be disclosed except that such calls shall be so designated by the member, and only the amount of the call and such designation shall be made available to a person conducting an audit.

For purposes of this subsection, sensitive or confidential in nature shall mean that either the member of the Legislature or the caller would reasonably expect that the nature or the content of the call would not be disclosed to another person without the consent of the member and the caller.

Sec. 4 . . .

(2) Nothing in this section shall be construed to authorize or require the Auditor of Public Accounts to perform any auditing functions relating to the Legislature, the Legislative Council, the Executive Board of the Legislative Council, or any member of the Legislature.

Section 5.
. . .

Section 6.
. . . .

The lawful custodian of such correspondence, memoranda, and records of telephone calls, whether created prior to, on, or after the effective date of this act, upon approval of the Executive Board of the Legislative Council, shall release such correspondence, memoranda, and records of telephone calls which are not designated as sensitive in nature pursuant to subsection (3) of section 81-1120.27 to the person the Executive

> Board of the Legislative Council has contracted with pursuant to section 1 of this act. A member's correspondence, memoranda, and records of telephone calls related to the performance of his or her legislative duties shall only be released to any other person with the explicit approval of the member.

(Emphasis added).

Thus, LB 579, as amended, expressly purports to remove the authority of the Auditor of Public Accounts to audit the books, accounts, vouchers, records and expenditures of the Legislature. The bill further allows members of the Legislature to designate any or all long-distance calls as "sensitive or confidential," thereby making the calls exempt from audit except as to the date and the cost.

Constitutional Analysis

A. Separation of Powers

Article II, section 1 of the Constitution of the State of Nebraska provides:

> 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 <u>any power properly belonging to either of the others</u>, except as hereinafter expressly directed or permitted.

(emphasis added).

The doctrine of separation of powers has been strictly construed in the State of Nebraska. *See* <u>Opinion of the Attorney General No. 85-69</u>, April 23, 1985 at 2 (citing <u>State ex rel. Meyer v. State Bd. of Equalization and Assessment</u>, 185 Neb. 490, 176 N.W.2d 920 (1970)). In interpreting Article II, section 1, the Nebraska Supreme Court has stated, "Nebraska's Constitution contains an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the federal Constitution and those of some

of the states, which merely definitely divided the three powers of government." Laverty v. Cochran, 132 Neb. 118, 120-121, 271 N.W. 354 (1937). *See also, State ex rel. Howard v. Marsh*, 146 Neb. 750, 755, 21 N.W.2d 503 (1946); *State ex rel. Sorensen v. State Bank of Minatare*, 123 Neb. 109, 114, 242 N.W. 278 (1932); *Searle v. Yensen*, 118 Neb. 835, 841, 226 N.W. 464 (1929).

The legislative authority of the Unicameral is extensive. However, it is not limitless. "The people of the state, by adopting a Constitution, have put it beyond the power of the legislature to pass laws in violation thereof." State ex rel. Randall v. Hall, 125 Neb. 236, 243, 249 N.W. 756 (1933) (discussing the importance and history of the doctrine of separation of powers). See also Laverty, 132 Neb. at 121. ("[T]he Constitution is still recognized as the supreme law of the state and as a limitation of power of all departments and all officials.").

As the Nebraska Supreme Court stated more than 100 years ago, "It cannot be denied that one great object of written constitutions is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect." State ex rel. City of Lincoln v. Babcock, 19 Neb. 230, 239, 27 N.W. 98 (1886). The Nebraska Supreme Court's commitment to the strict separation of powers remains unchanged today. *See e.g., State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403, 413 (1991).

In State ex rel. Sorensen, the court stated, "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." 123 Neb. at 114, 242 N.W. at 281. Likewise, it is the duty of the executive branch of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.

B. The Constitutional Authority of the Auditor of Public Accounts

Pursuant to Article IV, Section 1 of the Constitution of the State of Nebraska, the Auditor is an executive officer. "The executive officers of the state shall be the Governor . . . Auditor of Public Accounts. . . ." The Auditor's status as an executive officer has remained unchanged since at least the adoption of the 1875 Constitution. *See State ex rel. Spire v. Conway*, 472 N.W.2d at 413.

Consequently, the Auditor has those powers provided in Article IV, section 1 of the Constitution of the State of Nebraska. This section provides that "Officers in the executive department of the state shall perform such duties as provided by law." In Nebraska the "law" includes the common law as well as statutory law. See Neb.Rev.Stat. §49-101 (Reissue 1988); State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

The primary duties of the Auditor of Public Accounts are set forth in statute at Neb. Rev. Stat. §§ 84-301 to 84-321 (1987 and Cum.Supp. 1992). Section 84-304 provides, "It shall be the duty of the Auditor of Public Accounts: . . . (3)(a) to examine or cause to be examined, . . . books, accounts, vouchers, records, and expenditures of all state officers, . . . state institutions . . . except when required to be performed by other officers or persons. . . ." Although § 84-304 is a statutory enumeration of the Auditor's duties it also represents a codification of common law duties. The history of this statute dates to R.S. 1866, c.4, §4, p.20. Thus, the statute predates statehood and the Nebraska Constitution.

The Nebraska Supreme Court has consistently interpreted the Nebraska Constitution as encompassing common law and inherent powers of constitutional officers. *See State v. State Board of Equalization and Assessment*, 123 Neb. 259, 243 N.W. 264 (1932); *Babcock*, 19 Neb. at 239. As recently as 1984, the Nebraska Supreme Court found that the Attorney General has "inherent powers" in addition to those provided by statute. *State v. Douglas*, 217 Neb. 199 at 237-238, 349 N.W.2d 870 (1984) ("We recognize that the Attorney General has some duties which are not purely statutory and are sometimes referred to as the common-law duties of the office." (Citing *State Board of Equalization and Assessment*, 123 Neb. 259, 242 NW 609).

Thus, the Nebraska Supreme Court has rejected the notion that constitutional provisions providing for powers and duties as "prescribed by law" mean the constitutional officers are without common law powers. See, e.g., In re Sharp's Estate, 63 Wis.2d 254, 217 N.W.2d 258, 262 (Wis. 1974). Instead, Nebraska follows the majority rule as recently set forth in Ex parte Weaver, 570 So.2d 675 (Ala. 1990).

In Ex parte Weaver, the Alabama Supreme Court construed a constitutional provision identical to that in the Nebraska Constitution regarding the duties of constitutional officers. The court's analysis is clearly applicable to constitutional officers of Nebraska.

> Article V, Sec. 137, of the Alabama Constitution provides: "The attorney general . . . shall perform such duties as may be prescribed by law." It has been suggested that this wording restricts the authority of the attorney general. However, this is not the general rule. The Supreme Court of Utah in Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969), adopted the reasoning of the Supreme Court of Montana in State ex rel. Olsen v. Public Service Comm'n, 129 Mont. 106, 283 P.2d 594 (1955), as to the general rule. The Utah Supreme Court noted that Article VII, Sec. 18 of the Utah Constitution provides: "The Attorney General shall be the legal adviser of the State Officers and shall perform such other duties as may be provided by Law." 23 Utah 2nd at 48, 456 P.2d at 178. This section of the Utah Constitution is similar to Article V, Sec. 137, of the Alabama Constitution. The Utah Supreme Court, as the Montana Supreme Court had done, reasoned that this language, rather than limiting the powers of the attorney general, grants the attorney general the powers that were held by him at common law:
>
> > It is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law, the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government.
>
> Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177, 178 (1969).

Ex parte Weaver, 570 So.2d at 684.

The existence of inherent powers of state constitutional officers has been recognized by the Nebraska Supreme Court consistently for over one hundred years. Significantly, this recognition has been clearly associated with the separation of powers doctrine and has been applied to the Auditor of Public Accounts. In *State ex. rel. City of Lincoln v. Babcock*, 19 Neb. 230, 27 N.W. 98 (1886), a writ of mandamus was sought against the State Auditor to compel him to register and certify certain bonds. The Auditor argued he did not have statutory authority to make the

requested certification. After quoting Webster that "one great object of written constitutions is to keep the departments of government as distinct as possible," id at 239, the court concluded,

> This rule seems to be fairly deducible from the authorities: that if the constitutional provision either directly or by implication imposes a duty upon an officer or officers no legislation is necessary to require the performance of such duty. This principle has been recognized to its full extent in this state, where for a long time after our present constitution took effect officers, where there were no statutory provisions upon the subject, performed their duties directly under the authority of the constitution, and in no case in this court has such action been questioned.

(Emphasis added).

An application of this principal which is more analogous to the present facts is found in *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265, 266 (1937). In this case, the Nebraska Supreme Court discussed the inherent powers of the various branches of government.

> In the absence of an express grant of . . . power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "It is a fundamental principle of constitutional law that each department of government, whether federal or state, 'has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution.' . . ." "All governmental powers are in their natures either legislative, executive, or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government

> are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned."

(Emphasis added).

Thus, in determining whether a particular duty is an inherent constitutional duty, a Nebraska court would examine whether the duty is such that it may be implied from the nature of the office. As an aid in this determination, the court may also examine the nature of the duties of the officer at the time the constitution was adopted. "Where constitutional provisions create the office of auditor without defining its duties, the duties of the state auditor are those pertaining to the office of public auditor at common law, or those which a territorial auditor was performing at the time of the adoption of the constitution." 81A C.J.S. §134, States at 574.

Under Nebraska's Territorial Laws of 1855, the Auditor of Public Accounts had the following duties, among others:

> Sec. 2. The auditor shall be the general accountant of the Territory, and the keeper of all public accounts, books, vouchers, documents, and all other papers relating to the accounts and contracts of the Territory, and its revenue and fiscal affairs.
>
> . . .
>
> Sec. 4. The auditor shall:
>
> > 1st--Audit all claims against the Territory, payable out of the treasury thereof, except such as are required to be adjusted and settled by law, by some other person;
> >
> > . . .
> >
> > 3rd--Audit and settle the accounts of all persons collecting the revenue of the Territory, or holding the money thereof; . . .

Neb. Terr. Laws 1855, Ch. XXV, § 2, 4.

Similarly, at the time of statehood Nebraska law provided, "The auditor is declared to be the general accountant of the territory . . ." The auditor's duties included the duty "To audit, adjust and settle all claims for services rendered, or expenditures made for the benefit of the territory . . ."

Revised Statutes of the Territory of Nebraska Ch. IV, §§ 2, 4 (1866).

The duties now codified at Neb. Rev. Stat. § 84-304 are very similar to those in existence under territorial law before the constitution was adopted. Thus, the Auditor of Public Accounts would likely be deemed by a court to have inherent constitutional power to audit all claims payable out of state funds. Such duties are deemed core functions which may not be removed by legislative enactment. This conclusion is supported by extensive, authority from other jurisdictions as well as previous opinions of this office.

This office has previously issued opinions under at least three Attorneys General that the State Treasurer, State Auditor and Attorney General have inherent constitutional authority which cannot be removed by legislative enactment. *See* 1970 Rep. Att'y Gen. No. 110 at 164, 166 (State Treasurer); Op. Att'y Gen. No. 214, March 4, 1982 (State Auditor); Op. Att'y Gen. No. 92004, January 9, 1992 (Attorney General). In Op. Att'y Gen. No. 214, March 4, 1982, Attorney General Paul Douglas stated, with respect to the State Auditor,

> It is equally clear that "the Legislature cannot relieve or preclude any executive officer from the performance of a duty enjoined on him by the Constitution, or, as otherwise expressed, it cannot take away from a constitutional officer the powers or duties given him by the Constitution; or vest such powers or functions in any other department or officer (footnotes omitted)." 16 C.J.S. §130, page 545 (1956).
>
> Therefore, in addition to the inability of the Legislature to abolish the office entirely or to excessively diminish its statutory responsibilities when no duties of any significance remain, it is also impermissible to take away any of the duties constitutionally established for the office.
>
> The Constitution of Nebraska does not specifically establish any duties for the Auditor of Public Accounts, with the exception of Article IV, Section 28, which gives him the authority, in conjunction with other named

constitutional officers, to review and equalize assessments of property for taxation. The only other constitutional provision regarding the duties of this officer is found in the same section which creates the office: "Officers in the executive department of the state shall perform such duties as may be provided by law." Nebraska Constitution, Article IV, Section 1.

The absence of specifically enumerated duties, however, does not necessarily mean that any present duty of the Auditor is fair game for legislative modification. . . .

Some of what makes up the substance of the office of Auditor of Public Accounts is evident from the title of the office itself. In ***Thompson v. Legislative Audit Commission***, 79 N.M. 693, 448 P.2d 799 (1969), "auditor" was defined as "An officer of the government, whose duty it is to examine the acts of officers who have received and disbursed public moneys by lawful authority." Id. at 696, 448 P.2d at 802, citing Ballentine Law Dictionary, Second Edition. Other insights into the authority inherent in the office can be found by examining the record of the Constitutional Convention of 1875. At that early date, the Auditor of the state was requested to furnish to the Convention 1) the amount of the appropriation made by the last legislative assembly for each public institution in each department of state government, 2) the amount; to whom, what department of state government, or public institution; and for what material or service warrants had been drawn since a specified point in time, 3) whether the warrants referenced in paragraph 2 represented the total expenditures for the department or institution, and, if not, he was requested to explain (Id. at 524), 4) to furnish a statement showing lands donated to Nebraska by the federal government and the lands donated by the state to each railroad or for other internal improvements, and 5) to furnish an accounting of the school fund for calendar years 1874 and 1875, with an itemization of legislative appropriations from the fund (Id. at 578). The foregoing request provides some indication that the Auditor was thought to be the general accountant of the state, an overseer of appropriations and expenditures for all state departments.

> Considering the proposal to create the office of Public Auditor in light of the foregoing, it is the opinion of this office that such legislation would be unconstitutional if it removed the responsibility for financial audits of state agencies from the Auditor of Public Accounts by placing that function with the Public Auditor as that function is one properly belonging to the Auditor of Public Accounts.

This conclusion is supported by numerous decisions from other state supreme courts. In *Giss v. Jordan*, 309 P.2d 779 (Ariz. 1957), the Supreme Court of Arizona held that statutory provisions relating to reimbursement of members of the Legislature for expenses, which provided that such claims were exempt from review by the State Auditor, were unconstitutional as an attempt to transfer to the Legislature the function of auditing delegated by the Constitution to the executive department. This case is directly applicable to any attempt by the Nebraska Legislature to prevent the State Auditor from auditing legislative phone records, expense accounts or other claims paid from the state treasury. The Arizona Constitution is identical to that of Nebraska in its designation of the auditor as an executive official whose duties "shall be as prescribed by law." Id. at 784. The *Giss* court framed the issue before it as whether "the auditing of claims against the state is a function or power properly belonging to the executive rather than the legislative department." Id. at 785. (This is the same language the Nebraska Constitution contains with respect to the separation of powers in Article II, §1). The court in *Giss* concluded as follows:

> It was undoubtedly intended by the framers of our Constitution that in the matter of auditing the accounts of all public officials and state agencies that this function was to be performed by an officer independent of the officers and agencies to be audited.
>
> Certainly this concept of an "independent audit" is violated in the Act under consideration. It is very essential that the sharp separation of powers of government be carefully preserved by the courts to the end that one branch of government shall not be permitted to unconstitutionally encroach upon the functions properly belonging to another branch, for only in this manner can we preserve the system of checks and balances which is the genius of our government. The result of

> attempting to withdraw from the state auditor and to place with a member of the legislature the right to "audit" the expense claims of the legislative department--one of the co-ordinate and equal branches of government--destroys, to that extent at least, this system of checks and balances. This court, in the case of *Udall v. Severn*, *supra*, stated:
>
> > ". . . Where the Constitution expressly, *or by implication*, confers a certain power on one of the great departments of the government, that power may not be delegated to another department. . . ." 52 Ariz. at page 77, 79 P.2d at page 352. (Emphasis supplied.)
>
> Cf. 16 C.J.S., Constitutional Law, § 167, p. 845.
>
> . . .

Id. at 787. (Emphasis added). The *Giss* court also stated,

> There is no question but that the legislature constitutionally has "the power of the purse" as no one may expend public funds without legislative sanction; however, we cannot believe that the framers of our constitution ever intended that the legislative branch of the government should, as to the expense claims of its own members, perform the executive function of "auditing", nor that it was intended any claims for the expenditure of public funds be paid without an audit by some official of the executive department. That power, we hold, was delegated by the Constitution to the executive branch and impliedly placed in the hands of respondent. Subdivisions D and E of section 41-1103, A.R.S., are held to be unconstitutional and therefore void.

Id. at 788. (Emphasis added). *See also Thompson v. Legislative Audit Commission*, 448 P.2d 799 (N.M. 1968) ("The removal of the duties implicit in the office of state auditor requires us to declare unconstitutional the entire statute."); *Wright v. Callahan*, 99 P.2d 961, 966 (Idaho 1940) ("The statute under consideration . . . clearly takes from the State Auditor activities which, prior to the time of the adoption of the Constitution, were vested in the territorial controller, and since the adoption of the Constitution, have been in the office of the State Auditor . . . [T]o permit the legislature to create an office and vest in the appointee the powers and duties conferred upon a constitutional officer, would be to permit the legislature to nullify the Constitution and reduce it

to a mere scrap of paper."); ***Hudson v. Kelly***, 263 P.2d 362, 366 (Ariz. 1953) ("The duties of the [auditor] now are and always have been those of general accountant of the state . . . It was undoubtedly intended by the framers of our Constitution that in the matter of auditing the accounts of all public officials and state agencies that this function was to be performed by an officer independent of the officers and agencies to be audited. This concept is violated in the Act under consideration. . . ."); ***State ex rel. Mattson v. Kiedrowski***, 391 N.W.2d 777, 780 (Minn. 1986) ("the legislature should have known that it could not denude the office [of Treasurer] of its inherent powers and duties, even though they had been prescribed by statute. . . ."); ***American Legion Post No. 279 v. Barrett***, 20 N.E.2d 45, 51 (Ill. 1939) ("the General Assembly may not take away from a constitutional officer the powers and duties given him by the constitution. . . . This court has held that those duties are such as are to be implied from the nature of the office and of them he may not be deprived or relieved."); ***Hicks v. Davis***, 163 P. 799 (Kan. 1917) ("The Constitution which creates the office of state auditor . . . does not define his duties. Therefore, they are those which pertained to that office at common law . . . the auditor must scrutinize every claim against the state. . . ."); ***Preece v. Rampton***, 492 P.2d 1355 (Utah 1972) ("the constitutional duties of the state auditor are those which the territorial auditor was then performing and . . . the constitutional provision that other duties may be imposed upon him does not permit the legislature to relieve him of any of those constitutional duties."); ***Ex parte Corliss***, 114 N.W. 962, 970 (N.D. 1907) ("the Constitution having named certain officers, the functions essentially and inherently connected with such offices must be discharged by these constitutional officers and none others."); ***State ex. rel. Crawford v. Hastings***, 10 Wis. 525 (1860) ("the functions of that officer [State Auditor] cannot, in whole or in part, be transferred to, or be exercised concurrently or otherwise by, any other person or officer.").

C. The Inability of the Legislature to Alter Constitutional Duties of a Constitutional Officer

The Nebraska Supreme Court has held that "an office created by the <u>legislature</u> may be abolished by that body. . . ." ***State v. Houston***, 94 Neb. 445, 452 (1913) (emphasis added). However, the Nebraska Supreme Court has repeatedly recognized the principal that the legislature may not transfer duties vested under the <u>Constitution</u> in one officer or entity to another officer, body or jurisdiction. ***State ex rel. Spire v. Beermann***, 235 Neb. 384, 395-399, 455 N.W. 2d. 749 (1990); ***Board of Regents of University of Nebraska v. Exon***, 199 Neb. 146, 256 N.W. 2d. 330 (1977); ***State v.***

Kidder, 173 Neb. 130, 112 N.W. 2d. 759 (1962); *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W. 2d. 502 (1949); *Rivett Lumber & Coal Co. of Benson v. Chicago & N. W. Ry. Co.*, 102 Neb. 492, 167 N.W. 2d. 570 (1918).

In sum, "the duties of a constitutional officer may be added to by statute but none, as they were known at common law, may be taken away." *People ex. rel. Walsh v. Board of Commissioners of Cook County*, 74 N.E.2d 503, 507, 508 (Ill, 1947). See also State ex. rel. University of Minnesota v. Chase, 220 N.W. 951, 956 (Minn. 1928); State ex. rel. Josephs v. Douglas, 110 P. 177, 180 (Nev. 1910) ("the Legislature . . . is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong to it.").

Even if the Legislature could constitutionally remove executive duties from a constitutional officer it could not do so in a manner which would violate the separation of powers provision of the Nebraska Constitution. Specifically, the legislature may not transfer the executive duties of auditing or litigating from the Auditor and Attorney General, respectively, to a legislative appointee. To do so would allow members of one branch to exercise powers belonging to another, which is a clear violation of the constitution. See Op. Att'y Gen. No. 92004, January 9, 1992.

Conclusion

Sections one and four of LB 579, as amended, are clearly unconstitutional and would be declared void by a court as being in violation of Article IV, §1 and Article II, §1 of the Constitution of the State of Nebraska. These sections purport to divest the Auditor of Public Accounts of his constitutional authority to conduct an independent audit of expenditures of state funds. The auditing of expenditures of state funds is an executive power. Pursuant to Article II of the Nebraska Constitution, the legislative branch may not exercise "any power properly belonging" to the executive branch.

Section 2 of LB 579 is unconstitutional to the extent it authorizes the legislative branch of state government to perform duties properly belonging to the executive branch. Whereas courts will construe legislative enactments so as not to conflict with the constitution, a court may construe LB 579 as permitting the legislature to contract for legal, auditing, accounting and other professional services within the confines of the legislative function. In other words, a court may uphold LB 579 to the extent it permits the legislature to hire legal counsel, auditors or accountants etc. to perform services related to the development of legislation or for internal studies, reviews or audits of the

legislature. This would not include executive functions such as independent financial audits or legal representation before a court of law. Although Section 2 of LB 579 purports to permit the hiring of legal counsel, auditors, accountants and other professionals "notwithstanding any other provision of law" and "not subject to review or approval by any other entity of state government," a court would not construe it to repeal the Auditor's duties codified at Neb. Rev. Stat. § 84-304 or the Attorney General's duties codified at Neb. Rev. Stat. § 84-205 since to do so would result in an unconstitutional intrusion by the legislative branch into executive duties.

Section three of LB 579, as amended, is likely unconstitutional insofar as it inhibits the Auditor of Public Accounts from conducting an independent, complete audit of the expenditure of public funds. This is a close question, however. The Legislature has legislative duties which could be infringed by improper disclosure of telephone communications, and a court could find this restriction on the Auditor's duties to be reasonable. However, a court may find the restriction unnecessarily impinges on the ability of the Auditor to conduct a complete and independent audit, especially since the Auditor has traditionally had access to such records and since the Legislature could prohibit the improper disclosure of such records by less restrictive means (for example, by prohibiting and penalizing improper disclosure by the Auditor, limiting use of such information to audit purposes, and proscribing reasonable safeguards and procedures for the verification of the call as being state business.)

Sincerely,

DON STENBERG
Attorney General

Steve Grasz

Steve Grasz
Deputy Attorney General

Approved By:

Don Stenberg

Attorney General

3-1084-3