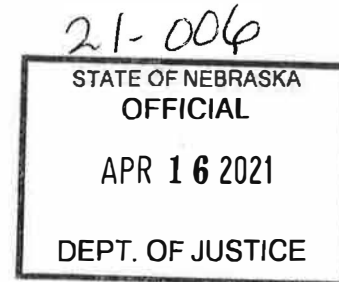




STATE OF NEBRASKA  
**Office of the Attorney General**

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL



**SUBJECT:** Constitutionality Under the Separation of Powers Clause of Service as a Member of Both the State Board of Health and a Judicial Nominating Commission

**REQUESTED BY:** Senator Megan Hunt  
Nebraska Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Leslie S. Donley, Assistant Attorney General

You have requested an opinion of the Attorney General relating to the recent appointment of Robert (Bud) Synhorst to the State Board of Health. You indicate in your opinion request letter that in addition to his appointment to the State Board of Health, Mr. Synhorst also serves on the Judicial Nominating Commission-Third District-District Court, which you assert "is an agency, or a component of, the judicial branch of our state government" under art. V, § 21 of the Nebraska Constitution.

You state that in *State ex rel. Spire v. Conway*,<sup>1</sup> "the Nebraska Supreme Court held . . . that a state senator could not hold a teaching position at Wayne State College while serving as a member of the Legislature because the college was operating under the auspices of the Board of Regents of the University of Nebraska," which the court interpreted to be "an executive agency and part of the executive branch."<sup>2</sup> You further

<sup>1</sup> 238 Neb. 766, 472 N.W.2d 403 (1991).

<sup>2</sup> In *Conway*, the court found that the State College Board of Trustees, like the University Board of Regents, was part of the executive branch. There was no indication

state that under *Conway*, “[t]he Court reasoned that our state constitution’s separation of powers provision . . . prohibits certain person[s] from serving two branches of government concurrently.” Thus, as a member of the legislative branch, *Conway* could not continue to serve in both the Legislature and as an assistant professor at Wayne State College.

You assert that “Mr. Synhorst is now concurrently serving as a member of commission[s] in the executive and the judicial branch of government.” Based on the foregoing, you have posed the following questions:

1. How is this “dual service” appointment consistent with the *Conway* prohibition against concurrent service in two branches of government?
2. If it is your opinion that Mr. Synhorst’s dual service on these commissions is improper, what is the remedy for resolving this unconstitutional arrangement?
3. Section 71-2603 provides for a removal process of Board of Health members for various reasons, including the “failure to maintain the qualifications for the position for which appointed.” Would removal of Mr. Synhorst from the Board of Health be the remedy for resolving the conflict with *Conway*?
4. Or would the Legislature’s most recent confirmation of Mr. Synhorst to the Board of Health be given deference? If so, and stated another way, is there a process available for removal from Mr. Synhorst from the Judicial Nominating Commission [that would] be the preferred remedy?

You have requested guidance on these questions, “and any other related subjects you identify, regarding the issue of the predicament of Mr. Synhorst’s dual service on the above-referenced commissions.”

### ANALYSIS

In Op. Att’y Gen. No. 157 (December 24, 1985), the Attorney General clarified the policies relating to the issuance of opinions to members of the Legislature:

In the case of requests from members of the Legislature, we have limited the issuance of such opinions for “valid legislative purposes” only. The Legislature’s purpose is, of course, to make, alter or repeal laws. See, *Nebraska Public Power District v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982). It is the function of the executive branch to apply and enforce those laws, and the judicial branch to interpret those laws. Consequently, it has been and continues to be the policy of the Attorney General that we issue legal opinions to state legislators which pertain only to pending or proposed legislation. In this regard it is also our policy to decline

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by the court in *Conway* that the Board of Trustees was operating under the auspices of the Board of Regents.

opinion requests from legislators concerning the constitutionality, or seeking interpretations, of existing statutes. . . .

There are two exceptions to this policy. The first exception is where the interpretation of an existing statute is directly related to the proposed or pending legislation, or in turn where the proposed legislation is dependent upon such an interpretation. The second exception is where the requested interpretation pertains directly to the performance of some function or duty by the Legislature itself.

*Id.* at 1.

Under those standards, we are uncertain what legislative purpose is implicated in your questions set out above. There is no pending or proposed legislation before us. The questions also do not implicate the performance of a legislative function or duty. It appears to us that the matter of the confirmation of Mr. Synhorst to the State Board of Health was fully resolved when the Nebraska Legislature voted to adopt the Health and Human Services Committee's confirmation report on March 31.<sup>3</sup> Moreover, legislative attempts to recommit the confirmation report to the committee were unsuccessful. There is nothing pending in this regard. However, since the Attorney General has independent authority under the quo warranto statutes<sup>4</sup> to remove a state official who may be improperly holding office, we will take this opportunity to consider the propriety of Mr. Synhorst's dual appointments.

#### **I. Applicable Law.**

Article II, § 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 except as expressly directed or permitted in this Constitution.

Neb. Const. art. II, § 1(1). "[T]he Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n*, 251 Neb. 517, 524, 557 N.W.2d 684, 690 (1997). "Article II also prohibits certain persons from serving two branches of government

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<sup>3</sup> The Legislature confirmed Mr. Synhorst's appointment to the board on March 31, 2021, with 37 members voting aye, 7 nays, 3 present and not voting, and 2 excused and not voting. Nebraska Journal, March 31, 2021, at 837.

<sup>4</sup> Neb. Rev. Stat. §§ 25-21,121 to 25-21,148 (2016).

concurrently. This is its personnel, or individual, aspect. This aspect serves as a check against the concentration of power, and guards against conflicts of interest which arise when one serves two masters.” *Conway*, 238 Neb. at 773-74, 472 N.W.2d at 408.

Neb. Const. art IV, § 6, states that “[t]he supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered.”

Judicial nominating commissions are created in Neb. Const. art. V, § 21, which provides, in pertinent part:

(1) In the case of any vacancy in the Supreme Court or in any district court or in such other court or courts made subject to this provision by law, 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.

\* \* \*

(4) 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 and of the district court and one for each area or district served by any other court made subject to subsection (1) of this section by law. Each judicial nominating commission shall consist of nine members, one of whom shall be a Judge of the Supreme Court who shall be designated by the Governor and shall act as chairman, but shall not be entitled to vote. . . .

(Emphasis added.) In addition, the Legislature has enacted Neb. Rev. Stat. §§ 24-801 to 24-812 (2016, Cum. Supp. 2020), which apply to “[a]ll judicial nominating commissions under Article V of the Constitution of Nebraska . . . .” Neb. Rev. Stat. § 24-801 (2016).

## II. Judicial Nominating Commissions Perform Executive Functions.

You initially ask how Mr. Synhorst’s “‘dual service’ appointment [is] consistent with the *Conway* prohibition against concurrent service in two branches of government[.]” Your question is premised on your assertion that a judicial nominating commission “is an agency, or a component of, the judicial branch of our state government.” The sole support for this assertion appears to be the fact that commissions are created in article V of the Constitution pertaining to the Judiciary.

The Attorney General has issued several opinions discussing *Conway* in the context of various fact situations. In Op. Att’y Gen. No. 92115 (October 1, 1992), we considered the constitutionality of Supreme Court Judges sitting as presiding members of judicial nominating commissions. Senator Schimek raised the concern that in light of *Conway*, since members of judicial nominating commissions who assist the governor in making judicial appointments are part of the executive branch, the separation of powers clause would preclude the judges from serving as members. Our analysis noted that the

*Conway* court interpreted the separation of powers clause “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.’ *Id.* at 788, 472 N.W.2d at 415-16.” We further noted that art II, § 1 “requires separation of legislative, executive, and judicial powers ‘except as hereinafter expressly directed or permitted.’” *Id.* at 2. In this context, the Nebraska Supreme Court had applied the exception to entities endowed by the Nebraska Constitution with multiple governmental powers, but not to individuals.<sup>5</sup> We concluded that

Article V, Section 21 . . . 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.

*Id.* (emphasis added).

Authority in other jurisdictions supports the position taken in Op. Att’y Gen. No. 92115 that members of judicial nominating commissions exercise an executive function when performing their duties. In *In re Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973), the governor of Florida requested an opinion from the Florida Supreme Court relating to the appropriate roles of the executive and legislative branches in light of recent enactments elevating judicial nominating commissions “to constitutional stature and permanence.” *Id.* at 29. The court held that “[t]he appointment of a judge is an executive function and the screening of applicants which results in the nomination of those qualified is also an executive function.” *Id.* In response to whether the governor could establish operational rules for the commissions, the court stated:

Your . . . question is answered in the negative. The purpose of the judicial nominating commission is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge. When the commission has completed its investigation and reached a conclusion, the persons meeting the qualifications are nominated. In this respect the commissioners act in an advisory capacity to aid the Governor in the conscientious exercise of his executive appointive power.

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<sup>5</sup> “While it may be necessary for certain agencies to share attributes with the executive, legislative, and judicial branches in order for those agencies to carry out the function assigned to them in the Constitution, those needs do not require the agency to employ personnel who exercise power in another governmental branch.” *Conway*, 238 Neb. at 785, 472 N.W.2d at 414.

The preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential to the effective operation of our constitutional system of government. . . . This doctrine is designed to avoid excessive concentration of power in the hands of one branch. . . . As a corollary to the doctrine of separation of powers, the executive branch under the Florida Constitution is empowered to fill by appointment vacancies in judicial office.

*Id.* at 30 (internal citations omitted).

In *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982), a former state judge brought suit against members of the Hawaii Judicial Selection Commission for violating his Fourteenth Amendment rights to procedural due process by denying his petition for reappointment. Richardson also alleged violations of the Hawaii Constitution and law. Commission members argued they were “absolutely immune from liability for damages” because they were agents of the court acting “in furtherance of their quasi-judicial functions.” *Id.* at 913. The court rejected these claims, stating:

One claiming immunity has the burden of demonstrating entitlement to it. . . . The Commission contends that its functions are “judicial” in nature because its responsibilities of recommending candidates for judicial office to the appointing officials and of reviewing reappointment petitions requires it to “weigh the merits of [the] candidates,” “consider all the evidence,” “conduct extensive investigations,” and “act very much like judges in attempting objectively to evaluate . . . the merits of each candidate or petition.” Although the Commission describes its responsibilities in “judicial” terms, these functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries. . . . Rather, these responsibilities indicate that the Commission's functions are executive in nature.

*Id.* at 914 (emphasis added) (internal citations omitted).

In *Matheson v. Ferry*, 641 P.2d 674 (Utah 1982), the Utah Supreme Court considered the constitutionality of statutes that provided for two members of the Legislature to serve on judicial nominating commissions and required senate confirmation of certain judicial appointments. The court noted that “[t]he function of actually carrying out the judicial selection processes as provided by law and making appointments has historically been the function of the executive in this state . . . .” *Id.* at 677. “Indeed, so far as we are aware, the actual selection and appointment of judges in every state except two (excluding states having popular election procedures) is done by the executive either by Constitution or statute, or both, under limitations and restrictions of varying degrees as the constitutions and laws in such states provide.” *Id.* at 678. The court stated that regardless of the source of the Governor’s power (i.e., constitutional, statutory, or inherent), the Governor’s power is both protected and proscribed by the separation of powers clause. The court concluded that since there was no specific language in the

Constitution prohibiting the Legislature from participating in judicial selection and appointment procedures in any degree, the statute providing for two legislative appointees on the commissions did not violate the separation of powers clause. However, the statutes adding the “advice and consent” provisions amounted to an “offensive control” by the Legislature of the Governor’s power of appointment and was violative of the clause. *Id.* at 679.<sup>6</sup>

“A constitution represents the supreme written will of the people regarding the framework for their government. *Pig Pro Nonstock Co-op. v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). When the language of the state Constitution is clear, unambiguous, and does not violate the U.S. Constitution, it is not for [the] court to read into it that which is not there.” *Pony Lake School Dist. 30 v. State Committee for Reorganization of School Districts*, 271 Neb. 173, 187, 710 N.W.2d 609, 622 (2006). There is nothing in art. V, § 21 that suggests that judicial nominating commissions constitute “agencies” of the judicial branch, or that members of these commissions are exercising judicial or quasi-judicial functions when they screen applicants for judicial appointment. In contrast, art. V, § 21 clearly and unambiguously states that the Governor fills judicial vacancies from a list of nominees presented to him by the appropriate judicial nominating commission. In this regard, members of judicial nominating commissions are exercising an executive function, not a judicial one.

Mr. Synhorst is now serving in the executive branch as a result of his appointment to the State Board of Health. He fulfills an executive function as a member of the Judicial Nominating Commission-Third District-District Court. He does not serve in two branches of government. Thus, in response to your first question, Mr. Synhorst’s dual appointments are, in fact, consistent with the *Conway* prohibition since only the executive branch of government is implicated.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that members of judicial nominating commissions exercise an executive function when they screen applicants for judicial office. Applying the *Conway* rule to the facts before us, we conclude that Mr. Synhorst’s dual appointments do not violate the separation of powers clause of the

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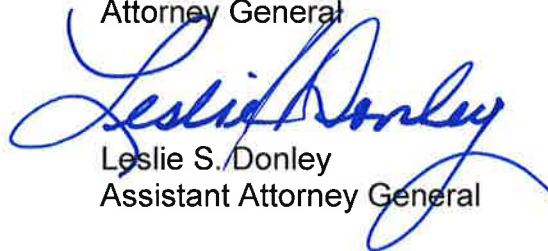
<sup>6</sup> Compare *Ashford v. Bowie*, 2016 WL 4186952, vacated by *Ashford v. Douglas County*, 880 F.3d 990 (8<sup>th</sup> Cir. 2018) (Judicial immunity applies to selection committee comprised of judges and nonjudges involved in selecting attorneys to be included on lists for court appointments.).

Senator Megan Hunt  
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Nebraska Constitution since they only involve service in and to the executive branch of government. In light of this conclusion, it is unnecessary for us to address the remaining questions in your request.

Sincerely,

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Attorney General



Leslie S. Donley  
Assistant Attorney General

Approved by:



Attorney General

pc Patrick J. O'Donnell  
Clerk of the Nebraska Legislature

49-2679-29