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#92004

DATE: January 9, 1992

SUBJECT: Separation of Powers Between the Executive and Legislative Branches of Government in Relation to LB 228 (Position of Counsel to the Legislature).

REQUESTED BY: Senator Brad Ashford
Nebraska Legislature

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

You have requested an opinion as to the constitutionality of LB 228 of the Ninety-Second Legislature, First Session (1991). LB 228, as amended, creates the position of Counsel to the Legislature and provides for the powers and duties of such position.

Section two of LB 228 provides in part:

The Counsel to the Legislature shall:

(2) Provide legal representation to any member of the Legislature or staff member when such person is sued or named as a party to litigation in his or her official capacity.

Section three of LB 228 provides:

(1) The Counsel to the Legislature shall, upon the recommendation of the Clerk of the Legislature and by a majority vote of the Executive Board of the Legislative Council, appear in, commence, prosecute, defend, or intervene in any action in any court or agency of this

> state or of the United States to protect the interests of the Legislature. The counsel may candidly advise the executive board and the clerk concerning the propriety or impropriety of any such action. Expenses incurred in any such action shall be paid from funds appropriated to the clerk for such purpose.
> (2) The counsel may provide legal representation to any member of the Legislature or staff member on matters arising in the course of such person's legislative responsibilities.

The foregoing provisions of LB 228 violate the constitutionally mandated separation of powers between the legislative and executive branches of government. 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 any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

The "doctrine of separation of powers has been strictly construed in the State of Nebraska." Opinion of the Attorney General No. 85-69, April 23, 1985 at 2 (citing State ex rel. Meyer v. State Bd. of Equalization and Assessment, 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).[1]

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[1] The separation of power between the branches of state government has been addressed on numerous occasions by the Nebraska Supreme Court and in prior opinions of the Attorney General. As we previously stated:

> The Constitution of the State of Nebraska adopted the same tripartite separation of powers as the Federal Constitution. In analyzing the distribution of powers as set out in the Constitution of the United States, the United States Supreme Court stated, "The object of the

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

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> Constitution was to establish three great departments of government: the Legislative, the Executive, and the Judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third to expound and enforce them." Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L.Ed. 97 (1816).

Opinion of the Attorney General No. 87114, December 9, 1987 at 4. See also State ex rel. Howard v. Marsh, 146 Neb. 750, 755, 21 N.W.2d 503 (1946) ("In the tradition of the founders of our national government, by the provisions of the Constitution of Nebraska, the powers of government are divided into three distinct departments, the legislative, the executive, and the judicial.").

As the Nebraska Supreme Court has noted, "The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu. . . ." Searle v. Yensen, 118 Neb. 835, 841, 226 N.W. 464 (1929).

> Montesquieu suggested a government with legislative, executive and judicial departments, each independent of the other. The framers of the American Constitution and the people of Nebraska adopted that plan. It has been regarded by statesmen and philosophers as an outstanding advancement in the science of government.

State ex rel. Sorensen v. State Bank of Minatare, 123 Neb. 109, 114, 242 N.W. 278 (1932).

effect." State ex rel. City of Lincoln v. Babcock, 19 Neb. 230, 239, 27 N.W. 98 (1886).

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.

Neb.Rev.Stat. §84-205(4) provides the Attorney General shall "when requested by . . . the Legislature, appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party, before any court, officer, board, tribunal or commission." Although this statute clearly authorizes the Attorney General to conduct much or all of the litigation contemplated as a potential duty of the Counsel to the Legislature under LB 228, section 84-205(4) is only a codified statement of the executive power which is the subject of the larger issue at hand. At issue is whether LB 228 authorizes the Counsel to the Legislature to exercise powers properly belonging to the executive branch.

Pursuant to Article IV, Section 1 of the Constitution of the State of Nebraska, the Attorney General is an executive officer. See Opinion of the Attorney General No. 89033, April 4, 1989; State ex rel. Caldwell v. Peterson, 153 Neb. 402, 407, 45 N.W.2d 122 (1950); State ex rel. Howard v. Marsh, 146 Neb. 750, 753, 21 N.W.2d 503 (1946). Therefore, the Attorney General 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." Id. In Nebraska the "law" includes the common law as well as statutory law.[2] See Neb.Rev.Stat. §49-101 (Reissue 1988); State

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[2] The common law is specifically "adopted and declared to be the law within the State of Nebraska" where it is "applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state." Neb.Rev.Stat. §49-101 (Reissue 1988).

In addition to the above statutory provision regarding the common law, the common law authority of the Attorney General has been recognized by the Nebraska Supreme Court. "By the great weight of authority, it is now held that the Attorney General is clothed and charged with all the common-law powers and duties except in so far as they have been limited by statute. . . As the

v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984). Thus, the legislature cannot divest the Attorney General of his common law duty to represent the state before the courts, at least where to do so would result in a violation of the separation of powers.[3]

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chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary exercise all such power and authority as public interests may from time to time require." State v. State Board of Equalization and Assessment, 123 Neb. 259, 243 N.W. 264 (1932). See also Babcock, 19 Neb. at 239.

[3] As recently as 1984, the Nebraska Supreme Court found the Attorney General has "inherent powers" in addition to those provided by statute. Douglas, 217 Neb. at 237-238. ("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, 243 N.W. 264 (1932)).

Thus, the Nebraska Supreme Court has rejected those decisions holding that constitutional provisions providing for powers and duties "prescribed by law" mean the Attorney General is without common law powers. See, e.g., In re Sharp's Estate, 63 Wis.2d 254, 217 N.W.2d 258, 262 (Wis. 1974); Shute v. Frohmiller, 53 Ariz. 483, 90 P.2d 998, 1001 (Ariz. 1939). Instead, Nebraska follows the majority rule as recently set forth in Ex parte Weaver, 570 So.2d 675 (Ala. 1990).

> 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

The common law powers of the Attorney General are broad and well recognized. In a 1989 opinion, Attorney General Robert Spire wrote:

> The Attorney General and his designees are vested with broad common law and statutory powers to carry out the duties of the Office. The inherent power and authority of the Attorney General to initiate and defend actions, to make decisions regarding strategy, and to negotiate and enter into settlements was addressed in State Board of Equalization and Assessment, 123 Neb. 259, 242 N.W. 609, (cited with approval in Douglas, 217 Neb. 199, 349 N.W.2d 870). There, the Nebraska Supreme Court

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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."

Id. at 684, quoting Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177, 178 (1969).

Whether the common law powers embedded in the office of the Attorney General are subject to legislative modification as in some jurisdictions, see Padgett v. Williams, 82 Idaho 28, 348 P.2d 944, 948 (Idaho 1960), or whether such common law powers are immune from legislative change, see E.P.A. v. Pollution Control Bd., 372 N.E.2d 50, 51-52 (Ill. 1977); People v. Daniels, 69 Ill.2d 394, 132 N.E.2d 507, 509 (Ill. 1956), need not be addressed in determining the constitutionality of LB 228 since even where modification of common law powers is permitted, the legislative branch cannot modify the duties of the Attorney General in a way which violates the constitutionally mandated separation of powers. See Murphy v. Yates, 276 Md. 475, 348 A.2d 837, 846 (1975) ("If an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced to impotence by the transfer of duties characteristic of the office to another office created by the legislature . . . We regard this as but another facet of the principle of separation of powers. . . .").

held that the Attorney General is the principal law officer of the state. Id. at 262. In this regard, the court stated:

> We find that a late case, which is in line with the weight of authority, is State v. Finch, 128 Kan. 665, 66 A.L.R. 1369, which traces the powers and duties of the Office of the Attorney General at common law from the earliest times to the present time, and holds: `Ordinarily the Attorney General, both under common law and by statute, is empowered to make any disposition of the state's litigation which he deems for its best interest. (Emphasis added.)

Id. at 261. Moreover, the court stated that the Attorney General is clothed and charged with all common law powers and duties except to the extent that they are limited by statute; and, as the chief law officer of the state, he is authorized to exercise all such power and authority as the public interests may require, absent some express legislative restriction to the contrary. Id. at 261-262; Douglas, 217 Neb. at 237.

These common law powers and duties were later codified by the Nebraska Legislature. Neb.Rev.Stat. §84-202 (Reissue 1987) provides:

> The Department of Justice shall have the general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested, and shall have charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interest of the state. (Emphasis added.)

Opinion of the Attorney General No. 89033, April 10, 1989 at 4.

LB 228 provides that the Counsel to the Legislature shall provide legal representation to members of the legislature and prosecute, defend or intervene in any action in any court to protect the interests of the Legislature. These provisions are in conflict with the constitutional role of the Attorney General as the chief law officer of the state, who is the exclusive legal

representative of the state in all litigation with regard to matters of public or statewide interest.

One could conceive of situations in which it might be necessary for the Attorney General to appoint outside counsel to represent the interests of the legislature where a conflict of interest is found to exist. However, even in a contest between the legislature and the executive branch the Attorney General may properly bring an action at the request of the legislature. In State ex rel. Meyer, 185 Neb. 490, 176 N.W.2d 920, the Attorney General brought an action "at the express request of the Legislature" seeking "to have certain appropriations vetoed by the Governor declared void and to uphold certain personal service limitations placed in the appropriation bills by the Legislature." Id. at 491.

Section 2(1) of LB 228 authorizes the Counsel to the Legislature to provide formal legal opinions to any member of the legislature. The danger of the legislative branch providing legal opinions on the constitutionality of its own proposals is apparent, especially when they go beyond providing mere guidance in drafting legislative proposals.[4] Furthermore, it is virtually inevitable

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[4] The separation of powers does not preclude the legislature from seeking legal advice from sources other than the Attorney General in all situations. One could even conceive of situations in which certain legal opinions by a Counsel to the Legislature could be constitutionally permissible. However, in the context of opinion requests from state senators to the Attorney General we have previously stated:

> It would serve no valid legislative purpose to issue an opinion to a legislator concerning the interpretation and enforcement of a particular statute, when the Legislature has no authority in this regard. This responsibility is the function of the executive branch of the government and under our separation of powers doctrine it is essential that no one branch encroach upon the powers reserved to another. See State ex rel. Beck v. Young, 154 Neb. 588, 48 N.W.2d 677 (1951).
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> Likewise, it would be inappropriate and serve no valid legislative purpose to comment to a legislator upon a particular interpretation of an existing law adopted and applied by the executive branch of government.

Opinion of the Attorney General No. 85-157, December 20, 1985 at 2.

the Attorney General would be requested to provide an opinion anyway, whenever a legislator was dissatisfied with the opinion of the Counsel of the Legislature.

In conclusion, "[T]he state attorney general, as chief law officer of the state, is the exclusive legal representative of the state in all litigation with regard to matters of public interest, and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest." Mountain States Legal Foundation v. Costle, 630 F.2d 754, 771 (10th Cir. 1980). See also State v. F.E. & M.V.R.R. Co., 22 Neb. 313, 318, 35 N.W. 178 (1887). The legislative branch may not assume control of such litigation without violating the separation of powers as prescribed in Article II, section 1 of the Constitution of Nebraska.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

APPROVED BY:

Attorney General

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As to opinions concerning pending or proposed legislation, "Neb.Rev.Stat. §84-205(3) (Reissue 1981) provides that one of the duties of the Attorney General shall be 'To give, when required, without fee, his opinion in writing upon all questions of law submitted to him by . . . the Legislature.' The general duty of the Attorney General to issue such opinions has been interpreted by the Supreme Court to mean that state officers are entitled to advice upon questions of law which arise 'in the discharge of their duties.'" Follmer v. State, 94 Neb. 217, 142 N.W. 908 (1913). "This office has likewise historically viewed its responsibility to issue opinions in this same light." Opinion of the Attorney General No. 85-157, December 20, 1985 at 1. Thus, the scope of constitutionally permissible legal opinions by a Counsel to the Legislature is quite limited.