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ATTORNEY GENERAL OPINION NO. 85-5

TO: Rose Bowman, Director
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Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Is the Governor of Idaho permitted to appoint a member of the judiciary to the Children's Trust Account Board?

CONCLUSION:

No. An appointment of a member of the judiciary to the Children's Trust Account Board would violate the separation of powers clause, article 2, section 1 of the Idaho Constitution.

ANALYSIS:

Your letter asks if it is permissible for the governor to appoint a sitting judge to serve on the Children's Trust Account Board, created by the 1985 legislature, codified at Idaho Code § 39-6001 et seq. The question is primarily one of separation of powers.

Little guidance is provided in that regard by article 5, § 7 of the Idaho Constitution, which states:

> No justice of the Supreme Court shall be eligible to any other office of trust or profit under the laws of this state during the term for which he was elected.

This provision of the constitution was adopted without debate at the constitutional convention. Vol. II, p. 1522. The meaning of the provision is, however, clear from the debate of a similar provision which was proposed regarding the

governor and other constitutional officers. The sponsors of that proposal--which failed to pass--had argued that such a restriction would serve three purposes: first, it would prevent the governor from using "the patronage of his office and the influence of his position, for the purpose of lifting himself into some other office, generally that of senator of the United States"; second, it would prevent constitutional officers, especially attorneys, from seeking less prestigious but more highly paying offices; finally, it would insure stability and continuity in government because, in the opinion of the sponsors, "when the people elect a man to any office he should undertake to fill that office during the term for which he was elected, and not when he gets into office merely use it for something else." Proceedings of Constitutional Convention, Vol. I, pp. 426-29.

Article 5, § 7 sheds no light on the question presented in your letter. For one thing, as the Idaho Supreme Court has stated, "this provision is applicable only to justices of the Supreme Court," not to trial judges. Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967). More importantly, the purpose of the provision, even as to supreme court justices, is to prevent a sitting justice from aspiring to another office during his term of office--not to map the terrain dividing strict separation of powers from permissible overlap of powers.

Instead, the answer to the question posed in your letter must be found in article 2, section 1, of the Idaho Constitution, which states in full:

> 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 charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The framers of the Idaho Constitution gave very little consideration to the separation of powers provision embodied in article 2, section 1. In fact, during the proceedings of the constitutional convention, there was no article regarding separation of powers in the papers before the convention delegates nor in any committee thereof. Judge Beatty offered the section under a suspension of the rules because the committee on revision had discovered that there was:

> no article in here such as is provided in nearly all constitutions for the distribution of the powers of the legislative, executive and judiciary; and I have prepared, or rather I have quoted from another constitution, what is the usual provision, . . .

Under suspension of the rules, the article was adopted unanimously.

The source of the separation of powers doctrine at the federal level predates the U.S. Constitution. As narrated by the Iowa Supreme Court in State v. Barker, 89 N.W. 204 (1902), the founding fathers:

> had in mind "Montesquieu's Dissertation on the Spirit of the Laws," in which he said: "There is no liberty if the power of judgment be not separated from the legislative and executive powers when the legislative and executive powers are united in one body or person." . . . He further said: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive, the judge might behave with all the violence of an oppressor."

89 N.W. at 208. The same principles were enunciated during the debate over adoption of the U.S. Constitution in the Federalist Papers. Of particular importance, as noted by the Supreme Court of Michigan, are the following passages from those documents:

> "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47.
>
> "For this reason, that convention which passed the ordinance of government, laid its foundation on the basis, that the

> legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." (quoted from Jefferson on Notes on the State of Virginia). The Federalist No. 78.

Local 170, Transport Workers Union of America v. Gadola, 34 N.W.2d 71, 78 (1948).

The Constitution of the United States does not itself contain any express separation of powers doctrine, "but the federal courts have uniformly held that only judicial functions may be imposed upon the judiciary." State v. Brill, 111 N.W. 638, 642 (Minn. 1907). A complete summary of the history of the separation of powers doctrine at the federal level may be found in the Brill case.

Against the federal background, several states have adopted an absolutely unyielding approach to questions involving separation of powers. In Oregon, for example, it has been held that a circuit court judge may not accept employment as a part-time teacher for pay at a state-funded college. In the Matter of The Honorable Loren L. Sawyer, Judge, 594 P.2d 805 (Or. 1979). The same provision of the Oregon Constitution has been held to prohibit a member of the Oregon Legislature from serving as a teacher in a public school. Monaghan v. School District No. 1, 315 P.2d 797 (Or. 1957).

Similarly, in West Virginia, that state's supreme court held that "no question can be raised as to the plain meaning of the separation of powers clause . . . and that its plain language calls not for construction but only for obedience." State v. Bailey, 150 S.E.2d 449, 452 (1966).

In Idaho, by contrast, the supreme court has never taken so inflexible an approach:

> It is not always possible to draw a sharp line of distinction between legislative, judicial and executive powers or functions, nor does it appear necessary to the purpose of the constitutional separation of powers to do so.

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 607, 308 P.2d 225, 228 (1967). In stressing the flexibility of the doctrine of separation of powers, the

Idaho Supreme Court was echoing the words of, among others, Chief Justice Cardozo while on the New York Court of Appeals:

> The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers.

In re Richardson, 160 N.E. 655, 657 (1928). Similarly, the Supreme Court of Georgia has held that:

> "This separation [of powers] is not and from the nature of things can not be total." (citations omitted.) "While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than another." (citation omitted.)
>
> The separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government, . . .

Greer v. State, 212 S.E.2d 836, 838 (1975).

The flexibility of Idaho's approach in dealing with separation of powers issues is provided for by the constitution itself, which provides an exception: "except as in this constitution expressly directed or permitted." This exception to the separation of powers doctrine has led the Idaho Supreme Court even to allow district court judges to exercise such obviously non-judicial powers as the appointment of drainage district commissioners to drainage districts situated within their judicial districts, when called upon to do so by statute. The court ruled that judges may perform such duties because the appointment clause of the Idaho Constitution (article 6, section 4) is equal with and falls within the exception to the separation of powers clause. Elliot v. McCrea, 23 Idaho 524, 130 p. 785 (1913). See also, Ingard v. Barker, 27 Idaho 124, 147 p. 292 (1915).

In like manner, the Idaho Supreme Court has been flexible in reading the separation of powers clause itself, which expressly forbids only "the exercise of powers properly belonging" to another branch of government. Thus, the court has upheld the constitutionality of a statute calling upon district judges to hear petitions by agricultural landholders to detach their lands from a municipality and, upon a finding that certain statutory conditions were met, to enter judgment granting such petitions. The supreme court held that the function of the court in such hearings is purely judicial in nature, not discretionary or policy-making. Lyon v. City of Payette, 38 Idaho 705, 224 p. 793 (1924). As such, a court performing such functions was not exercising any power "properly belonging" to the legislative or executive branches of government.

The Idaho Supreme Court's most recent and most extensive treatment of the separation of powers doctrine is to be found in Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962). That case involved a statute which created a Children's Commission, staffed initially by four members of the legislature. In addressing a challenge to that statute on the ground that it violated the separation of powers clause of the Idaho Constitution, the supreme court adhered to the same flexible approach that has been traditional throughout the state's history:

> It is the basic powers of sovereignty which must remain separate; not subsidiary activities which include the ascertainment of facts, investigation and consultation, the duty of reporting facts and making recommendations, for the purpose of carrying out those basic powers.

84 Idaho at 100, 369 P.2d 594. The court then conducted a detailed examination of the powers conferred upon the Children's Commission by statute and determined that these powers were "subsidiary," not "basic":

> to conduct a study and appraisal, make findings and recommendations relative to certain subject matters involving children, and to report to the Governor in order that he may make appropriate budgetary decisions for submission to the next session of the legislature.

84 Idaho at 101, 369 P.2d at 594.

The principles that guided the court in Jewett v. Williams are dispositive of the question posed in your letter. The Children's Trust Account Board, unlike the Children's Commission in the Jewett case, is not merely "a fact-finding and fact evaluating body, to provide information to thelegislature." 84 Idaho at 101. As constituted by the 1985 Idaho Legislature, Idaho Sess. Laws, ch. 31, p. 59, codified at Idaho Code § 39-6001 et seq., the Children's Trust Account Board is created within the department of health and welfare "to administer the children's trust account." 39-6001. In doing so, the board is empowered to "contract with public or private nonprofit organizations, agencies, schools or with qualified individuals for the establishment of community-based educational and service programs designed to reduce the occurrence of child abuse and neglect." 39-6002(a). Further, the board is given the power to "develop policies to determine whether programs will receive renewed funding." 39-6003. In addition, the board is given the power to "adopt rules and regulations pursuant to [the Idaho Administrative Procedure Act] to carry out the provisions of this chapter." 39-6002(d). The board, finally, is not subservient to the department of health and welfare within which it is situated. Rather, the department is responsible for the management and accounting of trust account moneys "under the direction of the children's trust account board." 39-6008.

In short, it is clear that the Children's Trust Account Board is not a mere fact-finding arm of the legislature; nor is it a mere advisory board subservient to the department of health and welfare. Rather, it is given powers and duties of an executive nature to "administer and enforce the laws as enacted by the legislature and as interpreted by the courts." This is the classic definition of executive power. Quinn v. United States, 349 U.S. 155, 161 (1954).

It is my conclusion that a member of the judiciary can not serve on the Children's Trust Account Board without violating the Idaho Constitution's prohibition against exercising powers that "properly belong" to another branch of government, as that prohibition has been interpreted by the Idaho Supreme Court. It must also be stressed that a judge does not have the privilege, in his individual or private capacity, to assume executive responsibilities that cannot be imposed on him by law. "To argue that we may separate a judge as the individual servant of the State from a judge sitting as judicial officer is too suspicious to stand the constitutional test imposed in this State for more than a hundred years." Local 170 v. Gadola, 34 N.W.2d at 78.

The policies underlying the prohibition against sitting judges exercising executive powers were stated by Chief Justice Cardozo. "The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other conflicting duties." In re Richardson, 160 N.E. at 661.

My conclusion that a member of the judiciary (or of the legislature) may not accept appointment to an executive board, commission or agency, is in keeping with the opinions of other attorneys general. See the following opinions, available on LEXIS: Office of the Attorney General, State of Utah, 85-12, May 9, 1985 (state judge may not simultaneously serve as a member of the State Board of Regents); Office of the Attorney General, State of California, No. 84-506, August 16, 1984 (member of California judiciary may hold office of county law library trustee, but not that of trustee of the State Library); Office of the Attorney General, State of South Carolina, October 6, 1980 (statute allowing automobile license holder to have implied consent hearing before a magistrate in the county where the licensee was arrested, found unconstitutional as imposing on the judiciary responsibilities which are not judicial in nature and which infringe on the powers of the executive branch of government); Office of the Attorney General, State of Iowa, 78-4-1, April 3, 1978 (proposal to have a district court judge serve as member of the Board of Directors of the Department of Correctional Services within his judicial district, was "a classic violation of the doctrine of separation of powers").

To the same effect are cases from numerous other jurisdictions. See, for example, State ex rel. McLeod v. Yonce, 261 S.E.2d 303 (S.C. 1979) (statute appointing circuit court judge to preside over public utility rate cases held unconstitutional): Greer v. State, 212 S.E.2d 836 (Ga. 1975) (members of the Georgia Assembly ineligible to serve on the governing body of of the World Congress Center Authority); Application of Nelson, 163 N.W.2d 533 (S.D. 1968) (statute requiring circuit judge to be chairman of South Dakota Electric Mediation Board held unconstitutional as infringing on executive branch despite fact powers of board were quasi-judicial in nature); State v. Bailey, 150 S.E.2d 449 (W.Va. 1966)(statute naming leadership of legislature to membership on State Building Commission held unconstitutional); Local 170 v. Gadola, 34 N.W.2d 71 (Mich. 1948) (statute requiring circuit judge to sit on compulsory arbitration board handling labor/management disputes for public utilities and hospitals held unconstitutional as an exercise of powers not properly belonging to the judiciary). Finally, despite a tradition dating back many decades and

despite allegations that the tradition was "efficient, convenient and useful in facilitating functions of government," the Mississippi Supreme Court recently responded to a suit brought by that state's attorney general and overturned nine different statutes appointing members of thelegislature to various boards, commissions and agencies. Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983).

It is a tribute to the wisdom, diligence and integrity of a judge that the governor wishes him to assume responsibilities as a trustee of the Children's Trust Account Board. Nothing in this opinion should be interpreted as casting a cloud on the talents or person of anyone involved in this endeavor. Nonetheless, it is my opinion that a member of the judciary (or of the legislature) may not serve on any board, commission or agency that exercises powers of the executive branch of government. To do so would violate the separation of powers clause, article 2, section 1, of the Idaho Constitution.

DATED this 21st day of October, 1985.

ATTORNEY GENERAL
STATE OF IDAHO

JIM JONES

ANALYSIS BY:

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AUTHORITIES CONSIDERED:

1. Constitutions:
   Idaho Constitution art. 2, section 1.
   Idaho Constitution art. 5, section 7.

2. Statutes:
   Idaho Code § 39-6001 et seq.

3. Idaho Cases:

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P.2d 225 (1967).
Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967).
Elliot v. McCrea, 23 Idaho 524, 130 P. 785 (1913).
Ingard v. Barker, 27 Idaho 124, 147 P. 292 (1915).
Lyon v. City of Payette, 38 Idaho 705, 224 P. 793 (1924).
Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962).

4. Cases Cited from Other Jurisdictions:

Quinn v. United States, 349 U.S. 155 (1954).
State v. Barker, 89 N.W. 204 (Iowa 1902).
Local 170, Transport Workers Union of America v. Gadola, 34 N.W.2d 71 (Mich. 1948).
State v. Brill, 111 N.W. 638 (Minn. 1907).
In the Matter of The Honorable Loren L. Sawyer, Judge, 594 P.2d 804 (Or. 1979).
Monaghan v. School District No. 1, 315 P.2d 797 (Or. 1957).
State v. Bailey, 150 S.E.2d 449 (W.Va. 1966).
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State ex rel. McLeod v. Yonce, 261 S.E.2d 303 (S.C. 1979).
Application of Nelson, 163 N.W. 2d 533 (S.D. 1968).
Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983).