

January 22, 1993

Honorable J. D. Williams
State Auditor
STATEHOUSE MAIL
Boise, ID 83720-1000

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Transfer of Post-Audit Function to Auditor's Office

Dear Mr. Williams:

By letters dated December 15, 1992, you have asked this office to review the following questions. First, does the State Auditor have constitutional authority to begin conducting modern post-audits on July 1, 1993? Second, may the State Auditor, or any other office of the government, conduct a performance audit on activities of other branches of government?

Analysis

A. Modern Post-Audit Function

In Williams v. State Legislature of Idaho, 111 Idaho 156, 722 P.2d 465 (1986), then-State Auditor, Joe Williams, challenged the legislature's placement of post-audit functions in the Legislative Auditor's office. The court held that the State Auditor's constitutionally mandated duties encompass the duties which the territorial controller was empowered to do and, thus, the court found the State Auditor has comprehensive auditing powers which include the modern post-audit function. *Id.* at 160:

[W]e conclude that the Territorial Controller would have been authorized to perform a modern post-audit function should that function have been in use at the time. The above considerations lead us to conclude that the constitution authorizes the State Auditor to have those comprehensive auditing powers.

The supreme court in Williams also held that the legislature cannot preclude the Auditor from carrying out his constitutional duties by failing to appropriate monies for those duties or restricting the appropriation. *Id.* at 161.

The Williams decision was issued in 1986 with a notation that, because the legislature would have completed its 1986 session at the time the opinion was issued, the opinion would not take effect until July 1, 1987. However, because of agreements between the State Auditor's office and the legislature, the post-audit function was not transferred to the Auditor's office in 1987 or in any of the subsequent years to date. However, this delay does not detract in any manner from the holding of the court in Williams nor the powers of the State Auditor to perform the post-audit function in general. The Williams court found that a "constitutional official need not exercise a function to be authorized to perform it." *Id.* at 161. In so holding, the court cited favorably to a Maryland decision:

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 in impotence by the transfer of duties characteristic of the office to another office created by the legislature

Id. at 160 (citing Murphy v. Yates, 348 A.2d 837, 846 (Md. 1975)) (citations omitted).

The holding of the Idaho Supreme Court in Williams is binding and, therefore, the State Auditor's office has the constitutional authority to conduct modern post-audits. The legislature cannot preclude the Auditor from performing his constitutional obligations by restricting funds or failing to appropriate for those functions. However, the legislature does have authority to statutorily authorize another entity, such as the Legislative Auditor, to perform duplicate or additional audits.

B. Performance Audit by One Branch of Government on Another Branch

The second question you asked our office to address concerns whether one branch of government can conduct performance audits on the activities of other branches of government and, specifically, whether the Auditor's office can conduct performance audits. With reference to the Auditor, the Idaho Supreme Court in Wright v. Callahan, 61 Idaho 167, 99 P.2d 961 (1940), held that the provisions of art. 4, § 1, of the constitution contained implied constitutional powers and duties equivalent to those of the territorial controller pursuant to title 1, ch. 7, § 205, of the revised statutes of the Idaho Territory of 1887. 61 Idaho at 177. In Williams, the supreme court found the implied constitutional duties of the state auditor included modern post-audit functions to the extent that those functions consisted of an examination of the books and financial records of state agencies and the rendition of professional accounting opinions concerning those books and records. The court expressed some concern with reference to extending modern post-audit authority to include evaluations of the performance of one branch of government to another branch of government:

Although the issue is not directly raised by this appeal, we observe that the "modern post-audit," to the extent which one branch of government may use such an audit to evaluate the performance of another branch, may implicate the separation of powers provisions of the Idaho Constitution. Idaho Const. art. 2, § 1. We distinguish such a "performance audit" from an audit consisting of an examination of the books and financial records of a state agency and the rendition of a professional accounting opinion concerning those books and records.

Williams, 111 Idaho at 158, n.1.

Other than the above-cited footnote, the supreme court in Williams did not analyze the use of performance evaluations by one branch of government on another. It is therefore necessary to review the separation of powers doctrine to determine if such evaluations would violate the provisions of art. 2, § 1, of the Idaho Constitution. The separation of powers provision of the constitution states as follows:

§ 1. Departments of government. -- 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.

There was very little consideration given to the separation of powers provision embodied in art. 2, § 1, by the framers of the Idaho Constitution. During the proceedings of the constitutional convention, there was no article regarding separation of powers in the papers before the convention delegates or in any committee of the convention. However, Judge Beatty, a committee delegate, noted the omission of a provision for separation of powers and, under a suspension of the rules, the article was adopted unanimously. Thus, there is little information to be garnered from the proceedings before the constitutional convention regarding the intent of the framers in applying the separation of powers provision. However, in interpreting the separation of powers provision, the Idaho Supreme Court has taken a fairly flexible approach.

The flexibility of Idaho's approach in dealing with separation of powers issues is partially provided for by a clause in art. 2, § 1, which provides an exception, "except as in this constitution expressly directed or permitted." In Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1991), the Idaho Supreme Court noted that "art. 2, § 1, of the Idaho Constitution contemplates limited interbranch encroachment when it follows the separation of powers pronouncement with the language, 'except as in this Constitution

expressly directed or permitted." This exception to the separation of powers doctrine has led the Idaho Supreme Court to allow a member of the executive branch, the Lieutenant Governor, to cast a tie breaking vote in the Senate (Sweeney v. Otter), and to allow district court judges to exercise non-judicial powers in the appointment of drainage district commissioners to drainage districts where called upon to do so by statute pursuant to the appointment clause of the constitution, art. 6, § 4. (Elliot v. McCrea, 23 Idaho 524, 130 P. 785 (1913).)

The Idaho Supreme Court has also been flexible in reading the separation of powers clause provision which expressly forbids "the exercise of powers properly belonging" to another branch of government. In Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962), the court held that four members of the legislature could sit on a commission created by statute under the jurisdiction of the executive branch. The court explained its holding as follows:

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. The Jewett court conducted an examination of the powers conferred upon the commission by statute and determined that these powers were limited to study, appraisal and making non-binding recommendations through a report to the Governor. The court held these powers to be "subsidiary" and not "basic," thus finding no violation of art. 2, § 1.

With reference to the issue addressed by this analysis, the constitution does not appear to "expressly" allow one branch of government to conduct performance audits on another branch of government. As such, the exception delineated in art. 2, § 1, contemplating limited interbranch encroachment, would not seem to apply in this instance.

The next step requires an analysis of the supreme court's holding in Jewett. It would seem, with proper statutory authority, that Jewett would allow one branch of government to conduct performance audits as long as those audits were limited to fact finding and fact evaluation for the purpose of providing information to the body being evaluated.

Arguably, the Auditor's office has statutory authority to conduct performance audits under the provisions of Idaho Code § 67-1001(5) which states: "It is the duty of the Auditor . . . (5) to suggest plans for the improvement and management of the public revenues." If, however, the Auditor's office undertakes performance audits on other

branches of government, it must do so cautiously, strictly following the provisions of the supreme court holding in Jewett. If conducting performance evaluations on other branches of government, the Auditor's office should limit its activities to ascertainment of facts, investigation and consultation. The Auditor cannot act as a policy maker when reviewing the performance of other branches of government; he must act in a subservient position to the separate branches of government, merely consulting and making non-binding recommendations.

Conclusion

The court in Williams v. State Legislature of Idaho held that the post-audit function, as limited to an examination of the books and financial records of state government and the rendition of professional accounting opinions concerning those books and records, is a constitutional function of the State Auditor's office. Although the legislature is not precluded from funding a second audit function in state government, it is precluded from using its power of appropriation to prevent the Auditor from performing this function.

With reference to performance audits conducted by one branch of government on another branch of government, it is clear that the supreme court will look very closely at this activity to determine whether it violates the principles of separation of powers delineated in art. 2, § 1, of the Idaho Constitution. *See* Williams v. State Legislature of Idaho, 111 Idaho at 158, n.1. However, if the performance audit by one branch of government on another branch of government is limited and follows the parameters delineated by the court in Jewett v. Williams, it may be held that such a limited function is not violative of the doctrine of separation of powers.

I hope this addresses your concerns, if I can be of further assistance to you in this or in any other matter, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division