

Office of the County Attorney
Montgomery County, Maryland

MEMORANDUM

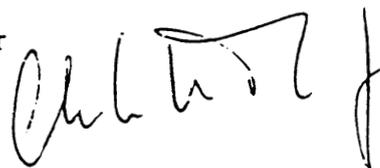
Opinion No. 97-1
Date: June 27, 1997

TO: Douglas M. Duncan
County Executive

Bruce Romer
Chief Administrative Officer

VIA: Charles W. Thompson, Jr.
County Attorney

FROM: Marc P. Hansen, Chief
Division of General Counsel



RE: Bill 38-96, Inspector General — Establishment; Legal Review

QUESTION PRESENTED

You have asked the Office of the County Attorney to conduct a legal review of Bill 38-96, Inspector General — Establishment. Bill 38-96 establishes an Office of Inspector General as a principal office in the Executive Branch of the County government. The purpose of the Inspector General is to review the effectiveness and efficiency of operations of the County government and certain independent County agencies. The Inspector General is also charged with the responsibility of preventing and detecting fraud, waste and abuse of government activities. In order to accomplish these purposes, the Inspector General is granted an extraordinary level of independence not given other department heads in the Executive Branch. This independence raises the question of whether Bill 38-96 is consistent with the Montgomery County Charter.

SHORT ANSWER

Although providing the Inspector General with independence is important in advancing the purpose for which the Inspector General is created, Bill 38-96 offends the County Charter because the Charter does not permit the Council to assume executive functions or make

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the head of a principal office in the Executive Branch of government independent from the supervision of the County Executive and Chief Administrative Officer.

ANALYSIS

I. THE INSPECTOR GENERAL LEGISLATION.

Bill 38-96 makes the Inspector General a principal office in the Executive Branch of County government. As already noted, the purpose of the Inspector General is to review the effectiveness and efficiency of the programs and operations of the County government and certain independent County agencies.¹ The Inspector General is also charged with the responsibility of identifying fraud, waste and abuse in government activities and proposing ways to increase accountability of County departments.

Bill 38-96 provides that the Inspector General serves for a four-year term.² In the event the position of Inspector General is vacant, the senior professional staff member in the Office serves as the Acting Inspector General until the new Inspector General is appointed by the County Executive and confirmed by the County Council.

The Executive may only remove the Inspector General for good cause and then only with the concurrence of the Council. The Inspector General directs the activities of the office

¹The independent County agencies are the Board of Education, the Planning Commission, WSSC, Montgomery College, the Housing Opportunities Commission, and the Revenue Authority. Section 2-64A(l) requires these independent County agencies to provide documents and information to the Inspector General. Subject to certain narrow exceptions, we question the authority of the County government to require agencies created by State law to provide the Inspector General with information absent State law authorizing the County to make these demands.

²Section 2-64A(c) provides that the term of the Inspector General begins "on July 1 of the second year after an Executive and Council are elected." Applied literally, this means that an Inspector General may not begin his or her term until July 1, 2000. At the same time, Bill 38-96 provides for a sunset date of June 30, 2000. Moreover, Bill 38-96 does not contemplate appointment of an Inspector General outside of the four-year cycle except when "the Inspector General resigns, dies, or is removed from office."

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through adoption of a four-year work plan. The Inspector General must consider recommendations for the work plan from the Executive, Council and others, but has final authority regarding the contents of the work plan.

The legislative history of Bill 38-96 demonstrates a clear Council intent to grant the Inspector General independence from the Executive so that the Inspector General will be able to conduct investigations and make recommendations without fear of dismissal and free from political control. By way of contrast, Council retains considerable control over the Inspector General's work program through the Council's control of the Office of Legislative Oversight's work program--Bill 38-96 provides that the Inspector General ensure that the Inspector General's work plan does not duplicate the work plan of the Office of Legislative Oversight-- and through Council's budget approval authority over the Office of the Inspector General.

II. THE MONTGOMERY COUNTY CHARTER.

Charter §101 (County Council) vests all legislative powers of the County government in the County Council. Charter §201 (Executive Powers), however, vests all executive power of the County government in the County Executive. Consistent with this separation of powers, Charter §117 (Limitations) prohibits the Council from appointing, dismissing or giving directions to an employee of the Executive Branch of the County government. Charter §211 (Duties of the Chief Administrative Officer) provides that the Chief Administrative Officer "subject to the direction of the County Executive, [shall] supervise all departments, offices, and agencies of the Executive Branch." Charter §215 (Appointments) provides, "The County Executive, after receiving the advice of the Chief Administrative Officer, shall appoint a single officer to head each department, principal office or agency of the Executive Branch."

The 1968 Commentary on the County Charter notes, "Consistent with §201 of the proposed charter under which all executive authority is given to the County Executive, this section [Charter §117] specifically prohibits the Council or any individual members of the Council from exercising executive authority." Thus, §117 prohibits Council involvement in the dismissal process of a member of the Executive Branch unless that power is given elsewhere in the Charter.³ The Commentary goes on to note with respect to Charter §201 that "It is intended .

³Charter §§210, 213, and 215 limit the Council's role in the hiring and dismissal of members of the Executive Branch to the confirmation of non-merit, Executive appointments.

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. . . to confer all executive power of the County government upon the Executive and it is contemplated that the County Executive's authority at the County level would be comparable to the executive power of the President at the Federal level and the Governor at the State level." With respect to Charter §215, the Commentary states, "The purpose of this provision is to insure that the County Executive will head the entire Executive Branch of the government and to prevent a division of executive authority between the Council and the County Executive."

As early as 1971, the Court of Appeals agreed with an opinion of the then County Attorney that §§101 and 201 of the Montgomery County Charter separates legislative and executive powers within the County government. *Eggert v. Gleason*, 263 Md. 243, 282 A.2d 474 (1971) (Decision to implement construction project is an executive function). In *Eggert*, the Court of Appeals reaffirmed its test for determining whether an action is executive or legislative as follows:

A recognized test for determining whether . . . it is executive or administrative . . . is whether the ordinance is one making a new law — an enactment of general application prescribing a new plan or policy — or is one which merely looks to *or facilitates the administration, execution or implementation of a law already in force and effect*. (Emphasis in original.)
Id. at 259.

In 1972, the County Attorney construed Charter §215 as preventing the Council from restricting the power of the County Executive to appoint individuals to positions covered under Charter §215.⁴ In 1976, Mr. McKernon issued Opinion No. 76.056, reviewing Bill No. 43-76. That legislation proposed to give the Human Relations Commission exclusive authority over the Office of the Human Relations Commission. The legislation also proposed to make the Human Relations Commission a principal office under Charter §212. After noting that the Charter requires that a **single** officer head a principal office, Mr. McKernon noted that the heads of principal offices are exempt from the Merit System under Charter §401 and concluded, "Thus, the head of a department would serve *at the pleasure of the County Executive*. To allow the Commission, in effect, to function as a principal department head would usurp the effective appointive authority vested in the County Executive." (Emphasis supplied.) In 1985, the Office

⁴Memorandum from Richard S. McKernon, County Attorney, to Nan Furioso, Interim Executive Director, Montgomery County Commission for Women, dated November 8, 1972.

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of the County Attorney issued Opinion No. 85.011 concluding that Bill No. 59-85 violated the separation of powers doctrine by requiring County Council approval of all Fire and Rescue Commission's actions except administrative and ministerial acts. These County Attorney opinions are important because a court will normally give great deference to a contemporaneous interpretation of a law by an agency charged with its administration-- the county Attorney is the chief legal officer of the County under Charter §213-- especially when the interpretation has been applied consistently over a long period of time. *Baltimore Gas & Electric Company v. Public Service Commission of Maryland*, 305 Md. 145, 501 A.2d 1307 (1986).

III. COURT DECISIONS.

Article II, Section 10 of the Maryland Constitution expressly grants significant control over the appointment process to the General Assembly. See, *Commission on Medical Discipline of the State of Maryland v. Stillman*, 291 Md. 390, 435 A.2d 747 (1981). Accordingly, cases construing the Governor's appointment authority provide little guidance in interpreting the County Charter.

The Court of Appeals has discussed the separation of legislative and executive powers at the local level. See, *Eggert v. Gleason*, 263 Md. 243. Of the many cases upholding the separation of powers in counties governed by a charter like Montgomery County's, the only case that, on first blush, appears to provide some support for Bill 38-96 is *County Executive of Prince George's County v. Doe*, 291 Md. 676, 436 A.2d 459 (1981). In *Doe*, the Court of Appeals invalidated an order of County Executive Larry Hogan banning abortions in Prince George's County hospitals unless necessary to save the life of the mother. The Court of Appeals noted that while the Prince George's County Charter required the Executive to direct, supervise and control the implementation of County law, the Charter gave the Council the authority to define the duties and functions of executive agencies. The court concluded that the Charter did not give the Executive "unbridled authority permitting him to usurp, nullify or supersede, at his pleasure, functions and duties committed by law to other executive branch offices, or to refuse to observe existing laws enacted by the Council." The situation in *Doe*, however, is significantly different from that presented in Bill 38-96. In *Doe*, the County Executive, without consulting with other bodies created by law to address the issue, instituted a significant new policy -- banning abortions. Bill 38-96 presents the opposite extreme by placing the head of an executive department outside the supervisory control of the Executive.

Although there are no Maryland cases directly on point, the U.S. Supreme Court has addressed the issue of legislative control over executive appointment powers under the U.S.

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Constitution, which in this regard is more similar to the County Charter than the Maryland Constitution.

In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court, in an opinion covering some 250 pages, discussed the interplay between the doctrine of separation of powers and the President's authority to "with the advice and consent of the Senate . . . appoint officers of the United States."⁵ In *Myers*, the Supreme Court struck down a Congressional act which required the President to obtain the consent of the Senate before removing a postmaster. The Court concluded:

The power to remove inferior executive officers, like that to remove superior executive officers, in [sic] an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins Case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove **or the right to participate in the exercise of that power**. To do this would be to go beyond the words and implications of that clause, and to infringe the constitutional principle of the separation of governmental powers. *Id.* at 161. (Emphasis supplied.)

Nine years later, the Supreme Court clarified that *Myers* applied only to officers exercising executive functions. *Humphreys Ex'r v. United States*, 295 U.S. 602 (1935). In

⁵Article II, Section 2, U.S. Constitution.

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Humphreys, the Court concluded that Congress could involve itself in the removal of Federal Trade Commissioners because they exercised quasi-legislative powers (requirement to make investigations and reports to Congress) and quasi-judicial powers (authority to act as a master in chancery). Of course, it may be argued that the Inspector General primarily performs the quasi-legislative function of issuing investigative reports. To the extent this argument is adopted, however, it leads to the conclusion that the Inspector General should be a part of the Legislative Branch of government, not the head of a principal office in the Executive Branch.

In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Supreme Court invalidated the Gramm-Rudman Balanced Budget and Emergency Deficit Control Act of 1985. The Gramm-Rudman Act mandated budget cuts to reach targeted deficit reduction levels. Under the Gramm-Rudman Act, the Comptroller General of the United States was authorized to specify budget cuts in a report to the President, and the President was required to follow those cuts. The constitutional defect, according to the Supreme Court, was that the Comptroller General was removable only by Congress. The Supreme Court reasoned that this amounted to a congressional intrusion into the functions of the President. The Court held that "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto This kind of congressional control over the execution of the laws . . . is constitutionally impermissible." *Id.* at 726-727. The Court went on to state that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of the enactment only indirectly — by passing new legislation." *Id.* at 733-734.

IV. APPLICATION OF THE LAW TO BILL 38-96.

Bill 38-96 invests an Executive Branch department head with an extraordinary level of independence. The Inspector General may adopt a work plan free from the direction of either the Chief Administrative Officer or the County Executive. Coupled with this authority Bill 38-96 prevents the Executive from removing the Inspector General except for cause and then only with the consent of the Council. In our view, these provisions run afoul of several Charter provisions. Bill 38-96 violates Charter §117 because it involves the Council in the dismissal of an employee of the Executive Branch of the County government. Charter §211 is violated because the Chief Administrative Officer is deprived of the responsibility of supervising an office of the Executive Branch of government.⁶ Finally, Bill 38-96 violates Charter §215 which

⁶Webster's New World Dictionary of the American Language, College Edition (1962) defines supervise as "to oversee or direct" the work of others.

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authorizes the Executive, after receiving the advice of the Chief Administrative Officer, to appoint a single officer to head each principal office of the Executive Branch. As already discussed, Chapter §215 has historically been seen as empowering the Executive to replace an incumbent department head with a new appointee without having to meet a burden of showing good cause for the Executive's decision.

The provision in the Inspector General legislation providing that the senior professional staff member in the Office of the Inspector General serves as the Acting Inspector General until a new Inspector General is appointed and confirmed further exacerbates the legislation's conflict with Charter §215. This provision, in effect, requires the County Executive to accept as a department head a specific individual for an indeterminate period of time should Council refuse to confirm the Executive's appointment.⁷

V. ARGUMENTS IN FAVOR OF BILL 38-98.

Legislative counsel defends the Inspector General legislation as being consistent with the Charter. Legislative counsel points to Charter §210, which provides that the Chief Administrative Officer must be a professionally qualified administrator who serves "at the pleasure of the County Executive." Likewise, legislative counsel points to Charter §213, which provides that the County Attorney serves "at the pleasure of the County Executive" but, upon request, is entitled to a public hearing before the Council prior to dismissal from office. Legislative counsel argues that since Charter §215, which provides for Executive appointment of all department heads, does not contain the phrase "at the pleasure of", the Charter intended to allow the Council, by law, to regulate the removal of department heads.

This argument is flawed for two reasons:

1. To prevent the Executive from removing department heads effectively shifts control over the Executive Branch to department heads who are answerable to the Council. In the case of requiring Council approval of a removal, this

⁷Additionally, the legislation provides that the Inspector General ensure that the Inspector General's work not duplicate the work of the Office of Legislative Oversight. In doing so, Bill 38-96 undermines the independence of the Inspector General from the Council. Through this provision, the Inspector General is left only those topics to study that the Council does not assign to the Office of Legislative Oversight.

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inserts the Council into the supervisory responsibilities given the Chief Administrative Officer and the County Executive over the Executive Branch. This result is contrary to the intent of Charter §§117 and 211.

2. The function of the phrase "at the pleasure of" in Charter §§210 and 213 is to clarify that the Executive may remove these officers at will, not to limit the Executive's appointment authority under Charter §215. Charter §210 provides that the Chief Administrative Officer should be a "professionally qualified administrator." This is the type of language one normally associates with a Merit System position. For example, Charter §401 provides that the Merit System "shall provide the means to . . . select . . . and maintain an effective . . . work force with personnel actions based on demonstrated merit and fitness." Adding the phrase "at the pleasure of" to Charter §210 was done to clarify that the Chief Administrative Officer was not to be given merit system protection--i.e. removal only upon a showing of cause. Similarly, in Charter §213 the County Attorney is entitled to a public hearing before the Council prior to dismissal from office. The right to a hearing is normally associated with a situation in which an officer may only be removed for cause. Adding the phrase "at the pleasure of" to Charter §213 makes it clear that the County Attorney may be removed by the Executive without cause.

Legislative counsel also argues that many members of boards and commissions may be removed only for cause. Specifically, legislative counsel points to the Ethics law which requires Council concurrence in the removal of an Ethics Commissioner for cause. This argument is significant because Charter §215, which provides that the Executive appoint department heads, also provides that the Executive appoint, subject to Council confirmation, members of boards and commissions.

We believe this argument is also flawed. Boards and commissions are not principal departments in the Executive Branch of government. Without deciding whether the removal provision in the Ethics law violates the Charter, we point out that the Ethics Commission, unlike the Inspector General, carries out significant quasi-judicial functions. We believe deciding specific cases in a trial-type proceeding is a significantly different function than administering a principal department in the Executive Branch of government. *See, Humphrey's Ex'r v. United States*, 295 U.S. 602.

VI. CONCLUSION.

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There is not a "bright line" test which can be applied in determining whether legislation violates the separation of powers doctrine established in the County Charter. In the case of Bill 38-96, we believe the combination of the provisions providing for removal for cause, requiring Council approval of removal, authorizing the Inspector General to establish his or her own work plan, and designating a senior professional staff member to act as Acting Inspector General until a new Inspector General is approved and confirmed, crosses over the line separating the Council's functions from the Executive's functions. Accordingly, we conclude that the County Charter conflicts with Bill 38-96.

We readily acknowledge the legitimacy of the functions of an Inspector General as envisioned in Bill 38-96 and the importance independence of the Inspector General plays in accomplishing those purposes. We conclude, nevertheless, that the means by which the Council has chosen to achieve the purposes laid out in Bill 38-96 violate the Charter. Other means, however, to achieve those ends are available to the Council. Certainly, the Council could propose an amendment to the County Charter to create an independent Office of the Inspector General. In the alternative, the Council could place the Inspector General's function in the Legislative Branch of government.

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