

**ISSUES ASSOCIATED WITH PROPOSED AMENDMENTS
TO WYO. STAT. §9-13-101 et seq.
21LSO-0060**

The bill proposes to add Judicial Officers to the “public employees” covered by the Ethics and Disclosure Act.

There are several grave concerns presented by the proposed legislation.

1. *The Proposed Legislation Attempts to Exercise Authority which is Vested by the Wyoming Constitution with the Commission on Judicial Ethics and Conduct.*

The Constitution for the State of Wyoming established and created the Commission on Judicial Conduct and Ethics. (see Wyo. Const. Art. 5, § 6) The Constitution states:

(a) There is hereby created the Commission on Judicial Conduct and Ethics.

(d) The commission, or a panel thereof, shall consider complaints of judicial misconduct made against judicial officers and, to the extent permitted and as provided for by the code of judicial conduct, may:

(i) Discipline a judicial officer; or

(ii) Recommend discipline of a judicial officer to the supreme court or a special supreme court.

Wyo. Const. Art. 5, § 6 (a) and (d).

Section 9-13-101 et. seq. is undoubtedly an “ethics” statute which was enacted in 1998 to provide ethical restrictions for certain members of the government *which were not already subject to an ethical code*. In fact, the common name for the statute is the “Ethics” and Disclosure Act. There is no doubt that this statute sets ethical standards for certain governmental employees. However, in 1998, all Judges, Justices and other judicial officers were already subject to a longstanding and strict set of ethical rules – *The Wyoming Code of Judicial Conduct*.

It was for good reason, indeed it was for Constitutionally good reasons, that the Act did not attempt to extend these rules to the judicial branch in 1998. The Wyoming Constitution vests the authority to establish the ethical obligations of the judiciary and to enforce those ethical obligations with the Commission on Judicial Ethics and the Wyoming Supreme Court.

Consequently, attempting to extend the Ethics and Disclosure Act to judicial officers violates

the Constitution's mandate because the legislative and executive branches are attempting to exercise control over matters vested by Constitution elsewhere. The amendments to the statute will render it Constitutionally invalid because the matter of an ethical code and the enforcement of that code is vested by the Wyoming Constitution with the CJCE and the Wyoming Supreme Court.

2. *The Proposed Amendments Violate Article 2, Section 1 of the Wyoming Constitution which provides for the Separation of Powers between Wyoming's Three Branches of Government.*

It is a basic tenant of our democracy that there are three branches of government which are separate but equal. Wyoming's Constitution provides for this separation of powers. (See Wyo. Const. Art. 2, § 1) Matters of ethics which apply to each branch and the enforcement of those ethics are matters which lie within the power of each branch. This has come up a number of times in other jurisdictions where the question of separation of powers has been raised in relation to the "legislation of ethics".

The issue is well-summarized by a Florida court:

The separation of powers provision in our constitution—Article II, Section 3, Florida Constitution—divides all governmental power into three substantive components, makes each an independent branch of government, and prohibits each from encroaching on the functions of another. This is the authority for each branch to adopt rules to govern itself. This is also the reason the executive power cannot prosecute, as a crime under statutes adopting the common law of England, a judge for failure to follow court rules and judicial ethics. Enforcement of court-adopted procedural and administrative rules, as well as judicial ethics, is for the judicial branch of government, just as the enforcement of congressional rules, adopted by the legislative power to govern itself, is for that branch of government.

A review of cases of judicial misconduct shows, without exception, that violation of rules of procedure and codes of judicial ethics or conduct are enforced by commissions such as the Florida Judicial Qualifications Commission, and not by criminal prosecution.

Clayton v. Willis, 489 So. 2d 813, 815–16 (Fla. Dist. Ct. App. 1986) (citing *In Inquiry Concerning Judge, J.Q.C.*, 357 So.2d 172 (Fla.1978)).

In Nevada, the constitutional doctrine of separation of powers was recognized as the reason why an ethics in government bill law did not apply to the judiciary:

The doctrine of separation of powers is fundamental to our system of government. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). The judicial department may not invade the legislative and executive province. *State v. District Court*, 85

Nev. 485, 457 P.2d 217 (1969). Neither may the legislative and executive branches of government exercise powers properly belonging to the judicial department. *Graves v. State*, 82 Nev. 137, 413 P.2d 503 (1966). Out of deference to the doctrine of separation of powers the legislature specifically excluded members of the judiciary from the Ethics in Government Law. **Such exclusion was constitutionally mandated.** *In re Kading*, 70 Wis. 408, 235 N.W.2d 409 (1975).

Dunphy v. Sheehan, 549 P.2d 332, 336 (1976) (emphasis added).

In New Jersey, a judge tried to argue that because a prosecutor had not brought criminal charges against him as a result of his conduct, the equivalent of Wyoming's Commission on Judicial Conduct and Ethics was precluded from pursuing punishment against him for ethical violations. Again, the separation of powers doctrine was cited:

Finally, the power of the judiciary, stemming from the doctrine of separation of powers, must prevail to control its own members. Any decision by the Attorney General's office not to present this matter to a grand jury involves a discretionary determination by the executive branch and cannot bind or affect the judicial branch in matters concerning the governance of the judiciary. (Judicial ethics punishment is not limited by AG's decision not to prosecute a crime.)

Matter of Yaccarino, 502 A.2d 3, 9 (1985).

See also *Kremer v. State Ethics Commission*, 424 A.2d 968, 969 (Pa. 1981), *aff'd*, 469 A.2d 593 (1983) (holding Pennsylvania's Ethics Act and financial disclosure requirements for judges to be unconstitutional) and *In Re Florida Bar*, 316 So.2d 45 (Fl. 1975) striking down portions of Florida's ethics enactment as it applied to financial disclosures for judges).

The proposed changes to the Ethics and Disclosure Act is, in essence, an attempt by the legislative branch to codify a rule of ethics for the judicial branch with the notion that the executive branch will then enforce those ethics against the judicial branch. This would violate Wyoming's Constitutional separation of powers, just as similar attempts in other states have been found to be constitutionally infirm (or the avoidance of including the judiciary constitutionally mandated).

The proposed changes to the Ethics and Disclosure Act would violate the separation of powers doctrine in Article 2, § 1 of the Wyoming Constitution.