

DOUGLAS F. GANSLER  
ATTORNEY GENERAL

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



DAN FRIEDMAN  
Counsel to the General Assembly

SANDRA BENSON BRANTLEY  
BONNIE A. KIRKLAND  
KATHRYN M. ROWE  
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 21, 2011

The Honorable Martin O'Malley  
Governor of Maryland  
State House  
100 State Circle  
Annapolis, Maryland 21401-1991

**Re: Senate Bill 270**

Dear Governor O'Malley:

We have reviewed Senate Bill 270, "Alcoholic Beverages – Allegany County Board of License Commissioners – Vacancies." It is our view that the bill is not clearly unconstitutional but that it will present difficulties in administration that you may wish to consider carefully before approving this bill.

Senate Bill 270 changes the manner of appointment of the Allegany County Board of License Commissioners. The current law provides that:

- there are three members of the Allegany County Board of License Commissioners, Art. 2B, §15-101 (a)(1);
- the members are appointed by the Governor with the advice and consent of the Senate, if in session, or if not, by the Governor alone, §15-101 (a)(1);
- the Governor selects a member to serve as chair, §15-101 (a)(2);

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- the members must be residents and voters in Allegany County, §15-101 (a)(3);
- the members must be “persons of high character and integrity and of recognized business capacity,” §15-101 (a)(3);
- the members serve staggered six-year terms, §15-101(b)(2);<sup>1</sup>
- two of the members must be members of the political party, “which at the last preceding general election in Allegany County polled the greatest number of votes in the aggregate for the several offices of County Commissioner therein.” §15-101(b)(3)(i); and
- the remaining member must be a member of the political party, “which at the last preceding general election in Allegany County polled the second highest number of votes in the aggregate for the several offices of County Commissioner therein.” §15-101(b)(3)(ii).

House Bill 270 amends these provisions by additionally requiring that the Governor appoint the members of the respective political parties with the “advice and consent” of the central committees of the respective parties.

The Governor’s power to appoint civil officers springs from the Maryland Constitution, which provides that:

[The Governor] shall nominate, and, by and with the advice and consent of the Senate, appoint all civil ... officers of the State, whose appointment, or election, is not otherwise herein provided for, unless a different mode of appointment be prescribed by the Law creating the office.

Md. Const., Art. II, §10. Interpreting this provision, the Court of Appeals has repeatedly rejected claims that the appointment power is inherently executive, but has instead held

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<sup>1</sup> Following the interpretive rule that the more specific governs the more general, the six-year terms for Allegany County Commissioners found in §15-101(b)(2) trumps the general provision creating two-year terms. §15-101(a)(1).

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that the appointment power resides "where the people choose to place it." *Commission on Medical Discipline of Maryland v. Stillman*, 291 Md. 390, 410 (quoting *Baltimore v. State*, 15 Md. 376, 456 (1860)). As the Court of Appeals said: when the legislature has created an office by statute, it "can designate by whom, and in what manner the person who is to fill the office shall be appointed." *Scholle v. State*, 90 Md. 729, 743 (1900). Moreover, our appellate courts have approved situations in which the legislature has placed the power to appoint public officials in the hands of nongovernmental actors. See *Stillman*, 291 Md. at 412 (appointment power given to the Medical and Chirurgical Faculty); *Scholle*, 90 Md. at 742-43 (same); *McCurdy v. Jessup*, 126 Md. 318 (1915) (appointment power given to private hunting and fishing organization).<sup>2</sup>

It seems to us, therefore, that in enacting Senate Bill 270, the legislature merely used the power granted by Art. II, §10 to create by law a system of appointment in which the appointment power is shared with the central committees of the two principal political parties. We cannot say that such a system is clearly unconstitutional.

That is not to say, however, that the arrangement designed by Senate Bill 270 will be easily administered. It is our view that the advice and consent process between the Governor and the party central committees does not replace, but is in addition to, the existing advice and consent process between the Governor and the Senate. §15-101(a)(1). Thus, if the bill is enacted, a Governor will have to (1) nominate a potential member of the Allegany County Board of License Commissioners, (2) submit that nomination to the appropriate party central committee, (3) receive the central committee's consent; (4) submit the nominee to the Senate; and (5) receive the Senate's consent. It is easy to imagine that gridlock might reign as a Governor sought to find, by turns, a candidate acceptable to both a party's central committee and to the Senate. Difficulty in administration, however, is not the basis on which this office will recommend your veto.

We also wish to point out that, if approved, the bill's effective date will be October 1, 2011. House Bill 270, at §3. Moreover, the requirement of advice and consent by the party central committees does not apply to "any member ... appointed before the effective date." House Bill 270, at §2. Thus if you sign Senate Bill 270, it

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<sup>2</sup> It is clear that the nexus between party central committees and service on the Allegany County Board of License Commissioners is more attenuated than those in the cases discussed. Because the *Stillman* court declined to "probe the limits of the *Scholle* doctrine," *Stillman*, 291 Md. at 411-12, we cannot speculate as to whether such a nexus is part of the constitutional requirement.

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cannot be made to apply if you choose to reappoint Charles Ronald Miller after the conclusion of his current term on May 2, 2011.

Very truly yours,

A handwritten signature in cursive script, reading "Douglas F. Gansler".

Douglas F. Gansler  
Attorney General

DFG/DF/kk

cc: The Honorable George C. Edwards  
The Honorable John P. McDonough  
Jeanne D. Hitchcock, Secretary of Appointments  
Joseph Bryce  
Karl Aro