

# Separation of Powers Between County Executive and County Fiscal Body

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# Separation of Powers

- ➔ Division of governmental authority into three branches – legislative, executive and judicial, each with specified duties on which neither of the other branches can encroach
- ➔ A constitutional doctrine of checks and balances designed to protect the people against tyranny

# Historical Background

- ➔ The phrase “separation of powers” is traditionally ascribed to French Enlightenment political philosopher Montesquieu, in *The Spirit of the Laws*, in 1748.
- ➔ Also known as “Montesquieu’s tri-partite system,” the theory was the division of political power between the executive, the legislature, and the judiciary as the best method to promote liberty.

# Constitution of the United States

## ➔ Article I – Legislative

- ➔ Section 1 – All legislative Powers granted herein shall be vested in a Congress of the United States.

## ➔ Article II – Executive

- ➔ Section 1 – The executive Power shall be vested in a President of the United States of America.

## ➔ Article III – Judicial

- ➔ The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

# Indiana Constitution of 1816

- ➔ Article II - The powers of the Government of Indiana shall be divided into three distinct departments, and each of them be confided to a separate body of Magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judiciary to another: And no person or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

# Indiana Constitution of 1851

## ➔ Article 3 - Distribution of Powers

Section 1. The powers of the Government are divided into three separate departments; the Legislative, the Executive **including the Administrative**, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

# Separation of Powers in State Government

## ➔ Article 4– Legislative.

Section 1. The Legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.

## ➔ Article 5 – Executive.

Section 1. The executive power of the State shall be vested in a Governor.

Section 1. The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish.

# Constitutional Provisions Concerning County Government

## ➔ Article 6 – Administrative.

Section 2. (a) There shall be elected, in each county by the voters thereof, at the time of holding general elections, a Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner, and Surveyor, who shall, severally, hold their offices for four years.

Section 3. Such other county and township officers as may be necessary, shall be elected, or appointed, in such manner as may be prescribed by law.

Section 10. The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character.

# Separation of Powers in Local Government

- ➔ County Executive and County Fiscal Body are statutory offices.
- ➔ Does Article 3 separation of powers apply to County offices?
- ➔ Does Article 3 separation of powers apply to local government?

# Statutory Separation of Powers

- ➔ Executive – The executive power is vested in a Board of County Commissioners
  - ➔ Exception - Marion County – mayor of Indianapolis is also the county executive
  - ➔ Exception – a county in which a single county executive has been elected and is serving
- ➔ Legislative – In 89 counties, the legislative power is also vested in Board of Commissioners
  - ➔ In Lake and St. Joseph counties, the legislative power is vested in the County Council
  - ➔ In Marion County, vested in the City-County Council.

# Case Law

- ➔ *City of Terre Haute v. Evansville & T.H. R. Co.* (1897), 149 Ind. 174, 46 N.E.77.
- ➔ Challenge to legislation authorizing the circuit court judge to appoint “city commissioners” to assessed damages and benefits for the construction of city streets.
- ➔ Was legislation an attempt to “confer executive power upon the judiciary”, violating Article 3?

# Case Law

- ➔ Supreme Court said “No,” focusing on phrase “no person, charged with official duties under one of these departments, shall exercise any of the functions of another.” The appointment of city commissioners was not a function of either the legislative or executive branches of state government, and judge was not exercising a function of either of those departments.

# Case Law

- ➔ *Baltimore & O. R. Co. v. Town of Whiting* (1903), 161 Ind. 228, 68 N.E. 266.
- ➔ Local ordinance regulating speed limits of trains within the town, and imposing penalties for violations. Town clerk, given powers of justice of peace to try violations.
- ➔ Was this an unconstitutional attempt to confer judicial power on an administrative officer?

# Case Law

- ➔ Supreme Court said “No.” The provision relates “solely to the state government and officers charged with duties under one of the separate departments of the state, and not to **municipal governments and officers.**”
- ➔ “The executive and administrative duties of mayors of cities and clerks of towns and cities are not such as come within the executive and administrative department of state government.”

# Case Law

- ➔ *Livengood v. City of Covington* (1924), 194 Ind. 633, 144 N.E. 416.
- ➔ Petition to disannex property was filed with city clerk, notice of proceedings was given, city council conducted hearing, and after hearing, denied petition. Property owners filed action in circuit court. Circuit court reviewed statute and dismissed it for lack of jurisdiction. Property owners appealed, arguing that the disannexation conferred judicial powers on the city council, in violation of Article 3.
- ➔ Supreme Court disagreed, reiterating the holding in *Baltimore*.

# Case Law

- ➔ *Sarrls v. State ex rel. Trimble* (1929), 201 Ind. 88, 166 N.E. 270.
- ➔ Mandate action to compel the Evansville city clerk to amend his certificate effectively denying a referendum on the question of city manager government in the city. After clerk was mandated to change his certificate, clerk appealed, arguing that the city manager statute violated the separation of powers provisions in both the federal and state constitutions and violated the federal constitution's guarantee of a republican form of government.

# Case Law

- ➔ Supreme Court disagreed, reiterating decisions in *Baltimore* and *Livengood*. Court also cited decisions from various other states finding the guarantee republican form of government was not violated by the city manager form of government.

# Case Law

- ➔ *State ex rel. Black v. Burch* (1948), 226 Ind. 445, 80 N.E.2d 294.
- ➔ Auditor of State was mandated to issue warrants to pay salaries to members of the General Assembly who were also employed in positions in the executive branch. Auditor maintained that they were disqualified from their executive positions while serving as members of the General Assembly, thus violating Article 3.
- ➔ The Supreme Court found that their positions in the executive branch were not “offices”.

# Case Law

- ➔ Supreme Court examined the purpose for which the separation of powers provisions were enacted, “...it is obvious that the purpose...is to rid each of the separate departments... from any control or influence by either of the other departments, and this...can be obtained only if Section 1 of Article 3...is read exactly as it is written.”
- ➔ An employee of an officer is executing the functions of that public office, even if that does not involve the exercise of sovereignty.
- ➔ The Court did agree that they were “de facto” officers and entitled to payment.

# Case Law

- ➔ *Mogilner v. Metropolitan Plan Commission of Marion County* (1957) 236 Ind. 298, 140 N.E.2d 220.
- ➔ Appeal from declaratory judgment upholding constitutionality of legislation establishing a single planning and zoning department in Marion County. Among other allegations, Mogilner argued that the legislation violated Article 3, Section 1 by giving a board of zoning appeals the power to issue restraining orders, conferring judicial powers on administrative bodies.

# Case Law

- ➔ The Supreme Court did not find a violation of Article 3, Section 1. “This section relates only the state government and its departments and does not limit the granting of judicial power to **local executive officers.**”

# Case Law

- ➔ *Martin v. Ben Davis Conservancy District* (1958), 238 Ind. 502, 153 N.E.2d 125.
- ➔ Constitutional challenge to conservancy district statute. Among provisions challenged was grant of power to circuit court to appoint appraisers and directors of conservancy district, which appellants argued was the delegation of executive and administrative authority to the court in violation of Article 3, Section 1. A related argument was that this infringed on the rights of local government.

# Case Law

- ➔ Supreme Court pointed to *Terre Haute* opinion's two page listing of non-judicial functions which the legislature has conferred on courts. With respect to Article 3, Section 1, the Court stated, "It is now recognized that the constitutional provision providing for the separation of the powers of government is applicable only to the state government ."

# Case Law

- ➔ The Court went on to note that the “practice of authorizing circuit court judges and other local judges to perform certain local administrative duties, ... has become so well established and ...interwoven with the operation of local government that it is no longer a constitutional question.

# Case Law

- ➔ *Willsey v. Newlon* (1974), 161 Ind. App. 332, 316 N.E.2d 390.
- ➔ Declaratory judgment action brought by township trustee against township justice of the peace who had changed his residency from the township. Trustee argued that the justice of the peace is a township officer, and subject to Article 6, Section 6 residency requirements. Justice of the peace maintained his office was a judicial office, and not a township office, since that would violate Article 3, Section 1.

# Case Law

- ➔ Justice of the peace argued that “since Article 3 separates the powers of government, the provisions of Article 6 concerning administrative officers cannot apply to a judicial office of the State.”
- ➔ The Court of Appeals reiterated that “it has repeatedly been held that the separation of powers doctrine of Article 3 has no application at the **local level.**”

# Case Law

- ➔ The Court of Appeals also noted dicta from at least four cases stating that the a justice of peace is a township officer. “The dicta of those cases is sufficiently persuasive to convince us that a justice of the peace [is] a township officer.”

# Case Law

- ➔ *Rush v. Carter* (1984 Ind. App.), 468 N.E.2d 236.
- ➔ County police officer ran for county council and was elected. Chose not to be sworn in due to pending litigation challenging his eligibility to serve in both positions. Trial court granted summary judgment for the County Auditor and County Commissioners, finding that a violation of the Article 2, Section 9 prohibition on two lucrative offices.

# Case Law

- ➔ On appeal, Rush argued that employment as a member of the county police department was similar to serving in a municipal police department; the position was not an “office.” Carter argued that more than Article 2, Section 9 was at issue.
- ➔ Court noted that if the decision were solely based on that provision, Rush would probably prevail, and noted that if Rush had been elected to a school board, or city council, there would not be an issue.

# Case Law

- ➔ The Court of Appeals was not finished, quoting Article 3, Section 1. “We are of the opinion that the contemporaneous holding by the same person of positions on the county council and as a county policeman is violative of this constitutional provision.” The court stated that “Because a county is an involuntary political or civil subdivision of the state government,....we are of the further opinion that Rush is bound by that constitutional provision in the same manner as state employees and officers.”

# Case Law

- ➔ *Gaskin v. Beier* (1993 Ind. App.), 622 N.E.2d 524.
- ➔ Gaskin was a deputy town marshal subsequently elected to the town board. After election he announced that he would vote to remove Beier, the town marshal. Beier filed a complaint, alleging Gaskin's dual positions violated Article 2, Section 9, Article 3, Section 1 and Gaskin was involved in conflict of interest.
- ➔ The Court of Appeals compared the position of deputy town marshal to serving as a member of a city police department and concluded that determined that a deputy town marshal was an employee, like a city police officer.

# Case Law

- ➔ The Court then addressed Article 3, Section 1, noting that Article 3 applied to state government and officers and not to **municipal** governments and officers, reciting the long list of cases supporting that principle. Gaskin's service did not violate Article 3, Section 1.

# Case Law

- ➔ *Harden v. Whipker* (1995 Ind. App.), 646 N.E.2d 727.
- ➔ Whipker was a county police officer and was subsequently elected to county council. Harden, the chairman of the Bartholomew Democratic Central Committee filed a complaint seeking to remove Whipker from either his county council position or his position as a county police officer. The trial court granted summary judgment for Whipker and Harden appealed. Harden argued that Whipker's simultaneous holding of both positions violated Article 3, Section 1 and Article 2, Section 9.

# Case Law

- ➔ The Court of Appeals noted that it had recently addressed the Article 2, Section 9 argument in *Gaskin v. Beier*
- ➔ With regard to Article 3, Section 1, the Court stated that it had previously reviewed the long standing precedent in *Gaskin* and reiterated that the provision applied **only** to state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers. The Court noted that *Rush* had reached a contrary conclusion and explicitly declined to follow *Rush*.

# Case Law

- ➔ *Bradley v. City of New Castle* (Ind. 2000), 730 N.E.2d 771.
- ➔ In a municipal annexation case, Supreme Court addressed an Article 3 challenge by citing previous case law that “There is authority for the proposition that the separation of powers doctrine applies only to state government and its officers, not municipal **or local governments.**” The Supreme Court explained that “Early on our supreme court explained the origin of the rule that the Separation of Powers Doctrine does not apply to **local government.**”

# Case Law

- *State v. Buncich* (2016 Ind.), 51N.E.3d 136.
- Statute created a Small Precinct Committee in Lake County to identify small precincts for consolidation in order to reduce election costs. Precinct committeemen who might lose their offices challenged the constitutionality of the legislation as a violation of the separation of powers doctrine and as impermissible special legislation.
- With respect to the special legislation, the Court noted that it had frequently found unique circumstances for Lake County only legislation, and found that the State had presented sufficient facts and there were” inherent characteristics” of Lake County to support special legislation.

# Case Law

- ➔ With respect to the separation of powers claim, the Court repeated the maxim that “This provision, however, relates solely to the state government and officers charged with duties...; it does not apply to local officers,” citing all of the previous precedent. “It has been repeatedly held that the...doctrine has no application at the local level”. The Court determined that precinct committeemen were NOT performing a state government function, noting that the General Assembly had specifically said precinct committeepersons held political office and “are not to be considered to be elected offices.”
- ➔ The Court held that precinct committee persons “fall outside” the separation of powers provision.

# Powers of the County Executive

- ➔ County Executive
  - ➔ Quasi-Judicial Proceedings
  - ➔ Appointment of County Administrator
  - ➔ Approve charges against County
  - ➔ Direct raising of funds to cover County expenses
  - ➔ Audit accounts of county officers dealing with money belonging to or appropriated for the County
  - ➔ With County Treasurer, make settlement for the preceding calendar year

# Powers of the County Executive

- ➔ Prepare, publish and post annual report of County's annual receipt and expenses
- ➔ Make orders concerning county property, particularly:
  - ➔ for the sale of the county's public buildings and the acquisition of land in the county seat on which to build new public buildings; and
  - ➔ the acquisition of land for a public square and the maintenance of that square
  - ➔ Grant licenses, permits or franchises for the use of county property under certain conditions

# Powers of the County Executive

- ➔ Establish and maintain a county courthouse, county jail, and public offices for the county clerk, the county auditor, the county recorder, the county treasurer, the county sheriff, and the county surveyor
- ➔ Employ and fix the compensation of an attorney to represent the executive
- ➔ In 89 counties, exercise legislative power and adopt ordinances for the government of the County or the transaction of county business
- ➔ Make statutory appointments as required by statute

# Powers of County Executive

- ➔ Review annual budget requests of county offices presented by County Auditor and make recommendations concerning those budget requests
- ➔ Prepare an itemized estimate of all money to be drawn by the County Executive and all expenditures to be made by the Executive or under its orders during the next calendar year
- ➔ Examine claims presented to County Auditor for payment and allow claims
- ➔ Adopt an ordinance allowing money to be disbursed prior to claims approval for certain expenses

# Powers of County Executive

- ➔ As County legislative body, adopt ordinances establishing county cumulative funds
- ➔ As County legislative body, approve issuance of bonds by County redevelopment commission

# Powers of County Fiscal Body

- ➔ Meet annually to fix the County's budget, tax rates and levies
- ➔ Employ and fix the compensation of an attorney to represent and advise the fiscal body
- ➔ In Lake and St. Joseph counties, exercise legislative power and adopt ordinances for the government of the County or the transaction of county business
- ➔ Appropriate money from the County treasury
- ➔ Make appointments as provided for by statute

# Powers of County Fiscal Body

- ➔ Fix the compensation of officers, deputies, and other employees whose compensation is payable from the county general fund, county highway fund, county health fund, county park and recreation fund, aviation fund, or any other fund from which the county auditor issues warrants for compensation. This includes the power to:
  - ➔ fix the number of officers, deputies, and other employees;
  - ➔ describe and classify positions and services;
  - ➔ adopt schedules of compensation; and
  - ➔ hire or contract with persons to assist in the development of schedules of compensation

# Powers of County Fiscal Body

- ➔ Fix salary schedule for county assessors who have achieved certain levels of certification
- ➔ At fiscal body's annual meeting, fix the county tax rates, budget and levies
- ➔ Make additional appropriations from the County treasurer
- ➔ May authorize appropriations to provide additional compensation not to exceed \$5,000 for each judge and full-time prosecutor
- ➔ Adopt ordinances for the issuance of bonds, notes, warrants of the County

# Powers of County Fiscal Body

- ➔ Under local income tax statute, act either as the adopting body (in former CAGIT counties) or as member of income tax council (in former COIT counties)
- ➔ At fiscal body's annual meeting:, conduct review of:
  - ➔ the DLGF's estimate of levy limits for each taxing unit in the County; and
  - ➔ the DLGF's estimated circuit breaker impact on each taxing unit in the County;
  - ➔ If a representative appears, a taxing unit's proposed budgets, tax levies, and tax rates for the ensuing calendar year.
- ➔ After the meeting, the fiscal body may prepare and distribute a written recommendation for taxing units in the county

# Powers of County Fiscal Body

- ➔ Review and approve budgets of certain political subdivisions established by the county or with a majority of its assessed valuation in the county that are governed by appointed boards
- ➔ Review and approve issuance of bonds or execution of leases by certain political subdivisions established by the county or with a majority of its assessed valuation in the county that are governed by appointed boards
- ➔ May impose a local service fee not to exceed \$50 on taxpayers whose business personal property is exempt from property taxation

# Powers of County Fiscal Body

- ➔ Designate economic revitalization areas and approve applications for tax abatement
  - ➔ If revitalization area is located in an allocation area, County Executive must adopt a resolution approving the statement of benefits filed by the taxpayer seeking tax abatement
- ➔ Approve leases proposed to be executed by the County redevelopment commission

