

# MAINTAINING THE BALANCE OF POWER BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF INDIANA STATE GOVERNMENT POST 1941

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### I. INTRODUCTION

Under article 3 of the Constitution of the State of Indiana, members of the legislative department of Indiana government may neither serve in the executive department, nor appoint others to do so. However, the Indiana

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state budget committee, made up of members of the legislature who have been appointed by the leadership of the general assembly, exercises a major role in the executive branch, approving and administering state funds and projects.

Under article 5 of the Constitution of the State of Indiana, the executive power of the State is vested in the governor, who shall take care that the laws are faithfully executed. Yet the general assembly has in past years placed responsibility for the State's economic development in another official in the executive branch, the lieutenant governor. And by its 2003 action, the general assembly has enacted legislation that will shift this executive authority once again, this time to a newly created entity outside state government, the Indiana economic development corporation (IEDC).

The Indiana economic development corporation's twenty-three member board will be appointed in large part by the general assembly. As a result, this newly-created entity may be subject to challenge on the basis of the separation of powers provision in the Indiana constitution. The Indiana supreme court's historic 1941 ruling of *Tucker v. State*<sup>2</sup>, and its progeny, define the role of the governor and prohibit the Indiana general assembly from encroaching upon the executive branch of state government by appointing its own members to perform executive functions or by enacting laws that dilute the powers of the governor.

In making the case that both the state budget committee law and the IEDC law stand at odds with the Indiana constitution, this paper will examine the Indiana political history preceding the court's 1941 ruling in *Tucker v. State*<sup>3</sup> and the constitutional bases for the decision. Next will follow a review of two Indiana cases that illustrate the court's application of the *Tucker* decision to later situations. *Book v. State Office Building Commission*<sup>4</sup> involved a challenge to a quasi-public entity similar in some

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<sup>2</sup> Tucker et al. v. State of Indiana, 218 Ind. 614, 35 N.E.2d 270 (1941).

<sup>3</sup> Supra.

<sup>4</sup> Book v. State Office Building, 238 Ind. 120, 149 N.E.2d 273 (1958).

ways to the IEDC. *Gardner v. Grills*<sup>5</sup> tested the original 1941 state budget committee law. Finally, the state budget committee law<sup>6</sup> and the IEDC law<sup>7</sup> will be reviewed and the question of whether and how any constitutional defects may be remedied will be addressed.

## II. POLITICAL ACTIVITY PRECEDING TUCKER V. STATE

### A. *The 1933 Executive Reorganization*

On January 9, 1933, newly-elected Indiana Governor Paul V. McNutt assumed office. McNutt was a lawyer and accomplished democrat politician who most recently had served as dean of the Indiana University Law School in Bloomington. The depression was in full force and Franklin D. Roosevelt had just been elected to his first term in office.

McNutt had run on a platform of streamlining state government and cutting costs.<sup>8</sup> “Indiana’s administrative system in 1933 consisted of more than one hundred distinct and largely independent departments and agencies ... tacked on as demands for new government services arose, with little attention given to integration or coordination of the total system.”<sup>9</sup>

McNutt’s executive reorganization bill, consolidating existing commissions, boards and bureaus into eight “departments,” was presented to the general assembly in January of 1933 and enacted in one day, under a suspension of the rules. “It was said [about this and other bills in McNutt’s ‘legislative package’] that often the legislators had to await publication of the bills to know what they had actually passed.”<sup>10</sup>

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<sup>5</sup> *Gardner v. Grills*, 242 Ind. 29, \_\_\_ N.E.2d \_\_\_ (1961).

<sup>6</sup> Acts 1961, chapter 123, p. 247 (codified at Ind.Code 4-12-1).

<sup>7</sup> HEA 1001, SECTION 260, p. 235. Cite as P.L. 1-2003, SECTION 260, codified at IC 4-1.5.

<sup>8</sup> For the background on the McNutt and Schricker administrations, see: I. GEORGE BLAKE, PAUL V. MCNUTT, PORTRAIT OF A HOOSIER STATESMAN (1966); JAMES H. MADISON, INDIANA THROUGH TRADITION AND CHANGE, A HISTORY OF THE HOOSIER STATE AND ITS PEOPLE 1920-1945 (1982); CHARLES FRANCIS FLEMING, THE WHITE HAT, HENRY FREDERICK SCHRICKER, A POLITICAL BIOGRAPHY (1966).

<sup>9</sup> MADISON, 90.

<sup>10</sup> BLAKE, 130. In 1930, the democrat majority in the Indiana house was 91 to 9, in the senate, 43 to 7.

Or, as described by historian James H. Madison: “Democratic dominance of state government in 1933 was most forcefully displayed in the state legislature that sat from early January to March 6 of that depression year, adjourning two days after Roosevelt took office.... The legislators themselves seemed often to be playing bit parts in the drama and at times even to be members of the audience. Seldom had an Indiana governor so dominated a legislature.”<sup>11</sup>

The new law took effect February 3, 1933.<sup>12</sup> The eight “departments” created by the act were: executive, state, audit and control, treasury, law, education, public works, and commerce and industries. “[T]he governor alone shall constitute the executive department, being the chief executive thereof in individual capacity.”<sup>13</sup> The governor was on the board of each of the remaining departments. For instance, “[T]he department of commerce and industries shall be in the charge of the board of [the] department of commerce and industries, which board shall consist of the governor, the lieutenant-governor, and three other persons, one of whom shall be designated by the governor as of the chief administrative officer thereof; and in the discretion and upon the direction of the governor such additional number of persons as he may direct from time to time, not to exceed five.”<sup>14</sup>

Thus, the potential for the elected state officials other than the governor “to direct independent departments was severely limited by the [act’s] requirements that they work through their department’s board, the majority of which always consisted of the governor and members appointed by and removable by him. In other words, the plural leadership represented by department boards was intended in reality to make the departments and the popularly elected officials heading them responsible to the governor. This purpose was further secured by the act’s provisions that all depart-

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<sup>11</sup> MADISON, p. 83.

<sup>12</sup> Acts 1933, ch. 4, p. 7.

<sup>13</sup> Acts 1933, ch. 4, sec. 10.

<sup>14</sup> Acts 1933, ch. 4, sec. 17.

ment employees except the constitutional officers and one deputy for each be appointed by and serve at the will of the governor.”<sup>15</sup>

Under the act, the state-wide elective office of attorney general was abolished. Unlike the constitutional offices of governor, lieutenant governor, secretary, auditor and treasurer of state, and state superintendent of public instruction, the office of attorney general was created by statute. Section 4 of the 1933 act provided: “[N]o successor of the attorney-general for the State of Indiana, now elected and qualified, shall be elected.” On the conclusion of the term of the current attorney general (December 31, 1936), the act provided that “the office of the attorney general for the State of Indiana shall be filled by an attorney-general ... who shall be appointed by the governor.” State government workers were less fortunate. Their positions were abruptly terminated by so-called “ripper” provisions in the law.<sup>16</sup>

McNutt’s reorganization attracted national attention and added Indiana to the list of “strong governor” states. It “moved state government toward a more centralized and integrated system – one in which responsibility was more hierarchically arranged and more clearly defined.”<sup>17</sup>

Historians have noted that the McNutt changes resulted in both a reduction in the size of government with its potential for greater efficiency, and “a much greater control over patronage.”<sup>18</sup> The 1933 act was followed by the creation of the Hoosier Democratic Club, made up of all democrat state and local appointive and elective officials, and was “immediately dubbed the ‘Two Percent Club’ because each member was required to contribute that percent of his salary each month to the organization or ‘machine.’”<sup>19</sup>

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<sup>15</sup> MADISON, 91.

<sup>16</sup> BLAKE, 130.

<sup>17</sup> MADISON, 92.

<sup>18</sup> BLAKE, 129.

<sup>19</sup> BLAKE, 142.

### ***B. The 1941 General Assembly's Response***

Paul V. McNutt was followed in office in 1937 by another democrat, M. Clifford Townsend.<sup>20</sup> Two years later, however, in 1939, “Democrats were in their weakest position since 1932. ... The serious economic downturn of 1937-38 left many Hoosiers doubting that the New Deal really had succeeded ....”<sup>21</sup> In 1940 the republicans continued “the come-back that had begun in 1938. ... Hoosier voters also cast a majority vote for native-son presidential candidate Wendell Wilkie.”<sup>22</sup> Republicans captured control of both houses of the legislature. In 1941, the “General Assembly had thirty Republicans in the senate and sixty-four in the house. Republicans also elected all state officeholders except one: Democratic gubernatorial candidate Henry F. Schricker defeated Kokomo Republican Glenn R. Hillis by fewer than four thousand votes, thereby denying Republicans a clean sweep in Indiana.”<sup>23</sup>

Democrat Governor Schricker entered office offering compromise to the republican house and senate. He “called for repeal of McNutt’s reorganization act of 1933 – arguing that the measure gave too much power to the governor. And ... he made major changes in appointive offices, removing many McNutt democrats who had been in Indianapolis since 1933.”<sup>24</sup>

However:

Republicans were in no mood to compromise. In one of the most thoroughly partisan ventures in Indiana history, they set about to dismantle the gubernatorial power McNutt had created and to reduce Schricker to a figurehead. The Republican majority passed some two dozen bills that were chiefly designed to deprive Schricker of his power to make executive appointments to departments and agencies of state government. The State Administration Act of 1941 repealed the 1933 reorganization act and, combined with a series of “little ripper bills,” as the Democrats labeled them, abolished, recreated, and reconstructed boards, commissions, and

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<sup>20</sup> Until 1972, art. 5, sec. 1 of the Indiana constitution prohibited a governor from succeeding himself in office.

<sup>21</sup> MADISON, 149.

<sup>22</sup> MADISON, 150.

<sup>23</sup> MADISON, 150.

<sup>24</sup> MADISON, 398.

departments of state government. In each case the new structure made the governor a minority board member. The new board directing the Department of Public Works, for example, was composed of the governor, lieutenant governor, and treasurer, each having one vote in appointment of members to the state highway commission and other agencies in the department. Under this scheme, Schricker would always be outvoted by the two elected Republican officers, and the executive branch of government would fall from his influence and control.<sup>25</sup>

Again, patronage played a large role. As noted by former Indiana Governor Matthew E. Welsh, “The 1941 legislature, the first controlled by the GOP since 1930, was a political organization starved for patronage, since it had not controlled the governor’s office for eight years, and times were tough. It passed a number of measures that terminated the tenure of almost all employees and provided that other elected state officials (all Republican) should become the majority (and controlling) members of all administrative agencies of the state” with a few public safety exceptions.<sup>26</sup>

Charles Francis Fleming, in his political biography of Henry Schricker, described how the legislation would operate: “Through the legislative process [the Republican controlled legislature] would relegate the duly elected Governor of Indiana to a minority member of a commission type of government, with the commission selecting the personnel to staff the hundreds of jobs necessary to operate the executive branch efficiently. The Legislature, very clearly, was violating the separation of Constitutional powers, for the sole purpose of obtaining political patronage.”<sup>27</sup>

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<sup>25</sup> MADISON, 399.

<sup>26</sup> MATTHEW E. WELSH, VIEW FROM THE STATE HOUSE: RECOLLECTIONS AND REFLECTIONS, 1961-1965 (1981), 79, n. 5. In a footnote on page 98, Welsh notes that the Supreme Court of the United States “limited patronage dismissals to policy-making positions” in *Elrod v. Burns*, 427 U.S. 347, 96 Sup.Ct. 2673 (1976), a case involving Cook County, Illinois sheriff’s office employees. The note continues that in 1980, in *Branti v. Finkel*, 445 U.S. 507, 100 Sup. Ct. 1287, the Court reaffirmed its position, holding: “[T]he ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position,” but whether “the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved.”

<sup>27</sup> FLEMMING, 66.

Governor Schricker responded by vetoing the bills. The general assembly overrode the vetoes. The attorney general, George N. Beamer, acting on behalf of the State, moved to enjoin the defendants – including both Secretary of State James M. Tucker and Governor Schricker – from acting or functioning under certain challenged acts of the 1941 session of the general assembly. For purposes of later discussion, it is important to note here that not all of the more than twenty acts of the general assembly<sup>28</sup> vetoed by Governor Schricker and overridden by the legislature were included in the legal challenge. Rather, the action involved only the four acts discussed below.<sup>29</sup>

A temporary injunction in favor of the attorney general was issued by the Marion County circuit court. From that judgment Tucker, and others, appealed to an Indiana supreme court that in 1941 consisted of four democrats and one republican.<sup>30</sup>

### III. THE SUPREME COURT'S DECISION IN TUCKER V. STATE

In a 4-1 opinion,<sup>31</sup> the Indiana Supreme Court, on June 26, 1941,<sup>32</sup> affirmed the decision of the trial court, ruling that the injunction was properly granted and should be made permanent because the four<sup>33</sup> questioned statutes were unconstitutional.<sup>34</sup>

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<sup>28</sup> Supra.

<sup>29</sup> See note 31.

<sup>30</sup> Chief Justice Michael L. Fansler, Justices Curtis W. Roll, Curtis G. Shake, H. Nathan Swaim, and Frank N. Richman. Justice Richman was the sole Republican. FLEMMING, p. 97.

<sup>31</sup> Fansler, C.J. wrote the opinion; Richman, J. dissented with an opinion.

<sup>32</sup> Rehearing denied July 11, 1941.

<sup>33</sup> Acts 1941, ch. 13 (p. 31), created the eight departments; Acts 1941, ch. 108 (p. 291) abolished the state-wide elective office of attorney general; Acts 1941, ch. 109 (p. 292) established the office of attorney general, the first incumbent to be elected at the general election in 1942, and provided that in the interim the governor, lieutenant governor and secretary of state would constitute a board to employ a transitional attorney general for the state; Acts 1941, ch. 182 (p. 552) abolished the state board of education and set up a new board of eight members, four to be appointed by the governor and four by the lieutenant governor (except where the governor and lieutenant governor were both of the same political party, in which case the governor was to appoint all the members.)

<sup>34</sup> Tucker, p. 628.

The Indiana Supreme Court's holding in *Tucker v. State*, that under the constitution of the State of Indiana the governor has sole and exclusive authority to exercise executive powers within the executive including the administrative department of state government, is grounded on the court's analysis of the relevant provisions of the Indiana constitution.

**A. *The Separation of Powers***

Article 3, Distribution of Powers, consists of a single section:

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. *[emphasis added]*

This is an express statement of the separation of powers. The federal constitution has no equivalent provision; the separation in the federal document is implied from the provisions establishing three branches of government. In the Indiana constitution, there is both article 3, section 1, the purpose of which is “to divide the government into departments, and to prohibit persons charged with duties in one department from functioning in another,”<sup>35</sup> and there are the specific grants of power relating to the legislative, executive, and judicial branches, *vesting* the powers of each department within a specified entity: “The Legislative authority of the State shall be *vested* in a General Assembly, which shall consist of a Senate and a House of Representatives” (Art. 4, sec. 1); “The executive power of the State shall be *vested* in a Governor” (Art. 5, sec. 1); “The Judicial power of the State shall be *vested* in a Supreme Court” (Art. 7, sec. 1).<sup>36</sup>

The court in *Tucker* acknowledged that it had consistently resisted past efforts of the general assembly to infringe upon judicial prerogatives.<sup>37</sup> By

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<sup>35</sup> Tucker, p. 640.

<sup>36</sup> Emphasis added. *See*: Tucker, p. 641.

<sup>37</sup> See also, *State v. Monfort*, 723 N.E.2d 407, 411 (2000): “In particular, it has been held in a variety of contexts that the legislature cannot interfere with the discharge of

analogy, the court applied its reasoning in decisions protecting the judiciary from legislative efforts to exercise judicial functions, to this situation, where it was claimed that the legislature had encroached upon the executive. The court cited extensively from its 1889 decision in *State ex rel. Hovey v. Noble et al.* (1889),<sup>38</sup> where the legislature had enacted a statute that created commissioners within the judicial branch to assist the court in performing its judicial functions. The law provided that the legislature should appoint the commissioners. The court in that case held that “the legislature might not invade the judicial department and appoint officers who were to function as assistants to the courts in the performance of their judicial functions.”<sup>39</sup> In its analysis of its earlier opinion, the *Tucker* court continued:

[T]he reasons given for the [*Hovey*] decision involve consideration other than the separation of powers provisions of the Constitution. It is pointed out that the judicial power of the government is vested in the courts (and not the judicial department), and that to permit the Legislature to appoint assistants to the courts would be an invasion of the judicial power. The Clerk of the Supreme Court in placed in the judicial department of the government by the Constitution. Under Section 1 of Article 3 the Legislature might not appoint a deputy clerk of the Supreme Court. It would be barred from so doing not because the appointment would invade and infringe upon the judicial power, which is in the courts, but because it would offend the prohibition against persons serving in one department of the government exercising a function in another.<sup>40</sup>

The *Tucker* court then asked, what if instead the act had called for the clerk of the supreme court, an administrative officer within the judicial department of the government, rather than legislature, to appoint the commissioners? The act would then not be unconstitutional under article 3, section 1, since:

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judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business.”

<sup>38</sup> 118 Ind. 350, 21 N.E. 244.

<sup>39</sup> *Tucker*, p. 650.

<sup>40</sup> *Tucker*, p. 650-651.

the Clerk of the Supreme Court is an administrative officer in the judicial department of the government, and the Supreme Court Commissioners would serve in the judicial department, and thus, in making the appointment, the clerk would be functioning in the same department. But there can be no doubt that the amended law would have been held unconstitutional, upon the ground that the judicial power was vested by the Constitution in the courts and not in the judicial department, and that the courts, and the courts alone, must exercise the judicial function, and that the appointment of "ministers and assistants" by *any* agency outside of the *courts* would make the court "a mere dependent, without a right to control its own business and records."<sup>41</sup>

And that, the *Tucker* court concluded upon this point, was the precise issue presented in the current case:

The question presented by the record before us is not whether persons in one department may be constitutionally vested with authority to make appointments in another department, but whether administrative officers and the Lieutenant Governor, who are in the executive including the administrative department, may be constitutionally vested with authority to make appointments within that department of the character involved in the legislation before us.<sup>42</sup>

The court ruled "no." The three-person governing or "appointing boards" the 1941 act created for each agency, where the governor was to share authority with two other persons,<sup>43</sup> could not stand: "Any power or authority vested by legislation in the Governor, together with other officers or persons, in which they are to have an equal voice with him, can not be executive, as he alone is vested with the executive power of the State. Any duty which he is by law required to perform, in connection with others, in which they have an equal voice with him, can in no sense be said to be an executive duty."<sup>44</sup>

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<sup>41</sup> Tucker, p. 651.

<sup>42</sup> Tucker, p. 651.

<sup>43</sup> In various combinations with the lieutenant governor, the auditor, treasurer, and secretary of state. Recall that all these officers except the governor were republican in 1941.

<sup>44</sup> Tucker, p. 667, quoting from Gray, Governor, et al. v. State ex rel. Coghlen, 72 Ind. 567, 578 (1880).

### ***B. The Executive Including the Administrative***

The authority of the other constitutional officers in the executive branch of government, the court concluded, was merely ministerial. With respect to the office of lieutenant governor: “the principal reason for creating the office of Lieutenant Governor was to provide an available substitute to fill the Governor’s office in case of the Governor’s death, resignation, or inability to discharge the duties of his office ... We must conclude from this that it was not intended that he should exercise any of the functions of the Governor’s office except in such a contingency. No executive powers are otherwise conferred on him. He is not the Governor, and clearly was not intended to have power equal to the powers of the Governor...”<sup>45</sup>

As for the secretary, auditor and treasurer of state: “[T]hese ministerial officers are not officers of the executive department. They are officers of the administrative department, which is included in and made a part of the executive ... which is a far different matter,”<sup>46</sup> pointing out that the remaining sections of article 6, deal with county and township offices and such “administrative” provisions as the requirement that the governor, secretary, auditor, and treasurer of state shall “reside at the seat of government,”<sup>47</sup>

### ***C. The Appointing Authority of the Governor***

The *Tucker* court ruled that all appointing authority within the executive including the administrative department lies with the governor as “a necessary and essential incident” to the requirement of article 5, section 16 that the governor “shall take care that the laws be faithfully executed.” The court dismissed a contention that section 1, under article 15, gave the

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<sup>45</sup> Tucker, p. 675. According to BLAKE, *supra*, at 165, in 1935 “[t]he McNutt administration also enacted into law a measure making the office of Lieutenant Governor a 12-month job. Prior to that time, the Lieutenant Governor served only 61 days plus the 40-day special session.”

<sup>46</sup> Tucker, p. 665.

<sup>47</sup> Art. 5, sec. 5.

legislature unlimited appointive powers, regardless of the separation of powers provision: “The provision cannot reasonably be construed to mean that the Legislature might create offices in the executive department, subordinate to the Governor, to assist him in the performance of his duties, and provide by law that the Legislature itself might elect these officers, or that the judges of this court might appoint them. Such a construction would be at cross-purposes with the cardinal scheme of the division of powers.”<sup>48</sup>

#### IV. SUBSEQUENT LEGISLATION AND CHALLENGES

##### A. *Book v. State Office Building Commission*

Seventeen years after *Tucker*, the Indiana Supreme Court struck down another legislative measure that encroached upon the executive authority constitutionally vested in the governor. By Acts 1957, chapter 304, the general assembly had amended an existing state office building commission law, enacted in 1953, to reconstitute it as “a public body corporate and politic,” with the power to issue revenue bonds to be secured by revenues from leases by the State of space in the office building, rather than by the full faith and credit of the State, which would have been unconstitutional.<sup>49</sup> But before bonds could be issued, a test case was necessary to ensure that the act, as amended, would withstand challenge. Among the issues raised in the test case was whether the act violated article 3, section 1 because it permitted persons charged with official duties under one department of state government to exercise functions of another.

The act provided, in relevant part, that “The commission shall consist of the governor, the lieutenant governor and the members of the state budget committee, ... and one member of the senate, to be appointed by

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<sup>48</sup> Tucker, p. 664.

<sup>49</sup> Art. 10, sec. 5: “No law shall authorize any debt to be contracted, on behalf of the State ...”

the lieutenant governor. ... and one member of the house of representatives, to be appointed by the speaker.”<sup>50</sup>

The court held that “no member of the legislature, including those presently serving as members of the State Budget Committee, is eligible to serve as a member of the Commission.”<sup>51</sup> Article 3, section 1 “is the keystone of our form of government and to maintain the division of powers as provided therein, its provisions will be strictly construed.”<sup>52</sup>

The court listed the responsibilities of the commission and, citing *Tucker*, found that the “foregoing, as well as other duties not mentioned, are clearly acts exercised in the enforcement of the State Office Building Act for the benefit of the public, and the duties and functions required to be performed in carrying out the provisions thereof rest within the executive-administrative department of state government.”<sup>53</sup> Further, the court quoted from a United States Supreme Court decision: “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement,”<sup>54</sup> and continued:

The Legislature may enact, but it cannot execute laws. That is the duty of the executive department. The Legislature here has attempted to confer executive power upon a Commission, the majority of which is composed of its own members, and to impose upon the legislative members thereof duties which they cannot constitutionally exercise. ... If members of the Legislature may be appointed as members of Boards which exercise functions within the executive-administrative department of government, the door is then open for the Legislature to enter and assume complete control thereof. In fact, if the present provisions for membership on the Commission are valid, the Legislature, by having six of its members on the Commission, could control its every act, and thus com-

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<sup>50</sup> The state budget committee members were, by law, required to be members of the General Assembly. More about this in the discussion that follows.

<sup>51</sup> Book, 238 Ind. 120, 166; 149 NE2d 273, \_\_ (1958).

<sup>52</sup> Book, p. 159.

<sup>53</sup> Book, p. 164.

<sup>54</sup> *Springer v. Philippine Islands* (1928) 277 U.S. 189, 202, quoted at pp. 164-165. *Tucker v. State* is also cited.

pletely usurp the authority of the Governor to “faithfully execute” the laws enacted by the Legislature.<sup>55</sup>

As it had in *Tucker*, the court left it to the governor to fill the vacancies resulting from the Court’s ruling, “under the authority vested in him to fill vacancies in state offices by [Article 5, Section 18].”<sup>56</sup>

**B. *Gardner v. Grills.***

Following shortly after the court’s 1958 decision in *Book* was this action,<sup>57</sup> initially heard in Marion County circuit court by Judge John L. Niblack in 1960. Nelson G. Grills, a state senator, represented himself in the action challenging the constitutionality of the law creating the state budget committee.

The 1941 budget committee act<sup>58</sup> was one of the bills that had been vetoed by Governor Schricker and then overridden. It was not, however, one of the four laws challenged in *Tucker*. Recall that only four of the twenty vetoed laws were included in the *Tucker* suit, and no actions to “follow-up” on the court’s decision with respect to the other arguably equally unconstitutional statutes appear to have been filed. Placing *Tucker* in historical context, however, less than five months after the motion for rehearing of *Tucker* was denied by the supreme court on July 11, 1941, Pearl Harbor brought the United States into World War II and moved lesser matters to the back burner.

Grills’ complaint charged that the 1941 budget committee act violated article 3, section 1, because it permitted persons charged with official duties under one department of the state government to exercise functions of another department. It was a logical sequel to *Book*’s holding that the members of the budget committee could not serve on the executive department’s state office building commission.

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<sup>55</sup> Book, pp. 165-166.

<sup>56</sup> Book, p. 168.

<sup>57</sup> At the trial level this case was identified as Nelson G. Grills v. Albert A. Steinwedel, as Auditor of the State of Indiana (Marion County Circuit Court, Cause No. 060-132). Steinwedel was succeeded in office by Dorothy Gardner.

<sup>58</sup> Acts 1941, ch. 106.

The act provided for four members of the Indiana general assembly and a budget director, all to be appointed by the governor. As explained by Governor Welsh: “In theory the governor controlled the committee, since its members were his appointees. Actually, however, he frequently found his freedom of choice quite limited if he expected to have successful working relations with the General Assembly, since a powerful legislator would exact his appointment to the committee as a price for his cooperation during the session.”<sup>59</sup>

The act set forth the powers and duties of the state budget committee, among them being to visit all the lands owned by the State, under the direction of the governor; to make such investigations as the governor might request of them; to consider any matter relative to the preparation of a budget and to prepare a budget for the general assembly; to fix the salaries of all appointive state officers and employees whose compensation was not otherwise provided by law.<sup>60</sup>

The trial judge found that “the State Budget Committee is an instrumentality of the State of Indiana and, as such, it necessarily performs some State functions. The members of said committee clearly are not judicial or legislative officers; hence, of necessity, they must fall within the executive department of State government and are administrative officers in the sense that they perform functions which usually are, and would be, performed by administrative officers within the executive department.” Citing article 3, section 1, and echoing *Tucker and Book*, the court further found:

The legislature may enact, but it cannot execute laws: that is the duty of the executive department. The legislature here has attempted to confer executive powers upon a commission, the majority of which is composed of its own members, and to impose upon the legislative members thereof duties which they cannot constitutionally exercise.

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<sup>59</sup> WELSH, 81-82.

<sup>60</sup> Acts 1941, ch. 106, sec. 1.

The court further finds that the legislature, when it designated that four of its members should constitute the majority of said State Budget Committee, in effect appointed the agents, though not by name, charged with the duty [executive] and enforcement of the State budget committee law. \* \* \*

The Court makes this finding under a long line of cases of the Indiana Supreme Court, the latest of which is *Book v. State Office Building Commission, et al* 238 Ind. 120; also *Tucker v. State*, 218 Ind. 614, and many other cases cited in said decisions.

As in *Book*, the court here struck only the provision for the appointment of members of the legislature to serve on the committee, and found that the governor had the appointing authority under the constitution to fill the resultant vacancies.

While the case was on appeal, the general assembly convened, repealed the 1941 budget committee law, and enacted a new law in March of 1961. The Indiana Supreme Court subsequently dismissed the appeal on the basis that it was moot.<sup>61</sup> However, as discussed in the next section, the 1961 law failed to cure the defects in the 1941 act.

## **V. TWO PROBLEMATIC STATUTES AND THE POTENTIAL REMEDIES**

### ***A. The State Budget Agency Act of 1961***

*1. The Issue.* As a result of the *Grills* suit, the 1941 state budget committee act was replaced by the state budget agency act of 1961. Under the 1961 act, the governor no longer appoints the four legislative members of the budget committee. Instead, they are named by the leadership of the house and senate. “Such Senators and Representatives shall constitute the legislative division of the Budget Committee ....<sup>62</sup> The chief functions of the “legislative division” are to cooperate in the preparation of a recommended budget report and budget bill, and “to serve as a liaison between

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<sup>61</sup> Gardner v. Grills, 242 Ind. 29 (1961).

<sup>62</sup> Acts 1961, ch. 123, p. 250.

the legislative and executive, including the administrative, branches of government ....”<sup>63</sup>

Other than the change in the manner of appointment of the legislative members to the state budget committee, there appear to be few major differences between the two acts, insofar as the budget committee is concerned. One difference is the adoption of a preamble or “purposes” section in the 1961 act declaring the intent to vest “in the budget agency duties and functions and rights and powers which make the execution and administration of all appropriations made by law the exclusive prerogative and authority of [the state budget agency] and otherwise denying such prerogative and authority to the budget committee.” Another involves the establishment of an actual executive state budget “agency,” where previously there had existed simply a budget director serving as the fifth member on the legislative budget committee, who was not an appointee of the governor.<sup>64</sup> A third change concerns the allotment of appropriated monies. The 1961 act establishes, in section 12, a system for the “execution and administration of budget bills and other appropriations,” and the budget agency, rather than the budget committee, is given the responsibility to administer an allotment system.<sup>65</sup>

At the *Grills* trial evidence in the form of minutes of the budget committee was introduced to show that the budget committee was performing executive functions; that it was involved in the allotment of appropriations (i.e. the execution of laws). The minutes of January 20, 1960 show that all four of the legislative members, plus the budget director, were present. A motion is made, authorizing the budget director to

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<sup>63</sup> Acts 1961, ch. 123, pp. 255-256. The “legislative division” terminology was deleted by Acts 1977, P.L. 28, SEC. 3.

<sup>64</sup> By Acts 1941, ch. 106, p. 276, the budget director was appointed by the board for the department of audit and control, comprised of the auditor of state, secretary of state, and the governor. (Recall that this was one of the 1941 acts vetoed by Governor Schricker, but overridden, and not included as part of the Tucker challenge. Thus it remained on the books. Another of these “Tucker boards,” the state board of finance, consisting of the auditor, treasurer and governor, continues to this day.)

<sup>65</sup> Acts 1961, ch. 123, p. 258.

“approve salaries as listed below.” This is followed by a listing of ten positions and salaries. Some are stricken or adjusted by hand. The document indicates the motion carried and is signed by all four legislators plus the budget director.

At the bottom of the minutes page is a line for approval by the governor, and the signature of Harold Handley, Governor, appears there. A similar minutes document dated January 20, 1960 provides that “there be awarded and allotted to the Board of Trustees of Purdue University the sum of \$768,890.00 for the remodeling of Coulter Hall. Allotments will be made according to the following schedule ....”

Notably, the minutes of the present day state budget committee, operating under the revised 1961 law, although more detailed, are strikingly similar.<sup>66</sup> For example, an entry from the April 10, 2003 minutes shows the state budget committee approving cost increases in a proposed purchase of property at Ball State University: “This project was originally reviewed by the State Budget Committee in February 2003 at a project cost of \$185,000. This project is back before Budget Committee because the price of the property has increased to \$210,000. Ball State University requests approval to increase the purchase price of 601 North Calvert Street from \$185,000 to \$210,000. ... The project will be funded from the university’s land acquisition fund.” The minutes conclude: “Pursuant to the provisions of IC 4-12-1 and IC 20-12, the State Budget Committee recommends approval of the foregoing projects.” There are signature blocks for the budget committee chair person, governor, and budget director.

Recent enactments of the general assembly have further enhanced the authority of the budget committee to operate within the executive branch by requiring specific budget committee approval before certain actions may be taken by either executive branch or judicial branch entities. A

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<sup>66</sup> The minutes of the Indiana State Budget Committee are accessible online: <http://www.in.gov/sba/committee/minutes/>

recent supreme court decision, *Indiana Family & Social Services Adm. v. Walgreen Co.*, illustrates this point.<sup>67</sup> The court, in the course of discussing a statute requiring budget committee *review*, points in its footnote 9 to several statutes requiring budget committee *approval* before certain actions could be taken.<sup>68</sup>

In sum, the trial judge in *Grills* ruled the presence of legislative members on the budget committee to be unconstitutional; his remedy was to strike that provision and have the governor fill the vacancies with his own, non-legislative, appointees. This remedy was consistent with the decision in *Book*. The 1961 general assembly intervened and passed the new law, “mooting” the issue, according to the court.

However, the still-operative 1961 act did not (and does not) resolve the issue posed in *Grills* – that members of the general assembly are serving in an executive capacity. Instead it makes the situation more egregious. Four of the five members of the budget committee under the new law still are required to be legislators, but now the general assembly itself, rather than the governor, appoints them.

Put differently, rather than requiring the governor to make appointments to the budget committee from the membership of the general assembly, as provided in the 1941 law, the 1961 law has the general assembly itself making legislative appointments to the budget committee. But it is submitted that the only correct application of *Tucker* and *Book* to this situation would be that set out by Judge Niblack – the governor should make the appointments (as the executive power of the state is vested in the governor), and the appointees may not be legislators (as they may not serve in two branches of government).

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<sup>67</sup> 769 N.E.2d 158 (Ind. 2003)

<sup>68</sup> Footnote 9: “See, e.g., Ind.Code Ann. § 11-13-2-1 (West 2001) (requiring budget committee approval before Indiana's judicial conference may distribute state financial aid for court probation services); Ind.Code Ann. § 12-8-1-12(a) (requiring unanimous budget committee recommendation prior to appropriation of additional Medicaid funds to supplement the legislative appropriation, when necessary to avoid violating federal law or jeopardizing federal Medicaid funding) ....”

**2. Resolving the Constitutional Defects.** The concept of a state budget committee – a group of legislators who, at best, serve as liaisons between the legislative and executive departments, and who, at worst, have co-opted the executive function of administering the appropriations laws passed by the general assembly – has some practical advantages, but cannot withstand constitutional scrutiny. The “cure” that would pass the test of the constitution would be for the governor to appoint the members of the budget committee, the caveat being that they could not be members of the general assembly. As the point of the budget committee concept is for members of the general assembly to be actively involved in the budget agency’s operations, this “cure” might not be useful. Short of amending the Indiana constitution to modify the concept of separation of powers, there does not appear to be a way to involve members of the general assembly in the administration of appropriations without running afoul of the separation of powers.<sup>69</sup>

**B. The Department of Commerce and the IEDC**

**1. The Issue.** The court in *Tucker* ruled that the authority of the governor could not be distributed by the general assembly among the other constitutionally-established, elected state officials within the executive including the administrative department of government – the lieutenant governor, the secretary, treasurer and auditor of state, and the superintendent of public instruction: “Any power or authority vested by legislation in the Governor, together with any other officers or persons, in which they

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<sup>69</sup> The court in *Tucker* also spoke to the doctrine of practical acquiescence. “[T]he legislature did not enact the Constitution, and a legislative intention as to how the Constitution is to operate is of little value in determining the intention of the drafters of the Constitution, especially where the legislative interpretation involves the usurpation of powers which the Constitution vests in the other departments of government. ... The many cases which will be hereafter discussed clearly indicate that the judicial department has never acquiesced in a construction of the Constitution that permits the Legislature to provide for appointment to office in such a manner as to invade or strike down the judicial power, which is vested in the courts, or the executive power, which is vested in the Governor ....” pp. 676-677.

are to have an equal voice with him, can not be executive, as he alone is vested with the executive power of the State.”<sup>70</sup>

Until 1935, the lieutenant governor had no duties except the constitutional responsibility to preside over the Indiana senate when it was in session. Governor McNutt had legislation enacted that made the office a full-time job. This made the office “a very helpful stepping-stone to becoming governor” for McNutt’s lieutenant governor, who succeeded him in office in 1937.<sup>71</sup>

However, as in 1941, a governor and lieutenant governor might be elected from opposing political parties. It was not until 1974 that the constitution was amended to provide that the governor and lieutenant governor would run on the same ticket.

In recent years the general assembly has made the lieutenant governor responsible for economic development in Indiana, naming the lieutenant governor the director of the department of commerce and the commissioner of agriculture, “by virtue of his office.”<sup>72</sup> The department is to “provide for the orderly economic development and growth of the state,” and it shall “develop and promote programs designed to make the best use of the resources of the state so as to assure a balanced economy and continuing economic growth for Indiana.”<sup>73</sup> Some of the responsibilities of the lieutenant governor include overseeing the Indiana small business development corporation, Indiana economic development council, Indiana development finance authority, Indiana twenty-first century fund and technology fund, Indiana venture fund, the office of energy policy, the office of tourism and community development, and the office of economic development.

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<sup>70</sup> Supra, n. 42.

<sup>71</sup> BLAKE, 165.

<sup>72</sup> Ind.Code 4-4-3-2.

<sup>73</sup> Ind.Code 4-4-3-7.5, 4-4-3-8.

The 2003 General Assembly has moved in a different direction, creating a new entity, the Indiana economic development corporation.<sup>74</sup> The IEDC “is a body politic and corporate, not a state agency but an independent instrumentality exercising essential public functions.” Employees of the corporation are not employees of the state.<sup>75</sup> Effective July 1, 2005, the afore-listed executive responsibilities previously assigned by the general assembly to the lieutenant governor<sup>76</sup> are to become “subsidiaries or agencies” of this new independent instrumentality.

The IEDC is to be governed by a twenty-three member board, “none of whom may be members of the general assembly.” However, a total of twelve of the members of the board are to be *appointed* by the leadership of the General Assembly. Seven of the members are to be appointed by the seven presidents of the seven state universities. Of the remaining four members, three are to be appointed by the governor. The other is to be the lieutenant governor, who is to serve as chairperson of the board, but has no other specified authority.<sup>77</sup>

The 2003 law provides that “the corporation shall carry out the economic development functions of the state in conformity with the laws enacted by the general assembly,” effective July 1, 2005. Until then the board is to serve as an advisory board to the state on economic development matters. After July 1, 2005 the corporation may incur debt; debt incurred by the corporation does not represent or constitute a debt of the state.<sup>78</sup>

The concept of a quasi-public agency exercising governmental functions is not new to Indiana state government. The general assembly has created the Indiana toll road commission; the Indiana toll bridge commission; the state office building commission; the Indiana port commission;

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<sup>74</sup> HEA 1001, SECTION 260, p. 235. Cite as P.L. 1-2003, SECTION 260, codified at IC 4-1.5.

<sup>75</sup> IC 4-1.5-3.

<sup>76</sup> IC 4-1.5-6.

<sup>77</sup> IC 4-1.5-4.

<sup>78</sup> IC 4-1.5-5.

and the Indiana housing finance authority. In each instance the purpose of creating “a separate body corporate and politic” to finance and manage these construction projects, rather than assigning these responsibilities to state agencies, was to avoid the Indiana constitutional debt limitation. Each of these building projects was financed through the sale of revenue bonds, to be repaid with income from the projects. As a prerequisite to the issuance of bonds, each of the laws was the subject of a test suit to assure that it would withstand constitutional challenge.<sup>79</sup>

In *Book*, the court found unconstitutional the provision that legislative members serve on the state office building commission, saying that “no member of the legislature ... is eligible to serve as a member of the Commission.”<sup>80</sup> Perhaps as a result, in its 2003 act the general assembly has specifically stated that none of the twenty-three members of the IEDC board, including the twelve members to be appointed by the general assembly, may be legislators. However, the court in *Book* also said that the legislative power is the power to make laws, “not to enforce them or appoint the agents charged with their enforcement.”<sup>81</sup>

Despite the fact that quasi-public entities have been created by the general assembly in the past, none except *Book* has posed a challenge to the separation of powers approaching that presented by the new IEDC act. The governor does not have a seat on the IEDC board; the lieutenant governor is named in the act as the chair of the board, but is given no other authority.

**2. Resolving the Constitutional Defects.** The answers to the issues posed by the department of commerce law are straightforward. The constitution vests the executive power of the State in the governor, who has the obligation to see to the execution of the State’s laws. Certainly, a

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<sup>79</sup> *Ennis v. State Highway Commission*, 231 Ind. 311, 108 N.E.2d 687 (1952) (toll road commission); *Indiana Toll Bridge Commission v. Minor*, 236 Ind. 193, 139 N.E.2d 445 (1957); *Book v. State Office Building Commission* (1958), *supra*; *Orbison v. Welsh*, 242 Ind. 385, 179 N.E.2d 727 (1962) (port commission); *Steup v. Indiana Housing Finance Authority*, 273 Ind. 72, 402 N.E.2d 1215 (1980).

<sup>80</sup> *Book*, p. 166.

<sup>81</sup> *Book*, pp. 164-165.

governor may elect to delegate certain responsibilities to the lieutenant governor, such as directing the department of commerce. But that is the governor's prerogative, not that of the general assembly. Any laws to the contrary should be changed.

As for the IEDC, although it is, by its terms, "a body politic and corporate, not a state agency but an independent instrumentality exercising essential public functions"<sup>82</sup> for debt financing purposes, it remains an instrumentality of the executive department of government under the supreme court's decision in *Book*. After listing the duties and functions imposed upon the members of the state office building commission, including "to acquire ... a site and to erect thereon a State Office Building," and to "issue and sell revenue debentures to pay the cost of construction," the court in *Book* stated: "The foregoing, as well as other duties not mentioned, are clearly acts exercised in the enforcement of the State Office Building Act for the benefit of the public, and the duties and functions required to be performed in carrying out the provisions thereof rest within the executive-administrative department of the State Government."<sup>83</sup>

The duties and functions imposed upon the members of the IEDC are somewhat less specific. Ind.Code 4-1.5-5-1 provides that "the corporation shall carry out the economic development functions of the state in conformity with the laws enacted by the general assembly" and Ind.Code 4-1.5-5-5 provides that "the corporation may incur debt." However, as in *Book*, the corporation here is charged with *implementing* the laws enacted by the general assembly, an executive function, not a legislative one. The general assembly does not have authority under the constitution either to make appointments in the executive branch or to authorize anyone other than the governor to do so. The resolution to the immediate problem posed by the IEDC legislation, therefore, would be to amend IEDC law to move

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<sup>82</sup> Ind.Code 4-1.5-3.2.

<sup>83</sup> *Book*, p. 164.

the appointing authority from the General Assembly and the university presidents to the governor.

The 2003 IEDC law was enacted because of dissatisfaction with the State's progress in the economic arena. Creating a new entity to develop and execute statewide economic policy, "removed from the existing state bureaucracy and shielded from partisan political control" was the approach selected by the 2003 general assembly in order "to bring a new level of professionalism and sophistication to Indiana's economic development activities. Oversight of the organization [is to] be provided by a twenty-three member, bi-partisan board designed on the principle of building a strategic alliance between the public, private, and academic realms." Several other states, including Michigan, Minnesota and West Virginia have taken a similar course.<sup>84</sup>

On May 16, 2003, however, the Supreme Court of Appeals of West Virginia struck down the West Virginia economic development committee as unconstitutional because the selection process for committee members violated the separation of powers. "Due to the resulting encroachment on the executive power of appointment, the provisions of West Virginia Code 29-22-18a(d)(3) (Supp. 2002) that direct the presiding officers of each house of the Legislature to submit a list of prospective candidates to the Governor for the chief executive's selection of certain members of the West Virginia Economic Grant Committee are in violation of the separation of powers provision found in article five, section one of the West Virginia Constitution." The court also found that the statute's broad statement of legislative intent to be an unconstitutional delegation of powers.<sup>85</sup>

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<sup>84</sup> Indiana Republican House Caucus, "Comprehensive, Consensus Economic Revitalization Plan for Indiana." Available at: [http://www.state.in.us/legislative/house\\_republicans/jobspr1.html](http://www.state.in.us/legislative/house_republicans/jobspr1.html) (as of 7/1/03)

<sup>85</sup> State of West Virginia ex rel. W.Va. Citizens Action Group v. W.Va. Economic Development Grant Committee (No. 31125), 213 W.Va. 255, 580 S.E.2d 869 (2003).

## VI. CONCLUSION

As was shown to be the case with the state budget committee, where the cure for the constitutional problems presented by having legislators serve on the state budget committee -- having the governor appoint non-legislators -- would appear to vitiate the very reason for the committee's existence, the cure for the IEDC appointment problem -- having the governor appoint all the members -- could endanger any political consensus that occasioned its passage.

The balance of power between the legislative branch and the executive branch has been an on-going debate in Indiana since at least the time of the landmark *Tucker* case in 1941. In the 2003 enactment of a statute creating the IEDC, the legislature has again attempted to exert additional influence over functions of the executive branch. Despite the general assembly's desire to enhance economic development opportunities for the State, it appears that the statute is susceptible to constitutional challenge. The clear language of the Indiana constitution regarding the separation of powers, and the history of its interpretation by Indiana courts, suggest that the general assembly may need to consider another approach.

-- Marcia J. Oddi, October 26, 2003 --