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ARTICLE

DUAL OFFICE ANALYSIS: CAN THE LEGISLATURE CARVE OUT EXCEPTIONS?

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INTRODUCTION

Every year the Attorney General's office receives numerous inquiries as to whether an individual who already holds one position in government is prohibited from attempting another position somewhere else in government, or worse, has already accepted a second position. Over time,[1] the Attorney General's office has developed a four-step analysis to determine if holding more than one office is permitted. The focus of this analysis is primarily based upon the intent of the framers of the Indiana Constitution.

Framers of both the U.S. Constitution and the Indiana Constitution feared that democracy could not flourish with too much power in the hands of too few. They understood the "best way to preserve liberty was to divide power. If power is concentrated in any one place, it can be used to crush individual liberty."[2] Individuals holding more than one office or doing multiple governmental functions can lead to power being consolidated into the hands of a few. Historically, whether dual office holding appears to be an abuse of patronage and corruption or a means for opportunistic politicians to use political influence to enhance power and personal gain, plural office holdings have been a constant issue.

The Indiana Constitution of 1816 established that each of the three coordinate branches of state government maintains a sphere of power that is constitutionally protected.[3] However, dual offices weakened those protections

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1. Since the expansion of government positions at the state and local levels during the early 1930's with the New Deal, the Attorney General's office has begun issuing opinions. One of the first was a 1933 opinion. Ind. Op. Att'y Gen. 170 (1933).

2. PAUL E. PETERSON, THE PRICE OF FEDERALISM 6 (1995).

3. 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA: A SOURCE OF CONSTITUTIONAL DOCUMENTS WITH HISTORICAL INTRODUCTION AND CRITICAL NOTES 89 (1916).

by creating circumstances where individuals experienced competing loyalties. Because of these concerns and the additional influence from the Jacksonian populist movement, Indiana's Constitutional Convention in 1851 amended the constitution creating a specific ban on dual state-office holdings.[4] Even though the prohibition on dual office holding has remained unchanged for over 150 years, questions still arise as to how one determines whether holding multiple offices is a conflict and whether exceptions to the "dual office" prohibition in Indiana's Constitution enacted by the legislature are, in effect, slowly eroding the constitutional protections.

The dual office ban under article II, section 9 is complimentary to article III, section 1 of the Indiana Constitution regarding the separation of powers. The concept of separating the powers within government is one of the fundamental principles of American constitutionalism at both the federal and state levels. Legislative, executive, and judicial powers are allocated to each of the branches of government allowing the branches to be independent of each other. The purpose of this separation is to ensure the preservation of each citizen's liberty. Framers of the federal and state constitutions understood that in order to be effective, the governmental branches must be endowed with various powers. However, power is subject to abuse. To limit this risk of abuse, the necessary powers of government are divided among three branches.[5]

This prevailing theme of separation of powers was fueled by a fear that one department, over time, could gain influence over the others.[6] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[7] Therefore, the courts have relied on the separation of

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4. *Id*; *see also* IND. CONST. art. II, § 9. The Indiana Constitution of 1816 contained a prohibition against Dual Office Holdings in article XI, section 13 but it was rarely enforced because the population was so sparse that certain rural areas required multiple office holders. IND. HISTORICAL COLLECTIONS REPRINT FOR IND. HISTORICAL BUREAU, DEBATES IN INDIANA CONVENTION 1850, at 1308-11 (1935).

5. THE FEDERALIST No. 51, at 323 (James Madison) (J. Cooke ed., 1961).

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government . . . into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

Id.

6. THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961):

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.

Id.

7. THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

powers doctrine to limit plural office holders.[8]

Dual office holding, or "incompatibility," was a major concern for the framers of the first state constitutions.[9] It is important to note that the broad ban on plural office holding in the constitutions of some states was first conceived as an anti-corruption measure.[10] Consequently, many states chose to go beyond the principles of separation of powers and include a direct prohibition against individuals holding more than one office.[11]

In some states, such as Indiana, courts have been able to rely on other constitutional provisions rather than constitutional principles. The framers of the Indiana Constitution created article III, section 1 in response to the fear of one branch of government influencing another. The Indiana framers even went a step further and created a direct prohibition against individuals holding more than one office by ratifying article II, section 9, which is the focus of this paper. Many other states have done the same by including limitations on dual office holders.[12]

Unlike article III, section 1, article II, section 9 seems to have been founded less in the "separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of 'bribing' Members of Parliament (M.P.s) and judges with joint appointments to lucrative executive posts. This corrupt practice was repeated in the colonies, which, after independence, enacted strict constitutional bans on plural office holding."[13] "Surprisingly, the separation-of-powers aspect of incompatibility seems not to have been the major theme."[14] As the Indiana Supreme Court explained in *Book v. State Office Building Commission*,

> Article 3, § 1 is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another.[15]

Therefore, though article III, section 1 and article II, section 9 are both used in a dual office analysis, the articles are separate and distinct constitutional provisions.

Over the years, the courts have generally adopted a process in analyzing dual office holdings. The Attorney General's office has adopted this process and formalized it by developing a four-step analysis to determine whether a public

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8. Lafayette, Muncie, & Bloomington R.R. Co. v. Geiger, 34 Ind. 185, 197 (1870); *see also* Tucker v. State, 35 N.E.2d 270, 279 (Ind. 1941).

9. *See* Steven G. Calabresi & John L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1057-61 (1994).

10. *Id*. at 1060.

11. *Id.* at 1152.

12. *Id.* at 1058-61.

13. *Id*. at 1051.

14. *Id*. at 1060.

15. 149 N.E.2d 273, 296 (Ind. 1958) (citing State *ex rel*. Black v. Burch, 80 N.E.2d 294, 311 (Ind. 1948); Monaghan v. Sch. Dist. No. 1, Clackamas County, 315 P.2d 797, 802-04 (Or. 1957)).

service position held by an individual violates any part of the Indiana Constitution. The first step involves the application of article II, section 9's prohibition against dual offices by analyzing whether the individual's employment status within government is that of an office holder and, if so, whether the office is a "lucrative office."[16] If no violation is found or no exemption exists, step two involves an analysis as to whether the positions require the individual to function in violation of the separation of powers doctrine under article III, section 1.[17] Third, the positions being held simultaneously are examined to determine whether they present a conflict of interest or a public policy concern. Finally, in the fourth-step, there is an inquiry as to any other prohibition by local ordinances or regulations.

This Article begins by discussing how the Framers of the U.S. Constitution and early state constitutions feared corruption and consolidated power enough to include a prevailing theme of separation of powers as well as, in the case of some states, specific amendments against dual office holding. The Article will then embark on the analysis that takes place when the Indiana Attorney General is faced with a dual office issue. The analysis begins by describing the application of article II, section 9, which focuses on whether a position is an office and if that office is lucrative. The article II, section 9 analysis concludes with a discussion of legislative encroachment on article II, section 9. The Article then addresses the second constitutional provision relevant in a dual office analysis by explaining the "Separation of Powers" clause in article III, section 1 and its application within the dual office dilemma. The Article continues with the analysis to determine whether dual offices were found to be against public policy because of conflict of interest or incompatibility. Finally, the Article will conclude with the remedies and the procedure to determine one's right to office.

II. HISTORY AND BACKGROUND OF THE DUAL OFFICE DILEMMA

The Framers of the U.S. Constitution feared corruption and consolidated power, which resulted in the prevailing themes of separation of powers, and checks and balances. The Framers adhered to these doctrines to prevent power

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16. *See* Wells v. State *ex rel*. Peden, 94 N.E. 321 (Ind. 1911); Bishop v. State *ex rel.* Griner, 48 N.E. 1038 (Ind. 1898); Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); Foltz v. Kerlin, 4 N.E. 439 (Ind. 1886); Howard v. Shoemaker, 35 Ind. 111 (1871); Dailey v. State, 8 Blackf. 329 (Ind. 1847); Sharp v. State, 99 N.E. 1072 (Ind. App. 1912); *see also* 14 Ind. Op. Att'y Gen. 1 (1991); 7 Ind. Op. Att'y Gen. 1 (1989); 4 Ind. Op. Att'y Gen. 1 (1989); 12 Ind. Op. Att'y Gen. 201 (1988); 5 Ind. Op. Att'y Gen. 149 (1988); 9 Ind. Op. Att'y Gen. 24 (1981); 3 Ind. Op. Att'y Gen. 9 (1980); 39 Ind. Op. Att'y Gen. 258 (1967); 22 Ind. Op. Att'y Gen. 140 (1967); 67 Ind. Op. Att'y Gen. 474 (1967); 15 Ind. Op. Att'y Gen. 66 (1962); 30 Ind. Op. Att'y Gen. 173 (1961); 18 Ind. Op. Att'y Gen. 87 (1961); 13 Ind. Op. Att'y Gen. 57 (1957); 12 Ind. Op. Att'y Gen. 54 (1957); 78 Ind. Op. Att'y Gen. 236 (1951); 72 Ind. Op. Att'y Gen. 216 (1951); 40 Ind. Op. Att'y Gen. 201 (1947).

17. *Burch*, 80 N.E.2d at 294; State *ex rel.* v. Kirk, 44 Ind. 401 (1873); 18 Ind. Op. Att'y Gen. 87 (1961).

from being consolidated in the hands of a small number of government officials and to prevent one branch of government from dominating another. This concern resulted in a prohibition against members of Congress also holding a federal executive or judicial position.[18]

The Framers were greatly influenced by English Whigs who relied on history of "the corrupting effect of plural office holding and royal patronage on the conduct of politics in Seventeenth and Eighteenth Century of England."[19] English Monarchs used patronage to control Parliament. The Monarch promoted influential Members of Parliament to ministerial office or used the incentive of a lucrative office, pension, or title of nobility to induce Members of Parliament to support both the Crown and its programs.[20] The British Parliament passed a rule, as part of the Regency Act of 1705, to curtail this corrupting use of patronage.[21] The Act required "any new ministers appointed from the ranks of Parliament to resign their legislative seats and stand for reelection, thus affording the electorate the opportunity to refuse the presence of the King's ministers in Parliament."[22]

The separation of powers principle began as a "colonial attempt to prevent the Crown-appointed governors from buying off members of the legislature. These governors, in imitation of the court in England, would offer lucrative positions in the executive branch to key members of the legislature."[23] Furthermore, the absence of hereditary nobility made the patronage problem worse in America because it meant that appointive offices were often the primary source of social distinction.[24] "The colonists successfully resisted this patronage and instituted prohibitions on holding several offices at once."[25]

In his farewell address of 1796, George Washington warned against the encroachment of one branch on the powers of another and cautioned against the destruction of the government by an abuse of the separation of powers principle.[26] Additionally, Thomas Jefferson wrote, "convention which passed the

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18. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

19. Calabresi & Larsen, *supra* note 9, at 1053.

20. *Id*. (citing SIR DAVID L. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 283 (9th ed. 1969)).

21. *Id*. at 1056 (citing Regency Act of 1705, 4 Ann. c. 8, §§ 24, 25 (Eng.)).

22. *Id.*

23. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 156-57 (1988).

24. *Id*. (referencing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 143 (1969)).

25. *Id.*

26. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 294 (Ind. 1958) (quoting George Washington, Farewell Address (1796)):

> It is important, likewise, that the habit of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate

ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."[27] The Framers of the U.S. Constitution were adamant about not allowing a party in one branch of government to have power or influence over another branch.

However, the text of the U.S. Constitution is silent on the subject of dually held federal and state office positions. Perhaps this was because it was widely believed that Congress might respond better to the interests of the states if individuals held both state and federal positions.[28] Also, there was a desire and need to attract the best politicians to national service even if those same politicians held state offices.[29] Regardless of the historical reasons for the Constitution's silence on the matter, today the general rule regarding holding multiple positions in the federal government is that one individual may not simultaneously hold federal and state offices.[30] In fact, forty-seven out of fifty states have state constitutional clauses prohibiting individuals from holding federal office and serving in state legislatures.[31]

Framers of the state constitutions, including Indiana's, relied on those same principles considered important in forming the U.S. Constitution. However, state framers did not stop at the reallocation of the appointment power and the office-creating power as was the focus of the pre-constitutional colonial times. While the immediate goal of dual-office clauses

> was to stop corruption and curb executive power, the clauses also expressed American egalitarianism and rejection of the English social hierarchy. Many people who previously had been denied the right to vote or hold political office believed that the primary purpose of the

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> the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments, ancient and modern; some of them on our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Id.

27. Thomas Jefferson, *Notes on the State of Virginia, 1781-1785*, *in* THE COMPLETE JEFFERSON 648, 649 (Saul K. Padover ed., 1943).

28. Calabresi & Larsen, *supra* note 9, at 1050.

29. *Id.* at 1049-50.

30. *Id*. at 1151.

31. *Id.*

> American Revolution had been to abolish the political institutions by which privilege had been maintained in the colonial governments.[32]

State constitutions were written to discourage the formation of a professional politician or courtier class that would be removed from the public at large.[33] The new American office holder was to be a "virtuous amateur, who would put aside his plow for a time to serve the people."[34] Such an office holder was thought to embody the concept of pure democratic representation by allowing for the participation of a great cross section of citizens in government rather than only an elite appointed class.

For example, the Pennsylvania Constitution of 1776 expressed contempt for the office-holding class as did North Carolina's Constitution.[35] "Virtually every state constitution written between 1776 and 1787 prohibited holding several offices at once."[36] These very early state constitutional prohibitions are similar to article II, section 9, which was added to the Indiana Constitution in 1851.[37] The Indiana Constitution of 1816 mentioned the dual office prohibition. However, it was of little emphasis until restrictions on the legislative process and popular election of the judiciary to curb its independence—a principle of Jacksonian democracy—led to a constitutional convention and the adoption of a new Indiana Constitution.[38] Since 1851, little in the Indiana Constitution has changed. Only thirty-eight amendments have passed in two separate and consecutive sessions of the General Assembly, as required by the constitution, and of these only twenty have been ratified by the people.[39] As of January 1, 1998, Indiana's 1851 Constitution, had an amendment rate of .27.[40] Only

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32. *Id.* at 1060 (quoting Robert F. Williams, *"Experience Must Be Our only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 411 (1988)).

33. JAMES SCHOULER, CONSTITUTIONAL STUDIES STATE AND FEDERAL 63 (Da Capo Press 1971) (1897).

34. Calabresi & Larsen, *supra* note 9, at 1060 (quoting Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (1988)).

35. *Id.* "As every freeman . . . ought to have some profession, calling, trade or farm, whereby he may honestly subsist, there can be no necessity for, nor use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants." *Id.* (quoting PA. CONST. of 1776, § 36). Additionally the North Carolina Constitution of 1776 provided that "no person in the State shall hold more than one lucrative office at any one time." *Id.* (quoting N.C. CONST. of 1776, art. XXXV).

36. LUTZ, *supra* note 23, at 161.

37. *Id*.

38. Price v. State, 622 N.E.2d 954, 962 (Ind. 1993).

39. Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 32-33 (G. Alan Tarr ed., 1996).

40. The amendment rate means that of all the amendments brought to the floor of the General Assembly, only .27 of them are passed by two separate and consecutive sessions of the General

Vermont and Tennessee have been amended less frequently.[41] Article II, section 9, the prohibition against dual offices in Indiana, has not been altered.

III. ANALYSIS OF THE PROHIBITION AGAINST DUAL OFFICES—ARTICLE II, SECTION 9

The Indiana Constitution prohibits a person from holding more than one lucrative office at a time. Article II, section 9 of the Indiana Constitution states:

> No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no annual salary shall not be deemed lucrative.[42]

In most situations, two determinations must be made under article II, section 9 of the Indiana Constitution: (1) whether both positions are offices and (2) whether both positions are lucrative. If either of the two positions is not an office, there is no violation of article II, section 9. If either of the two positions is not lucrative, there is no violation of article II, section 9.

A. What Is an Office?

The Indiana Supreme Court has defined "office" in relation to article II, section 9, of the Indiana Constitution as follows:

> An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof.[43]

The Indiana Supreme Court did not look solely to compensation to determine whether an office under article II, section 9 existed.[44] The court first looked to the functions and duties required by the position. The Indiana Supreme Court explained that an office is:

"a position or station in which a person is employed to perform certain

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Assembly and then ratified by the people.

41. Lutz, *supra* note 39, at 32-33.

42. IND. CONST. art. II, § 9; *see also* IND. CODE § 3-8-1-3 (2003) ("A person may not hold more than one (1) lucrative office at a time, as provided in Article 2, Section 9 of the Constitution of the State of Indiana.").

43. *See* Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 290 (Ind. 1958) (citing Wells v. State *ex rel.* Peden, 94 N.E. 321 (Ind. 1911)).

44. *See* Indianapolis Brewing Co. v. Claypool, 48 N.E. 228, 230 (Ind. 1897).

> duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust." From these definitions, and we think they are correct, it is quite apparent that compensation is not indispensable to the existence or creation of an office within the meaning of the constitution.[45]

The court went on to say that circumstance denies the commissioners of their character as officers "because the act provides some compensation for them, namely, their expenses."[46]

> It is the creation of an office with a certain tenure that is forbidden. Webster defines the word "office" to be "a special duty, trust, or charge, conferred by authority and for a public purpose; an employment undertaken by the commission and authority of the government, as civil, judicial, executive, legislative, and other offices." Burrill's Law Dictionary defines the word "office" to mean "a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust."[47]

The court concluded from these definitions that it was quite apparent that "compensation is not indispensable to the existence or creation of an office within the meaning of the constitution. So that the office of park commissioner is an office, within the meaning of the constitutional restriction."[48]

Initially, the Indiana Supreme Court construed article II, section 9 to apply only to "lucrative offices" at the state level. For example, in *Kirk* a court determined that an office is not a lucrative office for the purposes of article II, section 9 if the duties are "wholly municipal in character."[49] In *Kirk*, the court was required to decide whether Kirk, who had been duly appointed to the state office of prison director of the Indiana State Prison South, could continue to hold that office after being elected as a Madison city councilman.[50] The court concluded, "[t]he office of councilman in a city, although a lucrative office in the ordinary sense of the word, is not a lucrative office within the ninth section of the second article of the constitution,"[51] based on the reasoning that "[t]he office of councilman is an office purely and wholly municipal in its character . . . [with] no duties to perform under the general laws of the State."[52]

However, the holding in *Kirk* was narrowly construed in *Chambers v. State*

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45. *Id*. (quoting BURRILL'S LAW DICTIONARY).

46. *Id*.

47. *Id.*

48. *Id.*

49. State *ex rel.* Platt v. Kirk, 44 Ind. 401, 406 (1873); *see also* Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); Howard v. Shoemaker, 35 Ind. 111 (1871).

50. *Kirk*, 44 Ind. at 402-03.

51. *Id*. at 408.

52. *Id*. at 406.

ex rel. Barnard:

> It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an officer within the meaning of the Constitution, but if the officer be charged with *any* duties under the laws of the State and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution.[53]

This analysis has been used by prior Attorneys General in several opinions all of which conclude that if an office is purely municipal, it does not come within the purview of article II, section 9.[54] However, courts that have construed article II, section 9 during the last century did not dwell on whether one of the positions involved is "purely municipal."[55] Rather, the analysis has focused on whether both of two lucrative positions are "offices," with a distinction being made between an "employee" and an "officer."

The courts have explained the distinction between a "public officer" and an "employee" by finding a difference between an office and an employment: "An office, as opposed to an employment, is a position for which the duties include the performance of some sovereign power for the public's benefit, are continuing, and are created by law instead of contract."[56] "The most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power."[57] For instance, the Attorney General looked to the type of duties that arose when deciding whether a member of the Adams County Council could serve as a member of the Adams County Alcoholic Beverage Board.[58] The Attorney General determined that the County Council is required to affix and adopt tax rates for various townships and has the duty of appropriating moneys for expenditures within the County. Therefore, the duties were clearly an exercise of the sovereignty of the state.[59]

Some courts look at the differences between the definition of employee and an officer. An employee is defined as, "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material detail of how

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53. 26 N.E. at 894 (emphasis added).

54. *See, e.g.*, 6 Ind. Op. Att'y Gen. 29, 31 (1949); 110 Ind. Op. Att'y Gen. 469, 471 (1944); Ind. Op. Att'y Gen. 693, 695 (1943).

55. Since the 1980 adoption of Home Rule, it is doubtful that any office can be deemed "purely municipal." *See* IND. CODE §§ 36-1-3-1 to -9 (West 1997); *see also* 14 Ind. Op. Att'y Gen. 1 (1991) (noting that "[u]nder Home Rule, the State has delegated to cities many powers and duties concerning the sovereign powers of the State in relation to health, welfare and safety").

56. Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993).

57. Shelmadine v. City of Elkhart, 129 N.E. 878, 878 (Ind. App. 1921).

58. 78 Ind. Op. Att'y Gen. 236 (1951).

59. *Id*. at 237.

the work is to be performed."[60] "Generally, one who holds an elective or appointive position for which the public duties are prescribed by law is a 'public officer.'"[61] Courts have distinguished an officer from an employee by looking at "the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond."[62] Courts have also drawn a distinction by looking at "[the officer's] power of supervision and control and by his liability to be called to account as a public offender in case of malfeasance in office."[63] Other important tests courts may consider when distinguishing between an office and employment are:

> [T]he tenure by which a position is held, whether its duration is defined by the statute or ordinance creating it, or whether it is temporary or transient or for a time fixed only by agreement; whether it is created by an appointment or election, or merely by a contract of employment by which the rights of the parties are regulated; whether the compensation is by a salary or fees fixed by law, or by a sum agreed upon by the contract of hiring.[64]

B. Is the Position in Question Lucrative?

The second determination to see if a dual office holding infringes on article II, section 9 is whether an office is lucrative. "The constitutional provision against the holding of more than one lucrative office at the same time goes to the character of the office rather than to whether the officer draws two salaries."[65] However, some type of compensation or payment is generally required for an office to be considered lucrative. A lucrative office as used in article II, section 9 is defined as "[a]n office to which there is attached compensation for services rendered. . . . Pay, supposed to be an adequate compensation, is affixed to the performance of their duties."[66] "Webster defines the word lucrative to mean 'yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade; lucrative business or office.'"[67]

A person holds a lucrative office under article II, section 9 when he or she holds title to an office in which he or she is authorized to exercise some of the

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60. Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (quoting BLACK'S LAW DICTIONARY 471 (5th ed. 1979)).

61. *Gaskin*, 622 N.E.2d at 528 (quoting Mosby v. Bd. of Comm'rs of Vanderburgh County, 186 N.E.2d 18, 20-21 (Ind. App. 1963)).

62. *Common Council of Peru*, 440 N.E.2d at 730 (quoting Hyde v. Bd. of Comm'rs of Wells County, 1987 N.E. 333, 337 (Ind. 1935)).

63. *Mosby*, 186 N.E.2d at 21.

64. *Common Council of Peru*, 440 N.E.2d at 731 (citing *Hyde*, 198 N.E. at 337).

65. 57 Ind. Op. Att'y Gen. 219 (1949) (quoting 1955 Ind. Op. Att'y Gen. 1 (1936)).

66. State *ex rel.* Platt v. Kirk, 44 Ind. 401, 405 (1873).

67. *Id.*

state's sovereign power and where the person is entitled to compensation.[68] Essentially, if state law grants any of the state's power (i.e., eminent domain, prosecution, taxation) to a public service position and the person holding such public service position is entitled to get any amount of money for serving in that public service position, then the public service position is considered a lucrative office for purposes of article II, section 9. Whether an individual receives compensation or not does not change the character of the office from lucrative to non-lucrative, even if the individual did not receive compensation.[69] The office is considered lucrative even if a person chooses not to accept compensation as long as the person is entitled to the pay affixed to the performance of the office's duties.[70] Such compensation can be salary or per diem (per day). Only pure reimbursement does not constitute compensation.[71]

The Supreme Court of Indiana in the case of *Book v. State Office Building Commission*, defined a lucrative office as follows: "'Lucrative office' as the term is used in Article 2, Section 9, of the Constitution of Indiana has been considered and defined by this court since the year 1846 as an office to which there is attached a compensation for services rendered."[72] The court determined that "[w]hile members of the State Office Building Commission are charged with certain duties under the Act creating the Commission, they receive no compensation for their services, and under the definition adopted by this court membership on the Commission does not constitute a lucrative office."[73]

Thus, the court held, in effect, that mere reimbursement for actual expenses was not sufficient to constitute compensation for services rendered. Therefore, as far as the "lucrative office" question is concerned, there would be no violation of the Indiana Constitution by one individual holding both offices for the reason that the essential element of compensation or per diem for services rendered is lacking.[74]

In a past opinion the Attorney General considered other per diem statutory provisions explaining that "[a] per diem is not a fee, salary or wages. It is a compensation for a service given the government for a day or a part of a day."[75] "The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it."[76] In *Dailey v. State*, in speaking of the offices of recorder and county commissioner, the court said that it considered

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68. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 289-90 (Ind. 1958).

69. 45 Ind. Op. Att'y Gen. 258 (1960).

70. Dailey v. State, 8 Blackf. 329 (Ind. 1847).

71. 45 Ind. Op. Att'y Gen. 259 (1960) (explaining *Book*, 149 N.E.2d at 289).

72. 149 N.E.2d at 289.

73. *Id*. *See also* Crawford v. Dunbar, 52 Cal. 36, 39 (1877); Wells v. State *ex rel.* Peden, 94 N.E. 321 (Ind. 1911); Chambers v. State *ex rel.* Barnard, 26 N.E. 893, 894 (Ind. 1891); Platt v. Kirk, 44 Ind. 401, 405 (1873); State *ex rel.* Little v. Slagle, 89 S.W. 326, 327 (Tenn. 1905).

74. *See* 45 Ind. Op. Att'y Gen. 259 (1960) (determining that because library board members did not receive compensation or per diem, the position was not considered a "lucrative office").

75. 70 Ind. Op. Att'y Gen. 260 (1954).

76. *See Book*, 149 N.E.2d at 289 (quoting *Kirk*, 44 Ind. at 405-06).

them both lucrative offices.[77] In discussing lucrative, the court said:

> Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. We know of no other test for determining "lucrative office" within the meaning of the constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation.[78]

The Attorney General determined that the per diem allowance to a member of the County Plan Commission was to be considered as compensation for a service given the county.[79] Even if the officeholder chooses not to accept the compensation, the office is still considered lucrative so long as the individual is entitled to the pay affixed to the office.[80]

A former Attorney General concluded, after examining the powers, duties, and nature of the office of trustee of a sanitary district, that a lucrative office existed.[81] The Attorney General determined that the office was lucrative as indicated by the provision for compensation.[82]

If both public service positions are lucrative offices, then there is a violation of article II, section 9's prohibition against dual office holding. This means that a person may not hold both offices at the same time, and this ends analysis of the problem. If, on the other hand, one determines that one of the public service positions is a lucrative office, then one must continue with step two of the four step analysis.

If a lucrative state office holder accepts a second lucrative state office, then the acceptance of the second lucrative state office automatically vacates the first office.[83] Thus, the first office becomes vacant and a successor will need to be appointed or elected, depending on the law applicable to the office.[84] Where a person is appointed and accepts a lucrative state office and continues to hold a lucrative federal office, the state court may expel that person from state office if the person persists in holding the lucrative federal office.[85]

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77. 8 Blackf. 329, 330 (Ind. 1847).

78. *Id.*

79. 70 Ind. Op. Att'y Gen. 260 (1954) (explaining that a State Representative could not be on Marion County Plan Commission because the per diem allowance was to be considered compensation for a service given the county).

80. *Dailey*, 8 Blackf. at 329.

81. Ind. Op. Att'y Gen. 88, 89 (1942).

82. *Id.*

83. *See, e.g.*, Wells v. State *ex rel.* Peden, 94 N.E. 321, 323 (Ind. 1911); Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1041 (Ind. 1898); Chambers v. State *ex rel.* Barnard, 26 N.E. 893, 894 (Ind. 1891); 30 Ind. Op. Att'y Gen. 149 (1947); Ind. Op. Att'y Gen. 270, 272 (1938); Ind. Op. Att'y Gen. 254, 255 (1933); 77 Ind. Op. Att'y Gen. 235 (1951).

84. Gosman v. State, 6 N.E. 349, 353 (Ind. 1886).

85. Foltz v. Kerlin, 4 N.E. 439, 440-41 (Ind. 1886); 17 Ind. Op. Att'y Gen. 83 (1987).

C. Previously Recognized Exemption

In some cases where both positions are considered lucrative offices, one of the positions may be found to have been specifically exempted by statute from the lucrative office restriction. For instance, using the foregoing analysis, courts have frequently held that an appointed deputy is an "office" within the meaning of article II, section 9.[86]

However, in the 1980s, the General Assembly enacted legislation specifically allowing "members of any township, town, or city . . . police department"[87] and "[a]ny county police officer"[88] to run for and serve as an elected officer and to be appointed to and serve in any office if so appointed. In light of such legislation, courts have subsequently held that "a deputy [town] marshal is an employee rather than a public officer,"[89] and that "a deputy sheriff is an employee of the county, rather than a public officer."[90] The General Assembly even went a step further, and in 1999, the General Assembly passed P.L. 176-1999, codified at Indiana Code section 5-6-4-3, which explicitly characterizes appointed deputies as non-officer holders; "[f]or purposes of Article 2, Section 9 of the Constitution of the State of Indiana, the position of *appointed deputy* of an officer of a political *subdivision or a judicial circuit is not a lucrative office*."[91]

Prior to the legislature passing Indiana Code section 5-6-4-3, courts had determined that a prosecuting attorney was clearly an "officer of . . . a judicial circuit."[92] Based on Indiana Code section 5-6-4-3, an appointed deputy prosecuting attorney is not a "lucrative office" and thus is not precluded from holding office in an elected position on the municipal or county level.

However, Indiana Code section 5-6-4-3 has not been challenged or construed by a court, and neither *Hill* nor its legal analysis concerning an "office" under article II, section 9 has been disapproved. Accordingly, a court may reach a different result. Nevertheless, in construing similar legislation as it relates to police officers, the *Gaskin* court noted that: "The legislature is the arbiter of public policy. Indiana Code section 36-8-3-12, which specifically authorizes a town

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86. *See, e.g.*, Hill v. State, 11 N.E.2d 141, 144 (Ind. 1937) ("A deputy prosecuting attorney is vested with power by express statutory provisions to perform the duties of the prosecuting attorney. He is a public officer and appointed to discharge the duties of the particular office. His acts are the acts of his principal.") (citation omitted); *Wells*, 94 N.E. at 321 (deputy county auditor is an "officer"); Union Township of Montgomery County v. Hays, 207 N.E.2d 223 (Ind. App. 1965) (deputy township assessor is an "officer"). *See generally* 1 Ind. Op. Att'y Gen. *1 (1997).

87. IND. CODE § 36-8-3-12 (2003).

88. *Id.* § 36-8-10-11(c).

89. Gaskin v. Beyer, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993).

90. Harden v. Whipker, 646 N.E.2d 727, 729 (Ind. Ct. App. 1995).

91. IND. CODE § 5-6-4-3 (2003) (emphasis added).

92. *See, e.g.*, State *ex rel.* McClure v. Marion Superior Court, 158 N.E.2d 264, 267 (Ind. 1959).

police officer to be a candidate for elective office and to serve if elected, is a clear statement of public policy by the legislature which we are constrained to follow."[93] In the absence of Indiana Code section 5-6-4-3, one would anticipate that the offices of deputy prosecuting attorney and city council member are both "lucrative offices" which cannot be held simultaneously. Since the constitutionality of Indiana Code section 5-6-4-3 had not been tested, it is not certain that the courts would defer to the General Assembly's declaration of public policy in interpreting the constitution.[94] If a court were to hold that Indiana Code section 5-6-4-3 authorizes the holding of dual lucrative offices in violation of article II, section 9, the court's interpretation would prevail.

Another example of an exempted position is any position on a public safety board.[95] Safety boards are city-level administrative bodies that are charged with oversight of the city's police and fire departments.[96] In addition, the safety board has exclusive control over other aspects of a city's public safety needs including animal shelters, inspection of buildings, equipment and supplies, and repairs.[97] With respect to the police department specifically, the safety board may adopt rules for the government and discipline of the police department.[98]

Some positions are not expressly exempted but may be found to be exempted through analogy. For instance, the Vanderburgh County Sheriff's Merit Board performs similar, though more restricted, functions at the county level as do the public safety boards at the city level. The merit board is responsible for adopting and enforcing rules for the discipline of members of the sheriff's department.[99] The sheriff's merit board is not charged with the broader public safety functions of safety boards; however, inasmuch as their functions overlap, the two bodies perform identical services.

Sheriffs' merit boards effectively act as safety boards at the county level. For example, in Evansville, Indiana, the seat of Vanderburgh County, the city's department of public safety has established a safety board pursuant to its authority under Indiana Code section 36-4-9-2(a)(2). The safety board is charged with the duties described in Indiana Code section 36-8-3-2. In addition, it is responsible for the oversight and discipline of the city's police department.[100] However, the safety board's jurisdiction does not extend to members of the county sheriff's department. Therefore, the sheriff's merit board is needed in order to perform the oversight and disciplinary role at the county level. Because these two boards perform the same functions with respect to law enforcement

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93. 622 N.E.2d at 530 (citation omitted).

94. *See id.*

95. IND. CODE § 36-8-3-12 (2003).

96. *Id.* § 36-8-3-2.

97. *Id.*

98. *Id.*

99. *See* Miller v. Vanderburgh County, 610 N.E.2d 858 (Ind. Ct. App. 1993).

100. *See* Cox v. Town of Rome City, 764 N.E.2d 242 (Ind. Ct. App. 2002); Chesser v. City of Hammond, 725 N.E.2d 926 (Ind. Ct. App. 2000); Burke v. Anderson, 612 N.E.2d 559 (Ind. Ct. App. 1993).

agencies and because the sheriff's merit board essentially takes the place of the safety board at the county level, it would be reasonable to extend the statutory exemption to sheriff's merit board members.

D. Legislative Encroachment on the Constitution

1. Amendment.—When the legislature creates a statute that appears to create an exception to the prohibition of holding dual offices, concern arises over whether the legislature's act improperly encroaches upon article II, section 9 or abuses article III, section 1 by influencing or affecting other branches of government. Under the Indiana Constitution, the General Assembly of our state is granted legislative authority in the words of article IV, section 1.[101] The exercise of the lawmaking power conferred upon the General Assembly is subject

> only to such limitations as are imposed, expressly or by clear implication, by the state Constitution and the restraints of the federal Constitution and the laws and treaties passed and made pursuant to it, has been uniformly declared by an unbroken line of decisions of this court from the beginning of the judicial history of the state to the present.[102]

However, the authority granted "to exercise the legislative element of sovereign power has never been considered to include authority over fundamental legislation."[103]

The grant to the General Assembly of "the legislative authority of the State" did not transfer from the people to the General Assembly all the legislative power inhering.[104] The Indiana Supreme Court has held that the words "legislative power" convey to the General Assembly the general legislative authority to make, alter and repeal laws.[105] "'Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has

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101. IND. CONST. art. IV, § 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. The style of every law shall be: "Be it enacted by the General Assembly of the State of Indiana"; and no law shall be enacted, except by bill.

Id.

102. Ellingham v. Dye, 99 N.E. 1, 3 (Ind. 1912).

103. *Id*.

104. *Id.* (citing McCullough v. Brown, 19 S.E. 458 (S.C. 1894)) ("such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose").

105. *Id*. at 8-9; *see also* State *ex rel.* Yancey v. Hyde, 22 N.E. 644 (Ind. 1889); City of Evansville v. State *ex rel.* Blend, 21 N.E. 267 (Ind. 1889); State *ex rel.* Jameson v. Denny, 21 N.E. 252 (Ind. 1889).

prescribed.'"[106] In *Lafayette, Muncie, & Bloomington Railroad Co. v. Geiger*, the court stated that

> [w]hen the constitution of a state vests in the General Assembly all legislative power, it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government prohibited by the state constitution.[107]

Accompanying the grant of general legislative authority over the subject-matter of ordinary legislation found in article IV, section 1 in the Indiana Constitution is article XVI, which places with the legislature the following special power and duty in relation to fundamental legislation:

> (a) An amendment to this Constitution may be proposed in either branch of the General Assembly. If the amendment is agreed to by a majority of the members elected to each of the two houses, the proposed amendment shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election. (b) If in the General Assembly so next chosen, the proposed amendment is agreed to by a majority of all the members elected to each House, then the General Assembly shall submit the amendment to the electors of the State at the next general election. (c) If a majority of the electors voting on the amendment ratify the amendment, the amendment becomes a part of this Constitution.[108]

The constitutional and legislative history of the state suggests that the general grant of legislative authority carries the power "to formulate and submit, at will, fundamental law to the people for their action."[109] The power to change the constitution "has ever been considered to remain with the people alone, except as they had, in their Constitution, specially delegated powers and duties to the legislative body relative thereto for the aid of the people only."[110]

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106. *Ellingham*, 99 N.E. at 7 (quoting COOLEY, CONSTITUTIONAL LIMITATIONS 131 (7th ed.)).

107. 34 Ind. 185, 198 (1870).

108. IND. CONST. art. XVI, § 1.

109. *Ellingham*, 99 N.E. at 8.

110. *Id.*; *see also* State v. Swift, 69 Ind. 505, 519 (1880). In the opinion of the court by Chief Justice Biddle, who was a member of the constitutional convention of 1850-51:

> "The people of a State may form an original constitution, or abrogate an old one and form a new one, at any time, without any political restriction except the constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a constitution already in existence, they can do it only by the method pointed out by the constitution to which the amendment is to be added. The power to amend a constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject, contrary to its prohibitions."

Ellingham, 99 N.E. at 18 (quoting *Swift*, 69 Ind. at 519).

The legislature's power to determine and declare the law covers "the whole body of the law, fundamental and ordinary."[111] A judicial question could arise "[w]hether legislative action is void for want of power in that body, or because the constitutional forms or conditions have not been followed or have been violated."[112] Therefore, courts have the power to exercise the authority "to determine the validity of proposal, submission or ratification of change in the organic law."[113]

2. Encroaching on Article II, Section 9.—Without an amendment, any legislation passed by the General Assembly allowing for multiple offices or expanding the duties of an office must be referenced with both article II, section 9 and article III, section 1 to see if there is a conflict. The Indiana Supreme Court has explained that every statute is "cloaked with a presumption of constitutionality."[114] The court explained that "[i]t is our duty to bring it into harmony with constitutional requirements, if the language permits. If it is capable of any constitutional interpretation, it must be upheld."[115] "A statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies."[116]

> A statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any reasonable basis. It is the duty of courts to uphold Acts of the Legislature if it is possible to do so within rule of law, and where there is a doubt as to the constitutionality of a statute, it must be upheld. The burden is on the party attacking the constitutionality of the statute to establish the invalidating facts; and its invalidity must be clearly shown.[117]

In construing the Indiana Constitution, the Indiana Supreme Court noted that it is appropriate to look to "the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions."[118] Added to this, the purpose underlying an Indiana constitutional provision is critical to ascertaining "what the particular constitutional provision was designed to prevent."[119]

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111. *Ellingham*, 99 N.E. at 21.

112. *Id*.

113. *Id.* (citing *In re* Denny, 59 N.E. 359 (Ind. 1901); State v. Swift, 69 Ind. 505 (1880)).

114. *In re* Public Law No. 154-1990, 561 N.E.2d 791, 791 (Ind. 1990); *see also* B&M Coal Corp. v. United Mine Workers of Am., 501 N.E.2d 401 (Ind. 1986); Am. Nat'l Bank & Trust Co. v. Ind. Dep't of Highways, 439 N.E.2d 1129 (Ind. 1982).

115. *In re Public Law No. 154-1990*, 561 N.E.2d at 791 (citing Progressive Improvement Ass'n v. Catch All Corp., 258 N.E.2d 403 (Ind. 1970)).

116. *Id*. (citing Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 591 (Ind. 1980)).

117. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 280 (Ind. 1958) (citation omitted).

118. Ajabu v. State, 693 N.E.2d 921, 929 (1998) (citing Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996) (internal quotation marks omitted)).

119. *Id.* at 930 (citing *Town of St. John*, 675 N.E.2d at 321 (internal quotation marks

If a court reaches a conclusion in conflict with any provision of the constitution, such conclusion must fail because the framers of the Indiana Constitution would not have been

> guilty of the folly of inserting therein conflicting or inconsistent provisions. So if it can be sworn that such conclusion renders meaningless a single word or sentence in the constitution it must fall; for it cannot be maintained that any word in an instrument of so much importance as this was not to have a potent meaning.[120]

There may exist a difference of opinion as to the "proper meaning to be given to some of the words or sentences" in the constitution.[121] However, the Indiana Supreme Court reasoned, "some meaning is to be attached to each and every word found therein, and we are not at liberty to attach to any word there found a meaning that will conflict with any other word or sentence, or the well-known intent of the framers of the Constitution."[122]

Article II, section 9 expressly prohibits individuals from holding more than one lucrative office, "except as expressly permitted in this Constitution."[123] This suggests that only through an amendment to the constitution would the legislature be authorized to create an exception. In other sections of the constitution, the framers provided that the legislature could act and pass ordinary law to change the prescription of the constitution by using language in other sections like "as may be prescribed by law"[124] or "may provide by law."[125] The framers realized certain areas needed to remain flexible to adapt to changing circumstances such as creating courts[126] and defining courts' jurisdiction,[127] or collecting taxes and creating exemptions.[128] The framers used the "except as provided in the Constitution" language only one other time in article I, section 25.[129] However, the word "expressly" was left out of article I, section 25 suggesting that a court may be able to interpret an implied power if a situation so dictated. The framers placing "expressly" in no other place but article II, section 9 suggests that they were not open to any legislative exception other than amendment.

However, the legislative authority is vested in the General Assembly, which has the sole power of creating the laws.[130] This power includes the authority to

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omitted)).

120. State *ex rel.* Collett v. Gorby, 23 N.E. 678, 680 (Ind. 1890).

121. *Id*.

122. *Id.*

123. IND. CONST. art. II, § 9.

124. IND. CONST. art. VI, § 3, 8; IND. CONST. art. VII, § 8; IND. CONST. art. X, § 8.

125. IND. CONST. art. II, § 14; IND. CONST. art. IV, § 4; IND. CONST. art. VII, § 1.

126. IND. CONST. art. VII, § 1.

127. IND. CONST. art. VII, § 8.

128. IND. CONST. art. X, § 8.

129. IND. CONST. art. I, § 25.

130. IND. CONST. art. IV, § 1.

create offices.[131] If the legislature can create the offices, it can prescribe the duties and responsibilities for that office. The framers, in giving the law-making authority and office creating power to the legislative department, must have intended for the legislature to be able to create offices as government evolved and to react to the needs and demands of such evolution. The framers would expect the legislature with its all encompassing legislative authority to adapt to government as it became larger and more active. If the legislature chose to allow an individual to hold multiple offices to promote efficiency and enable individuals with expertise to handle multiple tasks, then the framers would have thought that permissible.

Furthermore, the legislature does not have an express prohibition listed in article IV, section 22 against creating exceptions to the dual office prohibition. There is no limitation expressly forbidding the legislature from defining exceptions to the general rule. If the framers had intended the legislature not to make exceptions, it would have been listed in article IV, section 22. In addition, in *State ex rel. Harrison v. Menaugh*, the Indiana Supreme Court agreed with Chief Justice Black's opinion in *Sharpless v. Mayor*:

> The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument. We become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away. If we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the constitution in any particular, there is nothing but our own will to prevent use from demolishing it entirely.[132]

Therefore, the legislative authority having been placed solely in the General Assembly and with no express prohibition against giving the General Assembly the power to make laws to create exceptions to article II, section 9, the General Assembly might have the ability to create such exceptions. An amendment would be necessary to repeal the entire prohibition, but for special exceptions to the general rule, the constitution can be implied to give such power to the legislature.[133]

Nevertheless, the intent of the framers and their purpose for creating article II, section 9 can be inferred from the Constitutional Convention debates. In one debate, the framers argued over exceptions being incorporated into the proposed

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131. *See* State *ex rel.* Yancey v. Hyde, 22 N.E. 644, 649 (Ind. 1889); *see also* IND. CONST. art. XV, § 1 ("All officers, whose appointment is not otherwise provided for in this constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law."); Tucker v. State, 35 N.E.2d 270, 285 (Ind. 1941).

132. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 120 (Ind. 1898) (citing Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 161 (1853)).

133. IND. CODE § 5-6-4-3 (2003) (appointed deputy of a political subdivision officer or a judicial circuit officer); § 36-8-3-12; § 13-21-3-10(b); § 20-6.1-6-14.

section.[134] As one framer argued, "no matter what the amount of a man's salary may be, let him be content with the one office."[135] The exchange concerned whether exceptions should be added to the amendment and whether there should be a compensation limit. Concern arose over prohibiting all offices from being held by the same office holder, because many of the offices filled are petty offices "filled by individuals for the mere convenience of the public, without much compensation attached to such offices."[136] It was argued that "[t]he design of the committee was not to exclude those men holding these little offices . . . but to leave the door open, inasmuch as many of them were established and kept up more for public convenience than from any profit which they yield."[137] The majority opposed leaving the door open and moved to include the language "office or appointment" into the amendment because they whole-heartedly believed in the principle of "one individual should not hold more than one office at a time."[138] A vocal minority thought that this would carry the prohibition too far by keeping local leaders from serving in the General Assembly. Furthermore, they argued that "unless the offices of clerk, auditor, or recorder, in the smaller counties, were combined and given to one person, they could not get competent persons to fulfil the duties appertaining to them."[139]

However, the majority stood hard and fast to a strict prohibition, except for militia officers, out of the fear of a "man's holding two appointments at the same time, because the duties imposed upon him by one appointment are very apt to interfere with those of the others."[140] An individual speaking for the majority suggested:

> If, sir, you permit one citizen to wield his influence, the patronage, and the very profits of one office, into which he may have been placed by the confidence of the people, to advance what he may deem to be his claim upon the people, or upon his party, for another, you virtually annul the force of a section already adopted, "that all elections shall be free and equal."[141]

At the conclusion of the debate, the majority voted not to include any amendment creating exceptions to article II, section 9. The purpose of the framers would lead to a conclusion that any exceptions would have to be created through a constitutional amendment.

Aside from any constitutional inhibitions or restrictions, "the legislature may be said to be unfettered in the exercise of the power with which it has been

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134. 2 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1053 (1850).

135. *Id.*

136. *Id*. at 1054.

137. *Id.*

138. *Id*.

139. *Id*. at 1308.

140. *Id*. at 1060.

141. *Id.* at 1310 (emphasis omitted) (citation to quoted phrase not provided in original).

invested."[142] In these situations where it is claimed that the General Assembly has passed legislation allowing a specific lucrative office to hold a second lucrative office, the statute can be said to conflict with the constitution. The Indiana Supreme Court explained that it must give the lawmaking power the benefit of validity because of the "fact that the legislature is invested with plenary power for all purposes of civil government."[143]

For instance, in *Rush v. Carter*, the court explained that if the consideration of the law in this case by the reviewing court were one of constitutional interpretation within the sole context of article II, section 9, which forbids the dual holding of lucrative offices, it may well be that *Rush* could prevail.[144] The court thought that the recent legislation[145] "changing the status of members of a county sheriff's department from the traditional concept of sheriff's deputy into that of a professional police officer, the latter comparing favorably in many respects with the employer-employee relationships associated with municipal police and fire departments and the state police," strengthened the case that no constitutional encroachment occurred.[146] The court looked more at policy and purpose than strict construction when it observed that when a county police officer "sought election to . . . a school board or city council, [Indiana Code section] 36-8-10-11 would sanction the act, and because of separate governmental entities and non-related duties and responsibilities between the two positions the problems attendant to the case at hand should not be present."[147]

Perhaps, article II, section 9 would not receive a construction as broad as its terms might indicate. However, section 9 states that an individual shall not hold more than one lucrative office "except as expressly permitted in this Constitution."[148] Section 9 does not say "as prescribed by law," which would leave greater discretion to the legislature to define exceptions through statutory use. Section 9 specifically states that exceptions must be in the constitution.

Nevertheless, an article II, section 9 conflict with both courts and past Attorney General opinions can be avoided by finding that a lucrative position is not an office.[149] For instance, in *Gaskin*, the court found that, like city police officers, deputy marshals are employees of the town. Thus, this section does not

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142. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 119 (Ind. 1898) ("This doctrine has been repeatedly affirmed in many of the decisions of this court."); *see* Hovey v. State, 21 N.E. 21 (Ind. 1889); Robinson v. Schenck, 1 N.E. 698 (Ind. 1885); Mount v. State *ex rel.* Richey, 90 Ind. 29 (1883); Lafayette, Muncie, & Bloomington R.R. Co. v. Geiger, 34 Ind. 185 (1870); Beebe v. State, 6 Ind. 501 (1855); Beauchamp v. State, 6 Blackf. 299 (Ind. 1842).

143. *Menaugh*, 51 N.E. at 120.

144. 468 N.E.2d 236, 237-38 (Ind. Ct. App. 1984) (though most courts have disagreed with the application of article III, section 1 in the holding of *Rush*).

145. IND. CODE § 36-8-10-11 (2003).

146. *Rush*, 468 N.E.2d at 237.

147. *Id.* at 237-38.

148. IND. CONST. art. II, § 9.

149. *See* Harden v. Whipker, 646 N.E.2d 727 (Ind. Ct. App. 1995); Gaskin v. Beier, 622 N.E. 2d 524, 524 (Ind. Ct. App. 1993); *see also* Ind. Att'y Gen. Op. 97-1; Ind. Att'y Gen. Op. 83-5.

contravene Indiana Constitution, article II, section 9.[150] The court in *Gaskin* distinguished between other situations and the one in its case explaining, "[u]nlike the marshal, who is appointed by the town legislative body, the deputy marshal is appointed by the marshal."[151] The legislature crafted Indiana Code section 36-4-4-2 so there would be no question as to whether it intruded on article II, section 9. The legislature specifically stated that city employees other than elected or appointed public officers may run for and hold a lucrative office. This prevents any question of the statute from getting bogged down in an analysis of office or employment.

The Attorney General's office has used the *Gaskin* court's framework to determine whether a position is an office in the article II, section 9 analysis. This analysis has allowed the Attorney General's office to avoid having to determine whether a statute conflicts with article II, section 9.[152]

For instance, the Attorney General found that the position of county attorney is not mentioned in the Indiana Code provisions pertaining to the management of county government.[153] The absence of statutory prescription indicates that a county attorney is not charged with a public duty as contemplated by *Gaskin*. The opinion explained that the General Assembly had enacted a statute which provided that an individual employed by a county executive as an attorney does not hold a lucrative office for the purposes of article II, section 9.[154] The Attorney General, in his opinion, was able to avoid commenting on the constitutionality of such statute because article II, section 9 was not in conflict because the position was determined not to be an office.[155] Similarly, the positions of attorney for the board of zoning appeals and attorney for the metropolitan planning commission are not considered "offices" under *Gaskin* because the General Assembly had neither defined these positions nor vested any powers and duties in the positions.[156]

The opinion contrasted the above with the case of a city civil engineer who is appointed by the mayor, in the same manner as a city fire chief and city police chief. Unlike a city fire chief and city police chief, however, a city civil engineer does not have statutorily prescribed duties or powers. The General Assembly has created the position, but has not established any responsibilities. Accordingly, a city civil engineer would not hold an "office" under article II, section 9.[157]

The assault on the dual office prohibition has generally always been direct, with the General Assembly passing a statute creating an exception. In many cases, the General Assembly has chosen to increase the duties of an office to the extent a second office conflict may arise. "[A]n office is not necessarily created

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150. *Gaskin*, 622 N.E.2d at 524.

151. *Id.* at 528 (citations omitted).

152. *See* Ind. Op. Att'y Gen. 1 (1997).

153. *Id.*; *see also* IND. CODE § 36-2 (2003).

154. Ind. Op. Att'y Gen. 1 (1997); *see also* IND. CODE § 36-2-2-30.

155. Ind. Op. Att'y Gen. 1 (1997).

156. *Id.*

157. *Id.*

by a statute that imposes additional duties and powers upon an officer."[158] "Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, by the legislative will."[159]

Because the people elect the General Assembly, the legislative actions should be deemed the will of the people, unless there is a direct conflict of a statute with the constitution. "[T]he great power conferred upon the legislature may be, and sometimes is, abused, but the remedy for this evil lies in an appeal to the people, who, in their sovereign capacity, can correct it, and not by appeal to the judiciary."[160] There is no reason for assuming that the courts should correct the mere abuse by the legislature of its power.[161] If the judiciary should assume to protect the people against the abuse of power upon the part of their own servants or representatives, it would be the equivalent of attempting to protect the people against their own abuse.[162] It is with this bias toward the will of the people that the court could incorporate into the construction of any legislation.[163]

If one of the positions is considered a non-lucrative position because it is has been determined to either be an employee instead of an officer, or there is no compensation making the office not lucrative, or there has been a statutory exemption, then the dual office analysis moves to the next step—article III, section 1. Along with the separation of powers analysis comes the issue of the legislature creating exceptions to a constitutional ban.

III. ANALYSIS—ARTICLE III, SECTION 1

A. In General

Arguments that dual office-holding is prohibited have sometimes been based on constitutional provisions pertaining to separation of governmental powers.[164]

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158. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 290 (Ind. 1958); *see also* Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 95 (1947) (concluding that the rule enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law).

159. Jeffries v. Rowe, 63 Ind. 592, 594 (1878); *see also* Walker v. Peelle, 18 Ind. 264 (1862); Walker v. Dunham, 17 Ind. 483 (1861); Ellis v. State, 4 Ind. 1 (1852); Gilbert v. Bd. of Comm'rs, 8 Blackf. 81 (Ind. 1846).

160. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 120 (Ind. 1898).

161. *Id.*; *see also* State *ex rel.* Terre Haute v. Kolsem, 29 N.E. 595 (Ind. 1891); Brown v. Buzan, 24 Ind. 194 (1865).

162. *Harrison*, 51 N.E. at 120.

163. *See Book*, 149 N.E.2d at 280 (determining that the statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any reasonable basis; it is the duty of courts to uphold Acts of the Legislature if it is possible to do so within rules of law; and where there is a doubt as to the constitutionality of a statute, it must be upheld).

164. Gaskin v. Beier, 622 N.E.2d 524, 524 (Ind. Ct. App. 1993) (holding that such provision

Article III, section 1 of the Indiana Constitution states: "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."[165]

The separation of powers doctrine serves to rid each of the separate departments of state government from any control or influence by either of the other state government departments.[166] "If persons charged with official duties in one [state government] department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department."[167] "[I]t is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments."[168] Thus, even if a person is not a dual office holder, if that person is executing functions of public office in more than one state government department, that person violates the separation of powers doctrine.[169] The objective of the separation of powers doctrine is fundamental and basic, "namely, to preclude a commingling of these essentially different powers of government in the same hands . . . in the sense that the acts of each [department] shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments."[170]

For instance, in *Book v. State Office Building Commission*,[171] there was a taxpayer's action to enjoin members of the Commission from proceeding further with the construction of a State Office Building.[172] The membership of the Commission included the Governor, the Lieutenant Governor, the members of

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was not violated by an individual's simultaneous service as a town deputy marshal and a town council member, the constitutional article in question related only to the state government, and officers were charged with duties under one of the separate departments of the state and not to municipal governments and officers).

165. IND. CONST. art. III, § 1.

166. Schloer v. Moran, 482 N.E.2d 460, 463 (Ind. 1985); Black v. Burch, 80 N.E.2d 294, 300-03 (Ind. 1948); State *ex rel.* Phelps v. Sybinsky, 736 N.E.2d 809, 815 (Ind. Ct. App. 2000).

167. *Black*, 80 N.E.2d at 302.

168. *Id*.

169. *See* 83-5 Ind. Op. Att'y Gen. No. 24 (1983).

170. *Black*, 80 N.E.2d at 300 (quoting O'Donoghue v. United States, 289 U.S. 516, 530 (1933)) (emphasis omitted).

171. 149 N.E.2d 273 (Ind. 1958).

172. *Id*. The court described the duties of the State Office Building Commission as follows:

> [T]o acquire a site within the City of Indianapolis, Indiana, and to construct and erect thereon with all necessary equipment, a State Office Building suitable and adequate to house the offices of the various departments and agencies of the State Government . . . . [and] to enter into appropriate agreements with the various State departments and agencies for the use and occupancy of such building.

Id. at 279.

the State Budget Committee, one member of the Senate appointed by the Lieutenant Governor, and one member of the House appointed by the Speaker. Because all the members of the State Budget Committee except the Budget Director were also members of the General Assembly, legislators constituted a majority of the Commission. The legislation creating the Commission was challenged as violating various provisions of the Indiana Constitution, including the dual office holding provision[173] and the separation of power clause.[174] The Indiana Supreme Court rejected the claim of unconstitutional dual office holding because the provision applies to "lucrative" offices and the Commissioners received only reimbursement of expenses. But the court held that the presence of legislators on a commission with executive administrative duties violated separation of powers.[175]

"The three departments of government are separate and distinct, officers of one department may not properly perform functions which have been assigned by law to another department."[176]

> Article 3, [section] 1 is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another.[177]

It is interesting to note that when article III, section 1 of the Indiana Constitution was reported in its original form by the committee on miscellaneous provisions on January 21, 1851, the word "power" was contained therein instead of the word "functions."[178] Though the two words are almost interchangeable, the term "functions" indicates a broader field of activities than the word "power."[179]

The Indiana Supreme Court determined that it was obvious that "the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments."[180] The court explained, "this object can be obtained only if [article III, section 1] of the Indiana Constitution is read exactly as it is written."[181] In *Black*, the court determined that four legislators who received appointments to boards and commissions in the executive branch were not public officers but mere "employees" who, therefore,

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173. IND. CONST. art. II, § 9.

174. IND. CONST. art. III, § 1.

175. *Book*, 149 N.E.2d at 273.

176. Parker v. State, 35 N.E. 179, 180 (Ind. 1893); *see also* State *ex rel.* Hovey v. Noble, 21 N.E. 244, 246 (Ind. 1888).

177. *Book*, 149 N.E.2d at 296.

178. KETTLEBOROUGH, *supra* note 3, at 732.

179. 7 Ind. Op. Att'y Gen. 30 (1961) (citing State *ex rel.* Black v. Burch, 80 N.E.2d 294, 302 (Ind. 1948)).

180. *Black*, 80 N.E.2d at 302.

181. *Id.*

did not violate article II, section 9.[182] However, the court determined that the legislators could not be charged with official duties in the legislative branch while employed to perform duties in either the executive or judicial branch pursuant to article III, section 1. The court explained that "[i]f persons charged with official duties in one department may be employed to perform duties . . . in another department the door is opened to influence and control by the employing department."[183]

Likewise, the Attorney General followed the court's reasoning in *Black* when it was faced with the issue of an elected state senator who also served as an investigator in the prosecutor's office.[184] The Attorney General reasoned that an investigator is "an employee of an officer" and, therefore, is not prohibited by article II, section 9.[185] However, a member of the Indiana General Assembly belongs to the legislative department, and the position of an investigator falls under the judicial department. Therefore, the Attorney General determined that such a dual holding would be in violation of the Indiana Constitution article III, section 1 as construed in *State ex rel. Black v. Burch*.[186]

Article III, section 1 attaches "only 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."[187] Therefore, the separation of powers doctrine has no application at the local level.[188] Consistent with this theory, Indiana Code section 36-4-4-2 prohibits a person from simultaneously holding office in both the executive and legislative branch of a city government, but does not speak to office holding on the state level.[189] Therefore, neither article III, section 1 of the Indiana Constitution nor Indiana Code section 36-4-4-2 prohibits a person from holding an office in one department of state government and another office in a branch of municipal government. Article III relates "only 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."[190] "The office of city councilman is 'purely and wholly municipal' in character. A city councilman has no duties under the general laws of the state."[191] However, in

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182. *Id*. at 299.

183. *Id*. at 302.

184. 7 Ind. Op. Att'y Gen. 30 (1961).

185. *Id.*

186. 80 N.E.2d at 37; *see also* 18 Ind. Op. Att'y. Gen. 66 (1981) (stating that the Indiana General Assembly membership and Indiana state teachers' retirement fund board of trustees membership are under separate departments of state government and the simultaneous holding of the two positions would violate article III, section 1).

187. Gaskin v. Beier, 622 N.E.2d 524, 529 (Ind. Ct. App. 1993).

188. Willsey v. Newlon, 316 N.E.2d 390, 391 (Ind. App. 1974); *see also* Sarlls v. State *ex rel.* Trimble, 166 N.E. 270, 270 (Ind. 1929); Bradley v. City of New Castle, 730 N.E.2d 771, 780 (Ind. Ct. App. 2000).

189. IND. CODE § 36-4-4-2 (2003).

190. *Gaskin*, 622 N.E.2d at 529.

191. State v. Kirk, 44 Ind. 401 (1873).

Rush v. Carter, the court concluded 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."[192] The court reasoned that "[b]ecause a county is an involuntary political or civil division of the state government . . . Rush is bound by that constitutional provision in the same manner as state employees."[193] The court noted that article III, section 1 is strictly construed.[194] To strengthen its opinion, the court cited the Indiana Supreme Court in *State ex rel. Black v. Burch*, explaining that "[t]he object of the separation of powers is to preclude a commingling of three essentially different powers in the same hands in the sense that the acts of each shall never be controlled by or subjected directly or indirectly to the coercive influence of either of the others."[195] The court applied this reasoning by suggesting that Rush as a council member would have some degree of fiscal control over Rush the county policeman and the rest of the county police department, and this overlapping control was prohibited by the holding of *Black*.[196]

Nevertheless, it has long been held in case law by the Indiana Supreme Court that the separation of powers doctrine, article III, section 1, relates 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.[197] In *Gaskin*,[198] the court distinguished *Rush* by focusing on its reliance on *Applegate v. State ex rel Pettijohn*[199] in determining that Gaskin having been elected to the board of trustees while serving as deputy marshal was not a violation of article III, section 1. The court pointed out that *Applegate* was a "mandamus action brought by the state to compel the Hamilton County Auditor to issue payment to the County Deputy treasurer for payment for her services."[200] The *Applegate* court explained that the county officers authority is limited to that granted by the

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192. 468 N.E.2d 236, 238 (Ind. Ct. App. 1984).

193. *Id.*

194. *Id*. (citing Warren v. Ind. Tel. Co., 26 N.E.2d 399 (Ind. 1940)).

195. *Id*. (citing State *ex rel.* Black v. Burch, 80 N.E.2d 294, 300 (Ind. 1948)).

196. *Id.*

197. State v. Monfort, 723 N.E.2d 407, 414 (Ind. 2000) ("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."); *see also* Willsey v. Newlon, 316 N.E.2d 390 (Ind. 1974); Mogilner v. Metro. Plan Comm'n of Marion County, 140 N.E.2d 220 (Ind. 1957) (explaining that the metropolitan plan commission falls within the category of municipal governments, and therefore, article III, section 1 is not applicable); State *ex rel.* Buttz v. Marion Circuit Court, 72 N.E.2d 225, 230 (Ind. 1947); Sarlls v. State *ex rel.* Trimble, 166 N.E. 270 (Ind. 1929); Livengood v. City of Covington, 144 N.E. 416 (Ind. 1924); Baltimore & O.R. Co. v. Town of Whiting, 68 N.E. 266 (Ind. 1903); Gaskin v. Beier, 622 N.E.2d 524, 529 (Ind. Ct. App. 1993); *Rush*, 468 N.E.2d at 236.

198. 622 N.E.2d at 529 n.3.

199. 185 N.E. 911 (Ind. 1933).

200. *Gaskin*, 622 N.E.2d at 529 n.3 (citing *Applegate*, 185 N.E. at 912).

legislature because the "[c]ounties are but subdivisions of the state."[201] Therefore, because the auditor had not been authorized to pay the deputy treasurer out of public funds, the auditor could not be forced to pay the deputy treasurer out of public funds.[202] The court decided not to follow *Rush* because *Applegate* did not arise in the context of an article III, section 1 challenge and because of the line of authority that article III, section 1 applies only to state government offices.[203]

Likewise, the Attorney General has followed the Indiana Supreme Court's opinion that article III, section 1 does not apply to municipalities. The Attorney General determined that a local library district is basically a political subdivision of the state as municipalities are political subdivisions of the state.[204] The term is applied to cities and towns as distinguished from separate departments of state government. Therefore, the library board members do not come within the purview of article III, section 1.[205]

B. Safeguard to Legislative Encroachment on the Constitution

Article III, section 1 of the Indiana Constitution is the "'keystone of our form of government and to maintain the division of powers as provided therein, its provisions will be strictly construed.'"[206] "'The true interpretation of this [separation of powers] is, that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution.'"[207]

"Notwithstanding the general prohibition against interference by one branch in the functions allotted to another, some powers that arguably constitute that interference are expressly conferred by the Constitution. If so, the specific grant is . . . 'ordained in the Constitution.'"[208] Therefore, the courts concluded that the explicit language in article VII, section 1 provides that "the power to create and abolish courts is among the powers given to the legislative branch."[209] But the court explained that though within the limits of the constitution, for the legislature to abolish a court "in the middle of a judge's term violates the separation of powers provision of the Indiana Constitution."[210] The court concluded that there must be an "'absolute integrity and freedom of action of

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201. *Applegate*, 185 N.E. at 912.

202. *Id*.

203. *Id.*

204. 45 Ind. Op. Att'y Gen. 260-61 (1960).

205. *Id*; *see also* 1960 Ind. Op. Att'y Gen. No. 34.

206. State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000) (quoting Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 293 (Ind. 1958)).

207. *Id.* (quoting *In re* Judicial Interpretation of 1975 Senate Enrolled Act No. 441, 332 N.E.2d 97, 98 (Ind. 1975)) (alteration in original).

208. *Id*. (quoting *In re* Senate Act 441, 332 N.E.2d 97, 98 (Ind. 1975)).

209. *Id*.

210. *Id.*

courts.'"[211]

Courts must weigh in to ensure that one branch of government is not influencing or controlling another. Therefore, article III, section 1 is a safeguard for situations where an action taken might be constitutional, but, because of the effect on another branch of government, the action violates article III, section 1 and becomes unconstitutional. For instance, in *State ex rel. Black v. Burch*, the Indiana Supreme Court held that the employment of four members of the General Assembly as employees, not officers, was not a violation of article II, section 9, but was a violation of article III, section 1 because the word "functions" as used in the Constitution includes "duties, official or otherwise, in another department."[212]

In *Rush v. Carter*, the court suggested that article II, section 9 did not apply because Rush was considered an employee not an officer, but that article III, section 1 did. The court reasoned that the encroachment of the constitution "under the facts of this case is that Rush as a county council member (a member of the legislative branch) would have, in some degree, fiscal control over, Rush the county policeman (a member of the executive branch) as well as the rest of the county police department."[213] The court explained that the holding of *State ex rel. Black v. Burch* was directed to resolve this type of situation.[214]

The Indiana Supreme Court found that the holding of *Rush* could be distinguished from the facts in *In re Tina T.*[215] In *In re Tina T.*, it was claimed that the local coordinating committee ("LCC") statute violates the separation of powers doctrine because the director of the county welfare department, a member of the executive branch of government, is one of the voting members of the LCC.[216] The court reasoned that in *Rush*, as a member of the county council, Rush would have been able to exercise actual decision-making power as a member of a body.[217] The court continued by suggesting that *Rush* "could have influenced the other council members such that actions taken by that body accrued to his own personal benefit or to the benefit of his department of the executive branch of government and to the detriment of other departments."[218] However, the LCC in *In re Tina T.* has no decision-making power and "is authorized only to make a recommendation to the juvenile court, which the court is obligated only to consider."[219] Therefore, the court could not find "the kind of coercive influence which the *Rush* Court warned against."[220]

The representation form of government could be jeopardized by allowing the

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211. *Id*. (quoting Bd. of Comm'rs v. Albright, 81 N.E. 578, 582-83 (Ind. 1907)).
212. 80 N.E.2d 294, 302 (Ind. 1948).
213. Rush v. Carter, 468 N.E.2d 294, 238 (Ind. Ct. App. 1984).
214. *Id*.
215. 579 N.E.2d 48 (Ind. 1991).
216. *Id*. at 59.
217. *Id*. at 60.
218. *Id*.
219. *Id*.
220. *Id.*

application of article II, section 9 to be controlled by only the will of the people. The electorate might not be informed or have knowledge of the effect and harm of the legislature providing exceptions to the constitution. Therefore, the courts must use article III, section 1 to insure that any abuse or unchecked influence does not upset the separation of power within the government.

The fact that a proposed dual office holding does not violate the constitutional provisions construed above does not finally determine whether that dual office holding is permissible. It is necessary to consider additional tests, including public policy, incompatibility, or conflict of interests between the two offices.[221]

VI. CONFLICT OF INTEREST OR AGAINST PUBLIC POLICY

The fact that a proposed dual office holding does not violate constitutional provisions does not determine finally whether an office holding is permissible. It is necessary to consider additional tests, including public policy, incompatibility, or conflict of interests between the two offices.[222] A person cannot serve in more than one public service position if the positions are incompatible with each other in that they create a conflict of interest or go against public policy, or if local ordinances or regulations prohibit such multiple position holding. Generally, a public officer is prohibited from holding two incompatible offices at the same time.

Two rules are generally recognized concerning when incompatibility has become an issue independent of statutory or constitutional provisions. First, "incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time."[223] Second, offices are generally held to be incompatible where a conflict of interests exists, "as where one office is subordinate to the other [office], and subject in some degree, to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant."[224] "In such cases it has uniformly been held that the same person cannot hold both offices."[225] "When such incompatibility exists, the acceptance of the latter office vacates the first office."[226]

The Michigan Supreme Court explained:

> "It is extremely difficult to law [sic] down any clear and comprehensive rule as to what constitutes incompatibility of offices. . . . Sometimes it is said that incompatibility exists where the nature and duties of the two

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221. *See* 30 Ind. Op. Att'y Gen. 173 (1961); *see also* 45 Ind. Op. Att'y Gen. 255 (1960).

222. *See* 30 Ind. Op. Att'y Gen. 173 (1961).

223. State *ex rel.* Metcalf v. Goff, 9 A. 226 (R.I. 1887).

224. *Id*. at 227; *see* 11 Ind. Op. Att'y Gen. 58 (1967); 70 Ind. Op. Att'y Gen. 258 (1954); 77 Ind. Op. Att'y Gen. 234 (1951); *see also* Schloer v. Moran, 482 N.E.2d 460, 464 (Ind. 1985); Wells v. State *ex rel.* Peden, 94 N.E. 321, 323 (Ind. 1911).

225. *See Goff*, 9 A. at 227.

226. 70 Ind. Op. Att'y Gen. 258 (1954).

> offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. . . . It is not an essential element of incompatibility at common law that a clash of duty should exist in all, or in the greater part, of the official functions. . . .
>
> One of the most important tests as to whether offices are incompatible is found in the principal that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both."[227]

Considerations of public policy can render it improper for an incumbent to retain two offices if that person may not be able to impartially and efficiently perform the duties of both offices.[228] "Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment."[229] "Incompatibility of office or position involves a conflict of duties between two offices or positions."[230] "While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest."[231]

"An incompatibility exists whenever the statutory functions and duties of the offices conflict or require the officer to choose one obligation over another. If this is the governmental scheme, incompatibility must be found even though in practice a conflict of duty might never arise."[232]

For instance, in *Wells v. State ex rel. Peden*,[233] the court compared whether the duties of deputy county auditor and trustee of the school of a town are incompatible. The court cited "several particulars in which the duties are incompatible."[234] The court explained that the auditor and his deputy apportion the school revenue and approve the bonds of school trustees. The school trustee, on the other hand, makes certain tax levies, while the auditor makes assessments and computes the taxes. The auditor or his deputy apportions and disburses certain school funds and the trustees receive them. The court held that "[t]here is such a connection between the two offices with respect to the school funds that leads to such incompatibility with respect to their management, and the

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227. Weza v. Auditor Gen., 298 N.W. 368, 369 (Mich. 1941) (quoting 22 R.C.L. §§ 55, 56).

228. 63C AM. JUR. 2D PUBLIC OFFICERS AND EMPLOYEES § 58 (2003).

229. *Id*.

230. *Id*. § 60.

231. *Id.*

232. *Id.* § 58.

233. 94 N.E. 321, 323 (Ind. 1911).

234. *Id*.

supervision of one [office] over the other, that the acceptance of one is the vacation of the other."[235]

A conflict of interest can also be a crime. When a public servant violates the provisions of Indiana Code section 35-44-1-3, that person commits conflict of interest, which is a Class D felony.[236] Further, even if there is no injury or actual benefit from the conflict of interest, the law does not "permit public servants to place themselves in a situation where they may be tempted to do wrong."[237] To deter conflict of interest the courts hold all such conflicting employment void.[238]

Whether these final considerations are violated will differ with each fact situation. Also, there may or may not be any local ordinances or regulations that govern whether a particular public servant may serve in another public service position. The public servant's appointing authority determines whether such positions are incompatible with each other in that they either create a conflict of interest or violate public policy.[239] The appointing authority, being in full possession of the relevant facts and more knowledgeable regarding the specific duties of the office, is generally in a better position to make this determination.[240]

Public policy is determined from a consideration of the constitution, statutes, practice of the state's administrative officers, and the decisions of the Indiana Supreme Court.[241] Courts have recognized that the "[L]egislature is the arbiter of public policy" and as such, deference should be given to the statutes passed by the legislature.[242] These statutes serve as "clear statement[s] of public policy . . . which [courts] are constrained to follow."[243] Alternatively, deference should be granted to the appointing authority, the individual most likely to have the factual knowledge necessary to make an informed decision as to whether public policy as expressed in constitutional provisions and various statutory prohibitions would be violated if dual offices are held by one individual.[244]

Past Attorney General opinions decline to answer these final questions for the appointing authority absent blatant conflicts of interest or violations of public policy.[245] For example, the Attorney General issued an opinion responding to an inquiry as to whether a member of the Marion County Plan Commission could continue to serve and be compensated once elected to the Indiana House of

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235. *Id.*

236. IND. CODE § 35-44-1-3 (2003).

237. Cheney v. Unroe, 77 N.E. 1041, 1043 (Ind. 1906); *see also* 3 Op. Att'y Gen. *1 (1989).

238. *Cheney*, 77 N.E. at 1044; Pipe Creek Sch. Township v. Hawkins, 97 N.E. 936, 937 (Ind. App. 1912).

239. *See* Gaskin v. Beier, 622 N.E.2d 524, 530 (Ind. Ct. App. 1993).

240. 11 Ind. Op. Att'y Gen. 58 (1967); 33 Ind. Op. Att'y Gen. 228 (1966).

241. *See* Hogston v. Bell, 112 N.E. 883, 886 (Ind. 1916).

242. *Gaskin*, 622 N.E.2d at 530.

243. *Id*.

244. *See* 11 Ind. Op. Att'y Gen. 58 (1967); 56 Ind. Op. Att'y Gen. 304 (1964).

245. *See* 3 Ind. Op. Att'y Gen. *1 (1989); 1987-88 Ind. Op. Att'y Gen. No. 87-3; 11 Ind. Op. Att'y Gen. 58 (1967); 4 Ind. Op. Att'y Gen. 20 (1961); 9 Ind. Op. Att'y Gen. 42 (1960); Ind. Op. Att'y Gen. 412 (1936).

Representatives.[246] The Attorney General answered that this dual office holding would be a violation of article II, section 9. Furthermore, though a member elected to not be compensated to avoid violation of a "lucrative" office finding under article II, section 9, the two offices are still incompatible.[247] The Attorney General determined that the office of a member of a County Plan Commission is "clearly subordinate to the office of a member of the General Assembly in its importance and principal duties and is subject to supervision by the latter."[248]

In another opinion, the Attorney General responded to an inquiry as to whether a mayor could also serve in a salaried administrative position as the physical education and athletic co-coordinator.[249] The mayor of the second-class city appointed most of the school board members. The opinion concluded, "persons appointed by the mayor as mayor are under his control and would make decisions in relation to the mayor as a school employee concerning his duties, salary, performance, and discharge. A clearer case of incompatibility cannot readily be imagined."[250] Nevertheless, generally the appointing authority having all of the factual knowledge is in a better position to judge whether the public policy as expressed in the constitutional provisions discussed above, and the various statutory prohibitions against public officers having a private interest in the results of their official acts would be violated.[251]

VII. REMEDIES

A. Consequence of Accepting a Second Office

The only enforcement for a claim of dual office holding is a legal challenge in a local court. Indiana courts have held that if a state office holder accepts a second lucrative state office this automatically vacates the first office as a matter of law.[252] Thus, the first office becomes vacant and a successor will need to be appointed or elected, depending on the law applicable to the office.

> [T]he act of accepting . . . the second office, operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment into the second office, his subsequent resignation of the latter can in no manner serve to restore his right of title to the first office.[253]

Also, if a person unlawfully holds or exercises a public office in Indiana, or

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246. 70 Ind. Op. Att'y Gen. No. 258 (1954).

247. *Id.*

248. *Id*.

249. 22 Ind. Op. Att'y Gen. 140 (1967).

250. *Id*.

251. *See* 11 Ind. Op. Att'y Gen. 58 (1967).

252. Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); *see also* 30 Ind. Op. Att'y Gen. 142 (1947); Ind. Op. Att'y Gen. 270 (1938).

253. *See* Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1041 (Ind. 1898).

if a public officer does an act, such as accept another lucrative office, which works to forfeit the officer's office, then a court may determine another person's right to hold the office.[254] In such a case, the plaintiff must demonstrate personal interest in right or title to the office.[255] Indiana Code section 34-17-1-1 provides that information may be filed against a person unlawfully holding a public office. The information may be filed by a prosecuting attorney within his or her respective jurisdiction or by any other person who claims an interest in the office.[256] A "*[q]uo warranto* is the proper remedy for determination of the right of a party to hold office."[257]

As a result of such a court determination, a de facto office holder (the officer who was found to have wrongly held the office) may be ordered to leave office and a de jure office holder (the rightful office holder) will be named to hold office.[258] However, the de facto officer's acts performed before being ousted from office are valid because, as a public policy, the courts have determined that the public should not suffer from the acts of an officer who may have had a defective title or no title at all.[259]

In the event of a conflict of interest, Indiana Code section 35-44-1-3 provides that "a public servant who knowingly or intentionally has a pecuniary interest in, or derives a profit from a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony."[260] Indiana Code section 35-44-1-3 does not prohibit a public servant from having a pecuniary interest in or deriving a profit from a contract or purchase connected with the governmental entity he serves if (1) he is not a member of or on the staff of the governing unit empowered to contract or purchase on behalf of the government entity; (2) the functions and duties he performs for the governmental entity are unrelated to the contract or purchase and; (3) he fully discloses his interest or profit to the governmental entity he serves.[261]

Under Indiana Code section 35-44-1-3 a "disclosure" does not in itself "permit a public servant to have a percuniary interest in or derive a profit from a contract or purchase connected with a governmental entity."[262] In an opinion by the Attorney General, several factors were listed to take into consideration when determining whether a percuniary interest is permissible: "the position of the elected official, the nature of the governmental entity, the type of contract and the federal and state constitutions, statutes, rules and regulations as well as

254. IND. CODE § 34-17-1-1 (2003).
255. Brenner v. Powers, 584 N.E.2d 569, 576 (Ind. Ct. App. 1992).
256. *See* IND. CODE § 34-17-2-1 (2003).
257. State *ex rel.* Brown v. Circuit Court of Marion County, 430 N.E.2d 786, 787 (Ind. 1982).
258. State *ex rel.* Bishop v. Crowe, 50 N.E. 471, 473-74 (Ind. 1898).
259. *Id*. at 474; State v. Sutherlin, 75 N.E. 642, 646 (Ind. 1905).
260. IND. CODE § 35-44-1-3 (2003).
261. *Id.* § 35-44-1-3(c)(1).
262. 3 Ind. Op. Att'y Gen. *1 (1989).

common law and codes of ethics."[263]

"In Indiana the Attorney General is a statutory officer, exercising only the authority granted by statute, whereas the office of prosecuting attorney is a constitutional office, carved out of the office of the Attorney General as it existed at common law."[264] Therefore, prosecuting attorneys, within their respective jurisdictions, conduct all prosecutions for conflict of interest.[265]

In *State ex rel. Steers v. Holovachka,* the court found that though the Attorney General does not have the responsibility of conducting all prosecutions, it reversed the lower court's ruling dismissing the Attorney General's request for a special prosecutor.[266] The court found that contracts were "public contracts"[267] within statutes that prohibited any person holding lucrative office under state law from being interested in any contract for public works.[268] The court reasoned that public officers are "prohibited by law from receiving any percentage or profit or money whatever on, or being interested directly or indirectly in public contracts passed upon and entered into under their jurisdiction and authority."[269]

Furthermore, the law of Indiana states "where a statute makes it a crime for a public officer to do a certain act, any contract made in violation thereof is absolutely void, as against public policy."[270] In *Hawkins*, a township advisory board member held a lucrative office position and would violate the conflict of interest statute by having an interest, direct or indirect, in any contract where the township was concerned. A contract between a township advisory board member and the board contrary to the statute would be void.[271]

However, an Attorney General opinion explained that a county surveyor could, if he was a registered engineer or surveyor, accept contracts in his individual capacity and charge for his services, provided that there was no breach or conflict with official duty, or violation of public policy statute.[272] The Attorney General quoted *Noble v. Davison*,[273] where the court said:

> Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy. . . . This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, or against the public good, or which have a tendency to injure the public. Contracts belonging to this class are held

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263. 3 Ind. Op. Att'y Gen. * 1 (1989) (internal citation omitted).

264. State *ex rel.* Steers v. Holovachka, 142 N.E.2d 593, 602 (Ind. 1957) (citation omitted); *see also* IND. CODE § 33-14-1-4 (2003).

265. IND. CODE § 33-14-1-4 (2003).

266. 142 N.E.2d at 603.

267. IND. CODE § 10-3713 (1956), repealed; *see id.* § 35-44-1-3.

268. *Holovachka*, 142 N.E.2d at 599-600.

269. *Id.* at 601.

270. Pipe Creek Sch. Township v. Hawkins, 97 N.E. 936, 937 (Ind. 1912) (citation omitted).

271. *Id*.

272. 38 Ind. Op. Att'y Gen. 169 (1957).

273. 96 N.E. 325 (Ind. 1912).

> void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results.[274]

Using the rationale of *Noble*, the Attorney General concluded that a county surveyor was not required to turn over to the county fees that he earned as a private surveyor during his tenure as county surveyor.[275] The opinion reasoned that those contracts would not be voided where contracting to do legal surveys in counties other than the one where he was elected County Surveyor did not interfere with his official duties.[276] However, for the legal surveys within the surveyor's own county not to be void because of a conflict would depend on whether those surveys interfere with his official duties.[277] Furthermore, it also must be determined whether the surveys are of the same nature as official duties imposed on him by statute.[278]

Where a person held the office of township trustee and accepted appointment as United States Marshal, his office of township trustee was automatically vacated.[279] Further, in such situations where a position is automatically vacated, the official who has the authority to appoint the person to a second office must decide whether such dual office holding would create a conflict of interest or violate public policy.[280]

Finally, when an office holder runs for another office, he or she should take notice of the Hatch Act found in 5 U.S.C. §§ 1501-1508. The Act proscribes the following activity:

> A state or local officer or employee may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office; (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or (3) be a candidate for elective office.[281]

The Hatch Act restricts the political activity of people employed by state, county, or municipal executive agencies that are affiliated with programs financed in whole or in part by federal loans or grants. However, the Hatch Act does not restrict the political activity of people employed by research or educational institutions, agencies that receive financial support in whole or in part by states or their political subdivisions, or religious, philanthropic, or cultural

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274. 38 Ind. Op. Att'y Gen. 169 (1957) (quoting *Noble*, 96 N.E. at 325).
275. *Id*.
276. *Id*.
277. *Id.*
278. 38 Ind. Op. Att'y Gen. 169 (1957).
279. Ind. Op. Att'y Gen. 333 (1935).
280. 33 Ind. Op. Att'y Gen. 228 (1966).
281. 5 U.S.C. § 1502(a) (2003).

organizations.[282]

Further, 5 U.S.C. § 1502(a)(3) does not apply to (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor; (2) the mayor of a city; (3) a duly elected official of an executive department of a state or municipality who is not classified under a State or municipal merit or civil-service system; or (4) an individual holding elective office.

If an officer or employee violates the Hatch Act, the Merit Systems Protection Board may determine that the violation requires the officer or employee to be removed from his or her office or employment.[283] Within thirty days of notice of this decision, the officer or employee must be removed from office or employment.[284] If removal does not occur, the Board may order the withholding of federal loans or grants from the agency that received notice.[285] The withheld amount is equal to two years pay at the rate that the office or employee was receiving at the time of the violation.[286] Further, the officer or employee may not be appointed within eighteen months of his or her removal from an office or employment within the same State to a State or local agency which does not receive loans or grants from a federal agency.[287] If such an appointment does not occur, the Board may order the withholding be made from that State or local agency.[288]

B. The Correct Procedure to Determine the Right to an Office

"[T]he information is the proper remedy to try the title and determine the right to an office, and to oust an intruder for ineligibility, abandonment, or forfeiture."[289] Any person who claims an interest in an office could file an information on his own relation to obtain possession of the office.[290] The prosecuting attorney in the respective county may also file an information when it is determined either to be part of his duty or when directed.[291] A person without any interest in a public office except with the same interest as the general public, and who had no special interest, could not file an information to try the title to an officer or to oust officers.[292]

When filing an information, the content of such filing must include "a plain

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282. *See id.* §§ 1501-1508.

283. *Id.* § 1505.

284. *Id.* § 1506(a)(1).

285. *Id.* § 1506(a)(2).

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Wells v. State *ex rel.* Peden, 94 N.E. 321, 322 (Ind. 1911) (citations omitted).

290. *Id.*; *see also* IND. CODE § 34-17-2-1 (2003).

291. IND. CODE § 34-17-2-1 (2003).

292. State *ex rel.* Brown v. Circuit Court of Marion County, 430 N.E.2d 786, 787 (Ind. 1982); *see also* State *ex rel.* Antrim v. Reardon, 68 N.E. 169 (Ind. 1903).

statement of the facts that constitute the grounds of the proceeding, addressed to the court."[293] In *State ex rel. Bishop v. Crowe*, an allegation in a complaint of a *quo warranto* proceeding to remove the defendant from office alleged that a relator was eligible for office.[294] The court held that the complaint was sufficient without setting out the plaintiff's qualifications and without pleading any of the evidentiary facts constituting eligibility.[295] The information only had to show that the office held by the defendant was the same office claimed by the relator.[296] However, Indiana Code section 34-17-2-6 states that a prosecuting attorney "shall also set forth the name of the person rightfully entitled to the office, if any, with an averment: (1) of the person's right to the office; or (2) that no person is entitled to the office and that a vacancy in the office will result."[297] A prosecuting attorney that files an information to try the title of an office need only have included the name of the person entitled to the office with a statement of the facts. Whereas, if a person claiming the office filed the information, the facts had to be stated showing his title to the office and his eligibility to hold the office.[298]

A person who claims to be the person entitled to hold the office that wins a judgment can begin exercising the functions of the office.[299] The court has the authority to order the defendant to hand over all funds and records that belong to the office to the person who wins the judgment.[300] For instance, in *Cadwell v. Teaney*, the court ordered the ouster of city officials who refused to leave office despite the election of new individuals.[301] The court also ordered that all the books and papers of the officials being ousted be given to the new electees.[302] The court has this discretion through Indiana Code section 34-17-3-2.

CONCLUSION

Year after year the Attorney General's office receives numerous questions regarding dual office holding. The concerns over fear of corruption in government as well as a fear of too much power and control falling into the hands of too few led the Framers to include article II, section 9 and article III, section 1 into the 1851 Constitution.

Over time, the Attorney General's office has developed a four-step analysis

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293. IND. CODE § 34-17-2-5 (2003).

294. State *ex rel.* Bishop v. Crowe, 50 N.E. 471 (Ind. 1898).

295. *Id*.

296. State *ex rel.* Strass v. Tancey, 69 N.E. 155 (Ind. 1903).

297. IND. CODE § 34-17-2-6 (2003).

298. *Id.* § 34-17-2-6; *see also* Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); State *ex rel.* Hatfield v. Ireland, 29 N.E. 396 (Ind. 1891); State *ex rel.* Ault v. Long, 91 Ind. 351 (1883).

299. IND. CODE § 34-17-3-2 (2003).

300. *Id*.

301. 157 N.E. 51 (Ind. 1927), *cert. denied*, 277 U.S. 605 (1928).

302. *Id*.

to determine if holding more than one office is permitted. The analysis begins by ascertaining whether article II, section 9 directly prohibits the holding of a second office. Only if both positions are considered lucrative and offices will there be a violation of article II, section 9. In some cases where both positions are considered lucrative offices, one of the positions may be found to have been specifically exempted by statute from the lucrative office restriction.

The General Assembly can carve out exceptions by going through the amendment process to expand or limit the effect of article II, section 9. However, if the General Assembly chooses to pass a statute rather than to attempt to amend the constitution, the courts must use construction to determine whether the statute encroaches on the constitution. A constitutional interpretation that adheres to a literal interpretation would presumably rule that an exemption would conflict with article II, section 9 because that section expressly prohibits more than one lucrative office. Furthermore, debates between the framers suggest the intended purpose of article II, section 9 should only allow for exceptions to be created through the amendment process. However, courts have at times given great deference to the broad power of the legislature and often assume the best restraint of the legislature is the will of the people.

If the Attorney General does not find a violation under article II, section 9, the analysis moves to the second step--article III, section 1. The separation of powers doctrine serves as a check on each of the separate departments of state government from any control or influence by either of the other state government departments. Article III, section 1 relates 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 fact that certain dual office holding does not violate constitutional provisions does not determine finally whether it is permissible. It is necessary to consider the third step in the Attorney General's analysis, whether the two positions are incompatible. This analysis includes additional tests such as public policy and conflict of interests. Finally, the last step, which requires review, is whether local ordinances or regulations prohibit such multiple position holding.

Generally, a public officer is prohibited from holding two incompatible offices at the same time. The only enforcement for a claim of dual office holding is a legal challenge in a local court. Indiana courts have held that if a state office holder accepts a second lucrative state office this automatically vacates the first office.