

bers of the General Assembly. . . . Voting by ballot involves secrecy, while *viva voce* voting insures publicity. . . . There was nothing sacred in the contrivance of a strip of paper with names or questions printed thereon, which the framers sought, to preserve by the use of the word 'ballot'; nor was there any imperative necessity for the use of the voice of the legislator which moved the convention to decree its perpetual exercise in legislative elections. The constitutional limitation is not violated by dispensing with the use of the paper contrivance in the one case, or the legislator's natural voice in the other, if in the former the people may choose in secret, and in the latter the legislator must make a public expression of his choice." *Spickerman v. Goddard*, 182 Ind. 523, 526, 527, 107 N.E. 2, 3 (1914).

It is my opinion, therefore, that since the use of voting machines is constitutional, the Legislature may provide the manner and method of listing the names of candidates on the ballot labels thereon. Any desired changes in the statutory procedure must be made by the General Assembly.

OFFICIAL OPINION NO. 37

December 15, 1966

**DEPARTMENT OF ADMINISTRATION—LEGISLATIVE
ADVISORY COMMISSION—Department's Duty to
Let Printing Contracts for Commission.**

Opinion Requested by Mrs. Mary L. Lauck, Secretary, Legislative Advisory Commission.

You have informed me that although the Legislative Advisory Commission has complied in the past with the state

OPINION 37

printing regulations, a question has been raised concerning the applicability of said regulations to the printing of the Commission. Since the law and regulations concerning state printing are administered by the Department of Administration, the question of whether that state agency has any duties to perform concerning the printing of the Legislative Advisory Commission is implicit in your question.

The Legislative Advisory Commission was created by Acts 1945, ch. 88 as found in Burns §§ 60-1701—1716:

“There is hereby created a *joint committee of the General Assembly* to act in an advisory capacity to the bureau. Said committee shall be known as the Indiana Legislative Advisory Commission. It shall be composed of the president of the Senate, the speaker of the House of Representatives, seven members of the Senate to be named by the president of the Senate, not more than four of whom shall be members of the same political party, and seven members of the House of Representatives to be named by the speaker, and not more than four of whom shall be members of the same political party. The president of the Senate shall be the chairman of said commission, and the director of the Indiana legislative bureau shall act as the secretary of the commission. Before the final adjournment of each succeeding General Assembly, the president of the Senate and the speaker of the House of Representatives shall name the members of said commission and shall cause such appointments to be entered of record in the journals. The members so appointed shall serve until the convening of the succeeding General Assembly. In the case of a vacancy in the appointive membership of said commission, the vacancy shall be filled by the officer making the original appointment.” Acts 1945, ch. 88, § 2, as last amended by Acts 1959, ch. 78, § 1, Burns § 60-1702. (Emphasis added.)

The Commission is therefore composed of elected state officials in the legislative branch of government. The duties of the Legislative Advisory Commission include the following:

“It shall be the duty of the commission to collect information concerning the government and general welfare of the state, *examine the effects of previously enacted statutes and recommended amendments thereto*, to instruct the director of the bureau as to what research and investigation shall be made by the bureau. Said commission shall advise the director as to the employment of such assistants and research agencies as it may deem desirable in the preparation of a program of legislative research and investigation, or in regard to any matters of state-wide public importance within the jurisdiction of the legislative branch. *Said commission shall also make or cause to be made for the use of the legislative branch of the state government, studies seeking to improve legislative procedure, to improve administrative organizations of the state, to eliminate waste and overlapping functions, and to institute economies.* Said commission shall have the power to call upon any department or agency of the State Government for such information as it deems pertinent to the studies in which it is engaged. *Said commission shall also have the power to designate members of the General Assembly to such sub-committees as it shall create, for the purpose of making investigations and studies, and said committee may call and examine witnesses.*” (Emphasis added.) Acts 1945, ch. 88, § 6, Burns § 60-1706.

The bureau referred to in that section is the legislative bureau created by § 1 of the same statute, Burns § 60-1701, as “an independent agency of the state government for the use of the members of the general assembly, the governor, the various departments, institutions and agencies of the state, as well as for a limited service for such citizens of this state as desire to avail themselves of its facilities.”

The Commission is required to report its findings and recommendations to the General Assembly, and may submit “such drafts of legislation as it deems necessary for the information of and consideration by the general assembly,” Act, § 7, Burns § 60-1707.

OPINION 37

At the present time, there are many study committees or commissions created by concurrent resolution or act of the General Assembly to operate under the jurisdiction of the Legislative Advisory Commission, *e.g.*, committee to study office of public defender, Acts 1965, ch. 457; see also chapters 458 and 459 of the 1965 Acts. The 1965 Appropriations Act, ch. 191 of the 1965 Acts, appropriated a definite sum to the Legislative Advisory Commission with the provision that, should the sum appropriated be insufficient to carry out the operation of the commission, "then the above amounts are hereby augmented to the amounts necessary." The Commission is also authorized to pay per diem allowances from its appropriation to qualified persons serving on a committee for research, study or survey for which no specific appropriation is provided. Thus it appears that the Legislative Advisory Commission is an interim committee of the General Assembly, appointed at the end of the regular term of one assembly to function until the succeeding General Assembly is convened. Its purposes are those which are set out in the statute previously quoted.

That legislatures have inherent and implied power to create committees authorized to sit during the interim between sessions for the purpose of making investigations legitimately within the scope of the functions, powers and duties of the legislature, and to secure information necessary to the proper discharge thereof has been decided in other states, *e.g.*, *State v. Fluent*, 30 Wash. 2d 194, 191 P. 2d 241 (1948); *Petition of Special Assembly Interim Committee*, 13 Cal. 2d 497, 90 P. 2d 304 (1939); *Terrell v. King*, 118 Tex. 237, 14 S.W. 2d 786 (1929); see also *Shaw v. Grumbine*, 137 Okla. 95, 278 Pac. 311 (1929).

Membership on such a committee is not the holding of a separate office by a legislator, *Russell v. Cone*, 224 Ark. 266, 272 S.W. 2d 678 (1925); *Parker v. Riley*, 18 Cal. 2d 83, 113 P. 2d 873 (1941).

It has been established that the Indiana General Assembly may by statute authorize a committee of the General Assembly to sit after the adjournment of the Legislature which created the committee, *Branham v. Lange*, 16 Ind. 497 (1861), over-

ruled on another point by *State ex rel. Black v. Burch*, 226 Ind. 445, 80 N.E. 2d 294 (1948).

There are no Indiana cases which establish the nature and powers of a legislative committee. However, legislators may engage in activities which are "properly incidental and germane to . . . legislative powers." *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 165, 149 N.E. 2d 273 (1958). In other jurisdictions it has been held that the scope of the powers given to a legislative committee or commission must be determined primarily by reference to the act or resolution creating it, and generally powers are as broad as the subject to which the statute is directed. See 49 AM.JUR. *States* § 42 (1943); *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130, 146 (1915). Therefore, the powers of the Commission must be determined from the act creating it. As previously quoted, § 6 of Acts 1945, ch. 88, Burns § 60-1706, sets out the duties of the Commission. It is clear from that provision, and from the succeeding section requiring reports and permitting submission of drafts of legislation to the General Assembly, that the commission was created to perform investigations and research and to draft proposed legislation, all of which are, in my opinion, properly incidental and germane to the performance of legislative duties. In order for the Commission to submit its findings and drafts of legislation to the General Assembly, it must prepare the material in proper form. Therefore, the power to cause such reports and drafts to be typed or printed must be implied from the express powers granted to the Commission.

The next question which is raised is whether the letting of a printing contract for the Legislative Advisory Commission is an act which is incidental to the proper exercise of the investigatory and research powers inherent and implied in the General Assembly, or whether it is the execution of a law which is the sole function of the executive department. If, of course, the letting of such contract is solely an executive function, the executive-administrative branch has the duty to perform such service for the Legislature, as well as for agencies and officers in the executive branch.

OPINION 37

State ex rel. Black v. Burch, supra, and *Book v. State Office Bldg. Comm'n, supra*, both held that the separation of powers provision of the Indiana Constitution, Art. 3, § 1, prohibits legislators from executing laws or appointing agents charged with the duty of enforcing or executing laws, as those duties are the sole function of the executive branch of the government. However, the primary purpose of the separation of powers provision of a constitution is to prevent the consolidation of all the powers of government into the hands of a single person or class of persons. *State ex rel. Yancey v. Hyde*, 121 Ind. 20, 32, 22 N.E. 644, 648 (1889). The California court has stated that such a provision does not require

“ . . . the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another.” *Parker v. Riley*, 18 Cal. 2d 83, 113 P. 2d 873, 877 (1941).

Of the appointing power, for example, the Indiana Supreme Court has said :

“ Generally, then, the appointment to an office is an executive function. It must be conceded, however, that it is not every appointment to office which involves the exercise of executive functions, as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the General Assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. Such appointments by the several departments of the State government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch.” *State ex rel. Yancey v. Hyde, supra*, 121 Ind. at 33, 22 N.E. at 648.

The analogy may be drawn that it is not every execution of a law which involves the exercise of executive functions, particularly when the execution of the law is necessary to enable the General Assembly to properly discharge its duties

as an independent legislative body, pursuant to Art. 4, § 16 of the Constitution. Therefore, it is my opinion that the letting of a printing contract for the Legislative Advisory Commission is an act which is incidental to the proper exercise of the investigatory and research powers inherent and implied in the General Assembly.

Since the letting of such a contract is an incidental or inherent power of the legislative branch of the government, it may select its own agents to perform that function. The next question is whether the Legislature may, if it desires, employ an officer or agency of the executive-administrative branch to perform that service for it, without violating the separation of powers provision of the Indiana Constitution, Art. 3, § 1. For an affirmative answer, see *Terrell v. King*, 118 Tex. 237, 14 S.W. 2d 786 (1929).

In *State ex rel. Black v. Burch, supra*, the Supreme Court held that legislators, who are officers in one department of the government, cannot become employees who exercise functions of another department of government. The Court said:

“. . . it 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. . . . If persons charged with official duties in one 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.” 226 Ind. at 463, 80 N.E. 2d at 2.

In the case at hand, this would apparently mean that legislators cannot be hired to work for the Department of Administration in any capacity, and that the commissioner of the department cannot be employed by the General Assembly in any capacity. Does this mean, however, that the General Assembly may not require an officer or agency in the executive-administrative department to perform for the General Assembly services which are generally considered to be an

OPINION 37

executive-administrative function? In my opinion, it does not. The Constitution itself requires the Governor to designate a meeting place for the General Assembly in case of danger from disease or a common enemy, Art. 5, § 20, and to give information and recommend measures to that body, Art. 5, § 11. The Secretary of State superintends the printing of the acts of the General Assembly, 1 R.S. 1852, ch. 96, § 5, as amended by Acts 1905, ch. 4, § 1, Burns § 49-1605. The legislative bureau is to "assist the secretary of state" in preparing enrolled acts for printing and publication, Acts 1945, ch. 88, § 16, Burns § 60-1716. Although the legislative bureau is presently directed to superintend the printing of the house and senate journals, Acts 1945, ch. 88, § 15, Burns § 60-1715, pursuant to the Constitution's direction that each house of the General Assembly publish its journal, Art. 4, § 12, an earlier statute, Acts 1897, ch. 69, § 1, as last amended by Acts 1957, ch. 335, § 1, Burns § 49-1607, required the Secretary of State to print said journals. Thus, it is apparent that administrative functions which could perhaps be performed by the General Assembly for itself have been performed for it by executive or administrative officers, pursuant to the direction of the Constitution or the General Assembly itself. It seems to me to be unreasonable to interpret the Constitution and the cases to forbid the General Assembly to obtain such aid. The Legislature does, of course, at all times retain its inherent power to perform for itself any acts necessary for it to maintain itself as a separate and independent branch of government pursuant to Art. 4, § 16 of the Constitution of the State of Indiana. If its designated agent in the executive-administrative branch of government failed or refused to perform, or performed so poorly as to endanger such status of the legislative branch, the latter could perform the necessary acts itself.

Therefore, in my opinion, the Legislature may require an agency or officer of the executive-administrative department to let the printing contracts of the Legislative Advisory Commission. It must next be determined whether the Legislature has, in the statutes concerning public printing, appointed an officer or agency in the executive-administrative branch as its agent to let printing contracts for the Commission.

In Acts 1941, ch. 124, § 1, as amended by Acts 1955, ch. 112, § 1, Burns § 63-1638, the Legislature created a "board of public printing." Section 4 of that 1941 Act, Burns § 63-1641, granted the board of public printing the power and made it the board's duty to act as purchasing agent for all state offices, departments, *commissions*, boards, *bureaus*, the state educational institutions and all other state institutions in the purchase of all printing, lithographing, binding, printing materials, and office supplies authorized by law to be paid out of state funds. The board was also empowered to enter into contracts with respect thereto. Section 6, as found in Burns § 63-1643, relates to legislative printing and reads as follows:

"All the legislative printing, lithographing, binding, stationery, printing materials, and office supplies shall be furnished under the supervision of said board and shall be paid for out of the legislative appropriation."

The Financial Reorganization Act of 1947, as amended, Acts 1947, ch. 279, Burns §§ 60-1801—1834, abolished the board of public printing and transferred to the director of the division of public works and supply created by that act, all rights, powers and duties of the board then imposed by law, with the exception of any rights, powers or duties which conflict with the terms of the 1947 Act. See Act, § 25, Burns § 60-1825.

"(b) The provisions of this Act shall apply to all *agencies* of the State. As used in this Act the term '*agencies* of the State,' 'agency,' or 'agencies' shall mean and include every *officer*, board, *commission*, department, division, *bureau*, committee, employee and other instrumentality of the state including without limiting the effect of the foregoing, state hospitals, state penal institutions and other state institution enterprises and activities wherever located; but excepting, unless specifically included, military officers and military and armory boards of the state and the State Fair Board, *state supreme and appellate courts* and state colleges and universities supported in whole or in part by state funds and persons and institutions under their control and excepting all counties, cities,

OPINION 37

towns, townships, school towns, townships and cities and other municipal corporations or political subdivisions of the state." Act, § 1, Burns § 60-1801. (Emphasis added.)

The specific exception of the judicial branch would indicate that the exception of the legislative branch was not intended.

The director of public works and supply was further granted the following powers and duties as to purchases and supply of printing:

"(7) To enter into contracts and issue orders for printing as provided by Chapter 124, Acts 1941, as amended. . . ." Act, § 5, as last amended by Acts 1961, ch. 83, § 1, Burns § 60-1805.

Thus, under the Financial Reorganization Act of 1947 the director of the division of public works and supply is given the same authority with respect to legislative printing contracts that the board of public printing had under the 1941 Act.

The Administration Act of 1961, Acts 1961, ch. 269, as amended, Burns §§ 60-101—114, created a department of state government to be known as the Indiana Department of Administration. Section 9, Burns § 60-109, of that act abolished the division of public works and supply and transferred its legal duties and powers to the Department of Administration. According to this section of the act, the Department of Administration now possesses the authority to enter into contracts and issue orders for printing which was formerly vested in the abolished division of public works.

Section 2 of the Administration Act of 1961, Burns § 60-102, reads in part as follows:

"The commissioner shall be well versed in administrative management and in the affairs of state government *which by law are the responsibility of the governor, and shall in no manner affect the separate departments of state government which by law or the Constitution of the state of Indiana are now under the*

1966 O. A. G.

jurisdiction and are the responsibility of other state elected officials. . . ." (Emphasis added.)

This indicates a general intention of the Legislature to exclude from the duties of the commissioner any duties "affecting" the other branches of government, namely the legislative and the judicial branches, and, in addition, those elected state officials who were held by *Tucker v. State*, 218 Ind. 614, 35 N.E. 2d 270 (1941), to have the power to appoint their own deputies and to hire employees to help them carry out the duties incidental to the carrying out of the administrative functions granted them by the Constitution. In 1961, this section was so interpreted by the Attorney General, 1961 O.A.G. 110, 123, 124, No. 24. That opinion was written at the request of Governor Matthew E. Welsh to advise him how several apparently conflicting acts passed by the 1961 General Assembly could be harmoniously administered.

However, § 8 of the Administration Act of 1961, Burns § 60-108, specifically refers to printing and reads in part as follows:

"The commissioner shall determine the number and distribution of *all* state reports and publications; and fix the style, form, binding, topography, quality of paper, and size of state reports and publications: Provided, That said commissioner shall curtail and eliminate wherever possible all departmental reports, bulletins and publications. *All powers and duties respecting the printing and distribution of state documents, supplies, and forms heretofore vested by law in the division of public works and supply, or any other officer or agency of this state, except elected state officials and the colleges and universities, are hereby vested in the commissioner.*" (Emphasis added.)

A possible interpretation of the *emphasized* provision is that it is not a limitation upon the power of the Department of Administration, but is a transfer of all power heretofore vested by law in the division of public works and supply concerning printing, plus any such power heretofore vested by

OPINION 37

law in any other state officer or agency of the state, except that power heretofore vested by law in elected state officials and the colleges and universities. Only if the power had been theretofore vested by law in elected state officials, would the power not have been transferred to the department upon the effective date of the 1961 Act. As previously stated, under the Financial Reorganization Act of 1947 and the 1941 Act creating the board of public printing, the duty of supervising legislative printing was specifically given to an administrative agency. No specific duties concerning printing had been delegated by statute to the Legislative Advisory Commission, although the legislative bureau is authorized to superintend the printing of the house and senate journals, as previously indicated. Since the duty to supervise printing for the Legislature was imposed upon the division of public works and supply at the time the Administration Act of 1961 became effective, the latter act may be interpreted to transfer that duty to the Department of Administration.

Another possible and conflicting interpretation of this section is that it reiterates the direction to the Department of Administration to confine its activities to the executive-administrative branch of the state government which is subject to the direction of the Governor.

The various sections of the Administrative Act of 1961 thus can be interpreted either to require the Department to supervise the printing of the Commission, or to forbid the Department to take any action at all concerning any activity of the Commission. The proper body to resolve any ambiguity in a statute, particularly a statute which concerns the functioning of the General Assembly, is the General Assembly itself, although the Indiana Supreme Court would make the final decision concerning the Legislature's intention in passing this statute were the question presented to it. Nevertheless, it is my duty to advise you of my opinion on the legal issues involved so that you can proceed with the duties imposed by law upon you.

Since the statute is ambiguous, consideration of the title of the act and the act as a whole, and consideration of your past practice will prove helpful in determining the intention of the

1966 O. A. G.

1961 General Assembly. The title of the 1961 Act reads in part as follows:

“AN ACT to improve the financial, personnel and managerial activities of the State of Indiana by creating a Department of Administration. . . .”

Section 5, Burns § 60-105, requires that the act be construed liberally to effectuate the policies and purposes set out in the title. The act as a whole, and particularly § 4 thereof, Burns § 60-104, evinces the clear intention of the Legislature to safeguard the public interest in connection with state purchases, and to promote economy and efficiency. The Legislature does, of course, intend that those purposes be fulfilled in all purchases for the Legislature as well as for the executive-administrative branch of government.

You stated that you have, in the past, complied with the state printing regulations of the Department of Administration. This indicates that the Legislative Advisory Commission has interpreted the Administration Act of 1961 as requiring the Department of Administration to perform this service for the Commission pursuant to the Administration Act of 1961.

After consideration of the purposes for which the Administration Act of 1961 was passed, the nature of the Legislative Advisory Commission and its statutory powers and duties, the past interpretation of the statute by the agencies involved, and considering that the various sections of the Administration Act of 1961 can be interpreted to harmonize with the legislative purposes, it is my opinion that you may continue to require the Department of Administration to supervise your printing and let contracts, in accordance with the statutes and rules and regulations governing the department, so long as the department's performance of such duties does not imperil the General Assembly's functioning as an independent branch of the government.