“judicial circuits.” All Indiana counties are in a judicial circuit. See various Indiana Acts as amended and compiled as Burns IND. STAT. ANN., § 4-332.

Therefore, had the Legislature intended to limit the salary increase to prosecutors in the designated circuits which adjoin only Indiana counties of more than one hundred sixty thousand population, it would have used the words “judicial circuits” instead of the word “counties,” and the out-of-state counties would thereby have been excluded.

In my opinion, prosecuting attorneys in judicial circuits in the State of Indiana of less than seventy-five thousand inhabitants which adjoin one or more counties of another state which have more than one hundred sixty thousand inhabitants, according to the last preceding United States Census, are entitled to the seven hundred and fifty dollars ($750.00) salary increase provided by § 14 of 1965 Ind. Acts, ch. 270, which adds § 18a to Ind. Acts of 1959, ch. 277, Burns IND. STAT. ANN., § 49-2618a.

OFFICIAL OPINION NO. 36

August 31, 1965

Hon. John P. Daley
Prosecutor
703 Michigan Avenue
LaPorte, Indiana

Dear Mr. Daley:

At the recent summer meeting of the Indiana Prosecutors’ Association, serious questions concerning the operations of a prosecuting attorney’s office in the State of Indiana were posed by members of the Association.

These problems involve the prosecuting attorney’s appointment of personnel, travel and office expenses, other operating expenses and equipment, and rent or office space for the prosecuting attorney’s office. The statutes involved are Ind. Acts of 1959, ch. 277, § 2, as amended by Ind. Acts of 1965, ch. 270, § 1, Burns IND. STAT. ANN., § 49-2602 (1965 Supp.), and Ind. Acts of 1959, ch. 277, § 19, as amended by
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Ind. Acts of 1965, ch. 270, § 15, which may be found in Burns IND. STAT. ANN., § 49-2619 (1965 Supp.). The last paragraph of the first statute referred to above reads as follows:

"There shall also be appropriated annually by the various county councils for other deputy prosecuting attorneys, for investigators, clerical assistance, witness fees, out of state travel, postage, telephone tolls and telegraph, repairs to equipment, office supplies, other operating expenses, and equipment, an amount as may be necessary for the proper discharge of the duties imposed by law upon the office of the prosecuting attorney of each judicial circuit."

This portion of the statute, prior to its amendment, read as follows:

". . . There shall be appropriated annually by the various county councils for deputy prosecuting attorneys, investigators, clerical assistance, out of state travel and extradition expenses an amount not less than said judicial circuit was allowed for same for the calendar year of 1958. . . ."

The required appropriation of an amount of money specifically ascertainable by reference to a particular time has been replaced by a provision that the county council must appropriate such an amount "as may be necessary for the proper discharge of the duties imposed by law upon the office of the prosecuting attorney."

Prosecuting attorneys are constitutional judicial officers under Article 7, section 11, of the Constitution of the State of Indiana, State ex rel. Williams v. Ellis, 184 Ind. 307, 112 N.E. 98 (1916). They are neither State nor county officers, State v. Patterson, 181 Ind. 660, 105 N.E. 228 (1914).

The usual rule under the County Reform Act, Ind. Acts of 1899, ch. 154, as amended, Burns IND. STAT. ANN., §§ 26-501—26-550, is that the expenditure of county funds is within the discretion of the county council, see Act, § 15, Burns § 26-515. In State ex rel. Wyman v. Hall, 191 Ind. 271, 278, 131 N.E. 821 (1921), it was stated:
"... the courts will not control by mandamus a discretion vested in an officer or board as to the kind of action to be taken even where the making of a decision and entry of an order of some kind is commanded." (Emphasis added.)

"... when the law imposes on any officer the duty to do a ministerial act under a given state of facts, mandamus will lie to compel the doing of that act upon allegation and proof that the required state of facts exists, and that upon proper and timely demand he has refused to do it." Id., 191 Ind. at 277. (Emphasis added.)

This latter rule applies where the county council is given no discretion to fix a salary or an amount. *State ex rel. Glenn v. Smith*, 227 Ind. 599, 87 N.E.2d 813 (1949); *Blue v. State ex rel. Powell*, 210 Ind. 486, 1 N.E.2d 122 (1936).

A board or council will not be allowed arbitrarily to defeat performance by an officer of a duty enjoined upon the officer by law. *Gruber v. State ex rel. Welliver*, 196 Ind. 436, 148 N.E. 481 (1925). If the board or council refuses to act, it will be mandated to meet to make such orders as may be required. *McDonald v. State ex rel. Gibbs*, 202 Ind. 409, 175 N.E. 276 (1931); *Sell v. State ex rel. Roth*, 188 Ind. 671, 125 N.E. 402 (1919).

When a township trustee is required to "provide suitable quarters" for a justice of the peace, and to furnish that justice of the peace the "necessary equipment to carry out the work of such justice of the peace," and rental is to be paid "in any amount not to exceed" a stated amount, the legal duty to provide "suitable quarters" and presumably the "necessary equipment" can be enforced by mandamus. The court stated in *State ex rel. Glenn v. Smith*, 227 Ind. 599, 605, 87 N.E.2d 813 (1949):

"There is nothing in the statutes defining the rights, powers and duties of the township trustees and the advisory boards which indicates that any of the said officers were vested with a statutory discretion to defeat the plain provisions of §§ 5-1705-6-7, Burns' 1946 Replacement, by refusing to make appropriations.
for and to pay salary, clerk hire and rent for the court rooms. 'The General Assembly may decide that certain activities of the business of government are so important that the supplying of funds to carry on these activities must not be left to the discretion of local authorities.' *State ex rel. Test v. Steinwedel* (1932), 203 Ind. 457, 473, 180 N.E. 865.”

However, the court concluded that “the reasonable discretion as to the location and amount of rent are not subject to control by the courts,” id., 227 Ind. at 607. (Emphasis added.)

Subsequent to the decision in the *State ex rel. Glenn* case, which had indicated that an abuse of discretion as to an amount of rent appropriated would be subject to the control of the courts, the Supreme Court decided *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940). That case actually held that neither the Legislature nor the county council, acting under the County Reform Act, could prevent or prohibit a court of general jurisdiction from appointing a pauper attorney in a criminal case and ordering his salary paid by the county. In so doing, it was necessary that the court overrule earlier cases. The court distinguished, to a certain extent, an earlier case, *Board of Commissioners v. McGregor*, 171 Ind. 634, 637, 87 N.E. 1 (1909), which held that a lawyer appointed by a judge to assist in the prosecution of a criminal case could not recover from the county for his services when no appropriation had been made by the county council. However, the court, in discussing the argument that the County Reform Act does not invade the inherent powers of courts, but provides reasonable limitations by submitting to a representative body of taxpayers and voters the question of determining to what extent, if any, the State shall be aided in prosecuting criminal offenses, stated in 217 Ind. at 507:

“... But the right to curtail jurisdiction is the right to destroy it. The effect of the statute is not only to determine what amount shall be expended, but to determine that no amount whatever shall be expended. Such a limitation is within the legislative discretion if the power emanates from legislative authority, but
it is not within the legislative discretion if the power derives from the Constitution.”

The court concluded that the power of a court to function as contemplated by the Constitution, and to try one accused of a serious crime, could not be made to depend upon the determination of a majority of the members of the county council simply because the Legislature had so decided.

“Such a conclusion is contrary to the consistent view of this court, that courts have inherent power to do all things that are reasonably necessary for the administration of justice within their jurisdiction.” 217 Ind. at 511.

This decision was followed by that in Noble County Council v. State ex rel. Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955). In that case the court decided that neither the Legislature nor the county council can restrict a court’s appointment or payment of such personnel as the functions of the court may require. The court’s determination of the amount and kind of personnel required, and the amount of their salaries, is subject to review only for an abuse of discretion by the Supreme Court. Although this case involved appointment of a person by the judge of a court to serve the court itself, the Supreme Court, at 234 Ind. 181, quoted Section 13 of Article I of the Constitution as follows:

“‘In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.’” (Emphasis added.)

The court also discussed the separateness and independence of the judicial branch of the government from the legislative and executive branches. As noted above, a prosecuting attorney is a constitutional judicial officer. The prosecuting attorney is not only specifically provided for in the Consti-
tution, but as indicated by the constitutional passage quoted, is necessary to the administration of justice contemplated by the Constitution. If the accused is entitled to a public trial by an impartial jury, it is necessary that an attorney represent the state at the trial, and participate in the selection of the impartial jury. Such attorney for the state must be able to participate in a trial in the county in which such offense has been committed. If the accused is entitled to demand the nature and cause of the accusation against him and to have a copy thereof, there must be a state's attorney available who not only is trained, but has the required amount of time, to prepare the accusation against the accused. Such officer must also have the office, staff and equipment to enable him to make a copy of the accusation and to present it to the accused.

That the prosecuting attorneys of Indiana do have necessary duties implicit in the constitutional title of their offices was declared in State ex rel. Indiana State Bar Assn. v. Moritz, 224 Ind. 156, 191 N.E.2d 21 (1963). The court further stated:

"There can be no serious question raised in this case but that the prosecuting attorney's duties are concerned with representing the State of Indiana as an attorney at law, primarily in criminal matters, although there are many statutes requiring him to perform duties with reference to the practice of law in various fields, both civil and criminal." 244 Ind. at 159.

The court restated its "inherent jurisdiction" to "control the operation of the judicial department of the government," of which prosecuting attorneys are a part. 244 Ind. at 160-161.

All of these facts the Legislature must have considered when it used the language adopted in the 1965 amendment to Acts of 1959, ch. 277, § 2, Burns IND. STAT. ANN., § 49-2602 (1965 Supp.):

"... [A]n amount as may be necessary for the proper discharge of the duties imposed by law upon the office of the prosecuting attorney of each judicial circuit."
Therefore, it is my opinion that the county council does not have the discretion to refuse to appropriate for "investigators, clerical assistance, witness fees, out of state travel, postage, telephone tolls and telegraph, repairs to equipment, office supplies, other operating expenses, and equipment," an amount which the prosecuting attorney considers necessary within reasonable standards in order that he discharge the duties imposed by law upon him. If the county council refuses to appropriate the necessary amount, it may be mandated to do so.

The last sentence of the second statute concerning which a question was posed at your conference was not changed by the 1965 General Assembly, and reads as follows:

"In the event any board of county commissioners does not furnish the prosecuting attorney with office space the county council shall appropriate an amount up to but not exceed [sic] the thirty-six hundred dollars per year to the prosecuting attorney for office space." Ind. Acts of 1959, ch. 277, § 19, as amended by Ind. Acts of 1965, ch. 270, § 15, Burns § 49-2619 (1965 Supp.).

Early statutes provide that the county commissioners must furnish offices for certain county officials at the county seat or in the county court house. See 1 R.S. 1852, ch. 20, § 16, Burns IND. STAT. ANN., § 26-624, and Ind. Acts of 1889, ch. 205, § 1, Burns IND. STAT. ANN., § 26-625. Prosecuting attorneys are not among those included.

Indiana Acts of 1919, ch. 13, as found in Burns IND. STAT. ANN., §§ 26-1805—26-1810, provides that where "parts of county buildings are not needed for the use of courts or county officers or other county business," the board of commissioners may lease such part or parts of such building to any private person or corporation for any definite period of time not exceeding five years, § 1 of the Act, Burns IND. STAT. ANN., § 26-1805. However,

"provision shall be made by such board of commissioners for reasonable office accommodations in such court-house for the prosecuting attorney of the judicial circuit in which such county is located, free of charge,
before any rooms or office accommodations shall be rented under this act to any other officer, person or persons.” (Emphasis added.) Act, § 2, Burns IND. STAT. ANN., § 26-1806.

My opinion that this provision must be strictly followed is reinforced by the fact that prior to the enactment of this section a board of commissioners was not authorized to lease rooms in the court house to any such person or corporation, State ex rel. Scott v. Hart, 144 Ind. 107, 43 N.E. 7, 33 L.R.A. 118 (1896).

The board of commissioners is authorized by another statute to lease parts of county buildings “not needed for the use of courts or county officers” to a city or town within which the county building is located. Ind. Acts of 1909, ch. 99, Burns IND. STAT. ANN., §§ 26-1801—26-1804.

Therefore, in my opinion, a prosecuting attorney is entitled to demand and receive, from the board of commissioners, suitable office space in any county building in which a room or office accommodation is rented or leased to a city or town, or to a private person or corporation. Under the statute authorizing leases to private persons or corporations, the board of commissioners is entitled to terminate any lease entered into at any time it determines that the leased premises are needed for county officers, Ind. Acts of 1919, ch. 13, § 4, Burns IND. STAT. ANN., § 29-1808.

If the board of commissioners has not provided a prosecuting attorney with office space, under the authority of State ex rel. Glenn v. Smith, 227 Ind. 599, 87 N.E.2d 813 (1949), supra, a court may mandate a county council to provide the prosecuting attorney an amount of money not exceeding thirty-six hundred dollars for office space. Under the rule in that case, a reasonable exercise of discretion by the county council as to location and amount of rent would not be overturned by the courts. However, any unreasonable exercise of discretion would be subject to court review, and in view of the later decisions in Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940), supra, Noble County Council v. State ex rel. Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955), supra, and State ex rel. Indiana State Bar
Assn. v. Moritz, 244 Ind. 156, 191 N.E.2d 21 (1963), supra, the present rule is that the Legislature may not give the county council discretion to control or curtail the functioning of any constitutional judicial officer, including a prosecuting attorney, by limiting the amount of money he may obtain for office space. In my opinion, a county council may be mandated to appropriate for office space the amount a prosecuting attorney finds is necessary within reasonable standards for him to fulfill his constitutional duties.

OFFICIAL OPINION NO. 37

September 1, 1965

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis, Indiana 46204

Dear Mr. Utterback:

This is in reply to your recent letter in which you request an Official Opinion on the following question:

"If a teacher, who has 15 or more years of service and has not attained age 50 or has 10 or more years of service and has not attained age 65, makes application for withdrawal and receives his total accumulation and subsequently returns to service after a period of inactivity and renders less than 60 days of service and is now age 50 or 65 respectively, is this teacher entitled to any retirement benefits?"

The Indiana State Teachers' Retirement Act provides, in part, at Ind. Acts of 1915, ch. 182, § 9, as amended, Burns IND. STAT. ANN., § 28-4506:

"(e) In the event that any teacher, a member of the fund, leaves the service . . . for any reason, such teacher shall be entitled to withdraw all arrearages paid in and the following portions of his regular contributions:

* * *

"After ten years 100%"

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