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Separation of Powers Doctrine As Applied to Cities

MUNICIPAL CORPORATIONS

SEPARATION OF POWERS DOCTRINE AS APPLIED TO CITIES

The municipal Council of the city of New York under authority of the city charter investigated the Municipal Civil Service Commission. It served a subpoena *duces tecum* upon the Mayor in an effort to secure the written report of a related investigation. The Mayor applied for an order to vacate the Council's subpoena. *Held*, the records of the Mayor pertinent to the investigation are not immune from the Council's power of subpoena.[1]

The principal issue was whether the doctrine of separation of governmental powers applied to municipal governments.

The classical strictness[2] of this doctrine has been modified in both federal[3] and state[4] application by modern decisions. However, the principle of executive immunity from process by either of the

1. LaGuardia v. Smith, 288 N.Y. 1, 41 N.E. (2d) 153 (1942) (two judges dissenting). An order of the Supreme Court, 176 Misc. 482, 27 N.Y.S. (2d) 321 (1941), denying the application was upheld by the Appellate Division, 262, App. Div. 708, 27 N.Y.S. (2d) 992 (1st Dept. 1941), motion for leave to appeal denied, 262 App. Div. 726, 28 N.Y.S. (2d) 705 (1st Dept. 1941). Petitioner appealed with permission of the Court of Appeals.
   The N.Y. City Charter (adopted November 3, 1936, by referendum under authority of N.Y. Laws 1934, c. 867, effective January 1, 1938) §43 authorizes investigations by the Council and §§5(3),803(1) authorize investigations by the Mayor.
2. ". . . that each department shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." Kilbourn v. Thompson, 103 U.S. 168, 191 (1880).
3. Ex parte Grossmann, 267 U.S. 87 (1924); Dreyer v. People of State of Illinois, 187 U.S. 71 (1902). "The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments. . . . " Story, Const. (5th ed. 1840) 48. See Willis, Constitutional Law of the U.S. (1936) 168, 169.
4. State ex rel. Patterson v. Bates, 96 Minn. 110, 104 N.W. 709 (1905); Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co., 191 N.Y. 123, 83 N.E. 693 (1908); Henrico County v. City of Richmond et al., 106 Va. 282, 55 S.E. 683 (1906); Sabre et al. v. Rutland Ry. et al., 86 Vt. 347, 85 Atl. 693 (1913). See Stockman v. Leddy, 55 Colo. 24, 129 Pac. 220, 223 (1912); People v. Kelly, 347 Ill. 221, 233, 179 N.E. 898, 903 (1931). See In re Sims, 54 Kan. 1, 37 Pac. 135, 137 (1894) (concurring opinion). Contra, Tucker v. State, 218 Ind. 614, 640, 35 N.E. (2d) 270, 279 (1941); State v. Shumaker, 200 Ind. 716, 164 N.E. 408 (1928). In these Indiana cases the court gives a strict construction to Ind. Const. Art. 3, §1, which expressly provides for separation of departments.
5. U.S. v. Burr, 25 Fed Cas. 187, No. 14,694 (C.C. Va. 1807); State ex rel. Bisbee v. Drew, 17 Fla. 67 (1879); People ex rel. Sutherland et al. v. Governor, 29 Mich. 320 (1874); Donnelly v. Roosevelt, governor, 144 Misc. 687, 259 N.Y.S. 355 (1932); People ex rel. Broderick v. Morton, 156 N.Y. 136, 50 N.E. 791 (1898). All these cases base the principle of executive immunity upon the doctrine of separation of powers.
6. Humphrey's Executor v. U.S., 295 U.S. 602 (1935); Springer v. Philippine Islands, 277 U.S. 189 (1927); Willis, Constitutional Law of the U.S. (1936) 133.

other departments still prevails.[5] In the federal government[6] and in state governments[7] where no express separation is provided by constitution, the doctrine of separation of powers is implied from the fact that separate departments are established. Presumably this same implication could arise where municipal corporations are set up with separate departments.[8] Neither federal nor state constitutions require tripartite departments in city government;[9] thus the statute or charter could establish any desired form of government.[10] However, the weight of authority holds that the doctrine of separation of powers does not apply to municipal governments.[11]

In the reasoning of the courts, two theories for denying the application of the doctrine are prominent. One theory holds that the doctrine applies only where the government possesses sovereignty. Municipalities are mere agencies of the state possessing no sovereignty[12] and, as such, their powers are strictly limited to those ex-

7. In re Sims, 54 Kan 1, 37 Pac. 135 (1894); State ex rel. Young, Attorney General, v. Brill, 100 Minn. 499, 111 N.W. 294 (1907); City of Zanesville v. Zanesville Telegraph and Telephone Co., 64 Ohio St. 67, 59 N.E. 781 (1901); Kimbal v. City of Grantsville et al., 19 Utah 368, 57 Pac. 1 (1899).

8. Springer v. Philippine Islands, 277 U.S. 189 (1927); Lehman, C. J., dissenting, "It seems to me clear that there is necessarily implied in the grant of investigating power to each a limitation that neither Council nor Mayor may encroach upon the field reserved for the other." Instant case at 13, 41 N.E. (2d) at 158.

9. Crowell v. Benson, 285 U.S. 22 (1932); Williams v. Eggleston, 170 U.S. 304 (1897); Forsyth v. City of Hammond, 166 U.S. 506 (1897); State ex rel. Thompson, Attorney General v. Neble, 82 Neb. 267, 117 N.W. 723 (1908); City of New York v. Village of Lawrence et al., 250 N.Y. 429, 165 N.E. 836 (1929); Willis, Constitutional Law of the U.S. (1936) 165.

10. Since state constitutional provisions for separation of powers are held not to apply to cities, legislatures may set up city managership form of government, Sarlls v. State ex rel. Trimble et al., 201 Ind. 88, 166 N.E. 270 (1929), or commission form of government, Evkerson v. Des Moines et al., 137 Iowa 452, 115 N.W. 177 (1908); Bryan v. Voss, 143 Ky. 422, 136 S.W. 884 (1911); State ex rel. Simpson v. City of Mankato et al., 117 Minn. 458, 136 N.W. 264 (1912); Barnes v. City of Kirkville, 266 Mo. 270, 180 S.W. 545 (1915); State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N.W. 224 (1912).

11. State ex rel. Wilkinson v. Lane, 181 Ala. 646, 62 So. 31 (1913); Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697 (1922); Livengood et al. v. City of Covington, 194 Ind. 633, 144 N.E. 416 (1924); Baltimore and Ohio Ry. v. Town of Whiting, 161 Ind. 228, 68 N.E. 266 (1903); Martindale v. Palmer, 52 Ind. 411 (1876); Waldo v. Wallace, 12 Ind. 569 (1859); City of Spartanburg v. Parris, 85 S.C. 227, 67 S.E. 246 (1910). See note 12 supra.

12. Williams v. Eggleston, 170 U.S. 304 (1897); Mayor of Mobile v. Moog 53 Ala. 561 (1875); Town of Petersburg v. Metzker, 21 Ill. 204 (1859); Scott et al. v. City of LaPorte et al., 162 Ind. 34, 68 N.E. 278 (1904); Attorney General ex rel. Nesmith et al v. City of Lowell, 246 Mass. 312, 141 N.E. 45 (1923); City of St. Louis v. Weber, 44 Mo. 547 (1869); Van Cleve et al. v. Passic Valley Sewerage Commissioner, 71 N.J.L. 183, 58 Atl. 571 (1904); instant case, 288 N.Y. at 12, 41 N.E. (2d) at 155 (1942). See also 1 McQuillin, Mun. Corp. (2d ed. 1940) 917; Cooley's Const. Lim. (7th ed. 1903) 264, 265.

pressly granted by statute or charter.[13] The other theory relies upon the fact that municipal governments have not kept the three departments separated in form or in practice, but have tended to intermingle their functions.[14]

The charter of New York City specifically grants to the Council power to appoint special investigating committees to conduct investigations and take testimony under oath.[15] Even in the absence of such express authority, federal,[16] state[17] and municipal[18] legislative bodies

13. City of Pawhuska v. Pawhuska Oil and Gas Co. et al., 250 U.S. 394 (1919); City of Worcester v. Worcester Ry. 196 U.S. 539 (1905); Williams v. Eggleston, 170 U.S. 304 (1897); Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205 (1931); Chicago Motor Coach Co. et al. v. City of Chicago, 337 Ill. 200, 169 N.E. 22 (1929); East Chicago Co. v. East Chicago, 171 Ind. 654, 87 N.E. 17 (1909); Scott et al. v. City of La Porte et al., 162 Ind. 34, 68 N.E. 278 (1904); State ex rel. Indianapolis v. Indianapolis Ry., 160 Ind. 45, 66 N.E. 163 (1903); Scenic Ry. v. McCabe, 211 Mich. 133, 178 N.W. 662 (1920); City of Richmond v. Null, 194 Mo. App. 176, 185 S.W. 250 (1916); Richmond F. & P. Ry v. City of Richmond, 145 Va. 225, 133 S.E. 800 (1926). See 1 McQuillin, Mun. Corp. [(2d ed. 1940) 910].

14. The mayor may be vested with legislative, executive or judicial authority. Ford v. Mayor and Council of Brunswick, 134 Ga. 820, 68 S. E. 733 (1910); City of Greenville v. Pridmore, 86 S.C. 442, 68 S.E. 636 (1910); Walker v. City of Spokane et al., 62 Wash. 312, 113 Pac. 775 (1911). In many states the mayor is made a part of the city council. Bartlett v. Dunscomb, 58 Cal. App. 610, 209 Pac. 74 (1922); Cochran et al. v. McCleary, Mayor, 22 Iowa 75 (1867); Brown v. Foster, 88 Me. 49, 33 Atl. 662 (1895); People ex rel. Dafoe v. Harshaw, 60 Mich. 200, 26 N.W. 879 (1886). The mayor is also frequently given powers as a magistrate. Uridias v. Morill, 22 Cal. 474 (1863); Santo et al. v. State, 2 Iowa 165 (1855); Baton Rouge v. Dearing, 15 La. Ann. 208 (1860); State ex rel. Linden v. Davis, Mayor, 96 Ohio 301, 117 N.E. 358 (1917). Mayors in Indiana cities of third, fourth, and fifth class may serve as city judge. Ind. Stat. Ann. (Burns, 1933) §48-1216, §48-1218, §48-1219, and preside at meetings of the Common Council, Ind. Stat. Ann. (Burns, 1933) §48-1403.

15. N.Y. City Charter, §43, Smith v. Kern, 175 Misc. 937, 26 N.Y.S. (2d) 560, aff'd without opinion, 260 App. Div. 778, 24 N.Y.S. (2d)1, aff'd. without opinion, 285 N.Y. 632, 33 N.E. (2d) 556 (1941); Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S. (2d) 454, aff'd without opinion, 282 N.Y. 647, 26 N.E. (2d) 800 (1939).

16. Sinclair v. U.S., 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1924), reversed on other grounds, Ex parte Daugherty, 299 Fed. 620 (S.D. Ohio 1924); In re Chapman, 166 U.S. 661 (1897); Wilkens v. Willet, 1 Keyes 521 (N.Y. 1864). See Landis Constitutional Limitations on Congressional Power of Investigation, (1928)) 40 Harv. L. Rev. 153.

17. Lowe v. Summers, 69 Mo. App. 637 (1897); In re Joint Legislative Committe to Investigate Educational System of New York, 285 N.Y. 1, 32 N.E. (2d) 769 (1941); In re Doyle v. Hofstader et al., 257 N.Y. 244, 177 N.E. 489 (1931); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); People ex rel. McDonald v. Keeler, 99 N.Y. 463, 2 N.E. 615 (1885); Ex parte Parker, 74 S.C. 466, 55 S.E. 122 (1906); State ex rel. Rosenheim v. Frear et al., 138 Wisc. 173, 119 N.W. 894 (1909).

18. The power to legislate inherently carries with it the necessary and auxiliary power of investigation, even in the case of muni-

are held to have similar inherent power of investigation as a necessary auxiliary to the legislative function. Since the doctrine of separation of powers will not protect the Mayor from the Council's power of investigation,[19] the only restrictions upon the exercise of this power, assuming a legitimate purpose,[20] are practical considerations of public policy.[21]

In Indiana, city councils have been granted power to conduct investigations of city departments, officers and employees, in which they may compel attendance of witnesses and production of books and papers.[22] Furthermore, Indiana courts are in accord with the principle that the doctrine of separation of powers does not apply to municipal governments.[23] Thus, the Indiana rule seems to be in accord with the New York case.

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cipal legislative bodies, regardless of the fact that they are not part of a sovereign government. Herlands v. Surpless et al., 258 App. Div. 275, 16 N.Y.S. (2d) 454, aff'd without opinion, 282 N.Y. 647, 26 N.E. (2d) 800 (1939); Briggs v. Mackeller, 2 Abb. Pr. (N.Y.) 30 (1855). Contra, In re Investigation of Contracts of City of Albany, 113 Misc. 370, 184 N.Y.S. 518 (1920).

19. See note 13 supra.

20. Federal and state legislative powers of investigation are usually held to be limited to the scope and purpose of possible future legislation. McGrain v. Daugherty, 273 U.S. 135 (1924). Atty-General Daugherty was later held not answerable to congressional subpoena because the investigation was judicial in nature rather than legislative. Ex parte Daugherty, 299 Fed. (S.D. Ohio 1924) 620. See Landis, Constitutional Limitations on Congressional Power of Investigation (1928) 40 Harv.L.Rev. 153. It is submitted that this same limitation would apply to municipal legislative investigation, unless expressly otherwise provided.

The N.Y. City Charter, §43, limits the Council's power of investigation to "matters relating to the property, affairs or government of any city or of any county within the city."

21. Lehman, C.J., dissenting, "In final analysis the question to be decided is whether there can be efficient government in which there has been in large degree a separation and distribution of power unless the powers so separated and distributed are deemed exclusive." ". . . . to give another department the power to harass or impede the chief executive is to invite disaster." ". . . . practical considerations and established traditions demand the rejection of a literal construction of the charter which would give the council the right and power to impede the chief executive officer of the duty in the exercise of his executive powers." Instant case 288 N.Y. at 14, 41 N.E. (2d) at 159, 160.

22. Ind. Stat. Ann. (Burns, 1933) §48-1409. Since executive and administrative authority in Indiana cities is vested in the mayor, city clerk and other specified departments, Ind. Stat. Ann. (Burns, 1933), §48-1501, it is submitted that the Common Council's investigating power extends to investigations of the executive departments.

23. Sarlls v. State ex rel. Trimble et al., 201 Ind. 88, 166 N.E. 270 (1929); Livengood et al. v. City of Covington, 194 Ind. 633, 144 N.E. 416 (1924); Baltimore and Ohio Ry. v. Town of Whiting, 161 Ind. 228, 68 N.E. 266 (1903); Waldo v. Wallace, 12 Ind. 569 (1859).