

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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January 9, 2002

Opinion No. 02-008

Constitutional Impediment to Individual Holding County and City Office

QUESTION

Does the Doctrine of Separation of Powers prohibit the same individual from holding a legislative office in a city government and an executive office in a county government?

OPINION

No.

ANALYSIS

We have been asked to reconsider Op. Tenn. Atty. Gen. 01-152 (September 25, 2001). In that opinion, this Office concluded that the same individual may hold the office of constable and the office of city alderman. The request points out that the office of constable is an executive office, while the office of city alderman is legislative. The request expresses concern that allowing the same individual to hold both an executive and legislative office might violate the Doctrine of Separation of Powers.

Article 2, Section 1 of the Tennessee Constitution establishes the legislative, executive and judicial departments of government. Article 2, Section 2 prohibits the members of one department from exercising the powers belonging to either of the others. The Constitution does not define in express terms what are legislative, executive, or judicial powers, but the Tennessee Supreme Court has said that the legislative power is to make, order, and repeal laws; the executive power is to administer and enforce laws; and the judicial power is to interpret and apply laws. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664 (1909).

To the extent that this doctrine applies to local officials, we think it would apply to offices within the same governmental entity. This principle is implicit in Justice Drowota's discussion, outlined in more detail below, of separation of the three departments of government on the local level. As our opinion notes, the office of constable is a county office. The office of city councilman is a city office. As a general matter, we do not think the Doctrine of Separation of Powers would prohibit the same individual from carrying out one function on behalf of a city, and another on behalf of a county.

Tennessee courts have also recognized that the Doctrine of Separation of Powers applies with less force to local governments. The most recent discussion of this issue appears in the concurring opinion in *Summers v. Thompson*, 764 S.W.2d 182, 188—199 (Tenn. 1988), *rehearing denied* (1988), *appeal dismissed*, 488 U.S. 977, 109 S.Ct. 524, 102 L.Ed.2d 556 (1988). That case addressed whether a city legislature could constitutionally be authorized to terminate a city judge. The majority opinion concluded that this arrangement was constitutional, but only because the particular city judge did not exercise the power of an inferior court within the meaning of Article VI of the Tennessee Constitution. In a concurring opinion, Justice Drowota — who also wrote the majority opinion — discussed the broader constitutional issues the case presented. Justice Drowota discussed the various forms of municipal government authorized under city law and noted that all of the statutory charters recognize, to some extent, the “basic tripartite distribution of powers.” 764 S.W.2d at 191. He recognized, however, that the division of power among the three departments was less distinct under the simpler statutory charters and cited several examples where city officials exercise both executive and legislative powers. *Id.* Justice Drowota noted that, while no statute or municipal charter could vest all three powers completely in one body,

Nevertheless, “[t]he great diversity of municipal corporations required to meet the wants of local communities seems to demand a larger liberty of legislation than private corporations.” Thus, at least at the local level, strict adherence to the departmental division of powers is not always required, as “it has long been recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government.”

764 S.W.2d at 192 (citations omitted). For these reasons, therefore, we do not think a court would conclude that the Doctrine of Separation of Powers would bar the same individual from serving as a city councilman and a constable.

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