IN THE

Supreme Court of the State of Indiana

No. 49S00-1201-PL-15

STATE OF INDIANA, Appellant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Appellee.	)	Appeal from the Marion Superior Court No. 49D10-1005-PL-021451 The Honorable David J. Dreyer, Judge

BRIEF OF THE INDIANA ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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The Attorney General has a general statutory duty to "represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law." Ind. Code § 4-6-1-6. In this matter, the interests of the State arise not only by way of the claims and defenses of the Family & Social Services Administration, but also by way of IBM's attempt to depose the Governor, who is not a party in either his official or personal capacities, concerning his official acts.

In light of the trial court's decision that "public policy" favors permitting the Governor's deposition notwithstanding Indiana Code Section 34-29-2-1, the Attorney General has a compelling interest in asserting the larger interests of the State and in protecting the Office of the Governor, and other elected officials, from this intrusive burden.

ARGUMENT

The trial court's Order requiring the Governor's deposition threatens to intermeddle with the internal affairs of a coordinate branch of government, something this Court has long prohibited. *See State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993) (observing that the Court "has held repeatedly that courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government").

The General Assembly has passed a statute to prevent such intermeddling by shielding the Governor and other State office holders from being deposed. Ind. Code

§ 34-29-2-1. This statute is justified by profound interests in preventing the judiciary from thwarting executive officials' prosecution of their duties and preventing civil actions from absorbing the time of the State's executives. A proper understanding of when, if ever, the legislature has decided to permit the deposition of a sitting Governor concerning his official actions implicates important principles of divided and limited government.

I. History dictates that, for purposes of invoking the governor's statutory privilege, a notice of deposition should be treated the same as a subpoena

Indiana has granted statutory privilege "from arrest on civil process, and from obeying any subpoena to testify" to certain state officials since at least 1817. *See* 1817 Ind. Rev. Stat. ch. 76; 1838 Ind. Rev. Stat. ch. 84; 1843 Ind. Rev. Stat. ch. 52. In 1852, the privilege was extended to several executive officers: "the governor, treasurer of state, secretary of state, auditor of state, and superintendent of public instruction." *See* 1852 Ind. Rev. Stat. ch. 5.

Currently, Indiana grants privilege "from arrest on civil process, and from obeying any subpoena to testify" to seven classes of persons. Ind. Code § 34-29-2-1.[1] Of those seven classes, six have a conditional privilege that applies only "during" a specified event or "while" the privileged person is engaging in a certain activity. *Id.* In contrast, the privilege granted to the "governor, treasurer of state, secretary of state, auditor of state, and superintendent of public instruction" is unconditional. *Id.*

Regardless whether the Governor is a non-party, the officer of a party, or a named party, the statutory privilege granted by Section 34-29-2-1 applies to the deposition at issue here. If the Governor is a non-party, his testimony cannot be compelled except by a "subpoena," which everyone agrees the statute covers. *See* 22 Ind. Prac., Civil Trial Practice § 22.10; Ind. R. Trial P. 30(G)(2). If he is a party or the officer of a party, the privilege also applies because, at the time the legislature originally added the Governor to the privilege statute, parties and non-parties were treated the same for the purposes of compelling testimony.

With regard to *non-party* witnesses, an 1852 statute provided that "[t]he officer taking the deposition, shall have power to summon and compel the attendance of witnesses." Act of June 18, 1852, 2 1852 Ind. Rev. Stat. pt. 2, ch. 1, art. 14, § 253. With regard to *party* witnesses, the statute provided that they were to be treated in the same way as any other witness; they could be "summon[ed] and compel[led]" to testify at a deposition. *See* Act of June 18, 1852, 2 1852 Ind. Rev. Stat. pt. 2, ch. 1, art. 14, § 253. If a party refused to testify, even at a pre-trial deposition, the court could compel them to do so on pain of contempt. *See* Act of June 18, 1852, 2 1852 Ind. Rev. Stat. pt. 2, ch. 1, art. 15, § 296. The party's attendance could be "enforced," *id.* at § 297, and failure to "attend and testify . . . may be punished as for a contempt," *id.* at § 299. The same held for testimony at trial. *See* Act of June 18, 1852, 2 1852 Ind. Rev. Stat. pt. 2, ch. 1, art. 15, § 295 ("A party to an action may be examined as a witness, at the instance of the adverse

[1] The statute was recodified in 1998 by P.L. 1-1998 § 25; prior to the recodification, it was located at 34-4-11-1, Burns 3-401, Burns 977, Burns 3302, and Burns 2895. Prior to that, it

party . . . and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission."); *see also* Act of April 7, 1881, 1881 Ind. Spec. Sess. Laws, ch. 38, § 295. Thus, in the nineteenth century, parties and non-parties were treated identically for the purposes of both trial and deposition testimony.

It is of no moment, therefore, that Section 34-29-2-1 speaks in terms of "subpoena" rather than any other name for compelling testimony. A subpoena is defined merely as "a command to appear at a certain time and place to give testimony upon a certain matter." *Black's Law Dictionary* 1426 (6th ed. 1990). In other words, a subpoena, like a deposition notice, compels testimony. Moreover, the word "subpoena" has historically been understood this way—in the nineteenth century, it was defined as "[a] summons for witnesses." Noah Webster, *A Dictionary of the English Language* 396 (rev. ed. 1850). This is consistent with the 1852 statute giving the presiding officer over a deposition "power to summon and compel the attendance of [non-party] witnesses." Act of June 18, 1852, 2 1852 Ind. Rev. Stat. pt. 2, ch. 1, art. 14, § 253. So, while today we often associate the term "subpoena" with an order issued by a court, the term is not inherently so limited.

Today, Indiana Trial Rule 37(D), uses the term "proper notice" to describe the means of compelling testimony of a party rather than the term "subpoena." But the modern practice of compelling testimony without judicial involvement does not negate the legislature's historical understanding of what it was accomplishing with

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was simply cited as Acts 1852, 1 Rev. Stat. ch. 5 § 1.

the privilege statute. The point was to protect certain elected officials from compelled testimony, period. A subpoena by any other name interferes as much.

II. The privilege statute protects important separation-of-powers principles

Undoubtedly the foundational principle underlying the privilege statute is that "courts should not intermeddle with the internal functions of either the Executive or Legislative branches of government." *State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993). Such concerns are implicated whenever a litigant seeks to invoke judicial process against the Governor. To be sure, separation of powers principles do not preclude naming the Governor in a lawsuit. The Governor's constitutional responsibilities and status should nonetheless counsel judicial deference and restraint when it comes to demands for his personal participation in litigation. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982).

Requiring a sitting Governor or other State elected official to give a deposition risks intrusion on the powers of those officials. First, particularly when the subject matter of the discovery is an official act, subjecting an elected official to a deposition is an affront to the dignity of the office. While it is appropriate for officials to feel pressure to explain their acts in the court of public opinion, it is another matter entirely for the judicial branch to compel such an explanation. Handing litigants the leverage to compel explanations from the governor and other elected officials under oath threatens to undermine the independent decision-making authority that separation-of-powers presumes. *Cf.* The Federalist No. 48

(James Madison) ("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. . . . [P]ower is of an encroaching nature, and [] it ought to be effectually restrained from passing the limits assigned to it."). Article III of the Indiana Constitution simply cannot be reconciled with a vision of government whereby courts become the inevitable forum to air public grievances about official decisions.

Second, depositions consume time, not only in the actual deposition itself, but even more so in preparation for the deposition. A deponent will need to consult with counsel, review documents, and piece together memories of perhaps long-ago events. When these burdens are imposed on a sitting elected official, they implicate not merely private interests but public and governmental interests of constitutional dimension.

Time is critically important to elected officials. Among the most important decisions they make are decisions about how to allocate limited time among myriad disparate issues that legitimately compete for attention. In politics and government, power often lies not simply in statutory and constitutional enumerations, but in the ability to establish and execute an agenda. Owing to status and profile as much as actual constitutional or statutory power, an elected official can, merely by allocating time, influence the development and resolution of public affairs—and is accountable to voters for doing just that.

For example, in 2006, Governor Daniels returned from a trade mission in Asia in order to personally attend the announcement of the new Honda assembly plant in Greensburg, Indiana. *See* Micheline Maynard, *Indiana Wins Race to Land Honda's New Plant*, N.Y. Times, June 28, 2006. Decisions regarding what events to attend among the many options are part of the Governor's authority to set and execute his agenda and must remain autonomous.

Accordingly, subjecting the governor to demands for personal compliance with litigation discovery could not help but interfere with the job the voters elected him to do. *Cf. Fitzgerald*, 457 U.S. at 751 ("[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.") Indeed, in his concurring opinion in *Fitzgerald*, Chief Justice Burger observed that private suits for damages against a President could be used for purposes of harassment and extortion. *Id*. at 762, 763. The same risks arise here, where the ability to subject the Governor and other elected officials to depositions could prove too tempting for lawyers to pass up. Surely that possibility underlies the legislature's decision to afford the Governor and other elected officials privilege from subpoena, and is equally implicated with regard to a deposition notice.

CONCLUSION

The trial court's Order requiring the Governor's deposition is erroneous and must be reversed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Indiana Rule of Appellate Procedure 44, I verify that this brief, excluding tables and certificates, contains less than 7,000 words according to the word-count function of the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2012, a copy of the foregoing was served via First Class United States mail, postage pre-paid, and via electronic mail, to the following:

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