Holding onto the Reins: Preserving Legislative Powers

NCSL 2013 Joint Professional Development Seminar
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Separation of Powers Doctrine

Constitutional Basis – Federal

- Federal Constitution does not explicitly set forth rule of separation of powers
- Concept arises out of the establishment of branches of government and the delegation of power
Separation of Powers Doctrine

Constitutional Basis – State

- No federal guarantee of separation of powers to states
- Most states explicitly declare
- Inherent or implicit for some states

“...no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.”

Article III, CO Constitution

Separation of Powers Doctrine

Powers of the Three Branches

- Legislative – Enact
- Executive – Administer
- Judicial – Interpret
Objective

- Prohibit one branch from exercising the powers of other branches or from improperly delegating its powers
- For powers granted, each branch is supreme
- Long-term, structural protections against the abuse of power is critical to preserve liberty
- Separation of powers not rigid or static; violations evaluated on case-by-case basis

Plenary Power of the Legislature

What does plenary power mean?

Plenary: Full, complete, entire

“...when the people by their constitution created [the General Assembly]... they conferred the full and complete power as it existed and rested in themselves, subject only to the restraints and limitations of their own constitution and the constitution of the United States.”

People ex rel. Tucker v. Rucker, 5 Colo. 455 (1880)
Can General Assembly really enact any law?

“...the legislature being invested with complete power ... and the state constitution being merely a limitation upon that power, we look... not to see if the enactment in question is authorized, but only to see if it is prohibited.”

_Alexander, County clerk, et al. v. the People ex rel. Schoolfield_, 7 Colo. 155 (1883)

How does constitution limit plenary legislative power?

- Initiative and Referendum
- Personal Civil Rights
- State Personnel System
- Limitations on taxes and spending (TABOR)
- Local control of education instruction
How have judicial decisions limited plenary legislative power?

Non-delegation doctrine
- U.S. Supreme Court decisions
  - The more power granted to executive branch agency, the more specificity must be set out in statute granting the power

Non-delegation doctrine in Colorado
- One explicit reference to non-delegation of legislative authority – Article V, Section 35
- Supreme Court decisions
- Distinction between what may and may not be delegated is between power to make law and authority regarding its execution
  - People ex rel Dunbar v. Giordano, 173 Colo. 567, 481 P.2d 415 (1971)
  - Dixon v. Zick, 179 Colo. 278, 500 P.2d 130 (1972)
- Any delegation must establish sufficient standards by which power delegated is to be exercised
  - People v. Lepik, 629 P.2d 1080 (Colo. 1981)
Plenary Power of the Legislature

Yes, there are limits to the General Assembly’s plenary power. But...

- Once enacted, law presumed to be constitutional
- Court may find law unconstitutional only if proven beyond reasonable doubt
- Legislators also decide whether bill is constitutional when voting on it

What is in the best interest of the institution?

- Protect power against encroachment
  - Warn against unnecessary delegation
  - Encourage actions that protect
- Encourage exercise of power in best interest of State
  - Elected to enact legislation
  - Duty to act to fullest extent possible
Plenary Power of the Legislature

Factors that may influence decisions

- Term Limits
  - Long-serving vs. newer members
  - Role of staff to educate and advocate
- Partisan Politics
  - Party v. institutional interest
  - One-party control v. split control

Power Struggles in a Drafting Context

Executive Encroachment on Legislative Powers

- Broad delegation of authority by legislature
  - Rule making
  - Governor's statutory authority to make “legislative” decisions
- Executive orders
- Other examples
Power Struggles in a Drafting Context

Executive Encroachment on Legislative Powers
Rule Making

- General Assembly directs executive branch agency to promulgate rules

- Rule Review Process – Is the executive branch agency acting within the scope of its statutorily granted authority?

Power Struggles in a Drafting Context

Senate Bill 10-191, Concerning ensuring quality instruction through educator effectiveness

“...the general assembly shall review the rules promulgated pursuant to [this act] ....in a bill that is separate from the annual rule review bill.”

General Assembly's attempt to preserve legislative power ultimately allowed the executive branch to exceed its power as delegated by state statute
Power Struggles in a Drafting Context

Executive Encroachment on Legislative Powers
Authority in Statute

- General Assembly may intentionally relinquish some of its power to the executive branch
- Fiscal emergencies and revenue shortfalls

Governor's Authority in Fiscal Emergencies

“The governor shall take such actions as necessary to be utilized by each principal department and each institution of higher education... to reduce state personnel expenditures in the event of a fiscal emergency. Such actions shall include, but need not be limited to, separations, voluntary furloughs, mandatory furloughs, suspension of increases in salary and state contributions for group benefit plans, suspension of merit pay, job-sharing, hiring freezes, forced reallocation of vacant positions, or a combination thereof.”

Section 24-50-109.5 (2), C.R.S
Power Struggles in a Drafting Context

Governor's Authority to Address Revenue Shortfalls

“If, during any fiscal period, there are not sufficient revenues available for expenditure during such period to carry on the functions of the state government and to support its agencies and institutions and such fact is made to appear to the governor, in the exercise of his discretion, by executive order, he may suspend or discontinue, in whole or in part, the functions or services of any department, board, bureau, or agency of the state government…”

Section 24-2-102 (4), C.R.S.

Power Struggles in a Drafting Context

Executive Encroachment on Legislative Powers

Authority in Statute

Executive Orders

- Executive orders are a tool for Governors to execute the laws

- What happens when the Governor uses an executive order to “take the reigns” on policy when the legislature should be driving?
Authorizing Partnership Agreements with State Employees
Executive Order D 028 07

Governor's Goal:
To establish a framework for employee partnerships in service of a smarter, more effective, more efficient, and more accountable state government

Power Struggle:
Some members of the General Assembly believed that the Executive Order unionized state employees in the state personnel system

Governor's Early Childhood Leadership Commission
Executive Order B 2010-002

Governor's Goal:
To create a commission to work on better alignment and coordination of efforts related to children in Colorado from birth to age 8

Power Struggle:
Policy discussion regarding health and safety of young children in Colorado, but no legislative involvement
Governor's Council For Educator Effectiveness
Executive Order B 2010-001

✓ Governor's Goal:
To create a council to consider options and provide recommendations to ensure that every educator is evaluated using multiple, fair, transparent, timely, rigorous, and valid methods, 50% of which is determined by the academic growth of their students

✓ Power Struggle:
GA was working on this too (Senate Bill 10-191: Ensuring quality instruction through educator effectiveness)

Control of Federal Funds Received by the State
Custodial vs. Non-custodial Funds

“The General Assembly’s plenary power over appropriations applies only to state moneys, while the Governor retains control over those funds deemed custodial in nature.”

_in re Interrogatories_, 88 P.3d 1196, 1200 ( Colo. 2004)
Federal “Jobs and Growth Tax Relief Reconciliation Act of 2003” (Jobs Act)

- Use only to “provide essential government services or to cover the costs of unfunded mandates”
- “State may only use funds provided... for types of expenditures permitted under the most recently approved budget for the state”

Governor signed and filed certification and state received $146.4 million in federal funds
Governor exercised control over funds and designated them for various programs and purposes
Dueling legal opinions by Legislative Legal Services and Attorney General
House Bill 04-1098 introduced to define “custodial moneys”
Defined “custodial moneys” to include moneys:

- Originating from source other than Colorado
- Provided for a particular purpose
- Containing restrictions or standards on use or requiring approval of use by non-state authority or government
- For which state acting as custodian or trustee

Defined “custodial moneys” to exclude:

- Moneys generated by federal government to Colorado for support of general or essential state government services of the type for which expenditures were made in the most recently approved annual general appropriation act, including additional payments received under Jobs Act
• General Assembly submitted interrogatories on HB 04-1098 requesting an advisory opinion from the CO Supreme Court

• Colorado Constitution (Art. VI, Sec. 3) authorizes the Supreme Court to issue advisory opinions “upon important questions upon solemn occasions”

• Interrogatories may be submitted by either house of General Assembly or the Governor
• Questions must relate to purely public rights
• For the GA, question must be connected to pending legislation and relate either to:
  • Constitutionality of pending legislation; or
  • Matters connected to pending legislation of purely public rights
Interrogatory asked whether bill could constitutionally exclude those moneys from definition of “custodial funds”

- Answer “yes” because those moneys excluded from definition are not custodial

Power Struggles in a Drafting Context

Executive Encroachment on Legislative Powers

- May attach conditions
- May not administer appropriation once made
  - May not interfere with staffing and resource allocation decisions
  - May not attach conditions that attempt to reserve to the GA powers of closer supervision that are essentially executive in character
Power Struggles in a Drafting Context
Legislative Encroachment on Executive Powers

“Headnotes Vetoes Case”
House Bill 02-1420 - The general appropriations bill or “Long Bill” for FY 2002-03

Headnotes - Definitions of certain line items that are common to departments of state government:

- “capital outlay”
- “personal services”
- “operating expenses”
- “health, life, and dental”
- “full time equivalent”
- “legal expenses”

SECTION 1. Definitions - general provisions. As used in this act, the following definitions and general provisions shall apply:

(1) (a) "Capital outlay" means:

(I) Equipment, furniture, motor vehicles, software, and other items that have a useful life of one year or more and that cost less than fifty thousand dollars;

(II) Alterations and replacements, meaning major and extensive repair, remodeling, or alteration of buildings, the replacement thereof, or the

(8) "Legal services" means the purchase of legal services from the department of law; however, up to ten percent of the amount appropriated for legal services may instead be expended for operating expenses, contractual services, and tuition for employee training. No funds shall be expended for legal services except those specifically appropriated for such purpose. The provision of this subsection (8) shall not apply to the departments of education, higher education, transportation, and the risk management fund in the department of personnel.

(9) "Motor vehicle" means a motor truck designated three-quarters of one ton or less, automobile, or other self-propelled vehicle costing less than fifty thousand dollars.
HB 02-1420 approved in part and disapproved in part by the Governor

Grounds for most of the line item vetoes:
- Violates the Colorado Constitution
  - Violates separation of powers in general
  - Inhibits Executive Branch from administering appropriation
  - Constitutes substantive legislation

Grounds for vetoing 13 headnote definitions:
- “To provide flexibility... so that impacts in services to citizens are minimized”
- Although departments directed to comply with headnote definitions, “they will be allowed to spend outside of these parameters” as necessary to meet citizens’ needs
Power Struggles in a Drafting Context

- General Assembly challenged Governor’s actions
- Governor cross-claimed infringement on executive powers
- Court held that the Governor cannot veto headnotes and the 13 headnote definitions were unconstitutional

Power Struggles in a Drafting Context

- OLLS advised Joint Budget Committee on:
  - What was unchanged
  - Possible modifications that address separation of powers defects
  - How to address other appropriation issues

- Discussions between Joint Budget Committee and Governor's Office resulted in House Bill 08-1321, which codified the Long Bill headnote definitions with modifications consistent with the Owens decision
Reducing State Expenses Without Reducing Appropriations

☑ Legislative Goal:
Senate Bill 10-029: “By the end of the 2010-11 state fiscal year, the governor... shall have reduced the personnel expenditures of the governor's office, the executive directors' offices of each principal department of state government and the directors' offices of any other state government agency to the level of personnel expenditures by those offices for the 2005-06 state fiscal year.”

Power Struggles in a Drafting Context
Legislative Encroachment on Executive Powers

☑ Power Struggle:
“The executive power of the state is vested in the Governor, who is given the duty to see that the laws are faithfully executed...In order to fulfill this duty to faithfully execute the laws, the executive has the authority to administer the funds appropriated by the legislature for programs enacted by the legislature.”

Anderson v. Lamm, 579 P2d 620 (Colo. 1978)
Mandatory Furlough of State Employees
House Bill 09-1221

- Legislative Goal:
  “In order to reduce personnel expenditures...the head of each principal department and the head of each legislative agency shall implement a mandatory furlough”

Same power struggle

Limitations on Legislative Power to Appoint Members to Boards and Commissions

- General Assembly may not empower its own members to serve on boards and commissions that exercise executive powers
- General Assembly may not authorize legislative leadership to make appointments of non-legislators to executive boards and commissions
Executive Order D 005 99

“Pursuant to the authority vested in the Office of the Governor of the State of Colorado by Article IV of the Colorado Constitution and the statutes of the State of Colorado, I, Bill Owens, Governor of the State of Colorado, hereby issue this Executive Order designating the Colorado Department of Public Safety as the Point of Contact for the Federal Bureau of Investigation's National Instant Criminal Background Check System.”

1993
Congress passes Pub.L. 103-159 The “Brady Handgun Violence Prevention Act”

• Requires a criminal background check of each person attempting to purchase a handgun from a federally licensed firearms dealer
• Required creation of national criminal records system (NICS)
• Until NICS is established, purchaser waits up to 5 business days for federal background check or a quicker transfer could occur if state enacts law providing for immediate check of available state criminal records by authorized government official
Power Struggles in a Non-Drafting Context

Executive Encroachment on Legislative Powers

1994

General Assembly enacts HB 94-1276 “Instant Criminal Background Check System Act”

- Authorized Colorado Bureau of Investigation (CBI):
  - To conduct criminal background checks of prospective handgun purchasers within 24 hours using the CBI’s computerized database system
  - To collect a fee to be paid by prospective purchasers to cover costs of criminal background check
  - Originally scheduled to repeal end of Feb. 1999. Later amended to repeal upon implementation of NICS

October 30, 1998

- NICS established and firearms dealers required to begin contacting NICS on November 30, 1998
- Federal regulations provided firearms dealers contact NICS directly, except in those states in which a state point of contact (POC) has been designated
- POC must be "an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order"
Power Struggles in a Non-Drafting Context
Executive Encroachment on Legislative Powers

January 6, 1999

- Introduction of Senate Bill 99-058, concerning implementation of the national instant criminal background check system
- Bill designated CBI as state point of contact for NICS purposes and also authorized CBI to:
  - Conduct criminal background checks using state criminal records; and
  - Impose a fee on prospective purchasers for background checks
- Killed in Senate Committee February 1, 1999

April 20, 1999

- Columbine High School shootings
  - 15 dead
  - 21 injured
Power Struggles in a Non-Drafting Context
Executive Encroachment on Legislative Powers

June 22, 1999

- Castle Rock man purchased handgun following NICS check even though restraining order entered against him in CBI database
- Hours later, man used the handgun to murder his 3 young daughters before being killed in police shootout

Power Struggles in a Non-Drafting Context
Executive Encroachment on Legislative Powers

July 1, 1999

- Governor Owens issues Executive Order D 005 99
Power Struggles in a Non-Drafting Context

Executive Encroachment on Legislative Powers

July 12, 1999, Legislative Legal Services Opinion

- Concluded that in absence of any direct constitutional or statutory power to be implemented by the Executive Order, it appears to exceed the powers of the Governor
- Shot down various arguments made in July 8, 1999, informal AG memo supporting Governor’s authority
- No statutory authority for imposition of a fee or legislative appropriation of state moneys to fund actions taken in furtherance of Executive Order

Power Struggles in a Non-Drafting Context

Veto Power

- The Governor's veto power is a legislative power
- However, it is a negative legislative power - vests in the Governor the authority to nullify, but not to create statutes
- The language conferring the veto power must be strictly construed
Colorado General Assembly v. Lamm

Line item veto power:

- Power to “disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be law, and the item or items disapproved shall be void…” (Colo. Const. Article IV, Section 2)

- Source of funding is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is devoted

- Governor cannot veto the source of an appropriation while leaving the amount in tact

Colorado General Assembly v. Owens (again)

- Headnotes in long appropriations bill are not line items subject to the Governor's line item veto power

- Headnotes defining the terms used throughout the long bills cannot be “items” because they are not sums of money, and they cannot be eliminated without affecting the other purposes or provisions of the long bill
The headnotes function as legislative conditions and so removal of that condition is beyond the Governor's item veto power, but...

The Court held that the headnotes at issue unconstitutionally intruded on the authority of the executive branch.

Colorado General Assembly v. Owens (yes, again)

Governor's authority to veto a bill in its entirety versus the item veto power

Appropriation in a substantive bill does not make the bill an appropriations bill

Governor cannot veto the appropriation clause of a substantive law bill without vetoing the entire bill
“Dear Governor Romer:

The purpose of this letter is to state our position concerning your action on the 1989-90 long bill, Senate Bill No. 245. Eight headnote provisions and 41 footnotes were lined through and purportedly vetoed without accompanying vetoes of the appropriations to which such headnotes and footnotes pertain. For the reasons which follow, we believe that the attempted veto of these headnotes and footnotes was invalid under the state constitution and had no legal effect.”

“... For the foregoing reasons, it is not necessary for the General Assembly to take action in response to your action on headnotes and footnotes in Senate Bill No. 245. Until the headnotes and footnotes in question are repealed or declared unconstitutional by a court of competent jurisdiction, they should be treated as duly enacted law.”

- Colorado Supreme Court held that absent a legislative override or a judicial determination of invalidity, Governor’s vetoes must be presumed valid
Questions?