ETHICS

How does separation of powers relate to ethics?

BY NICHOLAS BIRDSONG

Forty-three state legislatures now use ethics commissions to enforce ethics laws and to protect the integrity of the legislative institution. This includes issuing penalties if legislators violate the rules.

But in some states, the imposition of those penalties has been challenged based on two common doctrines: legislative immunity and the separation of powers.

All states have adopted some kind of legislative immunity, which was inherited from British colonial rule and prohibits interfering with or questioning an official’s conduct by sources outside the legislative branch of government.

However, 31 states have ethics commissions that exist outside the legislative branch but still exercise oversight authority over their respective legislatures. Are they violating separation of power principles?

In 2009, the Rhode Island Supreme Court considered whether a legislator was protected from fines he received from the ethics commission for voting on a bill he should have recused himself from because of a conflict of interest. In Irons v. Rhode Island Ethics Commission, the court found that, since the ethics commission existed outside the legislative branch and voting on a bill was a core legislative duty, legislative immunity protected the lawmaker from being fined.

The separation of powers doctrine has not been a barrier to ethics enforcement in all states, however.

Twelve states and territories have avoided conflicts by establishing ethics commissions or legislative committees that fall under the umbrella of the legislative branch. Others have limited the authority of the commission to making recommendations that must be adopted by a legislative vote before becoming effective.

State courts, as well, have applied separation of powers principles differently. In Parcell v. State, for example, the Kansas Supreme Court affirmed an executive branch commission’s exercise of authority over legislators. The justices took a more permissive view because the state constitution did not clearly delineate between the branches of government. Because most commissioners were appointed by the Legislature, and there was no “usurping of power” or coercive influence, the court found the commission’s authority permissible.

North Dakota took a proactive approach to any potential conflict when it created an ethics commission through a 2018 voter-initiated ballot measure. The constitutional amendment avoids the separation of power challenge by stating that it supersedes any other potentially conflicting constitutional provisions.

As ethical violations continue to challenge the integrity of our state legislative institutions, it’s becoming increasingly important to understand and carefully consider how the separation of powers doctrine applies to ethics commissions.

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