See You in Court

The balance of power between governors and legislatures sometimes gets out of whack.

By Rich Jones and Brenda Erickson

During the past two years, legislatures and governors in several states have squared off in court. The issue? Separation of powers.

Arizona, New York, Iowa, Colorado and Wisconsin legislatures challenged their governors in the past two years over such issues as the item veto, appropriating federal funds and negotiating compacts. The rulings have so far favored the legislative branch 3-2.

Conflict between the two branches is a built-in feature of American government. Our nation’s founders created a system that divides authority among the legislature, governor and courts to eliminate concentrated power in one place. But separation of powers is not absolute, and the conflicts that arise are usually resolved through the political process. Recently they have evolved into legal confrontations.

AN ARIZONA EXAMPLE

In June 2003, the Arizona Legislature passed the general appropriations bill for FY 2004 that contained line items entitled “lump sum reduction” for five state agencies.

The effect was to give the governor discretion over $4.7 million in cuts contained in these agencies’ budgets. The governor vetoed the lump sum reduction lines, eliminating the budget cuts and, in effect, increasing the amounts appropriated by the Legislature.

The Legislature adjourned sine die without attempting to override the vetoes. But the Senate president, the House speaker and the majority leaders from each chamber filed suit in the Arizona Supreme Court challenging the governor’s use of the line item veto.

In December, the court ruled that the legislators lacked standing to bring the case and let the governor’s vetoes stand.

“We stayed out of it,” Arizona Chief Justice Charles E. Jones told the House Judiciary Committee in 2004. “It was strictly a political issue, an issue that should have been resolved by the branches.”

But Jim Drake, rules attorney for the House, says the court neglected to consider examples of previous court cases. The decision leaves open the question of what the Legislature can do to enforce limits on the governor’s line-item veto power, he says.

NEW YORK’S STRUGGLE

The New York Legislature has been sparring with the governor over the budget process and their respective powers for the past six years. Two cases currently ready for oral argument before the state’s highest court may more clearly define these powers.

The Legislature’s role in budget preparation was significantly changed by a 1927 amendment to the constitution which gave the executive a strong role in the initiation of the state’s budget. The amendment contains a “nonalteration” provision that states that the Legislature can alter appropriation bills only by striking or reducing an appropriation or proposing a new and different expenditure. However, the Legislature has challenged, in both cases, gubernatorial efforts to use the executive’s appropriation-proposing authority to change or invalidate existing state laws.

The Legislature amended three of the governor’s bills in the 1999 budget that did not involve appropriations, but contained policy directives relating to appropriations. Governor George Pataki used the item veto to remove the amendments. Assembly Speaker Sheldon Silver went to court arguing that the item veto only applies to appropriations.

In 2001, the governor’s budget contained language that would have circumvented existing laws. In passing the budget, lawmakers deleted or revised this language. Pataki sued the Legislature claiming it had violated the “nonalteration” provision.

The state appellate court ruled in the governor’s favor in both cases. It said that the governor can use the item veto to remove language in appropriations bills and that the Legislature can only make the adjustments described in the nonalteration provision. Both cases have been appealed.

The decisions “amount to a coronation of the governor,” says Silver. “The only role left for the elected representatives of the Legislature would be to plead for the people of our state before the king’s throne.”

The Legislature and governor were at odds over the budget once again during the 2003 legislative session. This time they resolved their differences out of court. The Legislature overrode all of Pataki’s 119 vetoes—the first time since 1982 that it overrode a governor’s veto.

IOWA’S POWER PLAY

A case before the Iowa Supreme Court involving the definition of appropriations bills and whether the governor can use the item veto to strike language in such bills was

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decided in the legislature’s favor in June.

“This case is huge for us,” says Speaker Christopher Rants. “It will forever change the relationship between the legislature and the executive.”

In a 2003 special session, the General Assembly passed two bills promoting economic development. One created the Grow Iowa Values Fund and laid out its administrative structure. It included tax reductions and changes in workers’ compensation and product liability laws—all favored by the legislative leadership, but opposed by the governor. The second law contained a $45 million appropriation for the fund.

The governor vetoed a number of provisions in the first bill, including many of those favored by legislative leaders. The speaker and the Senate majority leader filed suit to challenge the validity of the item vetoes.

A district court ruled in the governor’s favor, upholding his item vetoes. The leaders appealed.

“This was a policy bill, not an appropriations bill,” says Rants. “It contained policy objectives that we wanted and policy objectives the governor wanted. The only way to compromise was to meld the two together, but the governor tried to have it his way and leave the legislature out all together.”

In its amicus brief filed with the Iowa Supreme Court, the National Conference of State Legislatures argued that the district court erred in its interpretation of case law to broaden the definition of appropriations. It also asserted that the governor can veto only “items of appropriation,” a power that does not extend to policy language contained in appropriations bills. Without these limitations, the governor would have been able to intrude on the general policymaking and appropriation powers that are the constitutional prerogatives of the legislature.

COLORADO’S CASE

The Colorado General Assembly recently asked the state supreme court to resolve a dispute over its authority to appropriate federal funds received under the federal Jobs and Growth Tax Relief Reconciliation Act of 2003. Governor Bill Owens allocated about $36 million received under the act to various programs with budget shortfalls and certain one-time capital projects.

At issue was whether the funds have significant restrictions on how they can be spent, making them custodial in nature and not subject to the legislature’s appropriations powers. During the 2004 session, a bill defining the legislature’s power to appropriate federal funds passed the House and passed the Senate on second reading. The legislature

BUDGET BATTLES

Legislatures and governors are most likely to clash over their respective budget and oversight powers because that is where executive and legislative powers intersect. It is understandable then that recent court cases involve aspects of each.

The legislature has the exclusive power to appropriate, but in most states the executive formulates and submits a budget for legislative consideration. In proposing the budget, the governor acts in some ways as an appropriator.

In addition to proposing the budget, governors in 44 states have veto powers that allow them to delete sections or items in appropriations bills without rejecting the entire bill. The item veto was proposed as a tool to prevent “log rolling” in which special interest spending was included in omnibus budget bills to secure votes. It gives the governor more power and flexibility than that granted under traditional all-or-nothing veto provisions that allow only the entire bill to be vetoed.

Thad Beyle, University of North Carolina professor of political science and nationally recognized expert on governors, says that the greatest increase in individual gubernatorial powers from 1960 to 2003 was in their veto powers as more governors gained the item veto.

“Governors like the item veto and extend it as far as they can,” Beyle says. “The word is out among the governors, use the item veto or threaten to use it to get what you want.”

It is not surprising then that three out of five of the recent court cases between governors and legislatures involved the item veto.

Most state budgets do more than appropriate funds. Many also contain substantive policy, as well as legislative directives, on how the appropriated funds are to be spent. By inserting language setting conditions on appropriations and recommending changes in programs based on oversight, legislatures come close to performing the administrative functions that are the exclusive province of the executive branch. Governors instinctively reject legislatively imposed restrictions on their ability to run state government.

We may be seeing more of these cases now because the likelihood of conflict increases when the governor and the legislative majority are from different parties. Currently the number of states with divided governments—governors and majority control of the legislature in the hands of different parties—is near an all-time high. In addition, the recent tough economies facing states have highlighted partisan and philosophical differences over approaches to balancing budgets. Sometimes these differences cannot be resolved politically, and the parties turn to the courts.

In Arizona, Iowa, New York and Wisconsin, the governor and at least one chamber of the legislature are controlled by different parties. And in Colorado, although both chambers and the governor’s office are controlled by Republicans, the legislature sought to protect its considerable authority over the budget process.

Alan Rosenthal, legislative scholar at Rutgers University, finds that the differences among the states in the relative powers of the legislature and governor make it hard to generalize about trends. Governors may be gaining a bit more power because they can communicate their messages to the public better than legislatures with their numerous voices. He also finds that governors in the states with term limits have generally gained some power because of the increased turnover and lack of experience among legislators. “However, there is a rough balance of power between the legislature and governor in most states,” says Rosenthal. “The separation of powers still holds, and it works.”

—Rich Jones, NCIL
Partisan balance, legislative experience of the governor, regular and open communications, and respect for the institutional prerogatives of each branch help determine the nature of legislative-executive relations.

Oklahoma House Speaker Larry Adair has served with five governors in his 22 years in the Legislature. “It’s a plus when the governor has previous legislative experience,” he says. “They understand how the Legislature works and probably have more realistic expectations.”

But while previous legislative experience can give the governor a better understanding of the process, familiarity also can breed contempt. Memories of past conduct can be a barrier to working with someone in a new position.

Most observers stress the importance of open, frank and regular communications in building solid working relationships between the legislature and the executive.

“Good interbranch communication can minimize misunderstandings regarding motives and goals,” says Connecticut Senate Majority Leader Martin M. Looney. “This is especially important and difficult” in states like Connecticut with divided government.

“Honesty, integrity and trust bolster legislative-executive relations more than anything else,” says Steven James, clerk of the Massachusetts House. He says that in the early 1990s Governor William Weld began meeting weekly with the Senate president and speaker, a tradition that continues today. These meetings help improve cooperation between the branches. “Even when the legislature disagrees with the governor, and they often do,” says James, “it is at least helpful that the measures were discussed in a meeting among the legislative leaders and governor.”

“Legislators need to treat the governor with respect, but must balance that with their responsibility to do what is best for the state,” says Illinois Senator Donne Trotter.

“Friction occurs most often when the rules of engagement are not clearly defined, and the two branches are second guessing each other,” says Kelly Skidmore, senior legislative aide to Florida Senate Minority Leader Ron Klein. “Or when the rules have been established, but are changed in the middle of the game or are totally disregarded for political expediency.”

“Good legislative-executive relations must be based on a mutual recognition of the strengths and proper role of the branches,” says Looney.

—Brenda Erickson, NCSL

asked the Supreme Court to rule on the constitutionality of the bill.

“The most important power of the people’s legislative body is the power of the purse,” says Senate President John Andrews. “The joint legislative leadership felt strongly that we needed to protect the legislature’s prerogatives in the budget process and develop a baseline for future actions.”

The Colorado Supreme Court upheld the legislature’s authority to appropriate the federal money received under the jobs program, finding that the limited restrictions on their use excluded them from being considered custodial funds.

“I am satisfied with the decision,” Andrews says. “It is a good example of where the system worked—a dispute between two branches was refereed by the third branch as intended by the Constitution.”

AND IN WISCONSIN

Wisconsin’s Assembly speaker and Senate majority leader filed suit in the state supreme court in 2003, challenging the governor’s authority to negotiate gaming compacts with Indian tribes that did not provide for periodic legislative renewal. The court ruled in favor of the Legislature, stating that the governor “exceeded his authority when he agreed unilaterally to a compact term that permanently removes the subject of Indian gaming from the Legislature’s ability to establish policy and make law.” The court also ruled that the governor did not have the power to negotiate a compact that waives the state’s sovereign immunity because that is a policy decision that only the Legislature can make.

Generally, legislators want to work with the governor. Legislators also recognize that their ability to get their programs passed will go a long way in determining whether the public views them as successful.

“Most governors can get much of what they want from the legislature,” says Alan Rosenthal of Rutgers University, author of the new book Heavy Lifting: The Job of the American Legislature. “Governors who are willing to cut the legislature in on decision making and give it some power can be very effective in working with the legislature.”

Institutional commitment on the part of legislators is important to maintaining a balance of powers between the branches, according to Rosenthal. This is a particular problem in states with term limits where lawmakers tend to have less of an appreciation for the legislature’s institutional prerogatives.

Throughout American history there has been an ebb and flow of power and preeminence between the legislative and executive branches of government. While each branch has separate constitutional functions, the informal relationships that exist are important in maintaining the equilibrium over time. Occasionally the courts step in to sort out the differences.