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Colorado General Assembly v. Lamm

SUPREME COURT, STATE OF COLORADO

Case No. 84 SA 79

REPLY BRIEF
Appeal from the District Court of the City and County of Denver
Civil Action No. 82CV9345
Honorable HAROLD D. REED, Judge

THE COLORADO GENERAL ASSEMBLY,

Plaintiff-Appellee,

v.

THE HONORABLE RICHARD D. LAMM, Governor,

Defendant-Appellant.

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THE HONORABLE RICHARD D. LAMM, Governor,

Defendant-Appellant.

Governor Richard D. Lamm by his attorney Duane Woodard, attorney general for the State of Colorado, submits the following reply brief.

ARGUMENT

I.

THE COLORADO CONSTITUTION REQUIRES THE GOVERNOR TO FAITHFULLY EXECUTE CONSTITUTIONAL REQUIREMENTS, PARTICULARLY WHEN EXERCISING THE VETO POWER.

The general assembly's arguments in the answer brief are premised on certain mistaken assumptions of constitutional law which overlook principles enunciated by this court. In its zeal

for constitutional debate, the legislature also misstates the concerns of the executive branch which are raised in this appeal.

Article IV, section 2 of the Colorado Constitution vests the supreme executive authority of the state in the Governor and directs him to "take care that the laws be faithfully executed." In order to faithfully execute the highest laws of Colorado, the Governor necessarily must make determinations whether bills enacted by the legislature comply with the requirements of the Colorado Constitution. See Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978). A determination of what is constitutional may properly be made by officials in the two branches of government other than judicial. Hudson v. Annear, 101 Colo. 551, 75 P.2d 587 (1938). Of course, a Governor's determination of constitutionality is subject to final review by the judicial branch in a proper case. See Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125 (1892).

The Governor's obligation to uphold the requirements of the state constitution is particularly important when an appropriations bill passed by the general assembly is presented to him prior to becoming law, as required by article IV, sections 11 and 12 of the Colorado Constitution. The only practical tool that a Governor has to counteract unconstitutional legislation is the veto power which the state constitution authorizes him to exercise at that point in the legislative process.

The general assembly mistakenly assumes that an appropria-

tions bill is entitled to a presumption of validity in the form it is presented to the Governor after majority approval in the two houses. The Governor's item veto power is an express constitutional delegation of a portion of the legislative power. Stong v. People ex rel. Curran, 74 Colo. 283, 220 P. 999 (1923). If the veto power is exercised and sustained, a presumption of validity attaches to the legislation in its final enacted form. See e.g., Colo. Auto & Truck Wreckers Assoc. v. Dept. of Revenue, 618 P.2d 646 (Colo. 1980). What the general assembly overlooks is that the legislative process is not complete until the Governor has had an opportunity to exercise his veto.

II.

THE DOCTRINES OF STANDING AND JUSTICIABILITY ARE RULES OF SELF-RESTRAINT CREATED BY THE JUDICIARY AND NOT EXECUTIVE ENCROACHMENT.

In addition to arguing that the Governor may not make initial determinations concerning the constitutionality of legislative enactments, the general assembly contends that the Governor's positions on standing and justiciability are an attempt to usurp a judicial function. But the Governor argues only that the general assembly is subject to the same case and controversy requirement which the judicial branch applies to any other plaintiff.

The doctrines of standing and justiciability are

judicially-created rules. In Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1970) Chief Justice Erickson pointed out that the doctrine of standing arises from the Colorado Constitution's article III separation of powers and is supported by judicial self-restraint, based upon considerations of judicial efficiency and economy. 570 P.2d at 539.

By invoking the judicial branch's own rules of self-restraint, the Governor seeks neither to assume the constitutional role of the judiciary nor to preclude judicial review of executive decisions in a case brought by a proper party. Of the two opinions cited in the answer brief as examples of prior judicial review of executive vetoes, neither case involved a case or controversy. Both opinions addressed interrogatories brought before this court pursuant to the court's original jurisdiction under article VI, section 3 of the Colorado Constitution. See In Re Interrogatories, Senate Resolution No. 5, 195 Colo. 220, 578 P.2d 216 (1978); In Re Interrogatories of the Governor Regarding Certain Bills of the Fifty-first General Assembly, 195 Colo. 198, 578 P.2d 200 (1978).

The essence of the Governor's argument on standing is two-fold. The constitutional grant of the item veto power to the Governor is an express exception to the more general grant of the legislative power to the general assembly. Stong v. People ex rel. Curran, supra. Consequently the general assembly has no legal interest entitled to protection with respect to the Gover-

nor's exercise of that delegated portion of the legislative power. More significantly, the general assembly has suffered no actual injury because it sustained the challenged vetoes by failing to repass the vetoed provisions in the manner provided for by article IV, section 11 of the Colorado Constitution. Under these circumstances the judicial rule of self-restraint expressed in the doctrine of standing is properly served by dismissal of the complaint.1/

The general assembly also has failed to respond persuasively to the remaining questions of justiciability. The answer brief contends that the issues are justiciable because no partisan political question is involved. This is too narrow a view of the political question doctrine. Political questions are those best resolved in the political process of lawmaking and not by intervention of the judicial branch. This lawsuit, however, seeks to evade the normal processes of political decision-making which permit the legislature to repass legislation over a veto. That is precisely the situation which courts have declined to address in the absence of a real case or controversy. The answer brief attempts to distinguish the cases cited on this point in the opening brief by arguing that this case is brought by the general assembly as a body rather than by individual legislators. Answer brief, p. 12. Since the general assembly as a body has the sole power to override these vetoes (which no individual legislator may do) the case for judicial intervention is even weaker

in this case.

The general assembly's contention that the complaint raises justiciable issues simply because it asserts a constitutional question is an erroneous equation. As noted in the opening brief, a party may only raise a constitutional question to the extent that party is adversely affected by the alleged unconstitutional action. See Augustin v. Barnes, 626 P.2d 625 (Colo. 1981).

III.

THIS COURT SHOULD NOT REVERSE ITS PREVIOUS DECISIONS WHICH RECOGNIZE THAT THE GOVERNOR MAY ADDRESS UNCONSTITUTIONAL LEGISLATIVE ENACTMENTS BY USE OF THE ITEM VETO.

The principal issue raised by the arguments of the general assembly is whether this court should reconsider its prior decisions holding that an attack upon the propriety of the Governor's exercise of an item veto is precluded if the vetoed provisions are unconstitutional legislative enactments. Anderson v. Lamm, supra, MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972). In the MacManus case this court expressly declined to address the propriety of the item veto exercised by the Governor, stating:

> The appellees have made the argument that sec.2(d) /a provision which required legislative approval of the expenditure of federal funds/ was not an item subject to the veto power conferred by Colo. Const. art. IV, sec. 12, and the Attorney General has not taken issue. We do not reach that question in the light of our ruling that

> the limitation was void, irrespective of a veto.

179 Colo. at 222. This issue has significance for future executive vetoes even if this court should conclude that the Governor's determinations of unconstitutionality were incorrect with respect to these asterisked conditions.

The result reached in MacManus and Anderson rests on a sound foundation of constitutional principles. What the general assembly forgets is that a distinction must be made between permissible legislative restrictions imposed as part of an appropriation and those purported restrictions which are void as unconstitutional legislative enactments. See MacManus v. Love, supra. The Governor has never contended that the item veto power permits him to delete proper legislative conditions without striking an entire item.

The distinction between permissible conditions and unconstitutional restrictions was addressed by the Supreme Court of Louisiana in a decision upholding the authority of the Governor to exercise his item veto to strike unconstitutional provisions included in a general appropriations bill. Henry v. Edwards, 346 So. 2d 153 (La. 1977). Applying a constitutional item veto provision virtually identical to that in Colorado, the court distinguished between proper legislative conditions on expenditures and unconstitutional restrictions which are inserted in an appropriations bill in an attempt to avoid the Governor's veto power over

substantive legislation. Proper conditions are not subject to veto unless the expenditure itself is vetoed. Unconstitutional conditions require a different result, the court reasoned:

> The Governor's constitutional power to veto bills of general legislation (LA. Const. art. 3, sec. 18) cannot be abridged by the careful placement of such measures in a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing "items" of expenditure essential to the operation of government. The legislature cannot by location of a bill give it immunity from executive veto. Nor can it circumvent the Governor's veto power over substantive legislation by artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation. Otherwise, the legislature would be permitted to impair the constitutional responsibilities and functions of a co-equal branch of government in contravention of the separation of powers doctrine embodied in La. Const. art. 2, secs. 1 and 2. We are no more willing to allow the legislature to use its appropriation power to infringe on the Governor's constitutional right to veto matters of substantive legislation than we were to allow the Governor to encroach on the constitutional powers of the legislature. In order to avoid this result, we hold that, when the legislature inserts inappropriate provisions in a general appropriation bill, such provisions must be treated as "items" for purposes of the Governor's item veto power over general appropriation bills.

346 So. 2d 158 (emphasis added).2/

A significant constitutional problem arises if the general assembly may enact unconstitutional measures in an appropriation bill but the Governor is barred from drawing public attention to

those void measures through use of his item veto power. One alternative to the exercise of the veto would be for the Governor to advise the executive branch of his conclusion that certain provisions are void and unenforceable. This alternative would only lead to public confusion and substantial uncertainty in the administration of state government since the challenged legislative restrictions would remain as the published law of the state in the absence of a veto. State agency officials would be put to a choice between the decision of the chief executive and the demands of the legislature that the budget be administered exactly as enacted. Contradictory actions might be taken by administrative officials in reliance on conflicting positions. Members of the public would not be put on notice that a controversy existed concerning provisions in the appropriations bill.

The general assembly argues that the above analysis permits the Governor to inflict questionable determinations of unconstitutionality upon the legislature. Answer brief, p. 28. This argument overlooks the constitutional provision which empowers the general assembly to repass provisions over a gubernatorial veto. Colorado Constitution, art. IV, secs. 11, 12. That power provides a remedy to counter possible executive abuse of the veto. If the Governor is prohibited the use of the item veto, he has no comparable remedy to counter possible misuse of the legislative process by the general assembly. While the general assembly has the proverbial last bite of the legislative apple, it does not

have a constitutional right to enact laws by a majority vote. The general assembly must follow all the constitutionally prescribed procedures to enact legislation.

IV.

THE GOVERNOR DOES NOT SEEK TO AVOID PROPER LEGISLATIVE LIMITS ON THE EXPENDITURE OF CASH FUNDS.

At pages 24 through 26 of the answer brief, the general assembly argues that the Governor's true motive is to seek discretion to expend cash funds without legislative limitation. That argument seriously misrepresents the Governor's position.

The Governor does not question the constitutional authority of the legislature to make an appropriation by setting aside a specified amount of cash funds for a particular purpose. See People v. Kennehan, 55 Colo. 589, 136 P. 1033 (1913).3/ In the circumstances of this case, a legislative appropriation of a specified amount of cash funds for a particular purpose remains after the Governor has deleted the challenged asterisked conditions. The proper legislative goal of controlling expenditures for a particular program is left intact. The constitutional problem recognized by the Governor occurs because the general assembly attempts, by use of the asterisked conditions, to go beyond its proper role of making an appropriation. In addition, it directs the executive branch how to raise the cash funds which

the legislature has authorized for expenditure.

At pages 24 and 25 of the answer brief the general assembly states that its purpose in using the asterisked conditions is not simply to limit expenditures for a particular program, but rather to specify that a particular program is to be self-supporting. The asterisked conditions are not the proper way to achieve that purpose. Such earmarking of cash funds is properly done by substantive statutory legislation which has no place in the general appropriations bill. See e.g. section 33-1-116, C.R.S. (1983 Supp.) (that section creates the "wildlife cash fund" consisting of moneys received from wildlife license fees earmarked for designated purposes). In the absence of such specific statutory or constitutional authority, section 24-75-201, C.R.S. (1982) requires all funds received by state agencies to be credited to the general fund. The legislature may pursue its expressed goal of shifting the costs of certain programs to program users, but it may not accomplish that goal through the general appropriations bill. See Anderson v. Lamm, supra.

Where a statute is already on the books that earmarks specific cash funds for a particular purpose, the general assembly effectively controls executive expenditure of those funds by the statutory limitation itself coupled with the overall cash funds spending limit set out in the line item which specifies amount and purpose. But the general assembly goes further in the asterisked conditions, attempting to set precise limits on the

amount to be expended from each cash fund source regardless of how much cash will actually be raised by that source. Rather than placing an overall restriction on executive spending for a specified purpose, the asterisked conditions direct the executive as to which of several statutorily authorized activities it should administer in order to raise the cash funds it has been authorized to spend from each program. Such unreasonably narrow restrictions go beyond the legitimate use of the appropriation power and amount to an unconstitutional interference with the executive's responsibility to administer the budget and to perform its statutory responsibilities.

V.

THE GENERAL ASSEMBLY MAY NOT EVADE THE ITEM VETO POWER BY DRAFTING APPROPRIATION ITEMS IN THE GUISE OF ASTERISKED CONDITIONS.

The general assembly argues at pages 18 and 19 of the answer brief, that the asterisked conditions are not themselves "items" subject to veto. The district court disagreed, concluding that the components of the asterisked conditions were items subject to veto. As discussed in the opening brief, the court further ruled that the associated cash fund amount must be reduced to reflect the deletion of those amounts in the asterisked condition which were vetoed. See opening brief, pp. 23-25.

The general assembly makes contradictory arguments on this

point. On one hand, it argues that the purpose of each asterisked condition is to restrict amounts from a particular cash fund for costs related to that cash program. Answer brief, p. 26. On the other hand, it argues, these amounts are not "items" because the related purpose is not set out in the asterisked condition as well as in the related line item. Answer brief, p. 19. As the district court correctly recognized, the amounts specified in the asterisked conditions in fact are items.

By drafting the general appropriations bill with cash funding restrictions in asterisked conditions, the general assembly is attempting to force the Governor to either accept all of the restrictions on cash funds set out in the condition, or to give up the entire line item appropriation for the specified purpose. This is precisely the problem which the item veto was enacted to prevent. See Stong v. People ex rel Curran, supra. The question presented to this court is what constitutes, in the words of the Stong decision, "a single item, distinct, separate and indivisible." In the case of those asterisked conditions in which the general assembly has set forth specific dollar restrictions as components of a separate cash fund appropriation, each of those component amounts is a separate item, distinct, separate and indivisible.

The answer brief fails to address the problems which follow from the district court's reasoning that a veto of any component of the asterisked condition also requires a reduction in the re-

lated cash funds appropriation. Opening brief, pp. 24-25. These problems are illustrated by careful examination of exhibit A, following page 18 of the answer brief. In drafting this appropriation for the Health Department, the general assembly chose to make both a total cash funds appropriation and a separate asterisked condition setting forth an enumeration of items within that total cash fund appropriation. By vetoing the asterisked condition and leaving the related line item intact, the Governor has left a separate item appropriation which will effectively serve its intended purpose. This is a proper exercise of the item veto power. See Brault v. Holleman, 217 Va. 441, 230 S.E.2d 238 (1976).

The district court's reasoning, however, would require the Governor to delete the cash fund appropriation of $2,293,236 on exhibit A, but leave intact the general fund appropriation of $1,893,503 contained in the same line. The Governor would be effecting precisely the type of partial veto disapproved in the Stong case.

The general assembly elected to draft these provisions in such a way that a veto of the components of the asterisked conditions could be accomplished and leave an overall cash fund appropriation for the specified purpose. The legislature should not now be heard to complain that this drafting permitted the Governor to exercise his item veto power to delete the more restricted enumeration while retaining the broader appropriation which was

also included in the bill.4/

At page 21, the general assembly appears to concede that the Governor properly exercised his item veto with respect to H.B. 1261, the supplemental appropriations bill. As discussed at pages 25-28 the Governor intended simply to veto an amendment changing the spending limit on the Highway Users Tax Fund, and thereby leave in effect the limit enacted originally. The district court erred by not recognizing that action as a proper exercise of the item veto.

CONCLUSION

The most serious question presented by this appeal is the extent to which the general assembly may exercise creative draftsmanship in a general appropriations bill to avoid limits otherwise placed on its powers by the Colorado Constitution. The answer is not an easy one. It requires a careful examination of each of the Governor's vetoes and the effect of each of the legislative enactments which he struck.

The use of asterisked conditions to restrict appropriations of cash funds is not a long-established budgeting mechanism. As recently as 1960, the Long Bill neither contained any asterisked conditions, nor made any distinction between general funds and cash funds for the appropriation process. See 1960 Colorado Session Laws, ch. 11, p. 40.

With the increasing complexity of the state budget, the general assembly has exercised considerable ingenuity in extending its power over the state's purse strings through use of the general appropriations bill. As this court has had occasion to note in the past, that artful draftsmanship may sometimes overreach the proper limits of the general assembly's powers.

It must be remembered that the Colorado Constitution provided for a delegation of a portion of the legislative power to the Governor to provide a countervailing force to the general assembly's legislative initiative. The lesson of the Stong case is that the exercise of the item veto power should be assessed in light of the purposes for which it was delegated to the Governor and not defined in a mechanistic fashion such as that employed by the district court below. When properly evaluated, the Governor's vetoes should be upheld.

1/ The general assembly further asserts that the bringing of this lawsuit was properly authorized by a joint resolution of the two houses, which was not first presented to the Governor as required by article V, section 39 of the Colorado Constitution. The legislature contends that the presentment requirement does not apply because this lawsuit relates solely to the transaction of the business of the two houses. Answer brief at p. 14. The initiation of a lawsuit attacking the constitutionality of certain actions of the Governor is a matter involving all three branches of government and is not a matter relating solely to the transaction of the business of the two legislative houses. Cf. Collier & Cleaveland Lithographing Co. v. Henderson, 18 Colo. 259, 32 P. 417 (1893). The general assembly felt it necessary to enact a statute to empower the committee on legal services to retain legal counsel to represent the general assembly in litigation. Section 2-3-1011, C.R.S. (1973). The more important decision to bring a lawsuit against a co-equal branch of government

should not be left to a resolution without being presented to the Governor. As a consequence, there is no authority for this lawsuit to be brought in the name of the general assembly and the district court erred by not dismissing the complaint.

2/ The Superior Court of New Jersey, Appellate Division, recently resolved a similar contoversy in a somewhat different manner. Construing a constitutional provision which gave the Governor power to veto "items of appropriation of money," the court concluded that this power did not permit the Governor to veto a condition attached to an appropriation without vetoing the appropriation itself. The court then went on to point out that the restriction on the item veto power was premised on the expectation that the legislature would include only proper items of appropriation or reasonable conditions, and not conditions offensive to the constitution. The court stated:

> The Governor's attempted veto, although ineffective, was understandable in the circumstances. His act called the attention of the public to the fact that the Legislature had exceeded its powers in acting as it did.
>
> The Legislature cannot be heard to complain of this action. None of its rights or powers has been involved. The reverse is true. The legislature has no power to pass laws violative of constitutional mandates, nor to insist that same be employed.

Karcher v. Kean, 190 N. J. Super. 197, 462 A.2d 1273 at 1281 (1983). The court then concluded that conditions in the appropriations bill which attempted to dictate to the Governor how he "should carry out his constitutional responsibility to execute the provisions of the appropriation act" were unconstitutional and therefore void. 462 A.2d at 1282.

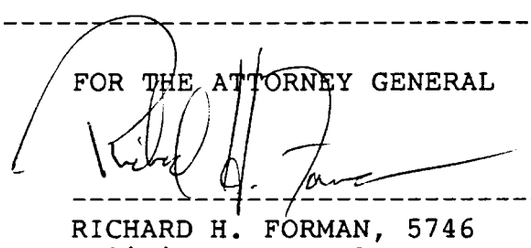
3/ In the Kennehan case this court quoted the following definition set out in a Nebraska case entitled State v. Moore:

> /T/o "appropriate" is to set apart from the public revenues a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other.

136 P. at 1306.

4/ The district court's ruling would result in even more problems if the Governor vetoed some, but not all, of the components of the asterisked condition. In such a case, the Governor would have to reduce the related cash funds total appropriation while retaining the related general fund appropriation.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 10th day of August 1984, addressed as follows:

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