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Separation of Powers, Supreme Court, Appellate Division, Third Department: Dorst v. Pataki

SEPARATION OF POWERS

U.S. CONST. art. I, § 1:

All legislative Powers herein granted shall be vested in a Congress . . . .

U.S. CONST. art. II, § 1:

The executive Power shall be vested in a President . . . .

N.Y. CONST. art. III, § 1:

The legislative powers of this state shall be vested in the senate and assembly.

N.Y. CONST. art. IV, § 1:

The executive power shall be vested in the governor . . . .

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Dorst v. Pataki[1]
(decided February 6, 1997)

In January of 1995, Governor Pataki issued an executive order preventing prison inmates convicted of violent crimes from participating in temporary release programs.[2] Five inmates at Albion Correctional Facility in Orleans County sought a declaratory judgment[3] to render the order unconstitutional.[4]

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[1] 228 A.D.2d 4, 654 N.Y.S.2d 198 (3d Dep't), *aff'd*, 90 N.Y.2d 696, 687 N.E.2d 1348, 665 N.Y.S.2d 65 (1997).

[2] *Id.* at 5, 654 N.Y.S.2d at 199.

[3] N.Y. C.P.L.R. 7801 (McKinney 1997). This rule states that "[r]elief previously obtained by writ of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article." *Id.* The issues to be

While the matter was proceeding, a state statute was amended to allow the governor to exclude inmates from programs with such orders.[5] Plaintiffs argued that this amendment violated the separation of powers provided for by the Federal[6] and State[7] Constitutions.[8] The trial court declared the executive order unconstitutional, but the amendment constitutional,[9] and the Appellate Division, Third Department, affirmed.[10]

Soon after taking office, Governor Pataki issued Executive Order No. 5.[11] Since his administration had pledged to protect the people of New York from violent felons,[12] he ordered the

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determined under this action include "whether the body or officer proceeded . . . without or in excess of jurisdiction." N.Y. C.P.L.R. 7803 (McKinney 1997).

[4] *Dorst*, 228 A.D.2d at 5, 654 N.Y.S.2d at 199. Plaintiffs sought this declaration on the grounds that the executive order contradicted the eligibility requirements that the legislature had promulgated, thereby violating separation of powers. *Id.*

[5] *Id. See* N.Y. CORRECT. LAW § 851 (McKinney 1997).

[6] U.S. CONST. art. I, § 1. This section provides in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress . . . ." *Id.* "The executive Power shall be vested in a President . . . ." U.S. CONST. art. II, § 1, cl. 1.

[7] N.Y. CONST. art. III, § 1. This section provides in pertinent part that "[t]he legislative powers of this state shall be vested in the senate and assembly." *Id.* "The executive power shall be vested in the governor . . . ." N.Y. CONST. art. IV, § 1. "He shall expedite all measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed." N.Y. CONST. art. IV, § 3.

[8] *Dorst*, 228 A.D.2d at 5, 654 N.Y.S.2d at 199.

[9] *Id.* at 5-6, 654 N.Y.S.2d at 199.

[10] *Id.* at 6-7, 654 N.Y.S.2d at 200.

[11] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.5 (1995): This title provides for: "Ordering that the Commissioner of the Department of Correctional Services bar the transfer of certain inmates sentenced as violent Felony Offenders to Temporary Release programs and residential Treatment Facilities." *Id.* This order was revoked and superseded by Executive Order No. 5.1, signed October 13, 1996. *Id.*

[12] *Id.* "This administration has pledged to protect the personal freedoms of innocent law-abiding citizens and eliminate temporary release for dangerous felons . . . ." *Id.* The Governor also stated that a violent felon who has "not served his or her full sentence is a threat to public safety and welfare." *Id.*

Commissioner of Correctional Services to enact or retract any rule as necessary to:

> prevent the future transfer to any temporary release program or residential treatment facility of any inmate sentenced as a violent felony offender convicted of a crime involving the infliction of serious physical injury, the use or threatened use of a dangerous instrument, or the use or threatened use of a deadly weapon.[13]

At the time of the order, temporary release programs were governed by statute.[14] Plaintiffs had either been eligible for temporary release, or had already been approved for it, but they all became ineligible under the executive order.[15] Therefore, the plaintiffs brought an Article 78 proceeding against that order.[16]

While the action was in progress, Correction Law § 851(2) was amended to allow the Governor to make such orders.[17] The Orleans County Supreme Court converted the Article 78 proceeding into a declaratory judgment action and declared Executive Order No. 5 unconstitutional, because it imposed restrictions on temporary release programs that conflicted with

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[13] *Id.*

[14] N.Y. CORRECT. LAW § 851(2) (McKinney 1995). This statute states that inmates eligible for temporary release who have been convicted of violent crimes require written approval from the Commissioner of Correctional Services in order to be admitted into temporary release programs. *Id.*

[15] *Dorst*, 228 A.D.2d at 5, 654 N.Y.S.2d at 199.

[16] *Id.*

[17] 1995 N.Y. Laws ch. 3, sec. 805, § 29 (1995). This amendment provided that:

> The governor, by executive order, may exclude or limit the participation of any class of otherwise eligible inmates from participation in a temporary release program. Nothing in this paragraph shall be construed as to affect either the validity of any executive order previously issued limiting the participation of otherwise eligible inmates in such program or the authority of the commissioner of the department of correctional services to impose appropriate regulations limiting such participation.

Id. *See* N.Y. CORRECT. LAW 851(2) (McKinney 1997). This amendment went into effect September 1, 1997. *Id.*

the Legislature's eligibility requirements.[18] However, it held the amendment to Correction Law § 851(2) was a "constitutional delegation of legislative authority to the Executive," and the plaintiffs appealed that holding.[19]

In their arguments before the Appellate Division, Third Department, plaintiffs asserted that the Legislature improperly gave the executive branch the authority to remove eligible inmates from the temporary release programs, thus violating the separation of powers doctrine.[20] The court rejected that claim holding that neither the Federal Constitution nor the New York State Constitution forbids delegating the power to administer the laws of the Legislature as long as that administrative power is limited by appropriate safeguards.[21] In reaching its holding, the court relied on *Levine v. Whalen*[22] providing that delegation of administrative discretion was not prohibited, so long as the legislature appropriately limited that discretion.[23]

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[18] *Dorst*, 228 A.D.2d at 5-6, 654 N.Y.S.2d at 199.

[19] *Id.* at 6, 654 N.Y.S.2d at 199-200. Only three out of the five original plaintiffs joined in the appeal, since two were already approved for temporary release, and the invalidation of the executive order rendered their claims moot. *Id.* at 6, 654 N.Y.S.2d at 200 n.1.

[20] *Id.* at 6, 654 N.Y.S.2d at 200.

[21] *Id.*

[22] 39 N.Y.2d 510, 349 N.E.2d 820, 384 N.Y.S.2d 721 (1976).

[23] *Id.* at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723. Gerald Levine, operator of the Westmere Convalescent Home was charged with violating the state's Public Health Law. *Id.* at 514, 349 N.E.2d at 822, 384 N.Y.S.2d at 722-23. The State Commissioner of Health ordered the operating system to be revoked, and for Levine to arrange for connection of a fire alarm system to the home, inspection by the local fire department, and for everything necessary to cease operations by the assigned date. *Id.* at 514, 349 N.E.2d at 822, 384 N.Y.S.2d at 723. On appeal, the Appellate Division declared the Public Health statute in question to be unconstitutional because it delegated legislative powers to the health department without adequate safeguards, and that the regulations adopted were arbitrary and unreasonable. *Id.* at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723. The Court of Appeals held that the Legislature may only assign discretion to an administrative organization when it limits the area in which that discretion can operate, and provides limits to its use, as is reasonable for the area in question. *Id.*

In response, plaintiffs argued that the delegation in the instant case contained no safeguards at all, and gave the Governor the authority to exclude from temporary release programs any inmates, for any reason.[24] However, the *Dorst* court held that the safeguards are part of the statutory scheme in question, citing to *Cavaioli v. Board of Trustees of S.U.N.Y.*,[25] which held that even when a statute doesn't explicitly provide standards for the administrative agency to abide by, sufficient standards may be found in related statutes.[26] Likewise, the entire statutory scheme of Article 26 of the Correction Law[27] provides that determinations for these programs shall be made with "consideration for the safety of the community and the welfare of the inmate."[28]

Lastly, plaintiffs argued that such standards were too general, and therefore unconstitutional.[29] The *Dorst* court also rejected this contention, relying a previous Court of Appeals case.[30] In *Boreali v. Axelrod*,[31] the Court of Appeals held that no matter how facially broad a grant of authority is, an administrative agency is forbidden to use its power to enact its own laws to

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[24] *Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200.

[25] 116 A.D.2d 689, 498 N.Y.S.2d 7 (2d Dep't 1986).

[26] *Id.* at 689, 498 N.Y.S.2d at 8. Employees of the S.U.N.Y. College at Farmingdale challenged a statute that gave the S.U.N.Y. trustees the right to determine salary schedules for employees, and the trustees used the schedule to differentiate employees at two-year schools from those at four-year schools. *Id.* The Appellate Division, Second Department, held that even though EDUC. LAW § 355-a didn't provide salary determination standards for the trustees to conform to, sufficient standards for that purpose could be found in EDUC. LAW §§ 354 and 355. *Id.* Therefore, the delegation was constitutional. *Id.*

[27] *Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200. The article is titled *Temporary Release Programs For State Correctional Institutions.* N.Y. CORRECT. LAW §§ 851-61 (McKinney 1995).

[28] CORRECT. LAW § 852(1) (McKinney 1995).

[29] *Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200.

[30] *Id. See* Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987).

[31] *Id.* The Public Health Council was held to have overstepped its authority when it issued its own code that regulated smoking in public places. *Id.* at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466. The council weighed the concerns of smokers and non-smokers, and reached its own conclusions and compromises without legislative approval. *Id.*

correct any evils it perceives,[32] but it could not say that the "broad enabling statute" was an unconstitutional delegation per se.[33]

The Court of Appeals came to a similar conclusion in *Sullivan County Harness Racing Association v. Glasser*,[34] where the Legislature granted broad powers to the State Harness Racing commission, including the power to issue licenses for any condition the commission felt was necessary.[35] The Court of Appeals held that there was no constitutional violation, since the commission could only issue the licenses when it determined it to be necessary, or in the public's interest.[36]

Under the Federal Constitution, the state has the authority to decide whether the legislative, executive, and judicial branches of

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[32] *Id.* at 9, 517 N.E.2d at 1353, 523 N.Y.S.2d at 468.

[33] *Id.* Nevertheless, the court held that the agency stretched the statute in question beyond its intended reach when the agency used it to write a code that embodied its own vision of public policy. *Id.* The court also cited to Levine v. Whalen, 39 N.Y.2d 510, 349 N.E.2d 820, 384 N.Y.S.2d 721 (1976), as authority that the Legislature cannot delegate its law-making duties to other branches of government, but it can delegate power to administrative agencies, with appropriate safeguards. *Id.* at 10, 517 N.E.2d at 1354, 523 N.Y.S.2d at 468-69. However, it still held that the actions taken, even though they were intended to find "the proper balance among health concerns," served the legislative function. *Id.* at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470. The dissent argued that the actions were well within the authority of the Public Health Council, since the Legislature had reserved this area for this agency 75 years before. *Id.* at 16, 517 N.E.2d at 1358, 523 N.Y.S.2d at 473 (Bellacosa, J., dissenting). Since the Legislature could not have predicted the need for regulation in many areas, it was wise to grant flexible authority to the agency that was expert in this field so it could enact the needed regulations, "free from the sometimes paralyzing polemics associated with the legislative process." *Id.* at 17-18, 517 N.E.2d at 1359, 523 N.Y.S.2d at 473 (Bellacosa, J., dissenting).

[34] 30 N.Y.2d 259, 283 N.E.2d 603, 332 N.Y.S.2d 622 (1972). The State Harness Racing Commission, under the authority granted by statute, conditioned a racing license to Sullivan County as long as they were not televised. *Id.* at 275, 283 N.E.2d at 605-06, 332 N.Y.S.2d at 625.

[35] *Id.* at 276, 283 N.E.2d at 606, 332 N.Y.S.2d 626.

[36] *Id.* at 277, 283 N.E.2d at 606-07, 332 N.Y.S.2d 626. The court therefore held that the Legislative grant to the Commission of "very broad power" was proper. *Id.* at 277, 283 N.E.2d at 607, 332 N.Y.S.2d at 627.

its own government should be kept entirely separate, or may be delegated as it sees fit.[37] If a state decides to blend the powers of different departments in the same officials, it does not violate the constitutional guarantee that every state shall have a republican government.[38] Under the New York State Constitution, the borderlines of the three branches are not definitely drawn, so separation of powers is not absolute, and cannot always be rigidly applied.[39] An executive agency cannot create legislation, but it tends to be difficult to draw the line that separates legislative power from administrative power to enact regulations.[40]

Extending this uncertain area to the instant matter, the Appellate Division, Third Department, affirmed the lower court's decision in holding that the amendment to Correction Law § 851(2) was a constitutionally legitimate delegation of power to the executive branch.[41] While the area is admittedly hazy, the legislative branch has never been prohibited from delegating authority to the executive branch to administer the Legislature's laws.[42] The Legislature is only required to institute proper limits and safeguards on the authority it delegates to the executive branch or administrative agency,[43] and those safeguards need not be specific to be upheld as constitutional.[44] The original order, Executive Order No. 5,[45] was declared unconstitutional because it directly contravened a state statute.[46] However, once the Legislature amended that statute to allow for such orders,[47] the Governor was then granted constitutionally permissible authority to issue such orders as long as they were consistent with the law

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[37] 20 N.Y. JUR. 2D *Constitutional Law* § 154.

[38] U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." *Id.*

[39] 20 N.Y. JUR. 2D *Constitutional Law* § 153.

[40] 20 N.Y. JUR. 2D *Constitutional Law* § 157.

[41] Dorst v. Pataki, 228 A.D.2d 4, 6-7, 654 N.Y.S.2d 198, 200 (3d Dep't 1997).

[42] *Id.* at 6, 654 N.Y.S.2d at 200.

[43] *Id.*

[44] *Id.*

[45] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.5 (1995).

[46] *Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200.

[47] N.Y. CORRECT. LAW 851(2) (McKinney 1997).

enacted.[48] Thus, the Governor reinstated his order in Executive Order No. 5.1,[49] since the amendment was deemed constitutional.[50]

Therefore, New York courts have taken a more functional than literalist approach to separation of powers cases. The New York courts seem to be adopting the holding of *Mistretta v. United States*,[51] which allowed Congress to delegate authority to the other two branches of the federal government, because the legislature cannot realistically be expected to provide for everything themselves.[52] Also, the courts are adopting the federal requirement that the Legislature simply provide clear guidelines, that prevent its delegation from exceeding certain boundaries.[53] Additionally, New York courts are permitting the legislative branch to continue its domain over primary lawmaking duties by correcting any defects in their own legislation by amendment. In this instance, the Legislature specifically gave the governor authority to exclude eligible inmates from temporary release programs, using only his vested executive powers to implement that exclusion.[54] Therefore, the delegation was permissible.[55]

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[48] *See Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200.

[49] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.5 (1995).

[50] *See Dorst*, 228 A.D.2d at 6-7, 654 N.Y.S.2d at 200.

[51] 488 U.S. 361 (1989). Congress had created a Sentencing Commission as "an independent commission in the judicial branch" to promulgate guidelines for sentences for certain federal crimes. *Id.* at 362-68. The Court held that the Commission did not violate separation of powers, and was not granted "excessive legislation discretion." *Id.* at 371.

[52] *Id.* at 372. In our complex society, Congress cannot fulfill its obligations without delegating its power. *Id.* Congress cannot generally assign its lawmaking power to either of the other two branches. *Id.* However, the nondelegation doctrine does not prevent Congress from procuring the assistance of those branches, so long as it lays down the specific objective that the delegation is to achieve, and sets the boundaries that the body authorized to exercise that authority must stay within. *Id.*

[53] *Id.* at 374.

[54] *Dorst*, 228 A.D.2d at 6, 654 N.Y.S.2d at 200.

[55] *Id.* at 6-7, 654 N.Y.S.2d at 200.