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Article 66

1996

Separation of Powers

SUPREME COURT

ALBANY COUNTY

Day v. Pataki[41]
(decided October 23, 1995)

The inmate-petitioner sought an order directing Governor Pataki to rescind and annul Executive Order No. 5,[42] which prevented the petitioner from participating in a temporary release program, on the grounds that it violated separation of powers doctrine principles implied by the New York State Constitution.[43] Since the legislature granted the Commissioner of the Department of Correctional Services the power to "review and evaluate all existing rules, regulations and directives relating to current temporary release programs . . . [which may include] selection criteria, supervision and procedures for the disposition of each application,"[44] the court concluded that Executive Order No. 5 did not usurp the power of the legislature and, thus, did not violate the State Constitution.[45]

Governor Pataki, on January 24, 1995, signed Executive Order No. 5, which prohibits inmates from participating in temporary release programs if they were convicted of violent felonies and other listed violent crimes. Shortly thereafter, the Department of

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41. 633 N.Y.S.2d 747 (Sup. Ct. Albany County 1995).

42. *Id.* at 748. Executive Order No. 5 provides in pertinent part:

> I, George E. Pataki, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order the Commissioner of the Department of Correction Services to promulgate, modify, adopt or rescind any rules or regulations, or emergency rules or regulations, as may be necessary from time to time 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 . . . .

Id.

43. *Id.* at 747-48.

44. *Id.*

45. *Id.* at 748 (quoting N.Y. CORRECT. LAW § 852(1) (McKinney 1987)).

Corrections amended the rule in question[46] to provide: "[A]n inmate is barred from participating in the temporary release program if the inmate's current commitment is for a crime involving either the use or threatened use of a deadly weapon or a dangerous instrument or the infliction of serious physical injury."[47] Consequently, the petitioner's application to participate in an industrial training program was denied because he was serving a sentence for an offense included in Executive Order No. 5.[48] He commenced an Article 78 proceeding alleging that Executive Order No. 5 violated the doctrine of separation of powers in that it "is an attempt to create or change the law, which is the sole responsibility of the Legislature."[49]

Corrections Law section 852(1) delegates to the Commissioner of the Department of Correctional Services the power to form and administrate temporary release programs including the power to provide rules with respect to eligibility criteria.[50] Applying *Clark v. Cuomo*,[51] the court explained that "in referring to the doctrine of separation of powers: 'It is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives that the doctrine of separation is violated.'"[52] The court

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46. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c) (1995).

47. *Day*, 633 N.Y.S.2d at 748.

48. *Id.*

49. *Id.*

50. *Id.* N.Y. CORRECT. LAW § 852(1) provides:

> The Commissioner, guided by consideration for the safety of the community and the welfare of the inmate, shall review and evaluate all existing rules, regulations and directives relating to current temporary release programs and consistent with the provisions of this article for the administration of temporary release programs shall . . . promulgate new rules and regulations for the various forms of temporary release. Such rules and regulations shall reflect the purposes of the different programs and shall include but not be limited to selection criteria, supervision and procedures for the disposition of each application.

Id.

51. 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985).

52. *Day*, 633 N.Y.S.2d at 748 (quoting Clark v. Cuomo, 66 N.Y.2d at 189, 486 N.E.2d at 797, 495 N.Y.S.2d at 939 (1985)). In *Clark*, the petitioner claimed that an executive oOrder, which established a program making voting registration forms and assistance available at state agencies, violated the

explained that since the legislature has expressly granted the Commissioner with the authority to evaluate and apply all rules relating to the temporary release program, Executive Order No. 5 does not usurp legislative domain nor is it inconsistent with legislative intent.[53] In conclusion, Governor Pataki's Executive Order No. 5 does not violate the doctrine of separation of powers since it is consistent with legislative policy.[54]

Dorst v. Pataki[55]
(decided October 9, 1995)

Five inmates[56] at the Albion Correctional Facility in Albion, New York, on behalf of themselves and all others similarly situated, brought an Article 78 proceeding[57] against Governor

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doctrine of separation of powers. *Clark*, 66 N.Y.2d at 186-87, 486 N.E.2d at 795, 495 N.Y.S.2d at 937-38. The court, rejecting this claim, held that since the legislature granted the State Board of Elections the power to encourage voter participation and that voter registration forms should be readily available, the executive order did not "represent[] a 'nullification' of legislative action." *Id.* at 190, 486 N.E.2d at 798, 495 N.Y.S.2d at 940 (citation omitted).

53. *Day*, 633 N.Y.S.2d at 748.

54. *Id.*

55. 633 N.Y.S.2d 730 (Sup. Ct. Albany County 1995).

56. Two of the five inmates, Antoinette Ferrer and Miriam Rodriquez, were approved for the temporary work release program prior to the signing of Executive Order No. 5. *Id.* at 737.

57. Generally, an article 78 proceeding is appropriate to determine whether a statute is being applied in an unconstitutional way. *Id.* at 732. *But see* Allen v. Blum, 58 N.Y.2d 954, 956, 227 N.E.2d 68, 68, 460 N.Y.S.2d 520, 521 (1983); Zuckerman v. Board of Educ., 44 N.Y.2d 336, 343-44, 376 N.E.2d 1297, 1301, 405 N.Y.S.2d 652, 656 (1978); Kovarsky v. Housing and Development Administration, City of N.Y., 31 N.Y.2d 184, 191-92, 286 N.E.2d 882, 885, 335 N.Y.S.2d 383, 387-88 (1972). These cases stand for the proposition that the court of appeals has uniformly held that it is proper to convert such a proceeding to a declaratory judgment action where the "constitutionality of a statute is at issue, or where petitioners seek review of a continuing policy." Accordingly, the court in this case exercised its discretion and converted the proceeding into a declaratory judgment action. *Dorst*, 633 N.Y.S.2d at 732.