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SEPARATION OF POWERS OVERVIEW

Prepared for the Law, Justice, and Indian Affairs Interim Committee
by Gregory J. Petesch

The separation of powers doctrine is explicitly provided for in Article III, section 1, of the Montana Constitution. It provides:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The general rule in Montana is that the constitution is a limit on rather than a grant of legislative authority. See State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916), and State ex rel. DuFresne v. Leslie, 100 Mont. 449, 50 P.2d 959 (1935). Under this general rule, the Legislature is free to act in any lawful manner in any area that is not constitutionally restricted. Each individual legislator is able to bring forward any proposal that the legislator chooses to pursue. However, statutes are effective only to the extent that they do not violate the United States or Montana Constitutions. The Judicial Branch has the authority to declare invalid the actions of coordinate branches of government, including the Legislature. That principle of law is firmly entrenched under the analysis contained in Marbury v. Madison, 5 U.S. 137 (1803), and that holding remains a cornerstone of our system of government. The Marbury decision also embodies the principle that a judicial determination that a legislative action is unconstitutional renders the legislative action unenforceable. Unlike the Legislature, the judiciary may act on an issue only when a case or

controversy is brought before it. The determination of which issues to consider or which legislation to challenge is determined by the litigants rather than the judges.

There are judicial decisions in Montana that are premised upon the separation of powers doctrine embodied in Article III, section 1, of the 1972 Montana Constitution and carried forward from Article IV, section 1, of the 1889 Montana Constitution. The Montana Supreme Court has stated that the purpose of the separation of powers doctrine is to constitute each branch as an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other and may prevent the tyranny and oppression that would be the result of a lodgment of all power in the hands of one body. State ex rel. Smith v. District Court, 50 Mont. 134, 145 P. 721 (1914). In Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924), the Montana Supreme Court articulated the general rule that the powers of state government are reposed in three departments. If a power is reposed in one department, the other two may not encroach upon or exercise that power, except as expressly directed or permitted in the constitution. However, the separation of the government into three branches does not mean that there may be no common link of connection or dependence, but only that the powers properly belonging to one may not be exercised by the others. State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913).

The area of separation of powers that most often involves the Legislature is the area of an alleged unlawful delegation of legislative authority. When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. The provisions of the statutes must be sufficiently clear, definite, and certain to enable the agency to know its rights and obligations. Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977). Laws creating legislative interim councils do not violate the doctrine of separation of powers required by the Montana Constitution by delegating authority to those entities. State ex rel. James v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 Mont. 275, 274 P.2d 611 (1954). A statute empowering the Legislative Finance Committee to approve budget amendments was declared invalid as an unconstitutional delegation of legislative power since this power was properly exercisable only by either the entire Legislature or an executive officer or agency, not by an interim committee. State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975). Generally speaking, the power of appointment is an executive function that cannot be delegated to the judiciary. Application of O'Sullivan, 117 Mont. 295, 158 P.2d 306 (1945). Because of the division of governmental powers into three branches, neither a District Court nor the Supreme Court may substitute its discretion for the discretion reposed in boards and commissions by legislative acts. Peterson v. Livestock Commission, 120 Mont. 140, 181 P.2d 152 (1947).

The separation of powers between the Legislative and Judicial Branches has also been construed. What is often characterized by the Legislative Branch as judicial activism is viewed by the Judicial Branch as judicial independence. Judicial independence is protected by provisions such as Article VII, section 7, of the Montana Constitution establishing terms of office for judges and providing that judicial salaries may not be diminished during a term of office. Under the separation of powers doctrine, the Legislative Branch of government is without constitutional authority to limit the Judicial Branch of government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction. In Coate v. Omholt, 203 Mont. 488, 662 P.2d 591, 40 St. Rep. 586 (1983), the Supreme Court struck down a statute that restricted a judge's pay if decisions were not rendered within statutorily prescribed periods. The Court held that the time limits within which judicial decisions must be rendered were a sphere of activity so fundamental and necessary to a court that to divest it of its absolute control would be to make meaningless the very phrase "judicial power". A statute dealing with disqualification of judges did not violate the separation of powers provision in that it did not impinge upon the existence or supremacy of the judicial system or alter its jurisdiction or duties but was a reasonable manner of providing a fair trial for all litigants. State ex rel. Peery v. District Court, 145 Mont. 287, 400 P.2d 648 (1965). Courts will also inquire into legislative findings for the justification of a legislative decision in enacting a statute. In State ex rel. Goodman v. Stewart, 57 Mont. 144, 187 P. 641 (1920), the Supreme Court construed a legislative declaration that an emergency existed. Under the 1889 Montana Constitution, an emergency act necessary for the immediate preservation of the public peace and safety was immune from a referendum of the people. The Court held that the legislative declaration of an emergency was not conclusive. The Court stated that the question, backed by facts, of whether the act was within the authority of the Legislature was a judicial one determinable by the courts.

It is in the area of determining the constitutionality of legislation that the Legislative Branch most often finds frustration with the Judicial Branch. In this context, it is important to remember that the 1972 Montana Constitution is a relatively new document and that several of its provisions have not been subject to judicial interpretation. In this light, I will examine some recent or pending decisions.

In Montana Environmental Information Center v. Department of Environmental Quality, 1999 MT 248, ___ Mont. ___, ___ P.2d ___, 56 St. Rep. 964 (1999), the Montana Supreme Court held that to the extent that section 75-5-317(2)(j), MCA, allows discharges of water from watering well or monitoring well tests, which degrade high quality waters without review, the statute violated Article II, section 3, and Article IX, section 1(1) and 1(3), of the Montana Constitution. Those provisions require the state to maintain the current quality of the environment. The Court found that the constitutional framers intended Article II, section 3, and Article IX, section 1, of the Montana Constitution to be interrelated and interdependent. The Court held that

state action or private action that implicates either constitutional section will be subject to a strict scrutiny analysis. Under a strict scrutiny analysis, the state must show a compelling state interest for its action, show that the action is closely tailored to effectuate that interest, and show that the action is the least onerous path that can be taken to achieve the state's objective. The Court also concluded that section 75-5-303, MCA, establishing a nondegradation policy for state water, is a reasonable legislative implementation of the constitutional mandate and that to the extent that section 75-5-317(2)(j), MCA, arbitrarily excludes certain activities from nondegradation review, it violates the rights guaranteed by Article II, section 3, and Article IX, section 1, of the Montana Constitution.

In several recent decisions, Montana courts have struck down several statutes regulating abortion even though those statutes have been upheld by the federal judiciary or similar statutes have been upheld by other state courts. See Doe v. Deschamps, 461 F. Supp. 682 (D. C. Mont. 1976), Doe v. Esch, Case No. CV 93-60GF (D.C. Mont. 1993), and Armstrong v. Mazurek, 906 F. Supp. 561 (D.C. Mont. 1995), vacated and remanded in Mazurek v. Armstrong, 520 U.S. 968, 117 S. Ct. 1865 (1997). Portions of the Montana decisions have been based upon the right of individual privacy contained in Article II, section 10, of the Montana Constitution. See Jeannette R. v. Ellery, No. BDV 94-811 (1st Jud. Dist. Ct. Mont. May 19, 1995). In State v. Burns, 253 Mont. 37, 830 P.2d 1318 (1992), the Montana Supreme Court determined that Montana's constitutional right of privacy is one of the most stringent in the country and its treatment of privacy rights is more strict than that offered by the federal constitution. Because the right of privacy is a fundamental right, the strict scrutiny analysis described earlier applies to statutes alleged to impinge upon that right. It is extremely difficult for legislation to survive a strict scrutiny analysis. In Intermountain Planned Parenthood v. State of Montana, No. BDV 97-477 (1st Jud. Dist. Ct. Mont. June 29, 1998), the District Court struck down the legislative restrictions on partial birth abortions by finding that the statute in question was void for vagueness and impinged upon a woman's right of privacy. In attempting to respond to the decision, I discussed the difficulty of overcoming a finding of a privacy violation with the sponsor of House Bill No. 530, Chapter 479, Laws of 1999. Although I believe that the Legislature adequately responded to the judicial determination that the statute was vague, it is unlikely that the current statute can survive a privacy challenge and the resultant strict scrutiny analysis. In the most recent decision concerning abortion legislation, the Montana Supreme Court essentially precluded the ability of the Legislature to enact any legislation restricting the right of a woman to make individual decisions concerning pregnancy prior to fetal viability. In Armstrong v. State of Montana, 1999 MT 261, ___ Mont. ___, ___, P.2d ___, 56 St. Rep. 1045 (1999), concerning the performance of abortions by physician assistants-certified, the Court determined that Montana's right of privacy broadly guarantees each individual the right to make medical judgments affecting his or her bodily integrity and health in partnership with a chosen health care provider free from

government interference. The Court stated that the government had demonstrated no compelling state interest for infringing women's right of procreative autonomy guaranteed under Article II, section 10, of the Montana Constitution. The Court also stated that final boundaries could not be drawn around the personal autonomy component of the right of individual privacy. The Court stated that the right is as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government and as broad as are the state's attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular. Based upon the Armstrong decision, the state has conceded the unconstitutionality of the parental notification statutes because the state's defense in that case is essentially the same as in the Armstrong case.

Several separation of powers issues are implicated in the current challenge to the enactment of House Bill No. 260, Chapter 563, Laws of 1999, concerning the coal producer's license tax, Montanans for the Coal Trust v. State of Montana, No. 99-342 Montana Supreme Court (1999). House Bill No. 260 is alleged to:

- (1) violate Article III, section 1, of the Montana Constitution by unlawfully delegating authority to the Board of Research and Commercialization Technology by granting overly broad discretion to the Board in the funding of projects;
- (2) violate Article V, section 11, of the Montana Constitution by being so substantially amended as to change its original purpose, by containing more than one subject, and by containing an illegal appropriation;
- (3) violate Article III, section 5(1), of the Montana Constitution by illegally prohibiting a referendum on the bill; and
- (4) violate Article IX, section 5, of the Montana Constitution by diverting coal severance taxes from the coal severance tax trust fund without a three-fourths vote of the members of each house of the Legislature.

The issues raised in the challenge of House Bill No. 260 that are of most concern from a separation of powers point of view are the alleged violations of Article V, section 11, of the Montana Constitution. It can be argued that the provisions of that section are intended to be limited to preventing the abhorrent legislative practices of logrolling, riders, and including substantive law in general appropriations bills. Any judicial pronouncement beyond those express prohibitions has the potential to dramatically impact the legislative process and directly involve the Judicial Branch in the way that the Legislative Branch processes legislation.

A finding that House Bill No. 260 contains an unlawful delegation of legislative authority could be remedied by providing additional guidelines limiting the discretion of the Board of Research and Commercialization Technology. A finding that House Bill No. 260 violates Article IX, section 5, of the Montana Constitution should provide the

Legislature with information concerning the judicial interpretation of the meaning of that provision.

Although the separation of powers doctrine by its very nature creates tension between the branches of government, the provision is intended to prevent the tyranny of any one branch and to thereby protect the rights of all citizens, including minority groups.

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