

In Re: Hickenlooper v. Coffman
2015 SA 296

Attorney General's Brief Addressing Jurisdictional Questions

Exhibit B

2003 WL 23221403 (Colo.) (Appellate Brief)
 Supreme Court of Colorado.

PEOPLE OF THE STATE OF COLORADO, Ex Rel. Ken Salazar, in his
 official capacity as Attorney General for the State of Colorado, Petitioner,
 Mark UDALL, individually as a citizen of Colorado, and in his capacity as the
 elected representative to the United States House of Representatives for the
 Second Congressional District of the State of Colorado, Petitioner-in-Intervention,

v.

Donetta DAVIDSON, in her official capacity as Secretary of State for the State of Colorado, Respondent.

No. 03SA133.
 June 16, 2003.

Original Proceeding Pursuant to [Colo. Const. Art. VI, § 3](#)

Secretary of State Davidson's Answer and Brief in Opposition to the Petitioner's Request for Relief

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*1 The Colorado Secretary of State, Donetta Davidson, by and through her undersigned counsel, Friedlob Sanderson Paulson & Tourtillot, LLC, submits this Answer and Brief in Opposition to the Petitioner’s Request for Relief.

INTRODUCTION

Procedurally, this case presents crucial questions pertaining to the Attorney General’s authority to bring any action against the Secretary of State and whether an original proceeding before this Court is appropriate to resolve issues where constitutional questions which are fact-dependent are pending in District Court. As framed in the companion case before this Court captioned *Davidson v. Salazar*, 03SA147, and in Governor Owens’ Answer herein, this Court should reject the Attorney General’s Petition, and not reach the merits.

As to the merits of congressional redistricting, this case is not about whether the General Assembly can adopt a congressional redistricting plan more than once per decade. The General Assembly has acted only once and the result is SB03-352. The question presented is whether this Court may preclude the General Assembly from enacting a congressional redistricting plan when an election has been held under a district court’s order following the General Assembly’s failure to adopt a plan subsequent to a decennial census. In asking this Court to enjoin the Secretary of State from implementing S.B. 03-352, he is also inherently asking this Court to enjoin the General Assembly from legislating. That novel result would require specific constitutional authority and none exists.

The relief the Attorney General seeks would violate Separation of Powers, ([Colo. Const. Art. III](#) entitled Distribution of Powers), U.S. Const. Art. I § 4 (“times, places and manner of *2 holding elections ... shall be prescribed in each state, by the legislature thereof...’ ”), and [Colo. Const. Art. V § 44](#) (“the general assembly shall divide the state into as many congressional districts ...”). The Federal and State Constitutions protect the prerogatives of the General Assembly to legislate

a new congressional redistricting plan following a decennial census, even when a Court has had to order a plan to remedy the absence of legislation enacting a new redistricting statute.

The Attorney General cites no specific federal constitutional, statutory, or Colorado constitutional provision to support his request. The cases cited by the Attorney General (typically lacking specific page references) are not relevant to the question presented. When the General Assembly fails to act and a Court enters an order for a remedial congressional redistricting plan to replace a plan rendered unconstitutional by a decennial census, the General Assembly still maintains the constitutional authority to adopt a plan pursuant to [Art. V, § 44](#). While any redistricting statute adopted by the General Assembly is of course subject to judicial scrutiny for compliance with superior constitutional and statutory requirements, if the statutory plan meets those requirements the Courts do not have authority to prevent the Secretary of State from implementing the requirements of the statute as adopted by the General Assembly in the exercise of its powers granted by the U.S. and Colorado Constitutions.

STATEMENT OF FACTS

On May 5, 2003, a bill entitled “Concerning the Congressional Redistricting of Colorado” (S.B. 03-352) was introduced in the Colorado State Senate. On May 6, 2003, the bill passed the Senate and was sent to the Colorado House of Representatives for consideration. On May 7, 2003, S.B. 03-352 passed the House and the Senate concurred in the House amendments. *3 The enrolled bill was sent to Governor for his consideration and he signed the bill into law on May 9, 2003.

On Friday May 9, 2003, a group of electors filed an action in Denver District Court challenging S.B. 03-352 on various grounds including Colorado constitutional law and legislative procedure. *See Keller v. Davidson*, Case No. 03CV3452 (Denver District Court). The Secretary of State filed an answer in that case on June 11, 2003.

On May 14, 2003, the Attorney General filed this original proceeding for writs of mandamus and injunction requesting a ruling of this Court finding S.B. 03-352 “void and prohibiting the enforcement of said legislation.” *See* Petition Pursuant to [Colo. Const. Art. VI, § 3](#) (the “Petition”) at 24. This original proceeding was not filed at the request of, nor with the consent of, the Governor or the Secretary of State.

In support of his Petition, the Attorney General makes numerous factual assertions that would normally be made, developed and decided by a trial court. Included in the Attorney General's petition are assertions that the bill “(1) raises serious state and federal constitutional issues” and “(2) affects the voting and representational rights of all citizens in the state of Colorado.” *Id* at 1-2. Whether S.B. 03-352 violates the state and federal constitutions or affects the rights of Colorado voters are legal issues which must be based on factual findings. Although the Petition is vague on what is meant by “federal constitutional violations” all legislatures or courts that consider such issues typically review the district boundaries for violations of the “one man-one vote” requirement and whether the districts as drawn violate anti-discrimination laws, including the Voting Rights Act. Conclusions of law on these issues are based on findings of fact developed before a trial court. The Petition goes on to assert other factual issues including *4 that “the new boundaries will move many voters from the district in which they voted in 2002 to another district with another representative for subsequent elections.” *Id* at 4. The Petition therefore does not present purely legal issues; these issues and others raised therein require factual findings for proper resolution. Instead, the Petition attempts to circumvent the necessity of fact finding.

Under the statutes that govern his powers and duties, the Attorney General cannot prosecute an action unless directed to do so by the Governor. *See*, [C.R.S. § 24-31-101\(1\)\(a\)](#). As stated above, the Governor has not directed the Attorney General to file this original writ. Further, the Governor has already filed a brief before this Court specifically stating that he did not do so and that he directed the Attorney General to defend the state statute passed by the General Assembly. Similarly, the Secretary of State neither requested nor consented to the filing of this action against her. To the contrary, the Secretary of State on May 14, 2003 wrote the Attorney General and not only asked him to reconsider and withdraw this original proceeding but specifically informed him that she had not consented.

ARGUMENT

I. The Attorney General of Colorado Does Not Have Independent Authority To File Writs Under [Colorado Appellate Rule 21](#) Unless Directed To Do So By The Governor or The Secretary of State.

Contrary to the Attorney General's assertions, this Court has never recognized the authority of that office to bring an action "on behalf of the people of the state." The Attorney General's assertion of power, if upheld, endorsed by the Court in this instance, would create a free agent outside the executive branch of government. Under such circumstances, he would have the independent authority to choose whether and when to defend any statute enacted by the *5 General Assembly, even though he is clearly charged with defending the laws of the state of Colorado. Of equal concern, if he chose, he could sue the very executive branch officials and agencies he is charged to represent by statute without permission or even consultation as he has done here. His assertion of independent authority is unprecedented, defies common sense, and violates the statutory scheme that has governed the powers and duties of the attorney general since 1876. If such independent power exists to act against the executive branch, the Attorney General would effectively be a fourth branch of government, upsetting the bedrock of separation of powers set forth in [Article III of the Constitution](#).

As the Secretary of State has already argued in her Petition for Writ of Injunction and Mandamus filed on May 21, 2003, and in her Statement in Opposition to Congressman Udall's Motion to Intervene filed on May 28, 2003, the Attorney General's lack of authority is fatal to his Petition, and it should be dismissed. Because the Secretary of State feels strongly that this Court should address this critical threshold issue, set forth in more detail below are the statutes, constitutional citations, case law, and common law references of this state that compel a conclusion that this issue has been brought before the wrong forum by the wrong person seeking the wrong relief.

A. The Common Law in Colorado.

The English common law is not part of the Colorado Constitution. Instead, it was adopted first by the Colorado Territorial legislature in 1861 and subsequently by the Colorado General Assembly (the "General Assembly") as part of the statutory scheme for the State of Colorado. *See*, [C.R.S. § 2-4-211](#) and *6 [Colorado State Board of Pharmacy v. Hallett](#), 88 Colo. 331, 334, 296 P. 540 (Colo. 1931). It exists in Colorado only by statute. *See*, [Hallett](#), 88 Colo. at 335; [Goldberg v. Musim](#), 162 Colo. 461, 427 P.2d 698, 703 (Colo. 1967).

Since the common law in Colorado is part of the state statutes, it may be repealed or amended at any time either by adoption of a law that expressly abrogates a part of it or by the adoption of a statute that is inconsistent with it. *See*, [Hallett](#), 88 Colo. At 335; *see also*, [City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427, 435 (Colo. 2000) (holding that the common law had been displaced by the incorporation and annexation statutes); *see also*, [Vaughan v. McMinn](#), 945 P.2d 404, 408 (Colo. 1997). As detailed below, the Attorney General's common law authority has been abrogated by statute, and this abrogation has been clearly recognized by this Court. [Colo. Const. Art. IV, § 1](#).

B. Since The Attorney General's Powers are Defined by Statute, He Does Not Have Authority To File This Action In This Court.

The Attorney General has such duties as are conferred by law. [Colo. Const. Art. IV, § 1](#). Relying on [Colorado State Board of Pharmacy v. Hallett](#), 88 Colo. 331, 296 P. 540 (Colo. 1931), the Attorney General claims that in the context of his constitutional powers, the term "law" includes both the statutes and the common law. The Attorney General's reliance on [Hallett](#) is misplaced. That case suggested that the attorney general had, at one time, "such powers and duties as the attorney general had at the common law." *Id*, 88 Colo. at 334. However, the Court actually held that attorney general's common law powers could be, and in the case of the Pharmacy Act at issue in the case, had been, circumscribed by statute. *Id* at 336 ("Whatever duties the attorney general had at the common law he may still have except in so far as they have been taken away by legislative enactment.").

Contrary to the Attorney General's contentions, the *Hallet* Court recognized that “[t]hrough the attorney general and the district attorney are *7 constitutional officers in this state their powers and duties are not specified in the Constitution itself, *but are such as the general assembly by legislative act may prescribe.*” *Id.* at 335 (emphasis added).

Indeed, this Court has stated unequivocally that the “attorney general does not have powers beyond those granted by the general assembly.” *People ex rel. Tooley v. District Court*, 190 Colo. 486, 489, 549 P.2d 774, 776-77 (Colo. 1976). Colorado law expressly limits his authority to bring an action to cases where he is commanded to do so by the governor or where specific named officials request that he do so on matters pertaining to their respective departments, such as the Governor or the Secretary of State. *See e.g.*, C.R.S. 24-31-101(1)(a) (attorney general shall appear for the state in civil and criminal proceedings “when required to do so by the governor”); C.R.S. § 1-1-107(2)(d) (*Secretary of State* empowered to enforce election code “by injunctive action brought by the attorney general”). As set forth above, the statutes dictate what parties the Attorney General may represent and spend tax dollars to defend. Here, the Attorney General has failed to cite any statutory or constitutional language that authorizes him to sue the Secretary of State.

The limitation on the duties and powers of the Attorney General cannot be expanded by a self-serving assessment that the he brings an action on behalf of “the people.” *See*, Petition, 03-SA-133, at p.5-6; *see also* letter from Salazar to Davidson, May 19, 2003, attached hereto as App. 1. Unlike other states, “Colorado ... has neither identified nor required the attorney general to serve as the ‘people’s elected chief law officer.’ ” *Tooley*, 549 P.2d at 777. Further, the Attorney General may not, by implication or analogy, expand his authority to bring actions in *8 Colorado courts. *Id.* at 776 (finding that C.R.S. § 24-31-101 “is the *exclusive* source of the attorney general’s powers ...”) (emphasis in original).

In *A.T. and Santa Fe R.R. Co. v. People ex rel. Attorney General*, 5 Colo. 60, 63-64 (Colo. 1879), this Court found in a petition for a *quo warranto* writ that the attorney general could not prosecute an action under a particular statute unless he was commanded to do so by the governor or the general assembly. Since neither had requested him to do so, it was improper for the attorney general to initiate these proceedings and instead, the district attorney was the proper public official to bring this action on behalf of the state. *Id.*; *accord Tooley, supra* (Agreeing with the district attorney that “in the absence of a command from the governor or the general assembly, the attorney general is not authorized to prosecute criminal actions”).

C. The Authority Cited by the Attorney General is Inapposite.

In the instant Petition, the Attorney General argues, against compelling authority to the contrary, that he does have the power to independently bring an original proceeding “on behalf of the People of the State of Colorado.” Petition, at 5. All of the authority cited by the Attorney General in support of this claim, however, is either inapplicable or inapposite.

The Attorney General grounds his authority to bring an original proceeding to protect the election process on the case of *People ex rel. Miller v. Tool*, 35 Colo. 225, 86 P. 224 (Colo. 1905). *See*, Petition, at 5. In *Tool*, the attorney general “and others” brought a petition for writ of injunction to enjoin anticipated election offenses within the City and County of Denver. However, *Tool* hardly provides the authority that the Attorney General urges.

First, it is altogether unclear from the text of that opinion whether the Attorney General brought the proceeding independently, or whether he was in fact commanded to do so by the *9 governor. However, the petition reveals that *Governor Peabody was a co-petitioner in that action*, and thus it is inconceivable that the action was brought without at least implicit approval and cooperation of the executive. Second, the facts of *Tool* are significantly different than the current action. In that case, the attorney general sought a writ of injunction to enjoin clearly illegal activity, including, *inter alia*, the intimidation of voters and election judges “by physical violence and arrest on fictitious charges.” *Tool*, 86 P. at 224.

As discussed above, *Hallet* is inapposite and does not support the common law power that the Attorney General claims. In fact, other states with statutory schemes that are similar to Colorado’s have held the attorney general does not have authority

independent of the statutes to initiate litigation on behalf of the people. *See, Arizona State Land Board v. McFate*, 87 Ariz. 139, 348 P.2d 912, 916-17 (1960).

Nor do the statutes that the Attorney General relies upon convey the authority that he supposes. The Attorney General cites C.R.S. § 1-1-107 (2)(b), and C.R.S. § 1-13-101 (2), as providing authority to the Attorney General to bring an original proceeding on his own behalf over the objection of the Secretary of State. *See* Petition, at 5. To begin with, a cursory review of C.R.S. § 1-1-107 reveals that it enumerates the powers and duties of the *Secretary of State*, not the Attorney General. *See id.* Further, C.R.S. § 1-1-107(1)(c) empowers the Secretary of State “with the assistance and advice of the attorney general, to make uniform interpretations of this code.” *Id.* This statute signals the *duty* of the Attorney General to serve and assist the Secretary of State in the performance of *her* duties. The statute certainly does not supply the Attorney General with authority to *sue* the Secretary of State, as he has done here.

*10 C.R.S. § 1-1-107(2)(d) similarly empowers the Secretary of State “To enforce the provisions of this code by injunctive action brought by the attorney general” Again, the grant of power is given explicitly to the Secretary of State; the Attorney General's role is that of the attorney representing his client.

Finally, the Attorney General attempts to rely on C.R.S. § 1-13-101(2). This statute authorizes the Attorney General to prosecute violations of the election code. The issues raised in the Attorney General's Petition do not involve violations of the election code because the congressional redistricting statute is found at Title 2 of the C.R.S., which is not part of the election code. Notably, no violation of the election code was alleged and no relief requested against the Secretary of State to redress any violation, therefore, C.R.S. § 1-13-101 could not be used as authority for the this action.

II. The Colorado Rules of Professional Conduct Prevent the Attorney General From Suing His Client, the Secretary of State.

Even if the Attorney General had clear statutory authority to bring an action seeking relief on behalf of “the people,” he still would have been barred by the Rules of Professional Conduct from seeking that relief against the Secretary of State. As set forth above, the statutes and the Constitution establish that he is the lawyer for the Secretary of State. Rule 1.7(a) of the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings provides that:

“A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

*11 (2) each client consents after consultation.”

The Comment associated with the Rule provides “Loyalty is an essential element in the lawyer's relationship to a client.” and in the context of litigation states: “Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.” The exceptions to this general rule do not fit the facts in this case and in any event contemplate consent from both clients prior to such adverse representation. The Secretary of State has not consented to the Attorney General's adverse representation. *See* letter from Davidson to Salazar, May 15, 2003, attached hereto as App. 2.

The Rules of Professional Conduct compliment the framework created in state law. The same considerations of loyalty and practicality dictate that the Attorney General cannot counsel with and defend the Secretary of State on some matters and in other matters, when he chooses, sue her.

III. The Extraordinary Relief Sought by the Attorney General is Not Warranted in This Case.

Even if this Court determines that the Attorney General has the authority to sue his own client on behalf of the people of the state, or in the alternative that the after-the-fact standing supplied by Congressman Udall's intervention is sufficient to bring the Petition before the Court on its merits, there is no justification under the present facts for the Court to exercise its original jurisdiction.

A. Appropriate Relief is Available in the District Court, and the Extraordinary Exercise of this Court's Jurisdiction is Unwarranted.

This Court's original jurisdiction has its source in [Article VI, Section 3, of the Colorado Constitution](#). The exercise of such jurisdiction is discretionary and governed by the *12 circumstances of the case. [Sanchez v. District Court](#), 624 P.2d 1314, 1316 (Colo. 1981). Use of an original writ is disfavored, however, where other appropriate remedies, such as an appeal, are available. *See Weaver Const. Co. v. District Court*, 545 P.2d 1042, 1044 (Colo. 1976). Accordingly, it is the settled rule that this Court “will exercise such power, only when it appears that some peculiar emergency or exigency exists, or when the questions involved are clearly *publici juris*, and then only when satisfied that the issues are not likely to be determined, and the rights of all parties properly protected, and enforced in the lower courts.” [People ex rel. Foley v. Montez](#), 48 Colo. 436, 439, 110 P. 639, 640 (Colo. 1910); accord [Clark v. Utilities Commission](#), 78 Colo. 48, 53, 239 P. 20, 21 (Colo. 1925) (Supreme Court will decline to exercise original jurisdiction where “the issues can be fully determined and the rights of all parties preserved and enforced in the district court”).

In this case, a lower court proceeding has already been initiated that will address and determine, *inter alia*, the claims presented by the Attorney General's Petition. *See Keller v. Davidson*, Case No. 03CV3452, Denver District Court.

In that venue, *all* the claims and questions of fact surrounding the passage and legality of SB-03-352 can be determined in one proceeding. At some point in time in order to afford due process to the parties, an evidentiary hearing must be held to resolve factual disputes.¹ It would be unprecedented to resolve disputed questions of fact before the District Court based upon a “Statements of Pertinent Facts” submitted to the state Supreme Court by a Petitioner. If Case No. 03CV3452 is permitted to proceed, an appeal of that court's disposition of the case can then *13 be heard by this Court on *all* of the issues presented. Contrary to the Attorney General's contention, there is still ample time for the District Court to rule and a direct appeal to be taken to this Court on all issues, well in advance of the commencement of election activities for the 2004 general election. *See* May 21, 2003 Affidavit of Donetta Davidson, attached hereto as App. 3. In *Avalos*, trial was not even begun until November 2001, and the appeal not decided until March 2002, yet the Congressional Districts were still set with sufficient time for the 2002 general election preparations. *See, Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002).

It is clear that the issues herein can be fully determined, and the rights of all parties preserved and enforced, in the pending district court proceeding. There is no emergency or exigency, and an appeal remains a wholly appropriate remedy. Accordingly, this Court should exercise its discretion and refrain from employing its extraordinary powers of writ in this instance.

B. There is No Justification for a Writ of Mandamus.

A writ of mandamus “is an extraordinary remedy” that may only be granted where the following three-part test is met: 1) the applicant must have a clear right to the relief sought; 2) the defendant must have a clear duty to perform the act requested; and 3) there must be no other available remedy. *State ex rel. Norton v. Board of County Commissioners of Mesa County*, 89.7 P.2d 788, 791 (Colo. 1995).

Here the Attorney General has failed to meet this burden and relief in the nature of mandamus must be denied. First, the Attorney General has not demonstrated a clear right to mandamus requiring the Secretary of State to abide by the redistricting plan set forth in *Avalos*. *14 Quite the contrary, as argued herein, the Attorney General has no right to seek any relief from the Secretary of State at all.

Second, the Secretary of State does not have a “clear duty” to abide by the *Avalos* decision. Rather, the Secretary of State has a clear duty to uphold the election laws passed by the Colorado Legislature. *See, e.g.* C.R.S. § 1-1-107. In this case, the Secretary of State is presented with a law that was duly passed by both houses of the General Assembly and signed by the Governor. *See*, S.B. 03-352 enacting changes to C.R.S. 2-1-101. Her clear duty, therefore, is to prepare for the election as in her discretion she deems appropriate. Further, it is the Attorney General who has a clear duty to assist and advise the Secretary of State in carrying out those duties. *See* C.R.S. § 1-1-107(1)(c). By bringing this Petition, he has clearly shirked that duty and has significantly hampered the Secretary of State in the performance of her duties. Obviously, the Secretary of State can accept advice from her lawyer or ignore it. She does not have a duty to implement his interpretation of the law otherwise she would be relegated to a mere functionary implementing the whims of the Attorney General, not a constitutionally empowered state officer.

Finally, the third element of the writ of mandamus is also absent, because there is another, more appropriate, remedy available: the *Keller* case in the district court. As argued above, the *Keller* case is the more appropriate venue for this dispute for a number of reasons. Therefore, with none of the required elements being present, the Attorney General is not entitled to the extraordinary relief of mandamus, and the Petition should be denied.

C. There is No Justification for a Writ of Injunction.

*15 A party seeking permanent injunctive relief must: 1) actually prevail on the merits; 2) demonstrate that they will suffer irreparable injury; 3) show that the harm to the moving party outweighs the harm the proposed injunction will cause the opposing party; and 4) demonstrate that the injunction will not be adverse to the public interest. *Campbell v. Buckley*, 11 F. Supp. 2d 1260, 1262 (D. Colo. 1998) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)).

The Attorney General cannot meet the burden for issuance of a writ of injunction enjoining the Secretary of State from performing her lawful duties, for the following reasons. First, this Court must above all determine that the Attorney General has prevailed on the merits. It must have before it the findings of fact and conclusion of law from an inferior court supporting the entry of an injunction. The Petition filed in this Court, unless denied, will prevent such a result. Even were the Court to rule on the merits of the Petition, the Attorney General cannot carry his burden to prevail, as set forth by the Secretary of State in Sections IV and V herein.

Second, there can be no irreparable harm to either the Attorney General or the people of the State of Colorado on whose behalf he purports to act. The General Assembly has performed its constitutional duty to the people by redistricting the State as required by the Colorado Constitution. The Attorney General has alleged no harm except that the General Assembly has legislated, which he believes they cannot do. No legally cognizable harm can flow from this lawful act. If the People of the State of Colorado are injured in this matter, it is because the Attorney General would have the judicial branch constrain the Legislature's plenary exercise of its power, in violation of the constitutional separation of powers.

Third, as there is no harm to the Attorney General (or to the people on whose authority he claims to act), the harm to the Secretary of State is clearly greater. She has been sued by her own *16 attorney, forced to retain outside counsel, and has been interfered with in the lawful exercise of her duties.

Finally, the granting by this Court of a writ of injunction in this matter would be directly contrary to several important public policy concerns that affect the public interest. This Court has said that it will not exercise its original jurisdiction, as in this instance specifically to enjoin the Secretary of State, where an appropriate remedy is available in the lower courts. *See People ex rel. v. McClees et al.*, 20 Colo. 403, 38 P. 468 (Colo. 1894). As discussed above, in this case not only is there a more appropriate venue available in a pending district court action, but the Attorney General seeks to enjoin activities which the Secretary of State is duty-bound to perform under the law. Further, it is strongly against public policy to allow the Attorney General to bring this action contrary to his statutory grant of power, and against his own client to whom he owes the highest duty of loyalty. The elements of injunctive relief cannot be supported in this action and the Petition must be denied.

IV. U.S. Constitution Art. I, § 4 Protects The Ability of The General Assembly To Adopt A Congressional Redistricting Plan Even Where A Court Has Ordered A Remedial Plan After The General Assembly Failed To Act.

Article I § 4 of the U.S. Constitution when read in concert with the Colorado Constitution prohibits any infringement on the ability of the General Assembly to legislate a redrawing of Congressional Districts following a decennial census. Article I § 4 provides:

The times places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

Colorado Constitution Article V § 44 tracks the U.S. Constitution; it provides:

*17 “The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.”

To the extent that Judge Coughlin's ruling in *Avalos* attempted to, or could be interpreted to, impose a permanent injunction² prohibiting the Colorado General Assembly from later exercising its authority to adopt a redistricting plan, such a ruling would be unconstitutional under both the Colorado and United States constitutions. Both constitutions are explicit and unambiguous in their grant of power *to the legislature* in these matters. Accordingly, Congressional redistricting is above all a matter for the state legislature to determine. See *Branch v. Smith*, 123 S. Ct. 1429, 1445 (citing *Abrams v. Johnson*, 117 S. Ct. 1925; 521 U.S. 74, 101 (1997)).

In his Petition, the Attorney General attempts to assert that the General Assembly is prohibited from legislating a new congressional redistricting plan after a state court has imposed a plan because the legislature failed to do so following a decennial census. He provides no authority for this position, however, and instead devotes a significant portion of his argument to the proposition that “courts play a significant role in redistricting when a legislature defaults.” See Petition at 10-12. This is an accurate statement of history. Be that as it may, *none* of the authority cited by the Attorney General stands for the ultimate proposition that he urges *this* Court to accept: that once a court has acted, the legislature may not. That position is not only *18 unsupported and inconsistent with relevant case law, it is clearly contrary to the plain wording of the U.S. and Colorado Constitutions.

In *Johnson v. Mortham*, 915 F. Supp. 1529 (N. D. Fla. 1995), a U.S. District Court adopted a congressional redistricting plan after the Florida legislature had failed to do so. It ordered that the “1992 congressional elections and congressional elections thereafter” be held consistent with its plan. *Id* at 1533-34. In 1994, a subsequent federal lawsuit alleged that the 1992 plan was unconstitutional. One of the grounds cited was that the Federal Court's 1992 plan purported to be a permanent redistricting plan, thus violating the principle of Separation of Powers and U.S. Constitution Article 1 § 4. The Court acknowledged that either the earlier Court Order had actually imposed a permanent redistricting plan, or the Florida legislature had interpreted the Order in that manner. The Court found that if either were true, the plan would be unconstitutional. “[T]he law is clear that a state legislature *always* has the authority to redistrict or reapportion, subject to constitutional constraints.” *Id* at 1544 (emphasis added). “Practically speaking, ‘a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.’ ” *Id* (quoting *Connor v. Finch*, 431 U.S. 407, 414-15, 97 S. Court 1828, 1833-34 (1977)). The Court concluded that the judicially-crafted plan “must be, and is, an *interim plan* which will remain in affect only until the Florida Legislature adopts a valid congressional redistricting plan, or through the decennial census, whichever first occurs.” *Id* at 1545 (emphasis added).

The Attorney General's discussion about Mississippi redistricting inaccurately portrays the gravamen of that set of federal cases. *See* Petition at 13-14. In fact, not only do the cases *19 cited therein not support his contentions, they show support from the federal law that state legislatures always have the power to redistrict. Following the 2000 decennial census, the Mississippi Legislature failed to reapportion the state's Congressional Districts, which were to be reduced in number from five to four. Judicial proceedings ensued in late 2001 in both the state courts of Mississippi and the U.S. District Court for the Southern District of Mississippi. As a redistricting plan was being developed by a State of Mississippi Chancery Court, Plaintiffs in the Federal Court urged that the state court process be enjoined and that the Federal Court impose a plan. They argued that the State Chancery Court could not achieve a new final plan in a timely way given the need for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. They also asserted that any Mississippi State Court attempt at congressional redistricting was in violation of Article 1, § 4.

While stating its intentions to defer to a state process, consistent with the direction in *Grove v. Emison*, 507 U.S. 25, 113 S. Ct. 1075 (1993), the Federal Court moved forward in development of a plan, in case such would be necessary. The State Chancery Court did eventually develop a plan. However, there were problems with the time frames involving preclearance of the Court's plan by the U.S. Attorney General under the Voting Rights Act. Plus, there were questions of delegation by the legislature of this function to the courts and of the specific effects of the plan. The state courts could not meet the time deadlines for filing required of candidates for congressional office. The U.S. District Court then adopted a plan which would enable candidates to timely file, basing its action on the grounds that there was a failure of the state plan to obtain preclearance. It also offered an alternative finding that the plan was unconstitutional because it violated the mandate of Art. I, § 4 that the Mississippi legislature pass *20 a redistricting plan. *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002). In one of its many published opinions in the matter, the Court stated:

“[W]e want to make this point absolutely clear: “The task of redistricting is best left to state legislatures, [which are] elected by the people and [are] as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.” *Abrams v. Johnson*, 521 U.S. 74, 101, 117 S. Ct. 1925 (1997).”

189 F. Supp. 2d 503 at 511.

The *Smith* Court's ruling was affirmed by the U.S. Supreme Court in *Branch v. Smith*, 123 S. Ct. 1429, 155 L. Ed. 2d 407, (2003). The Mississippi Chancery Court's plan “had no prospect of being precleared in time for the 2002 election”. The Supreme Court limited the basis of its ruling to the preclearance issue. “[W]e have no occasion to address the District Court's alternative holding that the State Chancery Court's plan was unconstitutional ... and therefore we vacate it as a basis for the injunction.” *Id* at 423. The concurring opinion by Justices Kennedy, Stevens, Souter and Breyer explained their rationale for vacation of the District Court's alternative holding on the Article 1, Section 4 issue: the Court will typically defer ruling on a constitutional challenge when a non-constitutional basis for ruling exists. *Id* at 434, 435. Therefore, unlike the Attorney General's contention that Supreme Court “declined to find” that Article I § 4 was an obstacle to state court redistricting, the Court actually refused to address the scope of Article 1 § 4 at all with respect to such plans and certainly didn't opine as to whether such plans could preclude actions mandated by Article I.

The question the Attorney General has put before this Court with his Petition is *not* whether a Colorado court may impose a congressional redistricting plan where the General *21 Assembly has failed to act. That question was answered, for now, in the *Avalos* case and is a non-issue in this proceeding.

The relief that the Attorney General seeks, to have a Colorado court *restrain* the ability of the legislature to adopt legislation concerning redistricting and the Secretary of State from implementing such a law, lacks any precedence or judicial support. On the contrary, the *Branch* Court in its recitation of the history of the current statutory scheme governing apportionment of the House of Representatives found at 2 U.S.C. *et. seq.* that the statute addresses “what is to be done pending redistricting:” and then quotes sections concerning specific requirements. *Id* at 423. The Federal statutory requirements of course, would

require enforcement by a court where a state initially failed to pass a legislatively enacted plan. That is why the phrase “pending redistricting” is so important here. The plain language in both the statutes and the Supreme Court’s interpretation thereof is that the Federal procedure will be followed “until a state is redistricted in the manner provided by the law thereof”. 2 U.S.C. § 2a(c). For Colorado the significance is clear. The state court (or the Federal court for that matter) can enforce a redistricting plan following the mandate of the U.S. statutes “until” the state is redistricted following Colorado law.

Since our state statutes have no provisions for any alternative redistricting process such as found in Minnesota or Mississippi other than that created by federal statute passed under constitutional guidance, that is the only process that can be followed. In the present situation, a state law (S.B. 03-352) has been enacted to redistrict the state, therefore the provisions of any court imposed plan have terminated until the new statute can be shown to be in violation of superior law. The most recent U.S. Supreme Court case (*Branch*), rather than implying any *22 support for the Attorney General’s position instead recites in detail that Courts must defer to the state legislature when it legislates. Even in states with alternative redistricting procedures, the legislature can still make adjustments to a court ordered plan in effect in prior elections. See, *Cotlow, et. al v. Growe, et. al*, 622 N.W. 2d 561, 2001 Minn. Lexis 140 (Minn. 2001).

V. Article V, Section 44 Is Plain On Its Face and The Power Of The Legislature To Divide The State Into Congressional Districts Is Unfettered.

The Attorney General argues that Colorado’s constitution allows redrawing of Colorado’s congressional districts to occur only once per decade. He cites authority from other states and the rules of statutory construction to support his position. In every instance the authority cited is inapplicable to the current facts. Moreover, because the language of Article V § 44 is plain, no tortured resort to statutory construction is necessary.

A. The Authority Cited by the Attorney General is Inapplicable to the Current Situation in Colorado.

The Attorney General, citing cases from other jurisdictions, argues that Colorado’s Congressional Districts can only be set once per decade. See Petition, at 21-22. The Attorney General relies heavily on a 1983 California decision. See *Legislature v. Deukmejian*, 66 P.2d 17 (Cal. 1983). Reliance on *Deukmejian* is misplaced however, because the relevant provisions of the California Constitution are significantly different than Art. V § 44 of the Colorado Constitution. The relevant portion of the California Constitution directs that “[I]n the year following the year in which national census is taken under the direction of congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the ... districts ...” Cal. Const. Art. XXI (emphasis added). When that mandate was violated court action followed. The Colorado Constitution does not so limit the exercise of the legislature’s authority: “When a *23 new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.” Colo. Const. Art. V § 44. The Colorado Constitution vests the authority to redistrict the state following the census in the general assembly, and sets no express limit on when this authority must be exercised. For this reason, *Deukmejian* and other California authorities are not instructive on this issue.

Similarly, the Wisconsin constitution before the Court in *State ex rel. Smith v. Zimmerman*, 63 N.W.2d 52 (Wisc. 1954), prescribed that the Wisconsin legislature had to act “[a]t their first session after each enumeration ...” *Id* at 56. As discussed above, Colorado’s constitution does not limit the timeframe in which the legislature must act. Nor was the Wisconsin court construing the effect of a judicially-enacted plan. It was, like many of the other authorities cited by the Attorney General, a case where the legislature had passed *two bills*. See *id*.

Nor do the other cases cited by the Attorney General bear on this issue. The Kansas case, *Harris v. Shanahan*, 387 P.2d 771 (Kan. 1963), concerned apportionment of the Kansas legislature, not the federal congressional districts and therefore cannot be instructive here. Equally irrelevant, the New York, Michigan, and Ohio cases cited by the Attorney General, see Petition at 22, do not decide the question of whether a remedial redistricting plan adopted by a court can subsequently prevent the legislature’s constitutional exercise of its power to redistrict the state following the decennial census.

By citing numerous cases that are not relevant, the Attorney General obscures the issue. Whether or not the General Assembly has power to pass more than one redistricting plan in a single decennial period is simply not the issue in this case. The General Assembly has done no *24 such thing. Rather, the issue that this Court must decide is whether the interim plan imposed in *Avalos* can operate to enjoin the General Assembly from fulfilling its clear duty under [Article V § 44](#). The Attorney General has presented no authority from this state or elsewhere to support this position, because there is none. The Petition must therefore be denied.

B. The 1974 Revisions to [Article V, Section 44](#) and the Initiated Measure Creating the Colorado Reapportionment Commission in [Article V, Section 48](#), Also Approved in 1974, Were Separate and Distinct and Did Not Create “Companion Provisions.”

The Attorney General argues that Colorado's constitution allows redrawing of Colorado's congressional districts to occur only once per decade. In so arguing, he necessarily implies that the plain language of [Article V § 44](#) can be interpreted to find support for his conclusion that a district court, by rendering a decision on a matter, can preclude the legislature from legislating. This contention is without support. Such an interpretation not only results in a tortured interpretation of [Article V § 44](#), it is manifestly contrary to its plain language. This Court has often held that when the language “is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written.” *In re Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996) (citing *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984)). In this case, the language is plain and its meaning is clear; the legislature shall divide the state into congressional districts.

Specifically, the Attorney General asserts that [Article V, Section 44](#) is ambiguous and that its meaning must be interpreted both by examining its history and also by looking to the separate Constitutional provisions dealing with the reapportionment of State legislative districts, which the Attorney General deems to be “companion provisions.”

*25 The Secretary of State rejects this argument. Neither the case law concerning reapportionment of the State legislative districts, nor the history of the adoption of the Reapportionment Commission in 1974 are relevant to the authority of the General Assembly to redistrict Congressional Districts. Nevertheless, a review of the history of both [Article V, Section 44](#) and the legislative reapportionment provisions³ confirm that Congressional Redistricting is the unfettered province of the General Assembly.

[Article V, Section 44](#) was revised in 1974 as part of a comprehensive referred measure embodied in Senate Concurrent Resolution No. 1 (“SCR-1”), Session Laws 1974, Page 445 at 451, known as Amendment 6. SCR-1 was developed as a result of deliberations by the Colorado Legislative Committee on Legislative Procedures commencing in 1968 with the intent to modernize, streamline and make substantive changes to [Articles IV, V, X and XII](#). Legislative Council Report to the General Assembly: Legislative Procedures and Space Needs in the State Capitol Complex, (Research Publication No. 196, December, 1972), at pp. 45 -93. The primary thrust of the substantive changes was gubernatorial succession. *1972 Report* at pp. 45 - 47.

In sharp contrast, the 1974 changes to the reapportionment of State legislative districts came as a result of an initiated measure spearheaded by the Colorado League of women Voters, known as Amendment 9, intended to take legislative reapportionment out of the hands of the General Assembly and place it into a newly appointed Colorado Reapportionment Commission. See “The Post's Opinion--Amendment No. 9: Yes”, *Denver Post*, October 22, 1974. Amendment 9 did not address changes to Congressional redistricting, but dealt solely with State *26 legislative districts and the reapportionment process. Legislative Council of the Colorado General Assembly: An Analysis of 1974 Ballot Proposals (Research Publication No. 206, 1974) at pp. 26 - 31. There is no indication that §§ 44 and 48 were intended to be companion provisions.

On page 18 of his Petition, the Attorney General places great weight on the 1974 Legislative Council Report, not only as Council's substantive interpretation as to the effect of Amendment 9 on Congressional Redistricting, but also as “evidence”

that the people intended to restrict the authority of the General Assembly in Congressional redistricting. This conclusion is inaccurate.

In 1974, as opposed to the current system established in 1994 with respect to the Blue Book Ballot Information Booklet, the reports of Legislative Council to the Legislature with respect to ballot proposals were not intended to reflect a substantive analysis of a proposal for the public. See C.R.S. 1963 § 63-4-3. Rather, as stated in the Letter of Transmittal executed by Senator Fred E. Anderson forwarding the 1974 Legislative Council Report, they were informational only:

“It should be emphasized that Legislative Council takes no position, pro or con, with respect to the merits of the proposals. In listing ARGUMENTS FOR and ARGUMENTS AGAINST, the Council is merely putting forth arguments most commonly offered by proponents or opponents of each proposal. The quantity or quality of the FOR and AGAINST paragraphs listed for each proposal is not to be interpreted as an indication or inference of Council sentiment.” *1974 Report*

The referenced statement on Page 18 of the Petition is from the “Arguments” paragraph directed at Amendment 9 only. *1974 Report* on Page 29. It does not reference SCR- or Congressional redistricting, nor does it indicate the “interpretation” of Legislative Council.

*27 In examining the history of both Colorado statutory and Constitutional provisions concerning the reapportionment of State legislative districts, it is evident that both before and after passage of Amendment 9 in 1974 there were clear limits on the exercise of that authority by the General Assembly (See *1974 Report* at Page 27). However, there is simply no evidence to dictate the conclusion that the General Assembly or the electorate identified the same kind of problems with the General Assembly’s authority to legislatively establish Congressional districts or the concomitant need to restrict and limit that authority.

The reference by the Attorney General to former Article V, Section 45, the antecedent to [Section 48](#) concerning reapportionment, as a “companion provision” to [Article V, Section 44](#) is also in error. [Article V, Section 45](#) underwent revisions in 1962 as a part of Amendment No. 7, which also was solely limited to reapportionment and not to Congressional redistricting, all as set forth at page 381 of the Colorado Revised Statutes (2002) in the “Historical background of and cases construing Amendment No. 7.” Clearly, [§ 45](#) as it existed prior to 1974 could not be considered a companion provision to [Article V, § 44](#) as it existed prior to 1974 as the two provisions were adopted at different times in difference circumstances.

C. The 1974 Revisions to [Article V, Section 44](#) Were Technical and Nonsubstantive and Cannot Be Interpreted as Changing and Restricting the Authority of the Colorado General Assembly to Redistrict Congressional Districts.

The Attorney General finally argues that the 1974 revisions to [Article V, Section 44](#) were themselves intended to prohibit the General Assembly from adopting the 2003 redistricting plan after the District Court ruling because revised [Section 44](#) “allows redrawing of Colorado’s Congressional Districts only once per decade.” The Attorney General’s final position also lacks support. As previously noted, SCR-1 contained both substantive and non-substantive changes to *28 a variety of Constitutional provisions dealing with the Executive and Legislative branches. *1972 Report* at 45. It is clear from the 1972 Legislative Council Report that the revisions to [Section 44](#)⁴ were deemed necessary to strike “obsolete language” and “modernize the provisions.” (*1972 Report* at p. 86). There is no indication that the revisions to [Section 44](#) were intended, directly or indirectly, to restrict the authority of the General Assembly with respect to Congressional redistricting. See Affidavit of Senator Fred E. Anderson attached hereto as Appendix 4, a sponsor of SCR-1, confirming that it was never the intent of the General Assembly in referring SCR-1 to the voters to limit the ability of the General Assembly to consider Congressional redistricting more than once a decade.

This conclusion is also supported by a review of the 1974 “Analysis of 1974 Ballot Proposals” by the Colorado Legislative Council, upon which the Attorney General places much weight. In its analysis of SCR-1, known as Amendment 6, Legislative Council addresses specifically the *substantive* changes contained in the referred measure consistent with the 1972 Report

and lumps the remainder, including revisions to [Section 44](#), into the category of “minor housekeeping or non-substantive amendments.” *1974 Report* at pp. 15 - 17.

The plain meaning of revised [Article V, Section 44](#) is a directive to the General Assembly to redistrict the Congressional districts “when a new apportionment shall be made by Congress.” There is no direct or implied limitation on the authority of the General Assembly. Further, a cursory review of the history of Congressional redistricting in Colorado shows that *29 Congressional redistricting was done twice in the 1960s by the General Assembly. “Summary of Congressional Districting and Legislative Reapportionment Action in Colorado: 1961 - 1967”, Legislative Council Report to the Colorado General Assembly: (Research Publication No. 125), May, 1967. With that history so recent, a major change in policy would have had to have been made to explicitly restrict the Legislature's ability to redistrict even more than once. Therefore, the language approved by the electorate in 1974 endorsed a continuation of the unfettered authority of the General Assembly to redistrict even if it meant more than once a decade.

The Attorney General frequently cites *Colorado Common Cause v. Bledsoe*, 810 P. 2d 201 (Colo. 1991) (interpreting the GAVEL Amendment in light of the speech or debate clause). Petition at pp. 15, 17, 18. While useful in stating this Court's doctrine concerning constitutional construction, in light of the specific historical references cited above, it does not support the Attorney General's erroneous interpretations of [Article V, § 44](#).

CONCLUSION

For these reasons, the relief requested in the Petition must be denied.

Appendix not available.

Footnotes

- 1 The Attorney General's Petition contains a “Statement of Pertinent Facts” as well as several other assertions of various facts, the truth of which the Secretary of State currently is without sufficient knowledge. At this early stage of the dispute, the Secretary of State is unwilling to compromise her defense by accepting these facts as true. Accordingly, the District Court provides a more appropriate venue in which to establish the veracity of these matters.
- 2 See page 8 of the Attorney General's Petition stating the District Court ordered “the congressional election process and the congressional primary and general election for the State of Colorado *in 2002 and thereafter* be conducted [pursuant to the Court's order]...” (emphasis added).
- 3 To avoid confusion, the reapportionment provisions concerning State legislative districts were contained in [Article V, Section 45](#) prior to the 1974 establishment of the Colorado's Reapportionment Commission in 1974 by initiative when the provisions were moved to [Article V, Section 48](#).
- 4 [Section 44](#). *Representatives in congress*. THE GENERAL ASSEMBLY SHALL DIVIDE THE STATE INTO AS MANY CONGRESSIONAL DISTRICTS AS THERE ARE REPRESENTATIVES IN CONGRESS APPORTIONED TO THIS STATE BY THE CONGRESS OF THE UNITED STATES FOR THE ELECTION OF ONE REPRESENTATIVE TO CONGRESS FROM EACH DISTRICT. When a new apportionment shall be made by congress the general assembly shall divide the state into congressional districts accordingly.