

In Re: Hickenlooper v. Coffman
2015 SA 296

Attorney General's Brief Addressing Jurisdictional Questions

Exhibit C

2003 WL 23303580 (Colo.) (Appellate Petition, Motion and Filing)
Supreme Court of Colorado.

Donetta DAVIDSON, in Her Official Capacity as Secretary of State for the State of Colorado, Petitioner,

v.

THE HONORABLE KEN SALAZAR, in His Official Capacity
as Attorney General for the State of Colorado, Respondent.

No. 03SA147.

May 21, 2003.

Petition for Writ of Injunction and Writ of Mandamus Pursuant to Colo. Const. Art. Vi, § 3

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*2 Secretary of State Donetta Davidson, a constitutional officer of the State of Colorado under the [Colorado Constitution Art. IV, § 3](#), submits this petition to this Court to issue a writ of injunction enjoining the Honorable Ken Salazar, Attorney General of the State of Colorado from proceeding with the “Petition Pursuant to [Colo. Const. Art. VI., § 3](#)”, 03-SA-133, filed May 14, 2003; for a writ of mandamus requiring the Attorney General and his deputies to conform to the statutory requirements under § 24-3 1-101 *et seq.*; and to temporarily stay the briefing schedule ordered by the Court in its Rule to Show Cause issued on May 15, 2003.

ISSUES PRESENTED

Does the Attorney General of the State of Colorado have the authority to bring suit against the Secretary of State in an original proceeding before the Colorado Supreme Court to enjoin her from enforcing a Colorado statute: 1) where no statute confers such authority on the Attorney General; and 2) where the Attorney General is obligated by statute to legally represent the Secretary of State as her attorney.

NATURE OF THE ACTION GIVING RISE TO THIS PETITION

During the last regular session of the General Assembly, the legislature enacted S.B. 03-352 which redistricted the seven congressional districts in Colorado. Governor Owens signed the bill into law on May 9, 2003.

Subsequently on May 14, 2003, the Attorney General of Colorado filed a petition with this Court wherein without the consent of the Secretary of State he requested this Court to issue a writ of injunction and a writ of mandamus against the Secretary of State, his client, to prevent the *3 Secretary of State from enforcing the new redistricting act and requiring her to abide by the redistricting plan adopted in [Beauprez v. Avalos](#), 42 P.3d 642 (Colo. 2002).

The Attorney General's assertion that he is the people's lawyer and thereby can bring an action against his executive branch client raises fundamental issues never before addressed by the courts of Colorado which will impact the definition of his duties and responsibilities beyond the parameters of the petition he filed on May 14, 2003. In Colorado, the Attorney General's authority is limited to those powers granted by the General Assembly and enumerated by statute. He has no general authority to represent the "People of the State of Colorado," much less bring an action on their behalf against his own client. Rather, existing statutes and case law mandate that he represent executive branch officers and agencies and is allowed to bring actions on their behalf only when requested to do so by the governor or other enumerated executive branch officers.

JURISDICTION, PARTIES, PENDING PROCEEDINGS, REQUEST FOR STAY, AND STANDARD FOR RELIEF

The Secretary of State respectfully requests this Court to enjoin the Attorney General from proceeding in the Petition he filed on May 14, 2003 and to mandate that he is entrusted with the legal representation of the Secretary of State and therefore cannot bring an action against her on matters pertaining to the Department of State without her permission.

***4 A. Jurisdiction**

This Court is empowered with original jurisdiction to require public officials to adhere to their duties as required by law or to order an official to desist from exercising power without lawful authority. *People ex rel. Graves v. District Court*, 37 Colo. 443, 455, 86 P. 87, 90 (1906).

This Court has exercised its original power in cases involving "the civil rights of the sovereign power of a state, vitally affecting its character and the proper administration of the government itself, in which the whole people and every individual member of the community has a direct, immediate and most sacred interest, when the exercise of a public right or a public controversy is the subject matter of controversy." *People ex rel Miller v. Tool*, 35 Colo. 225, 241-42, 86 P. 224, 229 (1905); *State ex rel. Norton v. Board of County Commissioners of Mesa County*, 897 P.2d 788, 791 (Colo. 1995).

This petition is brought by the Secretary of State, because it is a matters of significant concern, not only to executive branch officials, but to the public at large regarding the "proper administration of government" (specifically the executive branch) concerning the authority of the attorney general to initiate without a request from the governor or the secretary of state a legal proceeding against another constitutional officer whom he is mandated by statute to represent. His assertion that he has independent authority to bring actions without such a request is contrary to existing statutes and Colorado Supreme Court case law that has consistently held since 1879 that the attorney general only has the authority and powers granted him by the General Assembly.

The statutory scheme in Colorado allows the attorney general to refuse to represent an executive branch client on a specific issue but such a situation he must set forth the conflict, *5 refrain from participation in the matter while in that situation he conflicts off the matter and the agency or official is provided outside counsel. *See* § 24-31-101 (1)(e). However nothing in the statutes allows the attorney general to refuse to represent his clients and then turn around and bring an action against one of them on the same issue. Such action vitally affects the character of the sovereign power of the State with regard to both its executive branch relationships, but also this Court's supervisory role of lawyers licensed to appear before the Colorado courts. Therefore, this type of action by the attorney general is unprecedented in Colorado.

The attorney general's assertion of power, if upheld, would make him 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 General Assembly even though he is 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 consultation or permission. His assertion of independent authority is unprecedented and violates the statutory scheme that has governed the

powers and duties of the attorney general since 1876. These issues affect the fundamental nature of the attorney general's role in state government which makes these questions ones of statewide concern to the public.

B. Parties

Donetta Davidson is the Colorado Secretary of State. She brings this action on behalf of herself in her official capacity and through her undersigned counsel. The attorney general wrote to the Secretary of State informing her that he could not represent her in any action concerning redistricting and, in the same letter, informed her that she would be named as the Respondent in the petition filed by the attorney general in this Court. *See* Appendix A.

*6 The Honorable Ken Salazar is the Colorado Attorney General and is the named respondent because he is mandated to perform his duties pursuant to the powers and duties assigned to him by the General Assembly. *See* § 24-31-101 *et seq.*; *People ex rel. Tooley v. District Court*, 190 Colo. 486, 489, 549 P.2d 774, 777 (Colo. 1976).

C. Pending Supreme Court And District Court Actions

A district court action was filed by a group of citizens challenging the enactment of S.B. 03-352. *See Maryanne Keller v. Davidson, Secretary of State and the General Assembly*, Case No. 03-CV-3452 (Denver District Court) App. B. That case attacks the enactment of the redistricting plan enacted by the legislature on various procedural and substantive grounds including those raised by the attorney general in his petition before this Court. Contrary to the assertions of the attorney general, the *Keller* case does not endanger the orderly commencement of the election process. *See Affidavit of Secretary of State Donetta Davidson* attached as App. C. The county clerks and recorders will begin preparation for the 2004 elections after the 2003 off year elections this year. Further, in the *Beauprez* case, the redistricting trial commenced in mid-December, 2001 and the case was appealed and a decision rendered by this Court in January 2002. There is no immediate need to rule on the constitutional issues that are also part of the *Keller* case. That case can be tried and, if necessary appealed before the 2003 off year elections are held allowing sufficient time for state and local election officials to properly administer the 2004 elections. *See Affidavit of Secretary of State Davidson*, App. C.

The Attorney General's petition before this Court, Case No. 03-SA-133 was filed on May 14, 2003.

***7 D. Standards for Granting Writs of Mandamus and Injunction**

In this original proceeding seeking issuance of the extraordinary writs of mandamus and injunction, it is recognized that the requirements for issuance of a writ of injunction as a jurisdictional writ are somewhat different than issuance of an ordinary writ of injunction. *People ex rel. v. McClees, et al.*, 20 Colo. 403, 38 P. 468 (1894). In addition to a showing of irreparable harm, of more harm to the petitioner than to the opposing party, and not the petitioner will prevail on the merits, the petitioner must also disclose a question "public juris." Some questions are ones involving the rights of franchises of the State in its sovereign capacity as distinguished from matters of private concern. *People ex rel. v. McClees, et al.* at 405. It is axiomatic that the instant case involves such important principles.

To prevail on a writ of mandamus the petitioner must show: 1) the movant has a clear right to the relief requested; 2) the respondent has a clear duty he must conform to; and 3) there is no other remedy. *See Board of County Commissioners of Mesa County*, 897 P.2d at 791.

STATEMENT OF FACTS

The Colorado Secretary of State is a constitutional officer whose office was created through [Art. IV, § 1 of the Colorado Constitution](#). The same section created the office of attorney general, but neither that Section of the Constitution, nor any other Section assigned any powers or duties to the attorney general.

His duties and scope of authority are found in statutes enacted by the General Assembly. [§ 24-31-101](#) *et seq.* Under that statute, the attorney general is required to prosecute and defend all civil and criminal actions and proceedings in which the state is a party or in which it has an interest in when required to do so by the governor and to prosecute all cases in the appellate *8 courts in which the state is a party or interested. He is the attorney for the executive branch of state government. The same statute continues that “it is the duty of the attorney general” at the request of the secretary of state and other named executive branch officials to prosecute and defend all suits relating to matters connected with their departments. *See* [C.R.S. § 24-31-101\(1\)\(b\)](#). In other words, it is the duty of the attorney general, at the request of the secretary of state to prosecute and defend her on election law matters because such matters are connected with her department. The attorney-client relationship is uniquely mandated by law. There is no provision in the law allowing abrogation of the relationship, a result implicit in allowing Attorney General to pursue to the petition he filed in this Court. Neither the Governor or the Secretary of State has requested the Attorney General to file the aforementioned petition. Since he did not receive a command to do so he is acting outside the scope of his authority. *Tooley* at 777.

In fact, by letter dated May 15, 2003, Secretary of State Davidson asked the Attorney General to reconsider and withdraw the petition he filed on May 14, 2003. *See* App. D. In his response letter dated May 19, 2003, Attorney General Salazar stated he would not withdraw the petition and he asserted that he was the people's lawyer and therefore had the authority to bring an action against his client the Secretary of State. *See* App. E. This exchange of correspondence between these two constitutional officials clearly defines the necessity of resolving these disputed issues of authority possessed by constitutional officers.

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.

***9 A. The Common Law in Colorado Law.**

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 [Colorado State Board of Pharmacy v. Hallett](#), 88 Colo. 331, 334 (Colo. 1931) It exists in Colorado only by statute. *Id.* at 335; [Goldberg v. Musim](#), 162 Colo. 461, 427 P.2d 698, 703 (Colo. 1967).

Since the common law is part of the state statutes, it may be repealed or amended 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. *Id.*; [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); [Vaughan v. McMinn](#), 945 P.2d 404, 408 (Colo. 1997).

As will be detailed below, the Colorado Attorney General cannot bring actions at common law whether original proceedings before this Court or actions before the trial courts of this state unless he or she does so pursuant to the statutes governing his or her duties and responsibilities.

1. The Attorney General Does Not Have Common Law Authority To File Actions In The Courts of Colorado.

The attorney general's authority to file original writs before this Court or actions in the trial courts is limited to circumstances defined by the statutes enacted by law. The Colorado statutes limit 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

*10 respective departments, such as the Secretary of State. Beyond those limited circumstances the attorney general does not have the authority to file actions in this Court or the trial courts of [Colorado. *State of Colorado v. ASARCO, Inc.*, 616 F.Supp. 822, 828-29 \(D. Colo. 1985\)](#) (Judge Carrigan found the Attorney General was authorized to file CERCLA action against the defendant ASARCO because the Governor of Colorado by Executive Order expressly commanded the Attorney General to file such action pursuant to C.R.S. § 24-31- 101.

The Colorado statutes define the powers and duties of the Attorney General. *See* C.R.S. 24-3 -101 *et seq.* Under these statutes, the attorney general is “the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch.” *Id.* In addition, the statutory scheme mandates that he “shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.” *Id.*

In the writ filed by the Attorney General last week, he alleges that he has common law authority to bring original proceedings before this Court on behalf of the people independent of any other authority he may possess under Colorado law. *See Petition in People ex rel Ken Salazar v. Davidson*, 03-SA-133 at p.5-6; *see* App. F. This perception is misplaced based on previous case law and an analysis of the historical statutes that have governed the attorney general since Colorado became a state in 1876.

The office of Attorney General is created by the Colorado Constitution. *See Art. IV, § 1.* However, the Constitution does not assign the attorney general any powers, duties or *11 responsibilities. [People v. District Court, 549 P.2d 778 \(1976\)](#). The Colorado Supreme Court has always found the attorney general has no powers except those granted by the General Assembly. [People ex rel. Tooley v. District Court, 190 Colo. 486, 489, 549 P.2d 774,777 \(1976\)](#) (the attorney general has authority to prosecute criminal cases only when the governor commands him to do so pursuant to C.R.S. § 24-31-101). More specifically, unlike other states the Colorado attorney general does not act as the “people’s elected chief law officer.” *Id.* Further, the attorney general cannot by implication expand his or her authority to bring actions in Colorado courts. *Id.* at 776; [People v. Corr, 682 P.2d 20 \(Colo. 1984\)](#) (court found the attorney general only had those powers explicitly assigned to him by the general assembly while rejecting the attorney general’s claim that he has “inherent authority” to initiate certain kinds of criminal investigations).

In *A. T.and Santa Fe R.R. Co. v. People ex rel. Attorney General*, 5 Colo. 60, 63-63 (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. Since Colorado became a state the attorney general’s authority to file an action has been governed by a statute that requires authority from the governor to file an action and in later years removed the General Assembly as a client. The attorney general has the authority to bring common law claims but he or she does not have the authority to initiate such actions unless commanded to do so by the governor. *See* C.R.S. § 24-31-101(1)(a).

*12 Nor does *Hallet*, *supra* support the proposition the attorney general has the authority to prosecute original writs before this Court outside granted by the specific authority granted by the law. In *Hallet*, the court recognized the attorney general has authority to file writs in original proceedings but that decision does not authorize the attorney general to file such actions on his own authority. In that case, the attorney general filed the action on behalf of the Colorado Board of Pharmacy, an executive branch agency, arguing that he alone could represent the Board even though the legislature enacted a statute in 1927 that enabled local district attorneys to represent the Board in court. This court found the General Assembly had altered the common law system of representation wherein the attorney general exclusively represented the executive branch of government by authorizing district attorneys to represent the Board. *Supra*. The Court did not find that the attorney general had authority on his own to file original writs with this Court.

In fact, the 1921 statute that governed the attorney general’s powers and duties at the time of the *Hallet* case is very similar to the present statute. *See* App. G, Chapter 131, §§ 5968-5973. That statute, *inter alia*, like C.R.S. 24-31-101, stated the attorney

general could initiate or defend criminal or civil actions when the state is a party or interested when required to do so by the governor or the general assembly. *Id.* at § 5968. The same statute goes on to state the attorney general has a duty to prosecute and defend all actions “relating to matters connected with” various executive branch departments if requested to do so by the head of one of the enumerated departments, including the Secretary of State. *Id.* at § 5969. Not only must an executive branch officer or the general assembly request that the attorney general initiate litigation but he or she is limited to representing the designated officials and agencies of the state (*i.e.* the executive and legislative branches of government), not “the people.”

*13 Read together these two sections limited the circumstances when the attorney general could initiate litigation to those where either the governor, general assembly or specific executive branch officers requested that he do so. Even assuming the attorney general had common law powers to initiate actions on his own, this statute if it does not specifically repeal the attorney general's common law power to initiate litigation on his own authority, clearly is inconsistent with that proposition and therefore abrogated such common law authority. *Vaughan, supra* at 408.

Subsequent holdings of this Court between *Hallet* and *Tooley* have held that the attorney general can initiate litigation only when he or she is authorized by the governor or other executive branch officers to do so pursuant to the statutes governing the powers, duties and responsibilities of the attorney general. *Dunbar v. County Court*, 283 P.2d 182, 184 (Colo. 1955). In *Dunbar*, the attorney general brought a writ of error on behalf of the Clear Creek County Department of Public Welfare. This Court stated that if the attorney general was not ordered through an executive order issued by the governor that mandated the attorney general to bring such action he was not authorized to do so. The decision emphasizes the attorney general's limited authority to bring actions in court and always on behalf of executive branch agencies or the general assembly, never upon his own authority on behalf of the people. These statutory limitations have not been altered by the General Assembly since Colorado became a state except in one significant way discussed below. *See* Apps. G through M.

One significant amendment to the attorney general's statute has been made by the General Assembly. The General Assembly added subsection 5. *See* C.R.S. 24-31-101(5). Under that subsection, the general assembly specifically recognized and codified the attorney general's common law powers, citing § 2-4-211 C.R.S., “regarding all trusts established for charitable, educational, religious, or benevolent purposes.” This is the exclusive reference to the common law powers of the attorney general in this or any other statute. Thus, the General Assembly has only codified one narrow section of the common law powers of the attorney general. By excluding the others, the attorney general is limited to those powers enumerated in C.R.S. 24-31-101 *et seq.*

Since an action was filed against the Secretary of State in *Keller*, the statutes require the Attorney General to defend her or withdraw from any representation and provide outside counsel. Yet he chose a third option; he has filed an action against her, and has, in essence, violated the statutory mandate since he is opposing the state (the Secretary of State) in a matter that neither the governor, under C.R.S. 24-31-101 (1)(a), nor the secretary of state, under C.R.S. 24-31-101(1)(b), has requested that he initiate. There is no case precedent or statutory authority cited by the attorney general which support such action.

In fact, the only case cited by the attorney general to support his authority is a California case. *See Pierce v. Superior Court in and for the County of Los Angeles*, 1 Cal.2d 759 (Cal. 1934). Not only is that case contrary to Colorado statutes and case law as demonstrated above but other states with statutory schemes 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).

B. The Attorney General Does Not Have Any Independent Statutory Authority to Bring Original Actions Against the Secretary of State

*15 The Attorney General cites C.R.S. § 1-1-107 (2)(b), (2002) 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. C.R.S. § 1-1-107 enumerates the powers and duties of the Secretary of State, not the Attorney General. C.R.S. § 1-1-107(1)(c) empowers the Secretary of State “With the assistance and advise of the attorney general, to make uniform interpretations of this code;” 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 ...”. The Attorney General’s role is that of the attorney representing his client, the Secretary of State. C.R.S. § 1-13-101(2) authorizes the Attorney General to prosecute violations of the election code. This power is also held by the district attorneys, pursuant to C.R.S. 1-13-101(1). The issues raised in the Attorney General’s Petition do not involve violations of the election code and thus reliance on C.R.S. § 1-13-101, (2000) is misplaced.

The congressional redistricting statute is found at Title II of the C.R.S. which is not part of the election code. The election code is found in Title I, C.R.S. Powers given under C.R.S. § 1-1-107 do not encompass the congressional redistricting statute.

C.R.S. § 1-13-101 authorizes the district attorneys and the Attorney General to file and prosecute violations of the election code. Even the Attorney General recognizes that he only has authority to investigate criminal complaints concerning the election code under this statute. *See* 10/21/02 Letter from Deputy AG Knaizer, App N. The statute does not give the Attorney General independent authority to bring civil actions.

The Attorney General’s petition fails to cite authority which gives him standing to bring the original action on behalf of the people.

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

The Attorney General is the Secretary of State’s attorney. This relationship creates obligations for the Attorney General under the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Rule 1.7(a) 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
- (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*, App

See Deukmejian v. Brown, 29 Cal. 3d 150, 624 P.2d 1206 (1981), for a review by the Supreme Court of California of the ethical dilemmas posed by the Attorney General suing the Governor. While the facts in *Deukmejian* (the Attorney General sued the Governor over the constitutionality of a law about which the Attorney General had earlier provided advice and counsel) are different than in the instant case, the opinion reviews the concern over the potential for even inadvertent disclosure of confidential information and insights obtained as a result of a long standing, broad representation of the executive branch. In addition, obligations to existing *17 and former clients are discussed in the context of the Attorney General suing a state executive branch client in a state where such power does not reside in the Attorney General.

The Rules of Professional Conduct compliment the framework created in state law. There is an attorney-client relationship between the Attorney General and his executive branch clients. It makes untenable the proposition that the Attorney General can sue the clients which on a daily basis he must counsel and represent on other matters.

CONCLUSION

1. This court should grant the Secretary of State's petition for a writ of injunction. As demonstrated above, without an injunction irreparable harm will occur because the Attorney General will become a free agent acting outside the scope of his statutory authority and, as in this case, in contravention of those statutes. Not only will harm occur to the Secretary of State but to the public as well if the Attorney General is allowed to define his powers beyond those assigned to him by the General Assembly. By imposing an injunction, the Court will not harm the public but, in fact, will maintain the existing and statutorily endorsed relationship between the Attorney General and other executive branch officials.

2. The writ of mandamus should be granted because the Petitioner is the Attorney General's client who, by statute, is entitled to be represented by him through the statutes cited above. At this time, the Secretary of State has no other remedy but this petition to this Court. The Attorney General has already petitioned this Court to endorse his view of his powers. The Secretary of State cannot pursue this issue before any other court.

3. The Secretary of State filed this petition because of the extraordinary circumstances presented by the petition previously filed by the Attorney General. At no other *18 time in the history of Colorado has the Attorney General brought an action against his client, who by statute, he is mandated to represent. The Attorney General's petition is an attempt to establish a new relationship between his office and other members of the executive branch of government without benefit of statutory change. Such a state of affairs requires this Court to review and determine the appropriate legal and client relationships among members of the executive branch. The Secretary of State respectfully requests this Court to review those fundamental relationships before addressing any question concerning recently enacted statutes.