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Constitutional Law

Donald T. Kramer, J.D.

IV. Construction of Constitutions [§§ 60–108]

D. Construction to Determine Operative Effect [§§ 95–108]

1. As Mandatory or Directory [§§ 95–97]

Topic Summary Correlation Table References

§ 97. Particular constitutional language—"Shall" or "may"

The use of the word "shall" in a constitutional provision is generally considered as an indication of the mandatory character of the provision,[39] although the word "shall" may receive a permissive interpretation when necessary to carry out the true intent of the provision in which that word is found.[40] Thus, use of the word "shall" is not always conclusive.[41]

Permissive constitutional language, such as the word "may," is usually treated as intended in fact to be merely permissive.[42] Accordingly, the word "may" should not be construed as "shall" in a constitutional provision, unless from the whole context the purpose plainly appears to be mandatory,[43] although occasionally the word "may" has been interpreted to mean "shall" or "must."[44] Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the provision in question. For instance, it seems to be the uniform rule that where the object of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or a private right requires that the thing be done—then the language, though permissive in form, is peremptory.[45]

[FN39] Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613, 141 A.L.R. 894 (1942); People v. DeJesus, 21 A.D.2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943), appeal dismissed, 322 U.S. 717, 64 S. Ct. 1288, 88 L. Ed. 1558 (1944); Stubbs v. State, 216 Tenn. 567, 393 S.W.2d 150 (1965); McMurdie v. Chugg, 99 Utah 403, 107 P.2d 163, 132 A.L.R. 435 (1940).

[FN40] Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960); Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927).

[FN41] Canyon Public Service Dist. v. Tasa Coal Co., 156 W. Va. 606, 195 S.E.2d 647 (1973).

[FN42] State ex rel. Lourin v. Industrial Commission, 138 Ohio St. 618, 21 Ohio Op. 490, 37 N.E.2d 595 (1941) (overruled by, Caruso v. Aluminum Co. of America, 15 Ohio St. 3d 306, 473 N.E.2d 818 (1984)).

For purposes of statutory and constitutional construction, the word "may" ordinarily signifies permission and generally means that the action spoken of is optional and discretionary. State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

[FN43] State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906).

[FN44] Robison v. Payne, 20 Cal. App. 2d 103, 66 P.2d 710 (3d Dist. 1937).

[FN45] Mundell v. Lyons, 182 Cal. 289, 187 P. 950 (1920).

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IV. Construction of Constitutions [§§ 60–108]

D. Construction to Determine Operative Effect [§§ 95–108]

2. As Self-Executing or Not Self-Executing [§§ 98–108]

a. In General [§§ 98–101]

Topic Summary Correlation Table References

§ 98. Generally

A constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution or mere restrictions upon the power of the legislature to pass laws.[46] However, it is entirely within the power of those who establish and adopt the constitution to make any of its provisions self-executing,[47] that is, operative without any necessity for further legislation.[48]

Criteria which may be relevant in determining whether a constitutional provision is self-executing or not include a description of the right in detail, such as the means for its enjoyment and protection; the absence of any directive to the legislature for further action; a particularly informative legislative history as to the provision's intended operation; a consistency of self-execution with the scheme of rights established in the constitution as a whole.[49]

Observation:

Even without the benefit of a declaration that they are self-executing, constitutional provisions in Bills of Rights and those merely declaratory of the common law are usually considered self-executing, as are provisions which specifically prohibit particular conduct.[50]

A clear distinction exists between the questions whether a constitutional provision is mandatory or directory and whether it is self-executing or requires legislation in order to give it effect.[51] A provision may be mandatory without being self-executing,[52] and a provision may be self-executing even though it contains some mandatory language.[53]

[FN46] State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994); Kraus v. City of Cleveland, 42 Ohio Op. 490, 58 Ohio L. Abs. 353, 94 N.E.2d 814 (C.P. 1950), decree aff'd by, 89 Ohio App. 504, 46

Ohio Op. 132, 58 Ohio L. Abs. 360, 96 N.E.2d 314 (8th Dist. Cuyahoga County 1950), appeal dismissed, 155 Ohio St. 98, 44 Ohio Op. 103, 97 N.E.2d 549 (1951).

[FN47] Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Birdsey v. Wesleyan College, 211 Ga. 583, 87 S.E.2d 378 (1955) (criticized in, Vulcan Materials Co. v. Griffith, 215 Ga. 811, 114 S.E.2d 29 (1960)); State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994); Kraus v. City of Cleveland, 155 Ohio St. 98, 44 Ohio Op. 103, 97 N.E.2d 549 (1951); O'Neill v. White, 343 Pa. 96, 22 A.2d 25 (1941).

A constitutional amendment, as much as a provision in the main body of the constitution itself, may be self-executing. Downs v. City of Birmingham, 240 Ala. 177, 198 So. 231 (1940).

[FN48] § 99.

[FN49] Shields v. Gerhart, 163 Vt. 219, 658 A.2d 924 (1995).

[FN50] Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985).

[FN51] State v. South Dakota Rural Credits Board, 45 S.D. 619, 189 N.W. 704 (1922).

As to whether a constitutional provision is mandatory or directory, generally, see §§ 95- 97.

[FN52] Leser v. Lowenstein, 129 Md. 244, 98 A. 712 (1916); State v. South Dakota Rural Credits Board, 45 S.D. 619, 189 N.W. 704 (1922).

[FN53] In re Larsen, 655 A.2d 239 (Pa. Ct. Jud. Discipline 1994) (a state constitutional amendment creating the Judicial Conduct Board and Court of Judicial Discipline, and requiring the Board and the Court to adopt their own rules of procedure, is self-executing, despite mandatory language therein requiring the Board and the Court to establish rules; however, the failure to promulgate rules cannot operate to deprive either the Board or the Court of their constitutionally granted jurisdiction).

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V. Determination of Constitutionality of Legislation [§§ 109–221]

A. Power to Declare Legislation Void [§§ 109–128]

2. Nature of Power [§§ 113, 114]

Topic Summary Correlation Table References

§ 114. As solemn responsibility

The exercise of the right and power of judicial tribunals to declare whether enactments of the legislature exceed constitutional limitations and are invalid is one of the highest functions and authorities of the courts.[37] It involves a grave responsibility[38] and a solemn duty,[39] and is at all times a matter of much delicacy.[40] By way of contrast, however, courts also have a solemn duty to avoid passing upon the constitutionality of any law unless compelled to do so by an issue being squarely presented to and confronting the court in a particular case.[41] Thus, courts should endeavor to implement the legislative intent of statutes and should avoid constitutional issues wherever possible.[42]

[FN37] Panitz v. District of Columbia, 112 F.2d 39 (App.D.C D.C. Cir. 1940).

A court's adherence to the principle that acts of Congress are presumptively constitutional is guided by the court's understanding that when it is required to pass on the constitutionality of an act of Congress, the court assumes the gravest and most delicate duty it is called on to perform. U.S. ex rel. Madden v. General Dynamics Corp., 4 F.3d 827, 26 Fed. R. Serv. 3d (LCP) 1401 (9th Cir. 1993).

[FN38] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (declined to extend on other grounds by, Telfair v. Gilberg, 868 F. Supp. 1396 (S.D. Ga. 1994)) and (declined to extend on other grounds by, Doe v. Poritz, 142 N.J. 1, 662 A.2d 367, 36 A.L.R.5th 711 (1995)) and (disagreement on other grounds recognized by, Artway v. Attorney General of State of N.J., 81 F.3d 1235 (3d Cir. 1996)) and (disagreement on other grounds recognized by, State v. Myers, 260 Kan. 669, 923 P.2d 1024 (1996)) and (disagreement on other grounds recognized by, Doe v. Criminal History Systems Board, 1997 WL 100878 (Mass. Super. Ct. 1997)); U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

[FN39] McCray v. U.S., 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 3 A.F.T.R. (P-H) ¶2763 (1904).

[FN40] U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

[FN41] State v. Watkins, 676 So. 2d 247 (Miss. 1996).

[FN42] State v. Mozo, 655 So. 2d 1115 (Fla. 1995), reh'g denied, (June 12, 1995); In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995), reh'g denied, (Aug. 3, 1995).

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V. Determination of Constitutionality of Legislation [§§ 109–221]

A. Power to Declare Legislation Void [§§ 109–128]

3. Judicial Restraint in Exercising Power [§§ 115–128]

Topic Summary Correlation Table References

§ 117. Avoidance of unnecessary decisions

While most courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved,[64] they will not make a ruling on a matter of constitutional law where there is a lack of this necessary involvement[65] or where some other basis for a decision is available;[66] thus, needless consideration of attacks on the validity of statutes and unnecessary decisions striking them down should be avoided.[67] This reluctance to decide constitutional issues except when absolutely necessary is sometimes referred to as the "doctrine of strict necessity," and flows from the unique place and character of judicial review of governmental actions for constitutionality under our American governmental structure.[68]

The invariable practice of the courts is not to consider the constitutionality of legislation unless it is imperatively required,[69] essential to the disposition of the case,[70] and unavoidable.[71] Thus, a court will inquire into the constitutionality of a statute only when and to the extent that a case before it requires entry upon that duty,[72] and only to the extent that it is essential to the protection of the rights of the parties concerned.[73]

CUMULATIVE SUPPLEMENT

Cases:

Questions regarding the constitutionality of statutes should be considered only where essential to the disposition of a case, i.e., where the case can not be determined on other grounds. Marconi v. Chicago Heights Police Pension Bd., 225 Ill. 2d 497, 312 Ill. Dec. 208, 870 N.E.2d 273 (2006), as modified on denial of reh'g, (May 29, 2007).

The constitutionality of a statute should be considered only when the question is properly raised and such determination is necessary and appropriate to a decision in the case. In re Commitment of Johnson, 153 S.W.3d 129 (Tex. App. Beaumont 2004).

[END OF SUPPLEMENT]

[FN64] I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317, 13 Envtl. L. Rep. 20663 (1983) (declined to extend on other grounds by, Gottesman v. U.S. I.N.S., 33 F.3d 383, 30 Fed. R. Serv. 3d (LCP) 187 (4th Cir. 1994)); Payne v. Griffin, 51 F. Supp. 588 (M.D. Ga. 1943); In re Wimberly Chapel Baptist Church of Osage County, 170 Kan. 684, 228 P.2d 540 (1951); State v. Phillips, 193 S.C. 273, 8 S.E.2d 626 (1940).

[FN65] American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989), on remand to, 889 F.2d 291 (D.C. Cir. 1989) and on remand to, 732 F. Supp. 13 (D.D.C. 1990) (courts should be extremely careful not to issue unnecessary constitutional rulings); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534, 18 Envtl. L. Rep. 21043 (1988); In re Snyder, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985), on remand to, 770 F.2d 743 (8th Cir. 1985); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985) (called into doubt on other grounds by, McLellan v. Acting Superintendent, M.C.I., Cedar Junction, 29 Mass. App. Ct. 122, 558 N.E.2d 5 (1990)); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984), on remand to, 364 N.W.2d 98 (N.D. 1985), cert. granted, 474 U.S. 900, 106 S. Ct. 270, 88 L. Ed. 2d 224 (1985) and judgment rev'd on other grounds, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986), on remand on other grounds to, 392 N.W.2d 87 (N.D. 1986) and (disagreement recognized on other grounds by, Wacondo v. Concha, 117 N.M. 530, 873 P.2d 276 (Ct. App. 1994)); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982), on remand to, 713 F.2d 137 (5th Cir. 1983), reh'g denied, 718 F.2d 1097 (5th Cir. 1983) and motion to recall mandate denied, 464 U.S. 927, 104 S. Ct. 329, 78 L. Ed. 2d 300 (1983) and (declined to extend on other grounds by, Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 1997 FED App. 88P (6th Cir. 1997)); Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), reh'g denied, 448 U.S. 917, 101 S. Ct. 39, 65 L. Ed. 2d 1180 (1980) and (not followed on state law grounds, Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995)) and (declined on other grounds to extend by, M.L.B. v. S.L.J., 117 S. Ct. 555, 136 L. Ed. 2d 473 (U.S. 1996)); U. S. v. Clark, 445 U.S. 23, 100 S. Ct. 895, 63 L. Ed. 2d 171 (1980); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450, 5 Media L. Rep. (BNA) 1273 (1979) (dispositive issues of statutory and local law are to be treated before reaching constitutional issues); Califano v. Yamasaki, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979), on remand to, 607 F.2d 329 (9th Cir. 1979) and (declined to extend on other grounds by, Grant v. Shalala, 989 F.2d 1332, 40 Soc. Sec. Rep. Serv. 527, Unempl. Ins. Rep. (CCH) ¶17171A (3d Cir. 1993)); Mobil Oil Corp. v. Virginia Gasoline Marketers and Automotive Repair Ass'n, Inc., 34 F.3d 220 (4th Cir. 1994), cert. denied, 513 U.S. 1148, 115 S. Ct. 1097, 130 L. Ed. 2d 1065 (1995) (courts should refrain from addressing constitutional questions unless it is necessary to do so); ACORN v. Edwards, 81 F.3d 1387, 108 Ed. Law Rep. 1080, 42 Env't. Rep. Cas. (BNA) 1942, 26 Envtl. L. Rep. 21257 (5th Cir. 1996), cert. denied, 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (U.S. 1997) and (distinguished on other grounds by, Strahan v. Coxe, 127 F.3d 155, 45 Env't. Rep. Cas. (BNA) 1321 (1st Cir. 1997)); Firestone v. Galbreath, 976 F.2d 279, R.I.C.O. Bus. Disp. Guide (CCH) ¶8097 (6th Cir. 1992), reh'g denied, (Oct. 21, 1992) and certified question answered, 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993), answer to certified question conformed to, 25 F.3d 323, 1994 FED App. 178P (6th Cir. 1994), on remand to, 895 F. Supp. 917 (S.D. Ohio 1995); Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n, Inc., 177 Ariz. 256, 866 P.2d 1342 (1994); Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996); Santa Clara County Local Transp. Authority v. Guardino (Howard Jarvis Taxpayers' Ass'n), 11 Cal. 4th 220, 12 Cal. 4th 344e, 45 Cal. Rptr. 2d 207, 902 P.2d 225 (1995), as modified on denial of reh'g, (Dec. 14, 1995); Stamford Hosp. v. Vega, 236 Conn. 646, 674 A.2d 821 (1996); In Interest of C.S., 516 N.W.2d 851 (Iowa 1994); Rhodes v. State Through Dept. of Transp. and Development, 674 So. 2d 239 (La. 1996), on remand to, 684 So. 2d 1134 (La. Ct. App. 1st Cir. 1996), writ not considered, 688 So. 2d 487 (La. 1997); Curran v. Price, 334 Md. 149, 638 A.2d 93 (1994); Neff v. Commissioner of Dept. of Indus. Accidents, 421 Mass. 70, 653 N.E.2d 556 (1995); State v. Still, 273 Mont. 261, 902 P.2d 546 (1995); State ex rel. Wieland v. Beermann, 246 Neb. 808, 523 N.W.2d 518 (1994); Owens v. State, 908 S.W.2d 923 (Tenn. 1995); City of Seattle v. Williams, 128 Wash. 2d 341, 908 P.2d 359 (1995).

The United States Supreme Court follows a policy of avoiding unnecessary adjudication of constitutional issues. U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964, 10 I.E.R. Cas. (BNA) 452 (1995).

Federal courts should not pass on the constitutionality of an act of Congress if construction of the act is fairly possible by which the constitutional question can be avoided. Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, 2 A.D.D. 176, 83 Ed. Law Rep. 930 (1993) (declined to extend on other grounds by, Foley v. Special School Dist. of St. Louis County, 927 F. Supp. 1214, 17 A.D.D. 570, 110 Ed. Law Rep. 630 (E.D. Mo. 1996)) and (distinguished on other grounds by, Jackson v. Benson, 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997)).

[FN66] Federal Election Com'n v. Survival Educ. Fund, Inc., 65 F.3d 285 (2d Cir. 1995).

A federal court should avoid addressing federal constitutional issues when it is possible to dispose of a case on pendent state grounds. Triple G Landfills, Inc. v. Board of Com'rs of Fountain County, Ind., 977 F.2d 287, 23 Envtl. L. Rep. 20130 (7th Cir. 1992).

[FN67] Communist Party, U.S.A. v. Catherwood, 367 U.S. 389, 81 S. Ct. 1465, 6 L. Ed. 2d 919 (1961); McElroy v. U. S. ex rel. Guagliardo, 361 U.S. 281, 80 S. Ct. 305, 4 L. Ed. 2d 282 (1960), for dissenting opinion, see, 361 U.S. 234, 80 S. Ct. 311, 4 L. Ed. 2d 268 (1960); Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n, Inc., 177 Ariz. 256, 866 P.2d 1342 (1994); Foreman v. State, 321 Ark. 167, 901 S.W.2d 802 (1995), appeal after remand, 328 Ark. 583, 945 S.W.2d 926 (1997); International Union of Elec., Salaried, Mach., and Furniture Workers, AFL-CIO v. Taylor, 669 A.2d 699 (D.C. 1995); State v. Mozo, 655 So. 2d 1115 (Fla. 1995), reh'g denied, (June 12, 1995); People v. McDaniel, 164 Ill. 2d 173, 207 Ill. Dec. 304, 647 N.E.2d 266 (1995); Curran v. Price, 334 Md. 149, 638 A.2d 93 (1994); Manor v. Superintendent, Massachusetts Correctional Inst., Cedar Junction, 416 Mass. 820, 626 N.E.2d 614 (1994), related reference, 2 Mass. L. Rptr. 506, 1994 WL 879790 (Mass. Super. Ct. 1994); State v. Watkins, 676 So. 2d 247 (Miss. 1996); World Peace Movement of America v. Newspaper Agency Corp., Inc., 879 P.2d 253, 22 Media L. Rep. (BNA) 2193 (Utah 1994).

A federal court should refuse to decide a constitutional issue unless a constitutional decision is strictly necessary. Cone Corp. v. Florida Dept. of Transp., 921 F.2d 1190, 36 Cont. Cas. Fed. (CCH) ¶76001, 55 Empl. Prac. Dec. (CCH) ¶40518 (11th Cir. 1991), cert. denied, 500 U.S. 942, 111 S. Ct. 2238, 114 L. Ed. 2d 479, 56 Empl. Prac. Dec. (CCH) ¶40803 (1991).

If a serious doubt of a statute's constitutionality is raised, a court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

[FN68] Citizens Nat. Bank of Evansville v. Foster, 668 N.E.2d 1236 (Ind. 1996).

[FN69] Bush v. State of Tex., 372 U.S. 586, 83 S. Ct. 922, 9 L. Ed. 2d 958 (1963); Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996), cert. denied, 117 S. Ct. 608, 136 L. Ed. 2d 534 (U.S. 1996) and (distinguished on other grounds by, Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 121 Ed. Law Rep. 892 (2d Cir. 1997)); People v. Victor, 62 Cal. 2d 280, 42 Cal. Rptr. 199, 398 P.2d 391 (1965); State ex rel. Hofstetter v. Kronk, 20 Ohio St. 2d 117, 49 Ohio Op. 2d 440, 254 N.E.2d 15 (1969).

The United States Supreme Court will not pass upon questions of the constitutionality of a statute unless

such adjudication is unavoidable. Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963) (declined on other grounds to extend by, Kasbati v. District Director of I.N.S., 805 F. Supp. 619 (N.D. Ill. 1992)) and (declined to extend on other grounds by, Mejia-Ruiz v. I.N.S., 51 F.3d 358 (2d Cir. 1995)).

Constitutional questions are not decided in advance of strict necessity. Jackson v. Oklahoma Memorial Hosp., 909 P.2d 765, 106 Ed. Law Rep. 364 (Okla. 1995), reh'g denied, (Jan. 30, 1996).

[FN70] Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff, 909 S.W.2d 348 (Mo. 1995), reh'g denied, (Nov. 21, 1995).

[FN71] Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963) (declined on other grounds to extend by, Kasbati v. District Director of I.N.S., 805 F. Supp. 619 (N.D. Ill. 1992)) and (declined to extend on other grounds by, Mejia-Ruiz v. I.N.S., 51 F.3d 358 (2d Cir. 1995)); U. S. v. Hayman, 342 U.S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952).

Only in cases where it is virtually impossible to decide an issue on the merits without considering constitutionality will the Kansas Supreme Court entertain the question of constitutionality. McVay v. Rich, 255 Kan. 371, 874 P.2d 641 (1994).

[FN72] Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995); In re Sale's Estate, 227 So. 2d 199 (Fla. 1969).

[FN73] O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905 (1940), reargument denied, 284 N.Y. 591, 29 N.E.2d 665 (1940); Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St. 2d 207, 34 Ohio Op. 2d 420, 215 N.E.2d 403 (1966), cert. denied, 385 U.S. 836, 87 S. Ct. 82, 17 L. Ed. 2d 70 (1966).

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V. Determination of Constitutionality of Legislation [§§ 109–221]

B. Raising Questions of **Constitutional** Validity [§§ 129–165]

2. Interest Essential to Raising Questions [§§ 139–161]

b. Sufficiency of Interest of Particular Classes of Persons or Entities [§§ 151–161]

Topic Summary Correlation Table References

§ 155. Taxpayers

A.L.R. Library

Constitutionality of Legislative Prayer Practices, 30 A.L.R.6th 459

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Am. Jur. Pleading and Practice Forms, Constitutional Law §§ 28, 29

Law Reviews and Other Periodicals

Delahunty, "Varied Carols": Legislative Prayer In a Pluralist Polity, 40 Creighton L. Rev. 517 (2007)

Generally speaking, a person who pays taxes or is liable to pay taxes for the support of a taxing unit and who would be injured by the unlawful expenditure of public funds,[54] by the illegal disposition of the public property of such taxing unit,[55] or by any other illegal act which would increase his or her burden of taxation, is entitled to institute and maintain a taxpayer's action, regardless of the amount or kind of taxes that he or she pays.[56] Thus, a tax-paying member of a state legislature has standing to challenge the constitutionality of the practice of beginning

each legislative session with a prayer offered by a chaplain paid out of public funds.[57]

However, as a general rule, private citizens who seek to restrain official acts must allege and prove some damage to themselves different in character from that sustained by the public generally.[58] Ordinarily, the mere status of one as a taxpayer is not sufficient to qualify him or her to institute a taxpayer's action. The rule is that the taxpayer must have a pecuniary interest in the subject of the action and must show that the acts complained of will result in some pecuniary loss or other injury to his or her property or interests as a taxpayer and to taxpayers as a class, through increased taxation and the consequences thereof, or in some financial loss or injury to the municipal corporation or other governmental unit on behalf of which he or she institutes the action, and in the absence of such a showing of direct pecuniary injury by the taxpayer, no justiciable case or controversy exists.[59]

Thus, a taxpayer who was not herself impeded from traveling to or settling in California by that state's property tax system which she challenged, and who did not identify any obstacle preventing others who wished to travel to or settle in California from asserting claims on their own behalf, could not have the tax system subjected to heightened scrutiny on the basis that the system violated the constitutional right to travel.[60] Taxpayers who sought to be excluded from the self-employment tax under exemptions for ministers and members of religious orders,[61] and members of certain religious faiths[62] lacked standing to contend that these exemptions violated both the establishment and free exercise clauses of the First Amendment, because the taxpayers cannot fall within the exemptions if those sections are held unconstitutional under the First Amendment, and thus their alleged injury cannot be redressed by a favorable decision.[63] And a group of 5,000 taxpayers lacked standing to challenge the alleged failure of the Internal Revenue Service to comply with various constitutional and statutory requirements in its tax collection efforts, absent any statement identifying any claimant as having personally suffered from the alleged conduct complained of or anything more than some remote and conjectural allegations of injuries.[64]

However, federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I § 8, of the Constitution,[65] so that, for example, federal taxpayers can challenge federal statutes[66] which authorize grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy, including religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as governmental agencies, and which restrict the use of funds in various ways, including a ban on the use of funds to provide family planning services or promote abortion.[67] Furthermore, the Court has held that taxpayers had standing to raise an establishment clause challenge to school district programs which provided classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools.[68]

An exception to the general rule that an individual taxpayer, to challenge a statute's constitutionality under the equal protection clause, must show that the alleged unconstitutional feature of statute injures him and so operates to deprive him of a constitutional right, exists when the individual taxpayer seeks to enjoin an illegal act by a municipal body.[69]

CUMULATIVE SUPPLEMENT

Cases:

There was no exception to the general prohibition on taxpayer standing for a Commerce Clause challenge to state tax or spending decisions. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (U.S. 2006).

Religious organization had federal taxpayer standing to challenge constitutionality of federally chartered corporation's AmeriCorps Education Awards Program (EAP), a nationwide community service program, as violative of the First Amendment's Establishment Clause. American Jewish Congress v. Corporation for Nat'l. and Community Service, 399 F.3d 351, 195 Ed. Law Rep. 733 (D.C. Cir. 2005).

Taxpayers, who were former employees of not-for-profit religious and social services corporation, had standing

to claim that state agencies violated Establishment Clause by providing social services funding to corporation 95% government financed and using 10% of funds received from government sources for religious purposes. Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223 (S.D. N.Y. 2005).

Claim was stated that state agencies violated Establishment Clause when they provided funding to not-for-profit religious and social services corporation, primarily financed by federal government, when 10% of funding went for religious purposes rather than social services to be performed for government. Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223 (S.D. N.Y. 2005).

[END OF SUPPLEMENT]

[FN54] Tax Equity Alliance for Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 672 N.E.2d 504 (1996) (a statute allowing 24 or more taxpayers to file a petition in equity to prevent the unlawful expenditure of public funds did not confer standing on those taxpayers to challenge the constitutionality of capital gains tax legislation, which did not authorize any expenditures, but which was directed exclusively at raising revenue); Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (Mo. 1994) (a taxpayer had standing to challenge a riverboat gambling statute based on direct expenditure of funds generated through taxation involved in implementing the challenged activity); City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995) (taxpayers had standing to challenge the constitutionality of a statute requiring that two percent of the gross proceeds from the lottery be credited to the Thoroughbred Racing Assistance Fund, as they were seeking to enjoin the expenditure of public funds).

[FN55] McIntire v. Forbes, 322 Or. 426, 909 P.2d 846 (1996) (the term "any interested person" for purposes of the provision in a statute allowing any interested person to petition the state supreme court for a determination of the constitutionality of a statute said to unlawfully divert funds for improper purposes includes taxpayers whose tax burden will be or is likely to be increased by the operation of the challenged statute).

[FN56]

Legal Encyclopedias

See 74 Am. Jur. 2d, Taxpayers' Actions §§ 3, 4.

[FN57] Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) (declined to extend by, Cammack v. Waihee, 932 F.2d 765, 2 Wage & Hour Cas. 2d (BNA) 1725 (9th Cir. 1991)) and (holding limited on other grounds by, Griffith v. Teran, 794 F. Supp. 1054, 76 Ed. Law Rep. 796 (D. Kan. 1992)) and (declined to extend by, Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2d Cir. 1997)).

[FN58] Carter v. Montana Dept. of Transp., 274 Mont. 39, 905 P.2d 1102 (1995), cert. denied, 116 S. Ct. 1675, 134 L. Ed. 2d 778 (U.S. 1996); City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995).

Citizens and taxpayers who challenged the validity of a law which included provisions defining the salaries of members of the state General Assembly failed to show any interest beyond that of the general public, and the court thus lacked jurisdiction. Pence v. State, 652 N.E.2d 486 (Ind. 1995), reh'g denied, (Sept. 22, 1995).

But see Stumes v. Bloomberg, 1996 SD 93, 551 N.W.2d 590 (S.D. 1996) (holding that the constitutionality of legislation affecting the use of public funds is a matter of public right, which may be the subject of a suit by a taxpayer or elector, under a judicial recognized exception to the "real party in interest" test, without a showing of any special injury or special interest).

[FN59]

Legal Encyclopedias

74 Am. Jur. 2d, Taxpayers' Actions § 4.

[FN60] Nordlinger v. Hahn, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) (declined to extend by, Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997)).

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Taxpayer's standing to raise constitutional question in federal court, 20 L. Ed. 2d 1671.

Legal Encyclopedias

As to the "cases and controversies" requirement generally, see 32 Am. Jur. 2d, Federal Courts § 548.
As to the standing of federal taxpayers to raise in a federal court the constitutionality of federal tax or appropriation statutes, see 74 Am. Jur. 2d, Taxpayers' Actions § 8.

[FN61] 26 USCA § 1402(e).

[FN62] 26 USCA § 1402(g).

[FN63] Templeton v. C.I.R., 719 F.2d 1408, 83-2 U.S. Tax Cas. (CCH) ¶9656, 52 A.F.T.R.2d (P-H) ¶83-6213 (7th Cir. 1983).

[FN64] Chrisman v. C.I.R., 82 F.3d 371, 77 A.F.T.R.2d (P-H) ¶96-2205 (10th Cir. 1996) (an assertion about the existence of files containing thousands of stories of common abuse among the claimants was not sufficient without a single concrete example).

[FN65] Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) (limitation of holding recognized by, Children's Healthcare is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466, 51 Soc. Sec. Rep. Serv. 944 (D. Minn. 1996)).

[FN66] 42 USCA §§ 300z et seq.

[FN67] Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), on remand to, 703 F. Supp. 1 (D.D.C. 1989) and on remand to, 125 F.R.D. 1 (D.D.C. 1989), related reference, 1989 WL 39012 (D.D.C. 1989) and related reference, 766 F. Supp. 1180 (D.D.C. 1991), related reference, 1992 WL 119125 (D.D.C. 1992) and (declined to extend by, Church of Scientology Flag Service Organization, Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993)) and (holding limited by noting organizations in Bowen case were operated in a secular manner but had a religious affiliation by, Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546, 91 Ed. Law Rep. 810 (1994)) and (declined to extend by, Children's Healthcare is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466, 51 Soc. Sec. Rep. Serv. 944 (D. Minn. 1996)).

As to the First Amendment substantial overbreadth exception to the general standing requirement, see § 140.

[FN68] School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267, 25 Ed. Law Rep. 1006 (1985), for dissenting opinion, see, 473 U.S. 373, 105 S. Ct. 3248, 87 L. Ed. 2d 267, 25 Ed. Law Rep. 1038 (1985) and (called into doubt on other grounds by, Fordham University v. Brown, 856 F. Supp. 684, 93 Ed. Law Rep. 608 (D.D.C. 1994)) and (declined to extend by, Russman by Russman v. Sobol, 85 F.3d 1050, 17 A.D.D. 257 (2d Cir. 1996)) and (overruled on other grounds by, Agostini v. Felton, 117 S. Ct. 1997, 138 L. Ed. 2d 391, 119 Ed. Law Rep. 29, 37 Fed. R. Serv. 3d (LCP) 1051 (U.S. 1997)) and (overruling on other grounds recognized by, Stark v. Independent School Dist., No. 640, 123 F.3d 1068, 121 Ed. Law Rep. 41 (8th Cir. 1997)).

[FN69] City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995).

Citizens who have paid validly assessed taxes have standing to sue various government entities for relief in the nature of mandamus and have the right to force uniform collection where the tax they pay is not collected from all taxpayers from whom it is legally due. Douglas v. Glacier State Tel. Co., 615 P.2d 580 (Alaska 1980).

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V. Determination of Constitutionality of Legislation [§§ 109–221]

C. Establishing Constitutionality [§§ 166–202]

1. Relevant Matters [§§ 166–184]

b. Construction in Favor of Constitutionality [§§ 172–179]

Topic Summary Correlation Table References

§ 177. Corollary rules of construction; court's rewriting the law—Reconciliation of conflicts and inconsistencies

If an asserted conflict or repugnancy between a statute and the federal or state constitutions can be reconciled, the court must do so.[11] Courts are bound to construe statutes so as to give them validity and a reasonable construction; seeming inconsistencies in various provisions of the statutes should be reconciled, if possible, so as to arrive at the meaning that gives effect to all parts of the statutes.[12] It follows that where the language of a statute is consistent with the language and purposes of the constitution and can readily be reconciled therewith, the statute will be held constitutional.[13]

This rule applies to appellate courts as well as trial courts. Both have an obligation to pursue every reasonable path of reconciliation of a challenged statute consonant with the Constitution; every presumption in favor of the statute will be indulged, and every effort will be made to construe ambiguous language so as not to conflict with the fundamental law.[14]

CUMULATIVE SUPPLEMENT

Cases:

When interpreting a statute, courts will interpret it as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute. Singh v. Superior Court, 140 Cal. App. 4th 387, 44 Cal. Rptr. 3d 348 (2d Dist. 2006), review filed, (July 21, 2006).

Before a court may declare unconstitutional an enactment of the legislative branch, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007).

Before court can declare statute unconstitutional, it must appear beyond a reasonable doubt that statute and con-

stitutional provisions are clearly incompatible. Desenco, Inc. v. Akron, 84 Ohio St. 3d 535, 706 N.E.2d 323 (1999).

[END OF SUPPLEMENT]

[FN11] Westvaco Corp. v. South Carolina Dept. of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995), reh'g denied, (Mar. 7, 1996) (a legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt; a legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution).

[FN12] Gross v. General Motors Corp., 448 Mich. 147, 528 N.W.2d 707 (1995).

[FN13] Mancuso v. Board of Education of Schenectady City School District, 207 Misc. 703, 142 N.Y.S.2d 428 (Sup. Ct. 1954), judgment aff'd, 309 N.Y. 726, 128 N.E.2d 422 (1955); State ex rel. Harbage v. Ferguson, 68 Ohio App. 189, 22 Ohio Op. 139, 34 Ohio L. Abs. 129, 36 N.E.2d 500 (2d Dist. Franklin County 1941), appeal dismissed, 138 Ohio St. 617, 22 Ohio Op. 152, 37 N.E.2d 544 (1941).

[FN14] Childs v. Childs, 69 A.D.2d 406, 419 N.Y.S.2d 533 (2d Dep't 1979), appeal dismissed, cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

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VII. Departmental Separation of Governmental Powers [§§ 246–312]

B. Executive Powers [§§ 255–258]

Topic Summary Correlation Table References

§ 255. Generally

The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them.[71] Ultimately, all executive power is granted by the Constitution, and the executive branch can exercise no power not derived from that instrument.[72]

The executive power is said by some to be more limited than the legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts—the legislature having the power, except where limited by the Constitution itself, to stipulate what actions executive officers shall or shall not perform.[73] As are all of the three main branches of government,[74] the executive branch is independent of the other two.[75] However, unlike the monarchs of old, the President of the United States, though entitled to extreme deference in the conduct of his constitutional duties and obligations, is not above the law.[76] And in accordance with the general principle of the separation of powers, the executive department cannot generally usurp or exercise judicial[77] or legislative[78] power, and, by the same token, the executive power may not be encroached upon or interfered with by the judiciary.[79] It is as important to preserve and protect the powers of the executive branch of the government and its ability to function as it is to preserve and protect the other branches.[80]

The executive power also includes the power to administer the laws, and thus the promulgation of rules and regulations for such purpose is also an executive function.[81] Very often, executive power is taken to be the same as administrative power, or a power or function is described as "executive or administrative," and some state constitutions expressly recognize the executive power as including the administrative. The distinction between "executive" and "administrative" is that the former involves carrying out a legislatively completed policy while the latter involves legislative discretions as to policy in completing and perfecting the legislative process.[82]

Executive power includes the power to issue pardons[83] and reprieves,[84] and to grant or revoke paroles;[85] the exclusive authority to decide whether to prosecute and which alternative charges to pursue rests with the executive branch.[86]

The President has the authority to conduct the nation's foreign policy, and to recognize a foreign government.[87]

The right to make appointments to public office may, under certain circumstances, be exercised in whole or in part by other departments;[88] however, that power has in a number of instances been regarded as an executive function.[89]

The executive power need not, in all cases, be exercised directly and exclusively by the chief executive, but may be, in some instances, and most frequently is, delegated to subordinates.[90]

CUMULATIVE SUPPLEMENT
Law Reviews and Other Periodicals

Executive agreements and the (non)treaty power, 77 NC LR 133.

Cases:

Separation of powers doctrine was not violated by President's designation of a military commission to try enemy combatant alleged to have fought for al-Qaeda; Congress, through the joint resolution passed in response to the attacks of September 11, 2001, authorized use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks, as well as through two statutes, authorized such commissions. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (U.S. 2005)

[END OF SUPPLEMENT]

[FN71] State for Use of Dept. of Corrections v. Pena, 911 P.2d 48 (Colo. 1996); Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941); Del Papa v. Steffen, 112 Nev. 369, 915 P.2d 245, 24 Media L. Rep. (BNA) 1879 (1996); Bourquin v. Cuomo, 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995), related reference, 231 A.D.2d 185, 659 N.Y.S.2d 933 (3d Dep't 1997); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995).

The province of the executive branch is to see that the laws are faithfully executed. McDonnell v. Juvenile Court in and for Second Judicial Dist., 864 P.2d 565 (Colo. 1993).

Generally speaking, executive power is the power to enforce the laws. Gleason v. Samaritan Home, 260 Kan. 970, 926 P.2d 1349 (1996).

[FN72] Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (U.S. 1942).

[FN73] State v. Huber, 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946).

[FN74] § 250.

[FN75] State ex rel. S. Monroe & Son Co. v. Baker, 112 Ohio St. 356, 3 Ohio L. Abs. 266, 147 N.E. 501 (1925).

[FN76] U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (neither the doctrine of separation of powers nor the need for confidentiality of high level communications can, without more, sustain an absolute unqualified presidential privilege of immunity from the judicial process under all circumstances; however, it is necessary in the public interest to afford presidential confidentiality the greatest pro-

tection possible that is consistent with the fair administration of justice).

A.L.R. Library

Executive privilege with respect to presidential papers and recordings, 19 A.L.R. Fed. 472.

[FN77] In re Energy Resources Co., Inc., 871 F.2d 223, 19 Bankr. Ct. Dec. (CRR) 226, 20 Collier Bankr. Cas. 2d (MB) 1552, Bankr. L. Rep. (CCH) ¶72846, Unempl. Ins. Rep. (CCH) ¶14630A, 89-1 U.S. Tax Cas. (CCH) ¶9249, 63 A.F.T.R.2d (P-H) ¶89-1010 (1st Cir. 1989) (the Internal Revenue Service cannot, in any obvious way, circumscribe, by using an internal rule, a court's statutory powers).

And see, regarding limitations on the executive branch as respects the judiciary § 256.

[FN78] § 258.

[FN79] McDonnell v. Juvenile Court in and for Second Judicial Dist., 864 P.2d 565 (Colo. 1993) (generally, a district court does not have the right to interfere with the executive branch of government in performing its statutory duties).

[FN80] Brooks v. Pan Am. Loan Co., 65 So. 2d 481 (Fla. 1953) (disapproved on other grounds of by, A. B. C. Business Forms, Inc. v. Spaet, 201 So. 2d 890 (Fla. 1967)).

[FN81] Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).

[FN82]

Legal Encyclopedias

See 2 Am. Jur. 2d, Administrative Law §§ 68–70.

[FN83]

Legal Encyclopedias

See 59 Am. Jur. 2d, Pardon and Parole §§ 13–14.

[FN84] U.S. v. Williams, 15 F.3d 1356, 1994 FED App. 37P (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied, (Apr. 4, 1994) and cert. denied, 513 U.S. 966, 115 S. Ct. 431, 130 L. Ed. 2d 344 (1994) and related reference, 43 F.3d 1473 (6th Cir. 1994).

[FN85] U.S. v. Fryar, 920 F.2d 252 (5th Cir. 1990), cert. denied, 499 U.S. 981, 111 S. Ct. 1635, 113 L. Ed. 2d 730 (1991) (parole revocation is an executive function).

[FN86] U.S. v. Spillman, 924 F.2d 721 (7th Cir. 1991), reh'g denied, (Mar. 4, 1991); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (not followed on state law grounds, Com. v. Swinehart, 541 Pa. 500, 664 A.2d 957 (1995)).

The executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

A court will not exercise its supervisory powers over the administration of federal criminal justice to dismiss an interstate travel count after the defendant's plea agreement with prosecutors regarding drug conspiracy counts, since the Constitution commits the prosecutorial function to the executive branch, not the judicial, and it is the province of the government to decide the terms on which it will bring criminal indictments. U.S. v. Burns, 990 F.2d 1426 (4th Cir. 1993), cert. denied, 508 U.S. 967, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) and related reference, 16 F.3d 413 (4th Cir. 1994).

[FN87] U.S. v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (executive recognition of Russian soviet republic was operative and gave validity to previous acts of such republic).

The issue of whether individuals of Latvian, Lithuanian, and Estonian ancestry should be permitted to represent those nations in the opening ceremonies of the XXIIIrd Olympiad, the International Olympic Committee having determined that those nations should be represented by the Union of Soviet Socialist Republics, was a matter of a political nature, beyond the province of our courts of law, in that the U.S. Const., Art. II, § 2, specifically delegates to the President of the United States questions dealing with the relations between the United States and other nations. Spindulys v. Los Angeles Olympic Organizing Committee, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (2d Dist. 1985).

[FN88] Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995) (under the Kansas Constitution, the appointment power does not reside exclusively in the executive branch).

Susolik, Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and the Rule of Law. 63 S Cal LR 1515, July, 1990.

A.L.R. Library

Supreme Court's construction and application of appointments clause of Art II, § 2, cl.2, of Federal Constitution, 101 L. Ed. 2d 1072.

Law Reviews and Other Periodicals

Blumoff, Separation of Powers and the Origins of the Appointment Clause. 37 Syr LR 1037, 1987.
Whitehouse, Appointments by the Legislature under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled. 1 Roger Williams U LR 1, Spring, 1996.

[FN89]

Legal Encyclopedias

See 63C Am. Jur. 2d, Public Officers and Employees § 90.

[FN90] § 289.

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VII. Departmental Separation of Governmental Powers [§§ 246–312]

B. Executive Powers [§§ 255–258]

Topic Summary Correlation Table References

§ 256. Limitations as respects judiciary

Executive officers cannot exercise[91] or usurp[92] judicial powers or functions, such as passing upon the constitutionality of legislation,[93] deciding whether a plaintiff or potential plaintiff has standing to maintain an action in court for judicial review of an agency's action,[94] amending or modifying court orders,[95] or sentencing criminals;[96] nor can they interfere with the courts,[97] or prevent them from exercising their inherent judicial functions.[98] On the other hand, it will not be held that an executive officer has performed a judicial function in performing his or her statutory duties which are executive in character.[99] Moreover, acts of the President[1] and other executive officers have been held not to constitute an exercise or usurpation of judicial power under many different circumstances.[2]

Observation:

The separation of powers doctrine requires administrative agencies in the executive branch to follow the law of the federal circuit whose courts have jurisdiction over a particular cause of action, and in the absence of a controlling decision by the United States Supreme Court, the respective Courts of Appeal express the law of that circuit.[3]

Although the executive branch may not force members of the judicial branch to perform duties that are not in keeping with their judicial roles and the independence of the judiciary, the power of the President, under a provision of a federal statute, to appoint members of the United States Sentencing Commission—at least three of whom must be federal judges—and to remove such members for neglect of duty, malfeasance, or other good cause, does not afford the President influence over the functions of the judicial branch of the Federal Government or undue sway over the members of that branch, in violation of the constitutional principles of separation of powers, because: (1) the President's power to appoint judges to other positions has never been considered sufficient to corrupt the integrity of the judiciary, and, in any case, the President's power of appointment to the Commission is limited by the requirement that judicial appointees be selected from a list submitted by the Judicial Conference of the United States; (2) the President has no power to affect the tenure and compensation of Article III judges as judges, so that even if the statute authorized the President to remove judges from the Commission at will, the President would have no power to coerce the judges in the exercise of their judicial duties; and (3) Congress has not given the President unfettered authority to remove Commission members, but has insulated such members from removal except for good cause.[4]

It has been held that the presence of a retired Supreme Court justice and an active circuit judge on a Presidential Commission to investigate organized crime does not violate the constitutional separation of powers doctrine, where the service of the judges was voluntary, judicial membership on the advisory commission did not prevent it from carrying out its duties, and participation by the judges did not disrupt the operation of the courts.[5] However, at least one court has taken a contrary position.[6]

CUMULATIVE SUPPLEMENT

Cases:

The Court of Appeals and the District Court lacked jurisdiction to order discovery of or access to classified documents for the sake of defendant's clemency petition; clemency decision was within exclusive province of Executive Branch, and such a court order would violate the separation of powers doctrine. U.S. v. Pollard, 416 F.3d 48 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1590, 164 L. Ed. 2d 303 (U.S. 2006).

Federal Sentencing Guidelines, as modified by Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act provision known as Feeney Amendment, violated Separation of Powers Doctrineby effectively uniting power to prosecute and power to sentence within executive branch; Amendment gaveexecutive branch effective control over Sentencing Commission by eliminating requirement that at least three ofseven members had to be federal judges, and shift in control was exacerbated by other elements of Amendmentincluding eliminating court's authority to grant third downward-departure point for acceptance of responsibilityabsent prosecutor's request, requiring de novo appellate review of most sentencing decisions, giving AttorneyGeneral power to create "fast-track" programs authorizing reductions in sentence in return for immediate guiltypleas, and requiring reporting to Attorney General of identity of any judge granting downward departure notrequested by prosecutor.U.S. v. Detwiler, 338 F. Supp. 2d 1166 (D. Or. 2004).

California death penalty law does not violate the constitutional principle of separation of powers by delegating sentencing authority to the prosecutor; ultimate sentencing power remains at all times with the judicial branch. People v. Tafoya, 42 Cal. 4th 147, 64 Cal. Rptr. 3d 163, 164 P.3d 590 (2007).

The existence of prosecutorial discretion whether to seek the death penalty in a given case does not render the death penalty law unconstitutional. West's Ann.Cal.Penal Code § 190.2. People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005), cert. denied, 2006 WL 1059431 (U.S. 2006).

"Terri's law" which authorizes the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient in a persistent vegetative state violated separation of powers; the Act, as applied, resulted in an executive order that effectively reversed a properly rendered final judgment authorizing termination of life support and thereby constituted an unconstitutional encroachment on the power reserved for the independent judiciary, even though the District Court of Appeal had concluded that the order was subject to recall as long as the ward was alive. West's F.S.A. Const. Art. 2, § 3; Laws 2003, ch. 03–418, § 1 et seq. Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004), cert. denied, 125 S. Ct. 1086, 160 L. Ed. 2d 1069 (U.S. 2005).

Memorandum issued by the President of the United States, directing state courts to give effect to decision of the International Court of Justice holding that the United States had violated the Vienna Convention by failing to timely advise Mexican national awaiting execution in United States prison of his right to talk to a consular official after he had been detained, and ordering the United States to provide review and reconsideration of his conviction and sentence, violated separation of powers doctrine by intruding into domain of the judiciary and, thus, did not preempt state procedural rule establishing requirements for consideration of a subsequent application for writ of habeas corpus or require state court to review and reconsider Mexican national's Vienna Convention claim. Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), cert. granted, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (U.S. 2007).

President cannot dictate to the judiciary what law to apply or how to interpret the applicable law. (Per Keasler, J., with three Judges concurring and one Judge concurring in result). Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), cert. granted, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (U.S. 2007).

[END OF SUPPLEMENT]

[FN91] People ex rel. Consolidated Water Co. of Utica v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961 (1937), probable jurisdiction noted, 58 S. Ct. 56 (U.S. 1937) and appeal dismissed, 303 U.S. 158, 58 S. Ct. 506, 82 L. Ed. 724 (1938).

[FN92] U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); People ex rel. Ingenito v. Warden and Agent of Auburn Prison, 267 A.D. 295, 46 N.Y.S.2d 72 (4th Dep't 1943), order aff'd, 293 N.Y. 803, 59 N.E.2d 174 (1944).

[FN93] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823, 9 Envtl. L. Rep. 20517 (1979); State v. Sproles, 672 N.E.2d 1353 (Ind. 1996) (the Department of State Revenue has no authority to strike down a tax statute).

The Rhode Island Attorney General does not have authority to determine that legislation is unconstitutional, although the Attorney General may inform the court that, in his or her opinion, a statute is flawed. National Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986).

[FN94] Sugarloaf Citizens' Ass'n v. Department of Environment, 344 Md. 271, 686 A.2d 605 (1996), reconsideration denied, 344 Md. 570, 689 A.2d 58 (1997).

[FN95] Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996), reh'g denied, (Nov. 19, 1996) (administrative modification of a child support does not permit an agency to review or enforce a trial court's support order, and thus it does not impinge on the judiciary's exclusive powers of judicial review and enforcement of prior orders).

The executive and legislative departments impermissibly interfere with judicial functions in violation of the state constitution when they purport to restrict or abolish a court's inherent powers, or when they purport to reverse, modify, or contravene a court order. Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996).

Modification of a death sentence to life imprisonment is a matter within the province of the Supreme Court, not the Attorney General. State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995).

[FN96] Forbes v. Singletary, 684 So. 2d 173 (Fla. 1996) (sentencing is an obligation of the courts rather than the Department of Corrections).

[FN97] State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

[FN98] Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996); State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970).

Judicial power under the Constitution extended to the President's claim of absolute privilege with respect to tape recordings and documents relating to conversations with his aides and advisors, subpoenaed by a special prosecutor for use in pending criminal prosecutions. U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

The executive branch may not decide for itself the question of whether an authority that is in question is exclusively committed to agency discretion; it is the function of the courts to interpret the Administrative Procedure Act concerning the right of citizens to obtain judicial review, not the function of executive agen-

cies to determine whether they wish to be reviewed by the courts or not. Diebold v. U.S., 961 F.2d 97 (6th Cir. 1992).

Separation of powers mandates that the judiciary remain independent of executive affairs and vice versa. U.S. v. Robertson, 45 F.3d 1423 (10th Cir. 1995), reh'g denied, 49 F.3d 671 (10th Cir. 1995) and cert. denied, 515 U.S. 1108, 115 S. Ct. 2258, 132 L. Ed. 2d 265 (1995) and cert. denied, 515 U.S. 1108, 115 S. Ct. 2259, 132 L. Ed. 2d 265 (1995) and cert. denied, 116 S. Ct. 133, 133 L. Ed. 2d 81 (U.S. 1995).

[FN99] People v. Superior Court (Alvarez), 14 Cal. 4th 968, 60 Cal. Rptr. 2d 93, 928 P.2d 1171 (1997), reh'g denied, (Mar. 12, 1997) (the action of a district attorney in filing an information is not the exercise of a judicial power or function).

[FN1] U.S. v. Williams, 15 F.3d 1356, 1994 FED App. 37P (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied, (Apr. 4, 1994) and cert. denied, 513 U.S. 966, 115 S. Ct. 431, 130 L. Ed. 2d 344 (1994) and related reference, 43 F.3d 1473 (6th Cir. 1994) (the executive power to grant reprieves and pardons for offenses against the United States does not limit the power of the judiciary).

[FN2] Chas. T. Main Intern., Inc. v. Khuzestan Water & Power Authority, 651 F.2d 800 (1st Cir. 1981) (holding that the President did not divest federal courts of jurisdiction over claims against Iran by agreeing to a settlement requiring U.S. claimants to divert their claims to an international arbitration tribunal since he simply exercised his constitutionally based power to "settle" claims of U.S. nationals against a foreign state in the course of negotiating an end to an international crisis).

Prosecutorial discretion to seek the death penalty does not violate the constitutional principle of separation of powers by delegating sentencing authority to the prosecutor, as the ultimate sentencing power remains at all times with the judicial branch. People v. Arias, 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (1996), reh'g denied, (July 10, 1996) and cert. denied, 117 S. Ct. 2408, 138 L. Ed. 2d 175 (U.S. 1997).

Washington Initiative 593, the "three strikes law," does not violate the separation of powers doctrine on the theory that it transfers sentencing discretion from judges to prosecutors without providing standards for the exercise of that discretion. State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996), reconsideration denied, (Oct. 24, 1996) and cert. denied, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (U.S. 1997).

A statute granting the warden of a prison authority to allow a defendant to participate in a youthful offender program did not violate the separation of powers doctrine; the statute did not authorize the warden to sentence or to alter a sentence; instead, the District Court retained discretion to reduce the sentence or to decline any sentence reduction following the defendant's successful completion of the program. Ellett v. State, 883 P.2d 940 (Wyo. 1994).

[FN3] Hyatt v. Heckler, 807 F.2d 376, 16 Soc. Sec. Rep. Serv. 52, Unempl. Ins. Rep. (CCH) ¶17092 (4th Cir. 1986), cert. denied, 484 U.S. 820, 108 S. Ct. 79, 98 L. Ed. 2d 41 (1987).

[FN4] Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

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[FN5] Matter of President's Com'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370 (3d Cir. 1986).

[FN6] Application of President's Com'n on Organized Crime, 763 F.2d 1191 (11th Cir. 1985).

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VII. Departmental Separation of Governmental Powers [§§ 246–312]

B. Executive Powers [§§ 255–258]

Topic Summary Correlation Table References

§ 257. Limitations as respects judiciary—Actions of administrative agencies

As a part of the executive branch of government, an administrative tribunal is not a court; it is not a part of the judicial branch of government, for purposes of the separation of powers doctrine.[7] And as a general rule, administrative agencies have no general judicial powers.[8] Thus, an administrative agency does not have the power, without statutory authority, to overrule or ignore a judicial precedent.[9] Moreover, the general rule is that an administrative agency may not determine constitutional issues, and is not authorized to consider or question the constitutionality of a legislative act or to declare unconstitutional statutes which it was created to administer and enforce.[10]

However, an agency in the executive branch may be called upon to adjudicate disputes of a type that might ordinarily otherwise be resolved by a court, and may perform such adjudicatory functions in harmony with the separation of powers doctrine, provided that there is an opportunity for judicial review of the agency's final determination.[11] And it is widely recognized that an administrative agency may have judicial and legislative, or legislative, executive, and judicial, powers or functions, sometimes softened by the word "quasi."[12] or stated to be in nature judicial and legislative.[13]

The power to determine controverted rights to property by means of a binding judgment typically is vested in the judicial branch, but the separation of powers principle does not bar administrative agencies of the executive branch from working in tandem with the judicial branch to administer justice under appropriate circumstances, and administrative factfindings are a necessary aspect of administrative discretion rather than an exclusively judicial function.[14] In addition, while the doctrine of separation of powers is fundamental to our form of government, it is not absolute, and it does not require that administrative agencies never consider the constitutionality of an administrative action.[15]

[FN7] Quinton v. General Motors Corp., 453 Mich. 63, 551 N.W.2d 677 (1996), reh'g denied, 453 Mich. 1205, 554 N.W.2d 12 (1996).

[FN8] State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995) (unless permitted by the Constitution, the legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in nature or to interfere with the exercise of such powers by the courts).

[FN9] Hecker v. Stark County Social Service Bd., 527 N.W.2d 226 (N.D. 1994), reh'g denied, (Feb. 8, 1995).

[FN10] Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995) (the facial constitutionality of a statute may not be determined by an administrative tribunal in a contested case proceeding; an administrative agency is the creation of the legislature, and may not be granted and may not assume the power to determine the constitutionality of a statute, which task rests with the judiciary).

[FN11] Maryland Aggregates Ass'n, Inc. v. State, 337 Md. 658, 655 A.2d 886 (1995), cert. denied, 514 U.S. 1111, 115 S. Ct. 1965, 131 L. Ed. 2d 856 (1995).

When payment of an administrative penalty is a prerequisite to judicial review, the payment requirement runs afoul of the state constitution's provisions regarding separation of powers. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996), reh'g of cause overruled, (Aug. 16, 1996).

[FN12] Slack Nursing Home, Inc. v. Department of Social Services of State of Neb., 247 Neb. 452, 528 N.W.2d 285 (1995) (some administrative agency determinations possess quasi-judicial characteristics and are appealable; de novo review from appeals involving the exercise of an agency's quasi-judicial powers is not violative of the constitutional separation of powers doctrine).

The separation of powers doctrine does not prohibit every exercise of judicial functions by individuals or groups outside the judiciary; however, the judiciary must maintain the power to check the exercise of judicial functions by quasi-judicial tribunals, ensuring that the essential attributes of judicial power, vis-à-vis other governmental branches, remain in the courts. Board of Educ. of Carlsbad Mun. Schools v. Harrell, 118 N.M. 470, 882 P.2d 511, 94 Ed. Law Rep. 966, 9 I.E.R. Cas. (BNA) 1693 (1994).

An administrative agency can have duties of a quasi-judicial nature in addition to its rulemaking duties; the conferring upon state agencies or officers of executive or administrative functions requiring the exercise of quasi-judicial powers does not conflict with constitutional provisions regarding the officers and bodies upon whom the judicial power may be conferred, particularly where a provision is made for appeals from decisions of such officers or agencies to the courts. Slack Nursing Home, Inc. v. Department of Social Services of State of Neb., 247 Neb. 452, 528 N.W.2d 285 (1995).

[FN13]

Legal Encyclopedias

See 2 Am. Jur. 2d, Administrative Law §§ 53, 69.

[FN14] Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996), reh'g of cause overruled, (Aug. 16, 1996).

[FN15] Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995) (an administrative body in a contested case proceeding may resolve questions of the unconstitutional application of a statute to the specific circumstances of a case or of the constitutionality of a rule that the agency has adopted; and it may address a claim that the agency's procedure is constitutionally deficient).

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B. Executive Powers [§§ 255–258]

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§ 258. Limitations as respects legislature

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Whitley, Protecting State Interests: Recognition of the State Government Attorney-Client Privilege, 72 U. Chi. L. Rev. 1533 (2005)

"Legislative power" is the power to make, alter, and repeal laws and to formulate legislative policy; and "executive power" is the power to put laws enacted by the legislature into effect.[16] It is clear that the executive can neither encroach upon the functions of the legislature nor interfere in its duties;[17] neither can the executive discharge the functions of the legislature in any manner by so acting in his or her official capacity that his or her conduct is tantamount to a repeal,[18] enactment,[19] variance, or enlargement[20] of legislation. For instance, the separation of powers doctrine precludes the executive branch, in expending public funds, from disregarding legislatively prescribed directives and limits pertaining to the use of such funds.[21]

Observation:

It is not always an usurpation of the legislative function for an administrative regulation to create liability.[22]

Since the whole legislative power is assigned to the legislative department of the government, the general rule is that there exists no power in the executive department to suspend the operation of statutes.[23]

But no unconstitutional encroachment on the powers of the legislative branch occurs when the chief executive participates in the lawmaking power by means of exercising his veto power; nor is it a violation of the separation of powers doctrine for the executive branch to act within its statutorily delegated powers in other respects.[24]

Observation:

The Supreme Court has pointed out that the central role or purpose of the speech or debate clause of the Federal Constitution,[25] which provides that members of Congress shall not be questioned in any other place for any speech or debate in either House, is to prevent intimidation of legislators by the executive branch.[26]

It is widely recognized that, notwithstanding the prohibition against the exercise of legislative functions by the

executive branch of the government, administrative agencies may lawfully exercise quasi-legislative and quasi-judicial functions.[27]

CUMULATIVE SUPPLEMENT
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An abdication of responsibility and violation of a finely wrought procedure: The Supreme Court vetoes the Line Item Veto Act of 1996, 78 Bos U LR 5:1583 (1999).

[END OF SUPPLEMENT]

[FN16] In Interest of C.S., 516 N.W.2d 851 (Iowa 1994).

[FN17] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823, 9 Envtl. L. Rep. 20517 (1979); Smith v. Dearborn Financial Services, Inc., 982 F.2d 976 (6th Cir. 1993); Dearborn Tp. v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952); People ex rel. Ingenito v. Warden and Agent of Auburn Prison, 267 A.D. 295, 46 N.Y.S.2d 72 (4th Dep't 1943), order aff'd, 293 N.Y. 803, 59 N.E.2d 174 (1944).

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Sargentich, The Contemporary Debate About Legislative-Executive Separation of Powers. 72 Cornell LR 430, March, 1987.

[FN18] Henry v. State, 10 Okla. Crim. 369, 136 P. 982 (1913).

An administrative agency cannot usurp legislative powers or contravene a statute. Ex parte Crestwood Hosp. and Nursing Home, Inc., 670 So. 2d 45 (Ala. 1995).

Administrative agencies are not authorized to modify statutory provisions under which they acquire power, absent a clear legislative intent. Furia v. Furia, 638 A.2d 548 (R.I. 1994), related reference, 692 A.2d 327 (R.I. 1997).

[FN19] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 47 Ohio Op. 430, 47 Ohio Op. 460, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952) (holding that an order of the President seizing the steel mills, which order directed that presidential policy be executed in the manner prescribed by the President, was unconstitutional since it was an attempt to enact law, which power is restricted to Congress).

An administrative agency cannot add or detract from a statute by promulgating a policy or regulation. GTE v. Revenue Cabinet, Com. of Ky., 889 S.W.2d 788 (Ky. 1994).

The National Labor Relations Board (NLRB) may not broaden the National Labor Relations Act to protect activities which have no bearing on the employment relationship. Office and Professional Employees Intern. Union, AFL-CIO, CLC v. N.L.R.B., 981 F.2d 76, 142 L.R.R.M. (BNA) 2064, 124 Lab. Cas. (CCH) ¶10492 (2d Cir. 1992).

But the Parole Commission did not violate the doctrine of separation of powers by establishing parole eligibility guidelines exceeding those established by Congress. Simpson v. Ortiz, 995 F.2d 606 (5th Cir.

1993), cert. denied, 510 U.S. 983, 114 S. Ct. 486, 126 L. Ed. 2d 436 (1993).

[FN20] Whitcomb Hotel v. California Employment Commission, 24 Cal. 2d 753, 151 P.2d 233, 155 A.L.R. 405 (1944); Fullilove v. Carey, 62 A.D.2d 798, 406 N.Y.S.2d 888, 17 Empl. Prac. Dec. (CCH) ¶8432 (3d Dep't 1978), order aff'd, 48 N.Y.2d 826, 424 N.Y.S.2d 183, 399 N.E.2d 1203 (1979).

[FN21] Superior Court v. County of Mendocino, 13 Cal. 4th 45, 51 Cal. Rptr. 2d 837, 913 P.2d 1046 (1996).

Absent a proper delegation of authority from the state legislature, the executive branch is precluded, under state constitutional separation-of-powers principles, from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature's choice of purpose. State ex rel. Schwartz v. Johnson, 120 N.M. 820, 907 P.2d 1001 (1995).

[FN22] Krupp Oil Co., Inc. v. Yeargan, 665 So. 2d 920 (Ala. 1995), reh'g denied, (July 21, 1995).

[FN23] Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826 (1924).

[FN24] Railway Labor Executives' Ass'n v. Skinner, 934 F.2d 1096, 6 I.E.R. Cas. (BNA) 833, 119 Lab. Cas. (CCH) ¶10782, 1991 O.S.H. Dec. (CCH) ¶29383 (9th Cir. 1991) (random drug testing regulations promulgated by Federal Railroad Administration did not violate the separation of powers doctrine because the Secretary of Transportation had authority to promulgate "appropriate rules, regulations, orders, and standards for all areas of railroad safety").

The doctrine of separation of powers is not violated where the governor exercises the very sorts of powers and duties authorized by the legislature in the statutes it has enacted. Montana Public Employee's Ass'n v. Office of Governor, 271 Mont. 450, 898 P.2d 675 (1995).

[FN25] U.S. Const., Art. I, § 6, cl. 1.

A.L.R. Library

Construction and application of speech or debate clause of United States Constitution (Art. I, § 6, cl.1)—Supreme Court cases, 60 L. Ed. 2d 1166.

[FN26] Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975); Gravel v. U. S., 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972), reh'g denied, 409 U.S. 902, 93 S. Ct. 98, 34 L. Ed. 2d 165 (1972) and reh'g denied, 409 U.S. 902, 93 S. Ct. 98, 34 L. Ed. 2d 165 (1972).

[FN27] § 257.

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C. Judicial Powers [§§ 259–274]

1. In General [§§ 259–263]

Topic Summary Correlation Table References

§ 260. Judicial functions, generally

The federal and state constitutions are the common sources of the power and authority of every court, and all questions concerning the jurisdiction of a court must be determined by those instruments,[38] with the exception of certain inherent powers which of right belong to all courts.[39] Therefore, unless the power or authority of a court to perform a contemplated act can be found in the constitution or the laws enacted thereunder, it is without jurisdiction and its acts are invalid.[40] At least in the absence of a textually demonstrable constitutional commitment of an issue to a coordinate political department, it is presumed by the United States Supreme Court that justiciable constitutional rights are to be enforced through the courts.[41]

Various tests have been suggested for determining what are or what are not judicial powers. The protection of constitutional rights is a core function of the judiciary.[42] It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the United States Constitution,[43] or to determine whether an act of a state legislature is consistent with the state's constitution,[44] and the power, under certain circumstances, to review decisions of the separate departments of government—judicial review—is an exclusive power of the judiciary.[45] Clearly and unarguably, the construction and interpretation of a constitution is a judicial function.[46]

Sentencing those who violate criminal laws is an important function of the judiciary.[47] The separation of powers doctrine also inherently places responsibility for regulating the practice of law in the state supreme courts.[48] The judiciary has exclusive power and responsibility over court records[49] and court personnel.[50] And it is peculiarly and exclusively the judiciary's function to determine whether a jury award in a civil case exceeds an amount that the state and federal constitutions will allow without violating the due process rights guaranteed to all citizens of the state and the United States.[51]

Where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial.[52] Thus, where the facts out of which a moral or legal obligation is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers

prescribed by the constitutions of the states.[53]

It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.[54]

The courts declare the law as it is,[55] resolving every doubt in favor of its constitutionality.[56] They also apply and administer the law.[57] But courts have no power to establish periods of limitation within which certain types of cases may be brought.[58]

CUMULATIVE SUPPLEMENT

Cases:

It is the responsibility of the Supreme Court, not Congress, to define the substance of constitutional guarantees. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).

The Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. U.S. v. Morrison, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (U.S. 2000).

Any enlargement of district courts' equitable powers, so as to permit them to issue prejudgment preliminary injunctions freezing defendants' unencumbered assets, was properly left to Congress. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999).

Federal courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches of government. U.S. Const. Art. 3 § 2, cl. 1. Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (U.S. 1998).

Federal courts are vested with the inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases; this authority is necessarily incident to the judicial power granted under Article III of the Constitution and includes the power of the court to control its docket by dismissing a case as a sanction for a party's failure to obey court orders or rules. Santamaria v. Todd Ins. Agency, 231 F.R.D. 246 (E.D. Tex. 2005).

Constitutional duty of Supreme Court is to preserve the integrity and independence of the judiciary, and ensure that the judicial power of the State remains vested in the courts. State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

[END OF SUPPLEMENT]

[FN38] Healy v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 (1934); State v. Bigelow, 76 Ariz. 13, 258 P.2d 409, 39 A.L.R.2d 979 (1953); Atchison, T. & S. F. R. Co. v. State Corporation Commission, 43 N.M. 503, 95 P.2d 676 (1939); Alexander v. Gladden, 205 Or. 375, 288 P.2d 219 (1955).

[FN39] In re Buckles, 331 Mo. 405, 53 S.W.2d 1055 (1932).

The courts of the state are set up by the Constitution without special limitations; hence they have and should maintain vigorously all the inherent and implied powers necessary to function properly and effectively as a separate department in the scheme of state government. Kirstowsky v. Superior Court In and For Sonoma County, 143 Cal. App. 2d 745, 300 P.2d 163 (3d Dist. 1956).

Legal Encyclopedias

As to inherent powers of courts, generally, see 20 Am. Jur. 2d, Courts §§ 43–45.

[FN40] Angel v. Bullington, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); Godchaux Sugars, Inc. v. Ockman, 225 La. 599, 73 So. 2d 577 (1954).

[FN41] Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846, 19 Fair Empl. Prac. Cas. (BNA) 1390, 19 Empl. Prac. Dec. (CCH) ¶9241 (1979).

[FN42] Opinion of the Justices, 141 N.H. 562, 688 A.2d 1006 (1997).

[FN43] Action for Children's Television v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 701, 133 L. Ed. 2d 658 (U.S. 1996) and cert. denied, 116 S. Ct. 701, 133 L. Ed. 2d 658 (U.S. 1996).

[FN44] Campbell County School Dist. v. State, 907 P.2d 1238, 105 Ed. Law Rep. 771 (Wyo. 1995), as clarified on denial of reh'g, (Dec. 6, 1995).

[FN45] Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996), reh'g denied, (Nov. 19, 1996).

Law Reviews and Other Periodicals

Entin, Separation of Powers, the Political Branches, and the Limits of Judicial Review. 51 Ohio St LJ 175, 1990.

[FN46] Calabro v. City of Omaha, 247 Neb. 955, 531 N.W.2d 541 (1995).

[FN47] State v. Kirk, 145 N.J. 159, 678 A.2d 233 (1996) (although sentencing discretion is shared to some extent among the three branches of government, determination of a sentence is committed to the discretion of the judiciary).

Since both substantive judgment in the field of sentencing and the methodology of rulemaking have been and remain appropriate to the judicial branch of the Federal Government, Congress' decision, in a provision of the Sentencing Reform Act of 1984, to combine these functions in an independent United States Sentencing Commission and to locate that commission within the judicial branch does not violate the constitutional principle of separation of powers. Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (not followed on state law grounds, State v. Philipps, 246 Neb. 610, 521 N.W.2d 913 (1994)).

Notwithstanding the decreased level of discretion dictated by the Sentencing Guidelines, sentencing remains an office of judges vested with the powers granted under Article III. U.S. v. Gutierrez, 978 F.2d 1463 (7th Cir. 1992), denial of postconviction relief aff'd by, 124 F.3d 204 (7th Cir. 1997).

So long as a statute does not wrest from the courts the final discretion to impose a sentence, it does not infringe upon the constitutional division of responsibilities between the legislature and the judiciary. State v. Benitez, 395 So. 2d 514 (Fla. 1981).

[FN48] Petition of Butcher, 322 Ark. 24, 907 S.W.2d 715 (1995); Watkins v. Mississippi Bd. of Bar Admissions, 659 So. 2d 561 (Miss. 1995).

The inherent right of the courts to prescribe the qualifications necessary for the practice of law does not mean that the legislature is without authority in that field, but the exercise of such authority by the legislature does not mean that the state supreme court, in the exercise of its authority within the premises, may not

require qualifications more extensive than those exacted by the legislature. Petition of Burson, 909 S.W.2d 768 (Tenn. 1995).

[FN49] State v. D.H.W., 686 So. 2d 1331 (Fla. 1996).

[FN50] Opinion of the Justices, 140 N.H. 297, 666 A.2d 523 (1995) (for purposes of a separation of powers analysis, the power to regulate officers of the court is a power inherent in the judicial branch).

[FN51] Life Ins. Co. of Georgia v. Johnson, 684 So. 2d 685 (Ala. 1996), cert. granted, judgment vacated (apparently on other grounds), 117 S. Ct. 288, 136 L. Ed. 2d 207 (U.S. 1996).

[FN52] State v. Blaisdell, 22 N.D. 86, 132 N.W. 769 (1911).

Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between parties who institute a suit before it according to the regular course of judicial procedure. People v. Sturman, 56 Cal. App. 2d 173, 132 P.2d 504 (2d Dist. 1942); Goetz v. Black, 256 Mich. 564, 240 N.W. 94, 84 A.L.R. 802 (1932).

[FN53] Harris v. Commissioners of Allegany County, 130 Md. 488, 100 A. 733 (1917).

A decision concerning just compensation owed one whose property is taken is the province of the judicial, not legislative, determination; however, this requirement is satisfied by the availability of judicial review. Wisconsin Cent. Ltd. v. Public Service Com'n of Wisconsin, 95 F.3d 1359 (7th Cir. 1996).

[FN54] Lewis v. Casey, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (U.S. 1996).

[FN55] Diamond v. Chakrabarty, 447 U.S. 303, 100 S. Ct. 2204, 65 L. Ed. 2d 144, 206 U.S.P.Q. (BNA) 193 (1980); Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).

The primary objective of statutory construction is to determine legislative intent and, while it is the function of the legislature to make laws, it is the function of the courts to finally and authoritatively interpret what the law says. U.S. v. Wells, 63 F.3d 745 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Nov. 2, 1995) and cert. granted, 116 S. Ct. 1540, 134 L. Ed. 2d 645 (U.S. 1996) judgment vacated on other grounds, 117 S. Ct. 921, 137 L. Ed. 2d 107 (U.S. 1997).

[FN56] § 176.

[FN57] Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Intern. Union of America, Local Union No. 205 v. Industrial Com'n, 128 Colo. 121, 260 P.2d 941, 42 A.L.R.2d 700 (1953); State ex rel. Keller v. Birrell, 149 Ohio St. 145, 36 Ohio Op. 482, 78 N.E.2d 53 (1948).

[FN58] Hermeling v. Minnesota Fire & Cas. Co., 548 N.W.2d 270 (Minn. 1996); Vernier v. State, 909 P.2d 1344 (Wyo. 1996).

The legislature is in the best position to determine and accommodate the complex and conflicting policies involved in determining an appropriate limitations period. S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996), reh'g of cause overruled, (Nov. 15, 1996).

AMJUR CONSTLAW § 260

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