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Separation of Powers

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

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

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

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

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

54. *Id.*

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

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

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

George E. Pataki, alleging that Executive Order No. 5[58] was unconstitutional in that it violated the doctrine of separation of powers.[59] Executive Order No. 5 instructed the Commissioner of the Department of Correctional Services to develop rules to prevent the future transfer of any inmate sentenced as a violent felony offender convicted of a crime involving the infliction of serious physical injury, the use or threatened use of a dangerous instrument or the use or threatened use of a deadly weapon to any temporary release program or residential treatment facility.[60]

Shortly after the governor signed the order, the commissioner amended title 7, section 1900.4(c) of the Official Compilation of Codes, Rules and Regulations of the State of New York "to bar any inmate from participating in temporary release whose current commitment is for a crime involving either the use or threatened use of a deadly weapon or a dangerous weapon or a dangerous instrument or the infliction of serious physical injury."[61] As a result, the petitioners became ineligible for participation in the temporary release program.[62] In addition, in June of 1995, the legislature amended section 851(2) of the New York Correction Law to provide that "[t]he governor, by executive order, may exclude or limit the participation of any class of otherwise eligible inmates from participation in a temporary release

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58. *Id.* at 731. The order was signed by the governor on January 24, 1995. *Id.*

59. *Id.* at 733. Petitioners argued that the order violated the principle of separation of powers as stated in the New York State Constitution. N.Y. CONST. art. III, § 1. This provision provides: "The legislative powers of this state shall be vested in the senate and assembly." *Id.* N.Y. CONST. art. IV, § 1. This provision provides in pertinent part: "The executive power shall be vested in the governor . . . ." *Id.*

60. *Dorst*, 633 N.Y.S.2d at 731.

61. *Id.* at 731-32. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c) (1994). The amendment listed several offenses, the commission of which would cause the inmate to be ineligible for participation in the temporary work release programs. The offenses included burglary in the first and second degree, robbery in the first degree, criminal use of a firearm in the first and second degrees, aggravated assault upon a peace or police officer, and criminal possession of a weapon in the second degree. *Id.*

62. *Dorst*, 633 N.Y.S.2d at 732.

program."[63] While holding that the executive order and the regulations were invalid as a violation of the doctrine of separation of powers, the court upheld the statutory amendment to section 851(2) of the Correction Law.[64]

The court was faced with several issues, primarily, whether it was appropriate for the governor, by executive order, "to direct the commissioner to change the eligibility requirements for the temporary release program and eliminate inmates convicted of violent felonies from future participation in the program."[65] If so, the court would have to decide whether Executive Order No. 5 violated the petitioner's due process rights in that they were no longer permitted to participate in the program after having been previously approved.[66] Furthermore, the court had to determine whether the legislative branch appropriately delegated its authority to the executive branch by providing the governor with the power to change the eligibility requirements for the temporary work release program via executive order.[67]

Addressing the first issue, petitioners argued that the governor's executive order was inappropriate in that he impermissibly usurped legislative power in changing the definition of "eligible inmate."[68] In the court of appeals' most

63. *Id.* at 732. N.Y. CORRECT. LAW § 851(2) (McKinney Supp. 1996). This subsection is to go into effect on September 1, 1997. The court explained that to the best of its knowledge, the governor had not yet issued a new executive order in compliance with the amended statute. *Dorst*, 633 N.Y.S.2d at 732. However, it anticipated that the governor would take such action in the near future. *Id.* at 737.

64. *Id.* at 735-37.

65. *Id.* at 732.

66. *Id.*

67. *Id.*

68. *Id.* at 733. N.Y. CORRECT. LAW § 851(2) (McKinney Supp. 1996). This section defines an "eligible inmate" as

> a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years . . . . Notwithstanding the foregoing, no person who is an otherwise eligible inmate who is under sentence for crime involving: (a) infliction of serious physical injury upon another as defined in the penal law, (b) a sex offense involving forcible compulsion, or (c) any other offense involving the use or threatened use of a deadly weapon

recent separation of powers case, *Bourquin v. Cuomo*,[69] quoting *Clark v. Cuomo*,[70] it explained that the separation of powers doctrine "is implied by the separate grants of power to each of the coordinate branches of government,"[71] and acknowledged that "some overlap between the three separate branches does not violate the constitutional principle of separation of powers."[72] In *Bourquin*, Chief Judge Kaye explained the impossibility of "neatly divid[ing]" the "duties and powers of the legislature and executive branches . . . into isolated pockets."[73] Furthermore, the court of appeals, in *Under 21 v. City of New York*,[74] restated the well settled principle that "no one branch [of government

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may participate in a temporary release program without the written approval of the commissioner.

Id.

69. 85 N.Y.2d 781, 652 N.E.2d 171, 627 N.Y.S.2d 618 (1995). In *Bourquin*, the court held that the governor had not exceed his power by issuing Executive Order No. 141, which authorized the "creation of a private, not-for-profit corporation known as the Citizen's Utility Board (CUB) intended, among other things, to represent the interests of residential utility customers in ratemaking and other proceedings before the Public Service Commission," and as such, did not violate the doctrine of separation of powers. *Id.* at 784, 652 N.E.2d at 172, 628 N.Y.S.2d at 619.

70. 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985). In *Clark*, the court of appeals held that the executive order, establishing a program to increase voter registration by requiring certain state agencies to make voter registration forms available, did not violate the constitutional principle of separation of powers. *Id.* at 192, 486 N.E.2d at 799-80, 495 N.Y.S.2d at 941-42. The court reasoned that the executive order was not inconsistent with the policy of the legislature, which was to promote the greatest possible participation in elections, despite the legislature's failure to enact legislation that would accomplish substantially the same result as the executive order. *Id.*

71. *Dorst*, 633 N.Y.S.2d at 733.

72. *Id.*

73. *Bourquin*, 66 N.Y.2d at 784, 652 N.E.2d at 173, 628 N.Y.S.2d at 620.

74. 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985). In *Under 21*, Chief Judge Wachtler held that an executive order issued by the mayor was invalid as an unauthorized use of executive power. *Id.* at 364, 482 N.E.2d at 10, 492 N.Y.S.2d at 531. The executive order prohibited employment discrimination by city contractors on the basis of sexual orientation. *Id.* at 353, 482 N.E.2d at 2-3, 492 N.Y.S.2d at 524.

should] be allowed to arrogate unto itself power residing entirely in another branch."[75]

When considering whether an action taken by the executive branch exceeds its authority as limited by the separation of powers doctrine, the court of appeals has examined the policy supporting the action, and contemplated whether the action was consistent with action taken by the legislature.[76]

Applying these standards to the present case, the court determined that the legislature explicitly chose to attach certain requirements to determine the eligibility of inmates for the temporary work release program.[77] The legislature, however, did not completely exclude an entire group of inmates from participation in the program, in contrast with what Executive Order No. 5 provided.[78] Correction Law section 851(2) allowed the commissioner broad discretion for promulgating the regulations regarding the temporary work release program, but

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75. *Id.* at 353, 482 N.E.2d at 2, 492 N.Y.S.2d at 523.

76. *See* Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). In *Broidrick*, the court of appeals struck down an affirmative action program for contracts in New York City because it determined that the City of New York had acted in excess of its authority, as granted by the legislature, in promulgating the regulation. *Id.* at 644, 350 N.E.2d at 596, 385 N.Y.S.2d at 266. The regulations included specific quotas to be complied with, instead of a percentage employment formula, which would most likely have survived constitutional scrutiny. *Id.* at 644, 350 N.E.2d at 596, 385 N.Y.S.2d at 266. The court looked to whether the executive action "create[d] a different policy, not embraced in the legislation." *Id.* at 646, 350 N.E.2d at 598, 385 N.Y.S.2d at 267.

77. *Dorst*, 633 N.Y.S.2d at 733. The court stated that section 851(2) of the Correction Law provides:

> [I]nmates . . . convicted of certain specified violent felonies involving "the use or threatened use of a deadly weapon or dangerous instrument" are eligible to apply for the program once they reach 18 months of their parole or conditional release eligibility date . . . otherwise eligible inmates who are under sentence for crimes involving either the infliction of serious physical injury upon another as defined in the Penal Law or any other offense involving the use or threatened use of a deadly weapon require the written approval of the Commissioner before they may participate in the temporary release program.

Id. (citing N.Y. CORRECT. LAW § 851(2)).

78. *Dorst*, 633 N.Y.S.2d at 731.

required that the commissioner be "guided by consideration for the safety of the community and the welfare of the inmate."[79] Pointing out that, although the commissioner has discretion to evaluate the eligibility of an inmate for the temporary work release program on a case-by-case basis, the court explained that the commissioner was bound by the forgoing guideline.[80] In contrast, Executive Order No. 5, on its face, precluded "the commissioner from exercising any discretion concerning the participation of violent felons in the temporary release program, despite the fact that the Legislature explicitly confers this discretion upon the commissioner."[81] As such, the order was clearly inconsistent with the statutory requirements provided in Correction Law section 851(2). Therefore, the court concluded that Executive Order No. 5 violated the doctrine of separation of powers and rendered it unconstitutional. [82]

The court next considered whether the amendment to Correction Law section 851(2)[83] was intended to have a retroactive effect. Relying on *Thomas v. Bethlehem Steel Corp.*[84] for the proposition that the language and intent of the statute itself determines if it should be applied retroactively, and on *Murphy v. Board of Education of North Bellmore Union Free School District,*[85] the court reasoned that since there were no explicit terms within the statute indicating that it was intended to be applied retroactively, it ruled that the statute would be interpreted and applied prospectively.[86]

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79. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(1)(4) (1994).

80. *Dorst*, 633 N.Y.S.2d at 734.

81. *Id.*

82. *Id.* at 735.

83. The legislature enacted Senate Bill No. 5281, which amended Correction Law section 851(2). *Id.*

84. 63 N.Y.2d 150, 470 N.E.2d 831, 481 N.Y.S.2d 33 (1984).

85. 104 A.D.2d 796, 480 N.Y.S.2d 138 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985). The court referred to the general rule that "statutes are to be construed as prospective only in the absence of an unequivocal expression of a legislative intent to the contrary . . . ." *Id.* at 797, 480 N.Y.S.2d at 139.

86. *Dorst*, 633 N.Y.S.2d at 736.

The question that had to be resolved after the court concluded that the executive order was invalid and that the amended Correction Law did not retroactively validate the order, was whether it was appropriate for the legislature to delegate to the executive branch the authority to curtail or exclude otherwise eligible inmates from participating in the temporary work release program.[87] The court of appeals explained that:

> Because of the constitutional provision that 'the legislative power of this state shall be vested in the Senate and the Assembly', the Legislature cannot pass on its law-making functions to other bodies, but there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature.[88]

Furthermore, the court has reasoned that "the principle that the legislative branch may not delegate all of its lawmaking powers to the executive branch has been applied with the utmost reluctance."[89] Accordingly. the court in this case rejected the petitioner's argument that the amendment was "overly vague"[90] and failed to provide "any guidelines or standards"[91] to aid the governor in exercising the delegated power, and explained that the legislature did not give the governor unfettered discretion or limitless authority to revamp the temporary work release program, but rather provided that the governor should take into consideration "the safety of the community and the welfare of the inmate"[92] when asserting his authority in this area.[93] Therefore, the court concluded that the "Senate Bill 5281, signed into law on

87. *Id.*

88. Levine v. Whalen, 39 N.Y.2d 510, 515, 349 N.E.2d 820, 822, 384 N.Y.S.2d 721, 723 (1976).

89. Boreali v. Axelrod, 71 N.Y.2d 1, 9, 517 N.E.2d 1350, 1353, 523 N.Y.S.2d 464, 468 (1987).

90. *Dorst*, 633 N.Y.S.2d at 736.

91. *Id.*

92. *Id.* at 737.

93. *Id.*

June 10, 1995, does not represent an unconstitutional delegation of legislative authority."[94]

Finally, the court examined the argument asserted by petitioners Antoinette Ferrer and Miriam Rodriquez, who were already approved for the program prior to the promulgation of the new regulations pursuant to the executive order.[95] They contended that they were exempt from the altered eligibility requirements because they had already been selected to participate and because the regulations explicitly provided for "future transfer."[96] Although this issue was rendered moot due to the court's invalidation of Executive Order No. 5, the court anticipated that the governor would issue another executive order, and, therefore, addressed its concerns about excluding inmates who had been previously approved for the program, mainly because such an exclusion raises important due process considerations.[97] The Second Circuit, in *Tracy v. Salamack*,[98] held that "[a] due process hearing is required before inmates already participating in *or approved for* the program may be removed,"[99] despite the well-settled rule that the ex post facto doctrine does not apply to the temporary release program.[100] The *Dorst* court agreed with the *Tracy* court, and unanimously explained that:

> Due process mandates a similar hearing and review process for those petitioners approved for the program who were nonetheless denied participation because of a change in their eligibility status. Fundamental fairness would dictate that the Government should not take away what has already been given without at a minimum

94. *Id.*

95. *Id.* After the order was signed, both inmates were informed that they were no longer eligible to participate in the temporary work release program. *Id.*

96. *Id.*

97. *Id.*

98. 572 F.2d 393, 396-97 (2d Cir. 1978).

99. *Id.* at 396-97 (emphasis added).

100. *See, e.g.*, People v. Miller, 79 A.D.2d 687, 434 N.Y.S.2d 36 (2d Dep't), *cert. denied*, 452 U.S. 919 (1980).

affording a hearing to ensure that due process requirements have been satisfied.[101]

101. *Dorst*, 633 N.Y.S.2d at 738.