THE COLORADO SUPREME COURT: INDEPENDENCE OR ACTIVISM?

Shawn Mitchell

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Society takes no position on particular legal or public policy questions, but is founded on the principles that the State exists to preserve freedom, that the separation of governmental powers is central to our Constitution and that it is emphatically the province and duty of the Judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about The Federalist Society,
please visit our website: www.fed-soc.org.

The Colorado Supreme Court: Independence or Activism?

Shawn Mitchell

The Colorado Supreme Court: Independence or Activism?

By Shawn Mitchell*

Politicians, academics, and even U.S. Supreme Court Justices have joined the debate over the role of the Judiciary and the line between judicial independence and genuine activism. Several highly publicized cases of the Colorado Supreme Court have recently placed it in the center of this debate. Critics argue that the court has usurped the policymaking function properly reserved to the public and elected officials, and warn that this is becoming an overarching trend. They argue, for example, that the court exceeded the bounds of its interpretive role when it declared its own work product "legislation" for purposes of striking a congressional redistricting plan.[1] So too, they contend, did the court act improperly when it rejected an immigration initiative on the basis that it violated the single *subject* rule because it had more than one *purpose*.[2] Supporters, however, argue the court reasonably employed tools at its disposal and that even creative interpretation of constitutional text is sometimes necessary to effectuate what they consider its underlying goals.

There is no question the Colorado Supreme Court has made a number of public policy pronouncements in recent years. The issue of debate is whether it was legitimately within its power to do so. This paper examines some prominent decisions of the Colorado Supreme Court that highlight this issue. The analysis considers recent decisions in the areas of (1) political structure and process, and (2) criminal law. The sampling is not comprehensive, but focuses on cases of significant public impact.

I. Political Structure and Process

The case of *People ex rel. Salazar v. Davidson* was born out of a politically charged atmosphere surrounding the state legislature's congressional redistricting plan.

.....

**Shawn Mitchell, an attorney in private practice, is a Colorado State Senator and served as Special Counsel to Colorado Attorney General Gale Norton.*

The controversy started after the 2000 census. November elections had resulted in divided control of the legislature, with a Democratic senate and a Republican house. When the two chambers failed to reach agreement on new congressional districts, plaintiffs representing Colorado's Democratic Party filed suit, seeking a new map. The district court accepted the map proposed by the plaintiffs for use in the upcoming 2002 elections, and the Colorado Supreme Court affirmed that action.[3] However, the elections that year returned Republicans to control of both chambers, and, in the next legislative session, the General Assembly reached an agreement on a new map for Congressional districts. When Democratic lawmakers challenged the map in district court, Colorado Attorney General Ken Salazar and Democratic U.S. Representative Mark Udall sought direct review of the issue by the Colorado Supreme Court.

The court accepted jurisdiction of the petition and granted the relief petitioners sought, but the means it used to do so sparked substantial debate. First, the court authorized the attorney general to effectively sue his own client, the Colorado secretary of state, in order to challenge a law that had been passed by the legislature and signed by the governor. The court determined that the attorney general, while constitutionally charged with representing state officials and defending state laws, may instead, if he chooses, press claims against those officers and laws. In so doing, the court admitted there was no precedent on point and that the closest comparison came from a 1905 case, *People v. Tool*, in which the attorney general sued to block a conspiracy of local election judges and officials, not state officials whom he normally represented.[4]

Of greater interest on a national scale, however, was the court's subsequent handling of the challenge it authorized. The court ruled that the General Assembly was barred from adopting a map of districts for Colorado's congressional seats based on two conclusions: (1) Colorado's constitution permits the legislature to redistrict only once per decade following a census; and (2) the single authorized legislative redistricting already occurred when a trial

court drew an emergency map, which the supreme court approved for use in the 2002 election.[5]

Critics of *Salazar* point to the fact that the existing map had been drawn and approved by judges, whereas federal and state law assigns the task to the legislature.[6] Colorado's constitution provides:

> The *general assembly* shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the *general assembly* shall divide the state into congressional districts accordingly.[7]

Nevertheless, the Colorado Supreme Court reached the conclusion that the "general assembly," while understood to be the legislature, could, in some circumstances, be read to include the judiciary as well. The majority explained as follows:

> In sum, the term "General Assembly" in the first sentence of Article V, Section 44 broadly encompasses the legislative process, the voter initiative, and judicial redistricting. Regardless of which body creates the congressional districts, these districts are equally valid. Hence, judicially created districts are no less effective than those created by the General Assembly.[8]

Though this language appears to declare the judiciary part of the general assembly and, simultaneously, separate from it, the conclusion served as the basis for the court's decision to bar the elected officials from enacting their own map because the court, acting on their behalf, had already legislated one. The court explained that this case implicated "matters of great public importance involving the fundamental rights of Colorado citizens to vote for their representatives in the United States Congress,"[9] and therefore proponents of the decision argue this interpretation was necessary to allow the court to impose a plan it believed better effectuated these goals.

Justice Kourlis strongly criticized this reasoning in the dissent, arguing the court had reached its conclusion through the performance of "semantic gymnastics."[10] The dissent specifically targeted the court's substitution of its own judgment for that of the legislature, in a power delegated to the elected body. Justice Kourlis contended, "Courts cannot be lawmakers under Article V of the Colorado Constitution. Courts do not enact or create laws; courts declare what the law is and what it requires."[11] Addressing the interim map imposed by the lower court, Justice Kourlis stated:

". . . the Colorado Supreme Court reached the conclusion that the "general assembly," while understood to be the legislature, could, in some circumstances, be read to include the judiciary as well."

> The only authority that courts have to intervene in this purely political, legislative process is to review the constitutionality of existing districts, as we would review the constitutionality of any law, in order to protect the voting rights of aggrieved claimants. Within that limited framework, courts may enter emergency or remedial orders for the purpose of allowing elections to go forward. Such court orders are interstitial, and cannot then serve to preempt the legislature from reclaiming its authority to redistrict.[12]

This case clearly demonstrates the battle lines drawn between the two sides—those that assert the Judiciary can and should impose its policy viewpoints when necessary to effectuate certain "fundamental" goals, and those that argue the Judiciary must stay within the bounds of the text provided by the constitution or statute regardless of potential underlying but unstated purposes.

Another politically controversial case that highlights these issues is *In re Title and Ballot Title*

and Submission Clause for 2005-2006 #55.[13] In that case, the Colorado Supreme Court rejected a voter initiative that would have barred Colorado agencies from providing non-emergency services to illegal aliens. The measure was proposed as a constitutional amendment and read as follows:

> Except as mandated by federal law, the provision of non-emergency services by the State of Colorado or any city, county or other political subdivision thereof, is restricted to citizens of and aliens lawfully present in the United States of America.[14]

The majority removed the initiative from the ballot on the grounds that it violated the "single subject" requirement of the Colorado Constitution.[15] This provision prohibits the combining of unrelated ballot initiatives in order to prevent voters from being forced to accept a secondary measure in order to pass the first, or from unwittingly approving a secondary measure in their efforts to support the first.

In this case, the majority believed the second concern was implicated because, despite the single mandate of the initiative, voters could potentially fail to take into account the many purposes behind it. In seeking to enforce what it considered to be the underlying goal of the constitutional provision, however, the court arguably engaged in very creative interpretation of the constitution's actual text, construing the word "subject" to mean "purpose." Writing for the majority, Justice Martinez explained:

> We identify at least two unrelated *purposes* grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits.[16]

The majority seemed to extract the purposes from various statements on the website of proponents of Initiative 55. Parsing such verbiage as "taxpayer provided services" and "recordation of the transfer of real property," the court identified a divide between services related to welfare and "administrative" services such as deed and title recording and dispute resolution. The court concluded the grouping was incongruous and that the administrative services were hidden from public consideration because the attention of most voters would be drawn to the welfare services.

In dissent, Justice Coats joined by Justice Rice, decried the majority's decision, arguing that, while it "pa[id] homage to the [constitutional] requirement's dual concerns for secreting unrelated provisions and combining provisions too unpopular to succeed on their own,"[17] it ignored the constitution's plain language by striking an initiative containing "a single mandate, clearly expressed in a single, concise sentence."[18] The dissent identified the majority's principal error as equating the constitutional requirement of a single subject with a novel requirement "that each initiative be motivated by a single objective or purpose in the minds of its proponents."[19] But Justice Coats pointed out that nearly any proposed constitutional provision could be read as intended to effectuate different purposes. Indeed, the due process and free speech clauses would fall into this category.

Justice Coats concluded, "The susceptibility of any group motivation or objective to being thinly sliced is limited only by the ingenuity (and desire) of the court doing the slicing."[20] Thus, the dissent warned, this case set dangerous precedent because, in the future, it might not be possible "for judicial

". . . in the future, it might not be possible "for judicial officers, however conscientious, to apply a standard as amorphous as the majority obviously considers the single-subject requirement to be, without conforming it to their own policy preferences."

officers, however conscientious, to apply a standard as amorphous as the majority obviously considers the single-subject requirement to be, without conforming it to their own policy preferences."[21]

Again, this case demonstrates a hotly divided court, where the majority is proceeding in the name of legislative intent, and the dissent is protesting on the ground of judicial overreaching. To be sure, both the congressional redistricting and ballot initiative cases demonstrate the ongoing debate separating independence from activism.

II. Criminal Law

In the criminal arena, legal observers have suggested an emerging trend in the Colorado Supreme Court toward erecting new protections for criminal defendants. The following two controversial cases illustrate the debate between those who believe the court has properly asserted its independence and those who are concerned it has exceeded its constitutional role.

People v. Harlan is among the more notorious capital cases in recent Colorado history.[22] According to the facts as recounted by the court, Rhonda Maloney was traveling on an interstate highway when her car was forced off the road by Defendant Robert Harlan. Harlan sexually assaulted Maloney, who cried for help and attracted the attention of a passing motorist, Jaquie Creazzo. When Creazzo stopped, Maloney jumped into the car, and the two sped off with Harlan in pursuit. Harlan fired a gun at the fleeing car, hitting Creazzo in the spine, paralyzing her for life. When the car crashed, Harlan pulled Maloney from the car and killed her. Harlan was convicted of capital murder and sentenced to death.

"In the criminal arena, legal observors have suggested an emerging trend in the Colorda Supreme Court toward erecting new protections for criminal defendants."

After his federal claims were rejected, Harlan raised in the state court an issue of alleged juror misconduct on the ground that one or more jurors consulted the Bible during penalty phase deliberations. The trial court vacated the death sentence and the Colorado Supreme Court affirmed, holding the penalty may have been "influenced by extraneous information" and "imposed under the influence of passion, prejudice, or other arbitrary factors."[23] Justice Hobbs, writing for the majority qualified the decision as follows:

> We *do not hold* that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult "reasoned judgment" and "moral decision" he or she is called upon to make in the fourth step of the penalty phase under Colorado law. We hold *only* that it was improper for a juror to bring the Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations; the texts had not been admitted into evidence or allowed pursuant to the trial court's instructions.[24]

This, of course, raises an interesting question: If one of the jurors had been able to recite the relevant Biblical passages from memory, would the death sentence have been set aside? This reasoning suggests that it would not. If so, critics have argued, there is little basis for the court's decision other than the result: invalidation of the controversial death penalty. The majority justified its holding on the basis that "[t]he written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not."[25] However, some observers are skeptical of this distinction between the written and spoken word, which has led to the charge of judicial activism.

The final case this paper will discuss is also a subject of debate in the broader legal community. *In the Matter of Mark C. Pautler* involves a district attorney who, in extreme circumstances, helped

persuade a confessed multiple rapist-murderer to surrender to authorities.[26] For his efforts, the attorney was found in violation of ethical rules and suspended from practice for three months, or, alternatively, given the option of twelve months professional probation and additional training.

The facts of the case are as follows: Deputy District Attorney Mark Pautler arrived at the scene of a crime that had left three brutally murdered, three kidnapped, and others raped and psychologically tortured. Pautler was with the police when Defendant William Neal, via cell phone, called to surrender. Neal asked to speak with a public defender first. Based on past experience, Pautler and the police worried that a public defender might persuade Neal not to cooperate. Not knowing whether Neal would ultimately surrender, or whether any other person remained in danger, Pautler posed as defender "Mark Palmer." Pautler granted Neal's three requests: cigarettes, a private cell at the police station, and "Palmer" present at his surrender. Neal surrendered peacefully. Pautler, however, later faced charges including violating a lawyer's ethical duty to tell the truth.

The disciplinary board ruled against Pautler, who appealed, arguing his actions were justified by the need to protect the public and prevent further harm by Neal. The Colorado Supreme Court rejected his argument and ruled Pautler's motive was irrelevant to his violation, but might be a mitigating factor in weighing punishment.

Critics of the court have argued that one major flaw in the court's reasoning is the unexamined assumption that giving the whole truth to a killer, while he is still free to kill, is more ethical and moral than engaging in the deception necessary to secure his surrender. The familiar criminal law principle of "choice of evils" or "necessity" supports those critics' argument. The doctrine recognizes that conduct which might otherwise be criminal can be excused if it is the only way to avoid something worse. Pautler had maintained that lying to Neal was less evil than running the risk he would kill again.

The court acknowledged that the question had not been addressed but concluded it did not apply because Pautler had not been criminally charged. Thus, the Colorado Supreme Court implicitly decided a lawyer's duty to tell the truth has no exceptions, even to prevent harm to others.

". . . the Colorado Supreme Court implicitly decided a lawyer's duty to tell the truth has no exceptions, even to prevent harm to others."

CONCLUSION

As highlighted by the cases above, the Colorado Supreme Court has joined the debate over the proper role of the judiciary. Some conclude the court has acted within the confines erected for it by the Colorado General Assembly and federal and state constitutions. Yet others believe the court has assumed a broader role more akin to a policy-driven legislature than to an independent judiciary. The cases, though not definitive on the resolution of this issue, certainly provide observers with an opportunity to reflect on the divide between independence and activism.

Endnotes

[1] People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003).

[2] In the Matter of the Title and Ballot title and Submission Clause for 2005-2006 #55, 79 P.3d 1221 (Colo. 2006).

[3] Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002).

[4] 86 P. 224 (1905).

[5] 79 P.3d. at 1225.

[6] *Id.* at 1232.

[7] Colo. Const. art. V, section 44 (emphasis added).

[8] 79 P.3d at 1237.

[9] *Id.* at 1224.

[10] *Id.* at 245 (Kourlis, J., dissenting).

[11] *Id*. at 1243-44.

[12] *Id*. at 1244.

[13] 138 P.3d 273 (Colo. 2006).

[14] *Id*. at 282.

[15] Colo. Const. art. V, §1(5.5)

[16] *Id*. at 280 (emphasis added).

[17] *Id*. at 283.

[18] *Id*.

[19] *Id*. at 284.

[20] *Id*.

[21] *Id*.

[22] 109 P.3d 616 (Colo. 2005).

[23] *Id.* at 634.

[24] *Id.* at 632.

[25] *Id.*

[26] 47 P.3d 1175 (Colo. 2002).

The Federalist Society
for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036