Louisiana Law Review

Volume 51 | Number 4
March 1991

Usurping the Executive Power: State Board of Ethics for Elected Officials v. Green

Elizabeth Vaughan Baker

NOTES

Usurping the Executive Power: *State Board of Ethics for Elected Officials v. Green*

I. INTRODUCTION

State Board of Ethics for Elected Officials v. Green[1] presented two main issues to the Louisiana Supreme Court: (1) Is it constitutional for the legislature to appoint members to boards and commissions within the executive branch of government, and (2) If so, can such a board or commission constitutionally exercise civil enforcement powers?

On first hearing, the court answered the first question affirmatively. The power of appointment under the state constitution does not exclusively belong to the governor, the court found. The second question, however, the court answered negatively. Once these legislatively-appointed officials are given authority to exercise functions that belong exclusively to the executive branch, such as filing civil proceedings, a violation of the separation of powers provision of the Louisiana Constitution occurs.

That opinion—a four-three split opinion—was reconsidered, and a rehearing was granted four months later. On rehearing,[2] the court maintained its position on the appointments issue, but changed its opinion on the constitutionality of a legislatively-appointed board or commission's civil enforcement powers. The court held that the mere fact that the legislature has appointed the board's members does not violate the principle of separation of powers, as long as (1) the appointment of the members by the legislature was otherwise valid constitutionally; and (2) the appointees are not subject to such *significant* legislative control that the legislature can be deemed to be performing executive functions through its control of the members of the board in the executive branch.[3] Second rehearing was denied.[4]

The *Green* trio involved a challenge to the constitutionality of civil enforcement power given to the Board of Ethics, an executive branch

---

1. 540 So. 2d 1185 (La. App. 1st Cir.) (*Green I*), aff'd, 545 So. 2d 1031 (1989) (*Green II*), aff'd on reh'g in part, rev'd in part, 566 So. 2d 623 (1990) (*Green III*).
2. *Green III*, 566 So. 2d 623.
3. Id. at 624.
4. Id. at 623. Second rehearing was denied Sept. 27, 1990.

board, primarily legislatively-appointed and acting as the Supervisory Committee on Campaign Finance Disclosure ("the Committee"). This casenote reviews the historical background of the Committee, how this case arose, and the statutory provisions at issue. Discussion of the two main issues and analysis of the supreme court's first opinion and the opinion issued on rehearing follows. This note concludes with an analysis of the status of *Green* in light of the close vote and the change in composition of the court.

II. Historical Background of the Supervisory Committee on Campaign Finance Disclosure

A. History of the Committee

The stated purpose of the Election Campaign Finance Disclosure Act[5] (the "Act") is "to provide public disclosure of the financing of election campaigns and to regulate certain campaign practices."[6] Generally, the Act provides for reporting contributions and expenditures involved in campaigns for elective state and local public offices, prohibits and limits certain practices, and provides for civil and criminal penalties. It also establishes the Supervisory Committee on Campaign Finance Disclosure.

The initial legislation[7] created three supervisory committees: one for candidates for the Senate,[8] one for candidates for the House of Representatives,[9] and one for other candidates and persons also required to file reports.[10] In 1976, the legislature replaced the three committees with one committee.[11] In 1980, the legislature changed the membership[12] and also gave the committee authority to enforce civil penalties by filing

5. The Act, enacted as 1975 La. Acts No. 718, § 1, has been amended several times: 1976 La. Acts No. 386, § 1; 1978 La. Acts No. 137, § 1; 1980 La. Acts No. 786, § 1; 1981 La. Acts Nos. 59, § 1 and 716, § 1; 1982 La. Acts Nos. 266, § 1 and 652, § 1; 1984 La. Acts Nos. 466, § 1 and 492, § 1; 1986 La. Acts No. 669, § 1; and 1987 La. Acts Nos. 722, § 1; 831, § 1, and 757, § 1.

6. La. R.S. 18:1482 (Supp. 1990).

7. 1975 La. Acts No. 718, § 1.

8. Composed of the secretary of the Senate, the legislative auditor, and the executive director of the Legislative Council.

9. Composed of the clerk of the House, the legislative auditor, and the executive director of the Legislative Council.

10. Composed of the secretary of the Senate, the clerk of the House, the legislative auditor, and the executive director of the Legislative Council.

11. 1976 La. Acts No. 386, § 1. The committees were replaced with one Supervisory Committee, composed of the secretary of the Senate, the clerk of the House, the legislative auditor, and the executive director of the Louisiana Legislative Council.

12. 1980 La. Acts No. 786, § 1. The membership was changed to the secretary of the Senate, the clerk of the House, the Secretary of State and the Attorney General.

civil proceedings. It was in 1981 that the legislature provided that the Board of Ethics for Elected Officials[13] would be the administrative and enforcement body for the Act.

The Board of Ethics is a part of the executive branch of state government, being placed in the Department of Civil Service, and is composed of five persons: one appointed by the governor,[14] two chosen by the House of Representatives, and two chosen by the Senate. Thus, legislative appointees compose *eighty percent* of the Board.

B. How This Case Arose

After conducting an investigation pursuant to the provisions of the Act, the Board of Ethics for Elected Officials, acting as the Committee, filed an action against various defendants alleging violations of the Act[15] and seeking to impose penalties.[16] The Board also filed interrogatories and requests for production of documents, noticed the taking of depositions, and issued subpoenas.[17]

Various defendants filed motions for protective orders from all discovery, arguing that the Board could not constitutionally proceed because the statute by which it had authority to act, Louisiana Revised Statutes 18:1511.5(A), violates article II, sections 1 and 2 and article IV, section 5(A) of the Louisiana Constitution of 1974.

III. THE CONSTITUTIONAL PROVISIONS AND JURISPRUDENCE

A. The Appointments Clause and Jurisprudence

The Louisiana State Constitution provides:

> The Governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the

---

13. La. R.S. 42:1132 (1990). The name also was changed from "Supervisory Committee, Campaign Finance Disclosure Act" to "Supervisory Committee on Campaign Finance Disclosure."

14. The gubernatorial appointee must be a retired or former Louisiana Supreme Court justice, court of appeal judge, or district court judge. Id.

15. The petition alleged the defendants should be found to have "knowingly and willfully made loans through or in the name of another to the Doug Green Campaign Committee, Inc.," in violation of La. R.S. 18:1505.2(A) (Supp. 1990); and "knowingly and willfully inaccurately disclosed the source of the loans," in violation of La. R.S. 18:1505.1(C) (Supp. 1990).

16. Pursuant to La. R.S. 18:1505.5, :1505.1(C) and :1505.4(A)(2) (Supp. 1990).

17. The question of whether these actions could be taken while the state pursued a criminal investigation of Green was not at issue.

> executive branch whose election or appointment *is not provided by this constitution or by law.*[18]

This provision can be compared with the United States Constitution which vests *exclusive* authority to appoint executive branch officials in the President, except for enumerated instances. Article II, section 2, clause 2 of the United States Constitution provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.[19]

The federal appointment process is a practical function of the doctrine of separation of powers: Congress establishes federal offices, and the President, subject to Senate confirmation, chooses the officers.[20]

In *Green I*, the first circuit faced the question of whether the Louisiana provision allowed the legislature to make appointments to executive branch boards or commissions without infringing on the governor's appointment powers. The supreme court, in *Green II* and *Green III*, affirmed the analysis of the first circuit on this issue. Finding that the Louisiana Constitution did not disallow legislative appointment to executive branch boards, the first circuit stated:

> Plaintiff's argument that the appointments clause limits the governor to appointing only officials exercising executive powers is based upon a misconception of the nature of our state Constitution. The federal Constitution is a document of "enumerated powers" (Amendment X, U.S. Const.). The Louisiana Constitution is different. Complete legislative power, except as *limited* by the Constitution, lies within the state legislature.[21]

Thus, the courts found the appointments clause does not limit the power of the legislature to enact statutes providing for legislative appointments to executive branch boards or commissions, unless the separation of powers doctrine is violated.

---

18. La. Const. art. IV, § 5(H) (emphasis added).

19. U.S. Const. art. II, § 2, cl. 2. The rest of this clause concerns the treaty-making process.

20. J. Nowak, R. Rotunda & J. Young, Constitutional Law § 7.11, at 249 (3d ed. 1986).

21. State Bd. of Ethics for Elected Officials v. Green, 540 So. 2d 1185, 1192 (La. App. 1st Cir.), aff'd, 545 So. 2d 1031 (1989), aff'd on reh'g in part, rev'd in part, 566 So. 2d 623 (1990).

The first circuit's interpretation of the Louisiana constitutional provision, in comparison with the federal constitutional provision, appears to be supported by textual authority. The Louisiana provision explicitly says appointments may be made by the governor that are not reserved by the constitution "or by law." The legislature explicitly provided for the appointment of the members of the Committee. Thus, as long as no other constitutional provision was violated, the appointments were valid. This was the interpretation of the first circuit,[22] which the supreme court affirmed.[23]

B. Separation of Powers

The second question in *Green*, however, was not decided so summarily. Even though the appointment of the members to the Committee was found valid, its powers still could be unconstitutional if violative of the doctrine of the separation of powers.

Article II, section 1 of the Louisiana Constitution provides that "the powers of government of the state are divided into three separate branches: legislative, executive and judicial." Article II, section 2 provides, "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."

Article IV, section 5 defines the powers and duties of the governor. Section 5(A) provides, "The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed."

Thus, under the constitutional scheme, the legislature makes the laws, the executive branch enforces the laws and the judiciary interprets the laws. The principle of separation of powers has been traced back to Cicero, Aristotle, Locke, and Montesquieu.[24] The underlying policies of division of power are to guarantee the liberty of the people and to prevent the exercise of autocratic power,[25] as well as to provide for checks and balances within the governmental structure.

Theoretically, the tripartite scheme is one of the most important principles in government,[26] but in application it has never been interpreted strictly at the federal or the state levels because of the impracticality and practical impossibility of delineating distinct lines between different

---

22. 540 So. 2d 1185.
23. 566 So. 2d 623.
24. 16 Am. Jur. 2d, Constitutional Law § 294 (2d ed. 1979).
25. Id. at § 296.
26. Id.

branches of government.[27] Some overlapping and blending of powers is inevitable.

State cases recognize some blending, such as inherent powers of the judiciary[28] and limited regulatory powers of agencies.[29] However, when a conflict has arisen in which the judiciary or executive branches treads upon the powers of the legislature, the court has read the state constitution provision fairly strictly, keeping the power of the legislature to make laws within the legislature.[30]

Green, however, presented a situation in which the legislature was usurping the executive power to enforce the law. The Board of Ethics is eighty percent legislatively appointed, but when functioning in its capacity as the Committee has authority to enforce the laws, which is an executive branch function.[31]

In *Guidry v. Roberts*,[32] a case similar to *Green*, the Louisiana Supreme Court upheld the constitutionality of the Campaign Finance Disclosure Act. At that time, however, the Committee did not have enforcement powers. The issue in *Guidry*, as in *Green*, was whether the functions and powers entrusted to the legislatively-appointed Committee violated any power exclusively vested in the executive branch, particularly the duty to "see that the laws are faithfully executed."[33] In upholding the constitutionality of the Act, the *Guidry* court stated:

> The powers granted these legislatively appointed instrumentalities . . . pertain only to receipt, dissemination, and investigation of reports, and to *referral* of them to appropriate prosecutorial officers—governmental activities which neither historically nor functionally fall within the exclusive power of the executive branch to "see that the laws are faithfully executed. . . ."[34]

The court in *Guidry* both relied on and distinguished *Buckley v. Valeo*,[35] the United States Supreme Court decision which addressed the constitutionality of the Federal Election Campaign Act. That Act provided for a commission composed of legislatively-appointed officials with the power to file civil suits for violations. The *Buckley* court held:

---

27. Id. at § 297.

28. Konrad v. Jefferson Parish Council, 520 So. 2d 393 (La. 1988); State In re Johnson, 475 So. 2d 340 (La. 1985).

29. State v. Barthelemy, 545 So. 2d 531 (La. 1989); State v. Taylor, 479 So. 2d 339 (La. 1985).

30. Commissioner of Agriculture v. Plaquemines Parish Comm. Council, 439 So. 2d 348 (La. 1983); State v. Broom, 439 So. 2d 357 (La. 1983).

31. Guidry v. Roberts, 335 So. 2d 438 (La. 1976).

32. Id.

33. La. Const. art. IV, § 5(A); 335 So. 2d at 444.

34. *Guidry*, 335 So. 2d at 446 (emphasis in original).

35. 424 U.S. 1, 96 S. Ct. 612 (1976).

> Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. . . . But when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result. The Commission's enforcement power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."[36]

The court in *Guidry* distinguished on the fact that it was the enforcement power—the power to institute civil actions—that was the unconstitutional infirmity in *Buckley*. At the time, the Committee had no such power.[37]

In 1980, however, the legislature provided this enforcement power. In response to an inquiry from the Secretary of State, Attorney General William Guste issued an opinion:

> [u]nder the Louisiana Supreme Court's holding in *Guidry* and the United States Supreme Court case of *Buckley v. Valeo* . . . it is clear that the granting of the power to institute civil actions in the Supervisory Committee is a violation of the separation of powers provision of the Louisiana Constitution.[38]

The court again addressed the separation of powers issue in 1977, one year after *Guidry*. In *Guste v. Legislative Budget Committee*,[39] the court held that exercise by the governor of his right to appoint twenty-four of twenty-eight members of the Legislative Budget Committee "does not make laws, nor does it so influence the law-making process that there is an indirect invasion of the legislative process."[40] The court noted, however, that *Buckley* would invalidate a statute creating a committee to perform functions exclusively executive when the legislature named the members of the committee.[41] In 1981, the legislature changed

---

36. Id. at 137, 96 S. Ct. at 691.

37. *Guidry*, 335 So. 2d at 446 (majority opinion by Tate, J.).

38. Op. Att'y Gen. No. 80-1384, 79 (Jan. 23, 1981).

39. 347 So. 2d 160 (La. 1977).

40. Id. at 165.

41. Id. at 164 n.5. "The principle of *Buckley v. Valeo* would invalidate a statute creating a committee to perform functions exclusively executive when the legislature named the members of the committee. . . ." Id.

the composition of the Committee to its present form, but left intact the power to institute civil actions.[42]

In *Green II*, the supreme court stated that the authority to institute civil proceedings rendered that part of the Act unconstitutional. On rehearing, the court stated:

> On reconsideration we take a different approach and reach a different result. . . . The mere fact that the Legislature has appointed the board's members does not violate separation of power principles, as long as (1) the appointment of the members by the Legislature was constitutionally valid and (2) the appointees are not subject to such significant legislative control that the Legislature can be deemed to be performing executive functions through its control of the members of the board in the executive branch.[43]

The first question, the court said, was answered affirmatively in the original opinion. The key focus of the constitutional determination under *Green III*'s different approach, the court stated, is to examine "the degree of control over the appointees."[44]

The court reviewed what it called "significant restraints on legislative control over actions of the Board."[45] There was no continuing relationship, it noted, between the legislature and the appointees in any significant degree beyond the original appointment.[46] The court also stated:

> Of course, the fact of original appointment may suggest the existence of some influence by the Legislature over the appointees, but even this possibility of control is dissipated by the spreading of the appointive powers among the Governor, the Senate and the House of Representatives.[47]

Thus, the court concluded, the state constitution was not infringed upon by the legislature exercising power *belonging to the executive branch* and "the equilibrium sought to be established by the constitutional allocation of power among the branches" was not *significantly unbalanced*.[48]

---

42. 1981 La. Acts No. 59, § 1; La. R.S. 18:1511.1, :1511.5 (Supp. 1990).

43. State Bd. of Ethics for Elected Officials v. Green, 566 So. 2d 623, 624 (La. 1990).

44. Id. at 625.

45. Id. La. R.S. 42:1132 (1990) provides that members of the Board are appointed for staggered six-year terms and can be removed only for cause; legislators, employees of the Legislature, and other public servants cannot be appointed; the Board's staff members are classified as civil servants.

46. 566 So. 2d at 625.

47. Id. at 626.

48. Id.

IV. Strength and Value of the Opinion

The final opinion may be challenged in several ways: (1) little authority supports the conclusion; (2) the changing of results with a change in the composition of the court weakens its value as a pronouncement of the court's position on this issue; (3) the reasoning in the opinion is imprecise and the language is vague; and (4) a major premise stated in the opinion is unrealistic.

The first circuit and the supreme court on first hearing found that the Committee's enforcement power was an unconstitutional infringement based on *Guidry*, *Buckley*, and *Guste*, and under the analysis presented in the opinion by the attorney general. The opinion on second rehearing cites little authority other than the constitutional provisions, which are quite broad. *Guste* is cited for the proposition that the focus of the constitutional determination is on the degree of control over the appointees contained in the particular statutory scheme under review.[49] But *Green III* does not address other dicta in *Guste* which, if followed, would have rendered the enforcement provisions unconstitutional.[50]

The procedural history of *Green* also weakens its value. Justice Ad Hoc Hall, who wrote the *Green II* opinion, was sitting in place of Justice Lemmon. Justices Marcus, Watson, and Cole signed the majority opinion; and Justices Dixon, Calogero, and Dennis dissented. When rehearing was granted, Justice Lemmon had returned and Justice Hall had not yet replaced Justice Dixon. Rehearing was granted by Justices Dixon, Calogero, Dennis, and Lemmon. The opinion on rehearing was written by Justice Lemmon, with Justices Dixon, Calogero, and Dennis joining the majority, and Justices Marcus, Watson, and Cole dissenting. When a second rehearing was denied, Justice Hall had replaced Justice Dixon, but he voted against a second rehearing. At a minimum, this procedural tennis weakens the opinion's value as a firm statement of the supreme court.

Another infirmity in the court's decision lies in the holding, which appears to contradict the reasoning in the opinion. The court states that

---

49. Id. at 625.

50. The principle of Buckley v. Valeo would invalidate a statute creating a committee to perform functions exclusively executive when the legislature named the members of the committee. Here, R.S. 39:311 names four legislators as ex-officio members of the committee. The Attorney General, however, does not attack the statute for this reason. R.S. 39:311, by the terms of Act 538 of 1976, will be ineffective after March 10, 1980, when a new section, R.S. 24:651, becomes effective, providing for a joint legislative committee on the budget, composed of the House Appropriations Committee and the Senate Finance Committee.

Guste v. Legislative Budget Comm., 347 So. 2d 160, 164 n.5 (La. 1977).

the legislature exercised power *belonging to the executive branch.*[51] The exact language states:

> We accordingly conclude that Louisiana Revised Statutes Annotated 18:1511.5 does not unconstitutionally infringe on Louisiana Constitutional Article II, Section 2's prohibition against the Legislature's exercising power belonging to the executive branch and does not significantly unbalance the equilibrium sought to be established by the constitutional allocation of powers among the various branches of government.[52]

The interpretation of the first circuit and subsequent validation of that interpretation establish that the legislature did not exercise power belonging to the executive by making appointments to executive boards or commissions. Residual power to make appointments was reserved to the legislature in the appointments clause—the clause is a limitation on the power of the governor rather than a limitation on the power of the legislature. Nevertheless, the language of the holding is framed *in terms of the legislature exercising power which belongs to the executive branch.* If the power truly belongs to the executive branch, then usurpation of that power by the legislature infringes on the doctrine of separation of powers. This interpretation, even if incorrect, at a minimum illustrates the ambiguity in the language used by the court.

Thus arises another problem with the holding: the statement that the exercise of the executive power by the legislature is not violative if is it does not "significantly unbalance" the constitution. The supreme court appears to be saying the doctrine is not undermined or compromised if it is not infringed upon *very much.* Constitutions by nature are general documents, interpreted by the courts. Interpretations build on one another like bricks. In its holding, the court has opened a door to significantly unbalance the constitutional doctrine of separation of powers.

The underlying rationale of the doctrine is undermined by blurring the lines between which branch can exercise what power, with no guidelines for when or why such blurring is necessary. If the legislature is exercising power belonging to the executive, then the action should be absolutely unconstitutional. Administrative agencies within limits may issue regulations without infringing on the legislative power to make laws. The judiciary has inherent powers of administration. Such powers, although technically "belonging" to another branch, are necessary for efficient functioning of government. The supreme court provides no

---

51. State Bd. of Ethics for Elected Officials v. Green, 566 So. 2d 623, 626 (La. 1990).

52. Id.

reason why it is necessary or beneficial to allow legislatively-appointed boards executive power to enforce laws. Allowing the legislature to usurp the executive power in little steps erodes the fundamental policies underlying separation of powers, such as preventing autocratic government and providing for checks and balances.

Furthermore, the view that legislative appointees are not under the control of the legislature after appointment is unrealistic. In general, the legislature, since each member must be elected and re-elected, has an interest in not appointing anyone to the Board of Ethics who might cause problems for legislators in their future actions. Because the Board sits as the Committee, if its members maintain any kind of allegiance or loyalty to the legislature or particular legislators from whom they obtained appointment, the integrity of the Board is compromised. And while the appointees cannot be legislators or their staff or family members, these appointees could be friends, business or law partners, or other allies of the legislator who nominates them. Specific actions taken by the Committee also may be influenced. The independence of the Board as a whole could be compromised by the loyalties of these appointees, and the whole purpose of the Board of Ethics and the Committee would be undermined. Notably, the governor's power to appoint a member to the Board is much more restricted than the appointive power of the legislature. The gubernatorial appointee must be a retired or former Louisiana justice or judge. The governor also is allowed only one appointee, whereas the legislature is allowed four. Thus, the power of appointment between the legislature and the governor is far from equal, nor is the possibility of control "dissipated by the spreading of the appointive powers."[53]

IV. CONCLUSION

The Louisiana Supreme Court on rehearing appears to have slashed a hole in the doctrine of separation of powers which can only become wider in the future. At the least the court has shown how the governor's influence in the appointments area may be reduced. It has allowed the legislature to usurp the executive power without justification. The original opinion kept the issue framed more clearly: was the separation of powers doctrine violated? Based on prior jurisprudence interpreting the state constitutional provisions at issue, the court concluded it was. On rehearing, the court did not state why it found its original rationale to be wrong. It only stated that after reconsideration, it reached a different result. The different result appears to be that as long as the constitution is not "significantly unbalanced," it can be violated. In the final analysis,

53. 566 So. 2d at 626.

the supreme court may have usurped power from the executive branch for itself. What used to be a clearly delineated line—that legislatively-appointed boards could not constitutionally have civil enforcement power—has been obliterated in favor of a case-by-case determination of whether the *degree of control significantly imbalances* the constitution. Regardless of who took the power, the executive branch has been robbed. This holding undermines the doctrine of separation of powers and erodes the principles on which these provisions are based.

Elizabeth Vaughan Baker