

1967

Phil L. Hansen, Attorney General of the State of Utah v. Legal Services Committee of the Utah State Legislature : Brief of Appellant

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In the Supreme Court of the State of Utah

PHIL L. HANSEN, Attorney General
State of Utah,

Plaintiff,

v.

LEGAL SERVICES COMMITTEE
UTAH STATE LEGISLATURE,

Defendant.

BRIEF OF

APPEAL FROM THE
JUDICIAL DEPARTMENT
SALT LAKE CITY

HONORABLE BYRON R. JENSEN

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Salt Lake City, Utah

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In The Supreme Court of the State of Utah

PHIL L. HANSEN, Attorney General of the
State of Utah,

Plaintiff-Appellant,

v.

LEGAL SERVICES COMMITTEE OF THE
UTAH STATE LEGISLATURE,

Defendant-Respondent.

CASE NO.

10784

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, the Attorney General of the State of Utah, appeals from a decision of the district court of the Third Judicial District, the Honorable Bryant H. Croft, Judge, ruling that the provisions of Senate Bill No. 4 as enacted by the 36th Utah State Legislature was constitutional and not in contravention of the provisions of Article VII, Section 18, of the Constitution of the State of Utah pertaining to the powers and duties of the Attorney General.

DISPOSITION IN THE LOWER COURT

The appellant filed suit in the district court of the Third Judicial District on June 24, 1966, challeng-

ing the constitutionality of Senate Bill No. 4 as enacted by the 36th Utah State Legislature, 2nd Special Session which established the Joint Legal Services Committee and legal advisor for the legislature of the State of Utah. A motion to dismiss was filed by the respondents and on the 4th day of November, 1966, an order was entered by the Honorable Bryant H. Croft, Judge, granting the respondent's motion to dismiss and determining that the contention of the Attorney General as to the constitutionality as to the reference legislature were without merit.

RELIEF SOUGHT ON APPEAL

The appellant submits that the decision of the district court should be reversed and this court should rule that the provisions of Senate Bill No. 4, 36th Utah State Legislature, Section 3, Chapter 7, Laws of Utah, 1966, 2nd S.S., are unconstitutional.

STATEMENT OF FACTS

On June 24, 1966, the appellant, the Attorney General of the State of Utah, filed suit in the District Court of Salt Lake County, against Senator Charles Welch, Jr., Senator Richard V. Evans, Representative Felshaw King, and Representative Allan E. Mecham, Legislators of the Utah State Legislature, comprising the Joint Legal Services Committee of the Utah State Legislature. It was alleged that the legislation establishing the committee and providing for the office of legal advisor to the legislature

was unconstitutional. The legislation was enacted as Senate Bill No. 4 by the 36th Utah State Legislature (R. 5-6). The duties of the legal advisor are to prepare legislative measures, review legislative measures and "give such **legal advice** and assistance concerning any measure before the legislature" when requested to do so. (Emphasis added.) The **Legal advisor** is also charged with the formulation of plans for codification and revision of state statutes. The Attorney General, in his complaint (R. 1), alleged that the legislation contravened the provisions of Article VII, Section 18, of the Constitution of the State of Utah providing that the Attorney General shall be the **legal advisor** for all state officers (R. 2). (Emphasis added.) The Attorney General contended that the legislation usurped the constitutional duties and functions of the Attorney General in acting as **legal advisor** to the legislature because the legislators were state officers. It is further contended that the establishment of the **legal advisor** to the State Legislature usurped the statutory duties and functions of the Attorney General. On July 23, 1966, the respondent filed a motion to dismiss the complaint of the Attorney General alleging that the allegations of the Attorney General were unmeritorious in that if his contentions were correct provisions of Article V, Section 1, of the Constitution of the State of Utah providing for the separation of powers would be violated. The respondents also contended that the terms "state officers" applied only to executive officers and that the legislature was free to hire its own officers and em-

ployees, including a **legal advisor**. It was further contended that if the Attorney General's position were correct his office would in effect interfere with the judiciary and that it was not the intention of the constitutional framers to so empower the Attorney General as to preclude the legislature from employing its own counsel. Finally, the respondents contended that such construction was contrary to the "practice" in other states. The matter was held before the Honorable Bryant H. Croft, District Judge, on October 11, 1966, and on November 4, 1966, Judge Croft entered a memorandum of the decision and a judgment ordering that the "plaintiff's complaint is hereby dismissed". Judge Croft concluded that the Attorney General was not vested with common law powers, but that the separation of power provisions of the Constitution were not violated, but that the provisions of the Utah Constitution establishing the office of the Attorney General and defining his powers did not encompass legislative officers and that the legislature was not otherwise excluded from employing a **legal advisor**.

Subsequent to Judge Croft's order the appellant perfected this appeal.

ARGUMENT

POINT I

THE PROVISIONS OF SENATE BILL NO. 4, LAWS OF UTAH 1966, CHAPTER 7, SECTION 3, 2ND S.S. ESTABLISHING THE OFFICE OF LEGISLATIVE ADVISOR ARE UNCONSTITUTIONAL IN THAT THEY

CONTRAVENE THE PROVISIONS OF ARTICLE VII, SECTION 18, OF THE CONSTITUTION OF THE STATE OF UTAH PROVIDING THAT THE ATTORNEY GENERAL SHALL BE THE LEGAL ADVISOR FOR STATE OFFICERS.

A. SEPARATION OF POWERS

The respondents in the motion to dismiss in the trial court relied, in part, upon a claim that the Attorney General's construction of Article VII, § 18 of Utah Constitution would do violence to the concept of separation of powers and be contrary to Article V, § 1 of the Constitution. The trial court apparently did not consider that argument valid, since it did mention that argument as a basis for its decision. Although no cross-appeal has been filed, the appellant wishes to lay to rest any contention that Article VII, § 18, of the Utah Constitution, making the Attorney General **the exclusive legal advisor** for the members of the Legislature, would violate the concept of separation of powers.

Article VII, § 18, provides:

"The Attorney-General shall be the legal adviser of the State officers, and shall perform such other duties as may be provided by law." (Emphasis added)

Article V, § 1, of the Utah Constitution also provides:

"The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly

belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.”

The Attorney General in acting as a legal advisor to the members of the Legislature does not exercise legislative power; to the contrary, he performs the traditional function that an Attorney General has always performed, that of giving legal advice to public officers. At common law the attorney general sat with Parliament and was its adviser on legal matters. Holdsworth, *A History of English Law*, Vol. 6, pp. 458-481 (1924); Beilol, **The Origin of the Attorney General**, 25 L. Q. R. 400 (1909). There is no conflict in the fact that the attorney general advises the members of the Legislature and Article V, § 1. Legal advice and guidance is not the exercise of legislative power. The Attorney General gives his legal advice to the judiciary as well when called upon to do so, Article V, § 1, was never intended to create three completely autonomous bodies, but merely three separate branches of government that had made up the traditional governmental structure in this country.⁽¹⁾ Madison commented on the concept in **The Federalist**, No. XLVII Vol. 1, p. 331 (Cent L. Jed 1916):

“* * * he [Montesquie] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROI. over, the acts of each other. His

(1) The very argument respondent made on this point would mean no checks and balances and prevent government from working. Hand. **The Bill of Rights**.

meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. * * *

This court clearly recognized the same limitations in Article V, § 1, in **Tite v. State Tax Commission**, 89 Utah 404, 57 P. 2d 734 (1936), holding that the Tax Commission could exercise certain quasi judicial powers, but not absolute judicial power. The court stated:

“It was Montesquieu in his *Esprit des Lois* who crystalized the theory of separation of powers to the degree we have it in our Federal and State Constitutions. But even here, as stated in *Bouvier’s Dictionary* (Rawles 3d Rev.) p. 1114, ‘The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable, and, although the threefold division of powers is the basis of the American Constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by the other.’ In *Brown v. Turner*, 70 N.C. 93, the court said, ‘[Although] the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a ‘common cause of vicinage,’ bordering the domains of each’.”

Clearly, the simple rendering of legal advice to members of the Legislature by the Attorney General does not encroach on the Legislative prerogatives and in no way transgresses Article V, § 1 of the Utah Constitution. Therefore, there is nothing that would prevent this court from saying that Article VII, § 18, makes the Attorney General the exclusive legal adviser for members of the Legislature.

B. **THE PLAIN MEANING OF ARTICLE VII, § 18.**

It is submitted that the plain meaning of Article VII, § 18, renders the Attorney General **the exclusive legal adviser** to the members of the Legislature and that the provisions of Section 3, Chapter 7, Laws of Utah 1966, Second Special Session, purporting to establish the office of **legal adviser** to the Legislature is unconstitutional.

Article VII, § 18 does not state that the Attorney General **may** be the Legislature's legal adviser or that he is a legal adviser for state officers, rather, it specifically enjoined that he **shall** be "**the**" **legal adviser of the State officers**. At the time the Utah Constitution was promulgated the position of Attorney General was not without historical significance. The Act of March 18, 1852, established the office of Attorney General of the Territory of Utah. This Act was upheld in **Snow v. United States**, 85 U.S. 317, (1873). However, in 1874, Congress repealed the prior law and the position was abolished. Compiled Laws of Utah 1876, p. 51. The Constitutional Con-

vention considered the position, and seemed to indicate the primary function would be **advising state officers**, and contemplated that other functions could be provided by the Legislature. Proceedings of the Constitution Convention 1895, Vol. II, pp. 1028-1030, pp. 1154. The only affirmative duty the Constitution expressly obligates the Attorney General to perform is that of being **"the" legal adviser to state officers**. Certainly, in view of the discussion of salaries, etc., during the convention it could hardly be said the framers intended the Legislature to hire its own **legal adviser**.

The trial court seemed to place great emphasis upon the contention that legislators were not "State Officers," as that term is used in Article VII, § 18. Nothing in the convention proceedings supports that conclusion. The term "State Officers" is used in Article XXIV, § 12, to include legislators. That section provides:

"The State Officers to be voted for at the time of the adoption of this Constitution, shall be a Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General, Superintendent of Public Instruction, **Members of the Senate and House of Representatives**, three Supreme Judges nine District Judges, and a Representative to Congress." (Emphasis added.)

Consequently, it cannot be profitably argued that the term "State Officers" was intended only to cover executive officers. The term "state officer" has in many contexts been held to include members of

the Legislature. **In re Anderson**, 164 Wis. 1, 159 N.W. 559; **Brown v. Superior Court**, 81 Ariz. 236, 303 P. 2d 990; **Jones v. Lockhart**, 76 Ariz. 390, 265 P. 2d 447; **Pitts v. Chilton County**, 27 Ala. App. 364, 173 So. 94; **Rich v. Industrial Commission**, 36 Cal. App. 2d 628, 98 P. 2d 249. It would seem to be an unnecessary and dubious play on semantics and constitutional interpretation to contend that members of the legislature are not "State Officers" within the meaning of Article VII, § 18 and therefore, **the Attorney General is "the" legal adviser to members of the Legislature.**

In **McCormick v. Thatcher**, 8 Utah 294, 30 Pac. 1091 (1892), the court decided that the members of the Board of Trustees of the State Agricultural College were state officers. The court carefully defined the elements of being an "officer" and did so in terms of the duties and powers exercised. This case was decided shortly before the Constitution Convention and, it is submitted, would lend support to the conclusion that the term "State Officers," as used in Article VII, § 18, was intended to encompass **all officials** exercising the sovereign powers of the State. This necessarily includes members of the Legislature. Consequently, the plain meaning of the term "State Officers" requires that members of the Legislature be included within its scope. It seems inescapable not to conclude that the **Attorney General** is, by constitutional mandate, **"the" legal adviser to the members of the Legislature.**

C. INTERFERENCE WITH CONSTITUTIONAL OBLIGATIONS AND PREROGATIVES.

A substantial portion of the trial court's memorandum was directed to the question of common law powers of the Attorney General. Then the trial court concluded (R. 33):

"The answer to the issue herein involved does not turn on what powers an Attorney General did or did not have at common law . . ."

Appellant agrees. Such was relevant below only on the question of separation of powers, an issue already resolved against respondents. The trial court determined that the Constitution, Article VII, § 18, did not prevent the enactment of Senate Bill, No. 4, Section 3, Chap. 7, Laws of Utah 1966, 2nd S.S. It is submitted the trial court erred. As has been noted Article VII, § 18 specifically enjoins the **Attorney General to act as "the" legal adviser for "State Officers,"** and the **members of the Legislature are "State Officers."**

The issue is, then, whether or not the Legislature may establish some **other** person or body to perform the duty and obligation the Constitution of the State vests in the Attorney General. The answer seems to be obviously not. Article VII, § 18, really contains two parts. The first makes the Attorney General **"the" legal adviser for "State Officers."** The second empowers the Legislature to legislate on matters concerning the duties of the Attorney General other than as legal adviser for "State Officers."

The Legislature may impose what authorized obligations it will on the Attorney General, but it may not replace him with someone else as respects the Constitutional obligation to act as legal adviser to state officers. To allow the Legislature to do what it is attempting to do by Senate Bill 4, the first portion of Article VII, § 18 is effectively emasculated. The question here is not the power of an agency to employ counsel to conduct litigation. Rather this case involves the express power and **obligation constitutionally imposed on the Attorney General to act as "the" legal adviser.** If the framers of the Constitution had intended the Legislature to be able to substitute someone for the Attorney General as legal adviser, the language of Article VII, § 18, relating to the Attorney General as "the" legal adviser could have been deleted and the Attorney General charged with performing only the duties the Legislature saw fit to authorize. By not so providing, the framers of the Constitution must have intended the specific language to be the one area the Legislature could not change by legislation. Where the instant legislation is directly inconsistent with the constitutional mandate it must fall as being in conflict with Article VII, § 18. If the Legislature were to be permitted to hire its own Attorney General, consistency and logic would likewise permit it to hire its own Governor, Auditor, Treasurer, Secretary of State, and Judges. The intended encroachment by the Legislature into the executive branch of state government can not be permitted. The next step would be into the judicial branch. Then, there would be no separ-

ration of powers. Then, there would be no democracy. Instead there would be an all-powerful single branch of government bordering on the fringe of monarchy. Our constitution and courts are our only safeguards against a dictatorial legislature. Those Constitutional provisions must be honored and preserved.

CONCLUSION

The office of Attorney General of the State of Utah is an important constitutional office. Generally the duties the Attorney General must perform may be set by statute, although the Attorney General may have common law powers also. However, Article VII, § 18, requires that the Attorney General perform one specific duty, that of being the legal adviser to "State Officers." The members of the Legislature are state officers. The Legislature has attempted to have the obligations of the Attorney General performed by someone else. This is contrary to the express mandate of the Utah Constitution. Consequently, this court should reverse the trial court and rule that Senate Bill 4, Section 3, Chap. 7, Laws of Utah, 1966, 2nd S.S. is unconstitutional.

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