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No. 02-02

LRB Notes

July 22, 2002

SEPARATION OF POWERS

By Mark Rosen

The principle of "separation of powers" is a term that is familiar to many, although its reach may not be realized. The framers of the United States Constitution wanted to safeguard against tyranny by separating the powers of government among three branches, so that each branch checks and balances the other two. This memo seeks to explain this doctrine in the context of the Hawaii Constitution and the role and powers of the Hawaii Legislature.

Q1: *Is the "separation of powers" doctrine spelled out in the Hawaii Constitution?*

A1: Not explicitly. Neither the United States Constitution nor the Hawaii Constitution specifically sets forth the separation of powers doctrine. However, each constitution establishes three distinct, separate branches of government and delegates specific powers to those branches, thereby implying the separation principle. The Hawaii Constitution vests the following powers in three co-equal branches of government:

- Legislative power is vested in the Legislature by Article III;
- Executive power is vested in the Governor as head of the executive branch under Article V; and
- Judicial power is vested in the Judiciary, consisting of "one supreme court, one intermediate appellate court, circuit courts, district courts and ... such other courts as the legislature may from time to time establish" under Article VI.

Q2: *Won't the "separation of powers" doctrine produce at least some government "inefficiency"?*

A2: Yes. The doctrine was not designed to promote efficiency, but rather to prevent the exercise of arbitrary power. The goal was to save the people from a government that was too powerful, rather than too weak, by means of the friction that is inevitable in distributing different government powers among three sectors. The aim was to assure vigorous and open debate on the major issues affecting the people by maintaining checks and balances to ensure free, responsible, and democratic government.

Q3: *Should this doctrine be applied strictly to require total separation?*

A3: No. While keeping the branches separate prevents the concentration of excessive authority in a single branch, the Constitution imposes overlapping responsibility on each branch to provide interdependence as well as independence, and to achieve a workable government. Moreover, a strict application of the separation of powers doctrine is inappropriate in a complex state government such as Hawaii's, in which administrative agencies often need to exercise some judicial and legislative powers as well as executive powers.

Q4: *What actions may the Legislature take under this doctrine?*

A4: The Legislature may do the following:

- Make, amend, and repeal laws (which includes the appropriation of funds) under its general legislative powers;
- Delegate rulemaking and regulatory powers to the executive departments, as long as there are adequate standards for them to follow;
- Give (Senate) advice and consent on certain gubernatorial appointments; and
- Create new courts.

Q5: *What actions may the Legislature not take under this doctrine?*

A5: The Legislature may not do the following:

- Delegate its lawmaking powers to the other branches;

- At least as interpreted by the Attorney General, appoint someone to an executive or judicial agency position that is not purely advisory. However, the Legislature can direct the executive to appoint members from lists of nominees submitted by the President of the Senate and Speaker of the House of Representatives; or
- Engage in enforcement or adjudicatory functions.

Q6: *May the other branches exercise legislative powers in Hawaii?*

A6: No. Under the Hawaii constitution, only the Legislature may engage in lawmaking. If the Legislature tries to allow the Governor or any executive department to make law (without adequate standards), it may be struck down as an "unlawful delegation of legislative power." However, the Legislature may authorize any executive department to adopt rules relating to a particular subject, and those rules, upon approval by the Governor, may have the force and effect of law. In such authorization, the Legislature must provide adequate standards for the department to follow.

Q7: *Are there other areas in which this doctrine influences legislative actions?*

A7: Yes. For example, while the Legislature controls the "power of the purse", the Legislature enacts separate appropriations bills for each branch of government to allow the respective branches to control their own moneys. Thus, separate appropriation bills are enacted for the Executive Branch (the General and Supplemental Appropriations Acts), the Legislature, the Judiciary, and the Office of Hawaiian Affairs.

Q8: *Has the Governor encroached on the Legislature's fiscal powers?*

A8: Not according to the Auditor. In 2000, the Legislature requested the Auditor to review and identify fiscally related powers conferred upon or assumed by the Executive Branch since 1987 that may be reclaimed or reasserted by the Legislature. The Auditor found few specific instances in which the Executive Branch's fiscal powers had increased, and that the Legislature appeared to have in fact reduced the Executive Branch's fiscal powers in some respects since 1987. The Auditor concluded that while the Legislature generally resembled other state legislatures in its exercise of fiscal powers, it did not play as formidable a role in budget development and enactment processes as some other states.