

The Washington Supreme Court is within inches of overstepping its constitutional powers

By Tracy Warner

The Wenatchee World
August 29, 2014

We stand at the crest of the great, legendary slippery slope. It awaits, very slick. All we need do is take a step down.

The decision rests with the Washington Supreme Court, which on Wednesday will preside over a crucial hearing to decide if the state and its Legislature should be found in contempt for failing to compile a “complete plan” on how to make ample provision for basic public education, a requirement etched in Article IX of our constitution as the state’s “paramount duty.”

The court, guardians of the constitution, ruled in 2012 in what is called the McCleary case, that the state has failed in its duty, that it must comply, must show progress and meet the goal by 2018. The “complete plan” to do that was required this year, but didn’t materialize in the divided Legislature. Now the court is urged to punish the Legislature, in part by ignoring the fundamental design and limits of government set forth in the very constitution it works to protect. The three coequal branches of government have specific powers. Can a perturbed judicial branch order the legislative branch to pass a law? Can the court dictate the content of legislation, veto appropriations, or order taxes levied?

“It is appropriate for the court to maintain pressure on the Legislature to continue working toward constitutional compliance. It is not appropriate for the court to hold the state in contempt because the Legislature did not pass a bill or resolution,” said the state’s final brief prior to Wednesday’s hearing, compiled by Attorney General Bob Ferguson and assistants. “Moreover, holding the state in contempt for failure to legislate is a slippery slope.”

There it is. The court is being asked by McCleary plaintiffs and third parties to virtually take control of budgeting process, and make decisions on how the state should tax and spend. Order a special session, they say, or order the tax system scrapped and replaced and expanded, or prohibit appropriations to programs other than K-12 education, those deemed “non-paramount.” They wish the court to order remedies they could not obtain in the difficult give-and-take of the legislative process. The state’s five living ex-governors – Dan Evans, John Spellman, Mike Lowry, Gary Locke and Chris Gregoire – filed a brief penned by former Attorney General Rob McKenna, urging the court to hold off, and give the budget-writing 2015 Legislature a chance to act, a Legislature that won’t be elected until November. The “democratic process can and must work,” they said.

The judicial branch may require the legislative branch to comply with the constitution. If it seizes legislative powers to meet the goal, there is danger. The effort to amply fund public education will be lost in the muck of constitutional crisis. By the constitution the Legislature has the power to appropriate funds and the power to levy taxes. The judiciary may declare laws unconstitutional, but it cannot appropriate, cannot tax or dictate the content of legislation, said the state's brief. It is not a representative or deliberative body able to legislate. It cannot take on power not granted by the constitution.

“The constitutional mandate to amply fund basic education does not exist in a constitutional vacuum and provides no justification for disregarding any other provision of the constitution,” said the brief.

Judges judge. They do not write laws. They do not write budgets or levy taxes. Because the Legislature cannot accomplish what we wish, as quickly as we like, does not justify shredding the basic structure of constitutional government. That slope is far too slick.

Tracy Warner's column appears Wednesday through Friday.