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Colorado Supreme Court Gives OK to Legislative Work Pause, Session is Officially on Hold

The Colorado Supreme Court provided much-needed clarification on the future of the state legislative session on Wednesday by ruling that, during a declared public health disaster emergency, it is permissible for the Colorado General Assembly to only count working days toward the session's constitutionally mandated 120-day limit. Because the legislature first suspended work on March 14 due to the COVID-19 pandemic and extended the temporary adjournment this past Monday, the court's decision means that the session is effectively paused until lawmakers decide it is safe or otherwise necessary to reconvene.

Article V, section 7 of Colorado's state constitution provides that "[r]egular sessions of the general assembly shall not exceed one hundred twenty calendar days." In a 4-3 decision, the court rejected Republican lawmakers' argument that the state constitution requires the session's 120 "calendar days" to be counted consecutively and continuously, thus allowing work to continue past the Colorado General Assembly's previous May 6 deadline.

The majority opinion, written by Justice Marquez, determined that the state constitution is ambiguous as to how the 120 "calendar days" limitation must be calculated. In coming to that conclusion, the majority examined how the state constitution does not explicitly mandate that the calendar days must be counted consecutively, nor does it include any express requirement for the legislature to adjourn sine die by a certain date.

Additionally, the majority found that the Colorado General Assembly's adoption of Joint Rule 23(d), which prescribes that under normal circumstances the legislature shall count calendar days consecutively, inherently demonstrates the state constitution's ambiguity in this area. In reference to the joint rule, the majority rhetorically asked "[i]f the plain text of article V, section 7 unambiguously mandated consecutive counting of calendar days, why were its drafters . . . compelled to adopt a clarifying rule?" Because of its determination that the state constitution is ambiguous as to how the 120 "calendar days" must be counted, the majority concluded that the legislature's normal practice of counting calendar days consecutively is reasonable and entitled to a presumption of constitutionality.

Correspondingly, the majority determined that, during a declared public health disaster emergency, Joint Rule 44 allows the Colorado General Assembly to deviate from its standard rules of procedure, including the practice of counting calendar days consecutively. Specifically, the court concluded that Joint Rule 44(g), which states that during a declared public health disaster emergency the legislature shall only count working days toward the 120-day total, is not foreclosed by the state constitution. The majority reasoned that because Joint Rule 44(g) only creates a "narrow exception" to Joint Rule 23(d)'s general practice and provides "crucial flexibility when a declared public health crisis

renders it unsafe to meet to consider and debate legislation,” it should also be entitled to deference.

Finally, the majority noted how a special session, which could be initiated by the governor or the legislature itself, would be an inadequate remedy in this context. The majority reasoned that special sessions, which are traditionally reserved for limited purposes and narrow subject matter, do not “comport with the broader, more general purpose of the legislature’s regular session.” The court also alluded to the 355 bills that were pending in the queue when the legislature suspended its work on March 14, stating that it would be inefficient to have to reintroduce and reconsider those pieces of legislation in a special session.

The dissent, led by Justice Samour and joined by Chief Justice Coats and Justice Boatright, unsurprisingly argued that the phrase “calendar days” in the state constitution is unambiguous and requires session days to be counted consecutively. The dissent, relying on dictionary definitions of “calendar day” (i.e., a day that runs midnight to midnight) as well as the use of the phrase in other state law contexts, posited that calendar days are inherently consecutive and that the working days provision in Joint Rule 44(g) impermissibly amends article V, section 7 of the state constitution.

The court’s ruling marks a major victory for the Democrat lawmakers that control both chambers of the state legislature. Before the temporary adjournment, Democrats were pursuing an ambitious policy agenda that included a paid family and parental leave program, a public health insurance option, and broad environmental and green energy legislation. With the Colorado Supreme Court’s ruling, the Colorado General Assembly retains the 52 session days it had remaining when it suspended its work and Democrats can, in theory, pick up where they left off. However, despite time remaining in the session being less of a pressing concern, the economic ramifications of the COVID-19 pandemic may still interfere with the legislature’s plans. In its most recent budget forecast, the state conservatively estimated it will be \$426 million short of what is needed to cover costs from growth in existing programs and inflation. As the economic malaise caused by the coronavirus outbreak continues, that shortfall may grow significantly higher.

Meanwhile, while some observers have speculated anywhere from a late spring to a mid-summer return, legislative leadership has not definitively signaled when the Colorado General Assembly might reconvene. Why? Because nobody really knows. While lawmakers are obligated to pass essential pieces of legislation like the state budget and the Public School Finance Act before the new fiscal year in July, more discretionary or partisan proposals may have to wait. In any case, given the global data coming out of China and Italy related to their collective experience with COVID-19 and a gradual return to some semblance of normalcy, it seems reasonably certain that the legislature will be able to return—with appropriate social distancing—sometime in 2020 ahead of the November election.

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