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MEMORANDUM

May 3, 2011

SUBJECT: Outline of Contingency and Nonseverability Discussion

TO: Representative Max Gruenberg

FROM: Doug Gardner
Director

You asked for a *sui generis* discussion of the contingency and nonseverability clauses after receiving my last memorandum. I agreed to put ideas down on paper that are a departure from the opinions previously issued based on current case law. Below are the ideas that are a product of our conversations, and other ways of looking at these two issues. I am also attaching a case I believe you may wish to read in detail, as I believe it addresses the discussion you are focusing on. This case was cited in my last memo to you.

I. OVERVIEW -- CROSS-CONTINGENCIES

A. The purpose of the line item veto is reduction of the total budget; not allowing the governor to decide the object of expenditure. *Constitutional Convention*, and *Knowles*.

B. Contingencies, including cross-contingencies, if triggered, also reduce expenditures.

C. The danger of cross-contingencies is that they may reduce the governor's incentive to exercise the line item veto, thereby having the effect of allowing expenditures to be too high (i.e., line item veto won't be used to reduce the budget). A counter argument is that the governor can still "strike or reduce," but the consequences are significant.

D. To balance the governor's "strike or reduce" function with the legislature's allocation function is to allow cross-contingencies, but only if there is a very close nexus between them.

E. Nexus: In descending order of likelihood that a court would uphold:

1. Physical -- dam and transmission lines;
2. Financial -- bonding, etc.;
3. Functional -- salary for director of group and other funding for group;

4. Equitable distribution (distributing related dollars -- schools, energy projects -- across the state).

F. Legal Basis

1. Ask the court to expand the definition of "item" in *Knowles* to include tied appropriations that meet an appropriate nexus requirement. The definition of "item" in *Knowles* is quite clear, but *Knowles* was not addressing a contingency that involved other appropriations, but confinement. This approach is problematic given the well-settled case law and definition of "item."

2. Simply uphold contingency, so long as an appropriate nexus is present. See attached case; *Brault v. Holleman*, 230 S.E.2d 238 (VA 1976). This would be more consistent with the *Knowles* analysis. The argument would be that there are limits with a nexus test on cross-contingencies in appropriations, and that given the established nexus, the asserted infringement on the governor's "strike or reduce" line item veto power would be reduced. There is no log rolling in this approach.

II. OTHER APPROACHES AVOIDING CROSS CONTINGENCIES

A. Two appropriation bills. Send out the endangered appropriations, wait for the governor's vetoes, then send out the governor's favorites. This approach is simple, but doesn't deal with really linked appropriations, and is more useful when the "linkage" is political.

B. Lump sum appropriation (X dollars for projects A, B, and C to a public corporation (AEA)). The governor cannot line out A, B, or C, but, the executive does have the power to allocate dollars to projects, but AEA may, which might have the affect of eliminating or reducing some projects.

C. Substantive Law.

1. Create an executive branch program and let the executive branch produce a list, then appropriate for "items 1 - whatever is on the list."

2. Establish a list of projects in statute, with either dollar amounts or a percentage attached to each project. See AS 29.60.700 for dollar approach and AS 23.15.835 for percentage approach. The governor may veto the entire substantive bill, but cannot delete projects.

III. SEVERABILITY

Severability gives the legislature the ability to decide that, if its contingency (of whatever type) won't work, it doesn't want to make the appropriation at all. The court will assume nonseverability -- the *Knowles* court explicitly did -- but the severability clause preserves the legislature's final decision. One argument is that nonseverability discourages use of the line item veto, or challenges to the contingency, but it also means that the legislature has to be willing to lose all the appropriations if the contingency fails. Perhaps this symmetry is the sign that the constitution has perfect checks and balances,

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where both the legislature and the executive go back to zero if there is a veto and an enforceable nonseverability clause. Not giving effect to a severability clause will diminish the legislature's power to appropriate in the first place. The legislature would be reluctant to put in contingencies or perhaps unwilling to appropriate at all, if it believed its nonseverability clause would not be honored.

DDG:plm

Attachment