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MEMORANDUM

April 29, 2011

SUBJECT: Line Item Veto, Nonseverability Clause, and Contingency Language in CSSB 46(FIN)

TO: Representative Max Gruenberg

FROM: Brian Kane BJK
Legislative Counsel
and
Doug Gardner
Director

1. Does the art. II, sec. 15, line item veto power of the governor "trump" a non-severability clause included in an appropriations bill by the legislature? Is an appropriations bill an appropriate bill in which to have a nonseverability clause?

It is unlikely that a governor's line item veto power would trump a nonseverability clause like the one in CSSB 46(FIN). Essentially, the nonseverability clause is an expression of the legislature's intent regarding certain portions of a bill. In the current scenario, the nonseverability clause directly relates to the legislature's not wanting to expend the funds in sec. 4 of the bill if the contingency is held invalid by a court. The legislature is stating to a court that, had it known the contingency would not be upheld, it would not have appropriated those funds in sec. 4 of the bill at all -- or at the very least would have appropriated them differently. The argument that the line item veto would trump the nonseverability clause in this instance would come awfully close to giving the governor the power to actually expend money himself. If the legislature's intent was for all of sec. 4 to be deleted if the contingency was held invalid, then allowing some projects to remain in that section that were not line item vetoed is having money appropriated for projects against the will of the legislature.

While art. II, sec. 15 of the state constitution gives the governor the power by veto to "strike or reduce items in an appropriations bill," this is clearly a situation of the governor being given some part of what is generally a legislative function (controlling the expenditure of state funds). It does not seem likely that a specifically carved out power like the line item veto would trump the legislature's intent in performing its legislative duty of making -- or not making -- appropriations.

In the memo released on April 26th, the attorney general cited *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984), arguing that this case supports the

proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further regulations. *Id.* at 919. The court found that the nonseverability clause so interfered with and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown* that the attorney general cited to in his memorandum.

Reading further in *Brown,* there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* (emphasis in original) The Supreme Court of Kentucky held since the "adoption of the state budget" is within the purview of the legislature, the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriations bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock*, 480 U.S. 678, 680 (1987), where the Court held:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id. at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock*, and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the

presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable, evidence of the legislature's intent that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the non-severability clause, in *Knowles v. Legislative Council*, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Putting the nonseverability clause in the bill is necessary to unequivocally state what the legislature intends in relation to the expenditure of money in sec. 4 of the bill. The nonseverability clause does not administer a program, nor does it amend existing law or extend beyond the life of the appropriation. Finally, the nonseverability clause is germane, as it directly speaks to the legislative intent regarding whether or not certain funds in the bill should be expended.

2. Please discuss the separation of powers issue as it relates to the arguments the attorney general made in his April 26th memo.

I have discussed above one of the two main cases the attorney general referenced in his memo, so I will not address the *Brown* case again here. In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriations bill, that provided for road construction projects totaling $12 million. Of the total $12 million, $7 million was state matching funds for federally aided interstate highway projects, and $5 million was for non-federally funded highway projects. *Karcher*, 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of $3 million for that project, or the $7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of $5 million for non-federally funded projects, or the total of $12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or

in part any such item or items while approving other portions of the bill." *Id.* at 489 citing art. V, sec. 1, para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II, sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II, sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

There are also a few cases outside of the state that may have some bearing on the issue at hand. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoed budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

> [The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have

> discussed, the matters vetoed were qualifications rather than items. . . . Thus the executive power was not invaded.

Rush v. Ray, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must be stated in the appropriations bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

3. Review *Sutherland's Statutes and Statutory Construction*, as it relates to the nonseverability clause in CSSB 46(FIN).

The attached article from Norman J. Singer, Sutherland's Statutes and Statutory Construction, §44A:15 (7th ed. 2009 ed.), provides two passages that take the position that the current trend for courts interpreting nonseverability or inseverability clauses, is to find the clauses enforceable. Two passages from Sutherland's underscore this trend:

> In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.

. . .

> Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

A similar debate surrounded the proposed inclusion of an inseverability clause in the proposed Balanced Budget and Emergency Deficit Control Act of 1985. Among the many controversial elements in the bill, which sought to achieve a balanced budget, was a provision that gave budget supervisory powers to a merged entity of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB"). In light of the partisan dynamic between the President and Congress at the time, the joint participation of congressional and executive agencies was a central feature of the bill. Anticipating a potential constitutional challenge to CBO participation on separation of powers grounds, the House passed a version of the bill that included an inseverability clause. As Congressman Panetta pointed out at the time:

> If you allow severability and the CBO role is found to be unconstitutional, then it leaves it up to the OMB, and it, in essence turns our power entirely over to the President and his agency. That is the issue at stake in terms of why we built inseverability in . . . .

For Congressman Panetta, maintaining a congressional role in the deficit reduction process was a key feature of the legislation. The Act, without the CBO, would include an inadequate check on the executive powers, and the Panetta camp refused to support it. Those opposed to the inseverability clause, however, did not see CBO involvement as a crucial factor and were willing to have the remainder of the Act stand as law even if the CBO's role were held unconstitutional: "[W]e do not want the whole

process that we have labored on so hard now to collapse because one provision is held to be unconstitutional."

Based on the above passages of Sutherland's, and on the cases cited in sections 2 and 3 of this memorandum, there is a strong argument that the nonseverability clause in sec. 37 of CSSB 46(FIN) (27-GS1740\T) would be found enforceable by the Alaska Supreme Court, based on a clear expression of legislative intent and a well documented legislative history that the legislature did not have a desire to fund any of the "energy projects" if the legislature couldn't fund all of the projects. In our discussion, you queried whether the Alaska Supreme Court, in the narrow context of an appropriations bill, might decline to enforce a nonseverability clause based on the principle that such a clause would nullify the governor's line item veto authority to "strike or reduce" as provided in art. II, sec. 15 of the state constitution. If the court chose to so limit the enforceability of a nonseverability clause in an appropriations bill, the court would be creating new law, that would be a break from the nonseverability case law and commentary that I have been able to locate so far in my search.

The considerations a court would have in taking such a significant step of finding a nonseverability clause unenforceable in an appropriations bill would be: (1) disregarding clear legislative intent of nonseverability; (2) essentially forcing the legislature to appropriate in ways that the legislature did not choose; (3) giving the item veto power in art. II, sec. 15 priority over the legislature's appropriation power in art. II, sec. 13; and (4) finding that the nonseverability clause actually violates the governor's veto power (the counter argument to the governor's is that while a contingency triggering a nonseverability clause makes a veto decision harder, the governor may still exercise the veto albeit with significant consequences).

As a final note, it is clear that if the governor does exercise his veto power, the legislature does have a remedy in art. II, sec. 16, because by a three-fourths vote of both bodies in joint session, the legislature can override a veto. If the court chose not to enforce a nonseverability clause in an appropriations bill, reasoning that the legislature's remedy was limited to article II, sec. 16, the court would in essence be concluding that while a majority of the house and senate chose to include a nonseverability clause in a bill, that it would take a three-fourths vote of both bodies to carry out their original intent of providing for nonseverability. In conclusion, all that I can say is that based on current case law in Alaska, and other jurisdictions, and the Sutherland commentary, it appears that the court would enforce a nonseverability clause in an appropriations bill; but that if the court chose to do so, based on a separation of power analysis, it could always carve out an exception to enforcement of a nonseverability clause in the very narrow area of an appropriations bill. The likelihood of this outcome is not possible to predict.

If you need further information, please advise.

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Enclosure

preferred to B's, has to be determined, of course, on the relative importance of the expectations, or on other grounds that may turn the scale. However, the particular decision goes and whatever the rule that is formulated, the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather, it is the method of intelligently balancing and discriminating between reasons for and against. When lawyers have a precedent to follow it is proper that they follow the precedent. When they have no precedent, they decide questions as other people decide them. Their logic is properly the logic of comparative values and not the mere mechanical logic of deduction from major and minor premises.

V. INSEVERABILITY CLAUSES IN STATUTES[1]

44A:15 Inseverability in statutes

When holding a statutory provision unconstitutional, a court must determine whether to sever the defective provision or to invalidate the entire statute. In order to guide courts, lawmakers often include a severability clause in legislation. The clause instructs a court that has held portions of a statute invalid to sever the invalid statutory provisions from the rest of the statute and to allow the statute's valid sections to remain operative. Less frequently, a statute will include an inseverability clause that invalidates an entire statute (or section of a statute) should a provision be held invalid. In part because severability clauses have become boilerplate, these clauses have had little effect on courts making severability determinations.

Despite the explicit statutory language in severability and inseverability clauses, courts all but ignore the clauses and apply their own tests and presumptions to determine severability. These tests generally begin with a presumption that all statutes are either severable or inseverable, usually followed by an examination of the particular statute's structure and legislative history in order to determine whether the remainder of the statute would be consistent with the legislative intent. Courts will also consider whether the statute can reasonably function as an autonomous whole without the invalid provision.

This approach provides scant guidance to courts faced with a severability question, often leaving them to speculate about what the legislature intended to accomplish in passing the statute and whether that purpose is frustrated by the provisions invalidated. This is remarkable in light of the clear instructions provided by

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inseverability (and severability) clauses that would appear to resolve this very issue.

This Comment argues that inseverability clauses are fundamentally different from severability clauses and should be shown greater deference than their sister severability clauses. Part I discusses the courts' approach to severability and inseverability clauses. Part II examines the assumptions behind the courts' treatment of severability clauses and criticizes the application of those principles to inseverability clauses. Part III argues that, with some exceptions, courts should defer to the plain language of inseverability clauses. It also attempts to place the proposed rule within the current debate over statutory interpretation.

I. Deciding Whether to Sever Invalid Statutory Provisions

A. Severability Clauses: A Mere Presumption

The Supreme Court established the general standard for determining whether an invalid provision is severable from the rest of a statute in *Champlin Refining Co v. Corporation Commission of Oklahoma*. Faced with a state oil drilling statute containing potentially unconstitutional price controls, the Court had to consider whether the overall statutory scheme could survive a challenge to the pricing provisions. The *Champlin* Court refused to defer to the statute's severability clause and required instead that a court look at the structure of a statute to determine severability. The Court held that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." In effect, this established a presumption of severability that could be rebutted if a court determined that the legislature did not intend for the statute to exist without the invalid provision. This required courts to speculate as to what the legislative intent behind the statute was at the time of its passage and what it would be after the provision was held invalid. Although a statute's severability clause would seem to provide evidence of legislative intent, the Court in *United States v. Jackson* stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." Thus, by including a severability clause, a legislature does little more than spill ink since the clause has a minimal bearing on the severability determination.

Similarly, in *INS v. Chadha*, the Court, after holding that the legislative veto provision of the Immigration and Nationality Act was unconstitutional, considered whether the provision was severable from the rest of the statute. Although the Act contained a severability clause, the Court again was unwilling simply to rely on the statute's own provision to determine severability. The Court chose instead to examine the legislative history of the Act, and

severed the unconstitutional provision only after concluding that the congressional intent in the legislative record supported such a holding.

The Court, in *Alaska Airlines, Inc v. Brock*, further explained that, far from being dispositive, a severability clause creates no more than a mere presumption of severability. The presumption can be overcome if legislative history and the statute's structure indicate that the statute would not have been passed without the invalid provision.

Similarly, several state courts often begin with a presumption of severability that can be overcome by legislative intent. Many of these courts have second-guessed plain statutory language and have held statutory provisions inseverable despite the presence of s[illegible]ability clauses. One court aptly described the caselaw's indif[illegible]ce to the plain language of severability clauses as "a narrow exception to the general rule that, when a clause is unambiguous, construction is unnecessary." The plain meaning of a severability clause unambiguously instructs a court to uphold the remainder of a statute. However, in the realm of severability, plain meaning does not prescribe the result, and the clause is all but ignored while the court makes an independent determination of legislative intent by construing legislative history and statutory structure.

Acknowledging the ineffectiveness of severability clauses, some states have actually codified rules of construction for interpreting severability questions that arise under their codes. These statutes reflect the caselaw's indifference to severability clauses. Pennsylvania's statute, for example, provides for a presumption that all of the state's statutes are severable, regardless of whether they include a severability clause or not. This presumption can be overcome, however, if a court finds that the legislature would not have passed th[illegible]atute absent the invalid clause or that the remainder of the [illegible]e cannot function properly without the invalid provision.

B. Inseverability Clauses: A Mirror Image?

Research uncovered no reported opinions in which a federal court has interpreted an inseverability clause in a federal statute, perhaps because there are so few of these clauses. When faced with an inseverability clause in a state statute, however, federal courts have applied the same analysis they apply to severability clauses—examining legislative intent, legislative history, and the statute's ability to function without the invalid portion before accepting the plain meaning of the inseverability clause. In *Biszco v. RIHT Financial Corp*, for example, the First Circuit held that the analysis applied to the severability clause in *Chadha* was equally applicable to an inseverability clause in a Rhode Island statute. Thus, inseverability clauses establish no more than a presumption of

inseverability that courts may overcome after an examination of legislative intent.

State courts have also imported the rule for interpreting severability clauses to inseverability clauses. In *Stiens v. Fire and Police Pension Association*, for example, the Supreme Court of Colorado first held that a portion of the Colorado Policemen's and Firemen's Pension Reform Law was an unconstitutional retroactive law because it mandated pension fund contributions to cover liabilities accrued before the statute's passage. Although the law contained an inseverability clause, the court was reluctant to follow it: "The special unseverability clause . . . is not conclusive as to legislative intent. It gives rise only to a presumption that, if the unconstitutional parts of an Act were eliminated, the legislature would not have been satisfied with what remained." After analyzing the legislative history of the statute, the court concluded that the General Assembly's intent to regulate the state's pension liabilities predominated and that this intent would be frustrated by holding the entire act invalid. The court held that, despite the presence of an inseverability clause, the unconstitutional provision was severable from the rest of the statute.

In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.

In addition, some states that have codified their severability law have included statutory language implying that, whereas severability clauses raise only a presumption, inseverability clauses may be dispositive of the severability question. The Indiana Code, for example, provides:

> (a) If any provision of this code as now or later amended or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application. (b) Except in the case of a statute containing a non-severability provision, each part and application of every statute is severable. If any provision

or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless: (1) the remainder is so essentially and inseparably connected with, and dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application; or, (2) the remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application. Thus, all Indiana statutes are severable unless they contain inseverability clauses or severability would be inconsistent with legislative intent or the severed statute would lack autonomy. The Code does not include a limitation, such as the one in subsection (b)(1), that would require an examination of legislative intent for "non-severability" clauses. This is significant because it implies that, when a statute supplies an inseverability clause, the clause is inseverable and no further examination of legislative intent or purpose is required.

II. Inseverability Clauses: A Recipe for Compromise

The previous Part outlined the courts' practice of analyzing inseverability clauses in the same manner as severability clauses. This Part will outline the differences between severability and inseverability clauses and propose that courts stop analyzing the two clauses in the same way.

A. Boilerplate or Deliberate?

The reason most commonly given for the courts' practice of second-guessing severability clauses is that the clauses are boilerplate provisions inserted into statutes by legislatures without thought or deliberation. Because of the often complex, multi-issue bills passed by legislatures, severability clauses are inserted to address a remote contingency: a court holding a small part of the overall statutory scheme invalid might dismantle far-reaching and elaborate omnibus legislation. Although severability clauses are included in statutes quite frequently, legislative drafters are nonetheless aware that courts do not show these clauses much deference. Legislators themselves acknowledge the perfunctory nature of severability clauses and their inclusion in legislation is generally uncontested. One congresswoman, for example, presumed that no floor debate was necessary to discuss the inclusion of a severability clause because such clauses were so commonplace:

> This is a standard "boilerplate" severability clause; similar language has been included in a wide variety of laws including: The Emergency Unemployment Compensation Amendments of 1993, the Americans with Disabilities Act, the Civil Rights Restoration Act, the Fair Labor Standards Act, the Education for Economic Security Act, and the Comprehensive Drug Abuse Prevention and Control Act.

Indeed, as Congressman Frank stated when he introduced a severability clause into a different bill: "This is fairly routine . . . this is I think agreed upon by all the parties, to explicitly put in the kind of severability clause that sometimes is made explicit . . . . This is just boilerplate severability." Congressman Frank acknowledged that severability clauses are not always included in legislation "explicitly" because there is an implicit assumption of severability to start with. As one congressman pointed out when he submitted a bill without a severability clause:

> No severability or nonseverability provisions were included in the bill, but it is the intention of the conferees that any judicial determination regarding the constitutionality of the bill be applied severably to the legislation. This is consistent with the current rule of thumb regarding constitutional challenges to any law that is silent on the issue of severability. Thus, the severability clause itself is understood by legislators as an innocuous provision that is not likely to be heeded by courts. As one court pointed out, "[t]he Act in question contains a "saving clause' which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not quite understood magic."

Furthermore, while the severability clause is rarely dispositive, it may prove useful to courts in the easy case and, even if it is ignored by courts entirely, it is hard to imagine how such a clause could be harmful. In a 1989 Senate debate over a proposed severability clause in a child-care bill, Senator Hatch, acknowledging that the clause presented a potential benefit with minimal risks, commented that "good draftsmanship, good legislative draftsmanship, smart legislative draftsmanship . . . mandates putting a severability clause in the legislation." This demonstrates that severability clauses are included with little discussion or deliberation. In the same debate, Senator Mitchell pointed out that the clause was so standard that "a severability provision exists in over 63 Federal laws."

Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a

constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

A similar debate surrounded the proposed inclusion of an inseverability clause in the proposed Balanced Budget and Emergency Deficit Control Act of 1985. Among the many controversial elements in the bill, which sought to achieve a balanced budget, was a provision that gave budget supervisory powers to a merged entity of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB"). In light of the partisan dynamic between the President and Congress at the time, the joint participation of congressional and executive agencies was a central feature of the bill. Anticipating a potential constitutional challenge to CBO participation on separation of powers grounds, the House passed a version of the bill that included an inseverability clause. As Congressman Panetta pointed out at the time:

If you allow severability and the CBO role is found to be unconstitutional, then it leaves it up to the OMB, and it, in essence turns our power entirely over to the President and his agency. That is the issue at stake in terms of why we built inseverability in . . . . For Congressman Panetta, maintaining a congressional role in the deficit reduction process was a key feature of the legislation. The Act, without the CBO, would include an inadequate check on the executive powers, and the Panetta camp refused to support it. Those opposed to the inseverability clause, however, did not see CBO involvement as a crucial factor and were willing to have the remainder of the Act stand as law even if the CBO's role were held unconstitutional: "[W]e do not want the whole process that we have labored on so hard now to collapse because one provision is held to be unconstitutional."

B. Limiting Court Powers

By failing to distinguish between severability and inseverability clauses, the courts ignore the differences in the messages that the two clauses communicate. The clauses are not mirror images of each other; they say different things.

A severability clause does not prohibit courts from invalidating the remainder of the statute because judicial review authorizes courts to declare statutes unconstitutional. Since a severability clause cannot permissibly limit the scope of the courts' powers of

judicial review, all the clause can do is instruct courts that when they hold a provision invalid they are not required to invalidate the whole statute. Through a severability clause, the legislature tells courts that it does not consider the various statutory provisions inextricably linked. Ultimately, the court must determine how far the unconstitutional provision extends and whether the remainder constitutes a fully functioning statute.

When applying inseverability clauses, on the other hand, the courts' exercise of the power is restricted insofar as the court is instructed to invalidate the whole statute if it determines it must invalidate some part. Thus, the clause communicates the legislative command that the statute's existence as a law is contingent on its existence as a whole. The court must carry out this legislative command, regardless of its opinion of the relationship between the invalid provision and the remainder of the statute.

Read in this light, the two clauses convey very different messages: one suggests to courts what they should but are not required to do; the other tells the courts what they must do. By applying the same analysis to both, courts fail to acknowledge the fundamental differences in the messages communicated by severability and inseverability clauses.

C. Preserving the Deal

Aside from being deliberately drafted into legislation, inseverability clauses serve a key function of preserving legislative compromise. Much commentary points out that legislation is the articulation of a legislative deal. But a compromise is of no value unless there is a mechanism to ensure the compromise's durability, that is, a way of preventing one party to the compromise from benefiting from the deal without upholding its share of the bargain.

An inseverability clause is a useful enforcement mechanism for legislative compromise because it binds the benefits and concessions that constitute the deal into an interdependent whole. In the debate mentioned above, for example, Senator Helms was unwilling to support the child-care bill unless it provided support for religious day care. If Helms's opponents had agreed to the religious day-care provision, there was a strong possibility that the provision would not have withstood a constitutional challenge. If the provision had been struck down and held severable, the compromise would have been unenforceable. Helms's opponents would have had their child-care benefit, and the religious day-care provision would have been a thing of the past. By making his support for the bill contingent on such an inseverability clause, Helms was entrenching the legislative deal and ensuring that there would be the compromise version of the bill or no version. The inseverability clause thus binds all the elements of the deal together.

Severability clauses, on the other hand, are not tools of legislative compromise. Legislators include them to ensure that the bulk of the legislation passed will remain intact even if some unanticipated contingency arises. As Senator Hatch pointed out:

> Who knows what a future Supreme Court will do? But, in the unlikely event that something in this legislation is unconstitutional, we surely want a severability clause in there so that all of the legislation is not wiped out in a single swoop of the Supreme Court's pen. Because severability and severability clauses are the default rule and the norm, respectively, the inclusion of an inseverability clause is an affirmative act by a legislature to preserve the coexistence of separate provisions. In settlement agreements and other kinds of contracts, for example, the parties determine that certain provisions are so central to the deal that without them there is no contract. The inclusion of inseverability clauses in these contracts is intended to preserve such compromises.

In a similar vein, a legislature may pass a bill that, as a result of a legislative deal, contains a balance of corresponding provisions. If the statute includes an inseverability clause, the legislature is saying that the statute is an organic whole of interdependent parts, no one of which should exist without any other. For example, several statutes codifying settlements of Indian claims in return for some form of reparation contain inseverability clauses for this reason and could not have been passed without them. If court action invalidated the statutory bar on prosecution of their claims, the tribes would have a double benefit: they could receive statutory compensation for their lands and still prosecute claims to recover those same lands. The inseverability clause prevents this outcome.

In *Kennedy v. Pennsylvania*, a state legislature had used an inseverability clause aggressively to gain government-wide support for its actions. The Pennsylvania legislature approved an across-the-board pay increase to state government employees, including legislators and judges. Because the state constitution prohibited legislators from voting themselves a pay increase during their current term, the increase for legislators was effective beginning with the next election. However, in order to gain votes to support the appropriation, the final bill also increased legislators' unvouchered expense accounts for the period prior to the election in the amount of the pay increase. Anticipating a court challenge to the expense account increase, the legislators included an inseverability clause. The clause provided that, were a court to invalidate any provision of the statute, none of the salary increases would be effective, including those for judges. Although the inseverability clause may have been an attempt to pressure judges into holding the expense account increase valid, the Pennsylvania court held the inseverability clause constitutional and valid, even though it affected the judiciary. While the scruples of the Pennsylvania legislature were questionable, their use of the inseverability clause proved an effective tool for preserving their deal.

Similarly, inseverability clauses are often included in budgetary legislation to ensure that the funding scheme developed is viable. If a court determines that an entitlement's eligibility requirement is invalid, then the funding apparatus supplied by the remainder of the entitlement would become inadequate. For example, in *Brookins v. O'Bannon*, the Third Circuit considered an inseverability clause that was included in the 1982 Pennsylvania Welfare Reform Act. The Act divided the class of needy persons eligible under the prior law into "chronically needy" and "transitionally needy" persons and continued to provide full benefits to the "chronically needy." The "transitionally needy," however, were limited under the new act to three months of benefits per year. With the savings generated by reducing benefits to the new "transitionally needy" class, the Act provided for a 5 percent increase in the benefits provided to eligible recipients. The Act included an inseverability clause that eliminated the 5 percent increase should the distinction between "chronically needy" and "transitionally needy" be held invalid. As one legislator pointed out: "We do not want to raid [the] State Treasury. We want to provide an increase in cash assistance allowance to the truly needy as long as those funds are there."

The clause provided an important tool for the legislature to regulate welfare spending by ensuring that the increase in benefits was contingent upon narrowing the scope of eligible welfare recipients. The Third Circuit ultimately did apply the inseverability clause, but only after examining the legislative history of the provision. One can only speculate as to what the court would have done to Pennsylvania's welfare budget had the legislative record lacked any discussion of the Act's inseverability clause.

Thus, by applying the same analysis to inseverability clauses as they apply to severability clauses, courts are denying legislators an effective tool for entrenching a compromise. If courts are only moderately deferential to inseverability clauses, and if the clauses establish no more than a presumption of inseverability, then courts will only apply the clause if there is a clear record in the legislative history. Consequently, legislators will be reluctant to rely on the clause as a tool of compromise for fear that courts will undertake independent determinations of legislative intent despite the statutory mandate of inseverability. This problem will be exacerbated for state legislators because legislative history for state legislation is often difficult to locate and thinly reported. Occasionally, legislation can be made palatable or effective only by tempering it with various limiting factors or requirements, and the inseverability clause is intended to ensure that these elements remain in the statute. By treating the inseverability clause as if it were only a minor indication of legislative intent, courts are usurping the legislature's role in determining what should remain as an enforceable statute.

III. A New Rule for Inseverability Clauses

The previous Part established that inseverability clauses serve a wholly different function from severability clauses. Therefore, the rule that courts apply to inseverability clauses should be distinct from that applied to severability clauses. The correct approach to inseverability clauses is to apply their plain meaning. Rather than embarking on an independent exploration of legislative intent, as the courts do for severability clauses, courts should unequivocally invalidate the remainder of a statute if the unambiguous language of the statute so directs.

A. A Public Choice Approach

The proposed rule can be understood through a theory of statutory interpretation that derives from a contracts approach. Public choice theory tends to view legislation as the product of various interest groups vying for their self-interests. Legislation therefore is a contract of sorts negotiated between the various parties, that is, between the different legislators and the interest groups with whom they sympathize. According to this theory, legislation is often a compromise between conflicting groups where one group agrees to support another group's proposed legislation in return for some modifications in the underlying bill or for support on another issue. Consequently, the legislation may lack a cohesive focus because different portions of the bill are included to placate different groups.

An inseverability clause provides legislators with a tool for enforcing these compromises because one group may be willing to support a piece of legislation only if it can be assured that particular limitations or provisions will be included in the final bill. Senator Helms, for example, could agree to support a child-care entitlement on the condition that religious day-care centers were eligible for the benefit. His insistence on an inseverability clause testifies to the clause's important role in entrenching a compromise.

Similarly, after the *Chadha* decision there were initiatives in Congress to include inseverability clauses in statutes with legislative veto provisions. The inseverability clause would enforce durable legislative deals whereby various federal actions mandated by statute could not be undertaken unless Congress had the power to veto the action. If the Court, as it did in *Chadha*, held such an attempt at legislative veto unconstitutional, then the inseverability clause would cause the entire statute to fall rather than leave the statute to function free from any legislative check on its application.

It is, however, imaginable that in many instances a sparse record will provide an inadequate background as to the negotiation and compromise behind an inseverability clause. Alternatively, because of the conflicting interests that influence the legislation, the legislative history often provides conflicting evidence of legislative intent

or purpose. As such, a rule that failed to defer to the plain meaning of the inseverability clause would, in effect, undermine the clause's function as a legislative tool for enforcing compromise. Courts would be free to speculate as to legislative intent and purpose in the absence of an informative legislative history.

Applying the plain meaning of inseverability clauses without second-guessing legislative intent helps facilitate durable legislative compromises. If courts are able to examine legislative intent and to speculate whether the legislature would have passed the legislation without the invalid provisions, there is a great likelihood that legislative deals will be undermined or short-lived. If courts will sever provisions that were passed as interdependent elements, legislators will be less willing to enter into compromises: they will fear that the issues they concede will outlive the issues they support. That is, the costs of the deal might outlive its benefits. Severability clauses, on the other hand, do not enforce the legislative compromise; they protect the passage of complex omnibus clauses. A strict plain meaning rule of severability clauses, therefore, would not help to preserve a legislative deal. If anything, the severability clause attempts to undo legislative deals by instructing courts to uphold the balance of a statute even when portions of the legislative deal have been struck down.

Nevertheless, courts' deference to the plain meaning of inseverability clauses should not be unlimited. If giving effect to an inseverability clause would result in overstepping the bounds of legislative or judicial authority, then the clause should not be followed. For example, in *Legislative Research Commission v. Brown*, an inseverability clause provided that if a Kentucky legislative veto provision were held invalid, then the state's executive department would not be permitted to issue regulations unless the state's general assembly was in session. The clause was intended to force the courts to uphold the veto in order to avoid crippling the executive branch's powers. The Kentucky Supreme Court wisely refused to apply the inseverability clause and held that the clause "unconstitutionally limit[ed] and interfer[ed] with the governor's mandated duties." Thus, legislatures are free to construct a legislative compromise through inseverability clauses provided they do not attempt to force courts to fashion unconstitutional holdings.

B. An Inseverability Canon

In order to prevent courts from undermining the legislative compromises that are sealed by inseverability clauses, this Comment calls for a new interpretive canon for inseverability clauses.

1. A clear statement rule.

The proposed rule would function like a clear statement rule.

Clear statement rules are generally defined by polarities. On the one hand, there is a presumption that cannot be overcome unless the legislature has provided a clear statement otherwise. On the other hand, a clear statement rule must also define what statutory language would be sufficient to constitute a "clear statement" to overcome the court's presumption. For example, in *Atascadero State Hospital v. Scanalon*, the Court articulated a clear statement rule for congressional abrogation of states' Eleventh Amendment immunity from suit in federal courts. The Court held that, when the statutory language is ambiguous as to abrogation, it will not attempt to divine whether Congress intended to abrogate. The presumption of immunity created a "requirement . . . that Congress unequivocally express its intention to abrogate . . . by making its intention unmistakably clear in the language of the statute."

The codified statutory construction rules in the Indiana Code, for example, illustrate how such a presumption would work. The rule presumes severability regardless of whether a severability clause is included in the statute. However, once the legislature has included an inseverability clause, a clear statement of legislative intent has been provided and the courts must therefore defer to the unambiguous language in the clear statement. Such a rule would prevent courts from second-guessing inseverability clauses. The proposed rule recognizes that the inclusion of an inseverability clause is a deliberate act of the legislature to enforce a legislative compromise and to ensure that the provision and the remainder of the statute operate in tandem.

There is one modification, however, from the clear statement model. Absent a clear statement in an inseverability clause, the default rule is not severability but rather a presumption of severability. The classic clear statement rule contains a default rule that can only be overcome by a clear statement. The default in the proposed rule for inseverability clauses, however, does not limit findings of inseverability to the presence of inseverability clauses. Whether or not the statute contains a severability clause, the presumption of severability can be overcome by legislative history or statutory structure indicating that the legislative intent was for inseverability. An inseverability clause, by contrast, provides a clear statement that unmistakably requires courts to invalidate the statute's remainder.

2. A statutory device.

As with substantive canons, courts often choose to interpret and apply particular statutory devices in a consistent manner. Courts will often apply time limitations and deadlines, for example, according to the statute's strict plain meaning. In *United States v. Locke*, the statutory deadline for a mining rights application was "prior to

December 31," even though similar deadlines generally extended to the end of the year with language such as "on or before December 31." The Supreme Court read the statute literally and held that an application filed on December 31 was too late. This can be read as a rule of strict construction for dates and deadlines included in statutes. As Justice Marshall wrote, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced."

Thus, while the severability clause canon examines legislative intent in spite of the clause's language, the canon for reading inseverability clauses should read the clauses strictly according to their plain meaning—in short, the inseverability clauses should be dispositive. To paraphrase Justice Marshall, if the inseverability clause is to have any content, its plain meaning must be applied.

This raises the potential, however, of an absurd result where an inseverability clause is activated by a very minor holding of invalidity. In *Rebaldo v. Cuomo*, for example, an amendment to New York's Public Health Law prohibited New York's public hospitals from charging any of the insurance carriers less than a specified rate. The law contained an inseverability clause that invalidated the entire statute if any payor was charged below the specified rate. The clause was intended to restrain the major payors like Medicare, Medicaid, and Blue Cross from obtaining cheaper rates. However, the court noted that "a literal construction of the language would lead to the absurd result that 'a single uninsured patient . . . would invalidate the statute'" if that person paid a hospital bill below the specified rate. Although the *Rebaldo* court decided the case on other grounds, the inexpertly drafted inseverability clause might have led to an absurd result.

However, as the Court in *Locke* noted, it is often necessary to let some seemingly harsh results stand in order to preserve the power of inseverability clauses generally. Although courts are often reluctant to enforce what appear to be absurd results, by generating a rule that strictly applies the plain meaning of inseverability clauses, courts will force legislatures to draft the clauses with greater precision. As Justice Scalia wrote, "we have an obligation to conduct our exegesis in a fashion which fosters [the] democratic process." By applying the plain meaning, courts are not only forcing legislatures to craft inseverability clauses with greater care, they are also providing legislatures with effective tools for passing legislation by creating durable compromises.

Conclusion

Applying the severability clause analysis to inseverability clauses

fails to address the distinct nature of inseverability clauses. This Comment demonstrates that the dynamic in inseverability clauses is different from that of severability clauses and calls on courts to apply the strict plain meaning of inseverability clauses. The presence of an inseverability clause evidences a legislative compromise and a deliberate attempt by the statute's drafters to inseverably link statutory provisions. An exploration by courts of the legislative intent behind an inseverability clause will necessarily undermine the clause's ability to enforce legislative compromise. By deferring to the plain meaning of inseverability clauses, courts will encourage the legislative process by preserving an effective tool for enforcing legislative deals.

VI. SEVERABILITY[1]

§ 44A:16 Severability

When a court holds a provision of a statute unconstitutional, a question remains regarding the validity of the remainder of the statute. The court may find that the unconstitutional provision may be severed from the statute and leave the remainder of the statute in effect. Alternatively, the court may hold that the unconstitutional provision cannot be severed and invalidate the entire statute.

In this Article, attorney John Nagle argues that the jurisprudence surrounding the issue of severability is confusing and inconsistent. After explaining the concept of severability and its ramifications for statutes, Mr. Nagle traces the development of the current judicial test for determining when a statute should be found severable. The effect of severability clauses—statutory provisions directing courts to leave the remainder of the statute in effect in the event a provision is found unconstitutional—is also discussed; Mr. Nagle finds that such clauses do not necessarily cause a court to reach a particular result. Mr. Nagle then examines the question of legislative intent in the context of severability. He concludes that courts have departed from established methods of determining legislative intent, opting instead to attempt to answer the hypothetical question whether the legislature would have chosen to enact the remaining parts of the statute without the unconstitutional provision.

Because the current jurisprudence of severability is unsettled, Mr. Nagle asserts that courts should follow several general principles regarding severability. First, courts should apply a plain meaning rule to severability clauses, so that a statute containing

[1]By John Copeland Nagle, B.A. 1982, Indiana University; J.D. 1986, University of Michigan Law School. Copyright 1993 by the North Carolina Law Review Association. Reprinted with permission from 72 N.C.L. Rev. 203 (1993) Footnotes omitted.

such a clause will automatically be considered severable. Second, when a statute does not contain a severability clause, the courts should look to the history, purpose, and structure of the statute to ascertain legislative intent. Finally, to assist in this inquiry Mr. Nagle advocates the creation of a legislatively-enacted clear statement rule requiring that courts consider a statute severable when a statute is silent on the issue of severability.

I. INTRODUCTION

Severability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional. The question that severability poses is easily stated: If part of a statute is unconstitutional, does the rest of the statute remain in effect? The question is also ubiquitous. It can arise any time part of a statute or a particular application of a statute is held unconstitutional. Moreover, the answer can have profound consequences. Concluding that statutory provisions are severable presents the danger of leaving in effect statutory provisions that the legislature would have never enacted alone. Alternatively, a holding of nonseverability can mean, for example, that an entire appropriations statute or sweeping reform legislation falls because of a single unconstitutional provision.

Yet severability is often overlooked. The severability test currently used by the Supreme Court was first stated in 1932, and the seminal article on severability was written in 1937. Fifty-one years after the test was first enunciated, *Immigration and Naturalization Service v. Chadha* revived interest in severability when the Court held that an unconstitutional legislative veto over executive branch deportation decisions was severable from the deportation power delegated to the executive branch. That decision provoked a number of critical discussions of the test for determining severability and its application to the nearly two hundred other statutes that contained legislative vetoes. Four years later, the Court had an opportunity to answer its critics in *Alaska Airlines v. Brock*, in which the severability of the legislative veto in the Airline Deregulation Act of 1978 was the only issue before the Court. A unanimous Court responded by keeping the same basic test and holding another legislative veto severable.

Criticism of the Court's approach persists. The problem, as one court recently put it, is that "[t]he test for severability has been stated often but rarely explained." Thus, while severability is noncontroversial in many cases because almost any test—including the *Alaska Airlines* test—would produce the same result, hard cases illuminate the doctrinal inadequacy of *Alaska Airlines*. Would unconstitutional restrictions on public funding of art. be severable from the funding itself? Is the unconstitutional legislative veto sev-