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Supreme Court
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December 13, 2019

Governor Mike Dunleavy
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Dear Governor Dunleavy:

Upon review of the FY 2021 budget you recently released, I found that this proposal includes an amended version of the judicial branch's request to the legislature. Specifically your proposal removes our request to restore $334,700 to the appellate courts' budget. I am writing to request that the judiciary's FY 2021 budget submission be returned to the version that was approved by the Supreme Court and submitted through your office for the legislature's consideration.

The judicial branch, like the executive branch, submits and presents to the legislature a budget that reflects the policy decisions and budgetary priorities of an independent branch of government. Like the executive branch, the judiciary's budget request is a careful balancing of competing needs tailored to meet the constitutional and statutory responsibilities of our branch of government. It is a budgetary representation to the legislature of our vision of how best to administer the judicial branch of government.

As you know, Alaska's Constitution adopts a tripartite form of government. The constitution vests the state's judicial power in the Alaska Court System and grants the Supreme Court the authority to administer the judicial branch of Alaska's government. The constitutional directive to administer the judicial branch includes the authority to formulate the judiciary's budget, as the budget has a direct and immediate impact on the Alaska Court System's ability to perform its constitutionally mandated functions. This consideration is recognized by the legislature in its exemption of the judiciary from the requirements of the Executive Budget Act (AS 37.07).

The documents I have enclosed demonstrate that this application of the doctrine of separation of powers to the budgetary processes has been recognized since 1967. The process is outlined in paragraph I of the Memorandum of Agreement between the Commissioner of Administration and the Alaska Court System:

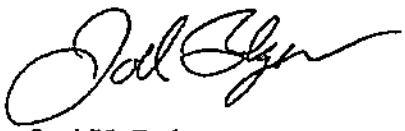
> The Alaska Court System shall continue to prepare its own annual budget request using the format prescribed by the Division of Budget and Management for the executive budget, which shall be transmitted to the Department of Administration's Budget Review Committee for inclusion in the total budget submitted to the legislature by the governor. It is agreed no diminution or alteration will be made by the executive branch recognizing, however, the governor's statutory right to strike or reduce an item or items in any appropriation made to the court system by the legislature.

In 1975, attorney Susan Burke revisited this issue, and prepared a detailed analysis of the Alaska Court System's budget authority. Her analysis supports the court's authority to have its budget submitted to the legislature without alteration. A copy of that analysis is attached.

This approach has been followed by every governor since the 1967 memorandum of agreement because every governor, upon legal review, has agreed that the judicial branch, like the executive branch, has the right to make its request to the legislature.

I'm hopeful that your office will reconsider its modification to the judiciary's budget after reviewing this material, and that you will restore our full request for inclusion in the operating budget bill. If that is not your intent, I would appreciate the opportunity to discuss this further. In the meantime, please contact me if you have any questions. I look forward to working with you to continue the spirit of cooperation which exists among the three branches of government in Alaska.

Sincerely,



Joel H. Bolger
Chief Justice

Attachment

Misc 12

Memoranaum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : October 13, 1975

FROM: Susan Burke
Staff Counsel

SUBJECT: Fiscal Control of Alaska Court System Budget

Recently the Department of Administration has suggested that it has the authority to review the Alaska Court System's budget request prior to submission to the legislature and present to the legislature a separate set of recommendations for funding levels of the judiciary budget. The purpose of this memorandum is to explore the constitutional and statutory scope of permissible action by the Executive Branch relating to our budget preparation and presentation. Three basic legal questions will be addressed:

1. The applicability, if any, of the Executive Budget Act (AS 37.07) to the judiciary;

2. The effect of the Governor's constitutional budgetary responsibilities (art. IX, sec. 12, Alaska const.) on fiscal independence of the judiciary;

3. The effect of the doctrine of separation of powers on participation by the Executive Branch in the judiciary's budget presentation.

Finally, this memorandum will outline briefly the 1967 controversy between the Judicial and Executive Branches involving among other things, the very issue that has once again been raised by the Department of Administration.

I. THE EXECUTIVE BUDGET ACT. The Executive Budget Act (AS 37.07) was enacted by the legislature in 1970, and replaced the Uniform Budgeting Act (AS 37.05.060-.120). Basically the Executive Budget Act is a comprehensive measure designed to establish "program budgeting" for the executive branch. Program budgeting is a relatively now concept whereby fiscal requirements are analyzed in terms of program policies and goals. Policies and goals are first formulated; plans are drawn to implement those goals and objectives; the resources necessary to carry out the plan are then estimated; and finally, a budget document is prepared that accurately reflects those estimated program needs. The Executive Budget Act provides a comprehensive procedure to enable the Executive Branch to develop its budget along these lines. After a statement of general responsibilities, the Act sets out these procedures in chronological order.

The Act first provides generally that the Governor shall

> evaluate the long-range program plans, requested budgets and alternatives to state agency policies and programs, and formulate, and recommend for consideration by the legislature, a proposed comprehensive program and financial plan which shall cover all estimated receipts and expenditures of the State government . . . .

In the next section, the legislature is charged with a budget review function, with analyzing the comprehensive program recommended by the Governor, and with providing a post-audit function. The Act then provides that the Division of Budget and Management shall assist the Governor in the preparation of the comprehensive program and assist "state agencies" in their statement of goals and objectives, their preparation of program plans and budget requests, and their reporting of program performance.

Under Section .050 of the Act, "each state agency" is required to prepare and present to the Legislative Finance Division a statement of goals and objectives, its plans for implementation, the budget requested to carry out the plans, an evaluation of the advantages and disadvantages of specific alternatives to existing programs, and a statement of the relationship of its program services to those of other agencies, of other governments, and of non-governmental bodies. The Governor's comprehensive program and financial plan to be recommended to the legislature is formulated "after considering the state agency proposed program and financial plans, and other programs and alternatives that he considers appropriate." (AS 37.07.060; emphasis added.) Section .080 provides for the administration of program execution by State agencies and by the Division of Budget and Management.

The Legislative and Judicial Branches of government are specifically excluded from the definition of "state agency" in the Act. AS 37.07.120(1) provides:

> In this chapter . . . 'agency' means a department, officer, institution, board, commission, bureau, division, or other administrative unit forming the state government and includes the Alaska Pioneers Home, but does not include the legislature or the judiciary. (Emphasis added.)

It has been suggested that while the judiciary is not a "state agency" under the Act, the general provisions of the Act that do not specifically mention "agencies" are applicable to the judiciary (and presumably to the legislature as well). The argument has been presented that the Act gives the Governor the responsibility of presenting to the legislature recommendations for a "comprehensive program and financial plan" covering "all estimated receipts and expenditures of the state government," and therefore must include in the plan his recommendations for funding levels of the various items in the judiciary's budget.

This argument must fail for several reasons. First, a reading of the Budget Act makes it clear that it is a comprehensive measure and that each section is inextricably tied to all other sections. The general sections have meaning only as they relate to the more specific procedures outlined in Sections .050-.090. For example, Section .060 provides that the comprehensive program and financial plan that the Governor presents is based on the programs and financial plans proposed by "State agencies". Further, the term "state government" as used in this Act is intended to carry a narrow meaning, limited to the Executive Branch. The definition of "agency" quoted above includes "departments . . . and other administrative units forming the state government". Since "agencies" form the

state government, then the term "the state government," as used in the Act, covers only "agencies" and does not cover the legislative and judicial branches.

The Executive Budget Act therefore cannot provide a basis on which the Department of Administration can validly argue that the Governor is obligated by statute to present recommendations to the legislature on the judiciary's budget request or that the judiciary must submit its budget request to the Governor for inclusion in his "comprehensive program and financial plan".

II. THE GOVERNOR'S CONSTITUTIONAL BUDGETARY OBLIGATIONS.

Article IX, section 12, of the Alaska Constitution provides:

> Budget. The Governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The Governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

It has been suggested that this provision requires the Governor to submit a comprehensive budget to the legislature including the judiciary's proposed expenditures and that to fulfill that obligation, the Governor necessarily has the authority to make his own recommendations on the judiciary's budget. This suggestion, however, is not supported by Article IX, section 12.

The budget that the Governor is to submit under this provision is to set forth the proposed expenditures and anticipated income of all "departments, offices, and agencies of the State". Individual constitutional provisions must, of course, be interpreted in light of the constitution as as whole. The phrase "departments, offices, and agencies of the State" is a reference to the Executive Branch, and does not include either the legislature or the judicial branches. The only other place in the constitution where this phrase is found is in Article III, which sets out the powers and organizational form of the Executive Branch. Article II of the constitution establishes the legislative branch, and all references to that branch in the constitution are to the "legislature". Article IV vests the judicial power of the State in the Supreme Court, the Superior Court, and courts established by the legislature, and further provides in section 1 that the "courts shall constitute a unified judicial system for operation and administration". Throughout Article IV the judiciary is referred to either in terms of individual levels of court or as "the judicial system". Nowhere in the Constitution is either the judiciary or the legislature characterized as a "department, office or agency" of State government.

Of further significance are the provisions of Article IV conferr ing on the judiciary the power of self-administration. The Governor's constitutional authroity with regard to the budget process is necessarily limited by the constitutional grant of self-administration to the judiciary. It takes no particular effort to conclude that "administration" in this constitutional context , includes fiscal management and that fiscal management

necessarily includes the formulation and preparation of proposed expenditures and their presentation to the legislature in the form of a budget document. If the Governor were to make his own recommendations to the legislature concerning the judiciary's budget, he would in effect be usurping the authority granted in the constitution to the Chief Justice and the Supreme Court to supervise, through the Administrative Director, the administrative operations of the judicial system.

In conclusion, the grant of self-administration to the judiciary necessarily limits the authority of the Executive Branch. Thus, the Governor must prepare the budget and appropriation bill under Article IX, section 12, within these limitations. To the extent that the Judiciary Article confers on the judiciary the power to formulate and present to the legislature its own policies and financial plans in pursuance of the administration of the judicial system, the Governor cannot do so.

III. SEPARATION OF POWERS. Although there is no explicit provision in the Alaska Constitution referring to a separation of governmental powers, the creation of three separate governmental branches operates as an apportionment of the different classes of power. Grants of legislative, executive and judicial power are by their very nature exclusive. The separation of powers under the Alaska Constitution is further butressed by the grant to the judiciary of powers of self-administration in Article IV, sections 15 and 16.

The doctrine of separation of powers essentially provides that each branch of government exercises such inherent power as will protect it in the performance of its major duty. The corollary of this theory is that one branch may not be controlled

or even embarrased by another branch, unless the constitution specifically provides. In setting the scope of the inherent power of the judiciary under the separation of powers doctrine, courts have generally been concerned with the power of the judiciary to direct executive agencies to disburse funds reasonably necessary for judicial operations. The cases, however, are illustrative insofar as they define inherent power rather broadly.

When funds are "reasonalby necessary" to fulfill judicial obligations, courts have held that the judiciary may compel their payment, even if no funds have been specifically appropriated for that purpose. In O'Coin', Inc. v. Treasurer of Country of Worcester, 287 N.E. 2d 608 (Mass. 1972), the Supreme Judicial Court of Massachusetts held that, apart from statutory authority, a judge may bind a county contractually for expenses reasonably necessary for the operation of his court. In Knox County Council v. State, 29 N.E. 2d 405 (IND. 1940), it was held that a statute denying the right of a court to order the payment of an allowance for court-appointed counsel was unconstitutional as an encroachment upon inherent court power. The inherent power of a court to provide for its functons also supported an order to compel the proper officer of the county to pay the bill of a handwriting expert. Edwards v. Prutzman, 165 A. 255 (Pa. 1933). In the leading case of Commonwealth ex rel. Carroll v. Tate, 274 A. 2d 193 (Pa. 1971), The Supreme Court of Pennsylvania stated the inherent powers doctrine first in the context of compelling payment for reasonably necessary expenditures, and then in more general terms. The Court stated first:

> Expressed in other words, the judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent branch of our government.

274 A. 2d, at 197. In adopting the more general theory of inherent powers, the court went on to quote with approval the following language:

> 'That courts have inherent power to do all things that are reasonably necessary for the proper administration of their office within the scope of their jurisdiction is a well-settled principle of law.'

274 A. 2d, at 198 n. 9.

In the instant controversy, the Department of Administration seeks to exercise a significant measure of control over the judiciary budget by scrutinizing that budget and making its own recommendations to the legislature as to what extent the requested budget should be funded. In so doing, the Executive Branch is attempting to superimpose its own policies and goals upon the administration of the judicial system. State v. Bonner, 214 P. 2d 747 (Mont. 1940), affirms that judicial power cannot be encroached nor taken away by executive action, stating:

> Neither the people nor the judiciary should permit the courts to be pursued by 'blocks,' by lobbies, by 'pressure groups,' or by an executive department with what Madison termed an 'enterprising ambition' to extend its power.

An attempt by the Department of Administration to influence the legislature's consideration of the judiciary's budget would be wholly incompatible with the constitutional principle of separation of powers and with judicial self-administration under Article IV, section 16 of the Constitution.

The Governor does have explicit authority to veto all or portions of the general appropriation bill enacted by the legislature. This is the one area in which the constitution by explicit language permits the executive branch to exercise fiscal control over the other two branches of government. Though an expressed exception to pure separation of powers, even this authority must be exercised within the limitations of that doctrine and cannot be exercised in a way that will impair the constitutional functioning of the legislature or the judiciary. Furthermore, it cannot be construed as confering upon the executive the power to take "two bites" of the judiciary's budgetary apple, one bite before the legislature acts on the budget, and another bite after legislative action.

IV. THE 1967 CONTROVERSY -- McMILLAN v. WARD. In 1967, a lawsuit was filed in the Superior Court of the Third Judicial District, seeking declaratory relief. McMillan v. Ward, No. 67-1179. The complaint sought a determination that the internal administration of the Court System, with regard to preparation of budget, to fiscal affairs, to personnel affairs, and to procurement of physical equipment, must be regulated by the Alaska Court System as an independent branch of government, and is not constitutionally subject to control and regulation by the Department of Administration. (Note: McMillan was then Administrative Directory of the Alaska Court System and Ward was Commissioner of Administration.)

No answer was filed to the complaint, and on August 7, 1967, the complaint was dismissed apparently at McMillan's request. On July 7, 1967, a Memorandum of Agreement was entered into,

dealing with each of the areas that were the subject matter of the declaratory judgment. Although the records do not memorialize any negotiations leading up to the dismissal of the action, it seems apparent from the dates on the dismissal and on the Agreement, and from the subject matter of the Agreement, that the Agreement was in effect a compromise and settlement of the lawsuit.

I have attached a copy of the "Ward-McMillan Agreement," and draw your attention to paragraph I:

> The Alaska Court System shall continue to prepare its own annual budget request using the formal prescribed by the Division of Budget and Management for the executive budget, which shall be transmitted to the Department of Administration's Budget Review Committee for inclusion in the total budget submitted to the legislature by the Governor. It is agreed no diminution or alteration will be made by the Executive Branch recognizing, however, the Governor's statutory right to strike or reduce an item or items in any appropriation made to the Court System by the legislature. (Emphasis added.)

Although strictly speaking, a separate set of recommendations submitted by the Department of Administration on the judiciary's budget is not a "diminution or alteration," such action would be in clear violation of the spirit of paragraph I of the Agreement. A recommendation by the Department that the legislature appropriate less to the judiciary in any category than that requested is an improper exercise of fiscal control whether it be submitted on in a separate document or in the form of a diminution in the budget document itself.

SB

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MEMORANDUM OF AGREEMENT

Cognizant of the basic principles of the separation of powers between the three branches of government and desiring to facilitate the administration of justice in the tradition of this concept, the Alaska Court System and the Department of Administration, State of Alaska, agree that:

I. The Alaska Court System shall continue to prepare its own annual budget request using the format prescribed by the Division of Budget and Management for the executive budget, which shall be transmitted to the Department of Administration's Budget Review Committee for inclusion in the total budget submitted to the legislature by the governor. It is agreed no diminution or alteration will be made by the executive branch recognizing, however, the governor's statutory right to strike or reduce an item or items in any appropriation made to the court system by the legislature.

II. The Alaska Court System has benefitted from the services provided by the Division of Personnel and agrees it would be advantageous to continue, so far as practicable, to be guided by the rules and regulations promulgated pursuant to the Personnel Act. Because, however, it is unrealistic to routinely equate court personnel with employees in typical

government agencies, it is agreed that requests for reclassification of court personnel will be given a presumption of need and reliability. It is agreed that when differences of opinion develop with respect to personnel requests made by the court system they be resolved through conferences between the judicial and executive branches.

III. The effective liaison between the court system and the Division of Finance has been a significant factor in the sound administration of the judiciary since statehood.

In order to facilitate internal administration, the court system has deemed it necessary to establish its own accounting system with emphasis on location rather than object control. The parties ratify this procedure and agree to explore and implement methods of integrating their respective systems in an effort to improve efficiency.

IV. Recognizing that certain items of equipment such as electronic recording equipment, judicial robes, books for law libraries and binders for court records are unique and essential to the operation of the court system, it is agreed that the Department of Administration, through its Division of Supply, will give special attention to the purchase

of these items to insure that the equipment is acceptable to the court system while at the same time preserving the economies available through uniform purchasing.

Robert W. Ward
Commissioner of Administration

John W. McMillan
Administrative Director
Alaska Court System

7-1-63