(9)

COMMITTEE REPORT

HOUSE

3/10/80

FURTHER:

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had HB 941

"An Act annulling 15 AAC 05.410(4); and providing for an effective date."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

CHAIRMAN

H 60 (Rev. 12/78)

HB 949

Call —
Gary Jenkins
2320
check
with Nels
ref. Billy Barnes
write up

Vi — I notified all parties on all the bills up next week except

HB 949 (2320 Gary Jenkins)
(annulling 15 AA C
05.410(4))

P/S check with Charlie & see who should be notified on This

Hold for #VR 8[illegible]
(by me) HB 949

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 25, 1980

SUBJECT: Constitutionality of bills prepared under Work Orders No. 8102 and 8105

TO: Senator Don Bennett, Chairman
Administrative Regulation Review

FROM: Joseph A. Guthrie
Legislative Counsel

As you may know, on February 19, 1980 the Alaska Supreme Court held in State v. A.L.I.V.E. Voluntary, No. 2022, that the use of a concurrent resolution to annul regulations, as authorized by AS 44.62.320, is unconstitutional. The court equated annulment of regulations with repeal of statutes in finding that the use of a concurrent resolution to annul regulations violates the procedures specified for lawmaking in Article II of the Alaska Constitution. These procedures, which the court described as safeguards against ill considered action, include the requirement that each bill be confined to one subject, have a descriptive title, contain an enactment clause of prescribed wording, be read three times on three separate days, and be passed by the recorded votes of a majority of each house.

None of these safeguards, of course, apply to concurrent resolutions.

In Work Order No. 8105, you would restrict committee referral of resolutions of annulment to the Administrative Regulation Review Committee. As the Supreme Court specifically disapproved the use of the concurrent resolution to annul regulations, completion of this request would, at best, be irrelevant.

In Work Order No. 8102, you would expand the Administrative Regulation Review Committee's power to suspend regulations to include regulations adopted prior to the adjournment of

the last session of the legislature, not just those adopted since adjournment as provided by current law. Although, in State v. A.L.I.V.E. Voluntary, No. 2022, the court was concerned with the annulment, and not suspension, of regulations, the Court cited with approval several cases rejecting the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees (see pages 24 - 26 of the slip opinion).

Therefore, it seems clear that the legislation you requested is now unconstitutional. Of course, it lies within the discretion of a legislator whether to pursue a measure the constitutionality of which has been cast into question by a court decision; however, we thought it incumbent upon us to advise you of the possibility of such a court ruling, should the measure be enacted.

JAG:ljb

Enclosure

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, AND DEPARTMENT OF REVENUE, Appellants,	)	File No. 3670
v.	)	O P I N I O N
A.L.I.V.E. VOLUNTARY, Appellee.	)	[No. 2022 -- February 19, 1980]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter J. Kalamarides, Judge.

Appearances: Joseph K. Donohue, Assistant Attorney General, Avrum M. Gross, Attorney General, Juneau, for Appellants. Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for Appellee. Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for Amici Curiae Alaska Legislative Council and Administrative Regulation Review Committee.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Burke and Matthews, Justices.

MATTHEWS, Justice.
BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

AS 44.62.320(a) provides:

The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

This statute encompasses a variant of what has come to be called the legislative veto.[1] The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

I

Chapter 15 of Title 5 of the Alaska Statutes authorizes games of chance and skill to be operated by permit holders. Only certain kinds of games, ("bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill")[2] are allowed, only nonprofit organizations may be issued a permit,[3] and all revenues must be devoted to "the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses."[4] The Commissioner of Revenue has been delegated the authority to adopt rules and regulations "necessary to carry out this chapter or protect the best interest of the public."[5]

---

1. For excellent histories of the legislative veto, see Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953); Newman & Keaton, Congress and the Faithful Execution of Laws - Should Legislators Supervise Administrators? 41 Cal. L. Rev. 565 (1953); and Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983 (1975).

2. AS 05.15.100.

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

5. AS 05.15.060(11).

From 1960 until 1976 one of the Commissioner's regulations prohibited lottery operators from giving prizes exceeding $15,000 in personal property or $30,000 in real property annually.[6] In November of 1976 the regulation was amended by increasing the annual personal property limit to $30,000 and the annual real property limit to $50,000 and by stating that personal property included cash and negotiable instruments.[7]

---

6. The regulation was designated 15 AAC 05.410(4). It provided:

> In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $30,000.00 in any one calendar year.

7. As amended the regulation reads:

> (4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of $30,000 in any one calendar year and real property in excess of the sum or value of $50,000 in any one calendar year.

A.L.I.V.E. Voluntary is an unincorporated association which acts as the political action committee for the Teamster's Union Local No. 959, and affiliated unions. For three years it has operated fund raising lotteries under a permit issued by the Department of Revenue. It applied for a permit for 1977 and reported that during 1976 it had distributed $80,000 in cash prizes. The Department denied A.L.I.V.E. a permit for 1977 on the ground that its prize distribution in 1976 had exceeded the allowable limit.

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation which was in effect for most of 1976 cash prizes were not included within the personal property limitation of $15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by

concurrent resolution, 15 AAC 05.410(4).

---

8. Legislative Resolve No. 79, in full, states:

Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and

WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to $30,000 in personal property and $50,000 in real property; and

WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and

WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS 05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;

BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

As a result of the legislative annulment A.L.I.V.E. added another count to its complaint under which it claimed that the denial of its permit was wrongful because it was based on continuing enforcement of the regulation despite its nullification by the legislature. In response, the state claimed that the legislature could not constitutionally annul an administrative regulation by concurrent resolution and therefore the regulation had not been annulled. Both parties moved for summary judgment on this issue. The court granted partial summary judgment in favor of A.L.I.V.E., holding that the legislative annulment power was constitutional and that the regulation in question was void ab initio.[9]

---

9. That is, since 1960. Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. See note 8, supra.

II

The Alaska Constitution defines with specificity the mechanics of legislation.[10] Each provision has a purpose "designed to engender a responsible legislative process worthy of the public trust." Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979).

Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive

---

10. Art. II, § 13 provides:

> Form of Bills. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

Art. II, § 14 provides:

> Passage of Bills. The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." Suber v. Alaska State Bond Committee, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.[11]

Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 543 n.11 (Alaska 1978), and to ensure an opportunity for the expression of public opinion and due deliberation.[12] Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and

---

11. See 3 Proceedings of the Alaska Constitutional Convention 1746-48 (January 11, 1956).

12. See 3 Proceedings of the Alaska Constitutional Convention 1751-54 (January 11, 1956).

to provide a public record of the vote cast by each legislator." Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979).

In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it.[13] This power is granted "'to preserve the integrity of . . . [the executive] branch of government . . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon hasty and ill-considered legislation.'" Thomas v. Rosen, 569 P.2d 793, 795 n.5 (Alaska 1977)(citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.[14]

The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In Plumley v. Hale, 594 P.2d 497, 502 (Alaska

---

13. Art. II, §§ 15, 16 and 17.

14. See 4 Proceedings of the Alaska Constitutional Convention 3110 (January 25, 1956).

1979) we held that the requirements of Art. II § 14 are mandatory, not permissive.[15] The minutes of the proceedings of our constitutional convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

> Now, a majority vote in each house of the legislature is not equivalent to passing a law, because it does not require the signature of the governor, and it does not require conformance with the provisions of this constitution and the provisions of such laws as will be passed under it with respect to the procedure in enacting a law. So, when we say in the second sentence, "The state may by law," we are saying that that law must be passed by the legislature in the manner that is required by the constitution and the statutes, and either signed by the governor or passed over his veto or become law without his signature in the manner provided in the constitution, which we felt was the real intention of the body rather than merely requiring that the legislature by a majority in each house and without adhering to any of those other restrictions and without any reference to the governor could contract debt on behalf of the state.

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). Of course, when the legislature

---

15. We also referred to the Art. II §§ 14 and 15 safeguards in North Slope Borough v. Sohio Pet. Corp., 585 P.2d 534, 543 n. 11 (Alaska 1978), stating: "Our constitution imposes certain requirements of formality on legislative action . . . . The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report."

wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity.[16]

Thus in People ex rel. Burritt v. Commissioners of State Contracts, 11 N.E. 180 (Ill. 1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed by the Illinois Constitution had not been followed. Speaking of them, the court stated:

---

16. Watrous v. Golden Chamber of Commerce, 218 P.2d 498 (Colo. 1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition "that any such pledge shall first be approved by joint resolution of the Senate and House of Representatives." Id. at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." Id. at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, Legislative Control of Administrative Rules & Regulations, 30 N.Y.U. L. Rev. 1031, 1043 n.56 (1955).

> That these various provisions, giving the form and mode by which, through the concurrent action of the legislative and executive departments, valid and binding laws are enacted, are, in the highest sense, mandatory, cannot be doubted.

11 N.E. at 185. The court went on to note that

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential. [Citation omitted].

Id.

In Mullan v. State, 46 P. 670 (Cal. 1896) the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

> A mere resolution . . . is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

Moran v. La Guardia, 1 N.E.2d 961 (N.Y. 1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result

was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution:[17]

> A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment. . . To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute. . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days. . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by

---

17. The other alternative holding was that the statute had not authorized termination by resolution.

itself and independent of the others, is necessary. No two of them acting together, much less alone, can make a law."[Citations omitted].[18]

1 N.E.2d at 962.

The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor

---

18. To the same effect are: Becker v. Detroit Sav. Bank, 257 N.W. 353 (Mich. 1934); Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General, 97 N.E. 967, 973 (Ohio 1912)("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . .); Scudder v. Smith, 200 A. 601, 604 (Pa. 1938)("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]); State ex rel. Todd v. Yelle, 110 P.2d 162, 165 (Wash. 1941)("It is . . . clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill. . ."); Rowley v. City of Medford, 285 P. 1111, 1114 (Or. 1930)("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."); Hawks v. Bland, 9 P.2d 720, 721 (Okla. 1932)("[a] resolution is the mere expression of an opinion and not an enactment of law."); Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News, 307 F.Supp. 1113, 1115 (E.D.Va. 1969) ("[T]he resolution expresses only the opinion of that legislative body.").

may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session. . . .", such changes shall "become effective at a date thereafter to be designated by the governor."[19] On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house."[20]

There are several noteworthy aspects of these expressed powers. First, they are accompanied by specific time deadlines. Second, the deadlines are different, sixty days in one case and forty-five days in the other. One may question, if there is an implied legislative veto power in the constitution, whether it is accompanied by a time limit, and if so, what the limit is. Third, the expressed legislative vetoes annul proposed executive action, they do not

---

19. Art. III § 23.

20. Art. X § 12. We do not agree with the dissent's characterization of the power granted in these two provisions as rule-making power, which we see as the power to interpret and implement statutes. Rather, the power contained in these provisions is the power to change statutes; therefore, the expression of these extraordinary powers in the constitution cannot be regarded as carrying an implication that general administrative rule making was meant to be forbidden.

change existing law. They therefore do not have the same potential for the disruption of public expectations and on-going executive programs that the blanket veto in question has. Fourth, the legislative vote required for the exercise of each of the expressed vetoes is different. Re-organization orders may be blocked by a resolution of disapproval concurred in by a majority of the members of the legislature in joint session,[21] while boundary change vetoes require disapproval by a resolution concurred in by a majority of the members of each house.[22] Since the Senate has twenty members and the House has forty,[23] these differences can be quite important. The votes of thirty legislators are required to forestall a veto taken in joint session, while ten senators can prevent a veto if the vote is to be by a majority of the members of each house. Here, as with the differing time deadlines mentioned above, one may inquire as to which voting method the constitution would impose as part of an implied general legislative veto power. The answer, of course, is that the constitution contains no clue. In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

---

21. Art. III § 23.

22. Art. X § 12.

23. Art. II, § 1.

III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional.[24] They are Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009, 54 L.Ed.2d 751 (1978); Opinion of the Justices, 83 A.2d 738 (N.H. 1950); and Reith v. South Carolina State Housing Authority, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), rev'd on other grounds,[25] 225 S.E.2d 847, 848 (S.C. 1976).

---

24. The dissent suggests that our comment in Boehl v. Sabre Jet Room, Inc., 345 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the constitutionality of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

25. The Amici would add Sibbach v. Wilson, 312 U.S. 1, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. See Atkins v. United States, 556 F.2d at 1060 and n. 21. In Buckley v. Valeo, 424 U.S. 1, 140 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284-85, 46 L.Ed.2d at 838-39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, Clark v. Valeo, 559 F.2d 642 (D.C. Cir.)(en banc) aff'd mem. sub. nom. Clark v. Kimmitt, 431 U.S. 950, 53 L.Ed.2d 267 (1977), but Circuit Judge MacKinnon reached the merits in a vigorous dissent criticizing Justice White's conclusion in Buckley. 559 F.2d at 685.

The New Hampshire case, Opinion of the Justices, 83 A.2d 738 (N.H. 1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

> The procedure which [the reorganizaton statute] provides is in distinct contrast to that contemplated by the Constitution. Consent is to be manifested by silence or adjournment, and disapproval by "concurrent resolution" . . . [T]he contemplated procedure violates the constitutional provisions requiring separate action by each house of the Legislature . . . [T]he act would dispense with the "passage" of any measure, as that word is commonly used, and with the requirement of presentation to the Governor. In a sense the act provides for a reversal of the democratic processes required by the Constitution, for under it the Governor would propose the legislative action, rather than approve or disapprove of action taken. 83 A.2d at 741.

In Reith v. South Carolina State Housing Authority, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), rev'd on other grounds, 225 S.E.2d 847, 848 (S.C. 1976), the South Carolina Court of Common Pleas considered, inter alia, the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General

Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution."[26] The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws.[27] On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional.[28] The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue.[29]

Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009, 54 L.Ed.2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because

---

26. Reith v. South Carolina State Housing Authority, Op. at 9.

27. Id. at 10.

28. 225 S.E.2d at 848-49.

29. 225 S.E.2d at 848.

it contravened article I, section 1 of the United States Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, en banc, in a four-to-three decision, upheld the statute.

Atkins is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped its reasoning and conclusion. Id. at 1058-60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed supra, pp. 7-10. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution:[30] "[T]he clause does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power." Id. at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed

---

30. U.S. Const. art. I, § 1 provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. Id. at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law. . ." Id. at 1064. In contrast, the annullment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense,[31] and annulling any one of them effects a change in the law.

IV

We turn now to a discussion of the major arguments of Appellee and the Amici.

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was

---

31. 1 Mezines, Stein & Gruff, Administrative Law § 1.02[2] at 1-45 (1977); 2A Sutherland, Statutes and Statutory Construction § 49.05 at 240 (4th ed. Sands 1973), which states:

> An administrative agency may be vested with the power to promulgate legislative interpretive rules which have the force and effect of law. Such powers must be limited by a standard, and, when exercised, the ensuing regulations, if within the standards, have the same efficacy as an original statute enacted by the legislature. [Footnote omitted].

approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied.[32] We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a delegation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not

---

32. The same argument was unsuccessfully made in Bradner v. Hammond, 553 P.2d 1, 4 nn. 4 & 5 (Alaska 1976).

mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.[33]

To illustrate this point we may assume that the legislature has the power to establish an independent agency which would have the power to disapprove of agency regulations. Since the agency would be a part of the executive department the article II constraints on legislative action would not govern its functions. Could the legislature instead convey to its own members the power to act as such an agency free from these constraints? The answer, we think, is clearly no for that would amount to dual office-holding, prohibited by article II, section 5,[34] and would infringe on the executive appointment power set out in

---

33. "A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983, 1067 n.430 (1975).

34. Art. II, § 5 provides in relevant part:

> Disqualifications. No legislator may hold any other office or position of profit under the United States or the State.

article III, section 26.[35] While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.

It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a com-

---

35. Art. III, § 26 provides:

> Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

See, e.g., Buckley v. Valeo, 424 U.S. 1, 118-43, 46 L.Ed.2d 659, 744-58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress; People v. Tremaine, 168 N.E. 817 (N.Y. 1929) discussed infra, pp. 25-26.

mittee,[36] or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

In State ex rel. Judge v. Legislative Finance Committee, 543 P.2d 1317 (Mont. 1975), at issue was a statute empowering an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. Id. at 1321.[37] The same reasoning was employed in People v. Tremaine, 168 N.E. 817 (N.Y. 1929), where the Court of

---

36. In fact, under AS 24.20.445(a), the Administrative Regulation Review Committee, a permanent joint committee of the legislature, is granted the power to suspend the operation of any regulation adopted after adjournment of the legislature until thirty days after the legislature reconvenes.

37. The people of Alaska recently rejected a constitutional amendment which, like the law struck down in Montana, was designed to vest the power to approve budget revisions in an interim legislative committee. See Alaska Const. art. II, § 11 (proposed amend. 1978 Supp.).

Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an appointment." Id. at 822. See also, Stockman v. Leddy, 129 P. 220, 223 (Colo. 1912); Bramlette v. Stringer, 195 S.E. 257, 264 (S.C. 1938). Contra, Opinion of the Justices, 266 A.2d 823 (N.H. 1970).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight can not take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important the question of whether the legislature might

perform a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev., 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. Id. at 1409-20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, supra, pp. 7-10.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion supra, pp. 7-10.

Appellee finds it significant that the Alaska Constitution contains no provision like that in section 7, clause 3 of article I of the United States Constitution[38] which authorizes the executive to veto legislative resolutions, and that executive involvement in the enactment of resolutions was not deemed necessary by the framers of the state constitution. This point, however, does not advance Appellee's case. Under the United States Constitution joint resolutions are one means by which laws are enacted;[39] they are therefore naturally included among those legislative acts subject to Presidential veto. However, under the state constitution resolutions are not an alternative law enactment process, and therefore there is no need to make them subject to an executive veto.

---

38. This clause provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. [Emphasis added].

39. United States ex rel. Levey v. Stockslager, 129 U.S. 470, 32 L.Ed. 785 (1889).

The Amici contend that since AS 44.62.320(a) was itself passed in accordance with all constitutional mandates and since the governor had the opportunity to veto the statute, constitutional requirements have been satisfied with respect to subsequent acts of the legislature taken pursuant to the statute. In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto.[40] It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.

REVERSED AND REMANDED with directions to enter partial summary judgment in favor of the state as to the effect of the concurrent resolution and for further proceedings.

---

40. See Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983 at 1067 (1975).

BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

I

I believe that the legislative power to annul administrative regulations by concurrent resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations.[1] Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readirgs on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature, a public record of the vote cast, being subject to veto by the governor,

---

1. The constitution does authorize "[r]egulatory, quasi-judicial and temporary agencies" to be established by law. Art. III, § 22. There are no constitutional requirements for promulgation of regulations.

a 90-day waiting period before becoming effective.[2] Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary for enacting a bill into law.

This issue was considered by this court shortly after statehood in Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 588 (Alaska 1960), where we stated:

> The legislative power of the state "is vested in a legislature." It is argued that because of this constitutional provision the power may not be delegated.
>
> But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

---

2. AS 44.62.180 does specify that, with certain exceptions, regulations become effective on the 30th day after filing by the lieutenant governor.

One of the bases specified in Boehl for upholding this power of the legislature to delegate regulatory authority was the identical right to annul regulations which the majority now finds to be unconstitutional. In Boehl we stated:

> It also is not essential, in order to sustain the grant of authority, that the legislature circumscribe administrative discretion by express standards of action in order that the opportunity for capricious exercise of power will not exist. There is slight danger of that. The exercise of the board's powers is hedged about by substantial safeguards. Before the board may act it must conduct a public hearing and afford any interested person the opportunity to be heard, and it must then "consider all relevant matter presented to it." There is ample opportunity for judicial review; for "any interested person may obtain a judicial declaration as to the validity of any regulation * * ". Finally, there is legislative supervision. The legislature, which meets annually, may revise the statute and thus restrict the bounds of administrative action; it has the power by resolution to annul any agency or department rule or regulation; and the Legislative Council, an interim legislative committee charged with the duty of making recommendations to the legislature, must annually review all agency regulations to determine if the legislative intent is being correctly followed.

349 P.2d at 590 (emphasis added)(footnotes omitted).

In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the

delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in Boehl that the legislature has that power.

II

The advent of the industrial revolution vastly increased and complicated the tasks of legislatures. Due to limits of time and specialized expertise, legislatures have found it impossible to prescribe laws adequately covering the tremendously varied and intricate forms of social relationships arising out of the proliferation of business, manufacturing, trade, transportation, communication and commercial enterprises.[3] Of necessity, legislative authority had to be delegated to administrative agencies. Nevertheless, both in England and in the United States, efforts were initiated to maintain some controls over broad delegations of authority.[4]

---

3. See generally Stone, The Twentieth Century Administrative Explosion and After, 52 Calif. L. Rev. 513 (1964).

4. See Boisvert, A Legislative Tool for Supervision of Administrative Agencies: The Laying System, 25 Fordham L. Rev. 638 (1957); Schwartz, Legislative Control of Administrative Rules and Regulations: The American Experience, 30 N.Y.U. L. Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain, 30 N.Y.U. L. Rev. 1045 (1955).

England has long utilized the laying system, whereby an administrative order or regulation must be laid before Parliament for a specified period of time before becoming effective.

> Parliamentary control over administrative rules and regulations . . . is asserted principally through provisions in enabling statutes that rules made under them shall be laid before Parliament. This is customarily combined with a provision in the statute, either that the rule shall not be operative until it is approved by resolution, either of both Houses or of the House of Commons alone . . . , or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void . . . .[5]

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years.[6] The early stages of the dispute involved the Reorganization Acts of the 1930's and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that

---

5. Schwartz, supra note 4, at 1032-33.

6. Clark v. Valeo, 559 F.2d 642, 649-50 (D.C. Cir.) (en banc) (per curiam), aff'd mem. sub nom., Clark v. Kimmit, 431 U.S. 950, 53 L. Ed. 2d 267 (1977).

period Congress disapproved by resolution.[7] Federal acts incorporating similar provisions have proliferated in recent years.[8] Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations.[9]

III

I agree with the majority that there is scant case authority on the specific issue in the United States. Our court, however, has favorably discussed the legislative veto in Boehl.

The holding in Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977)(en banc)(per curiam), cert. denied, 434 U.S. 1009, 54 L. Ed. 2d 751 (1978), supports the position

---

7. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 576-82 (1953). The 1939 and 1945 Reorganization Acts provided for disapproval by a concurrent resolution; the 1949 Act allowed disapproval by either House. Id. at 579, 581.

8. Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 989 (1975). An appendix to this article lists many statutes giving special effect to congressional resolutions. Many have been passed in the 1970's and involve veto power over actions of executive agencies or the President. See id. at 1089-92 app. A.

9. Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. Legis. 593, 595 (1976).

taken in this dissent. Atkins upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.

424 U.S. at 284-85, 46 L. Ed. 2d at 838-39 (emphasis added) (footnotes omitted).

The majority cites Reith v. South Carolina State Housing Authority, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), rev'd on other grounds, 225 S.E.2d 847, 848 (S.C. 1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, Opinion of the Justices, 83 A.2d 738 (N.H. 1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. Id. at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." Id. at 741-42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary increases to be approved by a legislative committee prior to submission to the governor for final approval. Opinion of the Justices, 266 A.2d 823 (N.H. 1970). The court, without analysis of its earlier

opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. Id. at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of policy. Accordingly, the legislature's power to select the means of participation should be generously construed.[10]

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the

---

10. We have held that when the legislature exercises power with reference to an essentially executive function those powers should be construed narrowly. Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976). Conversely, when, as here, a basically legislative function is involved, the powers of the legislature should be construed broadly.

annulling action is taken at the first session of the legislature following promulgation of the regulation.[11]

I believe that a statute can validly condition the delegated power to enact regulations by requiring that the regulations be subject to annulment by resolution, just as it could limit the effective date of the new regulations or the length of time during which they would be in force. I find no material difference between AS 44.62.320 and other statutes, upheld by the United States Supreme Court, that condition the exercise of rule-making authority by approval of private citizens.[12] If private citizens can exercise such power, then certainly the legislature should be able to exercise the same power.

---

11. A long-term scrutiny of executive action taken pursuant to regulations leading to delayed annulment might involve legislative infringement on the executive power to enforce laws. We are not confronted with such a question and need not pass on it because the regulation here in question was annulled at the first legislative session following its promulgation. We are similarly not confronted with an annulment by a single legislator, a committee of the legislature, or by one house.

12. United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 574-78, 83 L. Ed. 1446, 1470-72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured); Currin v. Wallace, 306 U.S. 1, 15-18, 83 L. Ed. 441, 451-52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

V

As the majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, section 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session,"[13] and article X, section 12, concerning local boundaries, which provides that the legis-

---

13. The full text of article III, section 23, provides:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

lature may veto by resolution local boundary changes proposed by an executive branch commission.[14]

The majority concludes that these two express provisions creating a legislative veto by resolution exclude the possibility of an implied legislative veto. They state:

> In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with

---

14. Article X, section 12, provides:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

In my view, the expression of some powers in these provisions does not lead to the conclusion that the constitution forbids either an expansion of rule-making powers in the executive or a denial of the legislative veto. The Alaska Constitution is silent on the question of administrative regulations. It does not say what powers may be delegated, how rules may be promulgated, or whether the legislature may retain a veto power by resolution. Presumably, these were questions that the constitutional drafters thought could best be resolved by the legislature.

There is an aspect of these two provisions, however, that is worthy of some notice. It seems significant that in the only two instances where the constitution does make a specific grant of rule-making power directly to the executive, it does so with a power reserved in the legislature to veto the rule by resolution. There seems to be little logic to a position that maintains that the constitutional drafters would have sanctioned the use of the resolution here, yet demanded the higher enactment standard when the legislature delegated power on its own.

Finally, the majority argues that where a veto power by resolution exists, it must also specify time limits, the method of voting and so forth. This argument is

unconvincing. Having allocated a specific rule-making power to the executive branch, it was appropriate for the constitutional drafters to define in the constitution a specific legislative check to that power. This would seem to be a virtual necessity, because any statute that the legislature might pass to circumscribe these executive powers otherwise would in all likelihood be unconstitutional. But where the legislature delegates rule-making power by statute, the constitutional drafters might well presume that the legislature could also design an appropriate system of checks and balances by statute law, as they have done here in AS 44.62.320(a).

VI

It is also of significance that the Administrative Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature.[15] In fact, two of the more active delegates, Hellenthal and Taylor, introduced House Bill 13 which was enacted as

---

15. Thirteen delegates and Convention Secretary (now Judge) Thomas B. Stewart were legislators in the first session of the Alaska State Legislature.

chapter 143, SLA 1959.[16] The bill was passed by a House vote of 37 to 1,[17] and by a unanimous Senate vote.[18]

At that time, the governor of Alaska was William A. Egan, who had presided as President over the Constitutional Convention. In signing House Bill 13 into law, Governor Egan delivered the following message to the legislature:

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.
>
> Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized.[19]

Although the governor saw fit to point out a possible constitutional problem with article VI because it required local governing bodies to hold public hearings, no question was raised about the legislature's power to annul regulations by joint resolution.[20]

What was said by the United States Supreme Court about legislation passed by Congress shortly after the

---

16. 1959 House Journal 52.

17. 1959 House Journal 427.

18. 1959 Senate Journal 708.

19. 1959 Senate Journal 1092.

20. See ch. 143 (ch. I, art. VII, § 1), SLA 1959.

enactment of the United States Constitution is apropos here:

> What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. . . . This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provisions.

Myers v. United States, 272 U.S. 52, 174-75, 71 L. Ed. 160, 189-90 (1926)(citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal

21
government. Such a practice, affording a practical means

---

21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. See AS 46.03.758(c)(regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.06.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 94 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 60) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs, annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

For a review of laws from other states relating to annulment of regulations, see Jackson, Legislative Review of Administrative Rules and Regulations 1 (July 1977)(papers prepared for Southern Legislative Conference). A chart at the end of Professor Jackson's paper indicates that the following states allow regulations to be annulled by means of resolution: Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, Tennessee, and Vermont. A New York report gives slightly different figures, stating that fourteen of the twenty-two states with legislative review mechanisms have procedures which can "cause an agency rule to be promulgated, approved, amended, modified, or annulled." Task Force on Critical Problems, Senate Research Service, New York State Legislature, Administrative Rules . . . What is the Legislature's Role?, 7 (June 1976). Appellant states that eight states allow nonstatutory legislative annulment -- six by concurrent resolution, two by one-House vetoes.

The states which do not allow annulment of the regulation generally provide that a legislative committee may review regulations to determine if they are consistent with legislative intent, hold hearings on questionable regulations, notify the agencies of its doubts, and sometimes, recommend statutory action by the legislature.

For a discussion of federal laws on the subject, see note 8 supra.

of supervision of the broad delegation of legislative powers required by the complexities of modern society, should not be hastily voided.

I conclude that the legislature's annulment of the cash prize regulation, pursuant to AS 44.62.320(a), does not violate the principle of separation of powers, does not provide a means by which the legislature can enact laws without passage of a bill, and does not unconstitutionally encroach on the power of the executive.

15 AAC 05.400. BINGO. "Bingo" is defined as a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers when objects similarly numbered are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers on such a card.

(1) No single sessions or series of bingo games, both regular and special, shall exceed 35 games in number.

(2) Not more than $1.00 shall be charged by any permittee for admission to any place where bingo games are being held. This fee shall entitle a person to one card, allowing him to participate without additional charge in at least five regular games to be played on that occasion. No charge in excess of 50 cents may be made for a single opportunity to participate in any game other than the five games covered by the admission fee.

(3) No bingo cards for regular games shall be selected by other than the player who is to use the cards. Each player must select his own card or cards for regular games from the deck, group or series of cards and shall be entitled to select any card in the deck, group or series of cards that has not already been selected by a player. Cards may not be reserved for players.

(4) When a caller has started vocally to announce a call, he shall complete the call of that number. After the caller has started vocally to announce a call, if any person shall have gone bingo based upon the previous number called, such person shall share the designated prize with any other person or persons who may have gone bingo on the completed call.

(5) No organization may hold, operate or conduct bingo sessions more often than nine occasions in any calendar month.

(6) A single prize awarded in bingo may not exceed $1,000 and the total prizes awarded during any one bingo session may not exceed $5,000. Prize amounts shall be stated before the beginning of each game and prizes shall be awarded as stated. Game tickets may not be considered as, nor included in, a cash prize. For example, if a person wins a $45 jackpot, that person must receive and sign for $45 in cash. The prize may not be divided into $30 cash and $15 in game tickets.

(7) No merchandise prize awarded in any bingo game may be converted into cash by the permittee organization.

(8) No person under the age of 19 years shall be permitted to participate as a player in any game of bingo.

(9) When any merchandise is awarded in a bingo game, its value, for the purpose of the law governing bingo, shall be its current value or retail price.

(10) Equipment, prizes and supplies for bingo shall not be purchased or sold at prices in excess of the current value or retail price.

(11) Rental and/or lease fees of bingo equipment and premises shall be reasonable.

(12) Alcoholic beverages: No game of bingo shall be held, operated or conducted under any permit, in any room, enclosure or outdoor area where alcoholic beverages are sold, served or consumed during the progress of the bingo game. (Eff. 9/7/60, Reg. 2; am 11/6/76, Reg. 60)

Authority: AS 05.15.060

15 AAC 05.410. RAFFLES AND LOTTERIES. Raffles and lotteries are the specified kinds of games of chance restricted to the selling of rights to participate, in the awarding of prizes, and determined by a drawing for prizes by chance.

(1) "On-premises raffle or lottery" means winners must be present at the place of drawing.

(2) "Off-premises raffle or lottery" means winners do not have to be present at the place of the drawing.

(3) Draw-raffle winners are determined by drawing from a container.

(4) Annulled under AS 44.62.320, passed 5/13/77.

(5) Special-draw winners are determined by means other than drawing from a container, with the following games permitted. No charge for a single opportunity to participate in special-draw raffles shall exceed 50 cents:

(A) Game No. 1 – Ring-toss game. Player tosses rings over Coca-Cola bottles, or similar object;

(B) Game No. 2 – Penny pitch. Player tosses pennies in glassware or similar object. If penny remains in the dish, player receives the dish as a prize;

(C) Game No. 3 – Fish pond. Player hooks a weighted fish with a number on it. A corresponding number on prize on shelf is the prize he draws;

(D) Game No. 4 – Duck pond. Player selects a floating duck. The number on the bottom of the duck that corresponds with numbered prize on shelf receives that prize;

(E) Game No. 5 – String game. All prizes on shelf attached to a string. Player selects string and receives article attached to it;

(F) Game No. 6 – Baseball game. Player must toss baseball into a numbered pie pan to receive prize;

(G) Game No. 7A – Dart game. Numbered slips of paper are placed on nails holding the various targets and the numbers turned away from the player. The total score made determines the prizes;

(H) Game No. 7B – Dart game. A wheel divided and numbered in eight sections is employed. Each player places money on a laydown board. The wheel is spun and one person throws a dart to determine the winning number;

(I) Game No. 8 – Grab bag. All packages are wrapped or in bags. Each player pays a fee and makes his own selection. There is a prize in each package;

(J) Game No. 9 – Bean guess. In this game a person guesses the number of beans in a container;

(K) Game No. 10 – Hamster game. Hamster is placed in an enclosure with several numbered exit holes. Winner is determined by hole hamster enters.

(6) All raffle or lottery tickets and stubs shall be serially numbered consecutively, and the permit number as shown on the permit issued by the Commissioner of Revenue shall be imprinted on each ticket and stub.

(7) Any and all tickets issued in any raffle or lottery must be accounted for to the permittee organization at the conclusion of each raffle or lottery. (Eff. 9/6/60, Reg. 2; am 11/6/76, Reg. 60)

Authority: AS 05.15.060

15 AAC 05.420. ICE CLASSICS. "Ice classics" are defined as games of chance wherein a prize of money is awarded for the closest guess of the time the ice moves in a body of water or watercourse within the state and being limited to the Nenana and Chena Ice Pools in the same manner as they were conducted in 1959 and previous years. Permits to conduct these activities shall only be issued to the Nenana Ice Classic Association, Nenana, Alaska, to conduct the Nenana Ice Classic, and to the Fairbanks Firemen's Benefit Association, Inc., Fairbanks, Alaska, to conduct the Chena Ice Pool Classic. No permit shall be issued for any other activity based on the two authorized ice classics. (Eff. 9/7/60, Reg. 2).

Authority: AS 05.15.060

15 AAC 05.430. DOG MUSHERS' CONTESTS. "Dog mushers' contests" are defined as games of chance wherein prizes are awarded for the correct guess of the racing time of a dog team or of team position in the race, including prizes to the race contestants.

(1) Dog mushers' contest shall be limited to the participation of dog team sleds drawn over a specified course laid out by officials of a

15 AAC 05.390. FISHING DERBY ASSOCIATIONS. "Fishing derby associations" means any civic, service or charitable organization within this state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes, but does not include organizations formed or operated for gaming or gambling purposes. (Eff. 9/7/60, Reg. 2)

Authority: AS 05.15.060

15 AAC 05.400. BINGO. "Bingo" is defined as a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers when objects similiary numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers on such a card.

(1) No single sessions or series of bingo games, both regular and special shall exceed 35 games in number;

(2) Not more than $1.00 shall be charged by any permittee for admission to any place where bingo games are being held. This fee shall entitle a person to one card, allowing him to participate without additional charge in at least five regular games to be played on that occasion. No charge in excess of 50 cents may be made for a single opportunity to participate in any game other than the five games covered by the admission fee;

(3) No bingo cards for regular games shall be selected by other than the player who is use to the cards. Each player must select his own card or cards for regular games from the deck, group or series of cards and shall be entitled to select any card in the deck, group or series of cards that has not already been selected by a player. Cards may not be reserved for players;

(4) When a caller has started vocally to announce a call, he shall complete the call of that number. After the caller has started vocally to announce a call, if any person shall have gone bingo based upon the previous number called, such person shall share the designated prize with any other person or persons who may have gone bingo on the completed call;

(5) No organization may hold, operate or conduct bingo sessions more often than nine occasions in any calendar month;

(6) A single prize awarded in bingo may not exceed $1,000,

file copy

and total prizes awarded during any one bingo session may not exceed $5,000. Prize amounts shall be stated before the beginning of each game and prizes shall be awarded as stated. Game tickets may not be considered as, nor included in, a cash prize. For example, if a person wins a $45 jackpot, that person must receive and sign for $45 in cash. The prize may not be divided into $30 cash and $15 in game tickets;

(7) No merchandise prize awarded in any bingo may be converted into cash by the permittee organization;

(8) No person under the age of 19 years shall be permitted to participate as a player in any game of bingo;

(9) When any merchandise is awarded in a bingo game its value, for the purpose of the law governing bingo, shall be its current value or retail price;

(10) Equipment, prizes and supplies for bingo shall not be purchased or sold at prices in excess of the current value or retail price;

(11) Rental and/or lease fees of bingo equipment and premises shall be reasonable;

(12) Alcoholic beverages: No game of bingo shall be held, operated or conducted under any permit, in any room enclosure or outdoor area where alcoholic beverages are sold, served or consumed during the progress of the bingo game. (Eff. 9/7/60, Reg. 2; am 9/14/76) Authority: AS 05.15.060

15 AAC 05.410. RAFFLES AND LOTTERIES. "Raffles and lotteries" are the specific kinds of games of chance restricted to the selling of rights to participate, in the awarding of prizes, and determined by a drawing for prizes by chance.

(1) On-premise raffle or lottery means winners must be present at the place of drawing;

(2) Off-premise raffle or lottery means winners do not have to be present at the place of the drawing;

(3) Draw-raffle winners are determined by drawing from a container;

(4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of $30,000 in any one calendar year and real property in excess of the sum or value of $50,000 in any one calendar year;

(5) Special-draw winners are determined by means other

new

file copy

(2) Off-premise raffle or lottery means winners do not have to be present at the place of the drawing.

(3) Draw-raffle winners are determined by drawing from a container.

(4) In holding, operating and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $30,000.00 in any one calendar year.

(5) Special-draw winners are determined by means other than drawing from a container, with the following games permitted. No charge for a single opportunity to participate in special draw raffles shall exceed 50 cents:

(A) Game No. 1 — Ring toss game. Player tosses rings over coca cola bottles, or similar object;

(B) Game No. 2 — Penny pitch. Player tosses pennies in glassware or similar object. If penny remains in the dish, player receives the dish as a prize;

(C) Game No. 3 — Fish pond. Player hooks a weighted fish with a number on it. A corresponding number on prize on shelf in the prize he draws;

(D) Game No. 4 — Duck pond. Player selects a floating duck. The number on the bottom of the duck that corresponds with numbered prize on shelf receives that prize;

(E) Game No. 5 — String game. All prizes on shelf attached to a string. Player selects string and receives article attached to it;

(F) Game No. 6 — Baseball game. Player must toss baseball into a numbered pie pan to receive prize;

(G) Game No. 7 A — Dart game. Numbered slips of paper are placed on nails holding the various targets and the numbers turned away from the player. The total score made determine the prizes;

(H) Game No. 7 B — Dart Game. A wheel divided and numbered in eight sections is employed. Each player places money on a laydown board. The wheel is spun and one person throws a dart to determine the winning number;

(I) Game No. 8 — Grab bag. All packages are wrapped or in bags. Each player pays a fee and makes his own selection. There is a prize in each package;

(J) Game No. 9 — Bean guess. In this game a person guesses the number of beans in a container;

fld

made for a single opportunity to participate in any game other than the five games covered by the admission fee.

(3) No bingo cards for regular games shall be selected by other than the player who is to use the cards. Each player must select his own card or cards for regular games from the deck, group or series of cards and shall be entitled to select any card in the deck, group or series of cards that has not already been selected by a player. Cards may not be reserved for players.

(4) When a caller has started vocally to announce a call, he shall complete the call of that number. After the caller has started vocally to announce a call, if any person shall have gone bingo based upon the previous number called, such person shall share the designated prize with any other person or persons who may have gone bingo on the completed call.

(5) No organization may hold, operate or conduct bingo sessions more often than nine occasions in any calendar month.

(6) No single prize awarded in bingo shall be over $1,000.00, and no series of prizes on one occasion will aggregate more than $3,000.00.

(7) No merchandise prize awarded in any bingo game may be converted into cash by the permittee organization.

(8) No person under the age of 19 years shall be permitted to participate as a player in any game of bingo.

(9) When any merchandise is awarded in a bingo game its value, for the purpose of the law governing bingo, shall be its current value or retail price.

(10) Equipment, prizes and supplies for bingo shall not be purchased or sold at prices in excess of the current value or retail price.

(11) Rental and/or lease fees of bingo equipment and premises shall be reasonable.

(12) Alcoholic beverages: No game of bingo shall be held, operated or conducted under any permit, in any room, enclosure or outdoor area where alcoholic beverages are sold, served or consumed during the progress of the bingo game. (Eff. 9/7/60, Reg. 2)

Authority: AS 05.15.060

15 AAC 05.410. RAFFLES AND LOTTERIES. "Raffles and lotteries" are the specific kinds of games of chance restricted to the selling of rights to participate, in the awarding of prizes, and determined by a drawing for prizes by chance.

(1) On-premise raffle or lottery means winners must be present at the place of drawing.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S – JUNEAU 99811

April 7, 1980

The Honorable Charles Parr
Chairman
House Judiciary Committee
Room 124 - Capitol Building
Juneau Alaska 99811

Dear Mr. Parr:

Re: House Bill No. 949

House Bill No. 949, an Act annulling 15 AAC 05.410 (4), was introduced in the House on March 10. 1980 and was referred to the House Judiciary Committee.

For the consideration of the House Judiciary Committee, I am enclosing a copy of a Fiscal Note prepared by Gary Jenkins, Director, Audit Division, Department of Revenue concerning the proposed legislation.

Sincerely,

R. D. Stevenson
Special Assistant

cc: Joseph K. Donohue
Deputy Commissioner
Department of Revenue

Gary Jenkins, Director
Audit Division
Department of Revenue

04-D2LH

STATE
of ALASKA

MEMORANDUM

TO: R. D. Stevenson
Special Assistant
Department of Revenue

DATE: April 7, 1980

FILE NO.

TELEPHONE NO.

SUBJECT: House Bill No. 949

FROM: Gary L. Jenkins
Director
Audit Division

This bill would annul a regulation pertaining to games of chance and skill which had been previously annulled by the Legislature by Resolution in 1977. A recent Alaska Supreme Court decision overturned that annullment because the Court decided it was not constitutional for the Legislature to annul a regulation by Resolution. The specific regulation which had been annulled in 1977 dealt with the limitation on the amount of personal and real property which could be awarded as prizes in any one year by a permittee. The previous regulation which had been in existence since 1960 provided that prizes of personal property could not exceed $15,000 and prizes of real property could not exceed $30,000 in any one calendar year. The revision of the regulation which was annulled increased those limits to $30,000 of personal property and $50,000 of real property in any one year. However, with the annullment of the revised regulation there has not been any limit on the amount of prizes which could be awarded by permittees since 1977.

At the time that the regulation was in the process of being revised, there was only one permittee organization which was in violation of the regulation and would also be in violation of the revised regulation. This organization was ALIVE, VOLUNTARY and is the political action arm of the Teamster's Union in Alaska. The majority of the proceeds of their raffles and lotteries are donated to political candidates. At the present time, they would be the only organization affected if the proposed legislation were not enacted.

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill No. 949

Title An Act annulling 15 AAC 05.410(4)

Requested by House Judiciary Committee Date 4/7/80

II. FISCAL DETAIL

Agency Affected Revenue

Program Category Affected Fiscal Services

BRU, Program, or Subprogram(s) Affected Audit Division

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS None

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

See attached memorandum to R. D. Stevenson dated 4/7/80.

IV. DATE April 7, 1980 PREPARED BY [signature]

AGENCY Department of Revenue, Audit Division

PHONE 465-2320

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/78)

STATE of ALASKA

MEMORANDUM

TO: R. D. Stevenson
Special Assistant
Department of Revenue

DATE: April 7, 1980

FILE NO:

TELEPHONE NO:

SUBJECT: House Bill No. 949

FROM: Gary L. Jenkins
Director
Audit Division

This bill would annul a regulation pertaining to games of chance and skill which had been previously annulled by the Legislature by Resolution in 1977. A recent Alaska Supreme Court decision overturned that annullment because the Court decided it was not constitutional for the Legislature to annul a regulation by Resolution. The specific regulation which had been annulled in 1977 dealt with the limitation on the amount of personal and real property which could be awarded as prizes in any one year by a permittee. The previous regulation which had been in existence since 1960 provided that prizes of personal property could not exceed $15,000 and prizes of real property could not exceed $30,000 in any one calendar year. The revision of the regulation which was annulled increased those limits to $30,000 of personal property and $50,000 of real property in any one year. However, with the annullment of the revised regulation there has not been any limit on the amount of prizes which could be awarded by permittees since 1977.

At the time that the regulation was in the process of being revised, there was only one permittee organization which was in violation of the regulation and would also be in violation of the revised regulation. This organization was ALIVE, VOLUNTARY and is the political action arm of the Teamster's Union in Alaska. The majority of the proceeds of their raffles and lotteries are donated to political candidates. At the present time, they would be the only organization affected if the proposed legislation were not enacted.

standards of care common throughout the health professions in the state or for intentional misconduct. (§ 1 ch 204 SLA 1968; am § 1 ch 73 SLA 1974; am § 6 ch 208 SLA 1975)

Effect of amendments. — The 1974 amendment rewrote this section.

The 1975 amendment substituted "this section" for "§ 100 of this chapter" in paragraph (5) of subsection (a).

Legislative committee report. For report on ch. 73, SLA 1974 (HCSSB 32 am H), see 1973 Senate Journal Supplement No. 5, p. 166.

Sec. 09.65.110. Civil liability for concealment of merchandise. A person who wilfully conceals goods or merchandise from a merchant's premises, in addition to any criminal penalty provided by law, is liable in a civil action to the merchant for damages of not less than $100 or more than $250, or in the case of goods or merchandise having a retail value in excess of $250, for the full retail value of the goods or merchandise. In addition, the person violating this section is liable for all costs and reasonable attorney fees involved in the action. (§ 1 ch 107 SLA 1974)

Cross reference. — As to concealment of merchandise, see AS 11.46.220, effective January 1, 1980. Until January 1, 1980, see AS 11.20.275.

Sec. 09.65.120. Definition of death. A person is considered medically and legally dead if, in the opinion of a medical doctor licensed or exempt from licensing under AS 08.64, based on ordinary standards of medical practice, there is no spontaneous respiratory or cardiac function and there is no expectation of recovery of spontaneous respiratory or cardiac function or, in the case when respiratory and cardiac functions are maintained by artificial means, a person is considered medically and legally dead, if, in the opinion of a medical doctor licensed or exempt from licensing under AS 08.64, based on ordinary standards of medical practice, there is no spontaneous brain function. Death may be pronounced in this circumstance before artificial means of maintaining respiratory and cardiac function are terminated. (§ 1 ch 8 SLA 1974)

Sec. 09.65.130. Representation of child. (a) The court may, upon the motion of either party or upon its own motion, appoint an attorney to represent the minor with respect to his custody, support, and visitation or in any other legal proceeding involving his welfare. When custody, support, or visitation are at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that those matters are at issue. Upon notification, the court shall determine whether the child should have legal representation or other services and shall make a finding on the record before trial. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney and may further order that other services be provided for the protection of the child.

(b) If custody, support, or visitation is an issue, the order for costs, fees, and disbursements shall be made against either or both parents, except that, if one of the parties responsible for the costs is indigent, the costs, fees, and disbursements for that party shall be borne by the state. If either or both parents are only temporarily without funds, as determined by the court, the court may advance payment for legal representation or other services rendered to the child; however, no repayment may be required for those who are receiving legal services for the indigent. The attorney general is responsible for enforcing collections owed the court, and repayment shall be made directly to the court under the provisions of rules governing the administration of the courts. The court shall, if possible, avoid assigning costs to only one party by ordering that costs of the child's legal representation or other services be paid from proceeds derived from a sale of property belonging to both parties, before a division of property is made.

(c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon the motion of either party or upon its own motion, appoint an attorney or other person to serve as guardian ad litem to represent the best interests of a minor in any legal proceedings involving his welfare. The court shall appoint a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from his preferences, would serve the welfare of the child. The person appointed under (a) of this section may also be appointed as guardian ad litem under this subsection. The court in its order appointing a guardian ad litem shall limit the duration of the appointment of the guardian ad litem to the pendency of the legal proceedings affecting the child's interests, and shall outline the guardian ad litem's responsibilities and limit his authority to those matters related to his effective representation of the child's best interests in the pending legal proceeding. The court shall make every reasonable effort to appoint a guardian ad litem from among persons in the community where the child's parents or the person having legal custody or guardianship of the child's person reside. When custody, support, or visitation are at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that these matters are at issue. Upon notification, the court shall determine if the child's best interests need representation or if the child needs other services and shall make a finding on the record before trial. The court shall enter an order for costs, fees, and disbursements in favor of the child's guardian ad litem and may further order that other services be provided for the protection of the child. (§ 2 ch 167 SLA 1975; am §§ 2, 3 ch 63 SLA 1977)

Effect of amendment. — The 1977 amendment, in subsection (a) substituted "attorney to represent the minor" for "attorney or guardian ad litem to represent the interests of a minor or dependent child" in the first sentence, substituted "representation" for "assistance" in the third sentence, deleted "or guardian ad litem" following "child's attorney" in the fourth sentence. The amendment also added subsection (c).

Editor's note. — Section 30, ch. 63, SLA 1977, provides: "Section 3 of this Act has the effect of limiting the discretionary authority of the court to appoint a guardian ad litem under Rule 17(b), Alaska Rules of Civil Procedure, and Rules 11(a) and 15, Alaska Rules of Children's Procedure, by requiring as a condition of appointment that the court find that the best interests of the child need articulation. Further, this Act requires limitation of the duration of the appointment, limits the scope of the guardian ad litem's authority, and establishes the geographical area from which the guardian ad litem may be selected."

Legislative committee report. — For report on ch. 167, SLA 1975 (CSHB 238 [Finance]), see 1975 House Journal, p. 923.

Section 310 of Uniform Marriage and Divorce Act is similar to this section. — Section 310 of the Uniform Marriage and Divorce Act of the National Conference of Commissioners on Uniform State Laws, which provides for the appointment of an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation, is quite similar to this section. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

This section gives the trial court discretion to appoint an attorney or guardian ad litem for a child in a proceeding "without respect to his custody, support, and visitation or in any other legal proceeding involving his welfare." Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

The supreme court cannot lay down a definite rule for guiding the trial courts in their decision whether to appoint guardians ad litem, since no two child custody cases are alike. Of necessity, the trial court has a considerable amount of discretion in making this decision. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

The fact that one or all of the custody claimants favor or oppose the appointment of a guardian ad litem is not necessarily conclusive. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

Appointment is not compelled where unnecessary. — In custody cases in which a guardian is not needed, neither this section, the court rules, nor supreme court decisions compel the court to waste its time and money, as well as that of the parties and counsel, in employing one. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

When guardian ad litem to be appointed. — In custody proceedings a guardian ad litem should be appointed when appointment would substantially enhance the likelihood that the individual needs and interests of the children would be adequately represented. Lacy v. Lacy, Sup. Ct. Op. No. 1308 (File No. 2770), 553 P.2d 928 (1976).

Basis for decision to appoint guardian. — The decision whether to appoint a guardian ad litem would appear to depend in large measure on the age of the children and the nature of the claim being advanced by the parent or parents. Lacy v. Lacy, Sup. Ct. Op. No. 1308 (File No. 2770), 553 P.2d 928 (1976); Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

Failure to appoint guardian not abuse of discretion. — Where neither party could suggest any specific benefit which a guardian might bring to the custody modification proceedings, and appointment of a guardian ad litem would have necessitated a postponement of the hearing, the superior court did not abuse its discretion in failing to appoint a guardian ad litem for the two minor children. Lacy v. Lacy, Sup. Ct. Op. No. 1308 (File No. 2770), 553 P.2d 928 (1976).

Guardian should be advocate of child. — See Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

A guardian ad litem appointed pursuant to this section is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

For discussion of powers and duties of guardian, see Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

A guardian is entitled to file such procedural motions as a motion for change of judge on the same basis as a party to the action. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

Payment of costs where parent is indigent. — If the trial court finds that a parent is indigent, her portion of the costs must be borne by the state. If the trial court further finds that she is receiving legal services for the indigent, the state is precluded by subsection (b) of this section from seeking repayment from her.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

FROM: Billy G. Berrier
Director
Division of Legal Services

You have asked our opinion on the extent of and limitation on the power of the legislature to amend initiatives.

It is well established that where the constitution provides for initiative and referendum, the legislature and the electorate are, within constitutional restraints, coordinate legislative bodies and there is no superiority of power as between the two (e.g. 1A Sutherland Statutory Construction 23.23. (p. 263) Jones v. Maine State Highway Commission 238 A2d 226 (Maine 1968)). It is, therefore, necessary to examine the particular constitutional provision involved to determine what, if any, limitations there are on the power of the legislature to act in regard to initiatives.

The relevant constitutional provision is part of Section 6, Art. XI of the Alaska Constitution which reads:

> ". . . An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time . . . ."

The constitutional language itself makes a clear distinction between repeal of an initiative which may not be done by the legislature within two years of the effective date of the initiative and amendment which may take place at any time.

The constitutional convention debated this provision very extensively. The debate included extensive discussion of the power to amend being the power to destroy. The debate was inconclusive on the extent to which amendment could go. As our Supreme Court stated in Warren v. Boucher, 543 P2 731 (Alaska 1975)

> "Our dissenting colleagues rightly observe that the article on direct legislation was the subject of extensive debate at the constitutional convention. . . .However, we find nothing in the vigorous floor debates thereon, which points to an agreed upon meaning or a consciously adopted definition of what this critical language should mean. Many views were expressed by individual delegates, but these expressions do not in this instance provide a reliable guide to what the constitutional convention as a whole intended by the adoption of the phrase in question, or what it meant to the voters who ratified the constitution." (p. 735)

It does appear clear, however, that the delegates intended and recognized the distinction between repeal and amendment that appears in the adopted language. Delegate R. Rivers who made the motion which was adopted to allow amendment of an initiative stated:

> "R. RIVERS: Mr. President, I rise to close the debate unless someone else wishes to be heard and that is to the effect that if you allow the legislature to repeal an initiated measure right away, that you are making the initiative meaningless as Mr. Hellenthal pointed out, but if something were wrong the amendatory process would be sufficient to protect the state." (2 Alaska Constitutional Convention Proceedings 1177)

The vote followed immediately afterward and the amendment to add "but may be amended at any time" was adopted. This view is buttressed by action on a later amendment by Delegate Kilcher. Earlier versions had a period of three years in which repeal or amendment by the legislature was prohibited. A motion to

allow amendment by two-thirds majority vote of both houses had earlier failed. Delegate Kilcher's amendment read:

> "nor may it be amended or repealed by the legislature within a period of two years except by a two-thirds majority vote of the members to which each house is entitled."

The debate on acceptance of this amendment shows the delegates were aware of the distinction.

> HELLENTHAL: Point of order. I think this matter has already been before the body once and possibly twice and that the motion is out of order.
>
> . . . . .
>
> PRESIDENT EGAN: The Chair would have to hold it changes the three years to read "two years" and whether or not the Convention has considered the question of a two-thirds majority vote in a two-year period of time the Chair does not recall that the Convention has considered it. Changing it to two years changes the complete substance.
>
> TAYLOR: I think Mr. Hellenthal's point of order is well taken because we have already, by the adoption of our previous motion, made it two years so the motion to amend as proposed by Mr. Kilcher moves to strike all this and then only adding a few words.
>
> PRESIDENT EGAN: That is correct, Mr. Taylor, but the question I believe Mr. Hellenthal was thinking of was the fact that Mr. Kilcher had previously offered an amendment that called for a two-thirds majority vote of both houses, but at that time the wording of the section said "three years" instead of "two years". Now there is a difference there.
>
> KILCHER: Mr. President, I have to add something to your explanation. If it were only that, I would agree it would just be a matter of taking advantage of a possible technicality and be a loss of time, and that was not the intention. I think the amendment is in order for a different reason. This is the first time that the amendment includes repealing, even before two

> years. It includes repealing and amending. In that respect it is a new amendment. The other one had a two-thirds majority for amending. I had this amendment written before the decision had been reached as to whether it was going to be two or three years. Irregardless of the three years I would like to see it repealable, not only amendable within two or three years.
>
> HELLENTHAL: I withdraw my point of order.
>
> KILCHER: I would like to grant the legislature the right to repeal before two years and to amend it before two years, both with the two-thirds majority.
>
> PRESIDENT EGAN: The meaning of the proposed amendment is entirely different than the meaning of the previous amendment. The amendment is in order." (2 Alaska Constitutional Convention Proceedings 1185, 1186)

The State of Washington considered a constitutional provision very similar to that of Alaska except the Washington constitutional language is somewhat inept. Amendment 26 to the Constitution of the State of Washington reads in relevant part:

> "No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: PROVIDED, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house . . ."

The question of how far an amendment could go arose in connection with legislative amendments to a reapportionment initiative. No one appeared to deny that the effect of the amendment was to gut the initiative. In State v. Meyers, 319 P.2d 828 (Wash 1957) the court held:

> "Giving the word 'amend' its usual and ordinary meaning as set out in Webster's Dictionary, and its meaning as given by this Court and other jurisdictions, we must hold that the people by granting to the legislature the right to amend, authorized it to change the law completely,

> within the realm of the subject matter contained in the act.
>
> Since Chapter 289 deals with the same subject matter as that contained in Initiative 199, namely, redistricting, the legislature had the unlimited power to establish methods of redistricting, and to alter, modify, take away, add to or change the various districts in such manner as it saw fit. It follows, then, that the repeal of §56 of Initiative 199, which established a method of redistricting, and substituted therefor another method was well within the purview of the definition of the term." (Note - Sec. 56 set method of reapportionment, remainder was detail or technical.)

However, there was a strong dissent which said:

> "The proviso should not be interpreted to exclude that which preceeds it; hence under the circumstances presented by the problem before us I cannot join in the reasoning of the majority opinion that the right to amend includes the right to repeal for such a conclusion nullifies a portion of Amendment No. 26."

(The dissent then goes on to quote an earlier Washington case State ex rel Mullen v. Howell, (Wash. 1919) 181 P920 at 923 relating to referendum that: "This case sounds in fundamentals, not in definitions.") and concluded:

. . . .

> "It is neither necessary nor proper for me to attempt to define the word amend, as it is used in the proviso of Amendment No. 26 to the state constitution for Laws of 1957, Chapter 289 is not an amendment of Initiative No. 199. It destroys and repeals it, hence Laws of 1957, Chapter 289 is unconstitutional."

The question of the permissable scope of the legislature's power to amend initiatives has been before our Court indirectly in Warren v. Boucher, 543 P.2d 731 (Alaska 1975) and directly in Warren v. Thomas, 568 P.2d 400 (Alaska 1977).

In Boucher the direct question was which enactments of the legislature operate to prevent an initiative from appearing on the ballot. The court held:

> "It is clear that the legislative act need not conform to the intitiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same.
>
> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or if it requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative."

It then made an analogy to the power to amend given the legislature saying:

> "The constitution thus vests broad authority in the legislature to vary the terms of an initiated law, after its adoption, by the process of amendment. This power amounts to a check or balance against the initiative process. No doubt the legislature was given this power to assure that initiatives which were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable, could be altered or corrected rapidly by the legislature. It was obviously intended by the framers that the initiative process should not be permitted to disrupt vital governmental functions or to impose intolerable burdens upon established administrative systems. To this end the legislature was given the ability to substitute its judgment for that of the proponents of an initiative.
>
> What is significant to us here is the effect which the amendatory power of the legislature has upon our interpretation of the words 'substantially the same measure.'

> For if the legislature has broad power of amendment, it follows that it has broad power to change an initiative by an enactment covering the same subject as the initiated measure. In short, we must interpret Art. XI, Sec. 4, broadly and not narrowly as to the scope of legislative power. We, of course, are not passing here on the question of whether an amendment so vitiates an act passed by initiative as to constitute its repeal."

While this is clearly dictum since the issue of amendment was not before the Court the analysis was reaffirmed, except as it may suggest that the legislature may interfere with the initiative process by amending an initiated law only where it creates a potential danger to the operation of governmental functions by Thomas.

Boucher then went to an analysis of the differences and held:

> "Viewing the two measures as a whole we find that they accomplish the same general goals. They adopt similar, although not identical, functional techniques to accomplish those goals. The variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law."

There was a strongly worded dissent. The dissent stated:

> "In this case the legislature took the initiative title and enacted a measure which clearly was more politically palatable to them, but which is definitely not 'substantially the same' as the initiative sponsored by the people."

followed by its analysis of the changes and effect.

Thomas was a case in which action was brought to prevent the legislature's amendments to the conflict of interest law, which was enacted by initiative, from becoming effective. The case was decided by a unanimous court. The court quoted the constitutional provision involved and said:

> "According to this plain language the legislature may not repeal a law passed by initiative for two years, but may pass an amendment at any time. We interpret this provision in accordance with the general principle

> of statutory construction that a constitutional provision should receive a reasonable and practical interpretation in accordance with common sense."

The court reaffirmed its recognition that the legislature has broad powers to amend an initiative. It stated the central issue in the case was whether the legislature had exceeded that broad power by passing an amendment which so vitiates the initiative as to constitute its repeal.

It then examined the changes and held:

> "Of course there remains the question whether the amendments so emasculate the law that it is effectively repealed. We conclude that they do not. There are considerable language changes, but these clarify and render the law more precise."

The court concluded its opinion with cautionary language saying:

> "As Warren argues, there is much merit in the dissent in Meyers as to the scope of the legislature's power to amend laws enacted by initiative, but we are not presented with a similar case. The amendments to AS 39.50, which preserve its basic structure and purpose, fall far short of the drastic changes made to the apportionment scheme by the Washington legislature.
>
> For purposes of this appeal it is unnecessary for us to decide at what point an amendment might be so drastic as to constitute a repeal of an initiated law in violation of the Alaska Constitution. In this case the amendments only reduced the penalties for violation of the law and clarified some of the language. We are of the opinion that such an amendment did not constitute a repeal of the initiated law."

The conclusion in my opinion is that the legislature has broad power to amend an initiative but may not exceed that power by enacting an amendment which so vitiates the initiative as to constitute its repeal. The court apparently will use a reasonable and practical approach in its analysis. The question as to whether amendments have reached the point where they are so drastic as to constitute a repeal will be

determined on a case by case basis by comparison of the amendment to the initiative being amended and developing a conclusion as to the total effect of the amendments. Based on the Alaska cases discussed earlier, considerable change by amendment is allowed without constituting a repeal.

I am aware that two cases concerning Ballot Proposition No. 4, Disposal of State Lands, which was approved by the people at the last general election are pending on appeal before the Supreme Court. Since among other questions, the matters discussed in this opinion have been presented for consideration of the court, the decision in those cases may significantly affect this opinion.

BGB:jdn

STATE OF ALASKA
THE LEGISLATURE

POUCH Y, STATE CAPITOL
JUNEAU ALASKA 9981
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 4, 1979

SUBJECT: Amendment to FRANK Initiative
(Work Order No. 5956)

TO: Representative-elect Ray H. Metcalfe

FROM: Billy G. Berrier BGB
Director
Division of Legal Services

The draft of the amendments to the FRANK initiative that you requested is enclosed.

In my opinion the proposed amendments would not be constitutional.

I am enclosing a current opinion from this division on the extent of and limitation on the power of the legislature to amend initiatives and the material contained in the Official Election Pamphlet on Ballot Proposition No. 3.

The general purpose of the initiative is disclosure to the voters of the full bondable costs of relocating the capital and approval of those costs by the people. The constitution requires voter approval of incurring general obligation bonded debt by providing in Sec. 8 of Art. IX that:

> "No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the State who vote on the question. . . ."

This has been implemented by statute providing for a vote and for the mechanics of voting on bond propositions. A vote authorizing incurring necessary bonded debt is required by the Constitution itself whether or not a specific statute requires that vote. With the amendment proposed in this bill, the only limitation portion of the initiative that survives is the prohibition of other expenditures prior to the already required approval. It appears clear that the general purpose of the initiative is not preserved.

Apart from the constitutional problem, I see two technical drafting problems.

The insertion of the word "necessary" preceeding the word "offices" on line 22 is redundant and harmful. While I realize this is intended to tie to the reference to "necessary bonded costs" on line 25, that tie is not needed. The surface meaning of the sentence, as it stands, is that there is a prohibition against moving "necessary offices" of the heads of principal departments; there is no prohibition of moving unnecessary offices. No court would interpret the section that way but adding a word which serves no useful purpose and creates a surface absurdity is unfortunate. I suggest its deletion.

A more serious problem arises from the limitation on the bond issue to only those bonds the commission determines to be required after giving priority to financing through the proceeds of sales of land. I assume it is your intention that the bond issue be limited to the amount necessary excluding proceeds of land sales. The phrase "after giving priority to financing" is somewhat unclear. If you intend to mandatorily exclude those costs, I would suggest language to replace that phrase with a phrase such as "after excluding those costs which the plan determines may reasonably be realized."

BGB:jdn

Enclosures