

SB

308

COMMITTEE REPORT

HOUSE

2/26/80

FURTHER:

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had CSSB 308

"An Act shifting to the state the burden of proving that a challenged regulation is valid."

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

Original sponsors: Hackney and Stinson

Offered: 2/13/80
Referred: Rules

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 308

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 ELEVENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act shifting to the state the burden of proving
7 that a challenged regulation is valid."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 44.62.300 is amended by adding a new subsection to read:
10 *delete (a)*

11 (b) In an action under (a) of this section, the state has the
burden of proving

12 (1) that the facts alleged are untrue; or

13 (2) that the facts alleged, even if true, do not constitute
14 grounds upon which the regulation may be invalidated.

15 *insert*

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29 COMMITTEE COPY



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

*Rule
for
com. Copy*

Pouch V
State Capitol
Juneau, Alaska 99811

February 14, 1980

LETTER OF INTENT

SENATE JUDICIARY COMMITTEE

The Senate Judiciary Committee, in reporting out SB 308, "Relating to the Validity of Regulations", feels that various state agencies and departments from time to time promulgate regulations which are totally out of line and beyond the pale of reason.

The bureaucrats of the state are running roughshod over the people and do not seem to understand the ever-increasing public resentment for which the regulations are directly responsible. The public is sick unto death of the amount of unprovoked good that is being done for them.

It is the unanimous opinion of the committee that by compelling the state to uphold the validity of regulations when they are challenged that, although it may be true that the agencies and departments involved may become swamped with litigation and challenges, much better the onus on their backs to justify the validity of regulations than on the backs of the 400,000 some-odd citizens of the state to have the regulations adjudicated invalid.

Strong letter follows!

Respectfully submitted,

Ziegler

Senator Ziegler, Chairman

Meland

Senator Meland, Member

Bice Ray

Senator Ray, Member

M. E. Dankworth

Senator Dankworth, Member

Don Bennett

Senator Bennett, Member

ALASKA STATE LEGISLATURE

ELEVENTH Legislature SECOND Session

SENATE BILL NO. 308

By HACKNEY

"An Act shifting to the state the burden of proving that a challenged regulation is valid."

7416 - Outside

Introduced in the Senate 1/14/80

HISTORY IN THE SENATE

19 80	Read first time and referred to Committee on										
1 14	JUDICIARY										
2 13	Reported back with recommendation that <i>Just replace w/ps, 5 do pass to Rules.</i>										
2 19	<i>Rules: Calendar 2/20</i>										
2 20	Read second time and <i>cs adp.</i>										
2 25	<i>held one day w/ amend. and withdrawn adn.</i>										
2 20	Read third time and										
2 21	<i>Held 1 reg. day.</i>										
2 22	<i>Held one more day</i>										
2 25	<i>Ret. 2nd for amend. read 3rd time</i>										
2 20	<table border="0"> <tr> <td>PASS <i>ed</i></td> <td>Effective Date</td> </tr> <tr> <td>Yeas 18</td> <td>Yeas</td> </tr> <tr> <td>Nays 2</td> <td>Nays</td> </tr> <tr> <td>Absent</td> <td>Absent</td> </tr> <tr> <td>Excused</td> <td>Excused</td> </tr> </table>	PASS <i>ed</i>	Effective Date	Yeas 18	Yeas	Nays 2	Nays	Absent	Absent	Excused	Excused
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2 20	<i>Reconsideration taken up</i>										
2 25	<table border="0"> <tr> <td>PASS <i>ed</i></td> <td>Effective Date</td> </tr> <tr> <td>Yeas - 15</td> <td>Yeas</td> </tr> <tr> <td>Nays - 5</td> <td>Nays</td> </tr> <tr> <td>Absent</td> <td>Absent</td> </tr> <tr> <td>Excused</td> <td>Excused</td> </tr> </table>	PASS <i>ed</i>	Effective Date	Yeas - 15	Yeas	Nays - 5	Nays	Absent	Absent	Excused	Excused
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2 25	Reported correctly engrossed										
2 25	Signed by President										
2 25	Sent to House										
	<i>D. J. Mulligan</i> SECRETARY OF THE SENATE										

HISTORY IN THE HOUSE

19 80	Read first time and referred to Committee on										
Feb 26	Judiciary										
	Reported back with recommendation that										
	Read second time and										
	Read third time and										
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	Reported correctly engrossed										
	Signed by Speaker										
	Returned to Senate										
	CHIEF CLERK OF THE HOUSE										

HISTORY IN THE SENATE

19	Received from House
	To enrolling
	Reported correctly enrolled
	Sent to Governor
 by Governor
	Filed with Lt. Governor
	Chapter No.

STATE OF ALASKA

*Copies to members
packets SRS 308*

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

February 26, 1980

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature

The Honorable Samuel Cotten
Chairman
Rules Committee
House of Representatives

The Honorable Charles Parr
Chairman
Judiciary Committee
House of Representatives

The Honorable Mike Miller
Chairman
State Affairs Committee
House of Representatives

Re: SB 308 (burden of proving
validity of regulations)

Gentlemen:

This bill passed the Senate by a substantial vote. (1980 S.J., p. 359) If enacted into law, it will create extremely serious problems. A floor amendment which would have alleviated some of these problems was offered yesterday and then withdrawn. I am writing in the hope that you will consider these problems before any definitive House action on the subject. I understand that the Senate recognizes that there are serious problems in this bill and anticipates substantial amendment in the House.

This bill would require that, when an administrative regulation is challenged under AS 44.62.300, the state bear the burden of "proving" it valid. There are two areas of difficulty: (1) the basic policy the bill reflects, and (2) more-or-less technical, legal difficulties. I am convinced that this bill would be inimical to the interests of the State of Alaska, not just of the executive branch.

The Honorable Terry Gardiner
The Honorable Samuel Cotten
The Honorable Charles Parr
The Honorable Mike Miller

February 26, 1980

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In reversing the presumption of validity of administrative regulations, the bill destroys the presumption heretofore applicable to statutes, regulations, and other governmental actions. Singling out regulations for a presumption of invalidity attacks an essential means of assuring governmental fairness in dealing with all people. Administrative regulations serve two fundamental governmental functions: (1) since statutes must speak in more-or-less general terms, regulations provide the details necessary to deal with the complexities of a highly technical, highly populous twentieth century society; and (2) they establish a standard for people in dealing with their government and with each other, to avoid their being subjected to possible arbitrary, ad hoc decision making by that government.

Numerous statutes expressly require the adoption of administrative regulations, and numerous statutes expressly authorize the adoption of others. In addition, several supreme court decisions have indicated that agency action taken in the absence of administrative regulations is invalid. Even the ombudsman has filed complaints about the absence of regulations. Administrative agencies thus required to adopt regulations would be unable to execute the statutes for which they are responsible if the regulations necessary to implement those statutory functions do not have the benefit of the presumption of validity.

A bill such as this, essentially stating that administrative regulations are presumed invalid, invites challenges. A complaint need not even be well founded in order to force the state through the hoops of "proving" validity. The attendant expense of such a proposal is difficult to predict precisely, but it is evident that it would be substantial. With the great number of challenges certain to be inspired by this bill if it passes, the witness fees, attorney fees, and related litigation costs would require greatly expanded agency budgets. In addition, the already crowded court dockets would become even more unmanageable. Thus the bill would increase the court overload, increase the cost to the state, and provide a windfall to lawyers.

The Honorable Terry Gardiner
The Honorable Samuel Cotten
The Honorable Charles Parr
The Honorable Mil. Miller

February 26, 1980

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While there is certainly a popular sentiment against government regulation, it appears most logical to deal with regulations in a way that allows one to distinguish between good ones and bad ones. This bill, in a wholesale fashion, would establish a presumption applicable to all regulations -- from fish and game season opening dates to oil and gas lease provisions to rules of the road to public assistance application procedures, etc.

Many people have in mind a favorite example of a regulation that appears unnecessary or unwise, but the literally thousands of regulations which are essential to the functioning of statutorily created programs, and which raise little if any controversy, would be as affected by this bill as the controversial or questionable ones.

It has been said in support of the bill that one of its purposes is to avoid having people "presumed guilty" under some regulation and to enable them to enjoy the traditional presumption of innocence until proven guilty. But most regulations do not deal with a question of guilt or innocence. They establish procedures, set standards, set prerequisites for application for some state benefit, regulate relationships among people, and do many things unrelated to a presumption of guilt or innocence.

Moreover, the bill creates internal conflicts within the Administrative Procedure Act. The presumption of invalidity is established by this bill in AS 44.62.300. But the bill does not amend AS 44.62.100 which embodies a presumption of validity. There is thus a conflict between the bill and the existing statute in that a presumption of validity is not operable if, in fact, the agency has the burden of proving that the plaintiff's alleged facts are untrue or that if true are not sufficient grounds for invalidating the regulation.

In addition, it is not really clear what the bill means by the "burden of proving." The general concept of "burden of proof" has two essential parts: the burden of "going forward" and the burden of "persuasion." In traditional legal concepts, a presumption, such as the presumption of invalidity established by this bill, would operate only on the burden of going forward. But it is not clear whether that is what the bill means.

The Honorable Terry Gardiner
The Honorable Samuel Cotten
The Honorable Charles Parr
The Honorable Mike Miller

February 26, 1980

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Another point left unclear by the bill is the standard for "proving" the regulation's validity. In reviewing various kinds of administrative actions, the courts have developed four standards. The one applicable to administrative regulations is known as the "reasonable and not arbitrary" test. But that goes to the substance of a regulation rather than to the procedure followed in adopting it. The bill leaves the point untouched.

It has also been asserted in support of this bill that it will make agencies more concerned about citizens' rights. It has been my experience through many years of dealing with state agencies that a concern for citizens and their rights is directly related to the quality of people working for the agency, and would have no relation whatsoever to statutes establishing burden of proof tests in future lawsuits. Of course, the mere fact that an agency reaches a policy decision different from the one some individual citizen or some legislator might make does not mean that the agency is not concerned about citizens' rights or that it is disregarding opinions that were expressed during the regulations-adoption process. Obviously, both houses of the legislature often have quite different opinions of what their respective constituencies require but that does not mean that either house is disregarding the needs of the people.

It has been suggested that this bill would provide a means that would be more expeditious and less expensive for individuals to relieve themselves of the requirements of regulations they do not like (whether or not thousands of other people, as well as the agency involved and perhaps a majority of the legislators, think that the regulation is wise and generally beneficial). The other avenues of protest open to an individual are AS 44.62.210's opportunity to comment; AS 44.62.230's procedure for petitioning for the adoption, amendment or repeal of a regulation; AS 44.62.060's legal review by the Department of Law; AS 44.62.300's opportunity for declaratory relief; and, of course, working with the legislature for enactment of a statute that would supersede the regulation. None of these methods is necessarily time-consuming or expensive to the individual, and they have the advantage of not interfering with the regular performance of functions by various administrative agencies. This bill, on the other hand, would be a serious disruption to the very programs mandated by the legislature and would be very expensive to the taxpayers of the state.

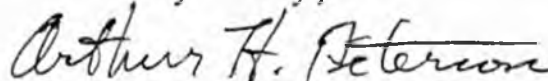
The Honorable Terry Gardiner
The Honorable Samuel Cotten
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The Honorable Mike Miller

February 26, 1980

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There is certainly a good deal of sentiment today against the multitude of regulations that affect our lives. However, before taking drastic action to respond to that sentiment, it is well to reflect on the fact that most, if not all, of these regulations, have been adopted because the legislature directed the agencies to do so. There are other ways to deal with the problem, and I would be happy to discuss them with you, but this approach would create many more serious problems that it would solve.

Yours very truly,



for Avrum M. Gross
Attorney General

AMG:md

cc: The Honorable Clem V. Tillion
President
Alaska State Senate

The Honorable Robert H. Ziegler, Sr.
Alaska State Senate

The Honorable Glenn Hackney
Alaska State Senate

Keith Specking
Legislative Assistant
Office of the Governor

Don Koch
Division of Insurance
Department of Commerce & Economic
Development

Karen Bernstein
Department of Fish & Game

Alaska State Legislature

Copies to members
packets

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SENATOR
GLENN HACKNEY
REPRESENTING
SENATE DISTRICT 0
"ALASKA'S GOLDEN HEART"

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
HOME PHONE 586-3593
OFFICE PHONE 465-3788

COMMITTEES
FINANCE
HEALTH, EDUCATION & SOCIAL SERVICES
CHAIRMAN

State Senate

March 3, 1980

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature

The Honorable Samuel Cotten
Chairman
Rules Committee
House of Representatives

The Honorable Charles Parr
Chairman
Judiciary Committee
House of Representatives

The Honorable Mike Miller
Chairman
State Affairs Committee
House of Representatives

Re: SB 308 (burden of proving
validity of regulations)

Gentlemen:

You will have received under date of February 26 a letter from the office of the Attorney General couched in apocalyptic terms relative to the subject bill. I think the office of the AG is indulging in flim-flam not to mention a generous school of red herrings.

Paragraphs II and III of the AG's letter attack the reversal of the assumption that regulations are automatically valid because they have been promulgated by the Administration. This is a lot of hokey. These regulations will be assumed as valid, the only question will come if a regulation is challenged. There is no conceivable reason to challenge regulations that are well drawn and applied in a fashion that is not arbitrary or capricious. They quite properly establish a standard for people in dealing with their government, it is only when they run amok that they should be challenged.

Reference to "several Supreme Court decisions" and complaints by the Ombudsman concerning the absence of regulations are immaterial to this discussion. If regulations should be adopted, then they should be adopted. The whole point of this exercise is that there should be great care taken to see that those regulations are reasonable.

The statement in paragraph V that passage of this bill would invite challenges and provide a windfall to lawyers is an interesting statement. To me, it presupposes that the majority of the regulations that are now on the books are of such an arbitrary nature as to invite challenge. There is no foundation to that statement. If the office of the Attorney General has a collective guilty conscience about wholesale numbers of regulations which, after all, are shunted through that office as their final step before adoption, then perhaps they should be reassessing their role in regulatory proceedings.

In paragraph VII the AG states, quite by accident I assume, the whole purpose of this bill. It is designed to enable the public to get at those "favorite example" cases of "a regulation that appears unnecessary or unwise." If the AG had substituted asinine and arbitrary in the case of unnecessary or unwise the example would be acceptable. Again, there are thousands of regulations within whose constraints the people can function quite comfortably, this bill only seeks to get at the mavericks.

In paragraph IX of his missive the AG mentions an internal conflict within the APA. I fail to see this conflict. This bill speaks only to regulations which are challenged. If the state cannot prove that that regulation is valid and necessary then it should be vaporized.

Paragraph X repeats the tiresome canard about "presumption of invalidity." It is not immediately apparent from this paragraph that the AG is clear about what he is unclear about.

Paragraph XII deals with the question of concern for citizens rights. Who, pray tell, gives to a regulatory agency decisional infallibility in its regulations, often pushed through with a callous disregard for the vehement objections of the citizenry affected? We all know of cases where this callous disregard has been exhibited, with no way to reverse it except through legislative action and that action has apparently been nullified by the recent Supreme Court decision.

Paragraph XIII details the cumbersome methods of protest now open to challenge of a regulation. This paragraph then goes on to say that passage of this bill would be "very expensive to the taxpayers of the state." This may come as a shock to the AG, but I cannot forbear to point out that it is

the taxpayers who are now paying the very expensive cost of abiding by arbitrary and capricious regulations.

In his whole letter, it is only in paragraph VI that the AG points out, again quite accidentally, an area that should be corrected. Those regulations affecting Fish and Game, and Oil and Gas, and issued as emergency regulations for the short term cure of a particular situation should be exempted from the provisions of this bill. It is interesting to note, however, that no one appeared at the Senate Judiciary hearing on SB 308 with testimony dealing with this aspect of the regulatory process.

In summation, as the AG might say, his letter of February 26th to you gentlemen is shot full of inconsistencies, conjecture and plain scare talk. Somehow I had expected something of a more positive nature to deal with what has become a valid concern to the people in this state who must daily deal with onerous regulation.

Sincerely,



Glenn Hackney
State Senator

cc: The Honorable Clem V. Tallion
President
Alaska State Senate

The Honorable Robert H. Ziegler, Sr.
Alaska State Senate

Keith Specking
Legislative Assistant
Office of the Governor

Don Koch
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Karen Bernstein
Department of Fish & Game