SB

569

The following bill analyses set forth the purpose and intent of the Administrative Regulation Review Committee in organizing and directing subsequent review activity.

1. "An Act relating to the suspension of effectiveness of regulations by the Administrative Regulation Review Committee."

Section 1. Statement of Purpose

As stated, the intent to suspend is to prevent an untoward or inappropriate action by a regulatory agency, during a period of time when the full legislature is not able to act. The enclosed opinions from the Legislative Affairs Agency on the question of suspension and the Supreme Court Decision in State of Alaska vs. A.L.I.V.E. Voluntary point up a delicate but important issue of constitutional law and policy; that of the use of a "legislative veto" to modify executive decisions.

It is imperative that a distinction be made that the proposed suspension process is not a legislative veto, but a unilateral action by a designated body of the legislature to postpone an action, subject to full review by the delegating body.

Section 2. Suspension by Resolution

The attached memorandum from Joe Guthrie, clarifies the method by which the action is accomplished. The existing use of a "committee report" is vague and imprecise.

3. "An Act relating to legislative review of regulations."

Section 1 adds new language to the Administrative Regulation Review Committee enabling statutes clarifying the committees review, suspension and nullification authority.

Section 2. Chapter 99. Miscellaneous Provisions

This section incorporates the standing committee of the legislature as review bodies to ascertain if new and/or proposed regulations are consistent with legislative intent, if they are generated by approved bills. In the event that the regulations are inadequate or inconsistent, it will then be the responsibility of the standing committee to notify the Administrative Regulation Review Committee and request more formal action.

The section is not intended to replace or change the responsibilities of the Administrative Regulation Review but to incorporate the special staff expertise of the standing committees.

Section 3 changes the review period by cognizant groups from thirty to sixty days, and adds the standing committees to the notification process.

The final attachments include two opinions and the A.L.I.V.E. decision for reference and further inquiry. A separate paper analyzing the more fundamental constitutional questions is in preparation.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M April 21, 1981

SUBJECT: Administrative Regulation Review Committee's use of resolutions as a vehicle to suspend regulations

TO: Administrative Regulation Review Committee
Attn: Allen Blume, A.A.

FROM: Joseph A. Guthrie
Legislative Counsel

You have asked why we thought it appropriate that the resolution be the vehicle used by the Administrative Regulation Review Committee to suspend regulations.

Rule 54 of the Uniform Rules, Alaska State Legislature provides that the rules of parliamentary practice comprised in Mason's Manual of Legislative Procedure implement and govern the Uniform Rules of the Legislature in all cases not covered by these Uniform Rules.

The Uniform Rules only cover committee action relating to bills. No procedure is provided for committee action on other matters. Sec. 145 of Mason's Manual of Legislative Procedure, paragraph 2, states that resolutions are used for making declarations, stating policies, and making decisions where some other form is not used. Hence our recommendation that the resolution by used by the Administrative Regulation Review Committee to suspend regulations.

JAG:ljb

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M April 9, 1981

SUBJECT: The Administrative Regulation Review Committee's power to suspend regulations after Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980)

TO: John G. Fuller, Chairman
Administrative Regulation Review Committee

FROM: Joseph A. Guthrie
Legislative Counsel

As you may remember, on February 19, 1980 the Alaska Supreme Court held in State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), 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 violated the procedures specified for law-making 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, operate when concurrent resolutions are adopted. While A.L.I.V.E. Voluntary, supra, was concerned with the annulment, and not with the suspension, of regulations the Court referred to the suspension power in a footnote on p. 778 of the opinion in the context of discussing what the legislature could not do. The Court stated that if it approved the annulment of regulations by concurrent resolution, it would necessarily follow that the legislature could vest a power to disapprove regulations in a legislative committee, or even a single legislator; hence the Court could not approve the exercise of the power of annulment by the whole legislature.

While the power to suspend is not final action like the power of annulment, the language in the A.L.I.V.E. Voluntary case requiring the legislature to act in accordance with the procedures set out in Article II of the constitution would seem to cast into doubt the constitutionality of the use of a concurrent resolution to suspend regulations by legislature or a committee of the legislature.

Please contact me if you have any questions.

JAG:ljb

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM February 28, 1980

SUBJECT: State of Alaska v. A.L.I.V.E. Voluntary

TO: Representative Nels A. Anderson, Jr.
House Majority Leader

FROM: Billy G. Berrier
Director
Division of Legal Services

You have asked my comments on the decision of the Supreme Court in the case of State of Alaska v. A.L.I.V.E. Voluntary, (File No. 3670). A copy of the decision is attached.

The case concerns a regulation relating to games of skill and chance annulled by the legislature. The authority for annulment was AS 44.62.320(a) which provides:

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

The Administrative Procedure Act was adopted by the First State Legislature in 1959. This Act provided, among other things, for the procedure by which regulations of agencies or departments are promulgated and the section was enacted as part of that procedure.

The Court held, with a majority opinion of three justices and a strong dissent by two justices, that regulations could not constitutionally be annulled by concurrent resolution since a resolution is not enacted in accordance with the requirements in Article II of the Constitution for adoption of law. The result, of course, is a non sequitor since the majority opinion avoided addressing the difference between regulation and law and finding that despite the difference, the enactment procedures applied. They, therefore, assumed the middle term of the syllogism and rambled widely to provide a substitute for the missing logic. Various cases were cited, only one of which was relevant and that one is no longer good law in its own jurisdiction.

For this reason, it is very difficult to determine the effect of the decision.

The holding is explicit that regulations may not be annulled by concurrent resolution. Although it is not explicitly stated, there is a clear implication that annulment by bill is constitutional.

Beyond that, the Court made several statements which do not appear necessary to the holding in this case. Much of this dicta is in sweeping terms. It casts doubt over substantial areas and, since the reasoning is essentially stream of consciousness rather than coherent, gives only minimal clues concerning the legal status of these areas.

Essentially the areas affected fall into two classes

(1) regulations and legislative oversight of regulations; and

(2) other areas of law where concurrent resolutions are used to provide legislative oversight.

On regulations the majority opinion states broadly:

> "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.
>
> * * *
>
> "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."

The case law on regulations which the majority opinion cited is not helpful. One of the cases is on point but is no longer good law in its own jurisdiction, the second is a trial court decision and the last is a federal case where the question of a one-house veto was present but not reached. The discussion of this last case illustrates the difficulty in following the reasoning in the majority opinion. The Court referring to the United States Circuit Court decision in Atkins v. United States, 556 F2d 1028 (1977) said:

> 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, and annulling any one of them effects a change in the law.

The connection and logic totally escape me.

In its discussion of delegation of power to annul regulations, an issue injected into the opinion since no delegation is involved in the case before the Court, the opinion is even less helpful. The majority opinion observes:

> "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 committee, 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."

Perhaps the second point made by the majority opinion in discussing the desirability of legislative oversight of administrative regulations gives the best clue. The opinion stated:

> 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.

It should be pointed out that the facts concerning the annulment which was the subject matter of the case do not support a conclusion that the annulment resulted from "secretive, poorly informed and politically unaccountable legislative action" but that, of course, is not material.

It is my conclusion that any annulment of regulation other than by law would be unconstitutional under this case. Although the question is not discussed since it is not relevant to the case, it is very clear that regulations which have the effect of law require statutory authorization and the legislature can withdraw the authorization or establish standards in whatever degree of specificity the legislature desired. Since in case of conflict between statute and regulation the statute controls, it is also clearly permissible to make the substantive statutes detailed thereby leaving less or no areas which must be dealt with by regulations. This latter course, however, involves a loss of flexibility and administrative expertise.

It appears that any form of legislative oversight of administrative regulations would be regarded with suspicion by the court. However, devices such as providing that no regulation can become effective until it has been before the legislature in session for a set time or even a provision that no regulation may become effective unless approved by law are not clearly precluded.

In Plumley v. Hale, 594 P.2d 497 (Alaska 1979), our Court discussed the question of non-retroactive treatment in civil cases. The Court in that case stated:

> In accord with United States Supreme Court precedent, we have previously identified four conditions indicating the propriety of non-retoractive treatment in civil cases: 1) the holding is one of first impression, or overrules prior law, and was not foreshadowed in earlier decisions; 2) there has been justifiable reliance on an alternative interpretation of the law; 3) undue hardship would result from retroactive application; and 4) the

> purpose and intended effect of the holding is best accomplished by prospective application.

The case concerned approval of free conference committee reports without a recorded roll call vote. The Court held the criteria to be satisfied and the decision to be prospective only. In my opinion the facts here, while not as compelling as the facts in Plumley, would lead to a conclusion that annulment of regulations which occurred prior to this case are not affected by the case.

The second major problem area is legislative oversight exercised by concurrent resolution in other areas than regulation oversight. The majority opinion made a very broad statement saying:

> 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.

(The dissenting opinion quite correctly pointed out this is not the question at all. Justice Boochever said

> 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.

This view will be significant in subsequent cases which concern the use of concurrent resolutions in context other than annulment of regulations placing as it does the issue before the Court in focus.)

The majority opinion went on the say:

> Of course, when the legislature wishes to act in an advisory capacity if 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.

While the dissent noted that numerous other statutes provide some specific legislative review function by concurrent resolution, the majority opinion does not specifically address this. The sweeping generality of the majority opinion clouds, and on its face forbids, these other functions.

These include:

1. AS 18.45.025 -- Approval of facilities siting permit for nuclear facilities.

2. AS 18.65.060 -- Disapproval of regulations relating to compilation of criminal justice information and release of this information.

3. AS 28.05.021 -- Approval of compacts with other states relating to motor vehicle registration and driving licenses.

4. AS 28.15.141 -- Approval of regulations relating to classification of drivers licenses.

5. AS 28.15.081 -- Approval of regulations relating to drivers license examination.

6. AS 35.10.080 -- Approval of physical facility procurement and planning policy.

7. AS 37.05.280 -- Approval of leases by the state with a rental in excess of $12,000. (While this has general application, it was adopted as part of and specifically relates to construction of public buildings by ASHA for lease to the state and is necessary for the validity of the revenue bonds issued by ASHA.)

8. AS 37.12.080 -- Approval of investments in a single project or to a single applicant by Alaska Renewable Resources Corporation if the investment exceeds $1,500,000 or five percent of the resources of the corporation.

9. AS 38.05.037 -- Disapproval of zoning by the division of lands in the unorganized borough.

10. AS 38.05.182 -- Disapproval of a determination by the Commissioner of the Department of Natural Resources that the taking of royalty on natural resources in money rather than in kind is in the best interests of the state.

11. AS 38.05.065 -- Approval of disposition of oil and gas and contracts for sale of state owned royalty gas or oil.

12. AS 39.23.080 -- Approval of salary commission recommendations. (This is now repealed but until the pay bill this year went into effect, it was the basis on which higher government officials, including the governor, legislators and judges, were paid.)

13. AS 44.55.110 -- Approval of Alaska Power Authority plans. This approval is a specific condition on bonding.

14. AS 44.57.210 -- Approval of projects of the Alaska Toll Bridge Authority. This approval is required before bonds may be issued.

15. AS 46.03.758 -- Disapproval of regulations establishing civil penalties for discharge of oil.

16. AS 46.40.080 -- Approval of Alaska coastal management programs.

While all of these are clouded by the language in the majority opinion, that language is clearly dicta except on the point of annulment of regulations. In my opinion, an attempt to determine whether in later cases the court would follow the broad sweep in the instant case, narrow that sweep depending on the issue before it, or even confine the case to its facts would be pure speculation. Courts have frequently done all three. The majority opinion with its conclusionary approach unsupported by a coherent rationale is of little assistance in determing the scope of the opinion.

Earlier in the opinion, I discussed retro-activity as it applied to regulations annuled by concurrent resolution before the opinion. There is an even stronger case for holding that retroactive application cannot be given to a decision in the areas where annulment of regulations is not in question.

I am, however, very distrubed by the possibility that a future decision in this area could be retroactive to the date of this decision based on a finding by the Court that this decision "clearly foreshadowed" a subsequent decision that resolutions could not be used as prescribed in these statutes. I do not think this would be the decision since certainly at the time of enactment of the laws referred to there was no foreshadowing and bringing all legislative action to a halt in areas of major concern to the state while the legislature re-wrote the law in these areas is certainly not reasonable.

Since the alternative would be to halt, among other things, power development, coastal zone management, and oil and gas sales based on a possibility that the Court will look on legislative oversight in these areas as unfavorably as it does on legislative oversight of regulations, I recommend continuing to operate within the statutory framework now established until the Court, by a subsequent decision, clarifies its position.

I would also recommend that the legislature consider the question of what options are open to it to meet the serious problems created by the case.

BGB:jdn

LB 569

18 May 1981

Administrative Regulation
Review Committee
Pouch V, State Capitol
Juneau, AK 99811

The Hon. Tim Kelly
Chairman
Senate Committee on Rules

Dear Mr. Chairman:

In the past months of this legislature, the Administrative Regulation Review Committee has undertaken an examination of the powers and authorities left to it subsequent to the Supreme Court decision on State of Alaska vs. A.L.I.V.E., Voluntary.

As a result of our investigations it is the position of the Committtee that clarification of the rules of procedure; description of the sequences of the review function; and modification of portions of the Administrative Procedure Act are in order to properly address a regulation review program.

Accordingly, the Administrative Regulation Review Committee submits the attached bill for "An Act relating to administrative regulations."

Sincerely,

Jack Fuller

Rep. Jack Fuller
Chairman
Administrative Regulation
Review Committee