

SJR

40

STATE OF ALASKA THE LEGISLATURE

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JUNEAU, ALASKA 99811
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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary
" "

5-9-86

5-9-86

8:00 AM

1:30 pm

Original sponsors: P.Fischer, Fahrenkamp,
Coghill and DeVries

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IN THE SENATE

BY THE JUDICIARY COMMITTEE

HOUSE CS FOR SENATE JOINT RESOLUTION NO. 40 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitu-
tion of the State of Alaska relating to
annulment of regulations by the legisla-
ture.

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

* Section 1. Article II, Constitution of the State of Alaska, is amend-
ed by adding a new section to read:

SECTION 22. ANNULMENT OF REGULATIONS. The legislature by con-
current resolution may annul a regulation adopted by a state depart-
ment or agency. The annulment of the regulation is effective thirty
days after the date the concurrent resolution is approved by both
houses unless the concurrent resolution specifies a different date.
The concurrent resolution requires three readings in each house on
three separate days, except that it may be advanced from second to
third reading on the same day by concurrence of three-fourths of the
house considering it, and approval by a majority vote of the member-
ship of each house. The yeas and nays on final passage shall be
entered into the journal.

* Sec. 2. The amendment proposed by this resolution shall be placed
before the voters of the state at the next general election in conformity
with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
tion laws of the state:

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

May 8, 1986

Honorable M. Mike Miller
Chairman
House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Re: SJR 40 (constitutional
amendment on annulment of
regulations)
Our file: 66-3-86-0493

Dear Representative Miller:

I understand that Senate Joint Resolution No. 40, proposing an amendment to the Alaska Constitution, is on your committee's agenda for tomorrow. This letter is to express the Department of Law's opposition to that resolution. If the resolution is passed, that proposed amendment would hit the voters for the third time in six years.

BRIEF STATEMENT

Essentially, the Department of Law's position is that:

1. In 1980, the voters rejected a virtually identical constitutional amendment by a substantial margin -- 82,010 to 58,808. In 1984, they even rejected an improved version (improved in terms of accountability to the public). We should assume that the voters knew what they were doing.
2. The legislature does not need this shortcut method to perform its proper oversight function.
 - (A) The Alaska Administrative Procedure Act includes provisions giving multiple notice to the legislature and enabling legislators to participate in the regulations-adoption process.
 - (B) If an executive-branch agency, in adopting a regulation, goes in a direction that is not supported by the current legislature, the legislature may legislate further -- enact guidelines,

limitations, prohibitions.

3. A concurrent resolution, the vehicle proposed by this resolution to annul administrative regulations, is not covered by the constitutional and other provisions applicable to bills, which provisions tend to assure protection of and accountability to the public.

4. An annulment resolution's bare negative statement does not afford the executive-branch agency responsible for executing the law any guidance in performing its constitutionally mandated duties.

DISCUSSION

The amendment proposed by SJR 40 is virtually identical to the Eleventh Legislature's CSHJR 82 am (1980 Legislative Resolve No. 5). That amendment was rejected by the voters on November 4, 1980 by a vote of 82,010 to 58,808. That is a substantial margin, and we should assume that the voters knew what they were doing. They again rejected the amendment in 1984 -- in the form of the Thirteenth Legislature's SCS HJR 5(Jud) (1983 Legislative Resolve No. 15) -- even though it contained provisions for a deferred effective date, three readings on separate days, and recording in the journal the yeas and nays on final passage. The voters should not be repeatedly subjected to the same ballot issue.

As you know, these proposals for constitutional amendments are intended to reverse the effect of the Alaska Supreme Court's decision in State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (1980). The essence of that court decision, which held invalid the statute (AS 44.62.320(a)) that provided for legislative annulment of administrative regulations by concurrent resolution, is that (1) procedurally and substantively valid regulations have the force of law, (2) an "annulment" of a regulation has the effect of changing the law, and (3) when the legislature changes the law, it must do so by following the constitutional procedures for law-making. Since AS 44.62.320(a)'s concurrent resolutions did not follow the procedures for law-making, the court held that that statute was invalid.

As the court pointed out in Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979), the various constitutional provisions specifying the mechanics of legislating are "designed to engender a responsible legislative process worthy of the public trust." Those provisions are "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively

votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." Id. Those procedures include, for example

- the single subject rule of art. II, sec. 13;
- the descriptive title rule of art. II, sec. 13;
- the requirement of separate readings on separate days, under art. II, sec. 14;
- the requirement that the ayes and nays on final passage be recorded in the legislative journal, under art. II, sec. 14;
- the provisions on gubernatorial veto, under art. II, secs. 15 and 16; and
- the deferred effective date, under art. II, sec. 18.

Those provisions provide for public accountability, public notice, and an opportunity for the public to prepare for the application of new law. Regulations adopted under the Alaska Administrative Procedure Act take effect only after the required public notice, opportunity for public comment, legal review by the Department of Law, and a deferred effective date. Curiously, the current version of this proposed constitutional amendment omits the improvements contained in 1983 LR 15. Neither the constitutional protections nor the corresponding Administrative Procedure Act protections would be applicable to a concurrent resolution's annulment of an administrative regulation.

The proposed constitutional amendment before you is not a "mere adjustment" or technical correction of the constitution. It proposes a substantial realignment of the constitutionally specified powers. Although the adoption of administrative regulations by an administrative agency is considered a "quasi-legislative function," it is an essential part of the executive branch's execution or implementation of a statute. The proposed amendment, by providing for legislative annulment by means of a concurrent resolution, provides for the legislature to make what can be considered executive-branch decisions -- executing a program created by statute. This concentration of power in the legislative branch -- both enacting the program statute and then participating in executing it -- does not reflect a sound policy in the face of the separation-of-powers doctrine as expressed in the Federalist Papers and other writings. That doctrine, of

course, involves a blending or sharing of powers. The purpose is to avoid an inappropriate concentration of power.

In addition, when the legislature makes a simple negative statement by merely annulling a regulation, it interferes with the executive-branch's execution of the statute and offers nothing in its place. For example, the regulation involved in the A.L.I.V.E. Voluntary case was a Department of Revenue regulation dealing with permits for such things as lotteries. It contained several elements: a dollar limitation, a time limitation, and a provision for the cumulative effect of the value of individual prizes in reaching the dollar limitation. When the legislature annuls a provision such as that, is the agency to interpret the annulment as meaning that the dollar limitation is not appropriate, or that the time period is not appropriate, or that the cumulative effect is not appropriate? If the agency concluded that the legislature must have been primarily concerned about the dollar limitation, and adopted a new regulation specifying a different dollar amount, would it be guessing right?

I do not believe that anyone questions the legislature's right to review the executive-branch's execution of the statutes. Nor does anyone question the legislature's right to enact statutes setting guidelines and imposing limitations or prohibitions. We may disagree as to the merit of a particular guideline or prohibition, but not as to the right of the legislature to enact it (subject, in some circumstances, to the applicability of other constitutional provisions).

The Alaska Administrative Procedure Act (AS 44.62) provides a carefully structured system with many opportunities for legislator involvement in the adoption of administrative regulations. If one of those opportunities was missed, or proved otherwise unavailing in some circumstance, further legislation might be appropriate. Such legislation would, of course, supersede the offending regulation.

In Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983), affirming Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), the United States Supreme Court held invalid what has become known as the "legislative veto." The U.S. Supreme Court's decision is consistent with our state supreme court's decision in A.L.I.V.E. Voluntary. Your committee might also find helpful the discussion in the official commentary to the 1981 Revised Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State laws; see, especially, the art. III introductory comments

Hon. M. Mike Miller
House Judiciary Committee

May 8, 1986
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which discuss the legislative/executive/public interrelationship regarding administrative regulations.

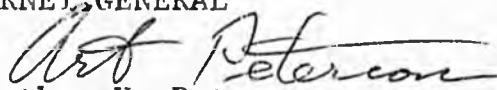
In a nutshell, the problem is that once the legislature passes a statute creating a program or function it is then up to the executive to execute that statute and up to the court system to determine whether the executive has exceeded its authority or otherwise violated the law. This proposed amendment would alter that balance by injecting the legislature into the execution stage of the system.

As the voters have done twice before, your committee should reject this proposed constitutional amendment.

Thank you for this opportunity to comment. I would be happy to discuss the matter further with you at your convenience.

Yours truly,

HAROLD M. BROWN
ATTORNEY GENERAL

By: 
Arthur H. Peterson
Assistant Attorney General

AHP:md

cc: Hon. Paul Fischer
Alaska State Senate

Jim Ayers, Director
Legislative Relations
Governor's Office

STATE OF ALASKA

THE LEGISLATURE

1983

Source

Legislative
Resolve No.

SCS HJR 5 (Jud)

15



Proposing an amendment to the Constitution of the State of Alaska relating to annulment of regulations by the legislature.

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* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

*Rejected by voters
98,856 to 96,174.
/*
52.02%

Alaska State Legislature

Senator Paul A. Fischer
Senate District D
Box 784
Soldotna, Alaska 99669
(907) 262-9420 W
262-9269 H



While in Juneau

Pouch V
Juneau, Alaska 99811
(907) 465-3791

State Senate

To: Representative Mike Miller, Chairman
House Judiciary Committee

From: Senator Paul Fischer *P.F.*

Date: April 25, 1986

Subject: Senate Joint Resolution 40

I urge that you promptly schedule hearings on SJR 40. As you are aware, the legislature lost its power to exercise a veto over agency promulgated regulations in the courts.

This has placed the legislature in the awkward position of passing laws and having an agency write regulations that supersede the law.

An example of this is Senate Bill 51 which was passed into law last year. In Senate Bill 51, the legislature mandated that interest earned on bond proceeds be used for the project for which the bonds were passed. The regulations that were passed far exceed the authority granted by the legislature.

The legislature cannot repeal these regulations without the governors concurrence, even though they supersede the legislature's intent. Under current law, the legislature cannot be guaranteed the laws it passes will be interpreted in the manner in which they were intended.

I realize that this proposed constitutional amendment has been before the voters two times and has failed. In the first vote, in 1980, it failed miserably when placed before the voters, 82,010, (58%) voted against, 58,808 (42%) voted in favor. But in the second vote, in 1984, the numbers changed substantially, 98,855 (52%) voted against, 91,171 (48%) voted in favor.

I believe that the voters were not fully informed of the consequences of current law. There are a myriad of issues that demonstrate the need for this legislative power. I urge your action on this legislation so that the voters will have the opportunity to speak on this issue. I believe if they are properly informed they will grant their elected representatives this power.

I appreciate your consideration of my request.