

HB

420

(11)

HOUSE COMMITTEE REPORT

Date referred: 4/12/88

FURTHER REFERRALS:

DATE: 4-22-88

The Finance Committee has considered HB 420

"An Act relating to adoption of regulations and the presumption of validity of regulations."

RECOMMENDS:

- replace with CS HB 420 (FIN) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published 4/12/88 Law
- zero with analysis

SIGNING DO PASS:

~~_____~~

SIGNING OTHER RECOMMENDATIONS:

 _____ DO NOT PASS
 _____ NO RE
 _____ M. D.

 _____ DO NOT PASS
 _____ DO NOT PASS

 Chairman's signature

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the adoption
of regulations..."
Sponsor: Req. of the Admin. Reg. Rev. Comm.
Requestor: House State Affairs

Agency Affected: Department of Law
BRU: Legal Services

Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Date: February 19, 1988
Approved by Commissioner: Grace Berg Schauble, Atty. Gen. Date: February 19, 1988
Agency: Department of Law

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Original sponsor: Rules/Administrative
Regulation Review Committee

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 420 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to adoption of regulations."

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

8 * Section 1. AS 44.62.040(b) is amended to read:

9 (b) Citation of the general statutory authority under which a
10 regulation is adopted, as well as citation of specific statutory
11 sections being implemented, interpreted or made clear, shall follow
12 the text of each regulation submitted under (a) of this section. The
13 signature of the governor approving adoption of the regulation or
14 order of repeal as required by AS 44.62.065 must accompany the regu-
15 lation or order of repeal.

16 * Sec. 2. AS 44.62 is amended by adding a new section to read:

17 Sec. 44.62.065. GOVERNOR'S SIGNATURE. A regulation or order of
18 repeal is not valid unless the governor has approved its adoption in
19 writing. The lieutenant governor may not accept a regulation or order
20 of repeal for filing under AS 44.62.040 unless it is accompanied by
21 the governor's approval of adoption. This section also applies to
22 regulations and orders of repeal exempted from submission to the
23 lieutenant governor under AS 44.62.040(a). This section does not
24 apply to emergency regulations, emergency orders of repeal, or to
25 regulations or orders of repeal of the

26 (1) Alaska Permanent Fund Corporation;

27 (2) Alaska Public Offices Commission;

28 (3) Board of Fisheries and Board of Game, including regu-
29 lations adopted under AS 16.05.270; and

1 (4) ombudsman.

2 * Sec. 3. AS 44.62.200(a) is amended to read:

3 (a) The notice of proposed adoption, amendment, or repeal of a
4 regulation shall include

5 (1) a statement of the time, place, and nature of proceed-
6 ings for adoption, amendment, or repeal of the regulation;

7 (2) reference to the authority under which the regulation
8 is proposed and a reference to the particular code section or other
9 provisions of law which are being implemented, interpreted, or made
10 specific;

11 (3) an informative summary of the proposed subject of
12 agency action and of the action's intended effect on persons subject
13 to the action; the summary must include a description of the substance
14 of each repealed regulation or group of related regulations and a
15 description of the intended effect of the repeal;

16 (4) other matters prescribed by a statute applicable to the
17 specific agency or to the specific regulation or class of regulations;

18 (5) a summary of the fiscal information required to be
19 prepared under AS 44.62.195.

20 * Sec. 4. The amendments made to AS 44.62.040 by sec. 1 of this Act and
21 AS 44.62.065, enacted by sec. 2 of this Act, apply to regulations and
22 orders of repeal adopted on or after the effective date of this Act. The
23 amendments made to AS 44.62.200 by sec. 3 of this Act apply to notices of
24 proposed action published on or after the effective date of this Act.

Original sponsor: Rules/Administrative
Regulation Review Committee

 New Language
[] Deleted Language
BY THE FINANCE COMMITTEE

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 420 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to adoption of regulations."

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10 regulation is adopted, as well as citation of specific statutory
11 sections being implemented, interpreted or made clear, shall follow
12 the text of each regulation submitted under (a) of this section. The
13 signature of the governor approving adoption of the regulation or
14 order of repeal as required by AS 44.62.065 must accompany the regu-
15 lation or order of repeal.

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18 repeal is not valid unless the governor has approved its adoption in
19 writing. The lieutenant governor may not accept a regulation or order
20 of repeal for filing under AS 44.62.040 unless it is accompanied by
21 the governor's approval of adoption. This section also applies to
22 regulations and orders of repeal exempted from submission to the
23 lieutenant governor under AS 44.62.040(a). This section does not
24 apply to emergency regulations, emergency orders of repeal, or to
25 regulations or orders of repeal of the [of the Dept. of Fish &

26 (1) Alaska Permanent Fund Corporation; Game]

27 (2) Alaska Public Offices Commission;

28 (3) Board of Fisheries and Board of Game, including regu-

29 lations adopted under AS 16.05.270; and

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6 ings for adoption, amendment, or repeal of the regulation;

7 (2) reference to the authority under which the regulation
8 is proposed and a reference to the particular code section or other
9 provisions of law which are being implemented, interpreted, or made
10 specific;

11 (3) an informative summary of the proposed subject of
12 agency action and of the action's intended effect on persons subject
13 to the action; the summary must include a description of the substance
14 of each repealed regulation or group of related regulations and a
15 description of the intended effect of the repeal;

16 (4) other matters prescribed by a statute applicable to the
17 specific agency or to the specific regulation or class of regulations;

18 (5) a summary of the fiscal information required to be
19 prepared under AS 44.62.195.

20 * Sec. 4. The amendments made to AS 44.62.040 by sec. 1 of this Act and
21 AS 44.62.065, enacted by sec. 2 of this Act, apply to regulations and
22 orders of repeal adopted on or after the effective date of this Act. The
23 amendments made to AS 44.62.200 by sec. 3 of this Act apply to notices of
24 proposed action published on or after the effective date of this Act.
25
26
27
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29

FISCAL NOTE

REQUEST:

Revision Date: 4/12/88
Title: An Act relating to adoption of regulations
Sponsor: State Affairs Committee
Requestor: State Affairs Committee

Agency Affected: Office of the Governor
BRU: Executive Operations

Components: Executive Office

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		72.7	75.2	77.6	80.4	83.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT		5.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		77.7	75.2	77.6	80.4	83.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		77.7	75.2	77.6	80.4	83.0
FEDERAL FUNDS						
OTHER						
TOTAL		77.7	75.2	77.6	80.4	83.0

POSITIONS:

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Analysis is attached.

Prepared by: Michael A. Nizich, Director *Mau* Phone: 465-3616
Division: Division of Administrative Services Date: 4/14/88

Approved by Commissioner: [Signature] Date: 4/14/88
Agency: Office of the Governor

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

RECEIVED

APR 15 1988

CONTINUATION OF FISCAL NOTE FOR CSHB 420 (STATE AFFAIRS)

Section 1 of this bill amends AS 44.62.040(b) to include the Governor's signature on regulations. "The signature of the governor approving adoption of the regulation as required by AS 44.62.065 must accompany the regulation."

The addition of the signing of regulations to the Governor's duties could result in some delays in the approval process due to scheduling conflicts.

Section 2 of this bill adds a new section to AS 44.62, "Sec. 44.62.065. GOVERNOR'S SIGNATURE. A regulation or order of repeal is not valid unless the governor has approved its adoption in writing."

The Office of the Governor will need to establish a regulatory review process, which will create the need for an additional Special Staff Assistant who will be charged with research and preparation of a policy review of each regulation referred to the Governor for approval.

Personal Services

Special Staff Assistant - Range 24

	FY 89	FY 90	FY 91	FY 92	FY 93
Salary	56.3	58.3	60.3	62.5	64.6
Benefits	12.7	13.2	13.6	14.2	14.7
Ins.	3.7	3.7	3.7	3.7	3.7
Total:	72.7	75.2	77.6	80.4	83.0

Equipment

Purchase of personal computer, printer, and software, plus required cabling for hookup to mainframe.

FY 89

Total: 5.0

Travel, contractual services, and supply requirements for this position will be absorbed by the Executive Office budget, as will any administrative or clerical support requirements.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 15, 1988

The Honorable Al Adams, Chair
House Finance Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

Re: CSHB 420 (SA) --
administrative regulations

Dear Representative Adams:

I understand that your committee will be considering this bill this afternoon. In connection with that consideration you will find the following two items attached: a fiscal note from the governor's office, and a copy of my April 14, 1988 letter to Senator Hensley regarding additional exceptions that should appear in sec. 2.

For the duplicate senate bill -- proposed CSSB 384 (Jud) -- Senator Hensley has suggested that, on page 1, line 23, the following words be substituted for "of the Department Fish and Game": "promulgated under AS 16.05.251, AS 16.05.255 and under AS 16.05.270 if there is no conflict between and board and the commissioner." As a minor, technical matter, "promulgated" should read "adopted" to be consistent with the rest of the Administrative Procedure Act, and, since the second "under" is intended to have the language regarding a conflict apply only with regard to AS 16.05.270, then the comma in the new language should be deleted and the conjunction "and" should be inserted. As a substantive matter, the reference to the specific statutes is good, but the reference to the conflict between a board and the commissioner (alluding to the text of AS 16.05.270) could perhaps be clarified.

With regard to sec. 1, the necessity of having the governor "approve" adopting of a regulation is certainly not obvious. If the point is merely to assure the governor's accountability for regulations, perhaps that could be more simply and economically achieved by having the new sentence read "The signature of the governor indicating [review] [awareness] [knowledge] of adoption . . ." instead of referring to the governor "approving adoption."

Although it would be best to delete secs. 1 and 2 from the bill altogether, making these four changes would certainly improve them: (1) the change just referred to regarding approving adoption; (2) the clarification of Senator Hensley's amendment regarding fish and game regulations; (3) appropriately

The Honorable Al Adams, Chair
House Finance Committee

April 15, 1988
Page 2

expanding the list of exceptions as indicated in the attached letter from me to Senator Hensley; and (4) the deletion of the two references to orders of repeal that were added to the existing sentence of AS 44.62.040(b) in sec. 1 of the proposed CSSB 384(Jud).


With regard to sec. 3, a more-or-less technical change to page 2, line 7, would be helpful. After the word "regulation," insert "or group of related regulations." This would take care of the situation where an entire article or chapter is being repealed, and little would be gained by describing each individual regulation. For example, suppose that a chapter of loan regulations were being repealed, and sec. 10 deals with applications, sec. 20 perhaps sets some time limit for the agency's response, sec. 30 deals with a request for a hearing, etc. The repeal of the entire chapter could be easily described, without burdening the reader with a description of each individual section. I believe that Senator Hensley and his assistant, Dave Gray, have agreed to this amendment.

Perhaps I should also mention that, when the Legislative Affairs Agency Legal Services Division attorney was preparing the proposed CS for SB 384(Jud), she included references to orders of repeal at appropriate spots (and, inadvertently, at the two inappropriate spots mentioned above) in secs. 1 and 2. I bring this to your attention so that a specific decision can be made on the insertion of those words and so that they are not either inadvertently overlooked in this version of the bill or inappropriately included. The policy question involved is whether it is considered necessary or advisable to have the governor approve each repeal of a regulation. Personally, I do not think that it is. But I cannot speak for the sponsors of this bill.

Sincerely yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:


Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:nb

cc w/o enc.: The Honorable Willie Hensley, Chair
Administrative Regulation Review Committee
Alaska State Legislature
Bob Evans, Legislative Liaison
Governor's Office

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

April 14, 1988

P O BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600

Senator Willie Hensley, Chair
Administrative Regulation Review
Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: CSHB 420 (SA) --
administrative regulations

Dear Senator Hensley:

When testifying on this bill before the House State Affairs Committee a couple of days ago, I mentioned that, if Sec. 2 is to be retained, the exception at page 1, lines 22 and 23, should be expanded. After the hearing, your assistant, Dave Gray, phoned to ask me for a list of additional kinds of regulations that should be excepted from the general requirement of having the governor's signature. Here is a quick list:

1. regulations that implement federal/state programs (e.g., aid to families with dependent children);
2. regulations such as safety standards (e.g., highways and airports) imposed as a condition of federal aid;
3. University of Alaska regulations, adopted by the Board of Regents;
4. ombudsman regulations;
5. occupational licensing regulations adopted by the 18 citizen boards appointed by the governor;

6. regulations of the Alaska Public Offices Commission, a body charged with regulating certain activities of politicians, including the governor;

7. regulations of the following multi-member boards, commissions, authorities, etc., where the intent of the enabling legislation was clearly to provide for multi-person decision making:

- A. Alcoholic Beverage Control Board;
- B. Alaska Industrial Development and Export Authority;
- C. Alaska Housing Finance Corporation;
- D. Alaska State Building Authority;
- E. Alaska Public Utilities Commission;
- F. State Board of Education;
- G. Professional Teaching Practices Commission;
- H. Board of Fisheries and Board of Game;
- I. Alaska Resources Corporation;
- J. Alaska Oil and Gas Conservation Commission;
- K. Medicaid Rate Commission;
- L. Permanent Fund Corporation;
- M. Municipal Bond Bank Authority;
- N. Alaska Public Broadcasting Commission;
- O. Alaska Railroad Corporation;
- P. Parole Board;
- Q. Commercial Fisheries Entry Commission;
- R. Alaska Commission on Postsecondary Education;
- S. Workers' Compensation Board.

I have not had time to check all of the relevant statutes pertaining to each of the items in this list, but I think that the point is clear. There are certain functions and certain kinds of decisions for which it would not be appropriate to have a statute formally requiring gubernatorial approval in each instance. There undoubtedly are more than I have been able to come up with in this quick list.

I would renew my suggestion that secs. 1 and 2 be deleted from this committee substitute.

I have just received word that the Senate Judiciary Committee will be taking up SB 384 (identical to HB 420) this

Senator Willie Hensley, Chair
Administrative Regulation Review Committee

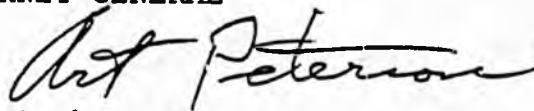
April 14, 1988
Page 3

afternoon. Therefore, I am sending Senator Kerttula a copy of
this letter.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:



Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:jf

cc: The Hon. Jay Kerttula, Chair
Senate Judiciary Committee
Alaska State Legislature

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 420

This bill amends the Administrative Procedure Act in three important respects. One, Sections 1 and 3 of the bill provide that a regulation or order of repeal would not be valid unless the Governor has approved its adoption in writing. This new requirement for the signature of the Governor approving adoption or repeal of a regulation will necessarily impose an additional administrative burden on the Office of the Governor. Because costs will be involved in complying with this section, a fiscal note analysis should be requested from the Office of the Governor.

Two, Section 5 provides that the legislature may, by special concurrent resolution, determine that a regulation is not within the procedural or substantive authority delegated to an agency and disapprove its enforcement. In such event, the burden is upon the agency in any proceeding for judicial review or for enforcement of the regulation to establish whether the regulation objected to is within the procedural and substantive authority delegated to the agency. This section will undoubtedly result in litigation to test the validity of a regulation that has been disapproved by concurrent resolution. It is not possible to quantify the extent of such litigation, given the variety and breadth of activities, public and private, that are subject to state regulation. However, to the extent that such litigation becomes extensive, or threatens to cripple a vital state program, the department may be forced to request funds at a later time.

Three, Section 6 provides that an information summary of the effect of the proposed agency action on persons subject to or affected by the proposed action be included with the notice of proposed adoption, amendment, or repeal of a regulation. The summary must include a description of the substance of each repealed regulation and a short analysis of the effect of the repeal. Although the Department of Law adopts few regulations of its own, the department reviews all regulations prior to their filing by the Lieutenant Governor, and it sometimes assists other departments in drafting their regulations. It is anticipated that the department will receive innumerable requests from other agencies for advice about the sufficiency of their efforts to comply with the requirements of this section for a substantive analysis on the effects of proposed regulatory actions. These requests will probably result in the department's regulations and legislative drafting staff, as well as the department's individual agency attorneys, becoming more swamped than they already are.

Because the workload, and resulting cost to the department, that will occur if this bill is enacted cannot be accurately predicted, fiscal note funds are not being requested at this time. Such a request may become necessary in the future, and the potential for additional Department of Law costs should be noted while the bill is being considered.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 19, 1988

SUBJECT: Sectional analysis of SB 384 & HB 420
(Adoption of regulations)

TO: Senator Willie Hensley, Chairman
Administrative Regulation Review Committee

FROM: Teresa B. Cramer *TC*
Legislative Counsel

You have requested a sectional analysis of SB 384 and HB 420 (Adoption of regulations and presumption of validity of regulations).

Sections 1 and 3 require that, under the Administrative Procedure Act, the governor approve a regulation before it becomes valid. The requirement extends to regulations that do not have to be submitted to the lieutenant governor under AS 44.62.040(a). That subsection exempts from filing a regulation that

- (1) establishes or fixes rates, prices or tariffs;
- (2) relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals; or
- (3) is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

Under sec. 7 of the bill, regulations that were adopted before the effective date of the Act would remain valid without the governor's signature.

Senator Willie Hensley
Pate 2
February 19, 1988

Section 2 requires that the drafting manual for administrative regulations contain instructions and examples for summaries of proposed actions.

Sections 4 and 5 address the presumption of validity of regulations. Under AS 44.62.100(c), added by sec. 5, the legislature can, by special concurrent resolution, remove the presumption of validity of a regulation if the legislature finds that the regulation is not within the procedural or substantive authority delegated to the agency. This section raises constitutional issues.

The section permits the legislature to change the legal standard under which a hearing or case will be decided by resolution. The Alaska Supreme Court held, in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), that the legislature may not use resolutions to affect the rights of others. The court stated, at 773 that

Of course, when the legislature 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.

Section 5 permits the legislature to take a binding action by resolution and therefore probably violates the provisions of the state constitution that set out requirements for enactment of bills, Article II, sections 13 - 17.

Section 6 changes the requirement concerning notice of proposed action which an agency is required to give before adopting, amending, or repealing a regulation. The section requires the agency to summarize the effect of the proposed change. For a repealed regulation, the agency must describe the substance of the regulation and analyze the effect of the repeal. Under section 7, the new requirement applies to notices of proposed actions published on or after the effective date of the Act.

Section 7 addresses the application of sections 1 and 3 and of section 6, as discussed above.

If I may be of further assistance, please advise.

TC:bb
wkb3/001

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

February 18, 1988

Honorable Fran Ulmer
Chair
House State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99801

Re: HB 420 (and SB 384) --
adoption of regulations
and presumption of val-
idity of regulations

Dear Representative Ulmer,

A copy of my February 8, 1988 letter to Senator Jay Kerttula, chair of the Senate Judiciary Committee, regarding this bill, is attached. As I mentioned there, this bill (identical bills in the house and senate) presents some interesting issues.

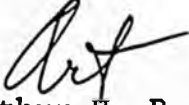
At the Senate Judiciary Committee hearing, February 9, 1988, Dave Gray, assistant to Senator Hensley and the Administrative Regulation Review Committee, mentioned that there were two basic parts to the bill: provisions dealing with the executive branch itself and provisions for the legislature. Although the comments in my letter to Senator Kerttula are not organized along those lines, I have offered a section-by-section commentary instead.

The gist of my comments is that the bill raises significant constitutional and practical problems, and it would enact legislation on points that could adequately be covered by a letter or phone call to the regulations attorney in the Department of Law. HB 420 (and its Senate counterpart) evidences a general frustration with the details of government -- in this instance, administrative regulations -- and with the tension built into the three-branch system of American government. If we can identify the precise problem sought to be solved by this bill, and if you should wish it, I would be happy to work with you and your committee in drafting any necessary legislation. However, as I mentioned in my letter to Senator Kerttula, there is no adequate, constitutional shortcut. Although litigating some of these issues would be fun for us lawyers, I would rather avoid the costly litigation that some statutory proposals invite.

You have indicated that it might be helpful if I were to attend your committee's hearing on this bill, scheduled for tomorrow. Thank you for this opportunity to comment.

Yours truly,

Grace Berg Schaible
Attorney General

By: 
Arthur H. Peterson
Assistant Attorney General

GBS:AHP:cb

Attachment

cc w/o att.: Hon. Willie Hensley
Chair
Administrative Regulation Review Committee
Alaska State Legislature

Hon. Stephen McAlpine
Lieutenant Governor

Bob Evans
Legislative Liaison
Office of the Governor

Alaska State Senate

P.O. Box V
Juneau, AK 99811
Phone: (907) 465-2444
465-3862/465-4923

P.O. Box 1069
Kotzebue, Alaska 99752
(907) 442-2494



Senate Finance Committee
State Affairs Committee
Vice-Chair, Rules Committee
Chair, Administrative Regulation Review

William L. Hensley

Sectional Analysis of Proposed CS for HB 420

Sections 1 and 2 require that, under the Administrative Procedure Act, the governor approve a regulation before it becomes valid. The requirement extends to regulations that currently do not have to be submitted to the lieutenant governor under AS 44.62.040(a). That subsection exempts from filing with the lieutenant governor a regulation that

- (1) establishes or fixes rates, prices or tariffs;
- (2) relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals; or
- (3) is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

Specifically exempted from the requirement of the governor's approval are emergency regulations and regulations of the Department of Fish and Game.

Section 3 changes the requirement concerning notice of proposed action which an agency is required to give before adopting, amending, or repealing a regulation. The section requires the agency to summarize the effect of the proposed change. For a repealed regulation, the agency must describe the substance of the regulation and analyze the effect of the repeal.

BACKGROUND

A. HISTORY OF LEGISLATIVE VETO OF REGULATIONS IN ALASKA.

- 1975 Administrative Regulation Review Committee approved by legislature with power to review regulations and recommend annulment under AS 44.62.320.
- 1977 Legislature passed AS 46.03.758, authorizing DEC to prepare a schedule of penalties for oil spills -- several oil suppliers strongly opposed resulting regulation. The Regulation Review Committee's recommendation of annulment and the probable success of an anticipated annulling resolution by the legislature caused the Governor to exempt discharges of 5,000 barrels.¹

¹See David S. Neslin. "Quis Custodiet Ipsos Custodes? (Who guards the guardians?): Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act", 57 Washington Law Review 691 (1982). That article uses this instance to provide an example of the dangers of legislative veto mechanisms: ". . .[they are] susceptible to abuse by powerful legislators with
(Footnote Continued)

1978 Legislature added power of suspension to the Regulation Review Committee. Requires an affirmative vote by two-thirds of committee members to suspend effectiveness of interim regulations until 30 days after legislature reconvenes.

1980 The Alaska Supreme Court in State v. A.L.I.V.E. VOLUNTARY held that the ability of the legislature to annul regulations by concurrent resolution was unconstitutional.² (See Appendix 1 for a copy of the decision).

A.L.I.V.E., a political action committee for the Teamsters' Union, had sued the state, alleging that the Department of Revenue's denial of a

(Footnote Continued)
parochial interests and by influential interest groups acting contrary to the public interest. Because of the informal nature of this process and the tendency of agencies to accede to committee requests, abuse will be difficult to detect or remedy. Legislative vetoes also facilitate over-involvement by the legislature in the daily administration of agency programs, and allow the committee. . .to narrow the scope of agency discretion. This subverts the more representative and formal statutory process, with its built-in checks and balances. Finally, by avoiding the governor's veto, legislative vetoes reduce the governor's authority and bargaining power with the legislature."

²Alaska v. A.L.I.V.E. VOLUNTARY, Alaska, 606 P.2d 769 (1980).

permit to conduct lotteries was wrongful, partly because the denial was based on a regulation which had been nullified by the legislature. The Court held that legislative annulment of a regulation by concurrent resolution violated Article II of Alaska's Constitution, which requires the governor to have the opportunity to veto any bill before it becomes law. ". . .the annulment provisions...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."³

1980 Constitutional Amendment to allow legislature to annul regulations by concurrent resolution defeated by voters in general election.

1982 Legislature amended Regulation Review Committee powers to allow suspension of regulations with a committee resolution (rather than a committee report). Legislative intent stated that "It is the intent. . .that [suspension powers] be granted to . . .prevent the public suffering

³Id at 777.

harm before the full legislature has the opportunity to annul the regulation by law.

1984 Constitutional Amendment to allow legislature to annul regulations by concurrent resolution defeated by voters in general election.

1986 Constitutional Amendment to allow legislature to annul regulations by concurrent resolution defeated by voters in general election.

B. OTHER LEGISLATIVE OVERSIGHT FUNCTIONS IN ALASKA.

Legislative Budget and Audit⁴ -- A permanent interim committee of the legislature whose powers include the power to "review and approved proposed changes to agency authorized budgets as provided in the Executive Budget Act (AS 37.07)"⁵ Under the Executive Budget Act, the Legislative Budget and Audit Committee can delay a revised program for 45 days, after which time the governor can commence with that activity.⁶

⁴AS 24.20.151 et seq.

⁵AS 24.20.201 (5).

⁶AS 37.07.080(h)(2).

Legislative Council⁷ -- A permanent interim committee and service agency of the legislature whose powers include the power to "execute a program for the oversight of the administration and construction of laws by state agencies and the courts through regulations, opinions & rulings."⁸ The Legislative Council is also specifically authorized in the Constitution to "perform duties as provided by the legislature."⁹ The Legislative Council is also required to annually examine regulations and court opinions to determine whether they properly implement legislative purposes or whether they indicate unclear statutes. The Council is required to submit an annual report to the legislature.¹⁰

Legislative Audit¹¹ -- A permanent staff agency responsible to the Legislative Budget and Audit Committee. Among other duties, Legislative Audit is required to perform performance post-audits of any agency at the request of the Legislative Budget and Audit Committee.¹²

⁷AS 24.20.010 et seq.

⁸AS 24.20.061(C).

⁹Article II, section 12.

¹⁰AS 24.20.065.

¹¹AS 24.20.241 et seq.

¹²AS 24.20.271(3).

Code Revision Commission¹³ -- A permanent commission of the legislature which is required to examine statutes to discover defects in law, review and consider proposed changes recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, etc., and to submit reports and recommendations to the Legislative Council.

Ombudsman¹⁴ -- An office created in the legislative branch which has jurisdiction to investigate the administrative acts of agencies.¹⁵ The Ombudsman is required to report opinion and recommendations to the agency, and then to present the report to the governor, legislature, grand jury, and/or the public.

C. SEPARATION OF POWERS ISSUES.

Any attempt by a legislature to exert influence over the regulatory process raises a major constitutional issue: Does the attempt constitute a violation of the separation of powers doctrine? This issue is resolved by asking whether the legislature is trespassing on the

¹³AS 24.20.075 et seq.

¹⁴AS 24.55.010 et seq.

¹⁵AS 24.55.100.

authority of the executive branch, and whether the attempt involves an improper delegation of legislative authority (i.e. a delegation of the power of the legislature as a whole to a legislative committee).

The Alaska Supreme Court has held that Alaska recognizes the separation of powers doctrine.¹⁶ In Bradner, the legislature, by statute, attempted to require legislative confirmation of executive officers below the level of department head. In finding that action a violation of the separation of powers doctrine, the court found that the appointment of executive officers was an executive function and stated: "In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision." In Bradner, the Court first asked the threshold question of whether the appointment of executive officers is a legislative or executive function.

In A.L.I.V.E., the Alaska Supreme Court held that the legislature cannot exercise its legislative power without following the enactment provisions of the

¹⁶Bradner v. Hammond, Alaska, 553 P.2d 1, 5 (1976).

constitution.¹⁷ (passage by requisite majority of each house; opportunity of governor to veto bill; three readings of a bill, on three separate days, etc.)

The central question in determining whether an action constitutes a violation of the separation of powers doctrine appears to be whether or not the act would be considered a "legislative" act, requiring the governor to have an opportunity of vetoing the act.

The A.L.I.V.E. opinion clearly states that the majority of the Court (Chief Justice Boochever and Justice Connor dissented) considers an annulment of a regulation an exercise of legislative power, and an invalid exercise unless the annulment is achieved through a bill which is subject to the governor's veto. However, the majority opinion does not clarify what other sort of legislative oversight in the regulatory process would be constitutionally valid.¹⁸ In particular, the A.L.I.V.E.

¹⁷Id. at 772.

¹⁸Although it does seem clear that the Court would have considered the delegation of annulment authority to an independent agency to be constitutionally valid. ". . . 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." Id at 777.

decision does not clarify the constitutionality of AS 24.20.225 (the authority of the Administrative Regulation Review Committee to suspend regulations), nor forms of limited legislative vetoes which have been valid in other states.

In some cases decided by other states subsequent to the A.L.I.V.E. decision, there has been some cautious acceptance of a selective legislative veto; a veto of either regulations or other executive branch actions by concurrent resolution, or in some cases by committee action.¹⁹ In other cases, such as the two Kentucky decisions discussed below, there have been allusions to possible gaps in the usual inability of the legislature to veto executive actions.

¹⁹See New Jersey, Pennsylvania, and Virginia cases discussed in text below.

SURVEY OF ALTERNATIVE APPROACHES IN OTHER STATES.

Following is a survey of approaches to the regulatory control or annulment in other states as well as a discussion of court opinions dealing with those approaches.

A. Action By Legislative Committee:

A.1. Veto budget decisions: Invalid in Kentucky.

The Kentucky Supreme Court has held that the power given to the Legislative Research Commission to veto executive decisions concerning the administration of the budget was considered executive in nature and not the subject of proper delegation by the General Assembly.²⁰ However, in that case, the court emphasized the fact that Kentucky's Constitution has an express separation of powers provision (which Alaska's Constitution does not). In addition, Kentucky's Legislative Research Commission was authorized to ". . .conduct while the General Assembly is not in session, any and all business of the legislative

²⁰Legislative Research Com'n v. Brown, Ky, 664 S.W. 2d 907 (1984).

department of government, except for the passage of legislation, which could be conducted. . .if the General Assembly was in session." (A much broader statute that has been attempted in Alaska).

A.2. Disapprove regulations: Invalid in West Virginia, New Hampshire.

In West Virginia, the Court struck down an attempt by the legislature to allow a review committee to disapprove regulations holding that the legislature cannot disapprove or amend regulations unless by legislative enactment.²¹ In New Hampshire, the Supreme Court issued an advisory opinion that a proposed statute which would allow committees of the legislature to disapprove rules was unconstitutional.²²

A.3. Approval of Department of Administration regulations: Valid in Kansas.

In a challenge to the State Finance Council (which is made up of the governor and eight legislators and which

²¹Barker v. Machin, W.Va., 279 S.E.2d 622 (1981).

²²Opinion of the Justices, N.H. 431 A.2d 783 (1981).

has authority over the Department of Administration: fixing compensation, approving regulations, etc.), the Kansas Supreme Court held the council's authority constitutional, holding that a strict application of separation of powers doctrine was not appropriate in the modern context of complex state government operations.²³ (Case contained in Appendix 2). It might be noteworthy that the jurisdiction of the Kansas State Finance Council is limited to the Department of Administration, and that possible interference by the legislature with executive functions are also limited to that department.

A.4. Suspension of Regulations by Legislative Committee:

There is statutory authority for a legislative committee to suspend regulations in Alaska, Alabama, Connecticut, Illinois, Minnesota, Nebraska, Nevada, and South Dakota. ²⁴

²³Schneider v. Bennett, 219 Kan. 285, 247 P.2d 786 (1975).

²⁴Philip P. Frickey. The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota. 70 Minnesota Law Review 1237 (1986).

In Alaska, AS 24.20.445 authorizes the Administrative Regulation Review Committee to suspend the "effectiveness of the adoption of or amendment to a regulation adopted after adjournment of the previous regular session of the legislature, until 30 days after the legislature reconvenes." The statute allows suspension with an affirmative vote of two-thirds of the committee members, and once a resolution to that effect is filed with the lieutenant governor. The committee has not attempted to suspend regulations to this time.

Since the procedure authorized in the Alaska statutes does not involve an actual annulment of a regulation without giving the governor the opportunity to veto, AS 24.20.445 skirts the major problem the Court pointed to in the A.L.I.V.E. case; the violation of Article II of the Constitution. Under A.L.I.V.E., annulment of a regulation is a "legislative" action, requiring passage by both bodies and the opportunity for the governor to veto. The question is whether the Court would also find a suspension of a regulation by the Regulation Review Committee a "legislative" action, having the effect of law. If the suspension was considered a "legislative" action then any action by the committee would be an unconstitutional violation of the separation of powers. On one side it could be said that suspension is not a legislative action; it does not have the force and effect

of law since it is only temporary. On the other side it could be said that suspension is worse than annulment since it leaves agencies in regulatory limbo until the legislature convenes; and thus, in effect, suspension does have the force of law. From previous court decisions, it is not clear how the court would rule on this issue.

B. Annulment authority in independent agency.

B.1. Statutory authority in California.

California passed legislation authorizing an Office of Administrative Law (OAL) in 1980. The OAL is an independent agency which has power to disapprove rules subject to the governor's veto. "The OAL is the best financed and the most active reviewing body in the states. The legislature appropriated \$1.4 million for the OAL's first-year operating budget and another \$2.1 million to defer the compliance of state agencies. As of March, 1981, the OAL had a staff of 26, including seven attorneys. . . During its first year of operation, July 1980 to June 1981, the OAL disapproved 27% of all proposed rules."²⁵

²⁵Neslin, 57 Washington Law Review 670.

B.2. Mentioned as a constitutional alternative in the A.L.I.V.E. decision.

In A.L.I.V.E., the Court stated ". . .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 actions would not govern its functions."²⁶

C. Selective veto by legislature as a whole (no veto power by governor):

C.1. Veto of sentencing guidelines adopted by Sentencing Commission: Narrowly upheld by Pennsylvania Supreme Court.

In a plurality opinion, the Pennsylvania Superior Court held that legislative veto of sentencing guidelines were constitutional.²⁷ (Case contained in Appendix 3). Four justices joined in an opinion which held that the General Assembly's rejection of the guidelines was not a

²⁶A.L.I.V.E., 606 P.2d 769, 777.

²⁷Com. v. Kuphal, Pa., 500 A.2d 1205 (1985).

violation of the separation of powers because it was not an "exercise of legislative power". That opinion stressed that the guidelines which were rejected were only proposed and not permanent (thus the effect of rejection did not have the force of law), and also that the "legislative power" was exercised when the enabling legislation was passed and gone to the governor -- since the governor had the opportunity to veto, there were no separation of powers problems.²⁸ (Four justices dissented, one justice concurred in part, and dissented in part).

C.2. Public Building Authority cannot build any project not specifically passed by General Assembly: Upheld in Virginia.

²⁸The Alaska Supreme Court rejected a form of this argument in A.L.I.V.E. where the legislature was arguing that since the bill which authorized the legislature to annul regulation by resolution was approved by the governor, that freed the legislature ". . . of the constitutional restraints which would otherwise govern its actions. 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." Of course, the Pennsylvania General Assembly's legislation which included a veto provision for sentencing guidelines is distinguishable from, and much more narrowly drawn than the Alaska Legislature's legislation which authorized a legislative veto for all regulations.

The Virginia Supreme Court held that the provision in the Public Building Authority Act that the Authority could not undertake any project not specifically included in a bill passed by the General Assembly was not a violation of the separation of powers.²⁹ (Case contained in Appendix 4). The Court cited the New Jersey case (Enourato) discussed below, and quoted an early Virginia case³⁰ (which in turn quoted Story's Const.): ". . .It is not meant to affirm that they [the three departments of government] must be kept wholly and entirely separate and distinct, and have no common link or dependence. . .The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments.

C.3. Building authority must obtain legislative approval of projects over \$100,000: Upheld in New Jersey.

See Enourato, discussed in "C.4." below.

²⁹Baliles v. Mazur, Va, 297 S.E. 2d 695 (1982).

³⁰Winchester & Strasburg R.R. Co. v. Commonwealth. 106 Va 264, 270 55 S.E. 692, 694 (1906).

C.4. Building authority must obtain approval of presiding officer of each house for every lease agreement with state agency: Upheld in New Jersey.³¹

In Enourato, the New Jersey Supreme Court held that legislative veto provisions in the New Jersey Building Authority Act were constitutional.³² (Case contained in Appendix 5). Under the Act, the Authority must obtain a concurrent resolution of the legislature within 45 days of the submission of a project whose estimated cost exceeds \$100,000 and also must have the approval of the presiding officer of each house of the legislature of every lease agreement between the Authority and a state agency. The court stressed the limited nature of the veto power, the fact that it is "only one part of the broader statutory

³¹Enourato is an clarification of the limits imposed on the New Jersey General Assembly in another case decided by the New Jersey Supreme Court on the same day. General Assembly of State of New Jersey v. Byrne, N.J. 448 A.2d 438 (1982). In Byrne, the court held that the Legislative Oversight Act which had passed over the governor's veto and which allowed the legislature to veto virtually every rule proposed by any state agency was unconstitutional. However, the court mentioned possible limits on its holding, stating: "Our holding here does not foreclose all legislative veto provisions. Where legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto can pass constitutional muster."

³²Enourato v. N.J. Building Auth., N.J., 448 A.2d 449 (1982).

scheme ensuring fiscal prudence", that it offers "little potential for interference with executive functions or alteration of the statute's purpose."

D. Sunset of regulations. Statutory authority in South Dakota.

South Dakota statute SDCL 1-26B terminates the authority of state agencies to promulgate regulations and voids existing regulations on a schedule. The statute also provides for interim legislative committees to review each agencies' regulations during the interim preceding the scheduled year for termination.

One possible version of sunseting regulations which was not used by any of the states surveyed might be to authorize regulatory powers to an agency for only a very short term -- for example until the next legislative session; in effect, only authorizing an agency to promulgate temporary regulations. During the next legislative session, the legislature would be in a position to either force the agency to issue regulations more in line with legislative intent or extend the authorization for the regulations for a longer period of time.

E. Veto of regulation by governor. Statutory authority in Iowa, Louisiana, Wyoming. Recommended by the Model State Administrative Procedure Act (1981).³³

Under the Alaska Administrative Procedure Act, the Department of Law has the authority to disapprove a regulation after determining its: 1) legality, constitutionality and consistency with other regulations; 2) the existence of statutory authority [note this allows the Department of Law broad discretion of interpretation of statutory limits] and the correctness of the required citation of statutory authority following each section; 3) its clarity, simplicity of expression, and absence of possibility of misapplication; 4) compliance with the drafting manual for administrative regulations.³⁴

F. Approval of regulation by governor. Statutory authority in Hawaii, Indiana, Nebraska, Wyoming.³⁵

Under the Alaska Administrative Procedure Act, the Lieutenant Governor files regulations.³⁶ It should be

³³Id at 671, 679.

³⁴AS 44.62.060(b)

³⁵Neslin, 57 Washington Law Review 669, 671.

³⁶AS 44.62.040.

noted that the Lieutenant Governor has no discretion to approve regulations, other than he may not accept a regulation for filing unless it has a written statement approving the regulation by the Department of Law.³⁷

G. Shift burden of proof of regulations validity in judicial review to the agency:

There is statutory authority to shift the burden of proving a regulation's validity to an agency in Iowa, Louisiana, Wyoming. This is also an option under the Model State Administrative Procedure Act (1981).³⁸

The Model State Administrative Procedure Act (1981) has a provision whereby an agency has burden of proof of establishing the validity of a regulation upon judicial review when a review committee files an objection on the grounds of invalidity. This reverses the usual presumption of a rule's validity.³⁹

³⁷AS 44.62.060(c).

³⁸Neslin at 681.

³⁹See Union Oil Co. v. State, Alaska, 574 P.2d 1266 (1978), where the court held that a regulation is accorded the presumption of validity and the challenger must demonstrate invalidity. Note also AS 44.62.300 which provides for a judicial declaration on validity of a regulation by an interested person when that person brings an action for declaratory relief in the superior court.

A procedural rule of the Iowa Department of Social Services was challenged on the basis that it violated the purpose and intent of the Administrative Procedure Act.⁴⁰ The Iowa legislature's administrative rules review committee had objected to the rule, but the department argued that the objection was ineffective because it did not notify the agency of the objection as required by statute (" . . . objection must contain essential findings and a brief elaboration of reasons.") The Court held that while the " . . . skimpy objection lodged in this instance and set out above only minimally passes muster", the burden of proving the regulation's validity passed to the agency. In this case, the Court held that the agency did not meet its burden of proving the rules validity.

H. Limit agency jurisdiction:

The following quote is from an article on alternatives to the legislative veto which are available to Congress. These would be an option for states as well. By utilizing any of the six possibilities listed below, a legislature would avoid separation of powers problems implicit in various forms of the legislative veto.

⁴⁰Schmitt v. Iowa Dept. Of Social Services, 263 N.W. 2d 739 (1978).

"A. . .major statutory technique for Congress to limit the impact or effect the overturn of existing or proposed rules to alter the jurisdiction of the issuing federal agency:

a. by granting exemptions to the rulemaking authority of the agency head;

b. by removing express areas from the regulatory authority of the agency head;

c. by establishing moratoriums on certain rulemaking;

d. by transferring jurisdiction from one agency to another or from the federal agency to state authorities;

e. by providing for waivers for regulated categories; and

f. by deregulating an area.

Such statutory instruments, occasionally used in tandem with direct overrides or congressional preemption of specific rules, usually have a broader impact than the more focused revocation or preemption."⁴¹

I. Veto statute in budget bill.

⁴¹Frederick M. Kaiser, "Congressional Action to Overturn Agency Rules: Alternatives to the 'Legislative Veto'", Administrative Law Review 667, 674.

In a recent decision, the Kentucky Supreme Court held that the General Assembly had the authority to provide in a budget bill for the suspension or modification of the operation of a statute.⁴² (Case included in Appendix 6). In Collins, the Court concluded that: "The budget, which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter. . .In a word, the final action on the enactment or adoption of the budget is a legislative matter."⁴³ Thus, in Kentucky, there is an indication that the legislature may have more valid authority in annulling statutes and regulations dealing with budgetary matters without violating the separation of powers doctrine.

J. Constitutional considerations to various approaches to regulatory control or annulment in other states.

Alternatives A and C listed above -- variations of annulment or suspension of regulation by committee or a limited legislative veto not subject to the governor's veto -- are at risk to a successful constitutional challenge. The Alaska Supreme Court has not clarified

⁴²Com. Ex Rel. Armstrong v. Collins, Ky., 709 S.W. 2d 437, 441.

⁴³Id at 441.

what would be constitutionally invalid, other than annulment of a regulation. In other states, there are indications that some involvement by the legislature into the executive branch's actions might be acceptable -- particularly in the realm of the budget, and also if the involvement is limited.

Alternatives B and D - I appear to be least susceptible to a successful constitutional challenge, and thus the safest alternatives. The Alaska Supreme Court has stated in the A.L.I.V.E. decision that B -- an independent agency to annul regulations -- would be acceptable. D -- sunseting regulations -- would appear to be acceptable, since regulatory authority does not exist in agencies without authorization from the legislature to begin with. E and F -- approval or veto by the governor -- would appear to be acceptable, since the separation of powers doctrine requires that that the legislature cannot both make laws and administer them, and the Supreme Court has said that an agency within the executive branch would be acceptable. G -- shifting the burden of proof -- appears to be acceptable, since the legislature is not making the final decision of a regulation's validity, the court is. H -- limiting an agency's jurisdiction -- is certainly acceptable, since that is a function of the legislature. I -- annulling a statute or regulation in the budget bill -- would appear

to be acceptable, since the governor is still given the opportunity to veto the annulment through the line item veto. However, this option would need to be analyzed further to ascertain any conflicts with Alaska's requirements for legislation -- the single subject rule, etc.

Original sponsor: Rules/Administrative
Regulation Review Committee

1 IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE
2 CS FOR HOUSE BILL NO. 420 (State Affairs)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL
6 For an Act entitled: "An Act relating to adoption of regulations."
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 44.62.040(b) is amended to read:

9 (b) Citation of the general statutory authority under which a
10 regulation is adopted, as well as citation of specific statutory
11 sections being implemented, interpreted or made clear, shall follow
12 the text of each regulation submitted under (a) of this section. The
13 signature of the governor approving adoption of the regulation as
14 required by AS 44.62.065 must accompany the regulation.

15 * Sec. 2. AS 44.62 is amended by adding a new section to read:

16 Sec. 44.62.065. GOVERNOR'S SIGNATURE. A regulation or order of
17 repeal is not valid unless the governor has approved its adoption in
18 writing. The lieutenant governor may not accept a regulation or order
19 of repeal for filing under AS 44.62.040 unless it is accompanied by
20 the governor's approval of adoption. This section also applies to
21 regulations exempted from submission to the lieutenant governor under
22 AS 44.62.040(a). This section does not apply to emergency regulations
23 or to regulations of the Department of Fish and Game.

24 * Sec. 3. AS 44.62.200(a) is amended to read:

25 (a) The notice of proposed adoption, amendment, or repeal of a
26 regulation shall include

27 (1) a statement of the time, place, and nature of proceed-
28 ings for adoption, amendment, or repeal of the regulation;

29 (2) reference to the authority under which the regulation

1 is proposed and a reference to the particular code section or other
2 provisions of law which are being implemented, interpreted, or made
3 specific;

4 (3) an informative summary of the proposed subject of
5 agency action and of the action's intended effect on persons subject
6 to the action; the summary must include a description of the substance
7 of each repealed regulation and a description of the intended effect
8 of the repeal;

9 (4) other matters prescribed by a statute applicable to the
10 specific agency or to the specific regulation or class of regulations;

11 (5) a summary of the fiscal information required to be
12 prepared under AS 44.62.195.

13 * Sec. 4. The amendments made to AS 44.62.040 by sec. 1 of this Act and
14 AS 44.62.065, enacted by sec. 2 of this Act, apply to regulations adopted
15 on or after the effective date of this Act. The amendments made to
16 AS 44.62.200 by sec. 3 of this Act apply to notices of proposed action pub-
17 lished on or after the effective date of this Act.

BY THE RULES COMMITTEE BY
REQUEST OF THE ADMINISTRATIVE
REGULATION REVIEW COMMITTEE

1 IN THE HOUSE

2 HOUSE BILL NO. 420

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to adoption of regulations and the
7 presumption of validity of regulations."

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

9 * Section 1. AS 44.62.040(b) is amended to read:

10 (b) Citation of the general statutory authority under which a
11 regulation is adopted, as well as citation of specific statutory
12 sections being implemented, interpreted or made clear, shall follow
13 the text of each regulation submitted under (a) of this section. The
14 signature of the governor approving adoption of the regulation as
15 required by AS 44.62.065 must accompany the regulation.

16 * Sec. 2. AS 44.62.050 is amended to read:

17 Sec. 44.62.050. STYLE AND FORMS. The Department of Law shall
18 prepare and shall revise when necessary a drafting manual for adminis-
19 trative regulations which prescribes the style and forms for submit-
20 ting regulations under AS 44.62.040. The manual shall also provide
21 detailed instructions and examples of informative summaries of the
22 proposed actions required under AS 44.62.200(a)(3).

23 * Sec. 3. AS 44.62 is amended by adding a new section to read:

24 Sec. 44.62.065. GOVERNOR'S SIGNATURE. A regulation or order of
25 repeal is not valid unless the governor has approved its adoption in
26 writing. The lieutenant governor may not accept a regulation or order
27 of repeal for filing under AS 44.62.040 unless it is accompanied by
28 the governor's approval of adoption. This section also applies to
29 regulations exempted from submission to the lieutenant governor under

1 AS 44.62.040(a).

2 * Sec. 4. AS 44.62.100(a) is amended to read:

3 (a) Except as provided in (c) of this section, [THE] filing of a
4 certified copy of a regulation or an order of repeal by the lieutenant
5 governor raises the rebuttable presumptions that

6 (1) it was duly adopted;

7 (2) it was duly filed and made available for public in-
8 spection at the day and hour endorsed on it;

9 (3) all requirements of this chapter and the regulations
10 relative to the regulation have been complied with;

11 (4) the text of the certified copy of a regulation or order
12 of repeal is the text of the regulation or order of repeal as adopted.

13 * Sec. 5. AS 44.62.100 is amended by adding a new subsection to read:

14 (c) A presumption described under (a) of this section is not
15 applicable if the legislature has adopted a special concurrent resolu-
16 tion determining that a regulation is not within the procedural or
17 substantive authority delegated to the agency and disapproving its en-
18 forcement. The lieutenant governor shall include the resolution in
19 the permanent file of the certified copies of regulations and orders
20 of repeal under AS 44.62.080 and shall publish notice of the resolu-
21 tion in the administrative code and the administrative journal. After
22 the filing of a resolution disapproving a regulation, the burden is
23 upon the agency in any proceeding for judicial review or for enforce-
24 ment of the regulation to establish that the whole or portion of the
25 regulation objected to is within the procedural and substantive au-
26 thority delegated to the agency.

27 * Sec. 6. AS 44.62.200(a) is amended to read:

28 (a) The notice of proposed adoption, amendment, or repeal of a
29 regulation shall include

1 (1) a statement of the time, place, and nature of proceed-
2 ings for adoption, amendment, or repeal of the regulation;

3 (2) reference to the authority under which the regulation
4 is proposed and a reference to the particular code section or other
5 provisions of law which are being implemented, interpreted, or made
6 specific;

7 (3) an informative summary of the effect of the proposed
8 [SUBJECT OF] agency action on persons subject to or affected by the
9 proposed action; the summary must include a description of the
10 substance of each repealed regulation and a short analysis of the
11 effect of the repeal;

12 (4) other matters prescribed by a statute applicable to the
13 specific agency or to the specific regulation or class of regulations;

14 (5) a summary of the fiscal information required to be
15 prepared under AS 44.62.195.

16 * Sec. 7. The amendments made to AS 44.62.140 by sec. 1 of this Act and
17 AS 44.62.065 enacted by sec. 3 of this Act apply to regulations adopted on
18 or after the effective date of this Act. The amendments made to AS 44.62.-
19 200 by sec. 6 of this Act apply to notices of proposed action published on
20 or after the effective date of this Act.