SB

384

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Proposed CS for
BILL VERSION: SB 384
PUBLISH DATE: 2/1/88

Recd 4.14.88

FISCAL NOTE

REQUEST:

Revision Date: 2/1/88
Title: An Act relating to adoption of regulations and the presumption...
Sponsor: Rules Committee
Requestor: Rules 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						
REVENUE						

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
Division: Division of Administrative Services
Phone: 465-3616
Date: 4/14/88

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

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

CONTINUATION OF FISCAL NOTE FOR PROPOSED COMMITTEE SUBSTITUTE TO SB 384

This analysis assumes SB 384 will be amended to include identical provisions as those of CS HB 420 (State Affairs), a copy of which is attached.

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
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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

April 14, 1988

Re: SB 384

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

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

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:jf

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

5-1340B
Bannister
4/14/88

Original sponsor: Rules/Administrative
Regulation Review Committee

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 384 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

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

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

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 lieutenant governor may not accept a regulation or order of repeal for filing under AS 44.62.040 unless it is accompanied by the governor's approval of adoption. This section also applies to regulations and orders of repeal exempted from submission to the lieutenant governor under AS 44.62.040(a). This section does not apply to emergency regulations, emergency orders of repeal, or to regulations or orders of repeal of the Department of Fish and Game.

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

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

(1) a statement of the time, place, and nature of proceed-

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

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

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

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

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

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

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

February 8, 1988

Hon. Jay Kerttula
Chair
Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

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

Dear Senator Kerttula;

Your staff assistant has asked for our comments on this bill, which I understand will be coming up for hearing before your committee tomorrow. I have not spoken with the governor about this bill, and, in offering the following comments, do not claim that they necessarily represent this Administration's position on this bill.

A few days ago, I received from the lieutenant governor's office a copy of a June 1987 report to the legislature's Administrative Regulation Review Committee (ARRC), entitled "Alternative Approaches To Oversee Administrative Regulatory Activities." It appears that this bill's origins are in that report.

The bill was prepared by the legislature's ARRC, and I commend the committee's efforts in considering the issues presented. However, in these comments I must stress the constitutional and practical difficulties the bill's enactment would generate. In doing so, I echo some of the November 9, 1987 comments to the ARRC by the legislative counsel who drafted the bill.

Here is a quick section-by-section commentary:

SECTION 1.

Section 1 amends AS 44.62.040(b) to require that the signature of the governor accompany a regulation. This is a mechanical provision offered in conjunction with the new statute in sec. 3 of the bill. The governor's signature could simply be added to the standard adoption form. This requirement by itself should not pose a major difficulty, although it will usually involve some delay. However, please see the comments below regarding sec. 3.

SECTION 2.

This would amend AS 44.62.050, the section requiring preparation of the regulations drafting manual, to require that the manual include "detailed instructions and examples of" the informative summaries required by current AS 44.62.200(a)(3). Basically, this is not a bad idea. However, a simple note or phone call to the regulations attorney (AS 44.62.125), suggesting that inclusion in the next edition of the manual, would suffice. A statutory requirement of this sort is totally unnecessary and could be troublesome.

SECTION 3.

This section adds a new statute, AS 44.62.065, that would require the governor's approval of each regulation adopted by an executive-branch agency. By its terms, the approval requirement applies to regulations exempted from the other requirements of the regulations-adoption portion of the Administrative Procedure Act (AS 44.62).

While constitutional, this formal requirement poses a major practical problem. If the governor's signature and approval are to be anything more than pro forma boilerplate, it will be necessary to establish a review process in the governor's office. If the governor's approval is to have meaning and substance, additional staff and a considerable amount of time will be required. Each year for the past six years, for example, an average of 153 new Administrative Procedure Act (APA) regulations projects have been initiated. I do not know how many projects exempted from the APA are undertaken each year. Being responsible for the Department of Law's legal review of all regulations projects, I know that it is a very time-consuming function. A policy review of both APA and non-APA regulations by the governor and his staff would require at least as much effort.

Under current constitutional provisions (see, for example, art. III, secs. 1 and 24, Alaska Constitution), the Alaska governor has the authority to affect the outcome of regulations projects. Under the proposal in sec. 3 of this bill, however, an entire structure and procedure must be established to ensure that review for every project.

SECTION 4.

This section's amendment of AS 44.62.100(a) is merely a compatibility amendment to take into account the new subsection proposed in sec. 5.

SECTION 5.

This proposed subsection, to be added to AS 44.62.100, the section on presumptions from filing, presents both practical and constitutional problems, as noted in the November 9, 1987 memo to the ARRC from legislative counsel. First of all, its provision that the legislature may adopt a special concurrent resolution "determining that a regulation is not within the procedural or substantive authority delegated" applies to all four of the presumptions in subsection (a). Those presumptions, listed in sec. 4 of the bill, are based on the legal review and approval given by the Department of Law under current AS 44.62.060. They are legal conclusions, some objective and some subjective. For example, presumption number two is that the regulation was filed and made available for public inspection -- something readily ascertainable. Presumption number one is simply that the regulation was adopted. And number four is simply that the text of the certified copy is the same as the text of the adopted regulation. Only presumption number three regarding "all requirements of this chapter," leaves room for debate. It seems foolish to have a concurrent resolution of the legislature reverse the presumptions in AS 44.62.100(a)(1), (2), and (4). What would be the reason to do so?

Of even greater significance are the constitutional issues this proposal raises. First, in making a determination that a regulation is "not within the procedural or substantive authority delegated to the agency," the legislature is making a legal judgment -- something reserved by the constitution to the judicial system. Thus there is a separation-of-powers problem. Second, in having the presumptions of validity reversed by a special concurrent resolution of the legislature, this proposal runs into the same kind of situation dealt with in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). There, the Alaska Supreme Court said, essentially, (1) regulations have the force of law, (2) when the legislature attempts to change a regulation or the effect of a regulation it is changing the law, (3) the Alaska Constitution sets out the procedures for the legislature to use to change the law, and (4) a concurrent resolution does not satisfy the constitutional procedures for law-making. Although this proposal is for a change of the burden of proof in connection with a challenge to a regulation, whereas the statute involved in the A.L.I.V.E. Voluntary case provided for annulment of a regulation, the problem and the analysis are essentially the same, notwithstanding the fact that a resolution adopted under this statute would not actually change a regulation itself.

A December 29, 1987 memo from Kathy Hathaway to Senator

Hensley offers Ms. Hathaway's opinion that this provision, based on sec. 3-204(d) of the Model State Administrative Procedure Act (1981) is valid. She cites an Iowa case, which the Uniform Law Commissioners' commentary under that section mentions "impliedly" upheld a similar provision. Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739 (Iowa 1978). You will note that that case predates both the Alaska Supreme Court's decision in State v. A.L.I.V.E. Voluntary and the United States Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983). Also, Ms. Hathaway did not mention that the entire subsection in the Model Act is bracketed, indicating that it does not have the full endorsement of the Uniform Law Commissioners, but is merely offered as an option that some states might want to consider, if likely to be held valid in their respective jurisdictions. Although the Uniform Law Commissioners' commentary under sec. 3-204 of the Model Act goes into some detail regarding the constitutional issues presented by a "legislative veto" or suspension of a regulation, it does not address the "law-making" rationale in connection with the burden of proof shift.

SECTION 6.

This section amends AS 44.62.200(a)(3) to require more detail in the informative summary that is published to give public notice of a proposed regulation adoption. While, in many instances, it would be helpful to have more information in the notice, the greater specificity of that detail, required across the board, would often restrict an agency's ability to respond to public comment at a written or oral hearing. If public testimony prompts a significant change in the original version of a regulation, the agency would have to begin the process anew, to assure that members of the public who might want to comment on the new proposal are adequately notified. The current provision is written to provide the necessary response flexibility.

In addition, the requirement that the notice describe the effect of each change will not always be possible to meet. Additional discussion of this in the drafting manual might help, without the legal consequences of failure that this generally applicable statute could entail. I wonder whether the bill's reference to an "analysis of the effect of the repeal" (page 3, lines 10 and 11) means something different from the "summary of the effect of" the change (page 3, lines 7 and 8).

It would be helpful to know more specifically what the problems are with the current system, which gave rise to the committee's proposal. As it is, I recognize that not all public

notices are ideal, but I cannot support this bill. At least two of its proposals can be easily handled without legislation. Others create constitutional and practical problems. The clash between policy expressed by the executive branch and that desired by the legislature is a traditional one best addressed by legislation governing the program at issue. There is no adequate, constitutional shortcut.

Thank you for this opportunity to comment. I would be happy to go into more detail on the points mentioned above and to offer additional information and analysis if you wish.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

GBS:AHP:cb

cc: 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

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Juneau, AK 99811
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Senate Finance Committee
State Affairs Committee
Vice-Chair, Rules Committee
Chair, Administrative Regulation Review

William L. Hensley

MEMORANDUM

To: Sen. Faiks, President
Rep. Grussendorf, Speaker

Rep. Sund, Vice Chairman
Sen. Sturgulewski, Member
Sen. Szymanski, Member
Rep. Hoffman, Member
Rep. Hanley, Member

From: Sen. Hensley, Chairman WLH
Administrative Regulation Review Committee

Re: Proposed legislation for the committee meeting on Wednesday, January 27.

Based on the committee discussion October 17, I present the following:

1. Attached is draft legislation that would require the governor's specific approval of agency regulation and rule making. It would also allow the legislature to shift the burden of proof of any regulation by action of a special resolution.

2. Two sectionals are included which give different emphasis on constitutionality questions.

3. An amendment proposed by Rep. Pourchot would require the published notification of proposed regulations be more descriptive of their substance and effect.

One comment: I requested the draft legislation to give the governor blanket authority over regulation approval, knowing full well that there are most probably areas which the legislature and/or the governor want exempted. Fish and game regulations are a prime consideration. APUC and AHFC actions are other examples. I would appreciate the committee's thoughts in this regard.

IOWA GENERAL ASSEMBLY

ADMINISTRATIVE RULES REVIEW COMMITTEE

SENATE MEMBERS
BERL E. PRIEBE
CHAIR
DONALD V. DOYLE
DALE L. TIEDEN

SECRETARY EX OFFICIO
PHYLLIS BARRY

STAFF
JOSEPH A. ROYCE

HOUSE MEMBERS
JAMES D. O'KANE
VICE CHAIR
EDWARD G. PARKER
BETTY JEAN CLARK

29 January 1988

FEB 4 1988

State of Alaska
Alaska Legislature
Attn: Mr. David Grey
BOX "V"
Juneau, Alaska, 99811

Re: The "objection" process in rules review

Dear Dave:

I was very pleased to hear from you yesterday and I'm even more pleased to hear that your legislature is considering giving its regulations review committee objection power. I'm sorry that I have never had an opportunity to do a study to document the impact the objection process has in Iowa, but I can guarantee it ensures that government agencies carefully consider suggestions and criticisms offered by our rules committee. The best evidence of this is that the frequency of objections is decreasing. While the volume of rule-making is steadily growing, the ability of the committee and the various agencies to compromise their seems to be increasing. This is reflected by the a stabilization in the number of objections. In 1986 the committee imposed five objections, up from three objections in 1985. Rather than risk having an objection placed on a rule, agencies tend, if possible to be willing to modify a proposal if requested by the committee.

A total of 104 objections have been imposed since 1977, but the trend has clearly been toward a decline in their frequency, as indicated below:

1977.....36	1982.....02
1978.....24	1983.....03
1979.....13	1984.....04
1980.....06	1985.....03
1981.....08	1986.....05

On a percentage basis, approximately one percent of the filings put into effect actually have an objection placed on them. In 1977 the percentage was almost ten percent.

The mechanics of the objection process are fairly simple. At any

time the committee may selectively call up a rule for review and impose an objection. An objection is simply the committee's opinion that a rule is "arbitrary, capricious, unreasonable or beyond the authority delegated to the agency". This action must be taken at a formal committee meeting, upon a vote of four members of the six member committee. A document is prepared detailing the committee's findings. It is certified as being true and accurate by the committee chair and then filed in the office of the Code Editor. A copy is published in the Iowa Administrative Bulletin and Code.

The document must contain more than a simple reference to the specific statutory grounds for objection. The document must contain these grounds and a brief elaboration of reasons for this finding. It must be detailed enough to apprise the agency of the precise nature and scope of the objection. Schmitt v. Department of Social Services, 263 N.W.2d 739 (Iowa, 1978).

The objection does not impact the effective date of a rule or prevent the agency from enforcing it. An objection places a cloud on the validity of the rule. It reverses the burden of proof in a subsequent judicial action contesting the validity of the rule The objection removes the "presumption of validity" that courts commonly accord an administrative rule. The agency then bears the burden of proving the validity of its rule. If the agency fails to meet this burden of proof, the agency must pay both the court costs and the attorney fees for the party attacking the rule (section 17A.4(4)"a").

An objection does not have an expiration date and will remain in effect as long as the rule itself. Procedural objections (limited to committee findings that the proper rule-making procedures were not followed) may expire two years after the effective date of a rule. ss17A.4(3) establishes a two year statute of limitations to challenge a rule on the grounds that the notice provisions of Chapter 17A were not followed.

I should note that objections are somewhat limited in their impact They reverse the burden of proof only upon the grounds specified by the ARRC in the document. If a court overturns a rule on grounds not specified in the objection, attorney fees will not be awarded. Iowa-Illinois Gas & Elec. v. Iowa State Commerce Commission, 334 N.W.2d 748 (Iowa, 1983).

As a conclusion, I enclose an excerpt from State Administrative Rule Making, by Arthur Bonfield. He is a nationally recognized expert in Ad. law and a law professor at the University of Iowa. It provides more detail and commentary on the objection process than any other article I have seen. It is largely drawn from the Iowa provisions. If I can be of any additional help at all, please just give me a call.

Sincerely,

Joe

Joseph Royce
staff

C O P Y

10 September 1987

Department of Insurance
Securities Bureau
Lucas State Office Building
Attn: Craig Goettsch

Re: Objection-191 IAC 19.60(2), relating to fees imposed for an interpretive opinion.

Dear Sir:

At its September 9 meeting the committee voted to object to the fifty dollar fee for interpretative opinions, appearing in 191 IAC 19.60(2). It was the opinion of the committee this charge is beyond the authority of the bureau. This provision appears as part of ARC 7871,in X IAB 5 (8-26-87).

Section 17A.9, Iowa Code, requires every agency to provide a method allowing the public to obtain the agency's formal opinion or interpretation on questions relating to the agency statutes, rules or policy. These statements are called declaratory rulings. They appear to be identical to the "interpretive opinion" established in the subrule. The statute makes no provision for the assessment of a fee nor has any agency attempted to impose one; to do so would run contrary to the purpose of section 17A.9. Declaratory rulings are essential to allow the public an opportunity to clarify questions and uncertainties about agency law or policy. They provide a service which is intended to encourage the public to request advise and interpretations from government agencies. A fee for this service would discourage its use and could lead to needless violations of law or policy through misinterpretation or misinformation. It is the opinion of the committee the "interpretive opinion" is a form of declaratory ruling and that section 17A.9, Iowa Code, precludes the imposition of a fee for this service.

CERTIFIED AS A TRUE AND CORRECT
COPY OF THE COMMITTEE ACTION THIS
_____DAY OF SEPTEMBER, 1987, BY:

_____
Berl Eastman Priebe
Chairman

ATTORNEY GENERAL[61] *(cont'd)*

than 30 days prior to the anniversary of the current registration. An application for renewal must be accompanied by a nonrefundable fee of $200. The renewal application must include all changes in the information which has been provided in the previously filed application.

These rules are intended to implement 1987 Iowa Acts, House File 520.

[Filed emergency 8/7/87, effective 9/7/87]
[Published 8/26/87]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 8/26/87.

ARC 7870

INSURANCE DIVISION[191]

Adopted and Filed Emergency

Pursuant to the authority of 1987 Iowa Acts, House File 614, section 16, the Insurance Division of Iowa hereby emergency adopts and implements the rescission of rule 19.1(523A), "Forms," of Chapter 19 of the Iowa Administrative Code.

The rescission is necessary to conform to changes in the reporting requirements of the Iowa Prearranged Funeral Contracts Act. Prior to July 1, 1987, the reports were filed with the applicable County Recorder. After July 1, 1987, reports will be filed with the Securities Bureau of the Iowa Insurance Division.

The rescission of the rule and adoption of the rules proposed on this date and published herein under Notice of Intended Action as ARC 7875, will bring the Bureau's rules into compliance with the amendments contained in 1987 Iowa Acts, House File 614, which were effective July 1, 1987.

In compliance with Iowa Code section 17A.4(2), the Division of Insurance finds that public notice and participation are unnecessary and impracticable because the changes merely bring the chapter into compliance with the statutory amendments, which nullified the statutory basis and authority of the rescinded rule.

The Division also finds, pursuant to Iowa Code section 17A.5(2)"b"(2) that the normal effective date of this action, 35 days after publication, should be waived and the rescission should be made effective upon filing with the Administrative Rules Coordinator on August 7, 1987, as it confers a benefit on the public since the rescinded rule would be construed to be in conflict with the statute [illegible] the rescission is necessary to effectuate proper compliance with the statute, and the notice period would delay adoption of new administrative regulations conforming to the amendments.

ITEM 1. 191—19.1(523A) is rescinded.

[Filed emergency 8/7/87, effective 8/7/87]
[Published 8/26/87]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 8/26/87.

ARC 7871

INSURANCE DIVISION[191]

Adopted and Filed Emergency

Pursuant to the authority of 1987 Iowa Acts, House File 614, section 16, the Insurance Division of Iowa hereby emergency adopts and implements new rule 19.60(72GA,HF614).

The new rule is a temporary, transitional rule that will help the Securities Bureau control administrative delays in processing initial permit applications by allowing applicants to file at any time after September 1, 1987, rather than having them wait until January 1, 1988. To further facilitate implementation of 1987 Iowa Acts, House File 614, the proposed rule will authorize an initial report and allow the Securities Bureau to accept and require fees on a temporary basis, prior to the adoption of the permanent regulations also proposed on this date.

The Division of Insurance finds that pursuant to Iowa Code section 17A.4(2), public notice and participation are contrary to the public interest in that speedy implementation of this rule is necessary to assure timely and reasonable treatment of those seeking permits required by the Iowa Prearranged Funeral Contracts Act.

The Division of Insurance also finds, pursuant to Iowa Code section 17A.5(2)"b"(2), that the normal effective date of this rule should be waived and the rule be made effective on September 1, 1987, as it confers a benefit upon the public to assure timely and reasonable treatment of those seeking permits required by the Iowa Prearranged Funeral Contracts Act.

New rule 19—19.60(72GA,HF614) is adopted as follows:

191—19.60(72GA,HF614) Transitional rule.

19.60(1) The Iowa securities bureau may accept and process applications for establishment permits and sales permits filed pursuant to the Iowa prearranged funeral contracts Act at any time after September 1, 1987.

19.60(2) The Iowa securities bureau may accept and require the following fees at any time between September 1, 1987, and January 1, 1988:

1.	Application packet	$ 5.00
2.	Certification	$ 5.00
3.	Duplicate permit fee	$ 5.00
4.	Establishment permit fee	$ 50.00
5.	Interpretative opinion	$ 50.00
6.	Filing fee (annual report)	$200.00-500.00
7.	Filing fee (seller's initial report)	$ 25.00
8.	Name change	$ 10.00
9.	Photocopies of records (per page)	$ 0.50
10.	Printout of permit holders	$ 10.00
11.	Sales permit fee	$ 5.00

19.60(3) The Iowa securities bureau may accept and require an initial report from sellers, as a prerequisite for an establishment permit, on the form prescribed by the commissioner.

19.60(4) The Iowa securities bureau may accept and require the following forms at any time between September 1, 1987, and January 1, 1988:

a. Content. Copies of all necessary forms and instructions may be obtained from the Iowa Securities Bureau, Iowa State Office Building, Des Moines, Iowa 50319.

NOTE: Rule later dropped

After this rule was adopted, the Administrative Rules Review Committee of the General Assembly filed an objection on May 21, 1981, that the rule is unreasonable. The utilities applied for rehearing before the commission, but the application was denied on May 22, 1981. They next requested the commission to issue a statement of reasons for and against the rule, pursuant to section 17A.4(1)(b) of the Code. The commission issued the statement on July 15, 1981.

The utilities then sought judicial review of the rule, pursuant to section 17A.19 of the Code. Iowa Citizen/Labor Energy Coalition, Inc. (IC/LEC) intervened in the appeal.

On judicial review the utilities allege the rule exceeds the commission's statutory authority, is unreasonable, and violates constitutional clauses. The commission, on the other hand, contends that it has statutory authority under sections 476.1, .2, and .8 of the Code to promulgate mandatory utility financing.

The district court found the commission exceeded its statutory authority in promulgating the rule and therefore did not address the issues of unreasonableness and unconstitutionality. The commission and IC/LEC appealed to this court.

I. *Scope of review.* We first consider two preliminary issues.

[1] A. This court will make anew the determination which the district court may make under section 17A.19 of the Code. *Temple v. Vermeer Manufacturing Co.*, 285 N.W.2d 157, 159 (Iowa 1979). In reviewing agency rule making, we can properly consider both the record made before the agency and before the district court. *Security Savings Bank v. Horton*, 293 N.W.2d 249, 251 (Iowa 1980); *Community Action Research Group v. Iowa State Commerce Comm'n*, 275 N.W.2d 217, 219 (1979).

[2] B. An agency rule is presumed valid. The burden is on the party challenging it to demonstrate that a "rational agency" would not conclude the rule was within the agency's delegated authority. *Milholin v. Vochies*, 320 N.W.2d 552, 554 (1982); *Iowa Auto Dealers Ass'n v. Iowa Department of Revenue*, 301 N.W.2d 760, 762 (Iowa 1981); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979); *Davenport Community School District v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 910 (Iowa 1979).

[3, 4] Once the Administrative Rules Review Committee objects to the contested rule, however, the burden shifts to the agency in a judicial review proceeding to prove the validity of the rule. *Iowa Auto Dealers Ass'n* 301 N.W.2d at 762; Iowa Code § 17A.4(3)(a) (1981). The committee objected that the rule was unreasonable. It did not object, however, with respect to the agency's delegated authority to promulgate such a rule. We find, therefore, that the district court correctly retained the burden on the utilities to prove promulgation of the rule was beyond the commission's statutory authority.

II. *Agency's statutory authority.* We pass then to the merits of the controversy.

[5, 6] A. To be valid, a rule adopted by an agency must be within the scope of powers delegated to to it by statute. *Haesemeyer v. Mosher*, 308 N.W.2d 35, 37 (Iowa 1981); *Temple v. Vermeer Manufacturing Co.*, 285 N.W.2d 157, 159 (Iowa 1979); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979); *Davenport Community School Dist. v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 910 (Iowa 1979); *Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n*, 268 N.W.2d 862, 868 (Iowa 1978). The ultimate determination of whether an agency could have rationally concluded it was acting within its delegated powers is for the court. *Haesemeyer* 308 N.W.2d at 37; *Iowa Department of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 615 (Iowa 1976); *Schmitt v. Iowa Department of Social Services*, 263 N.W.2d 739, 745 (Iowa 1978).

B. The commission finds authority to promulgate mandatory utility financing in the recent amendments to sections 476.1 and .2 of the Code. Section 476.1 now provides in part:

> The jurisdiction of the commission under this chapter shall include programs designed to promote the use of energy conservation strategies by rate or service-regulated gas and electric utilities.

Section 476.2 now provides in part:

> The commission shall promulgate rules concerning the use of energy conservation strategies by rate or service regulated gas and electric utilities by July 1, 1981.

We note that section "shall include programs designed to promote the use of" and "shall promulgate rules concerning the use of" energy conservation strategies. (Emphasis added.) Section 4.1(36) of the Code provides that use of the word "shall" in a statute imposes a duty. Thus the commission has no discretion as to whether it

[illegible] the [illegible] *Corp. v. Nicholas*, [illegible] 9-4 (Iowa [illegible] by these directives, mandated the commission to *require* utility financing of conservation measures. Such commission authority, if it exists, must be implied from the statutory language the commission relies on.

Section 4.1(2) of the Code states that words and phrases "shall be construed according to the context and the approved usage of the language." We think the ordinary meaning of phrases such as "programs designed to promote" and "rules concerning the use of" suggest the commission is to encourage, influence, and provide incentives relating to energy conservation. But we find difficulty reading into this language authority *to require utility financing* of energy conservation.

The California Supreme Court faced a similar problem in *Southern California Gas Co. v. Public Utilities Comm'n*, 24 Cal.3d 653, 156 Cal.Rptr. 733, 596 P.2d 1149 (1979). The state commission proposed a rule requiring utility financing. The utilities challenged the proposal by pointing to provisions of the California Home Insulation Assistance and Financing Act, which provides:

> The commission shall permit any electrical or gas corporation to institute a home insulation assistance and financing program for its residential customers....

Calif.Pub.Util.Code § 2782 (Deering 1979). Because the legislature had expressly *permitted* utility financing, the court refused to find an intent to allow the commission to institute *mandatory* financing:

> Although we are mindful of the importance of energy conservation in today's society, we must nevertheless conclude that the Legislature has not yet bestowed upon the commission the power to mandate the institution of home insulation financing assistance programs.

24 Cal.3d at 661, 156 Cal.Rptr. at 737, 596 P.2d at 1153. *See also Re Residential Energy Conservation Policy Act of 1978* (Dist. Colum.Pub.Serv.Comm'n No. 743, 7/16/82), 48 Publ.Util.Rep. 4th 575 (commission refused to assume authority to *require* utility financing where statute allowed *permissive* utility financing).

[7] The Iowa Code provisions relied on by the commission do not mention financing at all, let alone permit it, as have the other codes quoted from. *Cf. Rochester Gas & Electric Corp. v. Public Service Comm'n*, 71 App.Div.2d 185, 422 N.Y.S.2d 770 (1979) (applying N.Y.Pub.Serv.Law § 185-g (McKinney 1979) *requiring* utility financing); Ohio Rev.Code Ann. § 4933.021 (Baldwin Supp. 1978) (*requiring* utilities to be lenders of last resort up to $750). We find the Iowa commission does not have authority to require utility financing under the recent amendments to sections 476.1 and 476.2.

C. The commission also relies on portions of statutory language in sections 476.-1, .2, and .8 of the Iowa Code:

> The Iowa state commerce commission shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.
>
> ....
>
> The commission shall have broad general powers to effect the purposes of this chapter....
>
> ....
>
> Every public utility is required to furnish reasonably adequate service and facilities.

The commission argues energy conservation is a "service" that necessarily must be provided by utilities to assure the adequacy of traditional energy services in the future; as such, the commission has authority to see to it such service is provided, including forcing utilities to finance conservation measures.

Regulation of utility services has traditionally included such items as rate-structure, method of providing energy sources, construction of new power plants, and customer relations. Requiring utilities to teach consumers energy efficiency may be within the scope of utility regulation, but requiring financing of the implementation of these measures casts the utility in an entirely different role—that of an involuntary lending institution. We think that if such a departure from the traditional function of utilities was intended by the General Assembly, it would have said so.

In *Southern California Gas*, the commission attempted to justify its proposed rule by relying on its broad statutory powers "to supervise and regulate every public utility in the State and may do all things ... which are necessary and convenient in the exercise of such power and jurisdiction...." 24 Cal.3d at 657, 156 Cal.Rptr.

at 735, 596 P.2d at 1151. But the court stated:

> The Legislature is given plenary power to confer other powers upon the commission. This plenary power, however, is subject to the limitation that the additional powers bestowed upon the commission must be "cognate and germane to the regulation of public utilities."

Id. Requiring utility financing was not found by the court to be within the domain of utility regulation. *Id.* at 660, 156 Cal. Rptr. at 736, 596 P.2d at 1153.

The District of Columbia Public Service Commission dealt with this problem in a proceeding entitled *Re Residential Energy Conservation Policy Act of 1978* (Dist.Colum.Pub.Serv.Comm'n No. 743, 7/16/82), 48 Pub.Util.Rep. 4th 575. The commission concluded it had no authority to order utilities to provide direct loan financing of residential conservation measures. *Id.* at 584. The function of that commission is to "insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable." D.C.Code Ann. § 43–402 (1981). But the commission found

> that a direct utility loan program is not a necessary and integral part of the utility services required . . . and therefore is not a 'service' under the implied regulatory authority of the commission. If utilities are to be required to undertake the substantial burden of establishing direct financing programs . . . there must be a clearer manifestation of the intent of the council of the District of Columbia or The Congress to grant the commission authority to do so. . . . For these reasons we find that the commission lacks authority to order a direct utility loan program.

48 P.U.R. 4th at 585.

We likewise find authority to require financing to be such a departure from traditional utilities regulation that it must be clearly manifested by legislative enactment. We agree with the district court that the commission does not have authority under its present powers to require utility financing. We intimate no opinion on any constitutional implications in compulsory utility financing by statute.

D. Intervenor urges us to consider certain provisions in chapter 93 of the Iowa Code relating to solar energy. The promulgated rule, however, has been amended to delete any portions regarding solar energy. We therefore find no need to consider chapter 93. Having found the commission acted outside its delegated authority, we also find no need to reach the utilities' challenges of unreasonableness and unconstitutionality.

AFFIRMED.

PROCEDURE FOR PROMULGATING REGULATIONS:

I. PUBLIC NOTICE

1. 30 days before the adoption, amendment, or repeal of a regulation, notice shall be:

a) published in the newspaper of general circulation,
b) mailed to every person who has filed a request,
c) mailed to the commissioner,
d) mailed to interested persons (when appropriate in the judgement of the agency),
e) furnished to the Department of Law with a copy of the proposed regulation,
f) furnished to all incumbant legislators and the LAA
g) furnished to the standing committee of each house have jurisdiction over the subject matter, together with a copy of the proposed regulation,
h) furnished to the staff of the Administrative Regulation Review Committee.

2. Failure to mail notice does not invalidate an action taken by an agency.

4. Notice shall include:

a) statement of time, place and nature of proceedings for adoption of regulation,
b) reference to the authority under which the regulation is proposed,
c) informative summary of the proposed subject of action,
d) fiscal note if the regulation would require increased appropriations by the state.

5. On the date designated in the notice the agency shall give the opportunity to present statements in writing. (orally is optional to agency.)

6. An interested person may petition for adoption or repeal of a regulation. Agency has 30 days to deny petition in writing or schedule the matter for public hearing.

II. SUBMISSION TO THE DEPARTMENT OF LAW

1. Department of Law prepares a written statement of approval or disapproval after each regulation has been reviewed in order to determine:

a) its legality,
b) existence of statutory authority,
c) its clarity,
d) compliance with drafting manual.

III. SUBMISSION TO THE LIEUTENANT GOVERNOR

1. Agency shall submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation adopted (with three exceptions).

2. Lieutenant governor may not accept a regulation which is not accompanied by written statement of Department of Law's approval.

3. Lieutenant governor shall supply a set of the AAC to each local government unit.

4. A regulation becomes effective on the 30th day after the date of its filing by the lieutenant governor.

MEMORANDUM

TO: Senator Willie Hensley
Attn: Dave Gray

FROM: Kathy Hathaway KH

DATE: December 29, 1987

SUBJ: Regulation Review Draft Legislation
Work Order No. 5-1340

Following is an analysis of the draft legislation relating to regulation review which you sent to me.

Sections 1 and 3 require that the Governor approve regulations before they become valid. This provision has the same effect as section 3-202 of the Model State Administrative Procedure Act (1981) whereby the Governor could veto regulations. Both the provision in the draft legislation and the provision in the Model Act serve as a method of centralization political authority over agency rules. According to the Commissioners on Uniform State Laws who drafted the Model Act, such provisions "facilitate ultimate coordination of all rule making, and provide a direct and easily usable political check on the rule-making process." This provision completely sidesteps the separation of powers issues which dog legislation attempts to limit agency rule-making, and to my knowledge presents no constitutional difficulties.

Section 4 of the draft legislation is a housekeeping provision which ties into Section 5.

Section 5 of the draft legislation would shift the burden of proof regarding the presumption of a regulation's validity in a judicial proceeding under certain circumstances. Currently the burden of proof is on the person challenging regulation's validity and this would still be the case in most instances under the draft legislation. (In other words, a regulations is presumed to be valid by the court, and the person challenging a regulation has a high burden of proving that it is invalid. Under this provision in the draft legislation, if the Legislature has passed a concurrent resolution determining that a regulation is not within the procedural and substantive authority delegated to that agency, the burden would shift to the agency which promulgated the regulation. (In other words, there would be no presumption of validity -- the agency must prove validity to the court's satisfaction.)

Section 5 is very similar to an option under the Model Act (section 3-204) whereby the legislative rules review committee can shift the burden of proof upon objecting to a regulation. The provision under the draft legislation is more conservative since it provides that the whole legislature act where the Model Act simply

requires action by a committee in situations where the agency is exceeding its authority.

While this provision raises the question of whether it violates the doctrine of separation of powers (the Legislature improperly interfering in either Executive or Judiciary Branch functions), there are strong arguments that such Legislative action would not violate the separation of powers doctrine and would pass constitutional muster.

The Alaska Supreme Court has not decided this particular issue. In State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) the court held that the legislature cannot nullify a regulation by concurrent resolution; any action having the force of law must pass both houses of the legislature and be presented to the Governor. The Commissioners on Uniform State Laws, in their discussion accompanying the burden of proof section of the Model Act, presented two major points which could be argued as to why Section 45 would not be unconstitutional under the A.L.I.V.E. decision.

1. The legislature would not be vetoing regulations and would not be forcing the court to find regulations which the legislature had objected to, invalid. The legislature "is only authorized to alter one aspect of the procedure by which the legality of the rule will be finally determined by the courts."

2. The Commissioners note that "legislatures have always been assumed to have the authority, which they have often exercised, to allocate the burden of persuasion in court litigation, so long as they act 'reasonably' when they do so."

Since the Alaska Supreme Court has not decided the specific issue presented by the provision in Section 45 of the draft legislation there is no certainty whether the court would consider that provision constitutional. On the one hand you could argue that the court would view shifting the burden of proof as having an impermissible binding effect on its activities. On the other hand is the persuasive argument of the Commissioners on Uniform State Laws: shifting the burden of proof does not bind the court but is a procedural change in the way the court hears the case. You could also contend that an objection by the legislature is a piece of evidence which is persuasive in creating a presumption if the court accepts the legislature's justification, and the presumption is rebuttable by the agency. You can very logically contend that legislative shifting the burden of proof does not bind the courts, and is permissible under the constitution. To my knowledge the only other state supreme court

which decided the validity of a state rule where the legislature had shifted the burden of proof is Iowa -- that supreme court impliedly upheld the provisions' constitutionality. Schmitt v. Iowa Dept. of Social Services, 263 N.W. 2d 739 (Iowa 1978). Iowa's constitution is similar to Alaska's in that it does not specifically allow such a scheme.

M E M O R A N D U M

TO: Senator William Hensley, Chairman
Administrative Regulation Review
Committee

FROM: Kathy Hathaway

SUBJ: Options in changing Alaska's
regulatory review process

DATE: August 20, 1987

Following is a list of major changes which could be made in Alaska's regulatory review process, with a short discussion of the pros and cons of each alternative. The options include: 1. Creating an independent agency with the power to veto regulations; 2. Sunsetting regulations; 3. Providing for approval and/or veto of regulations by the Governor; 4. Changing the burden of proof in court challenges to a regulation when the Legislature has formally objected to that regulation; and 5. Providing for a test of a selective legislative veto. Concluding this memorandum are my recommendations for committee consideration.

OPTION 1. CREATE AN INDEPENDENT AGENCY WITH THE POWER TO VETO REGULATIONS.

A major consideration to this option is the cost. California's independent agency had a first year operating cost of $1.4 million. However, budgetary problems could be avoided to a certain extent by expanding the authority of an existing agency to include the power of vetoing regulations.

The Ombudsman presently has the authority to expose administrative failings and to initiate court action if necessary. Since the Ombudsman's Office deals so extensively with activities of the administration, it would be a logical agency to review the administration's regulations.

In order to be constitutional under the separation-of-powers doctrine, an independent agency must be truly independent. The Ombudsman's Office is a creature of the legislature, and if it were to be given the authority to review regulations, it must be made independent of the legislature. For example, the Ombudsman could no longer be a legislative appointee.

Other than cost, the greatest objection to the creation of an independent agency is that it would add another hoop in the regulatory process, adding significantly to the time and effort necessary to promulgate regulations.

2. SUNSET REGULATIONS.

The advantage of sunsetting regulations is, of course, to ensure legislative review of regulations. Also, with a sunset provision for regulations, the Governor might be less likely to veto legislation changing regulations since without the legislation there would be no ability to promulgate <u>any</u> regulations.

The disadvantage of sunsetting regulations is particularly apparent with the 120-day session. It would be necessary for the legislature to spend a significant amount of time in reviewing and debating regulations. It also seems questionable whether the imposition of this burden upon the legislature would do anything other than add an artificial deadline to a power the legislature <u>already</u> has. It is clear that the legislature presently has the power to review regulations and that any legislator or legislative committee can introduce legislation to annul regulations.

3. APPROVAL AND/OR VETO OF REGULATIONS BY THE GOVERNOR.

The Model State Administrative Procedure Act provides for the Governor's authority to veto all or a portion of any agency's rules. Several states also provide for the <u>approval</u> of regulations by the Governor. Either approval or veto of regulations by the Governor would have basically the same effect, as long as the Governor could veto or approve severable portions of a rule, and as long as the veto power was limited to the same duration of time as the approval power would have been.

By providing the Governor with approval power over regulations, he is made directly accountable for administrative actions. In theory, this is already the case since Alaska's Governor enjoys considerable power under our Constitution. However, under this provision, all regulations would pass through the Governor's office, and he is more directly accountable for the actions of the unelected agencies.

This provision would also focus resolution of regulatory conflict between contending agencies by the chief executive of the state. It would strengthen the Governor's ability to

implement policy and the focus of the bureaucracy. Under existing statute, the Attorney General can only disapprove regulations as to form, style, and legality, not on policy or consistency. This provision would also give citizens and special interest groups one more chance to appeal the promulgation of onerous regulations.

Under the Model State Administrative Procedure Act, the Governor is given the power, not only to veto proposed regulations, but also to veto existing regulations. The reasoning is that "a rule may become unwise or politically unacceptable only in light of changed circumstances occuring long after its adoption; and the issuing agency may nevertheless refuse to repeal the rule at that later time."

The argument against giving the Governor the power to veto existing regulations would be that, in effect, it allows the Governor extra chances to veto legislation that has already been subjected to a gubernatorial veto. A veto of long-standing regulations would effectively gut the legislative purpose of the enabling legislation, since regulations are promulgated to implement legislation. A second argument against giving the Governor the power to veto existing regulations is that it would allow a new administration to make drastic changes in administrative activity immediately upon assuming office; when in the past changes come about slowly as new Commissioners gradually gain control of their departments.

Under the Model State Administrative Procedure Act, the Governor is given the power to veto regulations of all agencies -- which in Alaska would include semi-independent agencies such as the Boards of Fish and Game and the Alaska Public Utilities Commission as well as agencies such as the Alaska Railroad which are exempt from following the Administrative Procedure Act (APA).

The advantage of giving the Governor the broad veto power outlined in the Model Act would be that the regulations of those agencies would be consistent with the administration's policy as shown in other agencies' regulations. The disadvantage would be that independent agencies would no longer be truly independent, and a shift in public policy which could have major economic and social effects.

OPTION 4. CHANGE THE BURDEN OF PROOF IN COURT CHALLENGES TO A REGULATION WHEN THE LEGISLATURE HAS FORMALLY OBJECTED TO THAT REGULATION.

The Model State Administrative Procedure Act lists this option for a legislature which "wishes to vest its administrative rules review committee with more than purely recommendatory authority" as a means to "provide an effective legislative check, by means less than statute, on unlawful agency rules."

Normally, under a challenge, the court presumes that a regulation is valid, and the challenger must meet the burden of proving the regulation invalid. If the Regulation Review Committee has previously filed an objection to a regulation, under this provision the court, in a subsequent challenge would presume that a regulation is invalid, and the agency must meet the burden of proving the regulation valid.

The advantage of this provision is that it increases legislative influence over the rule-making process while it does not appear to present major constitutional difficulties with the separation-of-powers doctrine. (Not only has it been recommended in the Model State Administrative Procedure Act, but the provision has been impliedly upheld by the Iowa Supreme Court). Another advantage is that except for the enabling legislation providing for the shift in burden of proof, any subsequent legislative action to shift the burden escapes possible veto by the Governor.

The disadvantage of this provision is that it is an indirect form of legislative influence. Its value lies more in the threat of court challenges than actual challenges. I could find only one Iowa case involving a challenge to a regulation which had been objected to by a legislative review committee.

In the case of regulations such as oil tax regulations which have a large economic impact on one special interest group and on the State's fiscal well-being in general, that group (the oil industry) could theoretically influence the review committee to object to the regulation. The industry could then institute a court challenge to overturn the regulation and the state could end up losing regulations which might be of great benefit to its citizens. The counterargument to this possible disadvantage is that the dratt language in the Model Act specifically limits the Committee's possible grounds for objection to a violation of the procedural or substantive authority of the agency. If the Committee has no legal grounds for objection to the rule, the Court will not shift the burden of proof. If the Committee has legal grounds for objection to the rule, then it should be face the burden of proof shift, whether or not special interests are involved.

A possible alternative to objection by committee would be objection to a regulation by legislative resolution. This alternative would mitigate any qualms about excessive influence by special interest groups. A difficulty with this alternative would be the impossibility of legislative action during the Interim. The difficulty would be eliminated if the Legislative Council (the body which acts for the legislature during the Interim) was able to object to a regulation when the legislature was not in session.

OPTION 5. SELECTIVE LEGISLATIVE VETO TEST.

This would involve including a clause allowing for a legislative veto by concurrent resolution of regulations relating to a certain subject contained in any single bill. It is very likely that there would be a constitutional challenge by the Governor to any such legislative action. In order to be in the best possible position to counter such a challenge, a selective veto should be tied to an issue regarding legislative budgetary responsibilities. Under the Alaska Constitution, the legislature has specific responsibility and authority to appropriate monies. Thus, if a legislative veto is tied to a budgetary issue, the legislature has a stronger argument that the separation-of-powers doctrine is not violated. One possibility for a selective legislative veto test would tie veto power to enabling legislation when the regulations promulgating that legislation involve an expenditure of funds which have not been approved by the legislature.

RECOMMENDATION 1. PROVIDE FOR APPROVAL OF REGULATIONS BY THE GOVERNOR.

This provision would provide for direct accountability by the Governor of actions taken by state agencies. The provision would allow the Governor an uncomplicated and central mechanism to ensure uniformity of public policy. By limiting the Governor's power of approval to those agencies which are already subject to the APA, there would be minimal interference with independent agencies.

RECOMMENDATION 2. PROVIDE FOR SHIFTING THE BURDEN OR PROOF IN COURT CHALLENGES TO A REGULATION WHEN THE LEGISLATURE HAS PASSED A RESOLUTION OBJECTING TO THE REGULATION DURING THE SESSION OR WHEN THE LEGISLATIVE COUNCIL HAS OBJECTED TO THE REGULATION DURING THE INTERIM.

This provision would provide increased legislative influence over the rule-making process. A shift in the burden of proof has no impact unless there is a court challenge, and then the impact will be nil if the agency is able to meet its burden of proving a rule valid. However, if an agency has any doubts concerning the legality of a regulation, the existence of this provision would influence them to change a regulation before there is an actual court challenge.

In addition, this provision allows minimal interference with the separations-of-powers doctrine, and thus has a good chance of surviving a constitutional challenge. Shifting the burden of proof by legislative resolution does not go nearly as far as vetoing a regulation by legislative resolution -- the Court would remain the ultimate forum in deciding the validity of a rule. Thus the provision is a mild form of legislative involvement with the executive branch. Another indication of the constitutionality of a shift in burden of proof is that a more extreme form of this provision (objection by the rules review

committee rather than objection by the legislature as a whole) has been impliedly upheld by the Iowa Supreme Court.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM November 9, 1987

SUBJECT: Adoption of regulations
(Work Order No. 5-1340)

TO: Senator Willie Hensley, Chairman
Administrative Regulation Review Committee

FROM: Teresa B. Cramer TBC
Legislative Counsel

Enclosed is the bill you requested requiring the governor to approve adoption of regulations and providing for the shifting of the burden of proof as to the validity of regulations in certain instances.

Sections 1 and ~~2~~ 3 add a requirement that the governor approve regulations before they become 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. ~~3~~ 7 of the bill, regulations that were adopted before the effective date of the Act would remain valid without the governor's signature. The bill does not have a special effective date.

Sections ~~3~~ 4 and ~~4~~ 5 address the presumption of validity of regulations. Under AS 44.62.100(c), added by sec. ~~4~~ 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 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. (606 P.2d 773)

Section 5 of this draft gives the legislature the power 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.

Even if a court were to find the umbrella statute in sec. 4 authorizes future resolutions, the system remains constitutionality infirm. If the legislature is acting under the statute to interpret the law and impose remedies where it believes the law to have been violated, then it is acting in a judicial capacity. The Alaska state constitution, Article IV, section 1, vests the judicial power of the state in the state court system. Under the separation of powers doctrine, the legislature may not assume the powers of the courts.

In drafting this bill, I had a few questions on the content and a suggestion to offer. An alternative approach without the constitutional infirmities of this bill would be to shift the presumption of validity permanently and require by statute that an agency establish its authority for the regulations on which it was relying at each hearing.

1. The draft does not set a time limit on the regulations that the legislature may consider. Does the committee wish to limit legislative review to regulations adopted within a stated number of months or years?

2. As drafted, all four of the statutory presumptions listed in AS 44.62.100 (see sec. 4 of the bill) are removed if the legislature acts. Should the specific statutory presumptions listed in AS 44.62.100(a)(1), (2), and (4) be included, or just the presumption in (3)?

If I may be of further assistance, please advise.

TBC:mkr
ml3/068

Enclosure

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 384
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the adoption of regulations..."
Sponsor: By the Rules Committee
Requestor: Governor's Office/OMB

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.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: February 8, 1988

Richard L. Pegues

Approved by Commissioner: Grace Berg Schaible, Atty. Gen. — Date: February 8, 1988
Agency: Department of Law

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Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 384

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.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Alaska State Senate

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

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

William L. Hensley

MEMORANDUM June 17, 1987

To: Sen Faiks, President
Rep. Grussendorf, Speaker

Rep. Sund, Vice Chairmen
Sen. Sturgulewski, Member
Sen. Szymanski, Member
Rep. Hoffman, Member
Rep. Hanley, Member

From: Sen. Hensley, Chairman WLH
Administrative Regulation Review Committee

Re: Consideration of committee's function and activities.

Since the A.L.I.V.E. decision by the Alaska Supreme Court, the legislature has tried to re-assert a legislative veto power over administration regulations through proposed constitutional amendments. The failure of these proposals lead me to believe that we should seek other ways to attain a proper and more determinative oversight role for the committee and the legislature as a whole. It is in this regard that I would appreciate your review of the attached material.

The report is a brief summary of what other states' laws and court decisions have done with legislative overview of administrative regulatory actions. It offers an instructive survey of how the separation of powers question is handled for contending jurisdictional interests across the nation. It also shows there is no preferred manner in which the legislative and executive entities exert control over rule making and regulatory powers delegated to the bureaucrasy. Rather, there is a variety of approaches and corresponding court historys.

I present this report to you for discussion about what the committee should do to achieve a more productive and useful function. Should we seek selective veto powers? Expressly delegate the veto powers to the governor, lt. governor or an independent committee? Seek agency burden of proof in a judicial setting? I hope you will give some consideration to these and the other examples in the report.

The special session offers a convenient time to share our thoughts on the committee's future goals, objectives, and activities.

Alternative Approaches to Oversee Administrative Regulatory Activites

A Report

for

Senator William L. Hensley, Chairman

Administrative Regulation
Review Committee

By

Kathy Hathaway

June 19, 1987

CONTENTS

APPENDICES

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]

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[1]See 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 wit.. (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

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(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."

[2] Alaska 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 <u>with a committee resolution</u> (rather than a committee report). Legislative intent stated that "It is the intent. . .that [suspension powers] be granted to . . .prevent the public suffering

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[3] <u>Id</u> 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 Audit[4] -- 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]

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[4]AS 24.20.151 et seq.

[5]AS 24.20.201 (5).

[6]AS 37.07.080(h)(2).

Legislative Council[7] -- 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 Audit[11] -- 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]

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[7]AS 24.20.010 et seq.

[8]AS 24.20.061(C).

[9]Article II, section 12.

[10]AS 24.20.065.

[11]AS 24.20.241 et seq.

[12]AS 24.20.271(3).

Code Revision Commission[13] -- 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.

Ombudsman[14] -- 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

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[13]AS 24.20.075 et seq.

[14]AS 24.55.010 et seq.

[15]AS 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

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[16] Bradner 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.

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[17] Id. at 772.

[18] Although 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.

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[19]See 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

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[20] Legislative 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

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

[22] Opinion 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]

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

[24] Philip 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]

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[25]Neslin, 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

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[26] A.L.I.V.E., 606 P.2d 769, 777.

[27] Com. 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.

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[28]The 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 legislture ". . .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 case[30] (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.

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

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

C.4. Building authority mu t 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

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[31] Enourato 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."

[32] Enourato 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 sunsetting 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

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[33]Id at 671, 679.

[34]AS 44.62.060(b)

[35]Neslin, 57 Washington Law Review 669, 671.

[36]AS 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 a 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]

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[37] AS 44.62.060(c).

[38] Neslin at 681.

[39] See 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.

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[40] Schmitt 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.

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[41]Frederick 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

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

[43] Id 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 -- sunsetting 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.

board, appears appropriate in view of all of the circumstances revealed in our review of the entire record. (Cf. *Davidson v. State Bar, supra*, 17 Cal.3d 570, 131 Cal.Rptr. 379, 551 P.2d 1211 [attorney publicly reproved for nondisclosure of material fact; prior public reproval; mitigating circumstances found]. *Sullins v. State Bar, supra*, 15 Cal.3d 609, 125 Cal.Rptr. 471, 542 P.2d 631 [attorney publicly reproved for nondisclosure of material information; no prior record of discipline].) This opinion shall serve as such a reproval.

MOSK, Justice, dissenting.

I dissent.

A trivial incident in which the petitioner was zealously, and legally, serving the interests of his clients and no self-interest has been magnified out of all proportion. There was no commission or omission that merits discipline by the bar.

Petitioner represented three defendants charged with a narcotics offense. At arraignment on December 13 the district attorney declared he would not object to reduction of bail from the $50,000 each originally requested by the sheriff to $10,000. Nevertheless the municipal court commissioner set bail at $50,000.

The same day petitioner appeared in open court before a municipal court judge and again requested a reduction of bail to $10,000. The hearing was continued to December 16 and bail remained at $50,000 in the interim. After the hearing petitioner advised the district attorney and the sheriff's investigating officer that he would seek a reduction in the superior court, and both stated they would not oppose bail reduction to $10,000.

Immediately thereafter the petitioner contacted the superior court bail commissioner, David Ziskrout, and upon representation that bail had been set at $50,000 for each defendant but that neither the district attorney nor sheriff would oppose reduction to $10,000 for each, the commissioner so reduced the bail.

Two questions emerge: was an injustice committed, and was the commissioner deceived by this attorney. It seems crystal clear to me that both queries must be answered in the negative.

That reduction of bail to $10,000 was not improper under all the circumstances is confirmed not only by acquiescence of the prosecuting agencies, but by subsequent action of the municipal court. On December 16 the municipal court judge before whom the preliminary hearing was set reduced bail on each defendant to $7,500.

The superior court commissioner could not have been deceived for he was advised bail had been set at $50,000 and he was being asked for a reduction to $10,000. Since it was his duty to independently determine the appropriate bail, the conclusion—actually the mere deferment of action—of a judicial officer at a lower level should have been of no significance.

It would be reassuring if this were among the more serious charges to be leveled against a California attorney. But I strongly suspect there is more egregious malfeasance than this minutia among a few of our more irresponsible and unethical legal brethren that should occupy the time and attention of the State Bar and this court.

I would dismiss the proceeding.

BIRD, C. J., concurs.

NEWMAN, Justice, dissenting.

I agree with Justice Mosk. Especially does it seem unwise to exploit "the time and attention of the State Bar" when peccadillos occur in a setting where the judge or other adjudicator who is involved may easily dispose of the matter.' Is it not appropriate, for instance, to proceed informally in the manner typically apt when an alleged "contempt", even where admitted or proved, leads merely to private admonition?

With regard to "the time and attention . . . of this court", here again we see exemplified the kind of State Bar case that in my view should be transferred pursuant to California Constitution, article VI, section 12. (Cf. conc. opn. in *Bib'le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 556, 162 Cal.Rptr. 426, 606 P.2d 733.)

STATE of Alaska and Department of Revenue, Appellants,

v.

A.L.I.V.E. VOLUNTARY, Appellee.

No. 3670.

Supreme Court of Alaska.

Feb. 19, 1980.

Unincorporated association, which was political action committee for unions, brought suit based on allegation that Department of Revenue's denial of permit allowing association to operate lotteries was wrongful for certain reasons including fact that such denial was based on continuing enforcement of a regulation despite its nullification by legislature. The Superior Court, Third Judicial District, Peter J. Kalamarides, J., granted association partial summary judgment, and State and Department of Revenue appealed. The Supreme Court, Matthews, J., held that statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation.

Reversed and remanded with directions.

Boochever, C. J., dissented and filed opinion in which Connor, J., joined.

1. Statutes ⇐107(1)

Constitutional requirements that every bill be confined to one subject and that there be a descriptive title are intended to prevent inclusion of incongruous and unrelated matters in same bill and to guard against inadvertence, stealth and fraud in legislation. Const. art. 2, § 13.

2. Statutes ⇐15, 19

Purpose of state constitutional provision requiring three readings of a bill on three separate days, requiring that vote of each legislator on final passage of a bill be recorded and requiring that no bill pass without an affirmative vote of the majority of the membership of each house is to ensure deliberation prior to passage, to ensure that 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. Const. art. 2, § 14.

3. Statutes ⇐26

Purpose of state constitutional provisions to effect that no bill shall become law unless governor has opportunity to veto it is to preserve integrity of executive branch of government, and thus maintain equilibrium of governmental powers, and to act as a check on hasty and ill-considered legislation. Const. art. 2, §§ 15, 17.

4. Statutes ⇐255

Purpose of state constitutional provision that laws are not to become effective, unless a two-thirds vote of membership of each house provides otherwise until 90 days after they are enacted is to provide fair opportunity to those people affected by the legislation to learn of it. Const. art. 2, § 18.

5. Statutes ⇐22

Statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation. Const. art. 2, §§ 1 et seq., 5, 13–18; art. 3, § 23; art. 10, § 12; AS 44.62.320(a).

6. Statutes ⇐22

When legislature wishes to act in an advisory capacity it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in State Constitution. Const. art. 2, § 1 et seq.

7. Statutes ⇐22

Legislature has no implied general power to veto agency regulations by informal legislative actions. Const. art. 3, § 23; art. 10, § 12.

8. Administrative Law and Procedure ⇐395

Power granted by state constitutional provisions to effect that, unless they are disapproved by legislature within 60 days, changes in the law by executive order shall become effective at a date thereafter to be designated by governor and that recommendations made by a state local boundary commission become effective 45 days after presentation to the legislature unless vetoed is not rule-making power, but, rather, power to change statutes, and, thus, expression of such power in Constitution does not carry any implication that general administrative rule making is meant to be forbidden. Const. art. 3, § 23; art. 10, § 12.

9. Constitutional Law ⇐60

Though legislature can delegate power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by Constitution; fact that legislature can delegate legislative powers to others, who are not bound by constitutional provisions defining the mechanics of legislation, does not mean that legislature can delegate the same power to itself and, in the process, escape from such constitutional constraints under which it must operate. Const. art. 2, § 1 et seq.

10. Constitutional Law ⇐58

Though power to void agency regulations can be exercised by either legislature or agency, if 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. Const. art. 2, §§ 1 et seq., 5; art. 3, § 26.

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Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for appellee.

Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for amici curiae Alaska Legislative Council and Administrative Regulation Review Committee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

AS 44.62.320(a) provides:

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

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

I

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

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

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

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation which was in effect for most of 1976 cash prizes were not included within the personal property limitation of $15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by concurrent resolution, 15 AAC 05.410(4).[8]

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

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

2. AS 05.15.100

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

5. AS 05.15.060(11)

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

> In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $20,000.00 in any one calendar year.

7. As amended the regulation reads:

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

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

> Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.
>
> BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:
>
> WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and
>
> WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to $30,000 in personal property and $50,000 in real property; and
>
> WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and
>
> WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS 05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;
>
> BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

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

II

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

[1] Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.[11]

[2] Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978), and to ensure an opportunity for the expression of public opinion and due deliberation.[12] Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[3, 4] In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it.[13] This power is granted " 'to preserve the integrity of . . . [the executive] branch of government . . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon corrupt or hasty and ill-considered legislation.' " *Thomas v. Rosen*, 569 P.2d 793, 795 n. 5 (Alaska 1977) (citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.[14]

[5, 6] The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that the requirements of Art. II § 14 are mandatory, not permissive.[15]

10. Art. II, § 13 provides:

Form of Bills. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska." Art. II, § 14 provides:

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

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

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

13. Art. II, §§ 15, 16 and 17.

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

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

16. *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of [illegible]

The minutes of the proceedings of our constitutional convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

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

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity.[16]

Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N.E. 180 (1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed by the Illinois Constitution had not been followed. Speaking of them, the court stated:

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

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

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

Id.

In *Mullan v. State*, 114 Cal. 578, 46 P. 670 (1896) the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

> A mere resolution . . . is not a competent method of expressing the legislative will, where that expression is to

such pledge shall first be approved by joint resolution of the Senate and House of Representatives." *Id.* 218 P.2d at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." *Id.* 218 P.2d at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U.L.Rev. [illegible]

have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

Moran v. La Guardia, 270 N.Y. 450, 1 N.E.2d 961 (1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution: [17]

> A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment . . . To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute . . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days . . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by itself and independent of the others, is necessary. No two of them acting together, much less alone, can make a law." [Citations omitted].[18]

1 N.E.2d at 962.

[7, 8] The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session . . . ", such changes shall "become effective at a date thereafter to be designated by the governor." [19] On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house." [20]

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

III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional.[24] They are *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950); and *Reith v. South Carolina State Housing Authority*, (Cl.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976).[25]

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

18. To the same effect are *Becker v. Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853 (1934), *Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General*, 85 Ohio St. 251, 97 N.E. 967, 971 (1912) ("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . .). *Schidder v. Smith*, 341 Pa. 165, 200 A. 601, 604 (1938) ("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]"), *State ex rel. Todd v. Yelle*, 7 Wash.2d 413, 110 P.2d 162, 165 (1941) ("It is clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill . . . "), *Rowley v. City of Medford*, 132 Or. 405, 285 P. 1111, 1114 (1930) ("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."), *Hawks v. Bland*, 156 Okl. 48, 9 P.2d 720, 721 (1932) ("[a] resolution is the mere expression of an opinion and not an enactment of law."), *Newport News Fire Fighters Ass'n. Local 794 v. City of Newport News*, 307 F.Supp. 1113, 1115 (E.D.Va.1969) ("[T]he resolution expresses only the opinion of that legislative body.").

19. Art. III, § 23.

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

21. Art. III, § 23.

22. Art. X, § 12

23. Art. II, § 1.

24. The dissent suggests that our comment in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the *constitutionality* of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

25. The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. *See Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284-85, 96 S.Ct. at 757-58, 46 L.Ed.2d at 838-39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 182 U.S.App.D.C. 21, 559 F.2d 642 (D.C.Cir.) (en banc) *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), but Circuit Judge MacKinnon reached [illegible]

The New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

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

In *Reith v. South Carolina State Housing Authority*, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976), the South Carolina Court of Common Pleas considered, *inter alia*, the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution."[26] The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws.[27] On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional.[28] The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue.[29]

Atkins v. United States, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because it contravened article I, section 1 of the United States Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, *en banc*, in a four-to-three decision, upheld the statute.

Atkins is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped its reasoning and conclusion. *Id.* at 1058-60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed *supra*, pp. 772, 773. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution: [30]

dissent criticizing Justice White's conclusion in *Buckley*: 182 U.S.App.D.C. at 64, 559 F.2d at 685

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

27. *Id.* at 10.

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

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

30. U.S.Const. art. I, § 1 provides:

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

"[T]he clause does not itself, as a textural matter, mechanically direct the manner in which Congress must exercise the legislative power." *Id.* at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. *Id.* at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . . ." *Id.* at 1064. In contrast, the annulment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense,[31] and annulling any one of them effects a change in the law.

IV

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

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied.[32] We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

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

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

[9] The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a deligation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.[33]

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

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

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

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

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

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

It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee,[36] or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

In *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975), at issue was a statute empowering an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. *Id.* 543 P.2d at 1321.[37] The same reasoning was employed in *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), where the Court of Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an appointment." *Id.* 168 N.E. at 822. *See also, Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 223 (1912); *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257, 264 (1938). *Contra, Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight cannot take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important, the question of whether the legislature might perform a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv.L.Rev. 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. *Id.* at 1409–20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, *supra*, pp. 772, 773.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion *supra*, pp. 772, 773.

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

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

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

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

I

I believe that the legislative power to annul administrative regulations by concur-

35. Art. III, § 26 provides:

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

See, e. g., Buckley v. Valeo, 424 U.S. 1, 118–43, 96 S.Ct. 612, 681–693, 46 L.Ed.2d 659, 744–58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress. *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929) discussed *infra*, p. 778.

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

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

38. This clause provides:

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

39. *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 745 (1889).

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

rent resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations.[1] Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readings on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature, a public record of the vote cast, being subject to veto by the governor, a 90-day waiting period before becoming effective.[2] Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary for enacting a bill into law.

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

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

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

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

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

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

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

In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in *Boehl* that the legislature has that power.

II

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

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

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

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years.[6] The early stages of the dispute involved the Reorganization Acts of the 1930's and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that period Congress disapproved by resolution.[7] Federal acts incorporating similar provisions have proliferated in recent years.[8] Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations.[9]

III

I agree with the majority that there is scant case authority on the specific issue in

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

4. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 639 (1957); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L.Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U.L.Rev. 1045 (1955).

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

6. *Clark v. Valeo*, 182 U.S.App.D.C. 21, 28-29, 559 F.2d 642, 649-50 (D.C.Cir.) (en banc) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

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

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

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

the United States. Our court, however, has favorably discussed the legislative veto in *Boehl*.

The holding in *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977) (*en banc*) (*per curiam*), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), supports the position taken in this dissent. *Atkins* upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

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

424 U.S. at 284–85, 96 S.Ct. at 757, 46 L.Ed.2d at 838–39 (emphasis added) (footnotes omitted).

The majority cites *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. *Id.* 83 A.2d at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." *Id.* 83 A.2d at 741–42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary increases to be approved by a legislative committee prior to submission to the governor for final approval. *Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970). The court, without analysis of its earlier opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. *Id.* 266 A.2d at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

IV

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

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the annulling action is taken at the first session of the legislature following promulgation of the regulation.[11]

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

V

As the majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, section 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session,"[13] and article X, section 12, concerning local boundaries, which provides that the legislature may veto by resolution local boundary changes proposed by an executive branch commission.[14]

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

> In our view, the specificity with which the constitution deals with the legislative

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

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

12. *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574–78, 59 S.Ct. 993, 1013–15, 83 L.Ed. 1446, 1470–72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured). *Currin v. Wallace*, 306 U.S. 1, 15–18, 59 S.Ct. 379, 387–388, 83 L.Ed. 441, 451–52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

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

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

14. Article X, section 12, provides:

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

veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

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

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

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

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

VI

It is also of significance that the Administrative Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature.[15] In fact, two of the more active delegates, Hellenthal and Taylor, introduced House Bill 13 which was enacted as chapter 143, SLA 1959.[16] The bill was passed by a House vote of 37 to 1,[17] and by a unanimous Senate vote.[18]

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

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter I thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

16. 1959 House Journal 52.

17. 1959 House Journal 427.

18. 1959 Senate Journal 708.

> Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized.[19]

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

What was said by the United States Supreme Court about legislation passed by Congress shortly after the enactment of the United States Constitution is apropos here:

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

Myers v. United States, 272 U.S. 52, 174–75, 47 S.Ct. 21, 45, 71 L.Ed. 160, 189–90 (1926) (citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal government.[21] Such a practice, affording a

19. 1959 Senate Journal 1092.

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

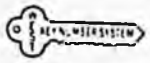
21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. *See* AS 46.03.758(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.05.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 94 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 60) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs, annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

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

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

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

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



ALASKA CHILDREN'S SERVICES, INC., Appellant,

v.

Francis S. L. WILLIAMSON, Commissioner, Department of Health and Social Services, and State of Alaska, Appellee.

No. 4155.

Supreme Court of Alaska.

Feb. 21, 1980.

Nonprofit corporation owning or operating residential child care facilities brought suit challenging ruling of Department of Administration that Department of Health and Social Services was not required to reimburse corporation for amounts by which actual cost increases in providing child care had exceeded predicted increases. The State of Alaska Superior Court, Third Judicial District, J. Justin Ripley, J., affirmed the ruling below, and corporation appealed. The Supreme Court, Connor, J., held that: (1) under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases, and (2) statute did not deprive corporation of due process or deny it equal protection.

Affirmed.

1. Statutes ⇐223.2(1)

Two statutes enacted at same time and dealing with same subject matter are in pari materia and should be construed so as to be consistent with one another and in such manner as to give maximum effect to each.

2. Infants ⇐19.4

Under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, such nonprofit corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases. AS 47.40.010(a)(3), 47.40.040(a).

3. Constitutional Law ⇐242.3(2), 278.7(1)
Infants ⇐12

Statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year did not deprive such a nonprofit corporation of due process and equal protection even though statute allowed DHSS to pay for only predicted cost increases when actual cost increases had been much greater. AS 47.40.010(a)(3), 47.40.040(a); U.S.C.A. Const. Amend. 14.

Charles K. Cranston, Gallagher, Cranston, Snow, Walters & Dahl, Anchorage, for appellant.

Thomas H. Robertson, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

OPINION

CONNOR, Justice.

This case presents issues of statutory interpretation.

Appellant Alaska Children's Services, Inc. (hereinafter ACS) is a private, non-profit corporation [1] that owns or operates residential child care facilities in Anchorage and Unalaska. Since 1971, ACS has provided full-time child care services for children who have become wards of the state by "agreement" with the Department of Health and Social Services (hereinafter DHSS). There has been no written contract between these parties. Rather, a working relationship developed that purported to follow statutory and administrative guidelines for state placement and support of these children.

The controversy that has arisen concerns the amount the state must pay ACS for its child care services. The focus is upon two related statutes. The first, AS 47.40.010(a)(3),[2] states that when the DHSS purchases services for persons for whom the state has assumed responsibility, it shall "pay all expenses related directly to the full cost of services at the levels of care required." The second statute, AS 47.40.040(a),[3] provides that the "'full cost' of services shall be determined by the per person, per day cost [4] in the preceding fiscal year plus a proportionate share of anticipated cost of living and staff salary increment increases" for the upcoming fiscal year.

DHSS has been paying ACS in accordance with this second statute; that is, pay-

1. ACS's letterhead indicates that it was founded jointly by the American Baptist, American Lutheran, and the United Methodist Churches.

2. The full text of AS 47.40.010 provides:
Purchase of Services. (a) When the department [DHSS] purchases services for persons for whom the state has assumed responsibility under the laws of the state, the department shall
(1) adopt regulations establishing the levels of care to be provided;
(2) determine the rates of payment for the full cost of services required;
(3) pay all expenses related directly to the full cost of services at the levels of care required;
(4) make the placement of persons in accordance with the levels of care provided for in the regulations.
(b) Services of jails and other penal institutions may not be included in services purchased by the state in this chapter.

3. AS 47.40.040 reads in full:
Determination of full cost of services. (a) In this chapter, "full cost" of services shall be determined by the per person, per day cost in the preceding fiscal year plus a proportionate share of anticipated cost of living and staff salary increment increases for the fiscal year for which the full cost of services, determined to be necessary by the department, is being determined. Child care costs for foster homes shall be computed in the same manner as for child care and nursing home institutions except that no salary costs may be considered.
(b) Full cost of services does not include the following:
(1) expenses, including salaries and fees, incurred in raising funds;
(2) funds expended for construction, major equipment and other capital expenditures;
(3) depreciation and replacement costs of, and costs of additions to, major property and equipment;
(4) religious training and education; and
(5) services provided which are substandard to, or exceed, the requirements of the department.

4. The per person, per day cost in each institution is referred to as the "unit cost."

sometimes, recommend statutory action by the legislature.

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

plea of not guilty, and explained the posture of the case. Defendant complains of a reference, in the instruction, to Marlowe King which reads:

". . . Marlowe King is charged as a codefendant in the Information filed by the State, but the Court for legal reasons has granted him a separate trial; and only Eugene Steward is being tried at this time. . . ."

Marlowe King was charged as a codefendant in the information. It was necessary to explain his position in order to give the jury understanding of the case and the issues to be tried. We see nothing prejudicial in the instruction.

[28] Instruction No. 7 defined sexual intercourse in connection with the rape charge. It is a verbatim statement of PIK [Criminal] § 57.02 and conforms with K.S.A. 21-3501(1). It is a correct statement of the law. (*State v. Ragland*, 173 Kan. 265, 246 P.2d 276.)

[29] Instruction No. 17 is in the form of a so-called "Allen Deadlock Jury" instruction. While not verbatim it closely follows PIK [Civil] § 10.20, which we approved in *State v. Scruggs*, 206 Kan. 423, 479 P.2d 886, when given before the jury commenced deliberations. We find no reversible error in the giving of the instruction. However, we believe the better practice in criminal cases is to give PIK [Criminal] § 68.12 along with other instructions before the case is submitted.

We find no reversible error shown by any contentions made concerning the court's instructions.

[30-32] Finally, defendant claims the trial court abused its discretion in applying the Habitual Criminal Act (K.S.A. 21-4504), in imposing sentence. Defendant says that in light of the previous sentences imposed on defendant in case number 2086-CR (which apparently was the case involving the unrelated crimes for which defendant was arrested) the imposition of enhanced consecutive sentences for convictions in the instant case constituted cruel and unusual punishment and an abuse of discretion. The sentences imposed were severe, but the crimes committed were heinous and cold-blooded. Defendant makes no point that the sentences exceeded permissible limits under 21-4504 and the statutory sentences for each crime. In *State v. Pettay*, 216 Kan. 555, 532 P.2d 1289, we held:

"When a sentence is fixed by the trial court within permissible limits of the applicable statutes the sentence is not erroneous. In the absence of special circumstances showing an abuse of judicial discretion it cannot be determined on appeal that such a sentence is excessive or so disproportionate to the offense as to constitute cruel and unusual punishment." (Syl. ¶ 4.)

The sentences imposed are not so disproportionate to the heinous offenses committed as to constitute cruel and unusual punishment.

Defendant's industrious counsel has briefed thirteen points of error which we have carefully examined, but find no error shown which warrants a new trial.

The judgment is affirmed.

210 Kan. 285

STATE of Kansas ex rel. Curt T. SCHNEIDER, Attorney General, Appellant,

v.

Robert F. BENNETT, Governor of the State of Kansas, et al., Appellees.

No. 48212.

Supreme Court of Kansas.

March 6, 1972.

Action in quo warranto was brought by State on relation of Attorney General to oust members of state finance council from exercising various powers and responsibilities placed in them by statute. The Shawnee District Court, Division No. 2, Michael A. Barbara, J., entered judgment in favor of defendants, and plaintiff appealed. The Supreme Court, Prager, J., held that statutory powers vested in state finance council were not unconstitutional as violative of separation of powers doctrine insofar as they involved expenditures from state emergency fund and issuance of certificates of indebtedness, but that powers vested in council amounted to an usurpation of executive powers by legislative department in violation of separation doctrine insofar as they involved supervision and control over operations of State Department of Administration and insofar as they involved authority to approve expenditures from special revenue funds in excess of fixed statutory limits, that quo warranto was available to oust legislative members of council from exercising powers and duties held to be unconstitutional, that acts of council from time of its creation until time of opinion were those of de facto officers binding between all persons dealing with council as a public body, and that duties of council involving supervision of Department of Administration and its various divisions were to devolve upon and be exercised by governor until such time as legislature adopted a new legislative plan or scheme.

Reversed in part and affirmed in part.

1. Constitutional Law ⇐50

A strict application of separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power, including legislative, executive, and judicial powers often blended together in same administrative agency.

2. Constitutional Law ⇐50

Sufficient flexibility to experiment and to seek new methods of improving governmental efficiency must be maintained in political system but, at same time, one cannot lose sight of ever-existing danger of unchecked power and concentration of power in hands of a single person or a group which separation of powers doctrine was designed to prevent.

3. Constitutional Law ⇐58

Separation of powers doctrine does not in all cases prevent individual members of legislature from serving on administrative boards or commissions created by legislative enactments.

4. Constitutional Law ⇐58

Individual members of legislature may serve on administrative boards or commissions where such service falls in realm of cooperation on part of legislature and there is no attempt to usurp functions of executive department of government.

5. Constitutional Law ⇐58

Separation of powers doctrine prohibits individual members of legislature from serving on administrative boards or commissions where such service results in usurpation of powers of another department by individual legislators.

6. Constitutional Law ⇐50

When a statute is challenged under constitutional doctrine of separation of powers, court must search for a usurpation by one department of powers of other department on specific facts and circumstances presented.

7. Constitutional Law ⇐50

A usurpation of powers under separation doctrine exists where there is a significant interference by one department with operations of other department.

8. Constitutional Law ⇐50

In determining whether a usurpation of powers exists under separation doctrine, a court should consider essential nature of power being exercised, degree of control by one department over another, objective sought to be attained by legislature, and practical result of blending of powers as shown by actual experience over a period of time.

9. Constitutional Law ⇐58

Statutory powers vested in state finance council, insofar as they involve su-

pervision and control over operations of State Department of Administration and its divisions, amounts to an unconstitutional usurpation of executive powers by legislative department in violation of separation doctrine. K.S.A. 75-3701 to 75-3775.

10. Constitutional Law ⊂58

Statutory powers vested in state finance council, insofar as they involve expenditures from state emergency fund, do not amount to an unconstitutional usurpation of executive powers by legislative department in violation of separation doctrine. K.S.A. 75-3713, 75-3713a.

11. Constitutional Law ⊂58

Statutory powers vested in state finance council, insofar as they involve authority of council to order issuance of certificates of indebtedness, do not amount to an unconstitutional usurpation of executive powers by legislative department in violation of separation doctrine. K.S.A. 75-3725a.

12. Constitutional Law ⊂62(13)

Statutory powers vested in state finance council, insofar as they involve authority of council to approve expenditures from special revenue funds in excess of fixed statutory limits, amount to an unconstitutional delegation of legislative power without adequate standards or guidelines. K.S.A. 75-3701 to 75-3775.

13. Constitutional Law ⊂62(1, 2)

The legislature may delegate to an administrative body some of legislature's functions where the policy is fixed and standards are definitely established which determine the manner and circumstances of the exercise of such power.

14. Constitutional Law ⊂62(2)

Great leeway should be allowed legislature in setting forth guidelines or standards for the exercise of legislative power by an administrative body; the use of general rather than minute standards is permissible.

15. Constitutional Law ⊂62(13)

Statutory powers vested in state finance council are usurpative of separation of powers doctrine insofar as there are no adequate legislative standards or guidelines to govern council in exercise of its authority to increase fixed positions of employment authorized for state agencies, to approve receipt and expenditure of federal or other funds not authorized by specific statutes, or to authorize state board of regents to amend or change its list of fees and service activities and to expend money derived therefrom. K.S.A. 75-3701 to 75-3775.

16. Quo Warranto ⊂13

Quo warranto was available to oust state legislative members of state finance council from exercising their powers and duties in respect to supervision and control over operations of Department of Administration and its various divisions insofar as such powers and duties constituted a usurpation of executive powers by legislative department in violation of separation doctrine K.S.A. 75-3701 to 75-3775.

17. States ⊂49

Acts of state finance council, from time of its creation until filing of opinion determining that certain powers and duties of council constituted an usurpation of executive powers in violation of separation doctrine, were those of de facto officers binding between all persons dealing with council as a public body composed of public officers.

18. States ⊂43

Duties of state finance council that involved supervision of Department of Administration and its various divisions were to devolve upon and be exercised by governor as head of executive department of state until such time as legislature adopted a new legislative plan or scheme for council that did not usurp executive powers. K.S.A. 75-3701 to 75-3775.

Syllabus by the Court

1. The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government.

2. The separation of powers doctrine prohibits individual members of the legislature from serving on administrative boards or commissions where such service results in the usurpation of powers of another department by the individual legislators.

3. When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented.

4. A usurpation of powers exists where there is a significant interference by one department with operations of another department.

5. In determining whether or not a usurpation of powers exists a court should consider (1) the essential nature of the power being exercised; (2) the degree of control by one department over another; (3) the objective sought to be attained by the legislature; and (4) the practical result of the blending of powers as shown by actual experience over a period of time.

6. Statutory powers vested in the state finance council with respect to expenditures from the state emergency fund (K.S.A.1975 Supp. 75-3713 and 75-3713a) and its authority to order the issuance of certificates of indebtedness (K.S.A.1975 Supp. 75-3725a) are not unconstitutional as a violation of the separation of powers doctrine.

7. Statutory powers vested in the state finance council as considered and set forth in the opinion which involve supervision and control over the operations of the state department of administration and its divisions are held to be an unconstitutional usurpation of executive powers by the legislative department in violation of the separation of powers doctrine.

8. Statutory powers vested in the state finance council as considered and set forth in the opinion which involve the authority to approve expenditures from special revenue funds in excess of fixed statutory limits are held to be an unconstitutional delegation of legislative power without adequate standards or guidelines.

John R. Martin, First Asst. Atty. Gen., argued the cause, and Curt T. Schneider, Atty. Gen., was with him on the brief for appellant.

Charles N. Henson, Eidson, Lewis, Porter & Haynes, Topeka, argued the cause, and was on the brief for appellees.

Robert A. Goldsnow, Kansas Legislative Counsel, Topeka, was on the brief amicus curiae, for the Kansas Senate, Kansas House of Representatives, and Kansas Legislative Coordinating Council.

PRAGER, Justice:

This is an action in quo warranto brought by the state of Kansas on the relation of the attorney general as plaintiff seeking to oust members of the state finance council from the exercise of various powers and responsibilities placed in them by statute. Judgment was entered by the district court in favor of the defendants-appellees denying the relief sought by the plaintiff. Because of a change in the personnel of the state finance council an order has been entered by this court substituting new parties defendant for certain original parties. Sen. Ross O. Doyen, president of the Kansas senate, has been substituted for Richard D. Rogers who no longer holds that position. Sen. Wint Winter has been substituted for Sen. Ross O. Doyen, who was formerly chairman of the senate ways and means committee. Rep. John F. Hayes, as majority floor leader of the Kansas house of representa-

tives, has been substituted for Donn J. Everett, who formerly held that position. Rep. John Carlin, as minority floor leader of the house of representatives, has been substituted for Richard C. "Pete" Loux. The remaining original defendants are Robert F. Bennett, governor of Kansas; Rep. Duane S. "Pete" McGill, speaker of the Kansas house of representatives; Sen. Joseph C. Harder, majority floor leader of the Kansas senate; Sen. Jack Steineger, minority floor leader of the Kansas senate; and Rep. Wendell Lady, chairman of the house of representatives ways and means committee. All legislator defendants are members of the state finance council by virtue of their legislative positions.

The questions presented in this case are entirely questions of law. The case must be determined on the basis of statutes creating the state finance council and prescribing the duties and powers thereof. It is the position of the attorney general that the exercise of certain statutory duties and powers of the state finance council by the legislative members of that body violates the constitutional doctrine of the separation of powers and that the exercise of certain other statutory duties constitutes an unlawful delegation of legislative powers.

Cases involving alleged violations of the separation of powers doctrine have been before this court on many occasions. The separation of powers doctrine was most recently discussed in *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304. *Leek* involved the question of whether K.S.A. 22-3707, providing for senatorial approval or rejection of gubernatorial appointments to the Kansas Adult Authority, is constitutional. Although *Leek* did not involve an attempt by the state legislature to have its own members serve on an administrative board, *Leek* is important because it discusses in some detail the separation of powers doctrine and some of the general principles pertaining thereto. Like the Constitution of the United States, the Constitution of Kansas contains no express provision requiring the separation of powers, but all decisions of this court have taken for granted the constitutional doctrine of separation of powers between the three departments of the state government—legislative, executive and judicial. The separation of powers doctrine was designed to avoid a dangerous concentration of power and to allow the respective powers to be assigned to the department most fitted to exercise them. (*Van Sickle v. Shanahan*, 212 Kan. 426, 446, 511 P.2d 223.) In *Van Sickle*, Mr. Chief Justice Fatzer set forth an excellent history on the separation of powers doctrine which does not need further elaboration here.

Throughout the judicial history of this state two basic approaches have been taken toward the doctrine. Some courts have applied the separation of powers doctrine strictly, refusing to tolerate the members of one department performing *any* duties traditionally assigned to a different department. A good example of this approach is that of Mr. Justice Smith in the majority opinion in *State v. Johnson*, 61 Kan. 803, 60 P. 1068, decided in 1900. There Mr. Justice Smith declares that the Constitution of Kansas has created three distinct and separate departments of government and that the functions of the three departments should be kept as distinct and separate as possible, except so far as the action of one is made to constitute a restraint upon the action of the other to keep them within proper bounds and to prevent hasty and improvident action. At times the strict view has been applied without qualification to the point that if any department of government acts in any way beyond the bounds of its designated power such action is without jurisdiction, unconstitutional and void.

Although the theoretical separation of powers of government was strictly enforced in our early history without qualification, the more recent cases have modified the doctrine and applied a more practical approach. In *Leek* it is pointed out that despite the excellent theoretical framework which various cases have constructed, this court has held the separation of powers of government has never existed in pure form except in political theory. This view was taken in 1900 by Mr. Chief Justice Doster in his dissenting opinion in *State v. Johnson*, supra, where he states as follows:

". . . I wish to say that in the practical affairs of government there is not and cannot be any such thing as a clearly defined and complete separation of such powers. There is not and cannot be any such thing as a legislature which wills and ordains, and nothing else; a judiciary that interprets and decides, and nothing else, and an executive that enforces, and nothing else. The metaphysical distinction between the spheres of will, judgment and action cannot be applied in the domain of political science. In the practical affairs of government the distinction between legislator, judge and executioner is speculative and doctrinal, rather than actual, and the lines of demarcation between them vague and fanciful, rather than real. There are points at which the functions of the one assimilate so closely to the others as to be impossible of detection and separation. The most that can be done is to recognize the theoretical classification made and preserve in general outline the distinction drawn. Modern political science has, however, generally discarded this theory (the distribution of governmental powers), both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization.'" (p. 837, 60 P. p. 1079.)

[1,2] In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of government as it exists today. Under our system of government the absolute independence of the departments and the complete separation of powers is impracticable. We must maintain in our political system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.

[3-6] The cases in this jurisdiction concerned with the separation of powers have involved various departments of our state government. *In re Sims, Petitioner*, 54 Kan. 1, 37 P. 135, involved an unconstitutional combination of executive and judicial power where a statute sought to confer on county attorneys the power to commit witnesses for contempt. *State v. Johnson*, supra, held invalid a combination of legislative, judicial, and executive functions in a court of visitation. *Sartin v. Snell*, 87 Kan. 485, 125 P. 47, held to be valid a statute providing for the appointment of county auditors by the district judges, a claimed improper delegation of executive power to the judicial branch. The issue presented in the case now before us involves a claimed unconstitutional delegation of executive powers to the legislative branch. It is necessary to consider the Kansas separation of powers cases involving the legislative and executive departments of government and the general principles of law which have been developed therefrom. We note in particular the following general principles:

(1) A statute is presumed to be constitutional. All doubts must be resolved in favor of its validity, and before a statute may be stricken down, it must clearly appear the statute violates the constitution. (*Leek v. Theis*, supra, ¶ 2.)

(2) The legislature may by statute provide for the appointment of members of boards or commissions created by the legislature. (*State ex rel. Fatzer v. Kansas Turnpike Authority*, 176 Kan. 683, 273 P.2d 198; *Marks v. Frantz*, 179 Kan. 638, 649, 298 P.2d 316; *Leek v. Theis*, supra, ¶ 4.)

(3) There is no *express* provision of the Kansas Constitution which in terms prohibits the legislature from providing for the appointment of certain of its members to administrative boards or commissions or which prohibits their serving on such boards or commissions. (*State ex rel. Fatzer v. Kansas Turnpike Authority*, supra; *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 692, 308 P.2d 537.)

(4) The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government. (*State ex rel. Fatzer v. Kansas Turnpike Authority*, supra; *State ex rel. Anderson v. Fadely*, supra, concurring opinion of Mr. Justice Schroeder, at page 697, 308 P.2d 537.)

(5) The separation of powers doctrine prohibits individual members of the legislature from serving on administrative boards or commissions where such service results in the usurpation of powers of another department by the individual legislators. (*State ex rel. Fatzer v. Kansas Turnpike Authority*, supra; *State ex rel. Anderson v. Fadely*, supra; *State ex rel. Anderson v. State Office Building Commission*, 185 Kan. 563, 345 P.2d 674; *Leek v. Theis*, supra.)

(6) When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented. (*Leek v. Theis*, supra, ¶ 10, 217 Kan. at page 805, 539 P.2d 304; *State ex rel. Anderson v. Fadely*, supra.)

[7, 8] The problem, of course, is to determine whether or not a usurpation of powers has taken place. That term has not heretofore been clearly defined. It has been suggested that to have a usurpation one department of the government must be subjected directly or indirectly to the coercive influence of the other. (*State ex rel. Anderson v. Fadely*, supra, 180 Kan. at page 696, 308 P.2d 537; *Leek v. Theis*, supra, 217 Kan. at page 807, 539 P.2d 304.) It seems to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department. In determining whether or not an unconstitutional usurpation of powers exists, there are a number of factors properly to be considered. First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available. We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated.

We turn now to the problem of determining whether there has been a usurpation by the legislative department of powers and functions of the executive department as a result of the creation of the state finance council and the exercise of its powers and duties. To determine this issue we must carefully examine exactly what the state finance council is and what it does.

The attention of this court was first directed to the finance council in 1957 in *Fadely*. The sole issue involved in that case was the constitutionality of G.S.1955 Supp. 75-3711(4) which authorized the state finance council to allocate to and authorize expenditures from the state emergency fund as provided for in G.S.1955 Supp. 75-3712 and 75-3713. No other duties or functions of the state finance council were challenged or considered by the court. In the majority opinion Mr. Justice (now Chief Justice) Fatzer discussed the history of the preceding acts leading up to the creation of the finance council. It would be helpful to review briefly that history in this opinion. In 1943 the legislature established a state war emergency fund to be administered by a state war emergency fund board consisting of six members—the governor, lieutenant governor, state auditor, speaker of the house, and chairmen of the ways and means committee of the senate and of the house of representatives. (Ch. 207, L. 1943.) The statute was a product of the emergency created by World War II. Section 3 provided that *while the United States was engaged in hostilities with any foreign nation and no longer*, such board, by unanimous vote of all of its members, was authorized and empowered to make allocations to and authorize expenditures by various state agencies from the state war emergency fund for two purposes: (1) preservation of the public health and protection of persons and property from extraordinary conditions arising out of the war and which were not foreseen at the time appropriations were made by the regular session of 1943; (2) repair or temporarily replace buildings or equipment owned by the state and destroyed or damaged by sabotage, fire, wind, tornado or act of God if such building or equipment was absolutely necessary to the continued functions of the particular state agency using the same. The council could act only by unanimous vote of all of its members. Following the end of World War II the legislature in 1947 created in lieu of the state war emergency fund a state emergency fund.. A state emergency fund board was created to make allocations to and authorize expenditures from the state emergency fund. What had originally been designed as a fund to take care of emergencies arising in war time had now become a permanent part of the Kansas governmental scheme.

At its 1953 regular session the legislature repealed all laws relating to the state emergency fund and the state emergency fund board and created the state department of administration consisting of a budget division, an accounts and reports division, a purchasing division, a personnel division, and the state finance council. (L. 1953, Ch. 375; G.S.1955 Supp. 75-3701 to 75-3708.) Thus Kansas became one of the states which sought to effect administrative reorganization through a department of administration. This plan assumed that the governor would be able to control and coordinate the numerous state agencies by the judicious supervision, auditing, and inspection of a central department. By controlling budget estimates and by continuous management audits, preaudits of financial transactions, centralized purchasing, and the recruitment, supervision, and direction of civil service personnel, the governor through his appointed director of administration, would presumably be able to direct the whole operation of the executive department of the state government.

The state finance council was created as a legislatively oriented council to approve the rules and regulations of the department of administration and thereby to check the power of the governor to coordinate the activities of state agencies.

The basic provisions of the 1953 act remain in effect today and may be found in K.S.A.1975 Supp. 75-3701 through 75-3775. In 1957 when *Fadely* was decided the council consisted of six members—(1) the governor, who was designated as chairman, (2) the lieutenant governor, (3) the president pro tem of the senate, (4) the speaker of the house of representatives, (5) the chairman of the senate committee on ways and means, and (6) the chairman of the house committee on ways and means. The general powers and duties of the state finance council were provided for in G.S. 1955 Supp. 75-3711, which is quite similar to our present statute, K.S.A.1975 Supp. 75-3711. Suffice it to say the finance council was granted broad powers to exercise control over the operations of the department of administration. In 1972 important changes were made in the department of administration. (L.1972, Ch. 332.) The state finance council was continued in existence and was declared "attached to the department of administration" (75-3708a). Its membership consisted of the same six members which it had under the 1953 act. Except in cases where other conditions and limitations were prescribed by statute, the chairman and four or more other members of the state finance council were declared to constitute a quorum and a majority vote of all members of the state finance council governed. (75-3711.) The two exceptions to the majority vote provision involved actions taken by the council with respect to the state emergency fund (75-3713) and actions authorizing the state board of treasury examiners to issue certificates of indebtedness (75-3725a), both of which required the unanimous vote of all members of the finance council. In 1974, K.S.A. 75-3708 was amended to enlarge the state finance council to its present nine members—the governor and the eight members who constitute the leadership of the Kansas legislature. Today the governor has one vote and the legislative members have eight votes.

In the petition filed in this case by the attorney general reference is made to numerous statutes involving the powers and duties of the state finance council. K.S.A.1975 Supp. 75-3711 provides that, in general, but not by way of limitation, the state finance council shall:

> (1) Hear and determine appeals by any state agency from final decisions or final actions of the secretary of administration or the director of [computer services].
>
> (2) Approve, modify and approve or reject proposed rules and regulations submitted by the secretary of administration as provided in K.S.A. 75-37[illegible] as amended.
>
> (3) Make allocations to, and approve expenditures by a state agency, from any appropriations to the state finance council for that purpose, of funds for unanticipated and unbudgeted needs, under conditions and limitations prescribed by the legislature.
>
> (4) Exercise powers and perform functions specified for the state finance council by the Kansas civil service act or by other laws.

A number of other statutes specifically vest the state finance council with additional powers and duties. The state finance council is vested by law with the authority to fix or approve the compensation to be paid to a large number of officers and employees of the executive department of government. The state finance council is required to fix the annual salaries of the adjutant general (48-203), the executive secretary of the state board of healing arts (65-2878), and the employees of the bicentennial commission (73-1501). The record refers to 71 state officers and employees whose annual salary or compensation must be approved by the state finance council.

The state finance council exercises control and authority over the state department of administration as a whole. The council must approve any and all rules and regulations with respect to the manner of performance of *any* power or duty of the department and the execution of *any* business of the department and its relations to and business with other state agencies. (K.S.A.1975 Supp. 75-3706.) The finance council may hear and determine appeals by any state agency from final decisions or final actions of the secretary of administration or the director of computer services. (K.S.A.1975 Supp. 75-3711[1].) All regulations promulgated by the director of the division of accounts and reports pertaining to old-age and survivors insurance for public employees are made subject to approval of the state finance council (75-3749). The finance council must approve all rules and regulations adopted by the director of architectural services pertaining to uniform standards for mobile homes and recreational vehicles. (K.S.A.1975 Supp. 75-1220[e].) Under K.S.A.1975 Supp. 75-4330 the state finance council must approve memorandum agreements resulting from labor negotiations involving state employees as a condition precedent to the effectiveness of such agreements.

The state finance council exercises extensive power and authority over the administration of the Kansas civil service act and the division of personnel. The council must approve all rules and regulations prepared by the director of the division of personnel for carrying out the provisions of the Kansas civil service act (75-3746). Assignment to classes of all positions in the classified exempt service of the Kansas civil service act and the assignment of classes to salary ranges are made a duty of the director of personnel but such assignments cannot become effective until approved by the council (75-2938). The director of personnel is required to prepare a pay plan which shall include a schedule of salary and wage ranges and steps, which must be approved by the finance council (75-2938[3]). The finance council must approve regulations adopted by the secretary of administration relating to the hearing of appeals by the state civil service commission. The council must approve all regulations pertaining to the furnishing of housing, food, and other maintenance to state employees (75-2961a). It is clear that these statutes vest in the state finance council the power to control operations of the division of personnel.

The state finance council exercises extensive power and authority over the functions and responsibilities of the division of the budget. K.S.A.1975 Supp. 75-3714a establishes as a part of the department of administration, a division of the budget whose administrative head is the director of the budget. The secretary of administration is empowered to adopt an allocation system on the advice of the budget director when it appears that for any fiscal year the resources of the general fund or any special revenue fund are insufficient to cover appropriations for that year. Agencies affected by decisions of the secretary of administration regarding the allotment system may ask for a review of such decision by the state finance council whose decision controls (75-3722). In addition the finance council may grant authority to any state agency to transfer a part of any item appropriated to such agency to any other item of its appropriation. (K.S.A.1975 Supp. 75-3726a.)

Other miscellaneous powers of the state finance council are worthy of mention. The secretary of corrections is directed to provide employment opportunities, work experiences, and educational or vocational training for all inmates capable of benefiting therefrom, and is authorized to grant each inmate as a reward for such employment an amount which shall be set by the state finance council but not less than 25 cents. (K.S.A.1975 Supp. 75-5211.) The finance council exercises control over the director of architectural services in that in

the event of disagreement between the director of architectural services and the administrative head of any state agency relating to plans, specifications, and contracts involving the construction or repair of public buildings, the secretary of administration is required to submit such dispute to the state finance council and its decision shall be final. (K.S.A. 75-3741; K.S.A. 1975 Supp. 75-1202b.) The finance council also has authority to establish limitations on the allowance of moving expenses made to new professional employees by any state agency. (K.S.A.1975 Supp. 75-3219.)

As indicated above two functions of the state finance council require the unanimous approval of all nine members of the council. K.S.A.1975 Supp. 75-3725a provides in substance that whenever it shall appear that the estimated resources for any fiscal year in the state general fund are sufficient to meet in full the estimated expenditures for that fiscal year, but the estimated resources in the state general fund in any month or months of such fiscal year are insufficient to meet in full the estimated expenditures for such month or months, the finance council may by unanimous vote order the state board of treasury examiners to issue a written certificate of indebtedness subject to redemption from the state general fund within 60 days. K.S.A.1975 Supp. 75-3713 authorizes the state finance council by unanimous vote of all its members to make allocations to and authorize expenditures by state agencies from the state emergency fund in the event of extraordinary emergency conditions specifically set forth in the statute. In addition by unanimous vote of all its members the finance council is authorized to make loans or grants of funds in the state emergency fund to political subdivisions where public buildings or equipment are damaged or destroyed. (K.S.A.1975 Supp. 75-3713a.)

Finally the state finance council is given extensive power and authority over the transfer and expenditure of public moneys. Under various appropriation acts enacted in 1975 it is provided that upon "written application to the governor and approval by the state finance council expenditures from special revenue funds may exceed the amounts" specified in these acts. Cited as examples by the attorney general are Laws of 1975, Ch. 8, § 51; Ch. 9, § 10; Ch. 10, § 14; Ch. 13, § 10; Ch. 14, § 12; Ch. 15, § 49; Ch. 18, § 54; Ch. 20, § 9; Ch. 21, § 5; Ch. 22, § 5; Ch. 23, § 15; Ch. 24, § 11; Ch. 25, § 7; Ch. 26, § 27; and Ch. 27, § 14. Furthermore, in the appropriation of moneys to state agencies unencumbered balances are commonly reappropriated from the state general fund with the proviso that expenditures therefrom may not exceed specified amounts except upon approval of the finance council. (L.1975, Ch. 9, § 5[a].) Some appropriation acts also provide that the number of full-time and regular part-time positions which may be paid from appropriations for specific agencies are fixed by law subject to approval of the state finance council to exceed the specified limitations. See for example, Laws 1975, Ch. 10, § 13. The state board of regents is authorized with the approval of the state finance council to amend lists of restricted fees and service activities, receipts from which are appropriated by law. (Ch. 14, § 3[b].) K.S.A.1975 Supp. 75-3711a provides that any state agency *not otherwise specifically authorized by law* may, with the approval of the state finance council receive grants of money and funds appropriated under any federal act or from any other source. The statute provides that such a state agency may with the approval of the state finance council, contract with and receive, and/or spend or transfer moneys from other state or federal agencies. This statute has no application to funds specifically authorized to be received and expended by any statute.

[9] All of the powers and duties of the finance council which are set forth above are challenged in this action by the attorney general either as a usurpation of executive powers by the legislature or on the basis that they constitute a delegation of legislative powers to the state finance council without sufficient legislative standards or guidelines. It is obviously a difficult task to classify these powers as executive or legislative and to determine which powers may constitutionally be exercised by the state finance council and which may not. We have concluded that the statutory powers and duties granted to the state finance council to supervise the operations of the department of administration and its various divisions are purely an exercise of executive power. In particular we hold the following duties or powers to be essentially executive or administrative in nature:

(1) The power to fix or approve the compensation paid to state officers and employees;

(2) Certain powers under the civil service act, such as the adoption of rules and regulations for carrying out the act, approval of assignment of positions in the civil service to classes, and the assignment of classes to salary ranges, approval of the pay plan containing a schedule of salary and wage ranges and steps, approval of terms upon which state agencies may furnish housing, food service and other employee maintenance to state officers and employees in the civil service, and the determination of the cost and value of such benefits;

(3) The determination of appeals by state agencies from actions by the secretary of administration in the allotment of the general fund or special revenue funds when insufficient to cover appropriations from such funds;

(4) Determination of the amount, not less than 25 cents, to be credited by the secretary of corrections to inmates for employment;

(5) Resolution of disputes between the director of architectural services and the head of a state agency over construction of buildings, major repairs, or improvements authorized by the legislature for the state agency;

(6) Setting of limitations on payment of moving expenses of state employees;

(7) Approval of rules and regulations governing operations of the department of administration and each of its divisions;

(8) Determination of appeals by state agencies from decisions of the secretary of administration or director of computer services;

(9) Approval of rules and regulations to carry out the uniform standard code for mobile homes and recreational vehicles;

(10) Approval of the transfer by a state agency of a part of an appropriated item to any other item of its appropriation.

All of these powers concern the day-to-day operations of the department of administration and its various divisions. The vesting of such powers in the state finance council in our judgment clearly grants to a legislatively oriented body control over the operation of an executive agency and constitutes a usurpation of executive power by the legislative department. All of the powers and functions set forth above are controlled by a majority vote of the nine-member finance council, only one of whom, the governor, is a member of the executive department. It is true that only the governor, as chairman, has the authority to call meetings of the finance council and that the governor has the power to set the agenda for any meeting. The trouble is that the governor has no real choice except to call a meeting of the state finance council since the department of administration cannot really function unless its rules and regulations are approved and made effective and unless intradepartmental disputes can be finally determined. The legislature has by these statutes placed the state finance council, a body controlled by legislators, at the apex of the administrative

structure of the state department of administration in a position where it exerts, both directly and indirectly, a coercive influence on that executive department. We, therefore, hold that all of the executive powers specifically set forth above may not constitutionally be performed by the state finance council with its present membership. Admittedly the legislature could have enacted statutes dealing with the subject matter delegated to the finance council. But it failed to do so. It chose to enact a law in general terms and conferred the power to execute it upon an administrative board in the executive department. Having done so the legislature could not constitutionally vest the power to execute the law in a body controlled by individual legislators. In so doing it violated the doctrine of the separation of powers.

[10] The powers exercised by the state finance council with respect to expenditures from the state emergency fund (K.S.A.1975 Supp. 75-3713; 75-3713a) we uphold as a cooperative effort between the executive department and the legislative department of the state. The powers granted there may be exercised only for the limited purposes specifically set forth in the statute. They are concerned with extraordinary conditions involving the public health or the protection of persons and property and were granted to insure prompt state action in the event of a major disaster. The powers of the finance council in relation to the state emergency fund were fully considered and upheld in *State v. Fadely*, supra. In view of the fact that such powers can be exercised only by the unanimous vote of the finance council we cannot say that the exercise of such powers by the council constitutes a usurpation of executive power.

[11] We have also concluded that the power of the state finance council by unanimous vote to order the state board of treasury examiners to issue a certificate of indebtedness under the limitations specifically set forth in K.S.A 1975 Supp. 75-3725a may constitutionally be exercised by the finance council. The legislature has established clear guidelines for the exercise of this power. Because the exercise of this power involves the creation of a debt of the state, we view this power as so closely related to the exercise of legislative power that in our judgment such power can be upheld under the circumstances. Since the action of the finance council must be unanimous, it cannot act without the approval of the governor. We, therefore, hold that the exercise of such power by the state finance council does not constitute a usurpation of executive power by the legislative department. We wish to emphasize that this power is upheld as not being in violation of the constitutional doctrine of separation of powers. We have not considered its validity with respect to any other constitutional provision.

[12] There remains for our consideration the constitutionality of the powers and authority vested by statute in the state finance council over the transfer and expenditure of public moneys. As pointed out heretofore the legislature in 1975 enacted a number of appropriation acts which delegated to the finance council broad powers to authorize expenditures from special revenue funds which exceed the limits of expenditures authorized by statute. Under each of these acts appropriations are made to various executive agencies from the state general fund and expenditure limitations are specifically established for each agency. The appropriation act then contains a provision usually in the following language:

> "Upon written application of the governor and approval of the state finance council, expenditures from special funds may exceed the amount specified in this act where such excesses are the result of circumstances which could not reasonably have been foreseen when the legislature was in session."

We have concluded that the attorney general is correct in his position that such statutory enactments confer upon the state finance council the power to amend the provisions of appropriation acts and to authorize expenditures by the executive department in excess of limitations specifically fixed by the legislature with no adequate standards or guidelines to control the finance council in the exercise of its discretion.

[13, 14] We agree with all parties that the appropriation of money and the setting of limitations on expenditures by state executive agencies constitutes an exercise of legislative power. We further agree that the legislature may delegate to an administrative body some of the legislature's functions where the policy is fixed and standards are definitely established which determine the manner and circumstances of the exercise of such power. (*Board of Sutanta v. Grant County Planning Board*, 195 Kan. 640, 408 P.2d 655.) Great leeway should be allowed the legislature in setting forth guidelines or standards and the use of general rather than minute standards is permissible. We recently spoke to this question in *State ex rel. Dir v. State Board of Education*, 215 Kan. 551, 527 P. 2d 952 where we stated:

> ". . . Our cases clearly recognize that the legislature may delegate a legislative function when constitutional authority for the delegation is present and the statutory delegation is circumscribed by sufficient legislative guidelines to cover the nature and extent of the legislative function intended to be delegated. . . ." (p. 554, 527 P.2d p. 955.)

Under the statutes now before us the only standard or limitation on the power of the state finance council to approve expenditures from special revenue funds in excess of fixed statutory limits is "where such excesses are the result of circumstances which could not reasonably have been foreseen when the legislature was in session." In our judgment this vague standard is insufficient to satisfy the constitutional requirement that the legislature may not delegate legislative power unless adequate standards are established which determine the manner and exercise of such power. There are no standards which limit the finance council as to the amount or the subject matter of the expenditures which it may authorize. The power to approve such expenditures may well involve millions of dollars of state money. We note for example that the annual report of the Division of Accounts and Reports of the Department of Administration for the fiscal year ending June 30, 1975, shows a total balance in the special revenue funds in excess of $114,000,000.

[15] We have likewise concluded that there are no adequate legislative standards or guidelines to govern the finance council in the exercise of its authority to increase the fixed positions of employment authorized for state agencies, or to approve the receipt and expenditure of federal or other funds not authorized by specific statutes, or to authorize the state board of regents to amend or change its list of fees and service activities and to expend the moneys derived therefrom.

Under the powers granted by these appropriation acts the finance council is in practical effect set up as a little legislature with the power to appropriate and authorize the expenditures of state moneys. In our judgment this unrestricted grant of power to the state finance council constitutes a delegation of legislative power without adequate standards or guidelines. Such a delegation of legislative power is unconstitutional.

[16-18] From what has been said it is evident that the plaintiff is entitled to judgment ousting the legislative members of the state finance council from the exercise of all of their powers and duties con-

cerning the supervision of the operations of the department of administration and its various divisions which we have held constitute a usurpation of executive power by the legislative department in violation of the separation of powers doctrine. The validity of the actions of the state finance council since its creation in 1953 may be questioned. It is the judgment of the court that from the time of its creation in 1953 until the filing of this opinion the acts of the state finance council were those of *de facto* officers binding between all persons dealing with the finance council as a public body composed of public officers. (*State ex rel. Anderson v. State Office Building Commission*, 185 Kan. 563, 345 P.2d 674.) It is further the judgment of this court that upon the filing of this opinion the duties of the state finance council involving the supervision of the department of administration and its various divisions shall devolve upon and be exercised by the governor as the head of the executive department of this state until such time as the legislature shall by statute adopt a new legislative plan or scheme.

We further hold that the state finance council as presently constituted may continue to exercise its powers and duties to authorize the issuance of certificates of indebtedness under the provisions of K.S.A. 1975 Supp. 75-3725a and to make allocations to and authorize expenditures by state agencies from the state emergency fund as provided for in K.S.A.1975 Supp. 75-3713 and 75-3713a.

Finally, we hold that upon the filing of this opinion the power and authority of the state finance council over the transfer and expenditures of public moneys which have been considered and declared to be invalid and unconstitutional in this opinion may no longer be exercised under existing statutes.

The judgment of the district court is reversed in part and affirmed in part in accordance with the views expressed in this opinion.

210 Kan. 148

Louis BARTLETT, father, and heir at law, of Dean L. Bartlett, Deceased, et al., Plaintiffs,

v.

DAVIS CORPORATION, Appellant,

Marinus HEERSCHE, d/b/a Wichita Big River Sand Company, Appellee,

v.

IOWA MUTUAL INSURANCE COMPANY OF DeWITT, IOWA, a corporation, et al., Appellees.

No. 47868.

Supreme Court of Kansas.

March 6, 1976.

Plaintiff brought wrongful death action against defendants, the owner and the operator of a sand and gravel pit, and the owner filed a cross petition against the operator for indemnity. After the cross petition for indemnity was dismissed and judgment was entered in favor of plaintiff, the Supreme Court, 204 Kan. 392, 462 P.2d 763, affirmed the wrongful death judgments against the defendant and reversed and remanded the dismissal of the owner's cross claim for indemnity against the operator. The Sedgwick District Court, Robert T. Stephan, J., after initially entering judgment for the owner and against the operator, vacated such judgment upon motion for revision of judgment, and entered judgment in favor of the operator, finding that the owner was not entitled to indemnity, and the owner appealed. The Supreme Court, Kaul, J., held that previous decision of Supreme Court remanding case to the trial court for determination with respect to indemnity issue was not res judicata on such issue and that indemnification of the owner was provided by indemnity provision in contract under which owner retained only a royalty interest in sand and gravel removed from his land, but was not allowed to carry on any independent operations on the premises, and under which the operator agreed to conduct operations in a

proper and careful manner and to comply with all laws and regulations of any municipal or governmental body which could affect operations on the premises.

Reversed and remanded with directions.

1. Appeal and Error ⇨1097(1)

When a second appeal is brought to the Supreme Court in the same case, the first decision is the settled law of the case on all questions involved and settled in the first appeal and reconsideration will not be given to such questions.

2. Appeal and Error ⇨1194(1)

When the Supreme Court, upon appeal, merely reverses a district court in connection with its ruling on a motion to dismiss or for summary judgment, and no judgment is directed, the effect of the decision of the Supreme Court is the same, for purposes of further proceedings in the district court, as if the district court had made the correct ruling in the first instance, except, that th district court has no authority to change or modify the ruling made by the Supreme Court.

3. Appeal and Error ⇨1194(1)

Prior decision of Supreme Court in same case in previous appeal, in which case was remanded for consideration of whether owner of land was entitled to indemnity from operator of sand and gravel pit located on owner's land, was not res judicata with respect to such issue where the Supreme Court did not direct judgment on the indemnity issue and decided to remand case on unrelated point.

4. Indemnity ⇨8.1(1)

Generally, a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other means can be ascribed thereto.

5. Indemnity ⇨6

The contract of indemnity is construed in accordance with the general rules for the construction of contracts.

6. Indemnity ⇨6

The cardinal rule in construing a contract of indemnity is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.

7. Indemnity ⇨8.1(1)

While the intent to indemnify against the results of an indemnitee's negligence must be clear to enforce an indemnity agreement, it is not necessary that an indemnity agreement contain specific or express language covering, in so many words, an owner's negligence if the intention to afford protection clearly appears in the contract, the surrounding circumstances, and the purposes and objects of the parties.

8. Indemnity ⇨8.1(1)

Where the indemnitor has possession and control of the work or premises and the owner does not maintain independent operations on the premises, a contract of indemnity is generally construed to cover passive negligence of the owner.

9. Indemnity ⇨8.1(2)

Inclusion of provision in indemnity agreement requiring that operator of sand and gravel pit carrying liability insurance naming owner of the premises as the insured supported conclusion that operator and owner intended indemnification of the owner for loss occasioned by failure of the owner to comply with city ordinance requiring fence around sand and gravel pit.

10. Indemnity ⇨8.1(2)

Indemnification agreement between owner of land and operator of sand and gravel pit on land, which was contained in lease contract giving operator exclusive right to enter and occupy land and giving owner only a royalty interest in sand and gravel removed and which expressly re-

case is strong, and if defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction.... Because an accused's decision whether to testify seldom turns on the resolution of one factor," *New Jersey v. Portash*, 440 U.S. 450, 467, 99 S.Ct. 1292, 1301, 59 L.Ed.2d 501 (1979) (BLACKMUN, J. dissenting), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify. (Footnotes omitted).

After setting forth these and other observations, the *Luce* court held that to preserve the issue of improper impeachment by prior convictions, a defendant must testify.

To accept this requirement for preservation of a *Bighum* issue, as the Commonwealth would have us do, would require us to ignore years of contrary case law in Pennsylvania. The appellate courts of Pennsylvania have consistently been able to give meaningful review to *Bighum* claims in the absence of testimony by defendants. In fact, the two keystone cases which helped to develop Pennsylvania's law as to the use of prior convictions for impeachment purposes, *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973) and *Roots*, supra, both involved trials in which the respective appellants had not testified. Since *Bighum*, supra, the appellate courts of this Commonwealth have continued to provide meaningful review in the absence of testimony by defendants. See, e.g., *Commonwealth v. Bunch*, 329 Pa.Super. 101, 477 A.2d 1372 (1984); *Commonwealth v. Williams*, 273 Pa.Super. 389, 417 A.2d 704 (1980); *Commonwealth v. Campbell*, 244 Pa.Super. 505, 368 A.2d 1299 (1976).

[3] Finally, our courts do not agree with Chief Justice Burger's observation in *Luce*, supra, that a defendant's decision to testify seldom turns on the trial court's ruling on the use of prior conviction evidence. To the contrary, the Pennsylvania Supreme Court noted in *Roots*, supra at 393 A.2d at 364, that "knowledge that [a defendant's] past convictions will be revealed to the jury, if he testifies, may well foreclose his only opportunity to present his version of the occurrence." Therefore, we expressly reject the Commonwealth's assertion that a *Bighum* issue is waived where an appellant does not testify at trial.[2]

At the conclusion of the Commonwealth's case, the trial court excused the jury and held a *Bighum* hearing to determine whether any of appellant's past convictions could be introduced for impeachment purposes, if appellant decided to testify. The record of the *Bighum* hearing conducted by the trial court in the instant case indicates that the *Roots* factors were properly considered and that the Commonwealth met its burden of proof. The two prior convictions were for robbery and, thus, necessarily reflected upon appellant's veracity. The convictions sought to be introduced were not stale, having occurred within five years of trial. Most important is the fact that the prosecution's case rested solely on the testimony of the victim and various police officers. There was no conclusive physical evidence.

[4] Therefore, if appellant had testified, the Commonwealth would have had to attempt to impeach the testimony. In this case, the prosecution had no other means available to impeach appellant's testimony. Therefore, we find no abuse of discretion by the trial court in its ruling that it would allow evidence of appellant's two prior convictions for robbery to be used for impeachment purposes. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

2. We recognize that the Pennsylvania Supreme Court is free to diverge from past case law and adopt the rationale and holding in *Luce*. However, in the absence of such a decision we reject the Commonwealth's assertion of waiver.

legislative power of the Commonwealth may be exercised only with concurrence of both houses and after presentment to the governor; General Assembly's rejection of the guidelines was not an "exercise of legislative power," rather, that power was exercised when General Assembly passed the Act which created the procedure for adopting the guidelines, which was passed by both houses and signed by the governor. 42 Pa.C.S.A. § 9721, Guideline § 303.1 et seq.; 18 Pa.C.S.A. § 1321(b)(Repealed); Const. Art. 2, § 1; Art. 3, §§ 1, 4, 5, 9; Art. 4, § 15.

Stuart M. Wilder, Asst. Public Defender, Doylestown, for appellant.

Stephen B. Harris, Asst. Dist. Atty., Warrington, for Com., appellee.

Before SPAETH, President Judge, and CAVANAUGH, WICKERSHAM, ROWLEY, OLSZEWSKI, MONTEMURO, BECK, TAMILIA and JOHNSON, JJ.

PER CURIAM:

Three appeals are before the court. The principal issue is whether the legislative veto provided by 42 Pa.C.S. § 2155(b) is constitutional. On Appeal Nos. 2803 and 2804 Philadelphia 1983, Judge WICKERSHAM, joined by Judges CAVANAUGH, ROWLEY, and JOHNSON, would hold that the legislative veto is not unconstitutional and would affirm. President Judge SPAETH, joined by Judges OLSZEWSKI, MONTEMURO and TAMILIA, would hold that the legislative veto is unconstitutional and would vacate the judgments of sentence. Judge BECK would hold that the legislative veto is unconstitutional but would further hold that the provision providing for the veto is severable; she therefore joins the judges who would affirm. The judgments of sentence on Appeal No. 2803 and 2804 Philadelphia 1983 are there-

fore affirmed. Appeal No. 2802 Philadelphia 1983 presents only the issue of whether the trial court in imposing sentence abused its discretion. On that appeal, all of the judges agree that the judgment of sentence should be, and it therefore is, affirmed. The several opinions follow.

WICKERSHAM, Judge:

On June 20, 1983, appellant Douglas Kuphal entered guilty pleas in the Court of Common Pleas of Bucks County to three separate informations, charging him with robbery, theft, receiving stolen property, assault, terroristic threats, criminal mischief, and driving under the influence. Following a presentence investigation, appellant was sentenced to concurrent terms of state imprisonment of twelve (12) to thirty-six (36) months and six (6) to twelve (12) months. These sentences were to run consecutively from a county sentence appellant was serving at the time. Following the denial of his motion for reconsideration of sentence, appellant filed these timely appeals.

On appeal, appellant questions the validity of Pennsylvania's sentencing guidelines, 204 Pa.Code § 303.1 *et seq.* As in its companion cases,[1] the principal issue in this case is whether section 3 of the Act of November 26, 1978, P.L. 1316, No. 319, 18 Pa.C.S. § 1321(b); transferred by Act of October 5, 1980, P.L. 693, No. 142, to 42 Pa.C.S. §§ 2151-2155, 9721 is unconstitutional. Section 3 of the Act provides for the creation of the Pennsylvania Commission on Sentencing and the adoption of sentencing guidelines by the Commission. Appellant argues that section 3 is unconstitutional and that, therefore, the sentencing guidelines under which he was sentenced, are invalid. We disagree.

The above Act provides that the Sentencing Commission should adopt sentencing guidelines and then publish them in the Pennsylvania Bulletin. After the Commission adopts and publishes the guidelines, "[t]he General Assembly may by concurrent resolution reject [the guidelines] in their entirety ... within 90 days of their publication." If not so rejected, the guidelines become effective 180 days after publication.

In January 1981, the Commission adopted and published proposed guidelines, these were rejected, however, by a concurrent resolution. In January 1982, the Commission presented a new set of guidelines to the General Assembly. The Senate expressly approved the new guidelines; the House, however, took no action on them within the 90 day period specified by the Act. In May 1982, the Sentencing Commission announced that the General Assembly had "adopted" the revised guidelines. They became effective July 22, 1982.

President Judge Spaeth's dissenting opinion notes that the Pennsylvania Constitution provides that the legislative power of the Commonwealth, which is vested in both Houses of the General Assembly, may be exercised only with the concurrence of both Houses *and after presentment to the Governor.* Pa. Const. art. II, § 1; art. III, §§ 1, 4, 5, and 9; art. IV, § 15. The Act under consideration provides that the General Assembly, by concurrent resolution, may reject the sentencing guidelines adopted by the Sentencing Commission. President Judge Spaeth argues that such a rejection is an exercise of legislative power and can only be made after presentment to the Governor and that since the Act does not provide for presentment to the Governor, it is unconstitutional.

[1, 2] We do not believe that the General Assembly's rejection of the guidelines was an "exercise of legislative power". An "exercise of legislative power" is an act that is legislative in purpose and effect. President Judge Spaeth says that the rejection was legislative in effect because it changed the procedure which sentencing judges would follow. We disagree. Since the guidelines were not in effect at the time of the rejection, the rejection did not *change* the procedure sentencing judges would follow, but merely *maintained the status quo.* Thus, we do not see how this can be considered an exercise of legislative power.

We believe that the "legislative power" with respect to the sentencing guidelines was exercised not when the General Assembly rejected the first set of guidelines, but when it passed the Act which created this procedure for adopting the guidelines. The Act itself was passed by both Houses and signed by the Governor. This was the "presentment" required by our Constitution. The rejection of the guidelines was not an "exercise of legislative power" such that it also required presentment to the Governor; hence the sentencing guidelines are not invalid on that ground. We hold that section 3 of the Act is constitutional. Finding no merit to the other constitutional challenges presented by appellant, we, therefore, affirm the judgments of sentence.[2]

Judgments of sentence affirmed.

BECK, J., files a concurring opinion.

SPAETH, President Judge, files a dissenting opinion joined by OLSZEWSKI, MONTEMURO and TAMILIA, JJ.

BECK, Judge, concurring.

I agree with Judge Wickersham that the sentencing guidelines are constitutional but I reach that determination through a different analysis.

If the legislative veto provision, 42 Pa. C.S. § 2155(b), of the sentencing guidelines legislation were non-severable, I should support Judge Spaeth's view that the process by which the guidelines came into being is unconstitutional. *See* Pa. Const. art. III, § 9. But inasmuch as I find that subsections 218(c) and 218(d) of the Act of October 5, 1980 ("Act of 1980"), P.L. 693, make the legislative veto provision severable, I uphold the constitutionality of the sentencing guidelines adopted pursuant to the Act of 1980.

"The public policy of this Commonwealth favors severability" of statutory provisions. *Department of Education v. First School,* 471 Pa. 471, 478, 370 A.2d 702, 705 (1977). Hence, a statutory provision is presumed severable unless the provision is so interrelated with the statute as a whole that the legislature clearly would not have intended to enact the remainder of the statute without the provision in question, *Heller v. Frankston,* 504 Pa. 528, 475 A.2d 1291 (1984); 1 Pa.C.S. § 1925, or the wording of the statute specifically rebuts the presumption of severability. *See First School.*

The language of the severability clause in the Act of 1980 supports the conclusion that the legislative veto provision is severable. In analyzing the severability clause in the Act of 1980, I consider two basic principles of statutory construction: (1) the legislature is presumed to change the wording of a statute in order to signal a change in legislative intent and (2) the legislature is presumed not to intend any provision of a statute as surplusage but rather is presumed to intend that every word in a statute have effect. *Masland v. Bachman,* 473 Pa. 280, 374 A.2d 517 (1977); *Crusco v.*

1. The companion cases are *Commonwealth v. Alvaran,* 03076 Philadelphia 1983, *Commonwealth v. Bates,* 02941 Philadelphia 1983; and *Commonwealth v. Sessoms,* 01999 Philadelphia 1983.

2. Appellant's statement of questions involved were:

> A. Do the sentencing guidelines, 204 Pa.Code § 303.1, result from an invalid delegation of legislative authority by the general assembly in violation of article II, § 1 of the Pennsylvania constitution?
> B. Are the sentencing guidelines, 204 Pa. Code § 303.1, null and void because they were not enacted by a bill by the general assembly in violation of article III, § 1 of the Pennsylvania constitution?
> C. Are all sentences imposed in Pennsylvania necessarily the product of the sentencing guidelines?

Brief for Appellant at 3.

Insurance Company of North America, 292 Pa.Super. 293, 437 A.2d 52 (1981).

The Act of 1980 does not adopt the severability language of its predecessor act, the Act of November 26, 1978 ("Act of 1978"), P.L. 1316, which clearly proclaimed that the legislative veto was non-severable. The legislative veto provision of the Act of 1978 appears in section 3 of that act. The severability clause (section 7) in the Act of 1978 states that "[t]he provisions of section 3 [which includes the legislative veto] are not severable and if any provision thereof ... is held invalid, the remainder of section 3 and section 6 shall be invalid." [1]

The legislative veto provision of section 3 of the Act of 1978 is now contained in subsection 218(a) of the Act of 1980.[2] Subsection 218(d) of the Act of 1980 specifically repeals the severability clause (section 7) of the Act of 1978. The Act of 1980 severability clause appears in subsection 218(c) which declares that "[t]he provisions of subsection (a), 42 Pa.C.S. § 9781 (relating to appellate review of sentence), and section 6 of the act of November 26, 1978 ... are not severable and if any provision thereof ... is held invalid, the remainder of subsection (a), 42 Pa.C.S. § 9781 and such section 6 shall be invalid." [3]

While the plain meaning of the words in the Act of 1978 severability clause evidences that the legislative veto provision in that act was non-severable, the question remains whether the language in the Act of 1980 precludes severability of the Act of 1980 legislative veto provision.

The severability clause in the Act of 1980 provides that subsection (a), 42 Pa.C.S. § 9781 and section 6 of the Act of 1978 are non-severable from the remainder of the Act of 1980. Guided by the tenets of statutory construction, I interpret the phrase "subsection (a), 42 Pa.C.S. § 9781" to mean subsection (a) of 42 Pa.C.S. § 9781 rather than subsection (a) of section 218 of the Act of 1980.

If the legislature had intended "subsection (a)" to refer to section 218 of the Act of 1980, the legislature could have unequivocally indicated so by inserting the words "of this section" immediately after the reference to subsection (a). This is precisely the technique utilized by the legislature in subsection 218(e) of the Act of 1980 where in a sentence referring, *inter alia*, to Title 42 (42 Pa.C.S.) and the Act of 1980, the legislature employed the phrase "subsection (c) of this section" to show that subsection (c) related to section 218 of the Act of 1980 and not to Title 42.

Given the repealer provision and the severability clause language in the Act of 1980, I am convinced that nothing in the Act of 1980 forecloses the severability of the legislative veto provision from the rest of the Act of 1980.

Agreeing with Judge Spaeth that the legislative veto provision is unconstitutional, I should strike that single provision of the Act of 1980. However, inasmuch as the Act of 1980 legislative veto provision was not exercised in conjunction with the sentencing guidelines adopted pursuant to the Act of 1980 and is, by my analysis, severable, I should uphold the constitutionality of the remaining provisions of the Act of 1980[4] and the sentencing guidelines adopted in conformity therewith.

1. Section 6 of the Act of 1978 appropriates $100,000 to the Pennsylvania Commission on Sentencing.

2. Section 3 of the Act of 1978 encompassed the following subjects: composition and organization of the sentencing commission, powers and duties of the commission, Commonwealth agency cooperation, adoption of sentencing guidelines, publication of sentencing guidelines, and appellate review of sentence. The legislative veto provision appeared under the heading "publication of sentencing guidelines." Subsection 218(a) of the Act of 1980 contains the following topics: Pennsylvania Commission on Sentencing, composition of commission, powers and duties, adoption of sentencing guidelines and publication of sentencing guidelines. The legislative veto provision appears under the heading "publication of sentencing guidelines." Subsection 401(a) of the Act of 1980 covers appellate review of sentence.

3. The subject matter of 42 Pa.C.S. § 9781 (relating to appellate review of sentence) is covered by subsection 401(a) of the Act of 1980.

SPAETH, President Judge:

The issue on this appeal and its companion cases [1] is the constitutionality of Section 3 of the Act of November 26, 1978, P.L. 1316, No. 319,[2] providing for the Pennsylvania Commission on Sentencing and the adoption of sentencing guidelines. I should hold that Section 3 of the Act is unconstitutional, from which it follows that the sentencing guidelines, 204 Pa.Code § 303.1 *et seq.*, are invalid. Since in sentencing appellant, the trial court considered the guidelines, the judgments of sentence should be vacated and the case remanded for resentencing. I should further hold, however, that this decision is prospective only and therefore does not apply to cases in which the sentencing guidelines were considered by the sentencing judge but not challenged by the defendant as unconstitutional.

-I-

The Sentencing Code [3] provides that the sentencing judge has discretion to choose from among five sentencing alternatives. 42 Pa.C.S. § 9721 (providing for a sentence of total confinement, partial confinement, probation, fine, or determination of guilt without further penalty). The Code sets general standards by which this discretion is to be exercised, 42 Pa.C.S. § 9721(b), states the principles specific to each alternative, 42 Pa.C.S. §§ 9722-9726, and identifies the factors that weigh in favor of probation, 42 Pa.C.S. § 9722.[4]

By Act of November 26, 1978, the General Assembly provided that the sentencing judge must also consider "sentencing guidelines," to be adopted by the Pennsyl-

4. The enabling legislation for the establishment of the sentencing commission authorized to provide sentencing guidelines was passed in accordance with the constitutional requirement of bicameral approval and presentment to the governor.

1. The companion cases are: *Commonwealth v. Mourar*, 03076 Philadelphia 1983; *Commonwealth v. Bates*, 02941 Philadelphia 1983; and *Commonwealth v. Sessoms*, 01999 Philadelphia 1983. In this case, there are three appeals from judgments of sentence. Appeal from judgment of sentence No. 2502 Philadelphia 1983 raises only the question of whether the trial court abused its discretion in sentencing appellant to six to twelve months incarceration. Upon review of the record, I find no abuse of discretion and therefore I should not disturb this sentence. Appeals No. 2803 Philadelphia 1983 and No. 2804 Philadelphia 1983 both raise the constitutionality of the sentencing guidelines.

2. This Act amended various sections of Title 18 (Crimes and Offenses): § 1 amended 18 Pa.C.S. § 1321(b) (general standards for sentencing); § 2 repealed Subchapter G of Chapter 13 of Title 18; § 3 amended Chapter 13 and added Subchapter G, 18 Pa.C.S. § 1381-1386 (providing for the Pennsylvania Commission on Sentencing); § 4 amended 18 Pa.C.S. § 4104 (tampering with records or identification); § 5 established interim guidelines for certain repeat offenses, *see* note 7, *infra*; § 6 appropriated money for the Pennsylvania Commission on Sentencing; § 7 provided that the provisions of § 3 were inseverable; and § 8 specified the effective date of the Act and included a sunset provision. The provisions of the Act relating to sentencing were repealed and transferred to Title 42 by the Act of Oct. 5, 1980, P.L. 693, No. 142, §§ 218(a), 401(a). (Act of July 10, 1980, P.L. 513, No. 106, § 3, amended H.B. 1872, which became the Act of Oct. 5, 1980.) Section 3 of the Act of 1978, which is being challenged on this appeal, was transferred by § 218(a) and § 401(a) of the Act of 1980 and now is codified at 42 Pa.C.S. §§ 2151-2155, 9781. For convenience, unless otherwise noted, when I refer to the Act of 1978, I am referring to § 3 relating to the Pennsylvania Commission on Sentencing as repealed, transferred, and amended.

3. Act of December 30, 1974, P.L. 1052, No. 345, § 1 *et seq.*, 18 Pa.C.S. § 1301, *et seq.*; transferred by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a) to 42 Pa.C.S. § 9701 *et seq.*

4. In the case of certain offenses, the sentence is not discretionary but mandatory: murder in the second degree, 18 Pa.C.S. § 1102(b) (life imprisonment); certain offenses committed with a firearm, 42 Pa.C.S. § 9712 (minimum must be at least five years confinement), certain offenses committed on public transportation, 42 Pa.C.S. § 9713 (same), certain second and subsequent offenses, 42 Pa.C.S. § 9714 (same); and murder in the third degree when the offender has a prior conviction for murder or voluntary manslaughter, 42 Pa.C.S. § 9715 (life imprisonment).

vania Commission on Sentencing.[5] The Act further provided that until guidelines adopted by the Commission became effective, the judge was to "consider as a guideline in imposing sentence" that certain repeat offenders should "be sentenced to a minimum term of not less than four years imprisonment."[6]

This legislation was the result of widespread interest in the sentencing commission concept. In 1978, the Uniform Law Commissioners' Model Sentencing and Corrections Act proposed a sentencing commission to develop sentencing guidelines, which would be effective following notice and comment rulemaking procedures and filing in the appropriate state office. § 3-110 *et seq.* Senate Bill No. 1437, 95th Cong., 2d Sess. (1978), which was the subject of considerable debate, also proposed a sentencing commission to develop sentencing guidelines. And just prior to passage of the Act of 1978, Minnesota had created a sentencing commission to establish guidelines for that state.[7] Since 1978, the sentencing commission concept has gained acceptance in other states and in the Congress[8], and in 1979, the American Bar Association recommended the use of a commission for setting minimum sentences. Standards Relating to Sentencing Alternatives and Procedures, Standard 18-4.3(c)(i) (1979).

Under the Act of 1978, the Pennsylvania Commission on Sentencing is specifically authorized to

(1) Establish general policies and promulgate such rules and regulations for the commission as are necessary to carry out the purposes of this subchapter and Chapter 97 (relating to sentencing).

(2) Utilize, with their consent, the services, equipment, personnel, information and facilities of Federal, State, local and private agencies and instrumentalities with or without reimbursement therefor.

(3) Enter into and perform such contracts, leases, cooperative agreements and other transactions as may be necessary in the conduct of the functions of the commission, with any public agency or with any person, firm, association, corporation, educational institution or nonprofit organization.

(4) Request such information, data and reports from any officer or agency of the Commonwealth government as the commission may from time to time require and as may be produced consistent with other law.

(5) Arrange with the head of any government unit for the performance by the government unit of any function of the commission, with or without reimbursement.

(6) Issue invitations requesting the attendance and testimony of witnesses and the production of any evidence that relates directly to a matter with respect to which the commission or any member thereof is empowered to make a determination under this subchapter.

(7) Establish a research and development program within the commission for the purpose of:

(i) Serving as a clearinghouse and information center for the collection, preparation and dissemination of information on Commonwealth sentencing practices.

(ii) Assisting and serving in a consulting capacity to State courts, departments and agencies in the development, maintenance and coordination of sound sentencing practices.

(8) Collect systematically the data obtained from studies, research and the empirical experience of public and private agencies concerning the sentencing processes.

(9) Publish data concerning the sentencing processes.

(10) Collect systematically and disseminate information concerning sentences actually imposed.

(11) Collect systematically and disseminate information regarding effectiveness of sentences imposed.

(12) Make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes which the commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.

42 Pa.C.S. § 2153(a).[9]

The Act further provides that the guidelines adopted by the Commission shall:

(1) Specify the range of sentences applicable to crimes of a given degree of gravity.

(2) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or convicted of a crime involving the use of a deadly weapon.

(3) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances.

42 Pa.C.S. § 2154.

Finally, the Act provides the procedure by which the guidelines may become effective. Before adopting any guidelines, the Commission must publish proposed guidelines in the Pennsylvania Bulletin, and hold public hearings, at which specified persons and representatives of specified organizations may testify. 42 Pa.C.S. § 2155(a)(1). The Commission must then publish the guidelines, as adopted after such hearings, in the Pennsylvania Bulletin, 42 Pa.C.S. § 2155(a)(2). The guidelines must be adopted and published within 21 months of the Commission's first meeting. 42 Pa.C.S. § 2155(a)(3).[10] However, when the guide-

5. Act of Nov. 26, 1978, P.L. 1316, No. 319, § 1, 18 Pa.C.S. § 1321(b); transferred by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a) to 42 Pa.C.S. § 9721(b). For a discussion of the background of sentencing guidelines in Pennsylvania, *see* Martin, Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania, 29 Vill.L. Rev. 21, 61-70 (1983-84).

6. Act of Nov. 26, 1978, P.L. 1316, No. 319, § 5 states:

> Pursuant to this section, there is established an interim guideline for the minimum sentencing of certain repeat offenders.
>
> (a) Until sentencing guidelines adopted by the Pennsylvania Commission on Sentencing and relating to the offenses set out in this subsection become effective pursuant to 18 Pa.C.S. § 1385 (relating to publication of guidelines for sentencing) [repealed, see, now, 42 Pa.C.S. § 2155], when any person is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) (relating to aggravated assault) involving the use of a firearm, arson or kidnapping, or of attempt to commit any of these crimes, and when that person has been previously convicted in this Commonwealth, or any other state or the District of Columbia, or any Federal court, of any of the offenses set forth in this section or their equivalent, the sentencing court shall consider as a guideline in imposing sentence that such person is sentenced to a minimum term of not less than four years imprisonment.
>
> (j) This section shall expire and be deemed null and void upon the effective date of sentencing guidelines adopted by the Pennsylvania Commission on Sentencing relating to the offenses set out in subsection (a).

7. 1978 Minn. Laws 723, Minn.Stat.Ann. § 244.09 *et seq.*

8. Congress has recently passed the Comprehensive Crime Control Act of 1984, which creates an independent sentencing commission to develop sentencing guidelines. Act of Oct. 12, 1984, Pub.L. 98-473, Title II, § 217, 98 Stat. 2017, 28 U.S.C. § 991-98. Maryland authorizes the judiciary to adopt sentencing guidelines. Md.Cts. Ann. Art. 27, § 643C. Laws in New York, South Carolina, and Washington provide for sentencing commissions. 1983 N.Y. Laws 711; S.C. Code Ann. § 24-27-10 *et seq.*; Wash.Rev.Code § 9.94A.030 *et seq.* In Wisconsin, a sentencing commission was given the authority to promulgate guidelines if the Supreme Court determined it did not have the authority. Wis.Stat.Ann. § 973.011. *See* Judicial Administration: Felony Sentencing Guidelines, 120 Wis.2d 198, 353 N.W.2d 793 (1984) (holding that the Supreme Court did not have authority to create sentencing guidelines).

9. In addition, the Commission is required to report annually to the General Assembly, the Administrative Office of Pennsylvania Courts, and the Governor, 42 Pa.C.S. § 2153(h), and is granted "such other powers ... as may be necessary to carry out the purposes of this subchapter or as may be provided under any other provision of law...." 42 Pa.C.S. § 2153(c).

10. Act of November 26, 1978, P.L. 1316, No. 319, § 3, 18 Pa.C.S. § 1385(a)(3) provided for an 18-month period. In 1980, the provision was

lines have been thus adopted and published, "[t]he General Assembly may by concurrent resolution reject [the guidelines] in their entirety ... within 90 days of their publication...." 42 Pa.C.S. § 2155(b).[11] If not so rejected, the guidelines become effective 180 days after publication.[12] 42 Pa.C.S. § 2155(c).

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The Commission on Sentencing began its work in April 1979, and published its proposed guidelines in October 1980. *See* 10 Pa.Admin.Bull. 4181-96 (Oct. 25, 1980). After hearings, the guidelines were revised, and in January 1981 they were adopted by the Commission and published. *See* 11 Pa.Admin.Bull. 463-76 (Jan. 24, 1981). However, in April 1981 the General Assembly by concurrent resolution rejected the guidelines. H.Res. 24 (adopted by House, Apr. 1, 1981; adopted by Senate, Apr. 8, 1981). The resolution "urge[d] and direct[ed]" the Commission to "revise and resubmit" the guidelines within six months. *Id.* In this regard, the resolution

> submit[ted] the following suggestions to the Sentencing Commission as the areas where the Commission should review the initial sentencing guidelines and examine the advisability of revisions:
>
> (1) Increase the upper limit of sentences within each section of the grid.
>
> (2) Provide judges more latitude in sentencing where aggravating or mitigating circumstances are found.
>
> (3) Clarify that the list of aggravating and mitigating circumstances is not exclusive.
>
> (4) Eliminate prior guideline proposal relating to treatment of concurrent or consecutive sentencing practices.
>
> (5) Increase the severity of sentences for crimes involving serious bodily injury or the likelihood or threat of serious bodily injury.
>
> *Id.*

In October 1981, as instructed by the concurrent resolution, the Commission proposed new guidelines, *see* 11 Pa.Admin.Bull. 3597-3605 (Oct. 17, 1981), and in January 1982, after hearing and publication, guidelines were again presented to the General Assembly. *See* 12 Pa.Admin.Bull. 431-40 (Jan. 23, 1982). The Senate expressly approved the new guidelines, S.Res. 227 (adopted by Senate, Apr. 20, 1982), but the House took no action on them within the 90-day period specified in the Act of 1978. 42 Pa.C.S. § 2155(b). In May 1982 the Commission announced that the General Assembly had "adopted" the guidelines, and, in anticipation of their effective date, scheduled training sessions for trial court judges. *See* 12 Pa.Admin.Bull. 1536 (May 15, 1982). The guidelines became effective July 22, 1982, 204 Pa. Code § 303.1 *et seq.*, applicable to cases in which the offense was committed on or after that date, *id.* § 303.1(d).

-3-

Before one may consider appellant's arguments that the sentencing guidelines are unconstitutional, it is necessary to consider the issue of appellant's standing.

Appellant has no standing to argue that in adopting and promulgating the guidelines as effective, the Sentencing Commission infringed upon the authority of either the General Assembly or the Governor. *Cf. United States v. City of Yonkers*, 592 F.Supp. 570 (S.D.N.Y.1984) (no standing to raise rights of Congress in case involving statute providing for one-house veto); *United States v. Sutton*, 585 F.Supp. 1478 (N.D.Okla.1984) (no standing where veto not exercised, for no showing of injury). To have standing, a defendant must be "affected by the particular feature alleged to be in conflict with the constitution." *Commonwealth v. Dodge*, 287 Pa.Super. 148, 153, 429 A.2d 1143, 1146 (1981). *See also Commonwealth v. Haldeman*, 288 Pa. 81, 135 A. 651 (1927). Here, appellant has been affected by the allegedly unconstitutional guidelines. Having committed crimes after the purported effective date of the guidelines, July 22, 1982 appellant was sentenced by a judge who in arriving at the sentence, considered the guidelines,[13] as the Act of 1978 required the judge to do. If the judge should not have considered the guidelines, because they are invalid as adopted pursuant to an unconstitutional Act, then appellant has been injured, and he is entitled to be resentenced without reference to the guidelines. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), it was argued that the appellant lacked standing to challenge the constitutionality of a provision in a statute authorizing one House of Congress to veto the decision of the Executive Branch to allow him, a deportable alien, to remain in the United States. The argument was that "Chadha [the appellant] lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests." *Id.* at 935, 103 S.Ct. at 2776. Rejecting this argument, the Court held:

> Chadha has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury...." [citation omitted]. If the veto provision violates the Constitution, ... the deportation order against Chadha will be cancelled. Chadha therefore has standing....
>
> *Id.*

This reasoning is equally persuasive here. Indeed, if appellant does not have standing to challenge his sentence as imposed on consideration of invalid guidelines, it is difficult to conceive who would have standing.

-4-

In explaining my conclusion, noted at the beginning of this opinion, that Section 3 of the Act of 1978 is unconstitutional, I shall not discuss all of the arguments that have been made to us,[14] for I should find one

amended to 21 months. Act of July 10, 1980, P.L. 513, No. 106, § 3, 42 Pa.C.S. § 2155(a)(3). The 1980 transfer act, *see* note 2, *supra*, provided for an 18-month period. Act of Oct. 5, 1980, P.L. 693, No. 142, § 218(b). The Act of July 10, 1980 purported to amend H.B. 1873, which became the Act of Oct. 5, 1980.

11. Other jurisdictions also provide for legislative review. The federal statute provides that the initial guidelines must be submitted to Congress, that the General Accounting Office is to undertake a study and make a report within 150 days, and that guidelines shall not go into effect until six months after submission. Comprehensive Crime Control Act of 1984, Act of Oct. 12, 1984, Pub.L. 98-473, Title II, § 235(a), 98 Stat. 2031. Amendments to the guidelines must also be submitted to Congress and "shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress." *Id.* § 217, 28 U.S.C. § 994(*o*). In Minnesota, "[t]he guidelines shall be submitted to the legislature on January 1, 1980, and shall be effective May 1, 1980, unless the legislature provides otherwise." Minn.Stat.Ann. § 244.09(12). In New York, the State Committee on Sentencing Guidelines must transmit guidelines to the governor and legislature, and they shall have no force and effect "unless enacted into law." 1983 N.Y. Laws 711. In Washington, "[T]he legislature shall enact laws approving or modifying either the standards recommended by the sentencing commission, ..." Wash.Rev.Code § 9.94A.070(1).

12. Originally, the effective date was 90 days after publication. *See* Act of Nov. 26, 1978, P.L. 1316, No. 319, § 3, amended Act of July 10, 1980, P.L. 513, No. 106, § 3.

13. At the beginning of the sentencing hearing, the sentencing judge specifically noted the recommended guideline ranges for burglary and robbery, *see* N.T. 10/11/83, 3-4, and there can be no question that the judge considered the guidelines in the determination of sentence. *See* slip op. of tr. ct. at 8. As required under 204 Pa.Code § 303.1(b), the sentencing guidelines forms were included in the records of both appeals, No. 2803 Philadelphia 1983 and No. 2804 Philadelphia 1983.

14. These arguments include arguments presented by amici, Defender Association of Philadelphia, Public Defender Association of Pennsylvania, and the Pennsylvania District Attorneys Association. Although Pa.R.A.P. 521(a) requires that the Attorney General be notified when the constitutionality of a statute is challenged, and here no such notice appears to have been given, cases in which the Commonwealth is a party are excluded from this requirement. *See Commonwealth v. Buttchenbaugh*, 306 Pa.Super. 406, 452 A.2d 789 (1982).

argument dispositive. This argument may be summarized as follows: The Pennsylvania Constitution provides that the legislative power of the Commonwealth is vested in both Houses of the General Assembly, and may be exercised only with the concurrence of both Houses and after presentment to the Governor. Pa. Const. art. II, § 1; art. III, §§ 1, 4, 5 and 9; art. IV, § 15. The Act of 1978 provides that the General Assembly may reject sentencing guidelines adopted by the Pennsylvania Commission on Sentencing, 42 Pa.C.S. § 2155(b), and since a decision to reject sentencing guidelines is an exercise of legislative power, it must be made with the concurrence of both Houses and after presentment to the Governor. However, the Act of 1978 provides for only the concurrence of both Houses. *Id.* Since this provision is expressly declared to be not severable, Act of Nov. 26, 1978, P.L. 1316, No. 319, § 7,[13] the entire provision of the Act providing for the Pennsylvania Commission on Sentencing and the adoption of sentencing guidelines must be declared unconstitutional.

-a-

The Constitution of 1776, Pennsylvania's first constitution, provided for a unicameral legislature and plural executive.[16] No provision for an executive veto was included. To provide a method of checking legislative action, the Constitution required the following:

> To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly, and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.
>
> Pa. Const. § 15 (1776).

This governmental structure had its critics from the beginning. *See generally* R.L. Brunhouse, The Counter-Revolution in Pennsylvania 1776-1790 (1942); E. Douglass, Rebels and Democrats (1955); Ryerson, Republican Theory and Partisan Reality in Revolutionary Pennsylvania, in Sovereign States in an Age of Uncertainty (R. Hoffman and P.J. Albert eds. 1981). The critics challenged the effectiveness of the checks on legislative action,[17] but it was not until 1789 that a convention to reconsider the 1776 Constitution was convened. *See generally,* Ryerson, *supra.*

The convention resulted in Pennsylvania's second Constitution, the Constitution of 1790. This Constitution, modeled after the Federal Constitution adopted the preceding year,[18] established our present form of government, creating a bicameral legislature[19] and an executive with veto pow-

15. This provision was repealed and added, as modified, by the Act of Oct. 5, 1980, P.L. 693, No. 142, § 218(c) (added, as modified) and (d) (repealed).

16. Pa. Const. § 2 (1776) provided that "[t]he supreme legislative power shall be vested in a house of representatives of the freemen of the Commonwealth, or state of Pennsylvania." Pa. Const. § 3 (1776) provided that "[t]he supreme executive power shall be vested in a president and council."

17. The legislature apparently violated both the public notice provision and the "laying over" provision. *See* A Report of the Committee of the Council of Censors 12-13 (1784). *See also* Council of Censors, January 19, 1784, in the Proceedings Relative to Calling the Convention of 1776 and 1790, at 69-75 (1825). R.L. Brunhouse, The Counter-Revolution in Pennsylvania 1776-1790 (1942); E. Douglass, Rebels and Democrats 269 (1955); A. Nevins, The American States During and After the Revolution 1775-1789, at 152 (1924).

18. Compare the wording of the bicameral and presentment provisions of the U.S. Constitution, art. I, §§ 1, 7, with the wording of the equivalent provisions of the 1790 Pennsylvania Constitution, art. I, §§ 1, 22, 23.

19. Pa. Const. art. I, § 1 (1790) provided:
> The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.

er.[20] In *Commonwealth v. Sutley,* 474 Pa. 256, 378 A.2d 780 (1977), the Supreme Court explained our form of government by saying:

> In Pennsylvania we embraced the concept of tripartite government with three equal, separate and autonomous branches in an effort to prevent governmental power from becoming concentrated into a single body. It was believed that each branch would act as a check on the other and by this diffusion of power prevent tyranny where the rights of the individual citizen would be ignored.
>
> *Id.* at 269, 378 A.2d at 786 (citations omitted).

-b-

It will be recalled that the Act of 1978 provides that sentencing guidelines adopted by the Pennsylvania Commission on Sentencing may be rejected by concurrent resolution of both Houses, without presentment to the Governor, 42 Pa.C.S. § 2155(b), and that here in fact both Houses did by concurrent resolution reject the guidelines adopted by the Commission, with the result that new guidelines were adopted by the Commission. The question must therefore be decided: Was the decision by both Houses to reject the sentencing guidelines an exercise of legislative power? For if it was, the Constitution requires presentment, from which it follows that unless it can be severed, the Act's provision that there need not be presentment renders the Act unconstitutional.

Although there is a strong presumption of constitutionality, *see Commonwealth v. Robinson,* 497 Pa. 49, 438 A.2d 964 (1981), *appeal dismissed,* 457 U.S. 1101, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982), nevertheless, I have no doubt that in rejecting the sentencing guidelines, the two Houses engaged in an exercise of legislative power. It is within "[the] exclusive power [of the General Assembly] to determine the penological system of the Commonwealth. It alone can prescribe the punishments to be meted out for crime." *Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 587, 28 A.2d 897, 900 (1942). *See also Commonwealth v. Sutley, supra; Commonwealth v. Glover,* 397 Pa. 543, 156 A.2d 114 (1959). Of course, as to any given offender the determination of the precise punishment is decided by the sentencing judge, that is to say, is exclusively within the judicial power. However, the sentencing judge must exercise this judicial power within the limits prescribed by the General Assembly. Two different sorts of limits may be pre-

This provision was not altered in subsequent constitutions: Pa. Const. art. I, § 1 (1838); Pa. Const. art. II, § 1 (1873).

20. Pa. Const. art. I, § 22 (1790) provided:
> Every bill, which shall have passed both houses, shall be presented to the governor. If he approve, he shall sign it; but if he shall not approve, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large upon their journals, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered; and if approved by two-thirds of that house, it shall be a law. But in such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general assembly, by their adjournment, prevent its return; in which case it shall be a law, unless sent back within three days after their next meeting.

This provision was not substantially altered in subsequent constitutions: Pa.Const. art. I, § 23 (1838); Pa.Const. art. IV, § 15 (1873).

Pa.Const. art. I, § 23 (1790) provided:
> Every order, resolution or vote, to which the concurrence of both Houses may be necessary (except on the question of adjournment) shall be presented to the governor, and, before it shall take effect be approved by him, or, being disapproved, shall be repassed by two-thirds of both houses according to the rules and limitations prescribed in case of a bill.

This provision was not altered in subsequent constitutions: Pa.Const. art. I, § 24 (1838); Pa. Const. art. III, § 26 (1873), renumbered in 1967, art. III, § 9.

scribed, the first going to the nature and duration of the sentence that may be imposed, the second, to the procedure that the judge must follow in deciding upon the nature and duration of the sentence. While the Crimes Code prescribes the duration of the possible sentence for a given offense, the Sentencing Code prescribes the nature of the sentence that within this limit may be imposed (total confinement; partial confinement; probation; fine; and determination of guilt without further penalty). The Sentencing Code also prescribes the procedure that the judge must follow in deciding upon the nature and duration of the sentence. For example, the judge must consider whether factors identified in the Code as favoring probation are present, 42 Pa.C.S. § 9722; he must order a presentence investigation report, or state of record why he has not, 42 Pa.C.S. § 9731, suspended insofar as inconsistent with Pa. R.Crim.P., Chapter 14; and he must state of record the reasons for his sentence, 42 Pa.C.S. § 9721(b). When the General Assembly by the Act of 1978 provided for sentencing guidelines, it changed the procedure that the sentencing judge had to follow. Specifically, it provided that

> [t]he court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to section 1385 [now 2155 of Title 42] (relating to publication of guidelines for sentencing).... In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to section 1384 [now 2154 of Title 42] (relating to adoption of guidelines for sentencing) and made effective pursuant to section 1385 [now 2155 of Title 42], the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.
>
> Act of Nov. 26, 1978, P.L. 1316, No. 319, § 1, 18 Pa.C.S. § 1321(b) [now 42 Pa.C.S. § 9721(b)].

When by concurrent resolution of both Houses the General Assembly rejected the sentencing guidelines that the Commission had adopted, it again changed the procedure that the sentencing judge had to follow. Without the concurrent resolution, the judge would have had to follow the guidelines adopted by the Commission. The concurrent resolution, however, rejected those guidelines as too lenient, thereby prescribing that the sentencing judge was not to consider them, but instead was to consider other guidelines, to be adopted later. This action was as much an exercise of legislative power as was the enactment of the Act of 1978 itself, or the enactment of the Crimes Code, or of the Sentencing Code.[21] The conclusion is therefore inescapable that the provision of the Act of 1978, that such legislative power could be exercised *only* by the concurrent resolution of both Houses, *without* presentment to the Governor, is unconstitutional.[22]

21. In his opinion Judge WICKERSHAM suggests that "since the guidelines were not in effect at the time of the rejection, the rejection did not *change* the procedure sentencing judges would follow, it ... merely *maintained the status quo*." At 1207 (emphasis in original). The difficulty with this suggestion, however, is that if the concurrent veto was not an exercise of legislative power, what was it? As Professor Goldsmith has put this point, in his article, *INS v. CHADHA* and the Nondelegation Doctrine: A Speculation, 35 Syracuse L.Rev. 749 (1984): "If ... an exercise of the veto was *not* a 'legislative' act, then perhaps the House had no business exercising it at all." *Id.* at 753. Also in this regard I note the Supreme Court's affirmance of *Consumers Union of U.S., Inc. v. Federal Trade Commission*, 691 F.2d 575 (D.C.Cir.1982) (en banc), *aff'd sub nom. United States Senate v. Federal Trade Commission; United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983). There, the Court of Appeals held that a concurrent veto resolution, which prevented a commission's proposed rule from taking effect, violated procedures established by the Constitution for the exercise of legislative powers. *See also Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C.Cir.1982), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983) (affirmance of decision holding unconstitutional one-house veto of Commission's proposed rule); *Allen v. Carmen*, 578 F.Supp. 951 (D.D.C.1983) (one-house veto of proposed administrative regulations unconstitutional).

22. This case does not raise the issue of the constitutionality of a statute requiring that before they become effective an agency's proposed guidelines must be enacted into law. *Cf.* 1983 N.Y.Laws 711; Wash.Rev.Code § 9.94A.070(1). Nor does it raise the issue of the constitutionality of a statute requiring an agency to report proposed guidelines to the legislature for their consideration and providing for their effective date at the end of a certain period of time in the absence of an act to the contrary. *Cf.* Comprehensive Crime Control Act of 1984, Act of Oct. 12, 1984, Pub.L. 98-473, Title II, §§ 217, 235, 98 Stat. 2017; Minn.Stat.Ann. § 244.09(12).

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This conclusion is not only confirmed as correct but is required by the decision of the United States Supreme Court in *Immigration and Naturalization Service v. Chadha, supra.* In *Chadha*, the Court held unconstitutional § 244(c)(2) of the Immigration and Nationality Act, which provided that a resolution by either House would invalidate a decision by the Attorney General to suspend deportation of an alien. The Court reviewed the constitutional prescriptions for bicameralism and presentment to the President, art. I, §§ 1, 7, and concluded that the Framers of the Federal Constitution had decided "that the legislative power ... [would] be exercised in accord with a single, finely wrought and exhaustively considered, procedure." 462 U.S. at 951, 103 S.Ct. at 2784. It was clear to the Court that the one-House veto was "essentially legislative in purpose and effect ... [because it] alter[ed] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." *Id.* at 952, 103 S.Ct. at 2784. In this regard, the Court pointed out that neither House had argued that in the absence of the veto provision, it could have ordered the Attorney General to deport an alien whose deportation had been suspended. The Court summarily rejected "the suggestion that the one-House veto provision ... either removes or modifies the bicameralism and presentation requirements" that legislative action must satisfy, observing that "[t]he explicit prescription for legislative action contained in Art. I cannot be amended by legislation." *Id.* at 957 n. 22, 103 S.Ct. at 2787 n. 22. Since the one-House veto failed to satisfy the constitutional requirements of bicameralism and presentment, the Court held that the provision authorizing it was unconstitutional.

This reasoning is controlling. While *Chadha* concerned a one-House veto instead of, as here, a two-House veto, that fact is immaterial. *See Consumers Union of U.S., Inc. v. Federal Trade Commission*, 691 F.2d 575 (D.C.Cir.1982) (en banc), *aff'd sub nom. United States Senate v. Federal Trade Commission; United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983) (two-House veto unconstitutional). It is equally immaterial that *Chadha* arose under the United States Constitution instead of the Pennsylvania Constitution. *See* discussion, subsection a, *supra. See also Legislative Research Commission by Prather v. Brown*, 664 S.W.2d 907 (Ky.1984) (interpreting Kentucky Constitution); *Burstein v. Morial*, 438 So.2d 554 (La.1983) (interpreting home rule charter); *Planned Parenthood Association v. Department of Human Resources*, 297 Or. 562, 687 P.2d 785 (1984) (en banc) (interpreting Oregon Constitution). *Compare State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 687 P.2d 622 (1984), which held provisions permitting the legislature to adopt, modify or revoke administrative rules by concurrent resolution without presentation to the governor unconstitutional under the Kansas Constitution. This conclusion was supported by federal and state decisions, 236 Kan. at 61, 687 P.2d at 636, including *Chadha, State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *Maloney v. Pac*, 183 Conn. 313, 439 A.2d 349 (1981); *Opinion of the Justices*, 121 N.H.

552, 431 A.2d 783 (1981); *General Assembly of State of New Jersey v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982).

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The remaining question is whether the unconstitutional concurrent resolution provision of Section 3 of the Act of 1978 may be severed from the other provisions of the section, so that these other provisions may remain in effect.

Under Pennsylvania rules of statutory construction, separate provisions of a statute are presumed severable.[23] However, this presumption is not available, for the Act of 1978 contained an express inseverability clause:

> Section 7. The provisions of section 3 [relating to the Pennsylvania Commission on Sentencing] are not severable and if any provisions thereof or the application thereof to any person or circumstance is held invalid, the remainder of section 3 and section 6 [appropriating funds to the Commission] shall be invalid.
>
> Act of Nov. 26, 1978, P.L. 1316, No. 319.[24]

Although reworded in 1980, the legislature again provided that the Act was inseverable:

> (c) The provisions of subsection (a) [relating to the Pennsylvania Commission on Sentencing], 42 Pa.C.S. § 9781 (relating to appellate review of sentence), and section 6 [relating to appropriations to the Commission] of the act of November 26, 1978 (P.L. 1316, No. 319), entitled "An act amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, further providing for sentencing; and providing for alteration of identification marks on personal property," are not severable and if any provision thereof or the application thereof to any person or circumstance is held invalid, the remainder of subsection (a), 42 Pa.C.S. § 9781 and such section 6 shall be invalid.
>
> (d) Subchapter G of Chapter 13 (relating to Pennsylvania Commission on Sentencing) of Title 18, and sections 7 and 8(a) and (b) [of the 1978 Act] ... are repealed....
>
> Act of Oct. 5, 1980, P.L. 693, No. 142, § 218.

These changes were made as part of the JARA Continuation Act of 1980, which transferred sections of Title 18, relating to the Commission, to Title 42. *Id.*, § 218(a).

Although this explicit expression of inseverability is by itself sufficient to overcome the presumption of severability, I have also examined the legislative record for evidence of intent. It discloses that indeed the legislature would not have created the Commission and authorized it to adopt guidelines without at the same time reserving the power by concurrent resolution to reject those guidelines. Thus, Representative Scirica, sponsor of the bill, noted that "[b]efore the guidelines become effective, they have to be submitted in their entirety to both Houses of the General Assembly, and we have 90 days to look them over and to decide whether or not to veto them." Pa.House Leg. J., Sept. 21, 1978, at 3131. In 1981, during the debate on the concurrent resolution rejecting the guidelines adopted by the Commission, Representative Reber pointed out

> that when the guideline enactment went into effect allowing you the right to review this, it had to be for a purpose, and I submit it was just this particular purpose that we do want to look at these, if in fact they come back too lenient.
>
> Pa.House Leg. J., Apr. 1, 1981, at 564.

See also Pa.House Leg. J., Apr. 1, 1981, at 566 (remarks of Rep. Hagarty). And in 1982, while debating the Senate resolution that approved the new guidelines, Senator Gekas stated:

> We will always have that ability [to reject the guidelines] because the Commission on Sentencing will continue to monitor and report to us and we as a Body will be on top of these guidelines and the sentencing procedures and the whole gamut of the judicial system having to do with sentencing from top to bottom.
>
> Pa.Senate Leg. J., Apr. 20, 1982, at 2160.

(I note in passing that one legislator correctly described the two-House veto as an "end run" around the constitutional requirements applicable to the exercise of legislative power:

> I cannot sit down without being critical of the way this whole issue comes before us. It is really being done by an end run and I think the proponents of this very involved sentencing guideline device realize it would have a hard time getting through the Legislature on its own merits.
>
> Pa.Senate Leg. J., Apr. 20, 1982, at 2164 (remarks of Sen. Snyder).)

Since the legislature thus made plain its intention that the provisions of Section 3 of the Act of 1978 should be "essentially and inseparably connected," 1 Pa.C.S. § 1925, note 23, *supra*, the conclusion that the concurrent veto resolution provision of the Section is unconstitutional renders the entire Section unconstitutional. The judgment of sentence should therefore be vacated and the case remanded for resentencing under the Sentencing Code.[25]

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I should not apply this decision retroactively,[26] for I have reviewed the various factors used to resolve the issue of retroactivity, and have concluded that sentences imposed since the effective date of the 1982 guidelines need not be vacated. *See Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Commonwealth v. Cain*, 471 Pa. 140, 369 A.2d 1234 (1977) (aff'd by an equally divided court) (EAGEN, J., Opinion in Support of Affirmance, joined by JONES, C.J., and POMEROY, J.); *Commonwealth v. Godfrey*, 434 Pa. 532, 254 A.2d 923 (1969); *Commonwealth v. Parrott*, 287 Pa.Super. 53, 429 A.2d 731 (1981).

A decision that the two-House veto resolution is unconstitutional was not foreshadowed in previous decisions. Indeed, this court has interpreted various aspects of the sentencing guidelines without intimating

23. The Statutory Construction Act of 1972 provides:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.
>
> 1 Pa.C.S. § 1925.

24. An earlier version of the bill, Printer's No. 2164, contained only the following clause:

> The provisions of 18 Pa.C.S. § 1356 (relating to appellate review of sentence) are not severable and if any provision thereof or the application thereof to any person or circumstance is held invalid, the remainder of the section shall be invalid.
>
> S. 195, § 6.

25. The legislatively-set interim guidelines, *see* note 6, *supra*, apparently would not be applicable in this case.

26. The question of retroactivity is not strictly before this court. However, given the potential impact of a decision holding the guidelines unconstitutional, I nevertheless address that issue. *Compare Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), where the Supreme Court addressed, without explanation, the retroactivity of its decision affirming a District Court holding that Congressional delegation of jurisdiction to bankruptcy judges under the Bankruptcy Act of 1978 violates Art. III of the Constitution.

> Although I should conclude that a decision holding the guidelines unconstitutional should not be applied retroactively, appellants who have raised and properly preserved the issue posed by this appeal—that the guidelines are unconstitutional for lack of presentment of the concurrent resolution—should receive the benefits of such a decision. *Cf. Shea v. Louisiana*, — U.S. —, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

that fundamental constitutional problems existed in the Act of 1978. *See, e.g., Commonwealth v. Rainey*, 338 Pa.Super. 560, 488 A.2d 34 (1985); *Commonwealth v. Rivera*, 338 Pa.Super. 199, 487 A.2d 923 (1985); *Commonwealth v. Smith*, 333 Pa.Super. 179, 481 A.2d 1365 (1984); *Commonwealth v. Royer*, 328 Pa.Super. 60, 476 A.2d 453 (1984). The parties have pointed out only two other instances in Pennsylvania law that might pose the same constitutional issue raised in this case,[27] and in these instances, the issue apparently has not been raised. Moreover, until *Chadha*, there was no indication from the United States Supreme Court that Congress' incorporation of legislative review mechanisms violated the Constitution. *See Exxon Corp. v. U.S. Department of Energy*, 744 F.2d 98 (Em.Ct.App.), *cert. denied sub nom. Energy Reserves Group, Inc. v. Department of Energy*, — U.S. —, 105 S.Ct. 576, 83 L.Ed.2d 515 (1984) (*Chadha* not retroactive in part because *Chadha* posed issue of first impression not clearly foreshadowed by earlier cases).

In addition, retroactive application of a holding to the effective date of the 1982 guidelines, July 22, 1982, would not further the purpose of the holding, *i.e.*, to preclude continued violation of the presentment provision by the legislature enacting review mechanisms not requiring executive consideration. *See Exxon Corp. v. U.S. Department of Energy, supra.* It is obvious that my conclusion that Section 3 of the Act of 1978 is unconstitutional does not affect the truth-finding process, which has been a significant fact in determining retroactivity, *see Commonwealth v. Cain, supra*, 471 Pa. at 162, 164, 166, 369 A.2d at 1245–47 (1977) (EAGEN, J., Opinion in Support of Affirmance, joined by JONES, C.J., and POMEROY, J.), and it does not follow that because a sentence was imposed upon consideration of the guidelines, the sentence was unfair.

Finally, to apply a decision of unconstitutionality retroactively would disrupt the already over-burdened criminal justice system. *Cf. Commonwealth v. Cain, supra* at 165, 369 A.2d at 1245–46 (EAGEN, J., Opinion in Support of Affirmance, joined by JONES, C.J., and POMEROY, J.). According to the Pennsylvania Commission on Sentencing, 29,908 sentences, on 20,529 separate forms, were reported during 1983, as having been imposed for offenses occurring on or after the effective date of the guidelines. Sentencing in Pennsylvania is (June 1984). *Cf. Exxon Corp. v. U.S. Department of Energy, supra* at 114. These figures suggest the magnitude of the problem if a decision of unconstitutionality were applied retroactively: it would create havoc. *Cf. Commonwealth v. Godfrey, supra*, 434 Pa. at 536–37, 254 A.2d at 925; *Commonwealth v. Oliver*, 251 Pa.Super. 17, 22–23, 379 A.2d 309, 312 (1977); *Commonwealth v. Lockhart*, 227 Pa.Super. 502, 507–08, 322 A.2d 707, 709 (1974).

For each of these reasons, I should hold that the decision that Act of 1978 is unconstitutional should be applied prospectively only.

The judgment of sentence in No. 2802 Philadelphia 1983 should be affirmed.

The judgments of sentence in No. 2803 Philadelphia 1983 and No. 2804 Philadelphia 1983 judgment of sentence should be vacated and the case should be remanded for resentencing in accordance with this opinion.

OLSZEWSKI, MONTEMURO and TAMILIA, JJ., join this dissenting opinion.

27. *See* Regulatory Review Act, Act of June 25, 1982, P.L. 633, No. 181, 71 P.S. § 745.1 et seq.; Sunset Act, Act of Dec. 22, 1981, P.L. 508, No. 142, as amended, 71 P.S. § 1795.1 et seq. (Attorney General Official Opinion, No. 84-3, advised the governor that Sunset Review Resolutions continuing certain bodies are subject to the presentment clause).

March of 1980. The court noted that Jenkins was charged with a crime, was committed to a State hospital for observation under § 19.2-169 with a warrant pending against him, was found incompetent to stand trial, and was committed to the same hospital for care, treatment, and maintenance. He ruled that under such circumstances Jenkins was an "inmate" of either the jail or the hospital and, "as such," there was "no difference" in the period of observation under § 19.2-169, for which the State did not charge, and in the period of hospitalization under Title 37.1, a mere "technical change in commitment," for which a charge was made. We disagree.[2]

We are of opinion that the applicable statutes provide in plain terms that a person is liable for the expenses of his care, treatment, and maintenance when confined to a State hospital pursuant to Title 37.1, even though he previously had been confined to the facility pursuant to Code § 19.2-169 as a person charged with crime.

In addition to the provisions already noted, *supra*, § 19.2-169 also provided that if a defendant, upon observation, is found mentally incompetent to stand trial

> "or requires hospitalization for the treatment of his mental disease or defect, an appropriate *court shall commit the accused pursuant to the provisions of § 37.1-67 of the Code* of Virginia and, thereafter, *the accused shall be subject to the provisions of Title 37.1* with respect to treatment, care, transfer, discharge, *and all other applicable sections.*" (Emphasis added.)

Jenkins was committed twice under that provision pursuant to civil commitment orders entered under Code § 37.1-67.1 *et seq.*, the successors to § 37.1-67. Consequently, having been so committed, Jenkins was "subject to the provisions of Title 37.1" by virtue of the specific language of § 19.2-169.

Included within Title 37.1 is Code § 37.1-105 which provided, in part:

> "*Any person* who has been or who may be admitted to any State hospital . . . *shall be liable* for the expenses of his care, treatment and maintenance in such hospital . . . ." (Emphasis added.)[3]

The foregoing language, considered with the specific provisions of § 19.2-169, clearly fixes liability upon Jenkins for the two periods of hospitalization in question.

The trial court based its decision on the conclusion that Jenkins was an "inmate" at all times during his stay in the State mental hospital. But the Attorney General points out "that there is no significant difference between the handling [by the hospital authorities] of patients incapable of standing trial and other involuntarily committed patients." He says the only apparent difference was set forth in § 19.2-169:

> "[A]t least ten days prior to the unconditional release or discharge of such individual charged with a crime, the facility director shall notify the appropriate court or judge thereof, the appropriate attorney for the Commonwealth and the attorney for the accused of such intended release or discharge."

Thus, as the Attorney General notes, the hospital director could have authorized the patient's unconditional release, provided he notified the appropriate criminal justice authorities. Upon such notice, the clerk of court was required to issue a praecipe to an officer of the court directing him forthwith to bring the person from the hospital facility and commit him to jail or the custody from which he was removed. Code § 19.2-171.[4]

2. On appeal, Jenkins contends the Commonwealth failed to prove certain facts essential to sustain a recovery against him. Such an argument was not made in the trial court and will not be noted for the first time on appeal. Rule 5:21. Also, Jenkins mounts a broadside constitutional attack on the entire statutory scheme under which he was hospitalized. We are unable properly to consider these constitutional arguments because they are based, in part, on assumptions of fact which are not supported by the meager oral stipulation in the trial court.

3. In 1982, § 37.1-105 was rewritten. Acts 1982, ch. 50.

4. Code § 19.2-171 was also repealed in 1982. Acts 1982, ch. 653.

Thus, when an accused is civilly committed under Title 37.1, he is not under the direct control of the criminal authorities during his incompetency. Moreover, Code § 37.1-1(16) defines one involuntarily admitted to a State hospital according to the provisions of Title 37.1 as a "patient." In short, as a practical matter as well as by statutory definition, Jenkins was a patient, not an inmate, during the periods in question.

Consequently, the Commonwealth was obligated to proceed against Jenkins according to the mandate of Code § 37.1-110, which provided, in part:

> "Upon the failure of any patient . . . to make payment of [his expenses], and whenever it appears from investigation that such patient, . . . has sufficient estate, or there is evidence of ability to pay such expenses, the Department shall petition [the appropriate court] for an order to compel payment of such expenses by persons liable therefor. . . ."[5]

For these reasons, the judgment below will be reversed and the case will be remanded for a new trial limited solely to the issue of the amount due by Jenkins to the Commonwealth for reimbursement of expenses.

Reversed and remanded.

Gerald L. BALILES, Attorney General of Virginia

v.

Edward J. MAZUR, Comptroller of Virginia.

Record No. 821123.

Supreme Court of Virginia.

Dec. 3, 1982.

Attorney General filed petition for writ of mandamus in Supreme Court seeking adjudication as to constitutionality of certain provisions of Public Building Authority Act. The Supreme Court, Thompson, J., held that: (1) revenue bonds issued by Public Building Authority which were payable solely from revenues pledged thereto and which were not backed by full faith and credit of Commonwealth were not in violation of debt limitation provision of State Constitution, and (2) provision in Act that Public Building Authority could not undertake any project not specifically included in bill passed by majority of General Assembly did not unconstitutionally contravene separation of powers.

Writ awarded.

1. States ⇐115

Revenue bonds issued by Public Building Authority to acquire and construct public buildings which were payable solely from revenues pledged thereto, and which were issued with express negation of any obligation by Commonwealth to pledge its full faith and credit for their payment, did not violate debt limitation provision of state constitution. Code 1950, §§ 2.1-234.16 to 2.1-234.19; Const. Art. 10, §§ 9, 9(a-d).

2. Constitutional Law ⇐58
States ⇐84

Provision in Public Building Authority Act that Authority could not undertake any project not specifically included in bill passed by majority of General Assembly did not unconstitutionally contravene separation of state legislative and executive powers. Code 1950, §§ 2.1-234.10 to 2.1-234.19, 2.1-234.13; Const. Art. 1, § 5; Art. 3, § 1.

Harry Frazier, III, Richmond (Gerald L. Baliles, Atty. Gen., William G. Broaddus, Chief Deputy Atty. Gen., Walter A. McFarlane, Deputy Atty. Gen., John G. MacConnell, Asst. Atty. Gen., James J. Knicely;

5. In 1982, § 37.1-110 was rewritten. Acts 1982, ch. 50.

Hunton & Williams, Fairfax, on briefs), for petitioner.

J. Burwood Felton, III, Richmond, for respondent.

Before CARRICO, C.J., and COCHRAN, POFF, COMPTON, THOMPSON, STEPHENSON and RUSSELL, JJ.

THOMPSON, Justice.

The Attorney General, by filing a petition for a writ of mandamus, invokes our original jurisdiction pursuant to Code § 8.01-653,[1] seeking adjudication as to the constitutionality of certain provisions of the "Virginia Public Building Authority Act of nineteen hundred eighty-one" (the Act). Acts 1981, c. 569; Code §§ 2.1-234.10 to -234.19.

On June 25, 1982, the Comptroller of Virginia (Comptroller) notified the Attorney General of doubts respecting the constitutionality, proper construction, and interpretation of the Act and raised certain questions for consideration by this court. The questions are:

1. Do the provisions of the Act empower the Virginia Public Building Authority (Authority) to undertake financial obligations to construct, improve, furnish, maintain, acquire, and operate public buildings for sale, lease, or conveyance to the Commonwealth which would violate the provisions of Article X, § 9 of the Constitution concerning the creation of debt to which the full faith and credit of the Commonwealth is pledged or committed?

2. Does the provision of the Act that the Authority shall not undertake any project or projects which are not specifically included and authorized to be undertaken in a bill or resolution passed by a majority of those elected to each house of the General Assembly violate the principle stated in Article I, § 5, and Article III, § 1, of the Constitution that the legislative, executive, and judicial departments of the Commonwealth shall be separate and distinct?

The essential facts are not in dispute and, as outlined in the petition for a writ of mandamus and accompanying brief, are:

The Authority was established as " . . . a body corporate and politic, constituting a public corporation and governmental instrumentality" for the purpose of "constructing, . . . maintaining, . . . and operating public buildings for the use of the State." The membership of the Authority includes the State Treasurer, the State Comptroller, and five additional members appointed by the Governor. Code §§ 2.1-234.12, -234.13.

The Authority is authorized to undertake only those projects specifically authorized in a bill or resolution passed by a majority of those elected to each house of the General Assembly. It has the power to (i) acquire, purchase, hold and use real and personal property; (ii) lease as lessor to the Commonwealth (and any of its political subdivisions or agencies), subject to the approval of the Governor, any project constructed by or any property at any time acquired by the Authority; and (iii) acquire by purchase, lease, or otherwise, and to construct, improve, furnish, maintain, repair, and operate projects. The Authority is also empowered to fix and collect rates, rentals, and other charges for use of its facilities or projects. Code § 2.1-234.13.

In furtherance of its purposes, the Authority may borrow money and issue notes, bonds, and other evidences of indebtedness and may secure such obligations by the pledge of its revenues, rentals, and receipts.

1. Under Code § 8.01-653, the Comptroller may, in those situations where he entertains doubt respecting the constitutionality, proper construction, or interpretation of an act of the General Assembly which directs payment of money out of the state treasury, withhold payment under the act until there has been a final adjudication made by this court. The Attorney General is empowered to file a petition for a writ of mandamus, directing the Comptroller to pay the money as provided in the act. This court is then required to

> Consider and determine all questions raised by the Attorney General's petition pertaining to the constitutionality or interpretation of any such act, even though some of such questions may not be necessary to the decision of the question of the duty of such Comptroller . . . to make payment of the moneys appropriated or directed to be paid.

The sum of all its obligations may not at any one time exceed $150,000,000. *Id.*

Code § 2.1-234.14 states, in part, that:

> The principal of and interest on such bonds shall be payable solely from the funds provided in this article for such payment. Any bonds of the Authority issued pursuant to this Article shall not constitute a debt of the Commonwealth, or any political subdivision thereof other than the Authority, and shall so state on their face.

Rents, fees, and other charges for use of the Authority facilities are required to be fixed and adjusted so that the revenues, together with all available funds, will be sufficient to pay the cost of maintaining, repairing, and operating the Authority's projects, to pay the principal of and interest on its bonds, and to create reserves for such purposes. Revenues received by the Authority may be pledged and assigned to secure its obligations, but the Authority may not convey or mortgage any project or any part thereof as security for its bonds.

The Authority was organized on December 7, 1981. On January 11, 1982, the governing board (Board) unanimously adopted a resolution (the "January resolution") authorizing the acquisition and/or construction of three public office buildings and the lease thereof to the Commonwealth, and issuance of revenue bonds. The Board further authorized its chairman to take such action as may be necessary to obtain the requisite approvals from the General Assembly and the Governor. On June 17, 1982, the Board adopted a resolution (the "June Resolution") which ratified and reaffirmed the January Resolution and approved an outline of financing and plan of lease for the proposed projects.

Specifically, the January Resolution provides for the issuance of approximately $75,000,000 Public Office Building Revenue Bonds to (i) acquire the James Monroe Building (Phases I and II) (the "James Monroe Project") and the Department of Motor Vehicles Building (the "DMV Project"), both now leased to the Commonwealth by the Virginia Supplemental Retirement System (VSRS), and (ii) construct a building for the Commonwealth's Department of Computer Services (the "Computer Services Project"). Each of these projects is located in the City of Richmond. The bonds will be secured by an assignment of all the Authority's rights to rental payments, rates, and fees charged for the use of or for the services and facilities associated with each project. The January Resolution expressly states that the bonds will be limited obligations payable solely from the revenues pledged for such purposes and that they will not constitute a debt of the Commonwealth or any political subdivision thereof other than the Authority.

James Monroe and DMV Projects. In consideration of the Authority paying to the Commonwealth an amount sufficient to pay the total investment of the VSRS in these projects, the Commonwealth will sell to the Authority for a nominal price the real property and improvements constituting the two projects. As to the James Monroe Project, the Authority will lease it to the Department of General Services for a period of 20 years, with rental payments sufficient to pay annual debt service on the bonds issued to finance its acquisition and to fund adequate reserves and administrative expenses. The DMV Project will be leased to the DMV for a period of two years, subject to automatic renewal for consecutive two-year terms over a twenty-year period.

The Department of General Services is required to request an annual appropriation from the General Assembly in the amount of the succeeding biennial rent payment to provide for the use, occupancy, and maintenance of such project. The two leases provide that upon the termination of the lease in 2002 A.D., fee simple title in the projects remains in the Authority. Both leases also contain clauses providing for early termination should funds for rental payments ever become unavailable.

If the Authority acquires these two existing buildings, the rental cost to the Commonwealth, based on the anticipated tax-

exempt borrowing by the Authority at 11% per year, will be approximately $7,919,539 per year, compared with the present cost for the James Monroe and DMV Projects of approximately $9,585,210 per year, for an estimated annual savings for both projects of $1,665,371.

Computer Services Project. For a nominal price, the Authority will acquire real property from the Commonwealth and construct thereon a building to be used by the Department of Computer Services. The lease has a one-year term, with subsequent automatic yearly renewals for a period of 20 years, provided the requisite annual rental payments are always made. These rental payments will be sufficient to amortize the bonds of the Authority issued to acquire and construct the project, to pay for the cost of repairs and operations, and to fund adequate reserves and administrative expenses.

The Authority will enter into a 20-year agency agreement with the Department of General Services to maintain the project, subject to cancellation in the event the underlying lease is not renewed. As with the leases in the James Monroe and DMV Projects, fee simple title in the project remains with the Authority upon the termination of the lease in 2002 A.D. Unlike the other leases, however, there is no clause in the Computer Services Project lease requiring the Department of Computer Services to make an annual request to the General Assembly for appropriations.

I. *Are Revenue Bonds, Issued by the Authority, Debts of the Commonwealth in Violation of Article X, § 9, of the Constitution of Virginia?*

[1] We hold that they are not. At the outset, we point out that the enabling legislation provides in part that "[a]ny bonds of the Authority issued pursuant to this Article *shall not constitute a debt of the Commonwealth, or any political subdivision thereof* other than the Authority, and shall so state on their face." (Emphasis added.) Acts 1981, c. 569, Code § 2.1-231.15. Also, the resolutions of the Authority are to the same effect:

> The Bonds will be limited obligations of the Authority payable solely from the revenues pledged thereto pursuant to the Indenture and shall not constitute a debt of the Commonwealth of Virginia or any political subdivision thereof other than the Authority.

In *Almond v. Gilmer*, 188 Va. 822, 51 S.E.2d 272 (1949), our first case recognizing the Special Fund Doctrine, we approved the issuance of revenue bonds by the State Highway Commission for the acquisition, construction, operation, and maintenance of certain highways, ferries, and bridges. The bonds were payable exclusively from a special fund composed of the revenues derived from the various projects.

We again considered the Special Fund Doctrine in *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961). There, the Virginia State Ports Authority contracted with a railway company to purchase certain of its properties for the purpose of providing new port facilities. As in *Almond*, this project was underwritten by the issuance of revenue bonds, which, in turn, were payable solely from the revenues derived from the newly constructed port facilities. Once again, both the Act and the bonds expressly negated any obligation by the Commonwealth or any political subdivision thereof to pledge its faith, credit, or taxing power for the payment of the bonds.

In contrast to *Almond*, however, the Ports Authority, in its contract with the railway, agreed to "urgently request" the General Assembly to make annual appropriations during the term of the lease for the purpose of participating in the cost of the project to the extent of 50% of the basic rent. In his brief, the Comptroller argued that this equated to a "moral obligation" on the part of the Commonwealth to make the appropriations, in violation of the constitutional restrictions on state debt. Referring to the argument rejected in *Almond v. Gilmer, supra*, this court held that there was no constitutionally prohibited debt even though the "expectation" of these continued appropriations was an essential ingredient in the negotiations between the Ports Authority and the railway. This did not in any way contractually obligate the state to make these appropriations. For the sake of emphasis, we repeat here the quotation in *Harrison v. Day*, 202 Va. at 976, 121 S.E.2d at 621, from *Almond v. Gilmer*, 188 Va. at 841, 51 S.E.2d at 279:

> It is true that the Commission and the State of Virginia may stand by as benevolent protectors of this enterprise of their creation. The one may allocate any funds not otherwise allocated or prohibited, to aid in its acquisition, maintenance and operation, and the other may make such appropriations toward those ends as it may desire. Yet neither is required to assume such philanthropic role.

Recently, in *Miller v. Watts*, 215 Va. 836, 841, 214 S.E.2d 165, 169 (1975), we summarized the doctrine as follows:

> [N]o constitutionally prohibited indebtedness is created when bonds issued to finance a particular State capital project are to be paid solely from a special fund derived from the revenues of that project; when the legislature is not obligated to appropriate funds for payment of the indebtedness; and, when the indebtedness is not secured by the general faith, credit, and taxing power of the State. [Citations omitted.]

In connection with the constitutional changes, we also said: "[The [Special Fund] Doctrine remains intact and its use is authorized by § 9(d) of the present Constitution." *Id.* at 841, 214 S.E.2d at 169.

Against this background, the present Constitution of Virginia deals definitively with the subject of state debt:

> Article X, § 9. State Debt.
>
> No debt shall be contracted by or in behalf of the Commonwealth except as provided herein.

The revisers obviously had in mind the anticipated growth of capital projects as the Constitution enumerates in § 9(a), (b), and (c) methods by which certain projects can be financed. The Constitution further provides in § 9(d):[2]

> (d) Obligations to which section not applicable.
>
> The restrictions of this section shall not apply to any obligation incurred by the Commonwealth or any institution, agency, or authority thereof if the full faith and credit of the Commonwealth is not pledged or committed to the payment of such obligation.

Thus, in the language of the document itself, we have one criterion for determining the existence of unconstitutional debt: Is the full faith and credit of the Commonwealth pledged or committed? If not, no unconstitutional debt is created.

The Comptroller argues that the Special Fund Doctrine is not applicable where the

2. In this context, it is illuminating to consider the comment concerning § 9(d) contained in *The Constitution of Virginia, Report of the Commission on Constitutional Revision* 319 (Jan. 1, 1969), which states:

> Added for the sake of clarity and completeness, this subsection serves to emphasize that the provisions of section 9 operate only when the full faith and credit of the Commonwealth is pledged or committed to the payment of an obligation. If an obligation in no way involves the Commonwealth's full faith and credit, then under the proposed section, as is the case at present, the constitutional debt limitations are not relevant.

Equally instructive are the relevant passages from A. Howard, *Commentaries on the Constitution of Virginia* 1126 (1974), where Professor Howard stated:

> 9(d). *Obligations to which section 9 is not applicable.* Section 9(d) was suggested by the Commission on Constitutional Revision for the sake of clarity and completeness and was accepted by the General Assembly without change. Section 9(a), 9(b), and 9(c) are all concerned with debt to which the full faith and credit of the Commonwealth is pledged. However, since the first sentence of section 9 states that no debt shall be contracted by or on behalf of the Commonwealth except as permitted by the Constitution itself, section 9(d) is necessary in order to make it clear that borrowing by the Commonwealth or by institutions, agencies, or authorities is in no way inhibited by section 9 so long as the full faith and credit of the Commonwealth is not pledged. It is therefore up to the Assembly or other competent authority to decide how much borrowing shall take place, for what purposes, and upon what conditions, when the State's full faith and credit is not involved.

fund consists entirely of money appropriated by the legislature. We are aware of no such limitation upon the Doctrine. The Comptroller's argument is answered by our holding in *Harrison v. Day*, *supra*. The overriding consideration, therefore, is whether the legislative body is obligated to appropriate the funds, not the source or composition of the special fund.

The Comptroller assails the issuance of these revenue bonds as a transparent attempt to evade the constitutional debt limitations. On the basis of our previous decisions, we reject this contention.

II. *Separation of Powers.*

[2] Code § 2.1-234.13 of the Act provides in part: "The Authority shall not undertake any project or projects which are not specifically included in a bill or resolution passed by a majority of those elected to each house of the General Assembly, authorizing such project or projects."

The Comptroller reasons that this puts the legislative branch of government in the position of deciding which projects shall be undertaken and to that extent is an encroachment upon the domain of the executive branch of the government, forbidden under Article I, § 5, and Article III, § 1, of the Virginia Constitution. He cites *Infants v. Virginia Hous. Dev. Auth.*, 221 Va. 659, 674, 272 S.E.2d 649, 657-58 (1980), where the Virginia Housing Development Act required the Governor to make certain budget information and recommendations available to the General Assembly. We dismissed the constitutional attack, holding that the Governor should include the budget item involved as an agency request rather than a recommendation, and alluded to "the common link" existing between the legislative and executive branches of government. 221 Va. at 674, 272 S.E.2d at 658.

The present position of the Comptroller is equally untenable. In the early part of this century, when a separation-of-powers argument was made against the establishment of the State Corporation Commission, in *Winchester & Strasburg R.R. Co. v. Commonwealth*, 106 Va. 264, 270, 55 S.E. 692, 694 (1906), the court quoted *Story's Const.* (5th Ed.) 393, 395:

> "When we speak ... of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. 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; and that such exercise of the whole would subvert the principles of a free constitution .... Indeed there is not a single constitution of any state in the union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it."

A similar situation recently arose in New Jersey, except that the legislature there had a power of veto over the projects rather than the right of prior approval. In *Enourato v. New Jersey Bldg. Auth.*, 182 N.J.Super. 58, 74, 440 A.2d 42, 50 (1981), *aff'd*, 90 N.J. 396, 448 A.2d 449 (1982), the court said:

> In the circumstances it is entirely reasonable for the Legislature to have reserved to itself oversight over major projects. Surely the Legislature would be more likely to make the appropriation to fund the rent for a project if it had approved the project and if its presiding officers had approved the leases. Accordingly we view the provision for legislative oversight not as an encroachment on the executive but rather as an adjunct to the Legislature's undisputed power to provide for appropriation of money. The oversight provisions should thus be regarded as an entirely appropriate application of an inherently legislative function. Thus the constitutional requirement for separation of powers has not been infringed.

Where the legislative branch will be called upon to fund the project, in its discretion, we see no affront to executive powers in adding that condition precedent to the statute.

We therefore hold that the revenue bonds proposed to be issued by the Virginia Public Building Authority, as heretofore described, are not state debts in violation of Article X, § 9 of the Virginia Constitution because the full faith and credit of the Commonwealth is not pledged or committed to pay said bonds. We further hold that Code § 2.1-234.13, requiring prior authorization by the General Assembly of any project undertaken by the Authority, does not contravene the separation of powers as required by Article I, § 5, and Article III, § 1, of the Virginia Constitution.

The writ of mandamus prayed for is awarded.

Writ awarded.

William C. SCHMIDT, Jr., etc.

v.

C. Hobson GODDIN, Committee, etc., et al.

Record No. 811750.

Supreme Court of Virginia.

Dec. 3, 1982.

Children of patient at sanitorium filed petition for restoration of patient's competency and discharge of his committee. The Circuit Court, Henrico County, Robert M. Wallace, J., ruled against petitioners, and they appealed. The Supreme Court, Thompson, J., held that: (1) ample evidence supported trial court's finding that patient had not regained competency; (2) patient's due process rights were not infringed when he was excluded from the courtroom during the testimony of physicians and sanitorium employees; and (3) it was error for the trial court to allow witness physician to participate in the trial by counsel, but such error was not prejudicial.

Affirmed.

1. Mental Health ⇐170

Ample evidence supported trial court's finding that patient at sanitorium, who had been discharged as an involuntary patient, had not regained competency. Code 1950, § 37.1-134.1.

2. Mental Health ⇐171

Trial court's determination that patient at sanitorium had not regained competency did not require the same findings of fact as an initial adjudication of legal incompetency. Code 1950, §§ 37.1-128.01, 37.1-128.04, 27.1 134.1.

3. Habeas Corpus ⇐89

Issues raised by petition for habeas corpus were moot, in view of fact that patient at sanitorium was a voluntary patient who could leave the sanitorium without giving 48 hours notice. Code 1950, §§ 37.1-67.2, 37.1 98, 37.1 [illegible].

4. Constitutional Law ⇐255(5)

In proceeding to determine if patient at sanitorium had regained competency, patient's due process rights were not infringed when he was excluded from the courtroom during testimony of physicians and sanitorium employees. Code 1950, § 37.1-134.1; U.S.C.A. Const.Amends. 5, 14.

5. Mental Health ⇐171, 172

In proceeding to determine if patient at sanitorium had regained competency, it was error to allow witness physician to participate in the trial by counsel, but such error was not prejudicial. Code 1950, § 37.1-134.1.

Edward G. Modell, Washington, D.C. (Blum & Nash, Washington, D.C., on brief), for appellant.

Beyond oversight through legislative committees, there is some additional room for legislative input into the execution of laws. Certain types of legislative participation create only a minimal danger of the aggregation of power in the legislative branch which the separation of powers seeks to prevent. This is particularly true where the Executive has extensive control pursuant to a statutory delegation of authority and the Legislature has only limited power to reject discrete projects rather than entire schemes of regulation.

In *Brown v. Heymann*, 62 *N.J.* 1, 297 *A.*2d 572 (1972), this Court upheld the constitutionality of the Executive Reorganization Act, which authorized the Governor to prepare an executive reorganization plan and present it to both houses of the Legislature. The statute provided that the plan would take effect unless both houses passed a concurrent resolution within 60 days disapproving the plan. The Court noted the plaintiffs' Presentment Clause claim but did not discuss it, focusing instead on the claim that by delegating too much legislative authority the act unconstitutionally *increased the power of the executive* branch. The Governor did not challenge the Legislature's veto power.

The Federal executive has also generally supported executive reorganization plans that take effect unless the Legislature votes a resolution of disapproval. *See Consumer Energy*, 673 F.2d at 458-59; 43 Op. Att'y Gen. 2 (Jan. 31, 1977) (Attorney General Bell) ("the procedures provided in ... the reorganization statute are constitutionally valid").[4] *But see* 37 Op. Att'y Gen. 56 (1933) (Attorney General Mitchell) ("power to disapprove administrative acts raises a grave question as to the validity of the entire provision in the ... Executive reorganization [statute]").

"[G]overnmental powers must be shared and exercised by the branches on a complementary basis if the ultimate governmental objective is to be achieved." *Knight*, 86 *N.J.* at 339, 431 *A.*2d 833. In some of these areas the legislative veto might serve an important function consistent with the separation of powers. However, we cannot allow the Legislature to create oversight mechanisms that will circumvent the constitutional procedures for making laws and interfere unduly with the Executive's constitutional responsibility to enforce them.

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 power can pass constitutional muster.

The remarkably broad veto power in *L.* 1981, c. 27, offers almost unlimited potential for law making without the constitutionally required participation of the Governor and for undue interference with the executive branch. For these reasons, we hold that the Act violates the separation of powers and the Presentment Clause.

V

The Legislative Oversight Act is unconstitutional. It violates the separation of

4. Similarly, in *Atkins v. United States*, 556 F.2d 1028 (1977), cert. den. 434 *U.S.* 1009, 98 *S.Ct.* 716, 54 *L.Ed.*2d 751 (1977), the Court of Claims upheld a legislative veto provision in the Federal Salary Act of 1967, 2 *U.S.C.* §§ 351 to 361, pursuant to which the President's recommendations for judicial pay increases become effective unless vetoed by either house of Congress. The court noted that by disapproving the President's recommendations Congress "is certainly not making new law," *id.* at 1063, and by approving the salary changes they "become effective, just as if a majority in each House had concurred in them and the President approved them (which of course can be assumed in light of his rule initiating them)," *id.* at 1064.

The Court of Claims in *Atkins* further noted that the "matter of salaries [is] traditionally within the peculiar province of the legislative branch, not impinging upon presidential functions or veto rights." *Id.* at 1063. *Atkins* thus suggests that control over the appropriations process is another area in which additional legislative oversight is appropriate and may sometimes proceed without the participation of the Governor.

The constitutional power of the Legislature in overseeing its own appropriations is discussed more fully in *Enourato v. New Jersey Building Authority*, *supra*, decided today.

powers by giving the Legislature excessive power to impede the Executive in its constitutional mandate to faithfully execute the law. Further, the Act permits the Legislature to effectively amend or repeal existing laws without the participation of the Governor. Foreclosing the Governor from the law-making process offends the separation of powers and the Presentment Clause. This is an exercise of legislative power that the Constitution forbids.

CLIFFORD and SCHREIBER, JJ., concurring in the result.

For invalidation—Chief Justice WILENTZ and Justices PASHMAN, CLIFFORD, SCHREIBER and HANDLER—5.

Opposed—None.

90 N.J. 396

Albert ENOURATO, Plaintiff-Appellant,

v.

NEW JERSEY BUILDING AUTHORITY, The Directors of the New Jersey Building Authority, Brendan T. Byrne, Governor of the State of New Jersey, Clifford A. Goldman, State Treasurer of the State of New Jersey, Earl Josephson, Acting Director, Division of Purchase and Property (Division of the Treasury, State of New Jersey), Edward F. Meara, III, Chairman, New Jersey Building Authority, and W. Harry Sayen, Nancy Beer, Edward L. Hoffman, John H. Walther, Al Faiella, Ramon Rivera, Bernard E. Kelchick, Edward Pulver, Directors, New Jersey Building Authority, Defendants-Respondents.

Supreme Court of New Jersey.

Argued March 22, 1982.

Decided July 22, 1982.

Plaintiff, a New Jersey resident and taxpayer who leased land to the State, brought action challenging the constitutionality of provisions of the New Jersey Building Authority Act giving Legislature a power to veto building projects and lease agreements proposed by the Authority. The Superior Court, Law Division, Mercer County, dismissed the complaint, and plaintiff appealed. The Superior Court, Appellate Division, 182 N.J.Super. 58, 440 A.2d 42, affirmed and further appeal was taken. The Supreme Court, Pashman, J., held that: (1) legislative veto provisions in New Jersey Building Authority Act, which limited veto power to approval or rejection of proposed building projects and leases that require continuing budget appropriations by the Legislature and which were limited in scope and did not empower Legislature to revoke at will portions of coherent regulatory schemes, fell within proper scope of legislative oversight of executive action and did not violate separation of powers provision or presentment clause of State Constitution, and (2) since New Jersey Building Authority Act did not authorize creation of any debts by state, debt limitations clause of the State Constitution did not apply to Authority's debts on any obligations of the state on its lease agreements with the Authority.

Affirmed.

Schreiber, J., filed separate dissenting and concurring opinion in which Clifford, J., joined.

1. Constitutional Law ⇨58

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 to alter the statute's purposes, legislative veto power can pass constitutional muster. N.J.S.A.Const.Art. 3, par. 1.

2. Constitutional Law ⇨58
States ⇨9

Legislative veto provisions in New Jersey Building Authority Act, which limited

veto power to approval or rejection of proposed building projects and leases that require continuing budget appropriations by the Legislature and which were limited in scope and did not empower Legislature to revoke at will portions of coherent regulatory schemes, fell within proper scope of legislative oversight of executive action and did not violate separation of powers provision or presentment clause of State Constitution. N.J.S.A. 52:18A-78.1 to 52:18A-78.32; N.J.S.A.Const.Art. 3, par. 1; Art. 5, § 1, par. 14.

3. States ⇐119

Since New Jersey Building Authority Act did not authorize creation of any debts by state, debt limitations clause of the State Constitution did not apply to Authority's debts on any obligations of the state on its lease agreements with the Authority; overruling *McCutcheon v. State Building Authority*, 13 N.J. 46, 97 A.2d 663. N.J.S.A. 52:18A-78.1 to 52:18A-78.32; N.J.S.A. Const.Art. 8, § 2, par. 3.

David S. Lieberman, Atlantic City, for plaintiff-appellant (DeGeorge & Gendzel, Lawrenceville, attorneys; Murray Gendzel, Lawrenceville, of counsel).

Michael R. Cole, Asst. Atty. Gen., for defendants-respondents (Irwin I. Kimmelman, Atty. Gen., attorney; Sherrie L. Gibble, Deputy Atty. Gen., on the brief).

The opinion of the Court was delivered by

PASHMAN, J.

Plaintiff is a New Jersey resident and taxpayer who leases land to the State. He challenges the constitutionality of provisions of the New Jersey Building Authority Act (Act), *L.* 1981, c. 120, *N.J.S.A.* 52:18A-78.1 to .32, which give the Legislature the power to veto building projects and lease agreements proposed by the New Jersey Building Authority. He alleges that the legislative veto violates the Presentment Clause, Art. V, § 1, ¶ 14, and the separation of powers provision, Art. III, ¶ 1, of the New Jersey Constitution. Plaintiff further alleges that the Act violates the State Constitution's debt limitations clause, Art. VIII, § 2, ¶ 3. For the reasons stated below, we reject plaintiff's claims and uphold the constitutionality of the challenged provisions.

I

The Legislature established the New Jersey Building Authority ("Authority") to build and operate office facilities for state agencies. *L.* 1981, c. 120, *N.J.S.A.* 52:18A-78.1 to .32. The Act authorizes the Authority to issue bonds and notes in an amount not to exceed $250,000,000 to be used to build those facilities. *N.J.S.A.* 52:18A-78.14(a). The bonds and notes are entirely the debt of the Authority, not the State. They must state on their face that they shall not create any indebtedness, liability or obligation of the State or any political subdivision. *N.J.S.A.* 52:18A-78.14(f).

All actions taken by the Authority must receive the Governor's approval. No action taken at any Authority meeting has any legal effect if the Governor vetoes the action within 15 days of the meeting. *N.J.S.A.* 52:18A-78.4(i).

The Act also contains two provisions that allow the Legislature to veto Authority actions. First, to commence any project whose estimated cost exceeds $100,000, the Authority must obtain a concurrent resolution of both houses of the Legislature within 45 days of the submission of the project to the Legislature for approval. *N.J.S.A.* 52:18A 78.6, .7, .9. Second, every lease agreement between the Authority and a state agency must be approved by the presiding officer of each house of the Legislature. *N.J.S.A.* 52:18A-78.9.

On November 24, 1981, plaintiff filed suit in the Superior Court, Law Division, alleging that the Act was unconstitutional. He claimed an interest in the matter as a New Jersey taxpayer and landowner who leased a building and property to the State for use by the Department of Environmental Protection. The Authority had proposed and the Legislature had approved building projects that might eliminate the State's need for plaintiff's facility.

The suit was filed one day before the Authority was scheduled to execute a contract for the sale of $135,000,000 in bonds. Over plaintiff's objection, the trial court granted respondents' request to schedule a show cause hearing for that same day. At the hearing respondents orally moved to dismiss the complaint. The trial court rejected plaintiff's constitutional claims and granted the motion.

The following day, November 25, 1981, respondents applied to the Appellate Division for an order reducing the time within which plaintiff could appeal the order of dismissal. The Appellate Division granted the motion requiring plaintiff to appeal by November 30, 1981 and submit briefs by December 4, 1981. Plaintiff appealed the dismissal of his complaint and filed a brief in the allotted time. On December 14, 1981 the Appellate Division heard oral argument and affirmed the dismissal. A written opinion followed. 182 *N.J.Super.* 58 (1981).

Plaintiff filed a notice of appeal with this Court on December 30, 1981, and moved for an interim restraint against the Authority's sale of bonds. The Authority cross-moved for summary affirmance. The Court denied both motions and accelerated the appeal by order dated January 19, 1982.

II

Constitutionality of the Legislative Veto Provisions of the New Jersey Building Authority Act

In *General Assembly v. Byrne*, 90 *N.J.* 376, 448 *A.2d* 438 (1982), decided today, the Court holds that the Legislative Oversight Act, *L.*1981, *c.* 27, is unconstitutional. By empowering the Legislature to revoke virtually all proposed executive agency rules, the Act intruded excessively upon the Executive's law enforcement authority in violation of the separation of powers. The Act also allowed the legislative branch to effectively amend and repeal existing laws without the participation of the Governor. This violated the separation of powers, *N.J. Const.* (1947), Art. III, ¶ 1, and the Presentment Clause requirement that "[e]very bill which shall have passed both houses shall be presented to the Governor" for approval or veto. *N.J.Const.* (1947), Art. V, § 1, ¶ 14.

[1] However, the Court in *General Assembly* made clear that the separation of powers leaves room for some legislative oversight and participation in executive action. Not every legislative input into law enforcement impermissably interferes with the Executive's law enforcement power. Likewise, not every action by the Legislature constitutes law making that requires a majority vote of both houses and presentment to the Governor.

> 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 power can pass constitutional muster. [*General Assembly* (at 395, 448 *A.2d* 448)]

[2] The Court finds that the legislative veto provisions in the New Jersey Building Authority Act, *L.* 1981, c. 120, *N.J.S.A.* 52:18A 78.1 to .32, fall within the proper scope of legislative oversight of executive action. The Act's veto power is limited to approval or rejection of proposed building projects and leases that require continuing budget appropriations by the Legislature. Legislative oversight therefore plays a necessary role in ensuring continuing legislative support for these projects.

At the same time, the veto provisions in the Act are limited in scope and do not empower the Legislature to "revoke at will portions of coherent regulatory schemes," *General Assembly*, 90 *N.J.* at 378, 448 *A.2d* 439. The veto therefore cannot substantially disrupt exclusive executive branch functions.. Indeed, the Governor has full control over Authority decision making. Further, even repeated use of the veto has little potential to alter the underlying legislative policy of providing capital facilities to meet internal governmental needs. Nor can it subvert the Governor's role in enforcing the law. The oversight provisions in *L.* 1981, c. 120, therefore violate neither the

Presentment Clause nor the separation of powers.

A. *The veto provisions' role in furthering the statutory scheme.*

The New Jersey Building Authority Act created the Authority and authorized it to issue bonds and notes in an amount up to $250,000,000 to provide facilities for state agencies. Those who purchase these bonds and notes become creditors of the Authority alone and not the State. They have no remedy against the State government because the statute provides that the notes and bonds issued by the Authority are entirely its own obligation. The notes must state on their face that

> neither the State nor any political subdivision thereof is obligated to pay the principal or interest and that neither the faith and credit nor the taxing power of the State or any political subdivision thereof is pledged to the payment of the principal of or the interest on the bonds or notes. [*N.J.S.A.* 52:18A-78.14(f)]

The Authority's creditors depend on the solvency of the Authority for repayment of the money they have lent. To repay the borrowed money, the Authority in turn depends upon rental payments from the state agencies that lease the Authority's facilities. In fact, the rental fees are calculated to satisfy the Authority's obligations on its bonds and notes. When it issues those bonds and notes, however, the Authority has no enforceable promise that the state agencies will pay the Authority the rent moneys necessary to reimburse its creditors. The statute provides that

> the payment of any and all rentals or other amounts required to be paid by the agenc[ies] thereunder, shall be subject to and dependent upon appropriations being made from time to time by the Legislature for that purpose .... [*N.J.S.A.* 52:18A-78.22]

The Authority's lenders thus depend upon the good faith of the Legislature in appropriating sufficient money each year to pay the rental fees that are used to repay them. The Legislature's refusal to appropriate the necessary money would not only bankrupt the Authority and force it to default on its obligations, but would also cripple the State's ability subsequently to borrow money for any purpose. The legislators who passed the Building Authority Act therefore sought to minimize the possibility that any future Legislature would refuse to make such appropriations.

One legislative veto provision in the Act gives either house of the Legislature the power to veto any Authority project estimated to cost over $100,000, *N.J.S.A.* 52:18A-78.8(b). The other provision enables the presiding officer of either house to veto any lease agreement, *N.J.S.A.* 52:18A-78.9. These vetoes advance the crucial purpose of obtaining continued legislative support in two related ways. First, the Act makes certain that every Authority project receives a legislative imprimatur by allowing the Legislature to reject any proposed project at its inception. It follows that if the Legislature does not veto a particular project and thereby approves it, this action will constitute a strong, if not compelling, basis for the Legislature to continue to appropriate sufficient money to support the project.

Second, the legislative veto mechanism can foster close cooperation between the Legislature and the Executive in this area of mutual concern. It can induce the Authority to exercise care in selecting its projects. The veto powers are vested not only in the Legislature but in the Governor as well. *N.J.S.A.* 52:18A-78.4(i). They thus serve to ensure that the Authority acts prudently. Moreover, veto power is only one part of a broader statutory scheme ensuring fiscal prudence. For example, before the Legislature even has a chance to review a proposed building project, the Governor can veto the proposal at its inception. *N.J.S.A.* 52:18A-78.4(i). Similarly, the Authority itself faces extensive requirements before commencing any project estimated to cost over $100,000. *N.J.S.A.* 52:18A-78.6. This includes the preparation of a detailed plan describing the project's estimated costs and the anticipated appropriations necessary for all lease agreements. *N.J.S.A.* 52:18A-78.6(a). As a further assurance of fiscal prudence, the Act mandates that the Authority's board of directors include the State Treasurer, the State Comptroller and the chairman of the State Commission on Capital Budgeting and Planning. *N.J.S.A.* 52:18A-78.4(b).

The Legislature has the power to fund or not to fund executive agencies and the projects undertaken by those agencies. Each year the Legislature must decide which executive activities it will fund. Legislative oversight has been regarded as particularly important in some situations where legislation authorizes an executive agency to undertake projects that require continued budget appropriations. *Cf. Atkins v. United States*, 556 *F.*2d 1028, 1063 (Ct.Cl.1977) (upholding legislative veto power over presidential recommendations for judicial pay increases under the Federal Salary Act of 1967, 2 *U.S.C.* §§ 351 to 361). The legislative veto provisions in *L.* 1981, *c.* 120, enable the Legislature to make those decisions about Authority projects at the most auspicious time possible—before the Authority begins the project. The Legislature's veto power in *L.* 1981, *c.* 120, helps ensure that the Authority will undertake financially sound projects in the way the Legislature envisioned when it passed the Building Authority Act.

We disagree with the dissent's contention that the argument for the narrow legislative veto in this case would apply equally to all executive programs requiring legislative appropriations. *Post* at 451–452. Unlike most funding situations, the approval of a building project and lease agreement locks the Legislature, for all practical purposes, into making continued appropriations. By contrast, in most cases a future legislature can discontinue appropriations if it believes the project funded is no longer necessary. Moreover, the Oversight Act's veto provisions withstand constitutional scrutiny only because they are both necessary to effectuate the statutory scheme and, as discussed below, they offer little potential for interference with executive functions or alteration of the statute's purpose. *General Assembly*, 90 *N.J.* at 395, 448 *A.*2d 438. *See post* at 405–407.

In sum, the Act's legislative veto provisions serve a necessary role in effectuating a scheme of cooperation between the Legislature and the Executive to obtain capital facilities for state agencies. They serve to assure that these projects will be soundly planned and will operate efficiently with the Legislature's continued fiscal support. Our next task is to consider whether the Act constitutes an undue legislative interference with executive functions or improper legislative policy making without the Governor's participation.

B. *The legislative veto's limited effects on the separation of powers.*

The legislative veto provisions in *L.* 1981, *c.* 120, serve a necessary legislative oversight purpose in ensuring that the projects approved by the Authority will receive continued legislative support. At the same time, the veto offers little of the potential for improper uses that led the Court to strike down the extremely broad veto provision in *General Assembly v. Byrne, supra.*

Three significant factors distinguish the veto provisions in the Building Authority Act from those in the Legislative Oversight Act that the Court struck down in *General Assembly*. First, the Governor's full control over the selection of Building Authority projects makes it impossible for the Legislature to usurp executive authority in ways that were possible under the Legislative Oversight Act. Pursuant to *N.J.S.A.* 52:18A-78.4(i), the Governor has 15 days to veto any Authority decision. The Legislature has absolutely no control over Authority projects unless the Governor first approves them.

A legislative veto in a particular statute may not offend the constitutional allocation of governmental powers if the statute gives the Executive extensive authority in the policy-making process. In *Brown v. Heymann*, 62 *N.J.* 1, 297 *A.*2d 572 (1972), this Court upheld the Executive Reorganization Act, which authorized the Governor to pre-

pare an executive reorganization plan and present it to both houses of the Legislature. The Court found no constitutional infirmity in the Legislature's power to pass a concurrent resolution within 60 days disapproving the plan.[1] *See also Atkins v. United States, supra.*

Second, because the Legislature's veto power is limited to the rejection of discreet projects and leases, it has limited potential to interfere with executive action. One significant constitutional defect in the Legislative Oversight Act was its potential for "allowing the Legislature to control agency rulemaking," 90 *N.J.* at 385, 448 *A.2d* 443. Executive agencies are charged with designing coherent plans to implement existing statutes. Where the Legislature has the power to veto any portion of a coherent scheme of regulation, it can

> undermine performance of that duty by ... nullify[ing] virtually every existing and future scheme of regulation or any portion of it.... Moreover, the Legislature need not explain its reasons for any veto decision. Its action therefore leaves the agency with no guidance on how to enforce the law. [90 *N.J.* at 386–387, 448 *A.2d* 443–444]

By contrast, the veto provision here cannot cause any such disruption. The Legislature cannot veto any arbitrary portion of a proposed Authority project. It must either veto the entire project or let the project proceed. Any "disruption" of Building Authority action in this context is actually part of the legislative scheme and can be considered necessary to further the statutory purpose of ensuring that the Legislature will support the building projects selected.

Moreover, the Legislature cannot coerce the Authority into proposing projects solely on the Legislature's own terms, since the Governor has veto power over every agency decision. *N.J.S.A.* 52:18A-78.4(i). The Legislature can forestall Authority action by repeatedly vetoing proposed projects, but it cannot engage in the types of intrusion and disruption that occur when the Legislature has total and arbitrary control.

Third, even repeated use of the veto would not be likely to alter the legislative intent in ways that require presentment to the Governor under the Presentment Clause. *N.J.Const.* (1947), Art. V, § 1, ¶ 14. In enacting the Building Authority Act, the Legislature clearly did not want the Authority to undertake any project unless it met with both legislative and gubernatorial approval. Exercise of the veto provisions is not inconsistent with the regulatory framework the Legislature has erected to assume tight controls over the selection of Authority building projects and leases.

We recognize that future legislators may veto a particular project that the legislators who passed the Act might have thought desirable. But this type of judgment is fundamentally different from a subsequent legislative nullification of a policy that a former Legislature enacted into law. *General Assembly*, 90 *N.J.* at 389, 448 *A.2d* 445. This crucial difference is illustrated in *Consumer Energy Council of America, etc. v. Fed. Energy Reg'y Comm'n*, 673 *F.2d* 425 (D.C.Cir.1982). The potential to interfere with exclusive executive responsibilities or to effectively alter the policy of existing laws without presentment to the Governor, which rendered the Legislative Veto Act in *General Assembly* unconstitutional, is negligible under the limited veto power in the Building Authority Act.

The above arguments notwithstanding, the legislative veto provisions in the Building Authority Act have some limited potential to interfere with executive functions and allow policy judgments without the participation of the Governor. Although the Legislature clearly intended tight controls over the Authority's selection of building projects, repeated legislative vetoes conceivably would prevent the Authority from commencing any projects at all. This legislative action would effectively repeal the Act without the constitutionally required presentment to the Governor. However, the mere remote possibility of never-ending legislative vetoes is insufficient to invalidate a veto provision that serves an important governmental purpose.

1. The dissent seeks to distinguish *Brown* on the ground that the Legislature there had to affirmatively wield its veto power to block executive action, while here the executive action takes effect only if the Legislature votes to approve it. We see no relevant distinction for purposes of constitutional analysis since in either instance the Legislature has identical power to impede executive functions.

More troubling is the fact that either house of the Legislature can veto proposed projects. This allocation of power tends to contravene the principle of bicameralism that "[i]n republican government, the legislative authority necessarily predominates [and therefore] ... [t]he remedy ... is to divide the legislature into different branches," *The Federalist No. 51* at 338 (R. Luce ed. 1976) (Hamilton or Madison). A one-house veto frustrates "[t]he overriding objective of bicameralism ... to constrain the exercise of ... legislative power by making sure that the Legislature can act only where representatives of two different constituencies are in agreement." *Consumer Energy*, 673 *F.2d* at 464 (footnote omitted).

The one-person veto provision in *N.J.S.A.* 52:18A-78.9, which allows either presiding officer to veto a proposed lease agreement, exacerbates this problem of concentrating legislative control. In *Opinion of the Justices*, 431 *A.2d* 783 (N.H.1981), the Supreme Court of New Hampshire invalidated provisions giving legislative veto power to standing committees and the presiding officers of both houses of the Legislature. The court held that although the "legislative veto is not *per se* unconstitutional ... wholesale shifting of legislative power to such small groups in either house cannot fairly be said to represent the 'legislative will.'" 431 *A.2d* at 788. *Cf. Atkins v. United States*, 556 *F.2d* at 1064 (upholding the veto provisions under the Federal Salary Act, but stating that "[i]t is not as if the 'veto' is imposed by one committee of Congress or one member").

A concentration of authority in one house of the Legislature or in one legislator threatens the separation of powers and the principle of bicameralism unless that power is narrowly circumscribed. As we have stated, not every legislative action requires the approval of both houses and presentment to the Governor. The more limited the grant of power, the more concentrated it can be without violating the Presentment Clause or the separation of powers. Here, the delegated authority is narrowly limited. No single house or single legislator is empowered to approve new legislation. No danger of precipitate legislative action is posed. To the contrary, the veto provisions of the Act provide *additional checks* against Building Authority projects which may in the future prove unwise or unduly costly. The presiding officers have power to disapprove the lease agreements only for building projects that the Legislature has already approved. These lease agreements involve no policy determinations whatsoever; they merely establish rental rates sufficient to allow the Building Authority to repay its bondholders. Thus, the Act's veto provisions, despite their failure to conform with the principle of bicameralism, do not offend the Constitution.

III

The Debt Limitation Clause

[3] We also reject plaintiff's argument that the New Jersey Building Authority Act, *L.* 1981, c. 120, *N.J.S.A.* 52:18A-78.1 to 82, violates the debt limitations clause of the State Constitution. *N.J. Const.* (1947), Art. VIII, § 2, ¶ 3.

Plaintiff claims that the debts of the Authority resulting from its issuance of notes and bonds are debts of the State, and therefore the procedures in Art. VIII, § 2, ¶ 3 must be followed. The Court rejected this argument in *Clayton v. Kervick*, 52 *N.J.* 138, 244 *A.2d* 281 (1968). In that case, as here, the Legislature created an independent authority empowered to borrow money and issue bonds that were not the liabilities of the State or any political subdivision. In *Clayton*, the New Jersey Educational Facilities Authority built school facilities with the borrowed money and leased them to

to repay the Authority's creditors. The Court held that the Authority's debts were not debts of the State, despite "[t]he fact that the rentals were admittedly geared to satisfy the bonded indebtedness and enable the State ultimately to become the owner of the buildings," 52 *N.J.* at 153, 244 *A.2d* 281.

Similarly, in *Holster v. Bd. of Trustees of Passaic County College*, 59 *N.J.* 60, 279 *A.2d* 798 (1971), the Court upheld the County College Bond Act, under which a county issued bonds whose repayment was expressly subject to appropriations being made by the Legislature. The Court stated:

> Although there is doubtless a strong likelihood that payment of the bonds will in fact be met by legislative appropriations, we find nothing in the statute compelling the State to make such payments as a matter of law. Hence, both issuing counties and purchasing bondholders are on notice that the faith and credit of the State will not be pledged in respect of bonds issued pursuant to this enactment, but that payment on the part of the State will be dependent upon appropriations provided from time to time. [59 *N.J.* at 66–67, 279 *A.2d* 798]

No relevant distinction exists between the financing schemes upheld in those cases and that in the New Jersey Building Authority Act. The Authority's bonds and notes are not a debt or liability of the State. They state on their face that the State does not pledge its faith and credit to their payment. *N.J.S.A.* 52:18A-78.14(f). Although the Act not only contemplates that the State will make the necessary appropriations but also seeks to ensure this result, *supra* at 402–404, the State is under no legal obligation to do so. The Authority's creditors have notice that their only remedy lies against the Authority.

Nor does the liability of the State on its lease agreements with the Authority create any debt of the State. Both the statute and the lease make clear that all rent payments from the State are subject to legislative appropriations. Moreover, the State may incur liability for future rentals without violating the debt limitations clause. *See Bulman v. McCrane*, 64 *N.J.* 105, 117–18, 312 *A.2d* 857 (1973). Plaintiff does not contend otherwise.

Since the Building Authority Act does not authorize the creation of any debts by the State, the debt limitations clause, *N.J. Const.* (1947), Art. VIII, § 2, ¶ 3, does not apply to the Authority's debts or any obligations of the State on its lease agreements with the Authority. We have already disapproved the contrary result reached by a sharply divided Court in *McCutcheon v. State Building Authority*, 13 *N.J.* 46, 97 *A.2d* 663 (1953), and now expressly overrule that case.

IV

For the above reasons, the New Jersey Building Authority Act, *L.* 1981, c. 120, does not violate the separation of powers, Art. III, ¶ 1, the Presentment Clause, Art. V, § 1, ¶ 14, or the debt limitations clause, Art. VIII, § 2, ¶ 3, of the New Jersey Constitution. The New Jersey Building Authority can issue bonds and notes and negotiate lease agreements with state agencies under the procedures set forth in the Act. The judgment of the Appellate Division is affirmed.

SCHREIBER, J., dissenting and concurring.

When tested by the principles decided today in *General Assembly v. Byrne*, 90 *N.J.* 376, 448 *A.2d* 438 (1982), the New Jersey Building Authority Act, *N.J.S.A.* 52:18A-78.1, *et seq.*, includes a classic example of a violation of the state constitutional requirement of separation of powers by enabling the Legislature to control an executive agency's essential functions. The Legislature has refined this intrusion by vesting each of its components, the Senate and Assembly, as well as their individual leaders, with the power to thwart the agency's ability to execute the law. It has thereby violated the constitutional structure of bicameralism. Lastly, the Act implicitly violates the Presentment Clause of the Constitution, which requires submission to the governor

for his approval or disapproval before a law can become effective.

Whether a power is executive, legislative or judicial is not always clear. In some situations the subject may be deemed to have the characteristic of more than one type of power. For example, some rules of evidence are distinctly procedural in nature and may be promulgated by the judiciary. Others have a much more substantive gloss and may be more appropriately enacted by the Legislature. *See* Evidence Act of 1960, *L.* 1960, c. 52. When that occurs, a sharing of power may be appropriate. *See Knight v. Margate*, 86 *N.J.* 374, 388–89, 431 *A.2d* 833 (1981). In other situations it may be fitting for one branch of government to exercise a power traditionally belonging to another. Thus, in executing and administering a law, the executive branch of government may legislate by adopting rules and may adjudicate by resolving adversarial interests. A third category is illustrated by one branch being called upon to perform an act incidental to a function belonging to another branch of government. Thus, the Chief Justice has been given the power to designate certain public trustees of the Prudential Insurance Company although execution of the insurance laws is an executive prerogative.

However, an outer limit of all these intrusions is that none may undermine the independence and integrity of a branch of government or that branch's ability to exercise the constitutional check with which it has been endowed. *See Myers v. United States*, 272 *U.S.* 52, 292–93, 47 *S.Ct.* 21, 84–85, 71 *L.Ed.* 160, 242 (1926) (Brandeis, J., dissenting). Examination of the problem before us should be made with these underlying principles in mind.

The New Jersey Building Authority (Authority) resembles numerous other agencies charged with carrying out their respective laws. The Authority, a corporate body, has been placed within the Department of the Treasury. It has 12 directors, including the State Treasurer, Comptroller of the Treasury, and Chairman of the Commission on Capital Budgeting and Planning, these three being members *ex officio*. The Governor appoints the remaining nine directors, two of whom are to be recommended by the President of the Senate and two by the Speaker of the General Assembly. The directors have four-year terms, except that those recommended by the legislative leaders may serve only during the two-year legislative term in which they are appointed. Any action taken by the Authority requires at least seven affirmative votes. All such action must be reflected in the minutes of the meeting and are subject to a gubernatorial veto.

The Authority's general powers are typical of regulatory agencies. It may adopt by-laws and an official seal, sue and be sued, and enter into contracts necessary or incidental to the performance of its duties. Its reason for existence is to provide office space for state agencies. To accomplish this the Authority is authorized to raise the necessary capital funds by issuing bonds and notes, the aggregate principal amount not to exceed $250,000,000 at any time. The State has no direct obligation to pay this debt, although the state agencies have an obligation to pay the rents under the leases that they enter into with the Authority and which rents are to be pledged to secure the bonds and notes.

The Authority is authorized to construct and improve office buildings necessary or convenient for the operation of any state agency. It must decide if a project is feasible. The Governor, however, can veto any project. If he does not and the costs are $100,000 or less, the Authority may proceed. However, if the costs are greater, the report proposing the project must be submitted to the Legislature. The Authority cannot proceed unless both the Senate and Assembly adopt resolutions of approval. Even if the Legislature has sanctioned the proposal, the President and the Speaker of the General Assembly must approve each lease made by a state agency with the Authority.

I

Separation of Powers

Justice Pashman has described in *General Assembly v. Byrne*, *supra*, the overriding

concern of the Founding Fathers that the Legislature might arrogate unto itself undue power. This concern and a desire to facilitate the administration of government by having the executive, rather than the Legislature, handle the details involved in administering and executing the laws are the primary reasons for the separation of powers implicit in the Federal Constitution and expressly set forth in the State Constitution in Art. III, par. 1.

A violation of the constitutional separation of powers precept occurs when, as stated in *General Assembly*, there is "unwarranted legislative interference with the executive branch and excessive legislative law-making power" so that the Legislature "can gravely impair the functions of the agencies charged with enforcing," administering and executing the statutes. *General Assembly v. Byrne*, 90 *N.J.* at 385, 448 *A.2d* 443. Legislative interference can violate the goals of a statute. This is particularly so when the legislative veto overrides a central or essential component of the executive authority. Moreover, "[t]he Legislature cannot [lawfully] pass an act that allows it to violate the Constitution." *Id.* at 391, 448 *A.2d* at 446. Professor Bickel expressed a similar thought in his testimony before the Subcommittee on Separation of Powers of the Senate Committee of the Judiciary:

> [T]he constitutional separation of powers is not ordained for the convenience of the separate branches of the Government, as they may from time to time conceive it, but is intended to insure observance of certain principles which the framers believed would conduce to effective and responsible Government consistent with the liberties of the people. Hence neither the Congress nor the President may choose to suspend these principles when convenient. [Congressional Hearings, September 15, 1967, at 247]

The New Jersey Building Authority Act cannot withstand these separation of power tests. The Authority is an agency in the executive branch of the government. No one has questioned the adequacy of the standards under which it is to approve a project to house another state agency or to determine the project's financial feasibility. Yet, the Legislature has retained control over the *heart* of the Authority's reason for being. It is the Authority, subject to the Chief Executive's approval, that determines whether a project is feasible and should be effectuated. But still the project cannot move forward without the approval of each house of the Legislature. What could constitute greater legislative control over an executive department of government!

The majority contends that legislative approval of a project will constitute "a strong, if not compelling, basis for the Legislature to continue to appropriate sufficient money" throughout all future years, to pay the rent required under the leases. *Ante* at 452. It argues that the approval of a project and lease agreement "locks the Legislature, for all practical purposes, into making continued appropriations . . . ." *Ante* at 453. It is one thing to appropriate dollars annually and quite another to bind one's self ahead of time to make appropriations. Obviously, the Legislature that approves a project in 1982 does not control future Legislatures. This is particularly evident when Legislatures must appropriate funds each year to enable tenants to pay their rents throughout lease terms as long as 35 years. Legislatures are not bound as courts are by precedent; yet even the judiciary is not "locked in." *See, e.g., Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 *N.J.* 237, 370 *A.2d* 449 (1977), overruled in *State v. Celmer*, 80 *N.J.* 405, 418, 404 *A.2d* 1 (1979).

More importantly whether the Legislature exercises the discretion to finance or not to finance governmental operations cannot justify a legislative intrusion into the executive power. Stating the proposition demonstrates its inherent weakness. Legislative control over appropriation purse strings does not warrant violation of the constitutional separation of powers. Otherwise the Legislature could through this mechanism direct the operations of all executive functions. Neither the Legislature's surrender of its appropriation authority, which is questionable to say the least, nor its exercise of that authority entitles the Legislature to assume a power in contravention of the Constitution. The contention that the Legislature's appropriation power entitles it to share in the executive function of formulating and planning housing projects entrusted to the Authority is not sound.

II

Bicameralism and Legislative Delegation of Power

The Constitution vests the legislative power in a Senate and General Assembly. *N.J. Const.* (1947), Art. IV, § 1, par. 1. The 1966 Constitutional Convention rejected a move to change to a unicameral legislature because of the constraint that bicameralism imposes upon the exercise of legislative power. Our constitutional provision is modeled after the federal scheme, both serving the same purposes. It is pertinent, therefore, to note Judge Wilkey's comments in *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 *F.2d* 425, 464 (D.C.Cir.1982):

> The overriding objective of bicameralism, then, is to constrain the exercise of the federal legislative power by making sure that the Legislature can act only where representatives of two different constituencies are in agreement.

See also The Federalist, No. 51 (J. Madison).

We have seen that either house of the Legislature can amend the Building Authority Act by vetoing projects approved by the executive branch of the government. Thus, one body may determine whether a duly enacted statute should be administered, this in defiance of the constitutional mandate that both the Senate and General Assembly must approve every bill. *See N.J. Const.* (1947), Art. V, § 1, par. 14(a).

As the Senate may not delegate its legislative power to the General Assembly, so, too, neither the Senate nor the General Assembly may delegate its legislative authority to a smaller body. It is obvious that the Senate could not delegate to a committee of its members the right to pass a bill. This can be done only by a majority of its members. Therefore, neither the Senate nor the General Assembly has the authority to delegate to its respective presiding officers the authority to approve each lease to be entered into between a state agency and the Authority. No standards or guidelines bind these legislative officers. Either could negate a proposed lease and doom to failure a project approved by the Authority, the Governor, and even the Legislature.

Springer v. Philippine Islands, 277 *U.S.* 189, 48 *S.Ct.* 480, 72 *L.Ed.* 845 (1928), has long been the leading opinion in this area of the law. There the Supreme Court struck down a statute vesting authority in the President of the Senate and Speaker of the House of Representatives of the Philippine Islands to vote government-owned stock in the Philippine National Bank, observing:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers v. United States*, 272 *U.S.* 52, 47 *S.Ct.* 21, 71 *L.Ed.* 160.
>
> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive. [*Id.* at 202, 48 *S.Ct.* at 482, 72 *L.Ed.* at 849]

Neither house of the Legislature may create effective legislation alone. Nor may it delegate essential executive or legislative duties to the Senate President or Speaker of the Assembly. The New Jersey Building Authority Act contravenes these principles.

III

Presentment Clause

Another important constitutional check on the legislative power is found in the Presentment Clause, *N.J.Const.* (1947), Art. V, § 1, par. 14(a). Every bill passed by both houses must be presented to the Governor. If he approves, it becomes law. If not, the Legislature may reconsider the matter and then, if two-thirds of each house votes for passage, the bill becomes law. The Presentment Clause serves two purposes. It protects the executive from an overreaching legislative power that could effectively thwart the executive in performing his constitutional charge of executing the laws. *See The Federalist*, No. 73 (A. Hamilton). The second purpose is to prevent hasty or imprudent legislation. It has also served as a means of expressing the policy of the chief executive, the only official elected statewide.

The legislative action under the Building Authority Act is essentially legislative in nature.[1] Even if it is contended that when the Legislature disapproves a project, it acts as an administrative agency, much as that agency itself acts when it declines to approve a project, that would violate the separation of powers. When the Legislature approves a project, its action is more akin to acting in a legislative capacity. It need follow no standards or criteria, other than constitutional ones. However, both approval and disapproval by the Legislature involve the Senate and General Assembly in a legislative review mechanism. This mechanism can be utilized only in accordance with the constitutional scheme. That scheme requires conformance with the Presentment Clause. There is no other way in which the Legislature may act legislatively. *See In re N.Y., Susquehanna & Western R.R. Co.*, 25 *N.J.* 343, 136 *A.2d* 408 (1957) (concurrent resolution may express opinion, but lacks operative effect of legislation).

It is no answer to say that the Governor had previously approved the project and therefore the Presentment Clause has not been violated. Otherwise, the Legislature could always seek proposals from the Governor and thereafter adopt them without presentment to the Governor. No one would seriously claim that such an adoption would constitute duly enacted legislation. The Constitution contemplates the Governor will act *after* the Legislature has completed its deliberations, not before. Legislative hearings might disclose facts or reasons that impel the executive to change his position. Sanction of a plan having prior gubernatorial approval and elimination of the presentment of the act after passage by the Legislature reverses the constitutional scheme of the legislative check and power placed in the executive—and without any valid reason. *Cf.* Justice Mountain's comment in *Vreeland v. Byrne*, 72 *N.J.* 292, 304-05, 370 *A.2d* 825 (1977), in which he advocates literal compliance with constitutional provisions governing details of governmental administration. Neither the Governor nor the Legislature may choose to suspend constitutional procedures.

IV

Some recent judicial opinions that have carefully considered these problems of presentment, separation of powers and bicameralism have declared legislative attempts to circumvent these provisions invalid. *See Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 *F.2d* 425 (D.C.Cir 1982);[2] *Chadha v. Immigration and Naturalization Service*, 634 *F.2d* 408 (9th Cir. 1980), *cert.* granted, 454 *U.S.* 812, 102 *S.Ct.* 87, 70 *L.Ed.2d* 80 (1981); *Opinion of the Justices*, 431 *A.2d* 783 (N.H.1981); *State ex rel. Barker v. Manchin*, 279 *S.E.2d* 622 (W.Va.1981); *State v. A.L.I.V.E. Voluntary*, 606 *P.2d* 769 (Alaska 1980).

The only recent decision of this Court which relates to this subject is *Brown v. Heymann*, 62 *N.J.* 1, 297 *A.2d* 572 (1972). However, that decision did not discuss the problems presented in this case. The issue in *Brown* was whether the Executive Reorganization Act of 1969 "so enhance[d] the executive power as to threaten the security against aggregated power which the separation-of-powers doctrine was designed to provide." *Id.* at 10, 297 *A.2d* 572. The Court answered that proposition in the negative. The statute authorized the Governor to prepare a reorganization plan of executive departments and to submit each plan to the Legislature. If the Legislature did not pass a concurrent resolution opposing the plan, it would become effective. See *N.J. S.A.* 52:14C-7(c). It was observed that the Legislature could express only disapproval. No affirmative legislative action was needed to have the plan become law. This is to be differentiated from the Building Authority Act under which the Legislature must act affirmatively before the project is effective and presiding officers of each house must approve leases that are essential to the realization of a project.

I sympathize with what the Legislature is seeking to accomplish in reviewing actions of administrative agencies. However, it is not without recourse. The Legislature could, of course, express its views during rulemaking hearings under the Administrative Procedure Act. It has also been suggested that the Legislature could require that rules would not become effective for a period of thirty days so that the Legislature could, if it so desired, pass a statute within that time nullifying or modifying proposed regulations. *See* Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 *Calif.L.Rev.* 983, 1060-61 (1975). It has also been proposed that the Legislature's direction should perhaps be to do more reviewing of what the administrative agencies are doing and then rewriting the laws in light of their administration, rather than reshaping and redirecting the administration of its laws. I am certain there are many other legislative oversight mechanisms that will fulfill the Legislature's desire that the laws be interpreted in accordance with its intent.

Though I believe those sections of the Building Authority Act relating to legislative concurrence in the Authority's projects and approval of the leases by the presiding officers of each legislative house are invalid, I am of the opinion that the balance of the statute may stand. Paragraph 31 of the Act evidences a broad legislative intent to that effect:

> If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which the judgment shall have been rendered.

1. One commentator has stated: "Since the Constitution plainly requires presidential participation in the exercise of legislative power, a power must be classified as non-legislative to justify its exercise by Congress or one of its branches in a way other than that prescribed." R. W. Gixanne, "The Control of Federal Administration By Congressional Resolutions and Committees," 66 *Harv. L. Rev.* 569, 593 (1953).

2. Judge Wilkey's opinion contains a comprehensive discussion of the Presentment Clause, bicameralism, and separation of powers. 673 *F.2d* at 771-78. He held that the provision authorizing either house of Congress to disapprove a regulation of the Federal Energy Regulatory Commission (FERC) under the Natural Gas Policy Act of 1978, 15 *U.S.C.* §§ 3301-3342, was unconstitutional for several reasons. Congress could not create a device enabling it to control agency rulemaking; the Presentment Clause was evaded because the President had had no opportunity to exercise his right of veto; the constitutional requirement of bicameralism was violated because one house could affect the validity of the regulation; congressional expansion of its role to one of shared administration of the law contravened separation of powers; and the entire scheme adversely affected the constitutional system of checks and balances.

The majority, in considering this opinion, has isolated one point in Judge Wilkey's discussion as crucial, that is, that the subject matter involved a "basic policy judgment." The opinion is not so circumscribed. However, even that standard does not differentiate this case. Here the Authority is making basic policy decisions with respect to where a state governmental body should be located, the adequacy of the facilities, and the costs involved. Though these policy decisions are different from whether incremental pricing should apply to boiler fuel, both the Authority and FERC have been entrusted with basic policy decisions within their respective substantive spheres.

I agree with the majority that the debt limitation clause, Art. VIII, § 2, par. 3, has not been violated, although this is a close question because of the State's obligations under the leases.

I join in the judgment that the sale of the bonds in the principal amount of $135,000,000 under the New Jersey Building Authority Act, as modified, would not violate the New Jersey Constitution.

Justice CLIFFORD joins in this opinion.

CLIFFORD and SCHREIBER, JJ., concurring in the result.

For affirmance—Chief Justice WILENTZ and Justices PASHMAN, CLIFFORD, SCHREIBER, HANDLER, POLLOCK and O'HERN—6.

For reversal—None.

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Mary JORDAN, Carmine Russo, Frank De Gaetano, James F. Murphy, Arthur J. Caccese and Elizabeth Caccese, his wife, Frank A. Duffield and Albert Florio, Jr., Individually and on behalf of all similarly situated owners and trainers of racing horses in the State of New Jersey, Plaintiffs-Appellants,

v.

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, Defendant-Respondent.

Supreme Court of New Jersey.

Argued March 9, 1982.

Decided July 27, 1982.

Owners of thoroughbred racehorses brought action challenging, as unconstitutional special law, statutory designation of regional division of national nonprofit horsemen's organization to receive percentage of purse money from thoroughbred horseracing in state. The Superior Court, Chancery Division, concluded that special law provisions of New Jersey Constitution had not been violated. Direct certification was granted, and the Supreme Court, Pollock, J., held that: (1) interest of horseowners in winnings of their horses was sufficient "additional private interest" to accord them standing; (2) participation of Attorney General as amicus curiae adequately protected interests of state; (3) statutory distinction, because of national organization's rules, in allocating benefits between members and nonmembers of organization bore no rational relationship to any legitimate public purpose; (4) to free statute from constitutional defects, organization's rules would be required to yield to legislative purpose of aiding racing personnel; and (5) regional division's statutory advantage, as recipient of funds, was not tantamount to unconstitutional "exclusive privilege."

Modified and affirmed.

1. Constitutional Law ⇐42(1)

Any slight additional private interest is sufficient to afford standing to private litigants who raise issues of great public interest, such as constitutional challenge to statute.

2. Constitutional Law ⇐42.3(2)

Interest of horseowners in winnings of their horses was sufficient "additional private interest" to accord them standing to challenge, as unconstitutional special law, statutory designation of regional division of national nonprofit horsemen's organization to receive percentage of purse money from thoroughbred horseracing. N.J.S.A. 5:5-66, subds. b(1)(d), b(2)(d), 5:10-7; N.J.S.A. Const.Art. 4, § 7, pars. 7, 9(8).

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐44

State is not required to be named as defendant in every action challenging validity of statute. R. 4:28-4(a).

4. Constitutional Law ⇐44

In action challenging validity of statute, Attorney General must be notified. R. 4:28-4(a).

5. Constitutional Law ⇐44

Participation of Attorney General as amicus curiae adequately protected interests of state in action challenging, as unconstitutional special law, statutory designation of regional division of national nonprofit horsemen's organization to receive percentage of purse money from thoroughbred horseracing. N.J.S.A. 5:5-66, 5:5-66, subds. b(1)(d), b(2)(d), 5:10-7; N.J.S.A. Const.Art. 4, § 7, pars. 7, 9(8); R. 4:28-4(a).

6. Statutes ⇐66

Special legislation may be constitutional if enacted for valid purpose and in accordance with procedures required for special legislation. N.J.S.A.Const.Art. 4, § 7, pars. 7-9; N.J.S.A. 1:6-1 et seq.

7. Statutes ⇐68, 77(1)

Whether law is "special" or "general" depends on class of persons affected by law. N.J.S.A.Const.Art. 4, § 7, par. 7.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⇐68, 77(1)

"General" legislation includes all those who should be included in class, but unconstitutional "special" legislation excludes some who should be included in class. N.J.S.A.Const.Art. 4, § 7, par. 7.

9. Statutes ⇐77(1)

Essence of unconstitutional "special" legislation is arbitrary exclusion of someone from class. N.J.S.A.Const.Art. 4, § 7, par. 7.

10. Statutes ⇐68, 77(1)

In considering whether legislation is "general" or "special," the court must determine purpose and subject matter of statute, whether any persons are excluded who should be included, and whether classification is reasonable, given purpose of statute. N.J.S.A.Const.Art. 4, § 7, par. 7.

11. Constitutional Law ⇐48(1)

Statute is presumed to be constitutional and court should exercise sparingly the power to declare statute unconstitutional.

12. Statutes ⇐77(1)

Purpose of constitutional prohibitions against special laws is to prevent abuse of legislative process by picking favorites. N.J.S.A.Const.Art. 4, § 7, pars. 7, 9(8).

13. States ⇐119

Direct benefit to national nonprofit horsemen's organization by statutory designation of regional division to receive percentage of purse money from thoroughbred horseracing in state would violate constitutional prohibition against appropriation of monies for private association. N.J.S.A. 5:5-66, 5:10-7; N.J.S.A.Const.Art. 8, § 3, par. 3.

14. Gaming ⇐3

Where object of statute designating regional division of nonprofit horsemen's organization to receive percentage of purse money from thoroughbred horseracing in state was to benefit all horsemen, if effect of statute, on account of organization's rules, was to restrict benefits to organization members in good standing but to require all horsemen, even those who were not members, to contribute to organization's regional division, distinction in allocating benefits between members and nonmembers of organization would bear no rational relationship to any legitimate public purpose and statute would be constitutionally defective. N.J.S.A. 5:5-66, 5:10-7; N.J.S.A.Const.Art. 4, § 7, pars. 7, 9(8).

15. Gaming ⇐3

Although statute designating regional division of nonprofit horsemen's organization to receive percentage of purse money from thoroughbred horseracing in state would be constitutionally defective in its effect if as written, it restricted benefits to organization members in good standing but required all horsemen, including nonmembers, to contribute to regional division, where statute was reasonably susceptible to constitutional construction and legislature would prefer that statute survive with ap-

ified expenditures were "appropriations," in the broad sense, as used in the title. Acts 1984, c. 418, § 1 et seq.; Const. § 51.

5. Statutes ⇐141(1)

Constitution's requirement that amended statutes be reenacted and published at length is limited, by its own wording, to amendment, revision, extension or conferring of existing statutes and if an enactment is merely a suspension or modification of existing statute, it does not fall within the requirement. Const. § 51.

6. Statutes ⇐141(1)

Budget bill's reduction in annual salary increases for certain state officers from those provided for in statutes did not constitute a repeal or amendment subject to reenactment and publication requirements. Acts 1984, c. 418, § 1 et seq.; KRS 15.755, 18A.355, 64.055, 64.480, 64.485, 446.085.

7. Statutes ⇐141(1)

Appropriations bill purporting to transfer money from agencies in which public and private funds and private employee contributions were commingled was unconstitutional because such transfers could not be termed suspensions or modifications of operation of statute exempt from reenactment and publication requirements; however, transfers of public funds were permissible. Acts 1984, c. 410, § 1 et seq.; KRS 45.253, 48.315; Const. §§ 15, 51.

8. Statutes ⇐141(1)

Budget bill which directed secretary of transportation to use road fund resources to meet rental payments to turnpike authority and provided that capital construction and equipment purchases contingency fund be used to advance funds for certain projects was a change in operation of statutes despite conflicts with existing statute and not subject to reenactment or publication requirements. KRS 45.760(12), 45.770, 143.090; Acts 1984, c. 418, § 1 et seq.; Const. § 51.

1. House Bill 474, Chapter 418 of the 1984 Acts hereinafter referred to as HB 474, or the budget bill.

9. Statutes ⇐141(1)

Budget bill permitting school districts to rent textbooks and imposing a minimum six-year period on use of textbooks was a valid suspension or modification of existing statute under General Assembly's policy authority and not subject to reenactment or publication requirements. Acts 1984, c. 410, § 1 et seq.; c. 418, § 1 et seq.; KRS 45.760(12), 45.770, 143.090, 446.085.

10. Statutes ⇐141(1)

Budget bill imposing certain conditions on payments for county jail medical service contracts was properly the subject of an appropriation and was germane to the bill and, thus, not subject to reenactment and publication requirements. Acts 1984, c. 410, § 1 et seq.; c. 418, § 1 et seq.; KRS 441.045, 446.085; Const. § 51.

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J. Michael Noyes, Gen. Counsel, Office of the Governor, Frankfort, A. Wallace Grafton, Jr., Sheryl G. Snyder, Virginia H. Snell, Wyatt, Tarrant & Combs, Louisville, for appellees; Lee Sisney, Charles Wickliffe, Finance and Admin. Cabinet, Frankfort, Henry Watson, III, Cynthiana, of counsel.

STEPHENS, Chief Justice.

The basic issue we address is to what extent, if any, the General Assembly of the Commonwealth may, in adopting a budget bill and based on the financial condition of the Commonwealth provide therein for the reduction, elimination and transfer of appropriated funds, and for all practical purposes, provide as a result thereof, that the effectiveness of certain existing statutes is temporarily modified.

BACKGROUND

At its regular session in 1984, the General Assembly passed a biennial budget bill.

This document appropriated the revenue for the Commonwealth and determined how that revenue would be expended for the operation, maintenance and support of the three branches of state government and the myriad of ancillary state agencies and programs.[2] This document, included a reduction in appropriations for various salary increases and transfers of funds from various trust and agency accounts to the General Fund to cover central administrative expenses.

In addition, at the same session the General Assembly passed corollary legislation[3] which conferred upon the General Assembly the authority to provide, in a budget bill for the suspension or modification of the operation of an existing statute if the General Assembly found that such action is required by the financial condition of state government.

PROCEDURAL HISTORY

The appellant, Attorney General of the Commonwealth, on June 6, 1984 filed a petition for declaratory judgment in the Franklin Circuit Court challenging the constitutional validity of those legislative acts.[4] Basically, the petition claimed that the legislative enactments violated the prescriptions of Section 51 of the Kentucky Constitution, both as to the germaneness of the titles of the acts and as to the failure to follow the procedural requirement of Section 51 for the enactment and publication of amendments to existing law. A temporary restraining order was entered by the trial judge which prevented various officials in the Executive branch of government from transferring funds from certain designated trust and agency funds[5] and other special accounts to the general operating fund of the Commonwealth. Following normal briefing and arguments, the trial court entered its findings of fact, conclusions of law and declaratory judgment. A notice of appeal was timely filed by the Attorney General and upon appropriate motion, and for obvious reasons, we transferred the appeal directly to this Court.

DECISION OF THE TRIAL COURT

In rejecting the contentions of the Attorney General in the main, the trial court declared that the General Assembly has, under Ky. Const. Secs. 15 and 51, the authority to "suspend existing laws in a budget bill if the provision is germane to the broad subject of appropriations." It further declared that the procedural requirements of Ky. Const. Sec. 51 were not applicable to the challenged statutes because they only effected a "suspension" of existing statutes and were not an "express or implied repeal" of existing statutes.

The trial court also upheld the General Assembly's authority to suspend previously authorized salaries, trust and agency funds.[6] It declared certain transfers of funds invalid because they accomplished more than "the mere suspension of existing statutory provisions" and because they were not "germane" to appropriations within the aegis of Kentucky Constitution Section 51.[7] The former ruling is before us on appeal, the latter is not.

2. The specific provisions of the statutes under attack will be more fully described in the appropriate parts of this opinion.

3. Senate Bill 294, Chapter 410 of the 1984 Acts hereinafter referred to as SB 294 or KRS 446.085.

4. Mr. Thompson was sued in his official capacity. He resigned the position of Secretary of the Finance and Administration Cabinet, and the Governor of Kentucky has appointed Gordon C. Duke to that office.

5. For a description of trust and agency funds, see infra, p. 18, *et. seq.*

6. Specifically the trial court approved the transfer of funds in the following areas: Board of Elections; Kentucky Development Finance Authority; University of Kentucky; Banking and Securities; Fish and Wildlife Resources; Road Fund; Capital Construction of Road Fund; Education and Humanities; Local Jail Support (medical contracts).

7. Those declared invalid were: Unified prosecutorial system, only insofar as it provides that a county or a circuit will receive funds proportional to the state's total criminal case load; Auditor of Public Accounts, only insofar as it imposes additional duties on the Auditor; Corrections, only insofar as it creates a scheme for

CONTENTIONS OF THE PARTIES

The appellant urges us to reverse the trial court because of what he maintains is an erroneous and "cryptic analysis" by the trial court of Sections 51 and 15 of the Kentucky Constitution. In essence, appellant argues that the titles to the two acts in question do not pass Section 51's constitutional requirement that the content of the act be germane to the title thereof. The Attorney General also urges us to declare as error the ruling that the procedural requirement of Section 51 does not apply to a "suspension" of existing statutes. Further, appellant argues the trial court erroneously concluded that Section 15 of the Kentucky Constitution permitted the statutory suspension and modification contained in HB 474. Finally, it is argued that the trial court erroneously applied the "germaneness" test of Section 51 to the various provisions of the acts in question.

THE CHALLENGED STATUTES

SB 294 provides as follows:

"(1) *Nothing in a budget bill adopted by the general assembly shall be construed to effect a repeal or amendment in the Kentucky Revised Statutes,* and if any repeal or amendment appears to be effected in any of the Kentucky Revised Statutes, it shall be disregarded, shall be null and void, and the law as it existed prior to the effective date of the budget bill shall be given full force and effect.

"(2) Notwithstanding the provisions of subsection (1) of this section *the general assembly may provide in a budget bill for the suspension or modification of the operation of a statute* if the general assembly finds that the financial condition of state government requires such suspension or modification. Such suspension or modification shall not extend beyond the duration of the budget bill." (emphasis added).

It is clear from the plain language of the statute that in Section (1) the General Assembly deprives itself of the legal authority to *repeal or amend,* through the device of a budget bill, any other existing law appearing in the Kentucky Revised Statutes. However, in Section (2), the General Assembly gives itself the power to *suspend or modify the operation* of any statute, but only if the financial condition of state government so requires. The duration of such suspension is limited to the duration of the budget.

The General Assembly has, by this statute, drawn a line between its power in the budget bill to suspend or modify existing statutes, as opposed to repeal ing or amending existing statutes. It cannot repeal or amend, but it can suspend or modify existing statutes through the provisions of a budget bill.

Armed with this legislation, the General Assembly, in its biennial budget bill for the years 1984-1986, exercised this authority by drafting items relating to the reduction of increases in state officials' salaries, items providing for the transfer of monies from agencies and special funds to the states' general fund and items qualifying funds for resource recovery road projects, school books, and local jail support.

It is our role to determine if SB 294 may constitutionally permit the General Assembly to suspend or modify the operation of existing statutes; if the answer is in the affirmative, to further determine if both SB 294 and the budget bill comply with the requirements of the title section of Kentucky Constitution Section 51. If the answer to the second inquiry is in the affirmative we must, finally, examine each contested "modification or suspension" contained in the budget bill to determine if such actually constitutes a repeal or amendment, or if each is only a modification or suspension within the purview of SB 294(2) and of the re-enactment and publication section of Kentucky Constitution Section 51.

investigating and reporting on community and private corporate availability of correctional services; Department of Social Services, only insofar as it exempts certain personnel from salary ceilings and imposes a limit on administrative costs; Transportation Cabinet, only insofar as it places a ceiling on the number of full time positions in the Transportation Cabinet.

DOES THE GENERAL ASSEMBLY HAVE THE POWER IN THE BUDGET BILL TO SUSPEND OR MODIFY EXISTING STATUTORY LAW?

[1] As stated, SB 294, while denying the power of the General Assembly to repeal or amend existing statutory law through the device of a budget bill, did indeed authorize that legislative body to "provide in a budget bill for the suspension or modification of the operation of a statute." No matter how one slices it, the General Assembly is permitted through the reduction or elimination of an appropriation, to effectively eliminate the efficacy of existing statutes, subject only to the finding of a financial emergency and further subject to the time limitation of the budgetary period.

We believe that this statutory scheme is clearly within the constitutional powers of the General Assembly.

It is clear that the power of the dollar—the raising and expenditure of the money necessary to operate state government—is one which is within the authority of the legislative branch of government. The Constitution of the Commonwealth so states and we have so stated. Kentucky Constitution Section 230, is as follows:

"No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law."

The purpose of this section is to prevent the expenditure of the state's money without the consent of the General Assembly. *Ferguson v. Oates,* Ky., 314 S.W.2d 518 (1958). As we said in *Legislative Research Commission v. Brown,* Ky., 664 S.W.2d 907 (1984),

"The budget, which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter.... Ky. Const. Sec. 49-50 empowers the General Assembly to contract debts; and Ky. Const. Sec. 53 empowers the General Assembly to provide for investigations into the accounts of the Treasurer and Auditor of Public Accounts.

... *In a word, the final action on the enactment or adoption of the budget is a legislative matter.* It is, of course, the duty of the Governor ... to carry out and to implement the budget which is passed by the General Assembly. Ky. Const. Sec. 81." *Id.* at 925. (emphasis added).

In *Brown,* we approved a legislatively mandated budget reduction plan applicable to all three branches of state government, the operation of which was triggered when a state revenue shortfall occurred.

Also in *Brown* we declared invalid a statutory provision that required the budget be submitted as a resolution, as opposed to the mandate of Kentucky Constitution Section 88 that it be presented as a bill. Significant to the issue in the case *sub judice,* we declared

"When the budget is enacted as a *bill,* the provisions thereof could *repeal existing statutes. But if the budget document is introduced in the form of a resolution, it can not have the effect of repealing any existing statutes."* *Id.* at p. 927. (emphasis added).

We thus *twice* stated that a budget bill could be used to *repeal* existing statutes.

Our statement there should not come as any surprise when one considers our previous decisions. In *Mattingly v. Kirtley,* 285 Ky. 795, 149 S.W.2d 521 (1941), a statute enacted in 1920 established a State Board of Athletic Control and authorized a $5,000.00 appropriation for the Board's operating expenses. That amount was not changed by a repeal of or an amendment to the statute. In the 1940 Budget Act, the appropriation to the Board was increased to $6,500.00. A suit was then filed seeking a determination of which amount was proper. The Court of Appeals gave effect to the "last word" of the General Assembly as expressed by the 1940 increased appropriation and permitted an amendment of the 1920 bill by the 1940 Budget Act. *id.* at 523. *Mattingly* stands for the proposi-

tion that—*at the very least*—the General Assembly may appropriate funds in a Budget bill in amounts that are different from those in previously enacted statutes. Interestingly enough, in that case the court did not attach any conditions such as emergency, etc., to the amendment permitted. In *Commonwealth ex rel. Meredith, Attorney General v. Johnson*, 292 Ky. 288, 166 S.W.2d 409, 414 (1942) the questioned budget bill permitted the Governor the "widest discretion" to expend and to transfer money from one fund to another, upon the finding by him that an emergency existed for which public money should be spent. The court said:

"To hold that the state government could not take the precaution of anticipating such miscellaneous items [as an emergency] would be to retard the progress and operation of public affairs." *Id.*

In *Johnson*, the court declared that a budget bill could allow not only the transfer of funds from special accounts but also that selfsame bill would properly authorize the unappropriated and unbudgeted expenditure of funds, if an emergency (or other miscellaneous items) were found.

If it is proper for the General Assembly to delegate to the Governor the power, in a budget bill, to transfer funds and to spend them for unbudgeted items, why is it not, *a fortiori*, proper for the General Assembly, in the limited circumstances of an emergency financial situation of state government, to transfer funds and to suspend and modify the operation of a statute? We think the question answers itself.

The United States Supreme Court agrees. In *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), our highest court specifically held that the United States Congress could modify statutory law in an appropriation bill. In an unanimous opinion, the Court quoting *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940) said:

"[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that ... it could accomplish its purpose by an amendment to an appropriation bill ...'" *Id.* at 222, 101 S.Ct. at 484.

At this point, it is necessary to remember that the questioned statute SB 294—by its own terms—denied the General Assembly the power to repeal or amend an existing law. It permitted only *suspension or modification.*

It may well be argued, that if the General Assembly has the constitutional power to *repeal or amend* existing statutes in a budget bill, it should have the power to *suspend or modify* such statutes in that selfsame budget bill. This conclusion is supported by logic, and it is also supported by law

Kentucky Constitution Section 15, is as follows:

"*Laws to be suspended only by General Assembly.* No power to suspend laws shall be exercised unless by the General Assembly or its authority."

There have been a minimal number of cases interpreting this section. In *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029 (1941), a statute authorizing a court to probate the sentence of a person convicted of a crime was held to be a constitutionally valid "suspension" of the criminal statute. We said:

"The legislature makes the laws that declare what are criminal offenses and define the processes by which these laws are enforced. Having the power to make, it has the power to modify and provide for abatement or suspension. *Id.* at 1034.

"[T]he power in the legislature to authorize the courts to suspend those laws is *in the logically implied affirmation contained in Section 15 of the Constitution of Kentucky....*" *Id.* (emphasis added).

It is beyond cavil that the General Assembly can suspend the operation of statutes. Moreover, under *Lovelace*, the General Assembly delegated that authority to the Courts. See also, *Gering v. Brown Hotel Corporation*, Ky., 396 S.W.2d 332 (1965).

Because of the General Assembly's exclusive authority with respect to public funds and the budget, we have no problem in deciding that Ky. Const. Sec. 15 applies to statutes which can be affected by the budget bill of the Commonwealth. The General Assembly is mandated to operate the financial offices of the Commonwealth under a balanced budget. If revenues become inadequate, the General Assembly must be empowered to use adequate devices to balance the budget. Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities.

We have reiterated the proposition that the General Assembly may constitutionally repeal or amend existing statutes by the terms of a budget bill, so long as said bill complies with Ky. Const. Sec. 51. We have emphasized the obvious, viz, that the General Assembly may also *suspend or modify* existing statutes in a budget bill. Since, under paragraph (1) of SB 294, the General Assembly *denied itself* the power to *repeal or amend* and further said in paragraph (2) thereof it granted (or recognized) in itself the power to suspend or modify existing statutes, we must, perforce, examine the questioned provisions of the budget bill and determine whether they are only suspensions or modifications, and therefore, proper under the General Assembly's self-imposed limitation. Prior to that, however, we must address appellant's argument that both challenged acts violate Section 51 of the Kentucky Constitution.

DO THE TITLES OF SB 294 AND HB 474 COMPORT WITH THE MANDATE OF KENTUCKY CONSTITUTION, SECTION 51?

Kentucky Constitution Section 51 is as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length".

There are two proscriptions contained in this oft-litigated section. One directs that an act of the General Assembly shall only relate to one subject and requires that the subject shall be expressed in the title of the act. The other directs that no existing law shall be revised, amended, or its provisions conferred or extended by referring to its title only, but rather when such action is intended, the law is required to be re-enacted at length. Appellant attacks HB 474 and SB 294 with respect to the first proscription of Section 51 and HB 474 with respect to the second.

(A) DO THE TITLES TO SB 294 AND HB 474 PROPERLY DESCRIBE THE SUBJECT OF THOSE ACTS.

Ky. Const. Sec. 51 has always been liberally construed, with all doubts being resolved in favor of the validity of the legislative action. The purpose of the section is said to be to prevent the enactment of "surreptitious" legislation. *Bowman v. Hamlett*, 159 Ky. 184, 166 S.W. 1008 (1914); *Dawson v. Commonwealth, Department of Transportation*, Ky., 622 S.W.2d 212 (1981). The framers of the Constitution intended to prevent surprise and fraud upon the members of the General Assembly and other interested parties, thus preventing the practice of "log rolling". *Commonwealth ex rel. Meredith v. Johnson*, 292 Ky. 288, 166 S.W.2d 409, 411 (1942).

[2] The title need only furnish general notification of the general subject in the act. If the title furnishes a "clue" to the act's contents, it passes constitutional muster. *Talbott v. Laffoon*, 257 Ky. 773, 79 S.W.2d 244 (1935).

"Section 51 of our Constitution ... was to prevent the evil that had grown up of legislating in one act upon as many dis-

tinct and wholly disconnected subjects as the legislative body saw fit, without any indication in the title of the act as to what its contents might be.... [Prior to its adoption] [i]t was then competent for the Legislature to legislate upon a multiplicity of unrelated subjects which were neither remotely germane to, or in any wise connected with, the one or ones named in the title ... *[t]o circumvent such deceptive practices resulting in deceitful, selfish, and other baleful consequences, the provision was inserted in the Constitution.*" *Id.* at 246 (emphasis added).

[3] Do the challenged titles provide the reader a clue as to the contents of the act? Do the acts perpetrate a fraud? Did the General Assembly in providing a title to the acts and placing it in juxtaposition with the content of the acts effect something deceitful, selfish or baleful? We think not.

The challenged SB 294 title is as follows: "AN ACT relating to the relationship of the budget bill to the Kentucky Revised Statutes, and declaring an emergency."

The challenged two paragraphs of SB 294 limit the General Assembly's right to *repeal or amend* in a budget bill but permit the *suspension or modification* of such existing statutes, but only in the event that the financial conditions of the state mandate emergency action. The substance of the act thus permits suspension or modification of Kentucky Revised Statutes by a budget bill. The act expresses the relationship of a budget bill to all existing statutory law—which is primarily what the title says it does. The "germaneness" argument here is little short of specious.

[4] The title of HB 474, the biennial budget bill, is as follows:

"AN ACT relating to appropriations for the operation, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state supported activities."

The various contested provisions of HB 474, provide for the transfer of funds from various trust and agency accounts to the general fund of the Commonwealth, and also provide for the reduction of raises made in various officers' salaries. The title to the act refers to "appropriation" for the operation, etc., of state government. Certainly, the title does not tell the reader that—in the voluminous act—the General Assembly has authorized the reduction of salary increases and the transfer of trust and agency funds. However, under the case law cited above all that is necessary is that the act give a "clue" as to its contents and that the act be not deceitful, selfish or result in "baleful" consequences.

HB 474 is a budget—a biennial budget—directing the expenditure of literally billions of dollars to be used in the operation of state government. The provisions thereof that suspend or modify the expenditure of monies in the event of a financial problem are clearly appropriations, in the broad sense. Appropriation of the people's money is the exclusive responsibility of the General Assembly, including the power to suspend or modify such appropriation under emergency financial circumstances. Moreover, such modification or suspension is obviously part of the whole framework of the budget, and no one could possibly be deceived by the inclusion of such provisions. The fact that the title tells the reader that the act is an appropriation for the funding of state government clearly alerts one to the fact that the act deals with "appropriations" including possible changes. No person could claim to have been misled by the title of HB 474 because the content of the act sets a course of action when the financial condition of the Commonwealth deteriorates. We believe that the title of HB 474 clearly complies with Ky. Const. Sec. 51.

(B) DO THE CHALLENGED PORTIONS OF HB 474 COMPORT WITH THE PROVISION OF KENTUCKY CONSTITUTION, SECTION 51 THAT REQUIRES AMENDMENT OF STATUTES TO BE DONE AT LENGTH?

[5] This second part of Section 51 is nearly so often litigated as the "germane" section. The purpose of this section is perhaps best explained by one of the framers:

"The members of the General Assembly did not know what they were voting for half the time, and this section ... provides when an act is amended ... shall be set out in full, so every man will understand what it is when voting on it, and the people will know what change has been made when they see it." *Spalding, Chairman of the Legislative Committee, Volume 3, p. 3792, Debates of the Constitutional Convention.*

As the court said, in *Board of Penitentiary Commissioners v. Spencer*, 159 Ky. 242, 166 S.W. 1017 (1914):

"When any person, lawyer or layman, takes up an act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act...." *Id.* at 1024

This part of Section 51 may be described as the reenactment and publication requirement of that section. As stated, its application is limited by its own wording to amendment, revision, extension or conferring of existing statutes. Its purpose is to prevent deceitful practices and to provide full and easily accessible information to legislators and to the public when the General Assembly is so effecting existing law.

If a challenged statutory enactment falls within the proscribed activities, as opposed to merely being suspensory in nature, it is violative of this second part of Section 51. If it is, however, merely a suspension or modification, it is not violative thereof. The same restriction appears in SB 294(2), wherein the General Assembly restricted itself to the same limitation of Ky. Const. Sec. 51.

We now proceed to examine the challenged statutory provisions that are before us on this appeal to determine if they repeal or amend existing statutes or if they merely suspend or modify existing statutes and are therefore valid.

DO THE CHALLENGED STATUTES CONSTITUTE A REPEAL OR AMENDMENT TO EXISTING STATUTES SO AS TO BE VIOLATIVE OF SECTION 1 OF SB 294?

1. STATE OFFICERS' SALARIES

[6] HB 474, the budget document, in Part VII thereof provides in essence that if the financial condition of the state deteriorates certain salary increases of specific state officers were to be reduced.[8] The bill then provided for annual increases which are less than are provided for in the particular cited statutes. Such reduction is temporary only, expiring at the end of the biennium. The trial court upheld this action saying that the General Assembly "... has the authority to suspend previously authorized salaries in a budget bill, a subject clearly germane to appropriations." We agree.

In *Mattingly*, we upheld a budget appropriation that "repealed" prior statutory authorization for the Athletic Board of Control. See also, *State ex rel. McLeod v. Mills*, 256 S.C. 21, 180 S.E.2d 638 (1971). As we view this statute, the General Assembly has—as a premise for its action—cited the shaky financial condition of the Commonwealth. It has exercised its discretion—nay, it has performed its constitutional obligation—that of operating the Commonwealth within a balanced budget, by reducing expenditures in areas which it felt were proper. It has exercised proper legislative discretion and judgment. It has not repealed or amended the existing salary statutes, it has simply temporarily sus-

[8] They are as follows: KRS 15.755 (Commonwealth Attorneys); KRS 15.765 (County Attorneys); KRS 18A.355 (State Employees); KRS 64.530 (Circuit Clerks); KRS 64.480 (Elective Statewide Officers—Governor, Lieutenant Governor, Attorney General, Superintendent of Public Instruction, Commissioner of Agriculture, Secretary of State, Auditor of Public Accounts, Clerk of Supreme Court); and KRS 64.485 (Justices and Judges of the Court of Justice).

pended them, as it clearly has the power to do. *LRC v. Brown, supra.* SB 294(2).

2. TRUST AND AGENCY FUND TRANSFERS

[7] Under a traditional statutory scheme, the General Assembly has created what are called "trust and agency funds." Basically, when any affected agency, board, commission, or other entity of state government receives fees, rental, sales, bond proceeds, gifts, or other income, those monies are specifically appropriated by the General Assembly to those units of government. *Budget, Part II, Trust and Agency Funds;* KRS 45.253.

In the present budget bill, and based on the same premise of the financial condition of the state, the General Assembly provided for the "suspension" of enumerated statutes to "provide for the transfer of certain agency and special funds to the general fund." *Budget Memorandum, at i.*[9] Not only does the budget document provide for the transfers, but they are also authorized by statute. KRS 48.315.[10]

In each of the challenged transfers of funds, the enabling act created a reduction in the funds available to the affected agency. The trial court upheld the validity of these transfers, declaring that the General Assembly has the authority under Section 15 of the Kentucky Constitution and under KRS 48.315 "to suspend, for the duration of the biennium, sections of the Kentucky Revised Statute that pertain to trust and agency funds." We agree in part.

We repeat ourselves when we say that the General Assembly has, constitutionally speaking, the power in a budget bill to *repeal* or *amend* the manner in which public funds are used. Ky. Const. Sec. 51, the "title" section, has not been violated by budget matters clearly relating to appropriations. What we decide is simply that the transfers of funds which are merely temporary, determinable suspensions of the operation of the statutes relating to appropriations of public funds are within the legislative authority as set out in SB 294 and Ky. Const. Sec. 51, the amendment section.

However, the transfers of funds which relate to appropriations of private contributions cannot be termed suspensions or modifications of the operation of the statutes. Because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional. Diversions from the Kentucky Employees Retirement System, County Employees Retirement System, State Police Retirement System, and Teachers' Retirement System fall within this category, as do Workers' Compensation and Workers' Claims Special Fund. The employee contributions and the insurance company assessments constitute private, mandatory donations.[11] To the extent that private funds were transferred, we reverse.

9. In the interest of brevity, we will not discuss these at length. Suffice it to say that the Attorney General complains of the following items—Kentucky Development Finance Authority, required lapsing of $100,000 each fiscal year to the General Fund; University of Kentucky, transfer of $500,000 from the Tobacco Research Trust Fund to the General Fund; Department of Banking and Securities, transfer of $3,000,000 to the General Fund; Fish and Wildlife Resources, lapsing $1,128,000 in 1984–1985 and $1,150,000 in 1985–86; and a general transfer of various amounts to the General Fund. See Budget Document, Item 19, 35, 49, 63. For anyone who desires to read the 47 specific authorized transfers, see Budget Bill, Item VIII.

10. KRS 48.315 is as follows: "(1) The general assembly may provide in a budget bill for the transfer to the general fund for the purpose of the general fund all or part of the agency funds, special funds, or other funds established under the provisions of KRS 15.430; 16.565; 21.347; 21.540; 21.560; 42.500; 47.010; 48.010(g); 56.100; 61.470; 61.580; 64.345; 64.350; 161.430; 161.430; 164A.110; 164A.020; 164A.800; 164A.810; 216A.110; 230.218; 230.398; 230.400; 230.770; 235.330; 248.540; 248.550; 278.130; 278.150; 287.485; 304.35-030; 311.450; 311.610; 312.019; 313.350; 314.161; 315.195; 316.210; 317.530; 317A.080; 319.131; 320.360; 321.320; 322.290; 322.330; 322.420; 323.050; 323.190; 323.210; 323A.060; 323A.190; 323A.210; 324.286; 324.410; 325.250; 326.120; 327.050; 330.050; 344.160; 334A.120; 335.140; 342.122; 342.480, etc.

(2) The transfer of moneys from the agency funds, special funds, or other funds to the general fund provided for in subsection (1) of this section shall be for the period of time specified in the budget bill.

(3) Any provisions of any statute in conflict with the provisions of subsections (1) and (2) of this section are hereby suspended or modified. Such suspension or modification shall not extend beyond the duration of the budget bill. (Enact. Acts 1984, ch. 410 § 6, effective July 13, 1984.)"

3. TRANSPORTATION PROVISIONS

[8] The budget bill directs that the Secretary of the Transportation Cabinet shall use road fund resources to meet lease rental payments to the Kentucky Turnpike Authority. It further provides that in the event such resources are insufficient to meet payments, the shortage shall be met by transferring coal severance tax receipts to "cover the obligation". *Budget Document, Part IV,* Road Fund, Item 1.

The bill also provides that the capital construction and equipment purchase contingency fund may be used to advance funds to projects authorized to be financed by bonds and may further be used to finance feasibility studies for future projects. *Budget, Part V. Capital Construction, L., Transporation.*

The Attorney General argues that the first provision is in conflict with KRS 143.-090 and that the second provision is in conflict with KRS 45.770. The trial court disagreed and found no inconsistency between the provisions and existing statutory law. We agree with the result, but not the reasoning, of the trial court.

It is clear that the first provision which diverts, albeit temporarily and for the same reason as all of the challenged provisions of the budget bill, funds from the purpose set out in KRS 143.090[12] does *conflict* with that statute. As we have said, previously, the "conflict" is authorized by SB 294.

The same reasoning applies to the second contested provision in this section. In addition, this action of the General Assembly was authorized by a 1984 statute. KRS 45.760(12) is as follows:

"(12) The general assembly may provide in a budget bill for the capital construction and equipment purchase contingency fund to be used to advance funds to projects authorized to be financed by bonds, and to finance feasibility studies for projects which may be contemplated for future funding."

The General Assembly thereby specifically authorized by another statute, the action which it took in the budget document. We find no inconsistency, even if such were relevant to our decision.

4. FUNDING FOR TEXTBOOKS

[9] The General Assembly, also through the budget bill, permitted local school districts to rent textbooks and further imposed a minimum six year period on the use of textbooks selected by the Textbook Commission. *Budget, Part I, General Fund, D. Education and Humanities, Item 29(c), (b).* It is argued that this section of the budget conflicted with KRS 156.400 and KRS 156.435(4). The trial court disagreed. We agree with the trial court.

In this section of the budget bill—as in all the questioned sections—the General Assembly was basing its action on the financial condition of the state and its various entities. It was acting on the authority granted in SB 294. In this instance, local boards of education can now—at their option—rent textbooks to students. All books shall now be used for six years. Both of these objects are economy moves. They allow local school boards to make

11. Following are the agencies and special funds which have private contributions:
Kentucky Employees Retirement System (KRS 61.580), County Employees Retirement System (KRS 78.650), State Police Retirement System (KRS 16.565), Teachers' Retirement System (KRS 161.420), Workers' Compensation (KRS 342.450), and Workers' Claims Special Fund (KRS 342.122).

12. KRS 143.090 provides a scheme for the expenditure of Road Fund Resources. It does not authorize the use of such funds for the payment of rent to the Kentucky Turnpike Authority.

appropriate individual decisions as to whether textbooks shall be *loaned or rented* to students. Whether one agrees with this infringement on the traditional use of "free" textbooks, one cannot challenge the General Assembly's right to make such a policy decision. The same logic applies to extending the use of books for a period of six years.[13]

We believe therefore that not only is the action of the General Assembly in the budget bill valid as a suspension or modification of existing statutes, we also believe that, there is, in effect, no real conflict.

5. FUNDS FOR MEDICAL CONTRACTS

[10] The budget bill provided $900,000 fund for medical service contracts for county jails. It also provided a condition, that that fund be maintained in an individual account specifically for medical contracts, and furthermore that a county must be "certified" before it received its share of the funding. In order to be so certified, the county must attest that it has investigated and obtained the "most feasible medical contract or contracts possible." The contract(s) is subject to approval by the Corrections Cabinet. *Budget, Part I, General Fund, C. Corrections, Item 27d. Local Jail Support.*

It is claimed by appellant that such provision is in conflict with KRS 441.045.[14] It is argued that the budget bill contains "substantive law" and that such a requirement is not an appropriation. The trial court disagreed and so do we.

It is an altogether too familiar litany that the premise of this provision is to react to the financial crunch of the state and that such directive is only temporary. It is also too familiar to say that this attempt of the General Assembly to regulate even temporarily, the procurement by medical services contracts—in an economical manner—is clearly a subject of an appropriation. The General Assembly is saying to counties, in effect, "we will give you $900,000 in aid but you don't qualify unless the contract you obtain is the most economical and feasible one." It cannot be seriously argued that this is not appropriation and therefore germane.

There is no need to "wrap up" this opinion with a lengthy summary. The General Assembly has the basic constitutional power and responsibility to tax and to spend the public's money. This power, as we have seen in prior decisions, is exclusive to the General Assembly and includes the power to use a budget bill to repeal, amend, modify and suspend existing statutes. Such power must be exercised within all constitutional proscriptions, including those of Section 51. The General Assembly, in the questioned statute hereinbefore described and relying on its own specific statutory authority, did precisely that.

The judgment of the trial court is affirmed.

STEPHENS, C.J., and GANT, LEIBSON, STEPHENSON, WHITE and WINTERSHEIMER, JJ., concur.

VANCE, J., dissents, and files a dissenting opinion.

VANCE, Justice, dissenting.

Section 51 of the Kentucky Constitution provides:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be revised and published at length."

13. Although the statutes permits the Superintendent of Instruction to authorize the use of textbooks for more or less than six years (KRS 156.400), the statute specifically allows the General Assembly to make its own period *in a budget bill.* KRS 156.440.

14. KRS 441.045 sets out the procedure as to how counties are to obtain money from the state for medical contracts. Nothing appears therein about the certification procedure

This section contains two important restrictions that relate to the transaction of the business of the General Assembly in an orderly and intelligent fashion. The provisions relating to title and the provisions relating to republication in full of amended statutes preserve the significant purpose of preventing confusion in the minds of legislators as to the effect of proposed legislation.

Our court, some time ago, expressed the purpose of this amendment. In *Talbott v. [illegible]*, 257 Ky. 773, 79 S.W.2d 244 (1935), we said:

"Section 51 of our Constitution, and like provisions in Constitutions of other states, is of comparatively modern origin, and the purpose of the people in incorporating it as a part of their fundamental law was to prevent the evil that had grown up of legislating in one act upon as many distinct and wholly disconnected subjects as the legislative body saw fit, without any indication in the title of the act as to what its contents might be. Prior to the adoption of such a provision, the title to an act might clearly indicate that it related to a specifically named subject, or to a number of named subjects, with the body of it containing provisions for a wholly distinct and unconnected subject or subjects than what was mentioned in the title. It was then competent for the Legislature to legislate upon a multiplicity of unrelated subjects which were neither remotely germane to, or in any wise connected with, the one or ones named in the title, and which, as we are advised, is yet true with reference to congressional legislation. To circumvent such deceptive practices resulting in dishonest, selfish, and other baleful consequences, the provision was inserted in the Constitution requiring, inter alia, that no statute 'shall relate to more than one subject, and that shall be expressed in the title.'"

[illegible] 246.

In *Board of Education v. Mescher*, 310 [illegible], 220 S.W.2d 1016 (1949), we said:

"The purpose of the provision have been stated many times. Among them is the important purpose to prevent surprise or fraud, and the enactment of vicious legislation under an innocent and misleading title. Therefore, the title must give fair and reasonable notice of the nature and provisions of the Act so that a member of the legislature or any other interested person reading the title may obtain a general notice or knowledge of the contents of the Act or what it proposes to do. The title must be a true although not a detailed index of the contents. If it is restrictive, then the Act must not exceed the specification or include what is not reasonably and properly connected with or germane to it.'" *Id.* at 220 S.W.2d 1019.

In *Board of Penitentiary Com'rs v. Spencer*, 169 Ky. 255, 166 S.W. 1016 (1914), this court considered the requirements of Section 51 of the constitution and its purposes as it regards the republication of amended statutes. After discussing some of the practices attempted before the adoption of Section 51 of the present constitution, we said:

"It can readily be seen that, under this practice, no person, by reading an act the provisions of which had been extended or conferred in the manner indicated, could obtain any idea of the meaning or effect of it, without reading it in connection with the old law the provisions of which had been carried into the new law, by reference to the title of the old law; nor could any person, by reading an old law that had been revised or amended, by adding to it certain words or taking from it certain words, understand the meaning and effect of the old law without reading it in connection with the new one that amended or revised it in this manner. And it was largely to prevent this deceptive and misleading manner of legislating, which afforded so many opportunities for fraud, as well as to make the laws more convenient and accessible, that this section was adopted. As aptly said on this subject by Mr. Spalding, the chairman of the legislative committee, in

volume 3, p. 3792, of the Debates of the Constitutional Convention: 'The members of the General Assembly did not know what they were voting for half the time, and this section in the report provides when an act is amended it shall not be amended in that way, but that the act, as amended, shall be set out in full, so every man will understand what it is when voting on it, and the people will know what change has been made when they see it.'

"This was the whole purpose of this provision in the Constitution, and that it is a wise provision is not open to doubt. When any person, lawyer or layman, takes up an act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act, and so the convenient and the proper way to revise or amend an old law, by either adding to it or taking from it, or extending its provisions, is to set forth in the new act the law as it will read when revised, amended or extended."

Id. at 166 S.W. 1023–1024.

In *Board of Penitentiary Com'rs v. Spencer, supra*, the court also established guidelines concerning the republication of amended statutes as follows:

"(a) That it is not necessary, when the body of the new act repeals, or has the effect of repealing, all or part of an existing act, to republish or set forth the parts repealed, although the title of the repealing act may purport to be an amendment to the existing act.

"(b) That when it is proposed to revise or amend one or more sections of the Kentucky Statutes, or an act, the body of the new act should contain the section or sections as they will read when revised or amended, if it is proposed to re-enact or leave in force any part of the section or sections that are amended or revised. If, however, it is intended to repeal one or more sections, then it is not necessary to set forth in the body of the act the section or sections repealed.

"(c) That when the act does not purport to be an amendment to an existing law, but a new act, it is not necessary to set out or republish any part of any old law that may be changed or repealed by the new law.

"(d) When the new act purports to amend an existing act by extending, revising, or amending it, and no particular section or part of it is specified, then the body of the new act must set forth the whole of the existing act as it will appear when extended, revised, or amended; but, if only a section or several sections of an act are extended, revised, or amended, it is only necessary to specify and republish the section or sections that are extended, revised, or amended.

"(e) That, when it is desired to confer or carry into a new law provisions of an old law, then so much of the old law as is thus conferred or carried into the new law must be published at length."

Id. at 166 S.W. at 1022–1023.

It seems to me that the purposes which impelled the framers of the constitution to place the limitations imposed upon the General Assembly by Section 51 of the constitution were inherently sound and ought not to be eroded to the vanishing point by judicial interpretation.

Let us examine the legislation in question. Senate Bill 294 is entitled "AN ACT relating to the relationship of the budget bill to the Kentucky Revised Statutes and declaring an emergency." This innocuous title would scarcely inform an unsuspecting legislator that it is really an act providing for the amendment, repeal, suspension, or modification of existing statutes through various provisions to be included in a separate budget bill. In my view, the title of the bill is misleading.

Even worse is the text. Section 6 of Senate Bill 294 provides:

SECTION 6. A NEW SECTION OF KRS CHAPTER 48 IS CREATED TO READ AS FOLLOWS:

"(1) The general assembly may provide in a budget bill for the transfer to

the general fund for the purpose of the general fund all or part of the agency funds, special funds, or other funds established under the provisions of KRS 15.430; 16.505; 21.347; 21.540; 21.560; 42.500; 47.010; 48.010(g); 56.100; 61.470; 61.580; 64.345; 64.350; 64.355; 78.650; 95A.220; 136.392; 138.510; 150.150; 154.150; 161.420; 161.430; 164A.110; 164A.050; 164A.800; 164A.810; 226A.110; 230.215; 230.398; 230.400; 230.770; 245.330; 248.540; 248.550; 278.130; 278.150; 287.485; 301.35–030; 311.450; 311.610; 312.019; 313.350; 314.161; 315.195; 316.210; 317.530; 317A.080; 319.320; 320.360; 321.320; 322.290; 322.350; 322.420; 323.080; 323.190; 323.210; 323A.060; 323A.190; 323A.210; 324.286; 324.410; 325.250; 326.120; 327.080; 330.050; 334.160; 334A.120; 335.140; 342.122; 342.480, etc.

"(2) The transfer of monies from the agency funds, special funds, or other funds to the general fund provided for in subsection (1) of this section shall be for the period of time specified in the budget bill.

"(3) Any provisions of any statute in conflict with the provisions of subsections (1) and (2) of this section are hereby suspended or modified. Such suspension or modification shall not extend beyond the duration of the budget bill."

Section 7 of Senate Bill 294 provides:

SECTION 7. A NEW SECTION OF KRS CHAPTER 48 IS CREATED TO READ AS FOLLOWS:

"To the extent that the provisions of a budget bill are in conflict with any provisions of KRS Chapters 12, 42, 56, 152, 175, or 341, the provisions of those chapters are hereby suspended or modified. Such suspension or modification shall not extend beyond the duration of the budget bill."

No member of the General Assembly could possibly have any idea by reading the language of Senate Bill 294 what agency funds were created by the 70 enumerated statutes and could not possibly know what funds were subject to transfer upon the passage of Senate Bill 294. The inclusion of "etc." at the end of the string of enumerated statute numbers would seem to make even more uncertain what transfers were to be authorized. Such uncertainty with regard to the effect of legislation is precisely the evil that Section 51 of our constitution was designed to prevent.

An entirely separate bill, House Bill 474, the budget bill, enacted into law the transfers authorized by Senate Bill 294. House Bill 474 was entitled "AN ACT relating to appropriations for the operation, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state supported activities."

With respect to the transfers of funds, it provided for a transfer from the agency and special funds to the general fund certain enumerated dollar amounts from certain enumerated agencies. In most cases, the agency from which funds were transferred was designated by an existing K.R.S. number which identified the agency and which designated the fees and monies which were appropriated to the agency by the existing statute, and the purposes and the manner in which those fees and funds were to be used.

No legislator could tell from a reading of House Bill 474 the purposes for which the transferred funds were required to be used by the existing statute. In a session limited to 60 days each biennium, in which hundreds of bills are introduced, it is not realistic to expect that an individual legislator could research each of the statutes enumerated in House Bill 474 to determine for himself the advisability of transferring funds away from that particular agency. In one instance, House Bill 474 purports to transfer $3,980,000.00 from the "Reinsurance Association" to the general fund, but no reference is made to the statute which created the association or to the purpose and manner in which its funds are to be used.

Of necessity, the individual legislators would find it impossible to determine the full import of House Bill 474 from a reading of its express language, and could not, therefore, know the full import of their action in either voting for or against the bill. It is just such uncertainties that Section 51 of our constitution was designed to prevent.

Furthermore, under only the loosest interpretation does the transfer to the general fund of funds appropriated to an agency by an existing statute have anything to do with the subject of appropriation. These transfers do not appropriate money. They rescind appropriations under existing statutes by transferring money which was previously made available to an agency by a statute which still exists on the statute books of this state. In doing so, the existing statutes, in my opinion, were amended by the budget bill and were therefore required by Section 51 of the constitution to be republished as amended.

The majority opinion states that these were not amendments, but only suspensions or modifications of the existing statutes. The General Assembly, in Senate Bill 294, divested itself of the power to repeal or amend an existing statute by a budget bill, but granted unto itself the power to suspend or modify existing statutes.

It seems to me beyond question that repeal and amendment of statutes relate to permanent actions of the General Assembly, whereas a suspension of a statute for the duration of the biennium of the budget bill is in effect a *temporary repeal*. A modification of a statute, limited to the biennium of the budget bill is a *temporary amendment*.

If an amendment is not valid unless republished as amended, it follows that a temporary amendment must also be published in full.

The transfer of various agency funds to the general fund conflicts in many instances with the express purpose and manner in which existing law requires those funds to be used, and the transfer in the budget bill does not suspend the existing statute. The existing statute is left intact, except to the extent that a portion of the funds for the use of the agency has been siphoned off for a different purpose. This does not suspend the existing statute but modifies it temporarily. Because a modification is in effect an amendment, albeit temporary, the full text of the existing law as modified is required to be published.

I do not doubt that the General Assembly has the power to control appropriations and expenditures, nor that it has the power to repeal or to amend statutes which appropriate money and provide the manner in which it shall be used.

It can, as an example, abolish the Department of Fish and Wildlife Resources Commission by repeal of the statute which created it. It has the power to direct that money derived from licenses issued by the commission be used for a different purpose than that provided by K.R.S. 150.150, but it must be done by amending K.R.S. 150.150 and republishing it in full as amended.

K.R.S. 150.150 provides:

"(1) Except as provided in this chapter, all moneys derived from the sale of licenses or from any other source connected with the administration of this chapter shall be promptly paid over to the state treasurer, who shall deposit such moneys in a special fund, known as the game and fish fund. The game and fish fund shall be used to carry out the purposes of this chapter and any law or regulation for the protection of wild animals, birds or fish, and for no other purpose.

"(2) All funds received under KRS 150.110, 150.310 and 150.520 shall be used by the department for the purpose of enforcing those sections and for the protection and propagation of mussel beds. Any surplus remaining in the fund at the close of each calendar year shall be turned into the general fund of the department. (1954d-10, 1954d-48 amend. Acts 1942, ch. 68, § 15; 1952, ch. 200, § 22; 1968, ch. 38, § 6; 1978, ch. 384, § 33, effective June 17, 1978.)"

This statute provides that the game and fish fund be used for purposes specified in the statute and *for no other purpose*. The budget bill purports to transfer $225,000.00 of the funds of the Department of Fish and Wildlife Resources Commission to the general fund with no limitation on the manner of spending. The budget bill does not repeal K.R.S. 150.150 because, except for the funds transferred, the statute will continue to be operative. The budget bill does, however, amend K.R.S. 150.150 because it takes away funds which were designated for a specific purpose and diverts them to another purpose. Because K.R.S. 150.150 was so amended, but its text was not republished or amended as required by the constitution, Section 51, a legislator would not know the effect that the budget bill would have upon the operation of the Department of Fish and Wildlife Resources Commission. The same thing is true of all other cases where the transfer of funds from commissions and agencies by the budget bill contravenes the express provisions of existing statutes.

I remain convinced that the intent and purpose of Section 51 of the constitution is sound, and that erosion of its effectiveness by judicial interpretation will in the long run lead to unfortunate consequences.

Recent events teach us the danger of circumventing the constitution. Sections 49 and 50 of our constitution prohibit the creation of public debt in excess of $500,000.00 except upon the vote of a bonded indebtedness by the people, accompanied by the enactment of a tax for the specific purpose of liquidating the principal and interest on the indebtedness. Notwithstanding this salutary economic principle, the state has issued millions of dollars of revenue bonds without a vote of the people and without enactment of a specific tax to retire the bonds. The bonds have been upheld by the courts upon the theory that they are to be retired from revenues derived from projects financed by the bonds and that such bonds do not constitute an indebtedness of the state. Many of the projects financed by these bonds produce no revenue at all apart from money taken from current state revenues. Revenue bonds are used to finance road construction projects, and the transportation department then leases the roads, and the lease payments are used to retire the principal and interest on the bonds.

Although not technically an indebtedness of the state, these bonds have created an obligation which must, as a practical matter, be satisfied out of current revenues because a default would ruin the credit of the state. The expenditure of current funds to pay for the leases necessary to retire interest and principal on revenue bonds is substantially responsible for a current critical shortage of funds available to the transportation department for other purposes.

One purpose of Sections 49 and 50 of our constitution is to prevent a current administration from obligating the tax revenues of a future administration. What has happened is that Sections 49 and 50 of the constitution have been circumvented, and as a practical matter, past administrations have been permitted to obligate the tax revenues of the present and of future administrations. We now begin to feel the consequences. I mention this as an example because it is easy to become impatient with restrictions imposed by our constitution. Section 51 serves a sound and prudent purpose, and in my view, it is important that we interpret it to prevent the very abuses it was designed to prohibit.

I would hold all of the contested sections of Senate Bill 294 and House Bill 474 unconstitutional to the extent they violate Section 51 of the Kentucky Constitution in the manner expressed in this dissent.