

SB

46

<TARGET><BILL>SB 46</BILL><SUBJECT>SB
46</SUBJECT><COMM>HJUD27</COMM></TARGET>

MEMORANDUM

STATE OF ALASKA DEPARTMENT OF LAW

TO: Mike Nizich
Chief of Staff
Office of Governor

DATE: April 26, 2011

TEL. NO.: (907) 465-3600

FROM: John J. Burns
Attorney General

FILE NO.: JU2010201740

SUBJECT: Sections 4, 36 and 37, CSSB
46(FIN) Contingency, Non-
severability, and Legislative
Intent Language

Introduction

As you requested, we have reviewed the contingency language in section 36, CSSB 46(FIN),¹ the non-severability provisions in section 37, and the legislative intent in section 4.² As set forth more fully below, our advice to you is as follows:

- (1) The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration; (b) the legislature has the power to pass appropriation bills; (c) the Governor has line item veto authority of appropriations; and (d) the legislature has authority to override the Governor's veto.
- (2) Section 36 of CSSB46(FIN) links together all of the appropriation items contained in section 4 of the bill and requires enactment of all or none, without reduction.
- (3) This condition is unconstitutional and unenforceable because it deprives the Governor of his constitutionally authority to review and reduce or strike individual appropriation items that do not serve the State's best interests.
- (4) Section 37 provides that if the condition in section 36 is invalid, all of the appropriation items that have been linked together in section 4 of the bill become invalid as well.

¹ Work Draft 27-GS1740\T, ("CSSB 46(FIN)").

² Legislative intent language in section 4 expresses that "the package of appropriations and projects listed [in section 4] are all necessary to achieve a statewide balance in addressing the state's diverse energy needs."

- (5) Because enforcement of this provision by a reviewing court would usurp the Governor's constitutionally assigned power to line item individual appropriation items, it is void and severable from the legislation.

Analysis

If enacted, the contingency language in section 36 of CSSB 46(FIN), the non-severability provisions in section 37, and the legislative intent in section 4 each would violate the Alaska Constitution in two ways: (1) by improperly impairing the Governor's line item veto power (art. II, section 15), and (2) by violating the confinement clause (art. II, section 13).

Governor's Constitutional Veto Power

Alaska's constitutional convention delegates intended to "create a strong executive branch with 'a strong control on the purse strings' of the state." *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). The Constitution gives the Governor this strong control in part by granting the Governor the power "by veto, [to] strike or reduce items in appropriation bills," commonly known as line item veto authority.³

The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration (art. IX, section 12); (b) the legislature has the power to pass appropriation bills (art. II, secs. 1 and 13); (c) the Governor has line item veto authority of appropriations (art. II, sec 15); and (d) the legislature has authority to override the Governor's veto (art. II, sec. 16). *Simpson v. Murkowski*, 129 P.3d 435, 446 (Alaska 2006). Sections 36 and 37 of CSSB 46(FIN) would violate this process by negating the Governor's constitutional power to strike or reduce the individual energy project appropriation items in section 4.

Section 36 violates the Governor's constitutional powers by linking the appropriation for each energy project item to the passage and enactment of every other appropriation made in section 4, without reduction. This would usurp the Governor's line item veto power, thus upsetting the checks and balances between the executive and legislative branches. If

³ Alaska Const. art. II, § 15; *see also Simpson v. Murkowski*, 129 P.3d at 446 (the Governor may not only veto entire bills, he may by veto, strike or reduce items in appropriation bills).

the legislature could link one appropriation to another (or to 50 other appropriations), the legislature would eliminate the Governor's power to strike or reduce individual line items. The Governor would have only two choices — to accept or to veto every appropriation as a group. Allowing the linking of appropriations with such a contingency would too easily permit the legislature to circumvent the Governor's constitutional veto authority. *See Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984).⁴

Section 37 exacerbates this constitutional violation by doubling the unconstitutional linkage of appropriations for energy projects. If a court finds the contingency in section 36 to be invalid, the legislature attempts to achieve the same result through different means—by making that contingency provision non-severable from the energy project appropriations. Thus, even if section 36 does not survive court challenge,, the legislature would still circumvent the Governor's line item veto power if a court upholds section 37. The bill effects an "all or nothing" approach to energy project appropriations either through application of either the contingency provision of section 36 or, if that does not work, through the non-severability provision of section 37.

A non-severability clause that would enable a legislature to overstep its constitutional authority would itself be unconstitutional and severable from legislation. *See Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984) (applying statutory severability clause to void and sever a non-severability clause used as part of a legislative attempt to usurp the Governor's constitutional authority). Upholding section 37 of CSSB 46(FIN) would promote the legislature's desire to unconstitutionally logroll the appropriations for multiple energy projects. These improper purposes underlying section 37 should lead a court to invalidate and, under AS 01.10.030, sever the non-severability clause from CSSB 46(FIN).

These contingency and non-severability provisions create inherent harm to Alaska's appropriation process. Even if the Governor were to choose not to line item veto any appropriation made in section 4, each appropriation would still be subject to legal challenge. Section 37's non-severability clause would invalidate every appropriation in section 4 if the legislature's attempt to usurp the Governor's constitutional veto powers

⁴ This would lead to uncontrolled "logrolling," — "the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority" — and would significantly limit the Governor's strong control on the purse strings. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L.Rev. 1171, 1177 (1993), *quoted in Alaska Legislative Council v. Knowles*, 21 P.3d 267, 373 n.33 (Alaska 2001).

with the section 36 contingencies is held to be unlawful. Any litigant opposed to even a single energy project contained in section 4 could effectively invalidate every section 4 appropriation by successfully challenging section 36.

This litigation risk would place a cloud over each appropriation that could impair the development of important energy projects. Sections 36 and 37 will potentially jeopardize the funding for energy projects until a court rules on the validity and severability of both sections. Until that time, no project proponent could rely on the availability of funds for an energy project from the section 4 appropriation. This uncertainty would make it difficult for project proponents to obtain necessary contracts to develop energy projects, and they may be exposed to contract damages if a project must be stopped because an expected appropriation is invalidated. It would also be difficult or impossible for a project proponent to finance additional project costs if funding from an appropriation is uncertain. Any lender or bond financing will require that all project funding be secured before additional financing will be made available on reasonable financial terms.

These legal risks would arise solely in the context of the legislature's attempt to usurp the Governor's constitutional power to exercise line item vetoes. A court should invalidate and sever sections 36 and 37 to avoid the harm done to the constitutional appropriation process. Severing those provisions would still leave the legislature with ultimate control over funding for the energy projects. If the Governor were to line item veto any of the appropriation items in section 4, the legislature has constitutional power to override that veto. Alaska Const. art. II, § 16. This legislative power makes the legislature's attempt in sections 36 and 37 to negate the Governor's constitutional veto power even more suspect.

In sum, the invasion of executive power functions make the contingency language in section 36 and the non-severability clause in section 37 unconstitutional under Article II, section 15, invalid, and severable from the legislation under AS 01.10.030.

Confinement Clause

The confinement clause (art. II, sec. 13) of the Alaska Constitution provides that "[b]ills for appropriations shall be confined to appropriations." In *State Legislature v. Hammond*, Judge (now Chief Justice) Carpeneti adopted a five-factor test to determine whether language added to an appropriations bill violates the confinement clause:

- (1) The qualifying language must not administer the program of expenditures;

- (2) It must not enact law or amend existing law;
- (3) It must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent;
- (4) The language must be germane, that is, appropriate, to an appropriations bill; and,
- (5) It must not extend beyond the life of the appropriation.⁵

The Alaska Supreme Court adopted Judge Carpeneti's test on a "nonexclusive" basis in *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).⁶

The contingency, non-severability, and legislative intent language in secs. 4, 36 and 37 violate the *Hammond* test in several ways. The legislature in these sections of the bill links multiple appropriations the legislature believes are necessary to implement a state energy policy based upon AS 44.99.115. But, AS 44.99.115 does not mandate that energy policy must be implemented by linking energy projects or appropriations. The relevant statutory energy policy language underlying the lintent expressed in section 4 is:

"Therefore, it is the policy of the state to . . . (2) encourage economic development by . . . (C) working to identify and assist with development of the most cost-effective, long-term sources of energy for each community."

AS 44.99.115(2)(C). This portion of the state energy policy encourages state agencies to work with individual communities to identify and develop cost effective sources of energy. Nothing in AS 44.99.115(2)(C), nor the remainder of that AS 44.99.115, makes state assistance to individual communities for the types of energy projects listed in section 4 dependent upon state assistance being provided "to achieve a statewide balance in addressing the state's diverse energy needs." *Quoting* section 4, CSSB 46(FIN). To the contrary, placing at risk the funding for any (and every) of the important energy projects listed in section 4 undercuts the statutory state energy policy by impairing the assistance which otherwise would be provided to develop "the most cost-effective, long-

⁵ Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

⁶ The court described that it approaches confinement clause disputes with an assumption that an act of the legislature is constitutional.

term sources of energy for each community.” AS 44.99.115(2)(C). The legislature’s attempt to link “the package” of appropriations and energy projects for a statewide balance does not implement AS 44.99.115. Rather, the linkage exhibits improper logrolling as legislators attempt to ensure funding for the listed projects.

To the extent that the linkage of projects is intended to be connected to a state energy policy or program, the linkage would both create and control a new state energy policy or program, violating the confinement clause under the Hammond test. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). The legislative attempts to control how monies are spent on energy projects violates several parts of the *Hammond* test, as well as violating the separation of powers doctrine, which grants the power to administer the energy policy and program to the executive branch. The attempt to control expenditures violates part one of the Hammond test related to legislative attempts to administer programs of expenditure. The attempt to change and control the scope of the state energy policy also demonstrates a legislative attempt to modify the existing law related to energy policy, violating part two of the *Hammond* test.

The contingency, non-severability and intent language also violates the *Hammond* requirement that legislative appropriation language be limited to the “minimum necessary” to explain the appropriation. The Alaska Supreme Court has explained that this “minimum necessary” factor limits the legislature’s ability to include substantive law in an appropriation bill by cloaking it as a “description.” *Alaska Legislative Council v. Knowles*, 21 P.3d at 377-78. The attempt by the legislature to control the scope of the energy policy program by linking many appropriations and projects cloaks into the appropriation bill those substantive law results that the legislature desires to implement. This violates the “minimum necessary” component of the *Hammond* test.

The contingency, non-severability, and intent language also violate the germaneness test. Under the germaneness test, the Alaska Supreme Court observed in *Alaska Legislative Council v. Knowles*, 21 P.3d at 379, courts generally will uphold conditions expressed as purposes for the appropriation. Thus, courts will generally uphold appropriation language identifying the facilities, employee positions, buildings or types of buildings on which the money could be spent. And courts will uphold contingencies on appropriations that relate to the receipt or nonreceipt of specific funds, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable. However, contingencies that relate to things other than the need for or use of the money or the need for the activity, may be found insufficiently “connected” to the appropriation.’ *Id.*

Mike Nizich
Chief of Staff

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The contingency, non-severability, and intent language in secs. 4, 36, and 37 of CSSB 46(FIN) likewise violate the germaneness test. Each appropriation for each energy project in section 4 stands on its own. Each appropriation will fund a separate and distinct energy project that promotes The attempt in sections 36 and 37 of CSSB 46(FIN) to link the appropriation for each energy project in section 4 to the multiple appropriations for multiple other energy projects goes beyond what is germane to an appropriation bill.

In sum, the contingency and intent language, if enacted, would specifically violate multiple parts of the *Hammond* test, and would be unconstitutional under the Article II, section 13, of the Alaska Constitution.

Conclusion

Because the contingency language in section 36, the non-severability clause in section 37, and the legislative intent language in section 4 of CSSB 46(FIN), usurps the Governor's line item veto power (art. II, section 15) and violates the containment clause (art. II, section 13), a reviewing court will likely find these provisions unenforceable.

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Alaska State Legislature

House of Representatives



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The Constitutionality of Sections 48(a) and 49 of CSSB 46 (FIN) (S) Version of Bill

I. Relevant Provisions of the Bill

A. Section 48(a)¹

“*Sec. 48. CONTINGENCIES. (a) Each of the appropriations made in sec. 4 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.”

B. Section 49²

“*Sec. 49. NONSEVERABILITY. Notwithstanding AS 01.10.030, in the event that a court of competent jurisdiction finds the contingency in sec. 48(a) of this Act is invalid, then the contingency in sec. 48(a) of this Act is not severable from the appropriations made in sec. 4 of this Act if

¹ p 145 lns 19-22

² p 145 ln 29 – p 146 ln 6

(1) the governor has vetoed, whether by striking or reducing, any appropriation in sec. 4 of this Act; and

(2) the legislature, by action or inaction, has failed to override all vetoes of, including reductions to, appropriations made in sec. 4 of this Act in the time and manner allowed under art. II, sec. 16, Constitution of the State of Alaska.”

C. Section 4³

Contains 105 appropriations from around the state, ranging from \$20,000⁴ to \$65,700,000⁵, covering 12 pages of the bill.

II. Relevant Constitutional Provisions

A. Article II, Section 15

“15. Veto ~ The Governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.”

B. Article II, Section 16 provides in relevant part:

“16. Action Upon Veto ~ Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items,

³ p 98 ln 1 - p 110 ln 13

⁴ Sitka – Wastewater Treatment Plant Renewable Energy Feasibility Study (HD 2) p 109 lns 17-20

⁵ Alaska Energy Authority - Susitna Hydroelectric Energy Plan (HD 12-35) p 98 ln 31 – p 99 ln 4

although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature....”

III. Constitutional Arguments

A. Article II, Section 15

This provision provides that the governor has the right to “veto, strike or reduce items in appropriation bills.” Because, as discussed in the other memoranda, sections 48(a) and 49 would deny him this right, they are unconstitutional. Each appropriation in section 4 is a separate item, being independent from all others. Merely relating to “energy” does not make them so interdependent that they would be considered separate items, any more than separate roads would be, though they were interconnected. Even if it could be argued that some projects depend upon others or are related to them, by tying so many items together under section 36, the legislation is fatally overbroad.

I also note that section 48(a) says, “each of the appropriations made in sec. 4 of this Act is contingent on...enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.”⁶ Similarly, section 49 refers to “the appropriations made in sec. 4 of this Act”⁷, “any appropriation in sec. 4 of this Act”⁸, and “all vetoes of, including reductions to, appropriations made in sec. 4 of this Act.”⁹ This

⁶ p 145 lns 19-22

⁷ p 145 ln 31 – p 146 ln 1

⁸ p 146 lns 2-3

⁹ p 146 lns 4-5

language shows that the legislators, themselves, considered each appropriation a separate line item.

The primary purpose of the sentences in Article II Section 15 permitting the line item veto or reduction is to give the governor the flexibility to veto or reduce individual appropriations and, secondarily, to prevent logrolling by the legislature. Operating together, sections 48(a) and 49 frustrate these purposes.

At the same time, Article II Sections 14¹⁰, 15, and 16 set forth the procedure to pass bills (including appropriations), veto legislation and line item veto or reduce appropriation items¹¹, and override vetoes¹². Taken together, they operate to limit the legislature's authority vis à vis the governor to the procedure specified.

Though advocates of section 48(a) and 49 argue that the legislature may specify that certain provisions of law are non-severable, that argument cannot prevail when the result would be unconstitutional. For example, if an appropriation item provided that it could only be spent on an unconstitutional purpose (for example to aid in discrimination or the promotion of a particular religion), and if it were made the subject of a non-severability clause that would cause the entire budget bill or a large part of it to fall, undoubtedly courts would refuse to enforce the non-severability clause, because enforcing it would lead to an unconstitutional result.

In State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the Alaska Supreme Court held that the legislature could not annul regulations by concurrent regulation, because that would circumvent the constitutional legislative process, including the governor's right to veto the annulling legislation.

¹⁰ Article II, Section 14 sets forth the procedure by which the legislature enacts bills into law.

¹¹ Article II, Section 15, *supra*.

¹² Article II, Section 16, *supra*.

In Legislative Research Commission v. Brown, 664 S.W. 2d 907, 925, 927-28 (Ky. 1984), the Kentucky Supreme Court applied similar reasoning to hold unconstitutional a statute requiring “the budget to be introduced as a resolution, rather than a bill.” 664 S.W. 2d at 925 (emphasis in original). The language of that case is, in my opinion, both instructive and persuasive. Kentucky Constitution Section 88, like Article II, Section 15, giving the governor line item veto power, refers to appropriation “bills” not resolutions. Both constitutional provisions provide the method by which bills must be sent to the governor “for either approval or disapproval (veto). See 644 S.W. 2d at 928, Alaska Constitution Article II, Section 15. They both also specifically allow line item veto by the governor.

No case has been cited containing sections like sections 48(a) and 49. The closest analogy is Brown. However, because the effect of the two sections is the same as the resolution in Brown -- to deprive the governor of the ability to “veto, strike or reduce items in appropriation bills” -- I believe Brown would be followed by Alaskan courts.

This conclusion is supported by the Alaska Supreme Court’s decision in A.L.I.V.E. There, as stated above, the court struck down a statute authorizing the annulment of regulations by resolution, because it deprived the governor of the right to veto legislation that would annul regulations. Applying the same reasoning to the two sections at issue here, I believe Alaska courts would be likely to follow Brown, and declare the two sections unconstitutional and allow line item vetoes to stand.

B. Article II, Section 16

This section sets forth the procedure to override a gubernatorial veto. The legislature must meet in joint session with each legislator getting an equal vote, having received the governor's veto message "with a statement of his objections"¹³, to reconsider passage "of the vetoed bill or item". "Appropriation bills or items"¹⁴ will still become law, despite the veto, if "three fourths of the membership of the legislature" vote to override the veto.

The entire process, in Article II, Section 16 is unconstitutionally thwarted by sections 48(a) and 49. Because sections 48(a) and 49 eliminate the entire line item veto process, the procedure in Article II, Section 16 is unconstitutionally denied.

Both the governor and the legislature are denied the right to have the legislature consider the governor's veto message on an item-by-item basis.

By passing sections 48(a) and 49 as part of one capital appropriation bill, requiring only 11 senate votes (as opposed to 21 house votes), all legislators votes are not considered equally as they must be under Article II, Section 16, which states that "the legislature shall meet... in joint session.... [A]ppropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature...."

Not only does this violation have the effect of (1) giving senators more power than they are allowed and representatives less power than they are entitled to, but it also (2) denies the minority on the issue (those who vote to sustain the vetoes) the weight to which they are entitled under Article II, Section 16. Constitutionally three fourths of the members (45 legislators) must vote to override. Only 16 members (1/4 plus one) need vote

¹³ See Article II, Section 15

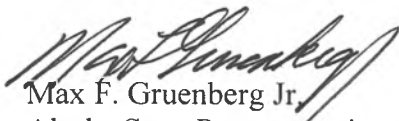
¹⁴ Emphasis added

to sustain vetoes. However, in passing sections 48(a) and 49 as part of a budget bill, only 32 votes (21 plus 11) are required. Conversely, under Article II, Section 16, only 16 members need vote to sustain vetoes, while under Article II, Section 14¹⁵, 29 are required to block passage of the appropriation bill. These are additional constitutional rights of legislators, both individually and collectively, that are protected under the constitution.

Though no case has been found directly on point, for these reasons I conclude that sections 48(a) and 49 also violate Article II, Section 16 of the Alaska Constitution.

I believe it is important to consider Article II, Section 16 for another reason as well. All the reported cases that have been cited involve the balance of power between the executive and legislative branches. Article II Section 16 involves the balance of power within the legislature – both (1) between the houses (legislating together with each member getting an equal vote as opposed to legislating separately, with each senator having twice the voting power of each representative), and (2) between the majority and minority on the issue of veto-override (only 32 votes are needed to pass the bill, while 45 votes are need to override the vetoes under the constitution).

Finally, these arguments on Article II, Section 16 give each legislator a direct and individual interest in any resulting litigation. First, these issues give legislators individually and collectively legal standing to enforce their constitutional rights and the right to intervene, individually or collectively, in any litigation as a matter of right.¹⁶


Max F. Gruenberg Jr.
Alaska State Representative
May 10, 2011

¹⁵ Article II, Section 14 provides in relevant part, “No bill may become law without an affirmative vote of a majority of the membership of each house.”

¹⁶ See Alaska R. Civ. P. 24(a)

LEGAL SERVICES

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MEMORANDUM

May 3, 2011

SUBJECT: Outline of Contingency and Nonseverability Discussion

TO: Representative Max Gruenberg

FROM: Doug Gardner
Director

You asked for a *sui generis* discussion of the contingency and nonseverability clauses after receiving my last memorandum. I agreed to put ideas down on paper that are a departure from the opinions previously issued based on current case law. Below are the ideas that are a product of our conversations, and other ways of looking at these two issues. I am also attaching a case I believe you may wish to read in detail, as I believe it addresses the discussion you are focusing on. This case was cited in my last memo to you.

I. OVERVIEW -- CROSS-CONTINGENCIES

A. The purpose of the line item veto is reduction of the total budget; not allowing the governor to decide the object of expenditure. *Constitutional Convention*, and *Knowles*.

B. Contingencies, including cross-contingencies, if triggered, also reduce expenditures.

C. The danger of cross-contingencies is that they may reduce the governor's incentive to exercise the line item veto, thereby having the effect of allowing expenditures to be too high (i.e., line item veto won't be used to reduce the budget). A counter argument is that the governor can still "strike or reduce," but the consequences are significant.

D. To balance the governor's "strike or reduce" function with the legislature's allocation function is to allow cross-contingencies, but only if there is a very close nexus between them.

E. Nexus: In descending order of likelihood that a court would uphold:

1. Physical -- dam and transmission lines;
2. Financial -- bonding, etc.;
3. Functional -- salary for director of group and other funding for group;

4. Equitable distribution (distributing related dollars -- schools, energy projects -- across the state).

F. Legal Basis

1. Ask the court to expand the definition of "item" in *Knowles* to include tied appropriations that meet an appropriate nexus requirement. The definition of "item" in *Knowles* is quite clear, but *Knowles* was not addressing a contingency that involved other appropriations, but confinement. This approach is problematic given the well-settled case law and definition of "item."

2. Simply uphold contingency, so long as an appropriate nexus is present. See attached case; *Brault v. Holleman*, 230 S.E.2d 238 (VA 1976). This would be more consistent with the *Knowles* analysis. The argument would be that there are limits with a nexus test on cross-contingencies in appropriations, and that given the established nexus, the asserted infringement on the governor's "strike or reduce" line item veto power would be reduced. There is no log rolling in this approach.

II. OTHER APPROACHES AVOIDING CROSS CONTINGENCIES

A. Two appropriation bills. Send out the endangered appropriations, wait for the governor's vetoes, then send out the governor's favorites. This approach is simple, but doesn't deal with really linked appropriations, and is more useful when the "linkage" is political.

B. Lump sum appropriation (X dollars for projects A, B, and C to a public corporation (AEA)). The governor cannot line out A, B, or C, but the executive does have the power to allocate dollars to projects, but AEA may, which might have the affect of eliminating or reducing some projects.

C. Substantive Law.

1. Create an executive branch program and let the executive branch produce a list, then appropriate for "items 1 - whatever is on the list."

2. Establish a list of projects in statute, with either dollar amounts or a percentage attached to each project. See AS 29.60.700 for dollar approach and AS 23.15.835 for percentage approach. The governor may veto the entire substantive bill, but cannot delete projects.

III. SEVERABILITY

Severability gives the legislature the ability to decide that, if its contingency (of whatever type) won't work, it doesn't want to make the appropriation at all. The court will assume nonseverability -- the *Knowles* court explicitly did -- but the severability clause preserves the legislature's final decision. One argument is that nonseverability discourages use of the line item veto, or challenges to the contingency, but it also means that the legislature has to be willing to lose all the appropriations if the contingency fails. Perhaps this symmetry is the sign that the constitution has perfect checks and balances,

where both the legislature and the executive go back to zero if there is a veto and an enforceable nonseverability clause. Not giving effect to a severability clause will diminish the legislature's power to appropriate in the first place. The legislature would be reluctant to put in contingencies or perhaps unwilling to appropriate at all, if it believed its nonseverability clause would not be honored.

DDG:plm

Attachment

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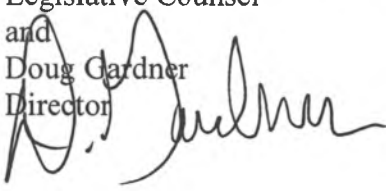
MEMORANDUM

April 29, 2011

SUBJECT: Line Item Veto, Nonseverability Clause, and Contingency Language in CSSB 46(FIN)

TO: Representative Max Gruenberg

FROM: Brian Kane 
Legislative Counsel

and
Doug Gardner 
Director

1. Does the art. II, sec. 15, line item veto power of the governor "trump" a non-severability clause included in an appropriations bill by the legislature? Is an appropriations bill an appropriate bill in which to have a nonseverability clause?

It is unlikely that a governor's line item veto power would trump a nonseverability clause like the one in CSSB 46(FIN). Essentially, the nonseverability clause is an expression of the legislature's intent regarding certain portions of a bill. In the current scenario, the nonseverability clause directly relates to the legislature's not wanting to expend the funds in sec. 4 of the bill if the contingency is held invalid by a court. The legislature is stating to a court that, had it known the contingency would not be upheld, it would not have appropriated those funds in sec. 4 of the bill at all -- or at the very least would have appropriated them differently. The argument that the line item veto would trump the nonseverability clause in this instance would come awfully close to giving the governor the power to actually expend money himself. If the legislature's intent was for all of sec. 4 to be deleted if the contingency was held invalid, then allowing some projects to remain in that section that were not line item vetoed is having money appropriated for projects against the will of the legislature.

While art. II, sec. 15 of the state constitution gives the governor the power by veto to "strike or reduce items in an appropriations bill," this is clearly a situation of the governor being given some part of what is generally a legislative function (controlling the expenditure of state funds). It does not seem likely that a specifically carved out power like the line item veto would trump the legislature's intent in performing its legislative duty of making -- or not making -- appropriations.

In the memo released on April 26th, the attorney general cited *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984), arguing that this case supports the

proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further regulations. *Id.* at 919. The court found that the nonseverability clause so interfered with and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown* that the attorney general cited to in his memorandum.

Reading further in *Brown*, there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* (emphasis in original) The Supreme Court of Kentucky held since the "adoption of the state budget" is within the purview of the legislature, the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriations bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock*, 480 U.S. 678, 680 (1987), where the Court held:

Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id. at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock*, and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the

presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable, evidence of the legislature's intent that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the non-severability clause, in *Knowles v. Legislative Council*, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Putting the nonseverability clause in the bill is necessary to unequivocally state what the legislature intends in relation to the expenditure of money in sec. 4 of the bill. The nonseverability clause does not administer a program, nor does it amend existing law or extend beyond the life of the appropriation. Finally, the nonseverability clause is germane, as it directly speaks to the legislative intent regarding whether or not certain funds in the bill should be expended.

2. Please discuss the separation of powers issue as it relates to the arguments the attorney general made in his April 26th memo.

I have discussed above one of the two main cases the attorney general referenced in his memo, so I will not address the *Brown* case again here. In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriations bill, that provided for road construction projects totaling \$12 million. Of the total \$12 million, \$7 million was state matching funds for federally aided interstate highway projects, and \$5 million was for non-federally funded highway projects. *Karcher*, 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of \$3 million for that project, or the \$7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of \$5 million for non-federally funded projects, or the total of \$12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or

in part any such item or items while approving other portions of the bill." *Id.* at 489 citing art. V, sec. 1, para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II, sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II, sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

There are also a few cases outside of the state that may have some bearing on the issue at hand. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoes budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

[The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have

discussed, the matters vetoed were qualifications rather than items. . . .
Thus the executive power was not invaded.

Rush v. Ray, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must be stated in the appropriations bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

3. Review *Sutherland's Statutes and Statutory Construction*, as it relates to the nonseverability clause in CSSB 46(FIN).

The attached article from Norman J. Singer, *Sutherland's Statutes and Statutory Construction*, §44A:15 (7th ed. 2009 ed.), provides two passages that take the position that the current trend for courts interpreting nonseverability or inseverability clauses, is to find the clauses enforceable. Two passages from *Sutherland's* underscore this trend:

In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.

...

Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

A similar debate surrounded the proposed inclusion of an inseverability clause in the proposed Balanced Budget and Emergency Deficit Control Act of 1985. Among the many controversial elements in the bill, which sought to achieve a balanced budget, was a provision that gave budget supervisory powers to a merged entity of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB"). In light of the partisan dynamic between the President and Congress at the time, the joint participation of congressional and executive agencies was a central feature of the bill. Anticipating a potential constitutional challenge to CBO participation on separation of powers grounds, the House passed a version of the bill that included an inseverability clause. As Congressman Panetta pointed out at the time:

If you allow severability and the CBO role is found to be unconstitutional, then it leaves it up to the OMB, and it, in essence turns our power entirely over to the President and his agency. That is the issue at stake in terms of why we built inseverability in

For Congressman Panetta, maintaining a congressional role in the deficit reduction process was a key feature of the legislation. The Act, without the CBO, would include an inadequate check on the executive powers, and the Panetta camp refused to support it. Those opposed to the inseverability clause, however, did not see CBO involvement as a crucial factor and were willing to have the remainder of the Act stand as law even if the CBO's role were held unconstitutional: "[W]e do not want the whole

process that we have labored on so hard now to collapse because one provision is held to be unconstitutional."

Based on the above passages of Sutherland's, and on the cases cited in sections 2 and 3 of this memorandum, there is a strong argument that the nonseverability clause in sec. 37 of CSSB 46(FIN) (27-GS1740\T) would be found enforceable by the Alaska Supreme Court, based on a clear expression of legislative intent and a well documented legislative history that the legislature did not have a desire to fund any of the "energy projects" if the legislature couldn't fund all of the projects. In our discussion, you queried whether the Alaska Supreme Court, in the narrow context of an appropriations bill, might decline to enforce a nonseverability clause based on the principle that such a clause would nullify the governor's line item veto authority to "strike or reduce" as provided in art. II, sec. 15 of the state constitution. If the court chose to so limit the enforceability of a nonseverability clause in an appropriations bill, the court would be creating new law, that would be a break from the nonseverability case law and commentary that I have been able to locate so far in my search.

The considerations a court would have in taking such a significant step of finding a nonseverability clause unenforceable in an appropriations bill would be: (1) disregarding clear legislative intent of nonseverability; (2) essentially forcing the legislature to appropriate in ways that the legislature did not choose; (3) giving the item veto power in art. II, sec. 15 priority over the legislature's appropriation power in art. II, sec. 13; and (4) finding that the nonseverability clause actually violates the governor's veto power (the counter argument to the governor's is that while a contingency triggering a nonseverability clause makes a veto decision harder, the governor may still exercise the veto albeit with significant consequences).

As a final note, it is clear that if the governor does exercise his veto power, the legislature does have a remedy in art. II, sec. 16, because by a three-fourths vote of both bodies in joint session, the legislature can override a veto. If the court chose not to enforce a nonseverability clause in an appropriations bill, reasoning that the legislature's remedy was limited to article II, sec. 16, the court would in essence be concluding that while a majority of the house and senate chose to include a nonseverability clause in a bill, that it would take a three-fourths vote of both bodies to carry out their original intent of providing for nonseverability. In conclusion, all that I can say is that based on current case law in Alaska, and other jurisdictions, and the Sutherland commentary, it appears that the court would enforce a nonseverability clause in an appropriations bill; but that if the court chose to do so, based on a separation of power analysis, it could always carve out an exception to enforcement of a nonseverability clause in the very narrow area of an appropriations bill. The likelihood of this outcome is not possible to predict.

If you need further information, please advise.

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Enclosure

preferred to B's, has to be determined, of course, on the relative importance of the expectations, or on other grounds that may turn the scale. However, the particular decision goes and whatever the rule that is formulated, the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather, it is the method of intelligently balancing and discriminating between reasons for and against. When lawyers have a precedent to follow it is proper that they follow the precedent. When they have no precedent, they decide questions as other people decide them. Their logic is properly the logic of comparative values and not the mere mechanical logic of deduction from major and minor premises.

IV. INSEVERABILITY CLAUSES IN STATUTES¹

44A:15 Inseverability in statutes

When holding a statutory provision unconstitutional, a court must determine whether to sever the defective provision or to invalidate the entire statute. In order to guide courts, lawmakers often include a severability clause in legislation. The clause instructs a court that has held portions of a statute invalid to sever the invalid statutory provisions from the rest of the statute and to allow the statute's valid sections to remain operative. Less frequently, a statute will include an inseverability clause that invalidates an entire statute (or section of a statute) should a provision be held invalid. In part because severability clauses have become boilerplate, these clauses have had little effect on courts making severability determinations.

Despite the explicit statutory language in severability and inseverability clauses, courts all but ignore the clauses and apply their own tests and presumptions to determine severability. These courts generally begin with a presumption that all statutes are either severable or inseverable, usually followed by an examination of the particular statute's structure and legislative history in order to determine whether the remainder of the statute would be consistent with the legislative intent. Courts will also consider whether the statute can reasonably function as an autonomous whole without the invalid provision.

This approach provides scant guidance to courts faced with a severability question, often leaving them to speculate about what the legislature intended to accomplish in passing the statute and whether that purpose is frustrated by the provisions invalidated. This is remarkable in light of the clear instructions provided by

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inseverability (and severability) clauses that would appear to resolve this very issue.

This Comment argues that inseverability clauses are fundamentally different from severability clauses and should be shown greater deference than their sister severability clauses. Part I discusses the courts' approach to severability and inseverability clauses. Part II examines the assumptions behind the courts' treatment of severability clauses and criticizes the application of those principles to inseverability clauses. Part III argues that, with some exceptions, courts should defer to the plain language of inseverability clauses. It also attempts to place the proposed rule within the current debate over statutory interpretation.

I. Deciding Whether to Sever Invalid Statutory Provisions

A. Severability Clauses: A Mere Presumption

The Supreme Court established the general standard for determining whether an invalid provision is severable from the rest of a statute in *Champlin Refining Co v. Corporation Commission of Oklahoma*. Faced with a state oil drilling statute containing potentially unconstitutional price controls, the Court had to consider whether the overall statutory scheme could survive a challenge to the pricing provisions. The *Champlin* Court refused to defer to the statute's severability clause and required instead that a court look at the structure of a statute to determine severability. The Court held that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." In effect, this established a presumption of severability that could be rebutted if a court determined that the legislature did not intend for the statute to exist without the invalid provision. This required courts to speculate as to what the legislative intent behind the statute was at the time of its passage and what it would be after the provision was held invalid. Although a statute's severability clause would seem to provide evidence of legislative intent, the Court in *United States v. Jackson* stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." Thus, by including a severability clause, a legislature does little more than spill ink since the clause has a minimal bearing on the severability determination.

Similarly, in *INS v. Chadha*, the Court, after holding that the legislative veto provision of the Immigration and Nationality Act was unconstitutional, considered whether the provision was severable from the rest of the statute. Although the Act contained a severability clause, the Court again was unwilling simply to rely on the statute's own provision to determine severability. The Court chose instead to examine the legislative history of the Act, and

severed the unconstitutional provision only after concluding that the congressional intent in the legislative record supported such a holding.

The Court, in *Alaska Airlines, Inc v. Brock*, further explained that, far from being dispositive, a severability clause creates no more than a mere presumption of severability. The presumption can be overcome if legislative history and the statute's structure indicate that the statute would not have been passed without the invalid provision.

Similarly, several state courts often begin with a presumption of severability that can be overcome by legislative intent. Many of these courts have second-guessed plain statutory language and have held statutory provisions inseverable despite the presence of severability clauses. One court aptly described the caselaw's indifference to the plain language of severability clauses as "a narrow exception to the general rule that, when a clause is unambiguous, construction is unnecessary." The plain meaning of a severability clause unambiguously instructs a court to uphold the remainder of a statute. However, in the realm of severability, plain meaning does not prescribe the result, and the clause is all but ignored while the court makes an independent determination of legislative intent by construing legislative history and statutory structure.

Acknowledging the ineffectiveness of severability clauses, some states have actually codified rules of construction for interpreting severability questions that arise under their codes. These statutes reflect the caselaw's indifference to severability clauses. Pennsylvania's statute, for example, provides for a presumption that all of the state's statutes are severable, regardless of whether they include a severability clause or not. This presumption can be overcome, however, if a court finds that the legislature would not have passed the statute absent the invalid clause or that the remainder of the statute cannot function properly without the invalid provision.

B. Inseverability Clauses: A Mirror Image?

Research uncovered no reported opinions in which a federal court has interpreted an inseverability clause in a federal statute, perhaps because there are so few of these clauses. When faced with an inseverability clause in a state statute, however, federal courts have applied the same analysis they apply to severability clauses—examining legislative intent, legislative history, and the statute's ability to function without the invalid portion before accepting the plain meaning of the inseverability clause. In *Biszco v. RIHT Financial Corp*, for example, the First Circuit held that the analysis applied to the severability clause in *Chadha* was equally applicable to an inseverability clause in a Rhode Island statute. Thus, inseverability clauses establish no more than a presumption of

inseverability that courts may overcome after an examination of legislative intent.

State courts have also imported the rule for interpreting severability clauses to inseverability clauses. In *Stiens v. Fire and Police Pension Association*, for example, the Supreme Court of Colorado first held that a portion of the Colorado Policemen's and Firemen's Pension Reform Law was an unconstitutional retroactive law because it mandated pension fund contributions to cover liabilities accrued before the statute's passage. Although the law contained an inseverability clause, the court was reluctant to follow it: "The special inseverability clause . . . is not conclusive as to legislative intent. It gives rise only to a presumption that, if the unconstitutional parts of an Act were eliminated, the legislature would not have been satisfied with what remained." After analyzing the legislative history of the statute, the court concluded that the General Assembly's intent to regulate the state's pension liabilities predominated and that this intent would be frustrated by holding the entire act invalid. The court held that, despite the presence of an inseverability clause, the unconstitutional provision was severable from the rest of the statute.

In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.

In addition, some states that have codified their severability law have included statutory language implying that, whereas severability clauses raise only a presumption, inseverability clauses may be dispositive of the severability question. The Indiana Code, for example, provides:

- (a) If any provision of this code as now or later amended or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application. (b) Except in the case of a statute containing a non-severability provision, each part and application of every statute is severable. If any provision

or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless: (1) the remainder is so essentially and inseparably connected with, and dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application; or, (2) the remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application. Thus, all Indiana statutes are severable unless they contain inseverability clauses or severability would be inconsistent with legislative intent or the severed statute would lack autonomy. The Code does not include a limitation, such as the one in subsection (b)(1), that would require an examination of legislative intent for “non-severability” clauses. This is significant because it implies that, when a statute supplies an inseverability clause, the clause is inseverable and no further examination of legislative intent or purpose is required.

II. Inseverability Clauses: A Recipe for Compromise

The previous Part outlined the courts’ practice of analyzing inseverability clauses in the same manner as severability clauses. This Part will outline the differences between severability and inseverability clauses and propose that courts stop analyzing the two clauses in the same way.

A. Boilerplate or Deliberate?

The reason most commonly given for the courts’ practice of second-guessing severability clauses is that the clauses are boilerplate provisions inserted into statutes by legislatures without thought or deliberation. Because of the often complex, multi-issue bills passed by legislatures, severability clauses are inserted to address a remote contingency: a court holding a small part of the overall statutory scheme invalid might dismantle far-reaching and elaborate omnibus legislation. Although severability clauses are included in statutes quite frequently, legislative drafters are nonetheless aware that courts do not show these clauses much deference. Legislators themselves acknowledge the perfunctory nature of severability clauses and their inclusion in legislation is generally uncontested. One congresswoman, for example, presumed that no floor debate was necessary to discuss the inclusion of a severability clause because such clauses were so commonplace:

This is a standard “boilerplate” severability clause; similar language has been included in a wide variety of laws including: The Emergency Unemployment Compensation Amendments of 1993, the Americans with Disabilities Act, the Civil Rights Restoration Act, the Fair Labor Standards Act, the Education for Economic Se-

curity Act, and the Comprehensive Drug Abuse Prevention and Control Act.

Indeed, as Congressman Frank stated when he introduced a severability clause into a different bill: “This is fairly routine . . . this is I think agreed upon by all the parties, to explicitly put in the kind of severability clause that sometimes is made explicit This is just boilerplate severability.” Congressman Frank acknowledged that severability clauses are not always included in legislation “explicitly” because there is an implicit assumption of severability to start with. As one congressman pointed out when he submitted a bill without a severability clause:

No severability or nonseverability provisions were included in the bill, but it is the intention of the conferees that any judicial determination regarding the constitutionality of the bill be applied severably to the legislation. This is consistent with the current rule of thumb regarding constitutional challenges to any law that is silent on the issue of severability. Thus, the severability clause itself is understood by legislators as an innocuous provision that is not likely to be heeded by courts. As one court pointed out, “[t]he Act in question contains a “saving clause” which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not quite understood magic.”

Furthermore, while the severability clause is rarely dispositive, it may prove useful to courts in the easy case and, even if it is ignored by courts entirely, it is hard to imagine how such a clause could be harmful. In a 1989 Senate debate over a proposed severability clause in a child-care bill, Senator Hatch, acknowledging that the clause presented a potential benefit with minimal risks, commented that “good draftsmanship, good legislative draftsmanship, smart legislative draftsmanship . . . mandates putting a severability clause in the legislation.” This demonstrates that severability clauses are included with little discussion or deliberation. In the same debate, Senator Mitchell pointed out that the clause was so standard that “a severability provision exists in over 63 Federal laws.”

Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a

constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

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B. Limiting Court Powers

By failing to distinguish between severability and inseverability clauses, the courts ignore the differences in the messages that the two clauses communicate. The clauses are not mirror images of each other; they say different things.

A severability clause does not prohibit courts from invalidating the remainder of the statute because judicial review authorizes courts to declare statutes unconstitutional. Since a severability clause cannot permissibly limit the scope of the courts' powers of

judicial review, all the clause can do is instruct courts that when they hold a provision invalid they are not required to invalidate the whole statute. Through a severability clause, the legislature tells courts that it does not consider the various statutory provisions inextricably linked. Ultimately, the court must determine how far the unconstitutional provision extends and whether the remainder constitutes a fully functioning statute.

When applying inseverability clauses, on the other hand, the courts' exercise of the power is restricted insofar as the court is instructed to invalidate the whole statute if it determines it must invalidate some part. Thus, the clause communicates the legislative command that the statute's existence as a law is contingent on its existence as a whole. The court must carry out this legislative command, regardless of its opinion of the relationship between the invalid provision and the remainder of the statute.

Read in this light, the two clauses convey very different messages: one suggests to courts what they should but are not required to do; the other tells the courts what they must do. By applying the same analysis to both, courts fail to acknowledge the fundamental differences in the messages communicated by severability and inseverability clauses.

C. Preserving the Deal

Aside from being deliberately drafted into legislation, inseverability clauses serve a key function of preserving legislative compromise. Much commentary points out that legislation is the articulation of a legislative deal. But a compromise is of no value unless there is a mechanism to ensure the compromise's durability, that is, a way of preventing one party to the compromise from benefiting from the deal without upholding its share of the bargain.

An inseverability clause is a useful enforcement mechanism for legislative compromise because it binds the benefits and concessions that constitute the deal into an interdependent whole. In the debate mentioned above, for example, Senator Helms was unwilling to support the child-care bill unless it provided support for religious day care. If Helms's opponents had agreed to the religious day-care provision, there was a strong possibility that the provision would not have withstood a constitutional challenge. If the provision had been struck down and held severable, the compromise would have been unenforceable. Helms's opponents would have had their child-care benefit, and the religious day-care provision would have been a thing of the past. By making his support for the bill contingent on such an inseverability clause, Helms was entrenching the legislative deal and ensuring that there would be the compromise version of the bill or no version. The inseverability clause thus binds all the elements of the deal together.

Severability clauses, on the other hand, are not tools of legislative compromise. Legislators include them to ensure that the bulk of the legislation passed will remain intact even if some unanticipated contingency arises. As Senator Hatch pointed out:

Who knows what a future Supreme Court will do? But, in the unlikely event that something in this legislation is unconstitutional, we surely want a severability clause in there so that all of the legislation is not wiped out in a single swoop of the Supreme Court's pen. Because severability and severability clauses are the default rule and the norm, respectively, the inclusion of an inseverability clause is an affirmative act by a legislature to preserve the coexistence of separate provisions. In settlement agreements and other kinds of contracts, for example, the parties determine that certain provisions are so central to the deal that without them there is no contract. The inclusion of inseverability clauses in these contracts is intended to preserve such compromises.

In a similar vein, a legislature may pass a bill that, as a result of a legislative deal, contains a balance of corresponding provisions. If the statute includes an inseverability clause, the legislature is saying that the statute is an organic whole of interdependent parts, no one of which should exist without any other. For example, several statutes codifying settlements of Indian claims in return for some form of reparation contain inseverability clauses for this reason and could not have been passed without them. If court action invalidated the statutory bar on prosecution of their claims, the tribes would have a double benefit: they could receive statutory compensation for their lands and still prosecute claims to recover those same lands. The inseverability clause prevents this outcome.

In *Kennedy v. Pennsylvania*, a state legislature had used an inseverability clause aggressively to gain government-wide support for its actions. The Pennsylvania legislature approved an across-the-board pay increase to state government employees, including legislators and judges. Because the state constitution prohibited legislators from voting themselves a pay increase during their current term, the increase for legislators was effective beginning with the next election. However, in order to gain votes to support the appropriation, the final bill also increased legislators' unvouchered expense accounts for the period prior to the election in the amount of the pay increase. Anticipating a court challenge to the expense account increase, the legislators included an inseverability clause. The clause provided that, were a court to invalidate any provision of the statute, none of the salary increases would be effective, including those for judges. Although the inseverability clause may have been an attempt to pressure judges into holding the expense account increase valid, the Pennsylvania court held the inseverability clause constitutional and valid, even though it affected the judiciary. While the scruples of the Pennsylvania legislature were questionable, their use of the inseverability clause proved an effective

tool for preserving their deal.

Similarly, inseverability clauses are often included in budgetary legislation to ensure that the funding scheme developed is viable. If a court determines that an entitlement's eligibility requirement is invalid, then the funding apparatus supplied by the remainder of the entitlement would become inadequate. For example, in *Brookins v. O'Bannon*, the Third Circuit considered an inseverability clause that was included in the 1982 Pennsylvania Welfare Reform Act. The Act divided the class of needy persons eligible under the prior law into "chronically needy" and "transitionally needy" persons and continued to provide full benefits to the "chronically needy." The "transitionally needy," however, were limited under the new act to three months of benefits per year. With the savings generated by reducing benefits to the new "transitionally needy" class, the Act provided for a 5 percent increase in the benefits provided to eligible recipients. The Act included an inseverability clause that eliminated the 5 percent increase should the distinction between "chronically needy" and "transitionally needy" be held invalid. As one legislator pointed out: "We do not want to raid [the] State Treasury. We want to provide an increase in cash assistance allowance to the truly needy as long as those funds are there."

The clause provided an important tool for the legislature to regulate welfare spending by ensuring that the increase in benefits was contingent upon narrowing the scope of eligible welfare recipients. The Third Circuit ultimately did apply the inseverability clause, but only after examining the legislative history of the provision. One can only speculate as to what the court would have done to Pennsylvania's welfare budget had the legislative record lacked any discussion of the Act's inseverability clause.

Thus, by applying the same analysis to inseverability clauses as they apply to severability clauses, courts are denying legislators an effective tool for entrenching a compromise. If courts are only moderately deferential to inseverability clauses, and if the clauses establish no more than a presumption of inseverability, then courts will only apply the clause if there is a clear record in the legislative history. Consequently, legislators will be reluctant to rely on the clause as a tool of compromise for fear that courts will undertake independent determinations of legislative intent despite the statutory mandate of inseverability. This problem will be exacerbated for state legislators because legislative history for state legislation is often difficult to locate and thinly reported. Occasionally, legislation can be made palatable or effective only by tempering it with various limiting factors or requirements, and the inseverability clause is intended to ensure that these elements remain in the statute. By treating the inseverability clause as if it were only a minor indication of legislative intent, courts are usurping the legislature's role in determining what should remain as an enforceable statute.

III. A New Rule for Inseverability Clauses

The previous Part established that inseverability clauses serve a wholly different function from severability clauses. Therefore, the rule that courts apply to inseverability clauses should be distinct from that applied to severability clauses. The correct approach to inseverability clauses is to apply their plain meaning. Rather than embarking on an independent exploration of legislative intent, as the courts do for severability clauses, courts should unequivocally invalidate the remainder of a statute if the unambiguous language of the statute so directs.

A. A Public Choice Approach

The proposed rule can be understood through a theory of statutory interpretation that derives from a contracts approach. Public choice theory tends to view legislation as the product of various interest groups vying for their self-interests. Legislation therefore is a contract of sorts negotiated between the various parties, that is, between the different legislators and the interest groups with whom they sympathize. According to this theory, legislation is often a compromise between conflicting groups where one group agrees to support another group's proposed legislation in return for some modifications in the underlying bill or for support on another issue. Consequently, the legislation may lack a cohesive focus because different portions of the bill are included to placate different groups.

An inseverability clause provides legislators with a tool for enforcing these compromises because one group may be willing to support a piece of legislation only if it can be assured that particular limitations or provisions will be included in the final bill. Senator Helms, for example, could agree to support a child-care entitlement on the condition that religious day-care centers were eligible for the benefit. His insistence on an inseverability clause testifies to the clause's important role in entrenching a compromise.

Similarly, after the *Chadha* decision there were initiatives in Congress to include inseverability clauses in statutes with legislative veto provisions. The inseverability clause would enforce durable legislative deals whereby various federal actions mandated by statute could not be undertaken unless Congress had the power to veto the action. If the Court, as it did in *Chadha*, held such an attempt at legislative veto unconstitutional, then the inseverability clause would cause the entire statute to fall rather than leave the statute to function free from any legislative check on its application.

It is, however, imaginable that in many instances a sparse record will provide an inadequate background as to the negotiation and compromise behind an inseverability clause. Alternatively, because of the conflicting interests that influence the legislation, the legislative history often provides conflicting evidence of legislative intent

or purpose. As such, a rule that failed to defer to the plain meaning of the inseverability clause would, in effect, undermine the clause's function as a legislative tool for enforcing compromise. Courts would be free to speculate as to legislative intent and purpose in the absence of an informative legislative history.

Applying the plain meaning of inseverability clauses without second-guessing legislative intent helps facilitate durable legislative compromises. If courts are able to examine legislative intent and to speculate whether the legislature would have passed the legislation without the invalid provisions, there is a great likelihood that legislative deals will be undermined or short-lived. If courts will sever provisions that were passed as interdependent elements, legislators will be less willing to enter into compromises: they will fear that the issues they concede will outlive the issues they support. That is, the costs of the deal might outlive its benefits. Severability clauses, on the other hand, do not enforce the legislative compromise; they protect the passage of complex omnibus clauses. A strict plain meaning rule of severability clauses, therefore, would not help to preserve a legislative deal. If anything, the severability clause attempts to undo legislative deals by instructing courts to uphold the balance of a statute even when portions of the legislative deal have been struck down.

Nevertheless, courts' deference to the plain meaning of inseverability clauses should not be unlimited. If giving effect to an inseverability clause would result in overstepping the bounds of legislative or judicial authority, then the clause should not be followed. For example, in *Legislative Research Commission v. Brown*, an inseverability clause provided that if a Kentucky legislative veto provision were held invalid, then the state's executive department would not be permitted to issue regulations unless the state's general assembly was in session. The clause was intended to force the courts to uphold the veto in order to avoid crippling the executive branch's powers. The Kentucky Supreme Court wisely refused to apply the inseverability clause and held that the clause "unconstitutionally limit[ed] and interfer[ed] with the governor's mandated duties." Thus, legislatures are free to construct a legislative compromise through inseverability clauses provided they do not attempt to force courts to fashion unconstitutional holdings.

B. An Inseverability Canon

In order to prevent courts from undermining the legislative compromises that are sealed by inseverability clauses, this Comment calls for a new interpretive canon for inseverability clauses.

1. A clear statement rule.

The proposed rule would function like a clear statement rule.

Clear statement rules are generally defined by polarities. On the one hand, there is a presumption that cannot be overcome unless the legislature has provided a clear statement otherwise. On the other hand, a clear statement rule must also define what statutory language would be sufficient to constitute a “clear statement” to overcome the court’s presumption. For example, in *Atascadero State Hospital v. Scanlon*, the Court articulated a clear statement rule for congressional abrogation of states’ Eleventh Amendment immunity from suit in federal courts. The Court held that, when the statutory language is ambiguous as to abrogation, it will not attempt to divine whether Congress intended to abrogate. The presumption of immunity created a “requirement . . . that Congress unequivocally express its intention to abrogate . . . by making its intention unmistakably clear in the language of the statute.”

The codified statutory construction rules in the Indiana Code, for example, illustrate how such a presumption would work. The rule presumes severability regardless of whether a severability clause is included in the statute. However, once the legislature has included an inseverability clause, a clear statement of legislative intent has been provided and the courts must therefore defer to the unambiguous language in the clear statement. Such a rule would prevent courts from second-guessing inseverability clauses. The proposed rule recognizes that the inclusion of an inseverability clause is a deliberate act of the legislature to enforce a legislative compromise and to ensure that the provision and the remainder of the statute operate in tandem.

There is one modification, however, from the clear statement model. Absent a clear statement in an inseverability clause, the default rule is not severability but rather a presumption of severability. The classic clear statement rule contains a default rule that can only be overcome by a clear statement. The default in the proposed rule for inseverability clauses, however, does not limit findings of inseverability to the presence of inseverability clauses. Whether or not the statute contains a severability clause, the presumption of severability can be overcome by legislative history or statutory structure indicating that the legislative intent was for inseverability. An inseverability clause, by contrast, provides a clear statement that unmistakably requires courts to invalidate the statute’s remainder.

2. A statutory device.

As with substantive canons, courts often choose to interpret and apply particular statutory devices in a consistent manner. Courts will often apply time limitations and deadlines, for example, according to the statute’s strict plain meaning. In *United States v. Locke*, the statutory deadline for a mining rights application was “prior to

December 31,” even though similar deadlines generally extended to the end of the year with language such as “on or before December 31.” The Supreme Court read the statute literally and held that an application filed on December 31 was too late. This can be read as a rule of strict construction for dates and deadlines included in statutes. As Justice Marshall wrote, “[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.”

Thus, while the severability clause canon examines legislative intent in spite of the clause’s language, the canon for reading inseverability clauses should read the clauses strictly according to their plain meaning—in short, the inseverability clauses should be dispositive. To paraphrase Justice Marshall, if the inseverability clause is to have any content, its plain meaning must be applied.

This raises the potential, however, of an absurd result where an inseverability clause is activated by a very minor holding of invalidity. In *Rebaldo v. Cuomo*, for example, an amendment to New York’s Public Health Law prohibited New York’s public hospitals from charging any of the insurance carriers less than a specified rate. The law contained an inseverability clause that invalidated the entire statute if any payor was charged below the specified rate. The clause was intended to restrain the major payors like Medicare, Medicaid, and Blue Cross from obtaining cheaper rates. However, the court noted that “a literal construction of the language would lead to the absurd result that ‘a single uninsured patient . . . would invalidate the statute’” if that person paid a hospital bill below the specified rate. Although the *Rebaldo* court decided the case on other grounds, the inexpertly drafted inseverability clause might have led to an absurd result.

However, as the Court in *Locke* noted, it is often necessary to let some seemingly harsh results stand in order to preserve the power of inseverability clauses generally. Although courts are often reluctant to enforce what appear to be absurd results, by generating a rule that strictly applies the plain meaning of inseverability clauses, courts will force legislatures to draft the clauses with greater precision. As Justice Scalia wrote, “we have an obligation to conduct our exegesis in a fashion which fosters [the] democratic process.” By applying the plain meaning, courts are not only forcing legislatures to craft inseverability clauses with greater care, they are also providing legislatures with effective tools for passing legislation by creating durable compromises.

Conclusion

Applying the severability clause analysis to inseverability clauses

fails to address the distinct nature of inseverability clauses. This Comment demonstrates that the dynamic in inseverability clauses is different from that of severability clauses and calls on courts to apply the strict plain meaning of inseverability clauses. The presence of an inseverability clause evidences a legislative compromise and a deliberate attempt by the statute's drafters to inseverably link statutory provisions. An exploration by courts of the legislative intent behind an inseverability clause will necessarily undermine the clause's ability to enforce legislative compromise. By deferring to the plain meaning of inseverability clauses, courts will encourage the legislative process by preserving an effective tool for enforcing legislative deals.

VI. SEVERABILITY¹

§ 44A:16 Severability

When a court holds a provision of a statute unconstitutional, a question remains regarding the validity of the remainder of the statute. The court may find that the unconstitutional provision may be severed from the statute and leave the remainder of the statute in effect. Alternatively, the court may hold that the unconstitutional provision cannot be severed and invalidate the entire statute.

In this Article, attorney John Nagle argues that the jurisprudence surrounding the issue of severability is confusing and inconsistent. After explaining the concept of severability and its ramifications for statutes, Mr. Nagle traces the development of the current judicial test for determining when a statute should be found severable. The effect of severability clauses—statutory provisions directing courts to leave the remainder of the statute in effect in the event a provision is found unconstitutional—is also discussed; Mr. Nagle finds that such clauses do not necessarily cause a court to reach a particular result. Mr. Nagle then examines the question of legislative intent in the context of severability. He concludes that courts have departed from established methods of determining legislative intent, opting instead to attempt to answer the hypothetical question whether the legislature would have chosen to enact the remaining parts of the statute without the unconstitutional provision.

Because the current jurisprudence of severability is unsettled, Mr. Nagle asserts that courts should follow several general principles regarding severability. First, courts should apply a plain meaning rule to severability clauses, so that a statute containing

¹By John Copeland Nagle, B.A. 1982, Indiana University; J.D. 1986, University of Michigan Law School. Copyright 1993 by the North Carolina Law Review Association. Reprinted with permission from 72 N.C.L. Rev. 203 (1993) Footnotes omitted.

such a clause will automatically be considered severable. Second, when a statute does not contain a severability clause, the courts should look to the history, purpose, and structure of the statute to ascertain legislative intent. Finally, to assist in this inquiry Mr. Nagle advocates the creation of a legislatively-enacted clear statement rule requiring that courts consider a statute severable when a statute is silent on the issue of severability.

I. INTRODUCTION

Severability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional. The question that severability poses is easily stated: If part of a statute is unconstitutional, does the rest of the statute remain in effect? The question is also ubiquitous. It can arise any time part of a statute or a particular application of a statute is held unconstitutional. Moreover, the answer can have profound consequences. Concluding that statutory provisions are severable presents the danger of leaving in effect statutory provisions that the legislature would have never enacted alone. Alternatively, a holding of nonseverability can mean, for example, that an entire appropriations statute or sweeping reform legislation falls because of a single unconstitutional provision.

Yet severability is often overlooked. The severability test currently used by the Supreme Court was first stated in 1932, and the seminal article on severability was written in 1937. Fifty-one years after the test was first enunciated, *Immigration and Naturalization Service v. Chadha* revived interest in severability when the Court held that an unconstitutional legislative veto over executive branch deportation decisions was severable from the deportation power delegated to the executive branch. That decision provoked a number of critical discussions of the test for determining severability and its application to the nearly two hundred other statutes that contained legislative vetoes. Four years later, the Court had an opportunity to answer its critics in *Alaska Airlines v. Brock*, in which the severability of the legislative veto in the Airline Deregulation Act of 1978 was the only issue before the Court. A unanimous Court responded by keeping the same basic test and holding another legislative veto severable.

Criticism of the Court's approach persists. The problem, as one court recently put it, is that "[t]he test for severability has been stated often but rarely explained." Thus, while severability is noncontroversial in many cases because almost any test—including the *Alaska Airlines* test—would produce the same result, hard cases illuminate the doctrinal inadequacy of *Alaska Airlines*. Would unconstitutional restrictions on public funding of art. be severable from the funding itself? Is the unconstitutional legislative veto sev-

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MEMORANDUM

April 28, 2011

SUBJECT: Line Item Veto

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Doug Gardner
Director
and
Pamela Finley
Revisor of Statutes

You have asked for a discussion of cases from other jurisdictions on the item veto, including those cited by the attorney general, as well as the meaning of "item" and "strike or reduce" as used in art. II, sec. 15, Constitution of the State of Alaska.

I. The Meaning of "Item".

The second sentence of art. II, sec. 15 of the state constitution reads as follows:

He [the Governor] may, by veto, strike or reduce items in appropriation bills.

In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001) (hereinafter "*Knowles*"), the court defined "item" as "a sum of money dedicated to a particular purpose":

Based on the language of our constitution, the historical purposes of the item veto, and the pertinent public policy considerations, we now define "item" as "a sum of money dedicated to a particular purpose."

Knowles, 21 P.3d at 371. The court noted that the "word 'item' conveys a notion of unity between two essential elements of an appropriation: the amount and the purpose." *Knowles*, 21 P.3d at 372. Although the court did not explicitly discuss the issue, footnote 28 in *Knowles* suggests that an item could have several purposes:

Consider, for example, the [undesirable] effect of striking from an appropriation's descriptive language a negative, a limiting date for expending the money, or one of several purposes. (emphasis added)

However, it appears from the court's discussion that an "item" can only have one amount. The court stated that "an item reduction must have a quantitative effect, implying that reduction must affect the appropriation's amount." *Knowles* at 372. In addition, two of the cases the court cited with approval indicate that an item may only have one amount: *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 195 (Minn. 1991) (defining "item of appropriation" as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose") and *Commonwealth v. Dodson*, 11 S.E.2d 120, 127 (Va. 1940) (defining "item" as "an indivisible sum of money dedicated to a stated purpose"). Cited in *Knowles*, 21 P.3d at 371, footnote 19. This is also the definition that governors in Alaska have used in exercising the item veto by vetoing allocations that have dollar amounts attached to them and reducing the appropriation by the amount of the allocation.¹

Based on the definition in *Knowles*, an item could be any one of the following:

- "Four million for roads in Anchorage"
- "Four million for roads X, Y, and Z in Anchorage"
- "One million for road X in Anchorage"
- "One million for road Y in Anchorage"
- "Two million for road Z in Anchorage"

The last three items give the legislature more control over the specific projects, but can be vetoed individually as items. The first two are more general, but the governor's item veto would be limited to striking the entire line, or reducing the four million.

II. The Meaning of "Strike or Reduce."

Knowles makes it clear that "reduce" refers to reducing the amount of the appropriation, not changing the purpose:

Reduction implies diminution. This suggests that an item reduction must have quantitative effect, implying that reduction must affect the appropriation's amount.

Knowles, 21 P.3d at 372. The court went on to explain that "strike" is just a greater version of reduce:

Reducing an item appears to be a lesser form of striking an item. This implies that these two forms are qualitatively similar and have equivalent

¹ See also *In Re Advisory Opinion to the Governor*, 239 So.2d 1, 6 and 22 - 23 (Fla. 1970) (Governor's constitutional power to veto "any specific appropriation" applied to lines consisting of purpose and amount, even though grouped together.)

effects, i.e., they diminish the amount appropriated. Reducing an item lessens its amount; striking it lessens its amount to nothing.

Knowles, 21 P.3d at 372 - 373. The court in *Knowles* was quite clear that the power to "strike or reduce" was not the power to edit the purpose or descriptive language of an appropriation:

The item veto permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve. . . .

. . . [I]t [the item veto] was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power permitting appropriations the legislature never enacted. . . .

Altering the purpose of the appropriation by striking descriptive words interferes with that unity [between the amount and purpose of the appropriation] because the result is no longer the item the legislature enacted.

Knowles, 21 P.3d at 372.

These purposes [of the item veto] seem most directed at the amount of an appropriation. Permitting a governor to strike descriptive language would not limit expenditures or help balance a budget.

Knowles, 21 P.3d at 373.

In short, "strike or reduce" means to eliminate the entire item or reduce the dollar amount of the item. Other deletions are not allowed.

III. Case Law from Other Jurisdictions.

A. The Attorney General's Opinion.

Alaska Attorney General John Burns, in a memorandum to Chief of Staff of the Office of Governor Sean Parnell, cited *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), and *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919, (Ky. 1984) respectively, for the proposition that the contingency language in section 36 of CSSB 46(FIN), and the nonseverability clause in section 37 of CSSB 46(FIN), violate the separation of powers in art. II, sec. 13 (legislature has the power of appropriation), and art. II, sec. 15 (governor has line item veto authority). Neither case is fully supportive of the attorney general's position that either the contingency language of sec. 36, or the

nonseverability clause in sec. 37, are separation of powers violations. Both cases require discussion.

In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriation bill, that provided for road construction projects totaling \$12 million. Of the total \$12 million, \$7 million was state matching funds for federally aided interstate highway projects, and \$5 million was for non-federally funded highway projects. *Karcher*, 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of \$3 million for that project, or the \$7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of \$5 million for non-federally funded projects, or the total of \$12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or in part any such item or items while approving other portions of the bill." *Id.* at 489 citing art. V, sec. 1 para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

The attorney general also cites *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919, (Ky. 1984), arguing that this case supports the proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further

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regulations. *Id.* at 919. The court found that the nonseverability clause so interfered and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown*, that the attorney general cited to in his memorandum.

Reading further in *Brown*, there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court, was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* The Supreme Court of Kentucky held that since the "adoption of the state budget" is within the purview of the legislature, that the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation, is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriation bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock*, 480 U.S. 678, 680 (1987), where the Court held:

Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id. at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock*, and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable evidence of the legislature's intent, that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

B. Cases from Other Jurisdictions.

Because *Knowles* establishes both the test for violations of the Confinement Clause and the definition of "item", we have concentrated our research in the limited time available on cases where a veto of one appropriation affected another or affected the governor's power. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoes budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

[The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have discussed, the matters vetoed were qualifications rather than items. . . . Thus the executive power was not invaded.

Rush v. Ray, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must

Senator Hollis French

April 28, 2011

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be stated in the appropriation bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

If you have any questions about the above, please contact us.

DDG:PF:ljlw:plm

11-281.ljlw

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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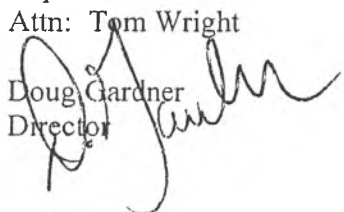
MEMORANDUM

April 22, 2011

SUBJECT: Contingency Language in CSSB 46(FIN)
(Work Order No. 27-GS1740\X)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Doug Gardner
Director



You have asked for: (1) a brief analysis of the function of secs. 39 and 40 of CSSB 46(FIN), and (2) the constitutionality of the contingency language found in sec. 39¹ of the draft CSSB 46(FIN).

1. The Function of Secs. 39 and 40 of CSSB 46 (FIN); What These Sections Do.

Section 39 of the draft CSSB 46(FIN) (27-GS1740\X) provides two contingencies. The first, in subsection (a), makes each of the appropriations in sec. 7 of the Act contingent on enactment of every appropriation in sec. 7, without reduction. In other words, if the governor were to veto all or a portion of any line item in sec. 7, the contingency would not be met, and none of the appropriations in the section would take effect.

The contingency in sec. 39(b) makes the appropriations in sec. 4 dependent on the FY 2012 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on October 1, 2011. If the price does not exceed that measure, the appropriations in sec. 4 would not take effect.

Section 40 of the draft CS relates to severability of the contingency provisions in sec. 39. Sec. 40(a) provides that if the contingency in sec. 39(a) is held invalid, the contingency is not severable from the appropriations made in sec. 7 of the Act. The function of this provision is to indicate the legislature's intent that if sec. 39(a) is invalidated, the appropriations made in sec. 7 not stand. In other words, if the contingency fails on

¹ In full, sec. 39 reads:

Sec. 39. CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation made in sec. 7 of this Act.

(b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on October 1, 2011.

constitutional grounds, it is the intent of the legislature that the appropriation fail as well. The severability provision in sec. 40(b) has the same effect on secs. 39(b) and sec. 4.

2. The Constitutionality of Governor's Veto Power Relating to Secs. 39 and 40.

a. Sec. 39(a) Contingency Language and Confinement Clause.

The contingency language found in sec. 39(a) of the capital budget bill does not prohibit the governor from vetoing items in sec. 7 of the bill. Instead, it provides that a veto by the governor of an item in sec. 7 of the bill will have the secondary result of deleting all projects found in sec. 7 from the bill. The governor is still free to exercise his veto regarding sec. 7.

Whether a court would uphold the validity of the contingency language found in sec. 39(a) is a question I cannot answer, as this is a scenario that has not arisen in the past. The contingency found in sec. 39(a) could be held unconstitutional because of a separation of powers issue related to the governor's veto powers, but I am not completely convinced that a court would rule the contingency language invalid. In fact, the veto power of the governor can be characterized as a legislative power (appropriating the state's money) that was conferred upon the governor in the state constitution. Likewise, the legislature, in art. III, secs. 25 and 26 of the state constitution, was bestowed an executive power in having the power to confirm certain appointees by the governor. Regarding the ability to confirm appointees, the Alaska Supreme Court held in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature's power to confirm should be limited to the specific instances listed in the constitution and not broadly construed because the legislature was exercising what was essentially an executive power. Bradner, 553 P.2d at 7 - 8. One could look at the Bradner case in light of the governor's line item veto power and argue that the line item veto power -- a legislative function in that it relates to appropriations -- should not be broadly construed, but viewed in more limited terms. Thus, the contingency of sec. 39(a) could be viewed as the legislature taking full advantage of its power of appropriation in choosing a statewide approach to funding energy projects, and that the governor still retains his strictly construed power to veto all of sec. 7 of the bill.

Of course, a court may hold that the contingency language found in sec. 39(a) of the bill does violate the governor's power of line item veto, but I do not believe that it is an open-and-shut case. There are certainly arguments to be made on both sides. In essence, a court's decision may come down to whether or not the projects in sec. 7 are sufficiently tied to each other that the contingency is reasonable.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the intent language found in sec. 7 of the bill and the contingency in sec. 39(a), in Knowles v. Legislative Council, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law

or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Based on the statutory energy policy found in AS 44.99.115, the legislature intends that its interpretation of the policy be followed in funding projects in all areas of the state. The intent language does not administer a program, as each project may still be carried out in accordance with existing law. For example, the Alaska Energy Authority is not being given any further guidelines on how to use the potential \$5,000,000 for "bulk fuel upgrades." I would certainly say that this intent language does not amend existing law or extend beyond the life of the appropriation. Finally, the intent language is likely germane, as it is tying all of the projects in sec. 7 of the bill to a state energy policy that it is attempting to follow.

b. Contingency Language in Sec. 39(b).

As for the contingency language found in sec. 39(b) of the bill, I feel strongly that this is a valid contingency. As recently as 2006, the legislature has passed a capital budget bill containing contingency language that tied certain appropriations to the price of petroleum. Found at sec. 64(c), ch. 82, SLA 2006, the contingency stated:

The appropriation made by sec. 20(j) of this Act is contingent on an increase in petroleum tax revenue, as estimated by the Department of Revenue, due to the state for the months of April, May, and June 2006 in an amount equal to or greater than the appropriation made by sec. 20(j) of this Act.

While this contingency did not name an exact price, it is quite similar to the contingency found in sec. 39(b). The legislature has simply set aside a certain list of projects that it does not believe should be funded unless the state generates a certain amount of revenue in the first three months of fiscal year 2012. If the price of Alaska North Slope crude oil reaches a certain level, then the legislature believes that money may be spent on the projects listed in sec. 4. This appears to me to be a fiscal policy decision -- that money should only be spent on certain projects if the state receives sufficient funds based on the price of oil.

c. Nonseverability Clause in Sec. 40.²

Like the contingency language in sec. 39, the nonseverability clause in sec. 40 of the bill is not an "item" subject to the governor's line item veto power in art. II, sec. 15. See

² You requested an analysis of the non-severability clause in sec. 40 of a version of the bill that was produced for another client. Since you had a copy of it by permission of the other client as I understand it, and faxed us the two pages with sec. 39 and sec. 40 from the other client's version on 4-21-11, we will provide an opinion for you regarding sec. 40 of the bill on that basis.

generally, Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001). So the governor, in my view, may not veto the nonseverability language itself in sec. 40 of CSSB 46(FIN). The question then becomes, if the governor ignores the contingency language in sec. 39(a), which is the section of the bill that is your focus, and vetoes any of the selected energy projects or "items" in sec. 39(a), or if the court declares that contingency language invalid, will a court give effect to the legislature's "all or nothing" intent by upholding the non-severability clause in sec. 40 of the bill.

The general rule is that provisions of a bill are presumed to be severable in the event that a portion of the bill is found to be unconstitutional. The legislature has provided by statute that all bills are to be construed as if they contained a severability clause. AS 01.10.030. The Alaska Supreme Court has found that this statute expresses legislative intent in favor of severability. See generally, Williams v. Zobel, 619 P.2d 422 (Alaska 1980). The inclusion of a specific severability clause in a bill creates an even stronger, but not conclusive, presumption of severability. Conversely, the inclusion of a nonseverability clause demonstrates the legislature's intent that if the nonseverable section of the bill identified by the legislature is found unconstitutional or otherwise invalid, the legislature's intent was for the remainder not to stand. The ultimate factor in determining whether an invalid provision of a bill is severable is the intent of the legislature. If it is clear that the legislature intended a bill or a portion of a bill to take effect as passed by the legislature or not at all, then that bill or provision would be found to be nonseverable. See, Lynden Trans., Inc v. State, 532 P.2d 700 (Alaska 1975).

It is always hard to predict how a court would interpret the non-severability clause in sec. 40. However, there is a good argument a court would view the nonseverability language in sec. 40 as a strong message of intent from the legislature that, if the legislature was constitutionally unable to use the contingency language in sec. 39(a) to fund "all or none" of the identified energy projects, the legislature did not want any of the appropriations to be effective.

WORK DRAFT

WORK DRAFT

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1 expenses for the fiscal year ending June 30, 2012.

2 (c) The unexpended and unobligated balance, not to exceed \$450,000, of the
3 appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 33 (Legislative Council -
4 \$36,425,700) is reappropriated to the Legislative Council to conduct for the legislature an
5 independent third-party scientific and multidisciplinary study of statutory and permitting
6 requirements and processes related to large mine development in the state for the fiscal years
7 ending June 30, 2011, June 30, 2012, June 30, 2013, and June 30, 2014.

8 (d) The unexpended and unobligated balance, after the appropriation made in (c) of
9 this section, estimated to be \$2,230,000, of the appropriation made in sec. 1, ch. 41, SLA
10 2010, page 46, line 33 (Legislative Council - \$36,425,700) is reappropriated to the Legislative
11 Council to begin scoping, planning, and implementing a system-wide redesign of the Bill
12 Action Status and Inquiry System (BASIS), an integrated document management system, and
13 a consolidation of the legislature's internal and external websites.

14 (e) The unexpended and unobligated balance, estimated to be \$8,275,000, of the
15 appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 27 (Budget and Audit
16 Committee - \$18,911,100) is reappropriated to the Legislative Budget and Audit Committee
17 to begin scoping, planning, and implementing an enhanced content management platform to
18 integrate appropriation data, tracking, and reporting with the legislature's Bill Action Status
19 and Inquiry System (BASIS) and for other purposes of the committee.

20 * Sec. 38. STATUTORY BUDGET RESERVE FUND. (a) The sum of \$300,000,000 is
21 appropriated from the general fund to the statutory budget reserve fund (AS 37.05.540).

22 (b) The sum of \$200,000,000 is appropriated from the general fund to the statutory
23 budget reserve fund (AS 37.05.540).

24 * Sec. 39. CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is
25 contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular
26 Session and enactment into law of every appropriation, without reduction of any
27 appropriation, made in sec. 7 of this Act.

28 (b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012
29 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on
30 October 1, 2011.

31 * Sec. 40. NONSEVERABILITY. (a) Notwithstanding AS 01.10.030, if the contingency

WORK DRAFT

WORK DRAFT

27-GS1740\X

1 found in sec. 39(a) of this Act is held to be invalid, then the contingency is not severable from
2 the appropriations made in sec. 7 of this Act.

3 (b) Notwithstanding AS 01.10.030, if the contingency found in sec. 39(b) of this Act
4 is held to be invalid, then the contingency is not severable from the appropriations made in
5 sec. 4 of this Act.

6 * Sec. 41. LAPSE. (a) The appropriations made in secs. 17, 18, 19(1), and 38 of this Act are
7 for the capitalization of funds and do not lapse.

8 (b) The appropriations made in secs. 20, 22, 25(a), 26(c), 26(e), 26(g), 27, 29, 30(c),
9 31(b), 31(c), 32(c), 32(d), 37(d), and 37(e) of this Act are for capital projects and lapse under
10 AS 37.25.020.

11 (c) A grant awarded in this Act to a named recipient under AS 37.05.316 is for a
12 capital project, unless specifically identified in this Act as an operating grant, and lapses
13 under AS 37.25.020 unless otherwise stated or designated for a fiscal year.

14 (d) The appropriation made in sec. 21 of this Act lapses June 30, 2015.

15 * Sec. 42. Sections 22 - 37 and 38(a) of this Act take effect June 30, 2011.

16 * Sec. 43. Except as provided in sec. 42 of this Act, this Act takes effect July 1, 2011.

MEMORANDUM

April 21, 2011

SUBJECT: Contingency Language in Capital Budget
TO: Representative Les Gara
FROM: Doug Gardner
Director

You have asked for a brief analysis of the constitutionality of the contingency language found in sec. 39¹ of the draft CSSB 46(FIN), especially focusing on the concept that substantive law may not be in an appropriations bill.

1. The Governor's Veto Power Relating to Sec. 39(a). The contingency language found in sec. 39(a) of the capital budget bill does not prohibit the governor from vetoing items in sec. 7 of the bill. Instead, it provides that a veto by the governor of an item in sec. 7 of the bill will have the secondary result of deleting all projects found in sec. 7 from the bill. The governor is still free to exercise his veto regarding sec. 7.

Whether a court would uphold the validity of the contingency language found in sec. 39(a) is a question I cannot answer, as this is a scenario that has not arisen in the past. The contingency found in sec. 39(a) could be held unconstitutional because of a separation of powers issue related to the governor's veto powers, but I am not completely convinced that a court would rule the contingency language invalid. In fact, the veto power of the governor can be characterized as a legislative power (appropriating the state's money) that was conferred upon the governor in the state constitution. Likewise, the legislature, in art. III, secs. 25 and 26 of the state constitution, was bestowed an executive power in having the power to confirm certain appointees by the governor. Regarding the ability to confirm appointees, the Alaska Supreme Court held in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature's power to confirm should be

¹ In full, sec. 39 reads:

Sec. 39. CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation made in sec. 7 of this Act.

(b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on October 1, 2011.

limited to the specific instances listed in the constitution and not broadly construed because the legislature was exercising what was essentially an executive power. Bradner, 553 P.2d at 7 - 8. One could look at the Bradner case in light of the governor's line item veto power and argue that the line item veto power -- a legislative function in that it relates to appropriations -- should not be broadly construed, but viewed in more limited terms. Thus, the contingency of sec. 39(a) could be viewed as the legislature taking full advantage of its power of appropriation in choosing a statewide approach to funding energy projects, and that the governor still retains his strictly construed power to veto all of sec. 7 of the bill.

Of course, a court may hold that the contingency language found sec. 39(a) of the bill does violate the governor's power of line item veto, but I do not believe that it is an open-and-shut case. There are certainly arguments to be made on both sides. In essence, a court's decision may come down to whether or not the projects in sec. 7 are sufficiently tied to each other that the contingency is reasonable.

2. The Confinement Clause Relating to Sec. 39(a). As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the intent language found in sec. 7 of the bill and the contingency in sec. 39(a), in Knowles v. Legislative Council, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Based on the statutory energy policy found in AS 44.99.115, the legislature intends that its interpretation of the policy be followed in funding projects in all areas of the state. The intent language does not administer a program, as each project may still be carried out in accordance with existing law. For example, the Alaska Energy Authority is not being given any further guidelines on how to use the potential \$5,000,000 for "bulk fuel upgrades." I would certainly say that this intent language does not amend existing law or extend beyond the life of the appropriation. Finally, the intent language is likely germane, as it is tying all of the projects in sec. 7 of the bill to a state energy policy that it is attempting to follow.

3. Section 39(b). As for the contingency language found in sec. 39(b) of the bill, I feel strongly that this is a valid contingency. As recently as 2006, the legislature has passed a

capital budget bill containing contingency language that tied certain appropriations to the price of petroleum. Found at sec. 64(c), ch. 82, SLA 2006, the contingency stated:

The appropriation made by sec. 20(j) of this Act is contingent on an increase in petroleum tax revenue, as estimated by the Department of Revenue, due to the state for the months of April, May, and June 2006 in an amount equal to or greater than the appropriation made by sec. 20(j) of this Act.

While this contingency did not name an exact price, it is quite similar to the contingency found in sec. 39(b). The legislature has simply set aside a certain list of projects that it does not believe should be funded unless the state generates a certain amount of revenue in the first three months of fiscal year 2012. If the price of Alaska North Slope crude oil reaches a certain level, then the legislature believes that money may be spent on the projects listed in sec. 4. This appears to me to be a fiscal policy decision -- that money should only be spent on certain projects if the state receives sufficient funds based on the price of oil.

If I may be of further assistance, please advise.

DDG:plm
11-266.plm

James Sullivan

From: Carolyn Kuckertz
Sent: Thursday, April 28, 2011 1:40 PM
To: pressreleasedistribution
Subject: Transcript and Links from Senator Paskvan's Speech this morning on the Senate Floor

Good Afternoon Everyone!

Following is a transcript of Senator Paskvan's speech this morning on the constitutionality of the contingency language included right now in the proposed Capital Budget-

If you would rather listen or watch: http://gavelalaska.org/media/?media_id=SFLS110428A (go to about 9:20 in)

Here are the links to the Alaska Supreme Court Opinions that Senator Paskvan references during his speech:

2001 Opinion: <http://www.touchngo.com/sp/html/sp-5395.htm>

2004 Opinion: <http://www.touchngo.com/sp/html/sp-5768.htm>

Thank you, Mr. President. In the last several days, there's been discussion about the building and I think probably about the state of Alaska as to the constitutionality of the Senate's efforts to advance an energy package. As someone who has worked in the legal system myself for about 30 years and have a tremendous respect for Alaska's constitution, I would hope to be able to offer a few comments about that.

Kind of as an introduction to that- We have three separate branches of government. The Legislative Branch- its function is to adopt policy and appropriate money to advance its policies. The Executive function is to implement that legislative policy and enforce those policies. The Judicial Branch, in this context, may be called upon to determine the constitutional boundaries between the Executive Branch and the Legislative Branch. This is where the independence of the judiciary is absolutely critical when it comes to its constitutional obligation of clarifying the application of the Alaska constitution.

As part of that, the Senate is advancing an energy policy and this plan is a statewide energy policy that brings, I believe, all Alaskans forward. The thought is that the public's highest priority right now is the cost of energy in Alaska and how, across this entire state, the Legislature can address the high of cost of energy. The Senate is advancing in its statewide energy plan, as an item, the generation and distribution of energy all across this state.

Then the question arises and has been discussed, how do we protect all Alaskans? We do not want to leave any region out. We want to protect Alaskans by saying we are all in this together. We want to work towards a solution of the problem of the high cost of energy with the recognition that all Alaskans across the state should be part of that solution. To advance this worthy goal of keeping Alaskans together, there is language which manifests the intent, at least on the Senate side, of keeping all Alaskans together.

Are there constitutional issues which are raised? Unquestionably the answer to that is: yes, there are constitutional issues which are raised. And I say in that regard that Alaska is a very young state. There are not cases. In other words, there's a not case law in Alaska that applies to every circumstance that may apply when there may be tensions between the Executive Branch and the Legislative Branch.

We do not know exactly who shall prevail in a circumstance such as this. But I emphatically state, the question is not about who is right or who is wrong, who should win or who should be the loser, the question is, What is the constitutional answer to these questions? That is what I believe is the goal of what we need to address. What is constitutional answer? Again, the three branches of government are set up exactly for these types of circumstances.

There are standards that can be found in some of our case law that addresses some of the points that the court system may be called upon to analyze when they look at the circumstance of the language that is currently in an appropriation bill. Mr. President, if I could read from select portions of this? (Senate President Stevens: "Without objection, Please Proceed.")

Again, Mr. President, there's a 2001 case that's advanced by, or an opinion of, the Alaska Supreme Court. It sets apart a standard which the courts would look to in determining whether the language within this appropriation bill should prevail or not prevail in the end. And it indicates quote, "The qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent." I do not think we violate that test Mr. President. Next, it says "It must not administer the program of expenditures." Mr. President, the language in this appropriations bill does not administer any of the monies in this program. Next is says, "It must not enact law or amend existing law." This language does neither of those. In other words, it complies with at third component of the test. And, it must not enact or amend existing law. This language does not do that whatsoever. Finally in this five part test, "It must not extend beyond the life of the appropriation and the language must be germane." That is appropriate to an appropriations bill. I submit that it does satisfy all of this test that is set forth in the 2001 opinion.

So looking to that test, the question is, is what standard will the Alaska Supreme Court apply when looking at the tension between the Executive and the Legislative Branch. In addressing these particular types of cases, the Alaska Supreme Court says, and I again I quote, "We assume that an act of the Legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment. Doubtful cases should be resolved in favor of constitutionality."

The Supreme Court several years after that 2001 opinion issued another opinion and it included in there a very interesting sentence that I would like to read to the body today. In addressing again the tensions between the Executive Branch and the Legislative Branch, the Supreme Court in 2004 looked at the language used by the drafters of the Constitution, looked to the minutes of the discussions as to what was being discussed at that time. This is what in 2004 the Alaska Supreme Court said: "The minutes indicate that the delegates never intended the governor's article 2 appropriations veto power to apply to anything other than monetary appropriations." End quote.

Mr. President, in conclusion, I think that there is a solid foundation for the Senate to advance this language as part of a statewide energy plan. It is part of a cohesive package to not only bring all Alaskans together, but to

keep all Alaskans together. The question is, is the extent of the constitutionality of the governor's veto power? It is not well established. In other words, the governor does have risk of constitutional significance and I believe that it's likely that the veto power will be strictly construed in these circumstances. Second, the Senate as a separate branch of government is legitimately asserting its policy and appropriations power. But it also has risk. Again, because we do not have case law to say precisely what the parameters of the Legislative power of policy making and appropriations is in the precise circumstance. So both the Executive Branch and the Legislative Branch do have some risk in this circumstance. But again we are under the standard that in doubtful cases, the Supreme Court will look at that and say 'even under doubtful cases the presumption shall be constitutionality as to the Legislative activity.'

I think the public should understand that there is no risk to Alaska's constitution itself. There is no changing of the constitution that is sought here whatsoever. I do stand in awe to think of the drafters of the Constitution, now more than 50 years ago, that set up the three branches of government at that time to address exactly the circumstances such as this. I think we have a wonderful system that we work within. As a legislator, one of the 60 that are elected from around this state, I believe it is my constitutional job to advance the policy making and appropriation power that this separate branch of government has and I thank the body for listening.

Carolyn Kuckertz

Press Secretary

Senate Bipartisan Working Group

Desk: 907-465-3803

Mobile: 907-748-7714

Carolyn_Kuckertz@legis.state.ak.us

Carolyn Kuckertz

From: Carolyn Kuckertz
Sent: Wednesday, April 27, 2011 6:25 PM
To: pressreleasedistribution
Subject: Transcript of Senator Stevens Statement 4-27-2011

Here is a transcript of the statement Senator Stevens made earlier today about where the Senate stands in talks with the House and Governor –

If you would rather watch a video clip: <http://www.youtube.com/user/AlaskaSenateMajority#p/u/0/6PBQsAbXLGw>

If you would rather listen in: http://aksenate.org/stevens/042711_stevens_statement.wav

As you know, this has been a contentious time for all of us. I wanted to let you know that myself and Senator Meyer met with the House Majority Caucus earlier today. I just wanted to clear the air. That's an unusual thing for two Senators to go into a room full of angry representatives, but we came out alive. So, that was an interesting experience. We told them where we are and what our concerns are.

As you know, the big problem is the contingency language. That's extremely important to the Senate and, as you know, of less importance to the House. What I think the principle that we have to stand behind and are standing behind, is protecting Legislative priorities, both the House and the Senate, of trying to not leave the Legislature in a weaker position than it was when we arrived and to recognize the importance of the Legislature in the process of Alaskan government and its appropriating power.

One of the major issues that lends to where we are is the governor's oil tax bill, House Bill 110 and the governor's comments. As you know, the governor at one point implied there might be repercussions for those who opposed his oil tax bill. As you know, the Senate has had serious concerns about it and continues to have serious concerns about it. Not really certain that that's the best way for the state to go. We want to have more information. We want to look into it more. We want to get more facts and figures on it before we are ready to agree to a \$2 billion reduction in state funding from oil taxes. So that was sort of an issue that poisoned things to start with and hasn't really let up much since.

I did want to let you know that this has been a negotiating process with the House and we have made numerous concessions along the way. In any negotiation, what you expect to do is you make a proposal and if the other side doesn't like it, they make a counter proposal. That has not occurred at all in this process. Every time we have made a concession, the House has said no and with no further suggestions on their part. So, we've continued to make concessions in order to protect that issue of that contingency language. I want to go through those concessions with you so that you understand how we've gotten to where we are. Senator Stedman or Senator Hoffman, leap in here if you have any further issues on any of the concessions I'll mention very briefly, but they may want to expand on a little bit.

The first concession had to do with major school maintenance. We reduced the major school maintenance by \$200 million. We wanted to do all of the list that was out there, all of the schools that needed major maintenance and repairs around the state. At the request of the House, we reduced that by \$200 million. The second thing we did was reduce debt. We did agree to that. That was a matter of days passing between each and every one of these. The third one was the \$150 oil trigger. We took that off and that had to do with \$100 million of the governor's capital projects. When we took that off, it freed up that \$100 million. The fourth thing that we offered, and again no response, no counteroffer, was to water down the language of the energy proposals. That includes AEA, the Alaska Energy Authority and an agreement to vet all of those energy projects through the AEA and we agreed to go from a 100-percent match down to a 50-percent match. The fifth thing that we did, that just occurred recently here, is an offer to take several projects out of the list and put them in an appropriations bill on their own, so they wouldn't be on that list. The whole thing could be vetoed by the governor. That's the area of weatherization, rebate and alternative energy. We made that proposal- All three come off and be put into one appropriations bill on their own. About \$100 million, I believe. To sort of conclude my comments, I am meeting this evening with the governor at 5:30. I've been calling today wanting to meet with him and talk about the issue and he's agreed to meet with me at 5:30. At that time, my intention is to ask

the governor to come meet with the Senate Majority caucus sometime tomorrow at his convenience. I think it is important for the caucus to hear from the governor, that we've read his press release, from the governor his intentions as to the potential vetoes and he has said in his press release that there will not be repercussions and no one will be held, nobody's budget will be slashed because they happen to be opposed to the oil tax bill. I think folks need to hear that from the governor himself. So, I'm going to ask him, and it's not firm, I'm not sure he's going to accept, I think he should- to come down and meet with the caucus just to confirm to folks that that is in fact his position. Simple request on my part and I don't see any reason the governor would not be willing to do that. So, that's where we are.

Mark Gnad

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:44 PM
To: Mark Gnad
Subject: FW: Transcript of Senator French Speech this morning on the Senate Floor 4-26-2011

Gretchen Staff

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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 2:11 PM
To: pressreleasedistribution; keymedia
Subject: Transcript of Senator French Speech this morning on the Senate Floor 4-26-2011

Good Afternoon Everyone!

Here is a transcript of the speech Senator French made this morning on the Senate Floor about contingency language:

To listen instead: http://aksenate.org/french/042611_french.wav.

Thank you Mr. President. A lot of us are here in a Special Session making contingency plans. Some folks in the Senate would like to be off to Norway. Others would like to be bear hunting. We have family obligations. They've all been put on hold because we are here trying to sort out a difficult matter of important public policy. This is the ninth day of the special session.

At the heart of it, really what's keeping us here is some contingency language inside the Capital Budget that's causing many people concern. I haven't seen a lot of public debate about it. There's been different remarks made in different press conferences and so forth. But I thought I would go ahead and start one here and see what responses it might provoke and of what thoughts other people may have. At the heart of this matter in my belief is the law and the politics of contingencies. Now the law in this area is about the relevant power between two co-equal branches of government and how we share power between the governor's branch and the legislative branch. It's subtle. I'll discuss that a little more at length in a few minutes.

The politics, on the other hands, are not so subtle. The politics started with the governor's proposed oil tax bill and his threat to veto capital projects if the reduction in oil taxes did not pass. Now let's put aside the inverted logic of this assertion of his power. Once that idea was set loose, what happened? Our Finance Co-

Chair from Sitka began to think about how to react to it. First, he had to ask himself which projects in the Capital Budget are the most important. Two-- and having decided they were energy projects in conjunction with legislation we'd passed last year and in conjunction with our own caucus' emphasis on certain subjects, fixing the energy problem being the number one problem. Two, how can fund those energy projects around the state fairly if the governor is going to be swinging his veto axe?

The answer is in section seven of the Capital Budget. There are energy projects in that section. \$400 million worth of energy projects. Basic infrastructure like power line upgrades. There's \$100 million worth of power line upgrades in that Capital Budget. Stuff that AEA has been asking for years. Meat and potato type projects. This is not fancy, it's just what you do to build a strong state. \$100 million dollars worth of power line upgrades. There's energy projects for Soldotna, for Kotzebue, for Snettisham, for Lime Village, for Metlakatla, for Homer and for Fairbanks. In Fairbanks, there's \$3 million for wood stove conversions there. They've got a serious air problem. This helps fund a fix to that. There's money for the Susitna Hydro Project in there-for folks who are listening at home. There's home weatherization funding. There's energy rebate funding. This is an excellent package designed to move the state forward.

You know there's been some talk that these projects have not been vetted. Let me give you just one example of a project that has been. The Whitman Lake project in Ketchikan has a final project from FERC. I think that is about as vetted as you can get. So the co-chair from Sitka thinks, how do I protect these necessary projects? How do I protect them? And he thought up an excellent response to the problem. You weld all those projects into one, into one statewide energy package that does something for every single region in this state. E Pluribus Unum, Mr. President. Out of many, one. Out of many, one. That's what he did. The nation's motto. It's interesting, isn't it?

And he used contingency language in the Capital Budget that said if one is vetoed, they're all vetoed. It's the first time in the state's history this has been done exactly this way. First time ever in fifty years. The senator from Sitka, I think he thought up a better mousetrap. An interesting twist on an old device. I say a better mousetrap because it's a new and improved twist on something that we've tried to do on occasion in the past. We've tried in the past to use contingencies to constrain executive power.

The most well known instance comes from 1997. That year the Legislature, indeed the Senate Finance Committee, wrote a Capital Budget that had several very interesting contingencies. Then Senator Sean Parnell was a member of that Finance Committee. He voted for the bill. Indeed two years later when he was Co-Chair of the Senate Finance Committee, he said "I would never waive the Legislature's rights to include conditional language in an appropriations bill." He was sitting in the exact same seat that the Senator from Sitka is sitting in today when he said that. Remarkable, isn't it? But I do digress a bit.

The 1997 appropriations wound up in court. They wound up in a case and the case is great reading if you are a lawyer. It's 17 pages long and I have a copy of it here. I've read it three times. It's very subtle. It is subtle. It revolves around two constitutional provisions. They're both in Article 2, Section 13 and Section 15. And I brought my constitution with me today. Section 13 is simple: Every bill should be confined to one subject. We know that's called the Confinement Clause unless it is an appropriations bill or one codifying, revising, or rearranging existing laws. So we have an appropriations bill before us. That's section 13. Section 15

discusses vetoes. It says the governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. Strike or reduce items. That's what he does in appropriation bills.

In this case, in the '97 case, there was a bunch of language in there and he tried to veto the language and it turned out that language is not an item. Language is not an item. You cannot veto language in an appropriations bill. It took Justice Eastaugh four pages to define what an item is. It's a subtle decision and it takes a while to get through it. But you can't veto language in the appropriations bill. That's as clear as clear can be.

So what we do now is-- The Department of Law has looked at this I'm sure. I'm sure they've looked at this case. I'm sure they've looked at it carefully. I'm sure they've told the governor he can't veto this language. I'm sure the Department of Law is concerned very deeply about what we're doing here. I'm thinking they know we are on to something.

Now, it's interesting that in these contests with the governor, the kind of contest we are engaged in now, we start out with the presumption of constitutionality. The things we do here on this Floor, the bills we pass are all presumed to be constitutional. It's presumed that we think hard, that we work hard and the acts we do are right and true to the constitution. The courts, when they review what we do in this body, will try to uphold our acts. The governor knows this as well.

Don't get me wrong, there are subtleties in the case from '97. It's titled Leg. Council versus Knowles. Both sides, as they read this case, will seize on little languages and sentences and try to support their own case. And though the budget passed in '97, this '97 case, the case was not decided for four years. It tells you that these things can drag out. And we shouldn't have to go there. We, this now, knowing this, knowing that these can be tangled issues shouldn't go there.

I've always been told that if you invent a better mousetrap, the world will beat a path to your door. The governor should be beating a path up to his old offices in the Senate Finance Committee. He should be talking to the co-chairs about which energy projects he supports and which he doesn't. Because it all comes back to those energy projects. It all comes back to building a statewide solution to the crisis the state is facing with respect to energy. He should be talking to them. We should be talking to the other body and the governor as well. I should parenthetically sort of ask, I'm curious about why some legislators are opposing this approach. Legislators should be looking to strengthen our body and not give up power to the governor. The only ones who should be opposing this are ones who might someday want to be governor. I can't imagine who that would be.

The way out of this, in my view, is through logic and through reason. I think that we, this body, the other body and the governor are all up to the task. Thank you, Mr. President.

Carolyn Kuckertz

Press Secretary

Senate Bipartisan Working Group

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Mark Gnadt

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:44 PM
To: Mark Gnadt
Subject: FW: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

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From: Mark Gnadt
Sent: Tuesday, April 26, 2011 1:16 PM
To: Bob Miller; Rep. Berta Gardner; Rep. Beth Kerttula; Rep. Bob Miller; Rep. Chris Tuck; Rep. David Guttenberg; Rep. Les Gara; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Mike Doogan; Rep. Pete Petersen; Rep. Scott Kawasaki; Rep. Sharon Cissna
Cc: Aurah Landau; Aurora Hauke; Brodie Anderson; Charles Boyle; David Bremer; David Dunsmore; Eugene White; Frank Ameduri; Gretchen Staff; Hannah McCarty; Jacob Wilson; James Waldo; Jay Hardenbrook; Jos Govaars; Ken Alper; Marie Rozak; Mark Gnadt; Meredith Cameron; Michelle Scannell; Mike Coumbe; Miles Green; Mindy O'Neill; Noah Hanson; Peter Stein; Randi Spray; Rose Foley; Ted Madsen; Troy Bouffard
Subject: FW: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 1:05 PM
To: pressreleasedistribution
Subject: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

Good Afternoon Everyone!

Here is the audio clip of Senator French's speech on the Senate Floor this morning regarding the contingency language included in the proposed Capital Budget. A transcript of this speech will be available shortly.

http://aksenate.org/french/042611_french.wav.

Here's a link to the brief of the Alaska Supreme Court case referenced in Senator French's speech – Knowles vs. Legislative Council in 1999.

<http://weblinks.westlaw.com/result/default.aspx?cfid=1&cnt=DOC&db=AK%2DCS%2DWEB&eq=search&fmqv=c&fn=%5Ftop&method=TNC&n=3&origin=Search&querv=TI%28%28%22KNOWLES%22%29+%26+%28%22COUNCIL%22%29%29&rlt=CLID%5FQRYRLT95824555914264&rltdb=CLID%5FDDB23449555914264&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=AKCS1%2E0&service=Search&sp=AKCS%2D1000&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA6449555914264&sv=Split&tempinfo=case&vr=2%2E0>

Also, here is an audio clip of the speech Senator Stedman made shortly following Senator French's speech. In it, he clarifies several of the disputed facts surrounding the Senate Finance Committee's Capital Budget. Once again, a transcript of this speech will be sent later this afternoon. http://aksenate.org/stedman/042611_stedman.wav

If you have any questions, please let me know!

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Mark Gnadt

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:43 PM
To: Mark Gnadt
Subject: FW: Transcript of Attorney General Burns Press Conference on 4/26/2011:

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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 6:18 PM
To: keymedia
Subject: Transcript of Attorney General Burns Press Conference on 4/26/2011:

Good Evening Everyone!

Here is a transcript of the press conference held by Attorney General John Burns this afternoon:

If you would rather watch or listen: http://gavelalaska.org/media/?media_id=PRAV110426A

First of all, I would like to welcome all of you. I apologize that we are a little bit late, but I wanted to do is also provide you a copy of the memorandum that has been issued by my office so that you have a full copy of it. I am confident it will answer any of the questions you have relative to this.

The principles of our democratic form of government are grounded in the constitution and it is the constitution that governs resolution of the issue on which the capital budget seems to have floundered.- the injection of contingency and non-severability language that is unabashedly aimed at constraining the constitutional power of the Executive Branch. My responsibility as Attorney General, and in fact the responsibility of all public officials whether they be elected or appointed, is to uphold the constitution. Politics must always yield to the constitutional principles that govern the administration of our state.

The irony of what the Senate Finance Committee is proposing by injecting contingency and non-severability language into the appropriation bill is that far from protecting the energy projects that are listed in Section 4 of the Capital Appropriations Bill, the contingency and non-severability language actually jeopardizes those projects and exposes them to potential litigation from third parties.

Even if the governor were to choose not to line item veto any appropriation, the reality is that each appropriation would still be of dubious of legal validity if the non-severability provision were upheld. Any litigant opposed to any single energy project could invalidate every appropriation by successfully challenging the Legislature's unconstitutional attempts through section 36 to usurp the governor's constitutional veto power. The contingency language in Section 36 of Senate Bill 46 and the non-severability provisions of Section 37 each violate the Alaska Constitution by improperly impairing the governor's line item veto as found in Article 3, Section 15. Each of these provisions is invalid and unenforceable.

Section 36, which in layman's terms is considered a poison pill provision, would make each energy project appropriation contingent upon passage and enactment of every other appropriation without reduction in the amount of the appropriation. Section 37, on the other hand, provides that if the contingency language in Section 36 is invalid, then in essence all of the projects must fail. It is an all or nothing package.

The simple reality is that the contingency and non-severability language violates the constitution because it violates the governor's line item veto power by prohibiting the governor from striking or reducing any individual appropriation made in section 4 of the Capital Appropriations bill.

Alaska's Constitutional Convention Delegates intended to create a strong executive branch with a strong control on the purse strings of the state. That's a quote. Article 3, Section 15 of the Alaska Constitution gives the governor strong control by granting the governor the power by veto to strike or reduce items in appropriation bills, a power that is commonly known as the line item veto.

The Alaska Constitution also clearly establishes the parameters by which the Appropriations process must be followed. First, the governor is required to submit a budget to the Legislature for consideration. The Legislature, in turn, has the power to pass appropriation bills. The governor, once that has been done, the governor has line item veto authority of appropriations. Finally, the legislature has the authority to override a governor's veto.

Section 36 and Section 37 would violate this process by negating the governor's constitutional power to strike or reduce any individual energy project appropriation. Section 36 violates the governor's constitutional power by linking, I call it the linkage provision, by linking the appropriations of each energy project item to the passage or enactment of every other appropriation made in Section 4. This usurps the governor's line item veto power, thus upsetting the checks and balances on which our constitution is premised.

Think about it logically- If the Legislature could link one appropriation to another or 50, 60 or 70 different appropriations, the Legislature could effectively eliminate the governor's power to reduce individual line items. The governor would have two choices: either veto them all or accept each and every appropriation. Allowing the linkage of appropriations with such a contingency would too easily permit the Legislature to circumvent the governor's constitutional veto authority.

Section 37, in turn, exacerbates this constitutional violation by doubling the unconstitutional linkage to appropriations for energy projects. If a contingency in Section 36 is held invalid, the legislature attempts to achieve the same unconstitutional result by making the contingency not severable from the energy project appropriation. If section 37 were found valid, the Legislature would effectively be usurping the governor's line item veto power by painting the all or nothing approach. A non-severability clause which would enable the Legislature to overstep its constitutional authority is itself unconstitutional and severable from the legislation. Upholding the validity of Section 37 would do nothing more than promote the Legislature's desire to usurp the governor's veto power and unconstitutionally logroll the appropriations from multiple energy projects.

From a practical perspective, equally significant in what is being overlooked by the political posturing that is taking place, is the risk that public interest litigation could place a cloud over each appropriation, which in turn would impair the development of important energy projects. Sections 36 and 37 make the funding intended for energy projects uncertain until a court rules on the validity of both sections. Until that time, no project proponent could rely upon actually receiving the money that is appropriated in Section 4. It would be both difficult and imprudent for project proponents to contract, to develop those energy projects when state funding is uncertain. Contract damages could arise if a project had to be stopped because an expected appropriation was held invalid. It was also be difficult or impossible for a project to obtain financing. Any lender or bond financing would require that all project funding be secured before additional financing would be made available on reasonable financial terms.

In sum, the invasion of the Executive Power functions makes the contingency language in Section 36 and the non-severability clause in Section 37 unconstitutional and invalid under the Alaska Constitution.

I have taken the liberty of providing a copy of the memo to those of you who are here and it will also be set forward under the link. It'll be in the link to our website at the Department of Law.

I'm happy to answer a few questions. I'm confident any questions you will have be answered in the memorandum. But, Becky?

Question: Where do you go from here? The governor yesterday said that if you get the bill with this language, you would have to test the bounds of it which suggests court action of some sort. Where do you take this? Do you let this play out in a court at some point?

Attorney General Burns: It is appropriate that it plays out in the Legislature until such time as the Legislature has finalized the Capital bill, it rightfully belongs with the Legislature to deal with the issues.

Question: Attorney General, let me see if I have your argument in summary that any language in that bill that would serve to limit the governor's line item veto power would be unconstitutional. It doesn't matter the exact sentencing, anything that does that?

Attorney General Burns: Yes.

Question: A senator from Anchorage this morning raised a 10-year-old court opinion. Are you aware of the opinion he raised on the Senate Floor and do you worry at all that your legal advice will conflict with that court decision from 2001.

Attorney General Burns: I believe you are referring to the Knowles, that case. I think the opinion of the Department of Law is very much consistent with the Knowles opinion. And again, I appreciate the press conference on availability and I will again, as I said, it's before you, the memorandum. It's also available by link. This is the Senate's language. At this juncture, it resides with the Senate. It's within the Senate's power to make those modifications before it's forwarded to the House. My intent in holding this press conference is just to unequivocally state the opinion of the Department of Law as it relates to that issue. Because again, I want to emphasize that you have to look at the practical implications of this. The practical implications are that in reality, many of these projects will, notwithstanding the fact that they may have appropriations, until these issues are resolved, either judicially, which I would hope would never get to that point, or legislatively through the Senate fixing the language, no project could rightfully go forward without being under a cloud.

Question: If you are talking about both legal questions and practical concerns and considerations- when you mention third party litigants and the prospect of third party litigants, do you have someone that you, that the state worries might go after a legal challenge? Who might sue over something like this?

Attorney General Burns: Anybody who feels that the process has been corrupted, that's there been a usurpation of the constitutional powers. Anyone. There are a myriad of potentials. It could be someone opposed to a project, somebody who just feels that, as I clearly do, that the constitution needs to be upheld. It's anyone who's a potential public interest litigant.

Question: Do you feel that the language in Section 37, the non-severability language, could be struck by line-item veto or does that not meet the definition of an item?

Attorney General Burns: It does not meet the definition of an item.

Question: So, it's more that you would potentially raise a court challenge to the language, not that you would recommend vetoing it?

Attorney General Burns: It's the effect of it. You know, the Legislature has the power to legislate, to state the obvious. So, the governor does not have the power to line item language. That's vested with the Legislature. It's the consequence of that language as it relates to the usurpation of the Executive branch's ability to act appropriately within its constitutional rights.

Question: What do you say to some of those of leaders in the Senate who say 'Our role is the appropriator and we just want to make clear that this money and these projects go forward.' As one Senator said yesterday, if the governor wants to veto, he just vetoes a larger chunk. You talked about the governor's authorities, but what about legislature's authorities. They think that they are on solid ground.

Attorney General Burns: The Legislature, it's their prerogative to lay whatever intent language they feel appropriate. But that intent language cannot infringe on the constitutional power that rests in the Executive Branch on the line item veto. Because, remember, in the end the Legislature retains the power to override a veto. That's the checks and balances. You don't allow one branch to usurp the rights of another just because they feel it may be convenient.

Question: Attorney General- You're saying in effect the governor has to veto that language if the Senate's Section 36 and 37 are in the bill. That your advice to him would be to veto those things to uphold the constitutional...

Attorney General Burns: At this juncture I've given no advice as to how to approach it and it would be speculative depending what the ultimate result of the language is. So I am going to reserve comment on that. But certainly he has multiple options. Thank you.

Carolyn Kuckertz

Press Secretary

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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 ⌄ 385

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.

Joseph K. Donohue, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellants.

1. For excellent histories of the legislative veto, see Ginnane, *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 Congress-*

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

sional 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.

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

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 \$30,000.00 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: Annuling 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

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

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

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*

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

Pet. 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 state turnpikes under the condition "that any

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. 1031, 1043 n. 56 (1955).

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,

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, 973 (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 . . ."); *Scudder v. Smith*, 331 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 443, 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 . . .");

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

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.");

Cite as, Alaska, 606 P.2d 769

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*, (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).²⁵

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 the merits in a vigorous

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 of 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."

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

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.

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

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

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

30. U.S.Const. art. I, § 1 provides:

"[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.

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.

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 delegation 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 negative 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

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

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

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.).

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 Constitution³⁸ 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. Un-

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, ac-

der 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-

ring 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. 785 (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 rec-

ognized 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.

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. 638 (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. Kimmit*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

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 . . . , or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void⁵

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

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 non-action. 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 ap-

proval 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 unconvinc-

ing. 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).

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, Helenthal 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 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

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

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 propos-

ing 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 38.06.055(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 doubts, 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, Commission-
er, 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

sometimes, recommend statutory action by the legislature.

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

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

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C

Supreme Court of Virginia.
Adelard L. BRAULT et al.
v.
Joseph H. HOLLEMAN, Jr., et al.

Record No. 761016.
Nov. 24, 1976.

In an original proceeding on petition for mandamus, petitioners challenged validity of governor's veto of General Assembly's appropriation of a biennial total of \$10,000,000 to Northern Virginia Transportation Commission for 'State aid for capital costs of Metro Rail' which was part of mass transit system under development. The Supreme Court, Carrico, J., held that unvetoes \$3,500,000 per year provision to 'be continued' for 'aid to mass transit' for northern Virginia was not a 'condition of' the vetoed appropriation; and that such veto of \$5,000,000 per year appropriation was an indivisible sum of money dedicated to a stated purpose, and, thus, such appropriation was an 'item' rather than a part of an item within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill.

Writ denied.

West Headnotes

11 Statutes 361  33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

An "item of an appropriation bill," within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill, refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions. Const.1971, art. 5, § 6.

[2] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Though governor is empowered to veto any particular item or items of an appropriation bill, he must, for his veto to be valid, strike down the whole of an item; he cannot reduce the amount of an appropriation which by itself constitutes an item. Const.1971, art. 5, § 6.

[3] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor cannot veto appropriation without also disapproving a condition attached to the appropriation and he cannot veto the condition without also disapproving the appropriation. Const.1971, art. 5, § 6.

[4] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For purposes of rule that governor cannot veto appropriation without also disapproving a condition attached to appropriation, unvetoes \$3,500,000 per year provision to "be continued" for "aid to mass transit" for northern Virginia was not a "condition of" vetoed appropriation of a biennial total of \$10,000,000 to Northern Virginia Transportation Commission for "State aid for capital costs of Metro Rail" which was a part of mass transit system under development. Const.1971, art. 5, § 6; Code 1950, §§ 15.1-1342 to 15.1-1372.

[5] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For several appropriations relating to same subject matter to constitute a single "item," within state constitutional provision empowering governor to veto any particular item or items within appropriation bill, "tying up" of purposes of appropriations must be more than incidental; relationship between purposes must appear intrinsically rather than extrinsically; determinative question is whether, from terms of appropriation bill itself, several appropriations relating to same subject are so legally interdependent that one cannot be eliminated from enactment without affecting its other purposes or provisions. Const.1971, art. 5, § 6.

[6] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

If it is clear from appropriation bill that, with disapproved provision eliminated by veto, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid. Const.1971, art. 5, § 6.

[7] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Five million dollar per year appropriation to Northern Virginia Transportation Commission for "State aid for capital costs of Metro Rail," which was a part of mass transit system under development, was an indivisible sum of money dedicated to a stated purpose; thus, such appropriation was an "item" rather than part of an item within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill. Const.1971, art. 5, § 6; Code 1950, §§ 15.1-1342 to 15.1-1372.

****239 *441** Jerry K. Emrich, County Atty., Arlington, for applicants.

Andrew P. Miller, Atty. Gen., Anthony F. Troy, Chief Deputy Atty. Gen., Walter A. McFarlane, Deputy Atty. Gen., J. Durwood Felton, III, Valentine W. Southall, Jr., Debra J. Prillaman, Asst. Attys. Gen., for respondents.

Before F'ANSON, C.J., and CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

****240 *442** CARRICO, Justice.

At its 1976 session, the General Assembly appropriated to the Northern Virginia Transportation Commission, in addition to other specified amounts, a biennial total of \$10,000,000 for 'State aid for capital costs of Metro Rail.' [FN1] On April 12, 1976, the Governor vetoed the Metro Rail appropriation. This original petition for a writ of mandamus challenges the validity of the veto and presents the question whether the Metro Rail appropriation is an 'item' within the meaning of Article V, Section

6[FN2] of the Virginia Constitution a. is subject to the Governor's power of veto.

FN1. As will be explained Infra, Metro Rail is part of a mass transit system now under development in the Washington, D.C., area, including several northern Virginia localities.

FN2. Article V. Section 6 reads, in pertinent part, as follows:

'The Governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object.'

The petitioners for mandamus are Adelard L. Brault, member of the State Senate from Fairfax County, James M. Thomson, member of the House of Delegates from the City of Alexandria, and the County Board of Arlington County. The respondents are Joseph H. Holleman, Jr., Clerk of the House of Delegates and Keeper of the Rolls of the State, John E. Harwood, Commissioner of the Virginia Department of Highways and Transportation, Charles B. Walker, Comptroller of Virginia, and Robert C. Watts, Jr., Treasurer of Virginia. The respondents are the state officials responsible for ministerially implementing release of the Metro Rail funds if the Governor's veto is held invalid.

The designee of the disputed appropriation, the Northern Virginia Transportation Commission, is the governing body of the Northern Virginia Transportation District,[FN3] composed of the counties of Arlington and Fairfax and the cities of Alexandria, Fairfax, and Falls Church. The Commission coordinates the interests of these localities in the activities of the Washington Metropolitan Area Transit Authority, which was created by a *443 compact [FN4] between Virginia, Maryland, and the District of Columbia to develop a mass transit system for a 'zone' which includes the northern Virginia communities, the Maryland counties of Montgomery and Prince Georges, and the District of Columbia. The Authority is currently developing the Metro system, consisting of both rail and bus service, with the goal of coordinating all methods of mass transportation in the zone.

FN3. Creation of the District was authorized by the Transportation District Act of 1964, Acts 1964, ch. 631, Code ss 15.1-1342 to - 1372.

FN4. See Acts 1966, ch. 2, Amending Acts 1958, ch. 627.

Under development by the Authority, and partially in use, is a combination subway and surface rapid rail system, known as Metro Rail, to serve the Zone. The Authority has also acquired the private bus companies formerly serving the zone and now operates the facilities as Metro Bus. Gradually, bus lines are being modified to serve areas remote from the rail system and to route passengers to Metro trains. In addition, the Authority is constructing parking lots at rail stations to accommodate passengers who drive their automobiles to the terminals before boarding trains.

The capital cost of development of the Metro system is funded by federal appropriations, proceeds of the sale of revenue bonds, and contributions from the local political subdivisions included within the zone. Pursuant to an agreement executed in 1970, the Virginia subdivisions are obligated to contribute a total of \$149,900,000 toward the capital cost of Metro Rail, but escalating costs may require 'substantially greater contributions than originally were anticipated.'

Although not a party to the 1970 agreement, the Commonwealth has contributed to the development of the Metro system, and the participating northern Virginia localities have received credit for part of the state aid on their obligations to contribute to the capital costs of Metro Rail. The most recent state effort appears in Acts **241 1976, ch. 779, s 126, Item 826, where a biennial total of \$18,000,000 was appropriated for 'State aid to regional transportation commissions or local governments from special revenues, in aid of the administration and capital costs of bus transportation, except as otherwise stated.' Item 826a contains various amounts appropriated to the Northern Virginia Transportation Commission, including the \$10,000,000 biennial total for 'State aid for capital costs of Metro Rail,' which was *444 vetoed by the Governor. The entire appropriation to the Commission and the Governor's veto read as follows:

'Item 826

'a. Northern Virginia Transportation Commission

State aid for administration _ _ \$125,000 the first year, \$125,000 the second year.

'This appropriation is conditioned upon provision from local sources of three dollars for each State dollar out of the appropriation.

'State aid for capital costs \$A\$05R\$A \$1,300,000 the first year, \$1,300,000 the second year.

(State aid for capital costs of Metro Rail \$A\$10R\$A \$5,000,000 the first year, \$5,000,000 the second year.

'Funds for Metro Rail shall be paid by the Northern Virginia Transportation Commission to the Washington Metropolitan Area Transit Authority and be a credit to the Counties of Arlington and Fairfax and the Cities of Alexandria, Fall(s) Church and Fairfax in the same proportion as they are obligated to pay their share of the capital costs of Metro Rail.)

I veto this item

/s/ Mills E. Godwin, Jr.

4/12/76

'It is provided that, in addition to the appropriation designated in this item for Metro Rail capital costs, payments of \$3,500,000 each year heretofore made for aid to mass transit for Northern Virginia Transportation Commission from other items in this act shall be continued.'

The appropriation included in Item 826a for 'administration' is self-explanatory. The parties agree that the appropriation of \$1,300,000 per year for 'State aid for capital costs' will serve as 'Metro bus capital;' that the \$3,500,000 per year required to 'be *445 continued' for 'aid to mass transit' is intended for 'Metro rail capital for parking facilities;' and that the vetoed appropriation of \$5,000,000 per year for 'State aid for capital costs of Metro Rail' would have applied to the costs of 'hard rail,' meaning 'the capital costs of constructing the rail system.' And, according to its terms, the \$5,000,000 per year appropriation was designed to afford credit to the northern Virginia localities on their obligations for the capital costs of Metro Rail.

As has been indicated, note 2 Supra, Article V. Section 6 of the Virginia Constitution empowers the Governor 'to veto any particular item or items of an appropriation bill.' The petitioners contend, however, that the disputed Metro Rail appropriation is not an 'item' subject to the power of veto under Article V. Section 6. The compact to which Virginia is a party, the petitioners argue, contemplates a 'unified regional transit system,' consisting of bus service, rail service, and related parking facilities. The General Assembly 'thought it well,' the petitioners say, to include in Item 826a funds for each element of the system, thereby 'tying up' the purpose to be promoted by the appropriation for Metro Rail with the purposes to be promoted by the appropriations for Metro Bus and for parking facilities.

Therefore, the petitioners maintain, the various appropriations for the unified transit system constitute a 'single 'item' as that term is used in Article V. Section 6 of the Virginia Constitution.' Accordingly, the petitioners assert, the Governor 'could not veto the \$5,000,000 annual appropriation for Metro rail capital costs without also vetoing the \$3,500,000 per year appropriation for Metro rail capital (parking lots), the \$1,300,000 per year appropriation for Metro bus capital and the \$125,000 per year appropriation for . . . administrative costs.'

Furthermore, the petitioners state, the Governor's power of veto does not permit him to reduce the amount of an appropriation or to disapprove an item subject to a condition without also vetoing the condition. Clearly, the petitioners aver, the **242 \$5,000,000 per year allotment for Metro Rail capital and the \$3,500,000 per year allocation for parking lots are the 'same 'item,' and the veto of the \$5,000,000 per year component had the effect of reducing the amount of this item; also the provision relating to the \$3,500,000 appropriation is a condition of the \$5,000,000 appropriation, yet the condition was not vetoed.

*446 Thus, the petitioners deduce, because the Governor cannot veto part of an item, reduce the amount of an appropriation, or veto a conditional item without also disapproving the condition, the action of the Governor in this case is invalid. From this, the petitioners conclude, it follows that they are entitled to a writ of mandamus directing disbursement of the disputed appropriation.

In Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940), we construed the veto provision contained in the Constitution of 1902 (Section 76), which provision is duplicated in the present Constitution (note 2 Supra). Dodson concerned seven vetoes involving the 1940 appropriation bill. This court overturned six of the vetoes and upheld the seventh.

Veto No. 2 in Dodson is of interest here. That veto concerned a provision creating and funding the office of Legislative Director in the Division of the Budget. According to the terms of the appropriation bill, the Legislative Director was to cooperate with the Executive Director of the Budget and the State Comptroller in the preparation of the budget and the supervision of expenditures from appropriations made by the General Assembly.

We noted that the 'creation of a new office, its holder to serve at a stated salary, with more, would be an 'item' which the Governor at his election might veto, but if it be tied up with other budget provisions, then under the terms of the Constitution it can not be eliminated.' 176 Va. at 303, 11 S.E.2d at 130. Because the appropriation for the Legislative Director was so closely 'tied up' with appropriations for the Executive Director and the State Comptroller, we held that the provision for the new office did not constitute an 'item' subject to the veto power of the Governor.

The parties to the present controversy agree that Veto No. 2 in Dodson bears some similarity to the veto involved in this case. Beyond this, however, they depart in their views on the effect of the Dodson decision upon this matter. The petitioners believe that, like the appropriation for the Legislative Director in Dodson, the \$5,000,000 per year appropriation for Metro Rail is so 'tied up' with the other appropriations in Item 826a that together they constitute a single item, veto-proof except as a whole. On the other hand, the respondents are of opinion that, unlike the appropriation in Dodson, the \$5,000,000 per year *447 appropriation for Metro Rail is a separate, independent item, subject by itself to the power of veto.

[1] Dodson enunciated the principles applicable to resolution of a veto dispute. In the constitutional sense, an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the term refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions.

[2] While the Governor is empowered to veto any particular item or items of an appropriation bill, he must, for his veto to be valid, strike down the whole of an item; he cannot disapprove part of an item and approve the remainder. And this rule prevents the Governor from reducing the amount of an appropriation which by itself constitutes an item.

[3] Where a condition is attached to an appropriation, the condition must be observed. The Governor cannot veto the appropriation without also disapproving the condition; correspondingly, he cannot veto condition; correspondingly, he cannot veto appropriation.

With these principles in mind, we return to the petitioners' contentions of invalidity concerning the veto in this case, viz., that the veto affected only part of an item, that the veto had the effect of reducing an appropriation, and that the veto struck down **243 a conditional appropriation without also disapproving the condition. We will consider these contentions in inverse order.

[4] First, we reject the notion, advanced by the petitioners, that the unvetoes \$3,500,000 per year provision to 'be continued' for 'aid to mass transit' for northern Virginia is a condition of the disapproved appropriation of \$5,000,000 per year for 'State aid for capital costs of Metro Rail.' The full \$3,500,000 provision reads as follows:

'It is provided that, in addition to the appropriation designated in this item for Metro Rail capital costs, payments of \$3,500,000 each year heretofore made for aid to mass transit for Northern Virginia Transportation Commission from other items in this act shall be continued.'

As we understand the petitioners' contention, they claim that the reference in the quoted provision to 'other items' is to the other appropriations contained in Item 826a; that continuance of the \$3,500,000 per year allocation is a condition, *448 therefore, of the vetoed \$5,000,000 per year appropriation; and that because the condition was not disapproved, the veto is ineffective. But even a casual reading of the quoted provision will disclose that the reference to 'other items' is not to other amounts of expenditure but to the sources in the appropriation bill from which the \$3,500,000 allocation shall be paid. The

only condition attached to the vetoed \$5,000,000 per year appropriation is that it be paid to the Washington Metropolitan Area Transit Authority as a credit for the participating northern Virginia localities on their obligations to contribute to the capital costs of Metro Rail. And this condition also was vetoed.

Second, the petitioners' next contention, that the veto had the effect of reducing an appropriation, assumes an important premise: the correctness of their primary contention that all the 1976 appropriations for the Metro system, or at least the combination of the \$5,000,000 and \$3,500,000 provisions, constitute a single item, subject to veto only as a whole. If the \$5,000,000 per year appropriation is an item itself subject to veto, its elimination would not have the allegedly improper effect of reducing an appropriation. Whether the disputed appropriation is such an item is the serious question in the case and the subject of our third and final inquiry.

To determine whether several appropriations relating to the same subject constitute a single item, the petitioners assert that we must 'compare the purpose of an appropriation amount that was vetoed with the purpose of an appropriation amount which was not vetoed,' and if 'the two things are 'tied up' with each other, the veto must fail.' Therefore, the petitioners say, the real issue in this case is whether there is 'a relationship between bus and rail mass transit in the (northern Virginia) area and between parking facilities at Metro rail stations and Metro rail lines.' These relationships are so 'considerable,' the petitioners state, that elimination of the appropriation for Metro Rail capital would affect seriously the appropriations for bus capital and parking facilities.

We would not question that, in a sense, the purposes to be served by the various appropriations for the Metro system are 'tied up' one with the other. After all, the appropriations relate to the same general subject, and they are grouped within the same numbered item. Indeed, it would be difficult to conceive a situation where it could not be said that several appropriations *449 relating to the same subject were not, at least incidentally, 'tied up' together.

Neither would we doubt that, from a practical standpoint, the various segments of the Metro system bear close relationships. Certain of the exhibits filed in this case factually demonstrate the integrated relationship of rail and bus service and parking facilities in the development of the system.

[5][6] These considerations, however, are not necessarily conclusive. The 'tying up' of purposes must be more than incidental; the relationship between purposes must appear intrinsically, rather than extrinsically. The real question, therefore, is whether, **244 from the terms of the appropriation bill itself, several appropriations relating to the same subject are so legally 'tied up,' are made so legally interdependent, that one cannot be eliminated from the enactment without, in the words of Dodson, 'affecting its other purposes or provisions.' If it is clear from the appropriation bill that, with the disapproved provision eliminated, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid.

[7] The petitioners concede that we should not be concerned 'whether either bus or rail mass transportation in the (northern Virginia) area will grind to a halt without the \$5,000,000 per year appropriation which the Governor attempted to veto.' We welcome this candid concession; it typifies the sort of extrinsic practical consideration we believe must be excluded in determining whether several appropriations relating to the same subject are legally interdependent. But, at the same time, we would point out that the petitioners' argument concerning the invalidity of the Governor's veto reduces itself to the same sort of proposition: that the single purpose of the General Assembly in adopting Item 826a was to provide a unitary appropriation for an integrated system of mass transportation in northern Virginia, complete with bus service, rail service, and parking facilities. This singularity of purpose, however, does not appear from the terms of the appropriation bill.

The purpose of the \$125,000 per year appropriation for 'State aid for administration' is obvious. Nothing in Item 826a, however, suggests that this appropriation is dependent upon the vetoed \$5,000,000 per year appropriation or upon any other appropriation contained in the item. Neither could it be suggested that the appropriation for administrative costs cannot *450 effectively serve its intended purpose after elimination of the \$5,000,000 per year provision.

The \$1,300,000 per year appropriation, although labeled 'State aid for capital costs,' otherwise is silent as to its purpose. The parties to this controversy represent that this appropriation is intended for 'Metro bus capital.' The provision concerning continuance of the \$3,500,000 per year allocation 'for aid to mass transit' likewise is uninformative of its intended purpose. The parties represent that this amount is for 'Metro rail capital for parking facilities.'

With respect to these two matters, we find ourselves in this position: either we are unable to ascribe meaningful purposes to the \$1,300,000 and \$3,500,000 amounts or we must accept the representations of the parties, in which latter event separate purposes are revealed. Both courses, however, foreclose the conclusion that either of the two provisions is dependent upon the vetoed \$5,000,000 per year appropriation or any other appropriation in Item 826a, or that the two provisions cannot serve their intended purposes, expressed or unexpressed, after elimination of the \$5,000,000 appropriation.[FN5]

FN5. In oral argument, but not on brief, the petitioners asserted that the words 'in addition to' in the \$3,500,000 per year provision, quoted previously, establish the relationship necessary to 'tie up' this provision with the \$5,000,000 per year appropriation. While the words do show some relationship, they are insufficient to establish the legal interdependence necessary to constitute the two provisions a single 'item.'

In sharp contrast, the purpose of the \$5,000,000 per year appropriation clearly is revealed by the terms of the appropriation bill. The disputed appropriation is labeled 'State aid for capital costs of Metro Rail,' and its primary and real purpose, as expressed by its terms, is to serve as credit for the participating northern Virginia localities against their contractual undertaking to contribute to 'the capital costs of Metro Rail.' This is a purpose separate and distinct from the purposes of any of the other provisions of Item 826a.

The \$5,000,000 per year appropriation is an indivisible sum of money dedicated to a stated purpose. It falls, therefore, within the Dodson definition of an 'item' in the constitutional sense. And, because its stated purpose is so separate and distinct from anything else in Item 826a, it may be eliminated**245 from the appropriation bill without affecting the enactment's other purposes or provisions. The disputed appropriation, therefore, *451 satisfies the Dodson test of separability. Accordingly, we hold that the Metro Rail appropriation is an 'item' within the meaning of Article V, Section 6 of our Constitution, and thus subject to the Governor's power of veto.

For the reasons assigned, the writ of mandamus requested by the petitioners will be denied.

Writ denied.

Va. 1976.

Brault v. Holleman

217 Va. 441, 230 S.E.2d 238

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21 P.3d 367
(Cite as: 21 P.3d 367)
C

Supreme Court of Alaska.

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

ALASKA LEGISLATIVE COUNCIL, Appellant/Cross-Appellee,

v.

Governor Tony KNOWLES, in his official capacity as Governor for the State of Alaska, and Mark Boyer, in his official capacity as Commissioner of Administration for the State of Alaska, Appellees/Cross-Appellants.

Nos. S-8842, S-8851.

April 20, 2001.

Legislative Council sued Governor and Commissioner of Administration, seeking declaration that Governor's five item vetoes of appropriations bills were invalid. Governor filed counterclaim asserting that vetoed language was unconstitutional. The Superior Court, First Judicial District, Juneau, Thomas M. Jahnke, J., ruled that vetoes were invalid. Parties appealed. The Supreme Court, Eastaugh, J., held that: (1) three appropriations for Alaska Seafood Marketing Institute (ASMI) were not subject to valid exercise of item veto power; (2) those appropriations violated confinement clause; (3) community residential centers appropriation was not subject to item veto; and (4) therapeutic treatment program appropriation was not subject to item veto.

Vacated in part and reversed in part.

Brvner, J., dissented in part and filed opinion in which Carpeneti, J., joined.

Carpeneti, J., dissented in part and filed opinion.

West Headnotes

[1] Appeal and Error 30 ↪ 840(3)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k840 Review of Specific Questions and Particular Decisions

30k840(3) k. Review of Constitutional Questions. Most Cited Cases

Supreme Court decides constitutional issues of law by applying its independent judgment; in doing so Court will adopt a reasonable and practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision and the intent of the framers, and Court will consider precedent, reason, and policy.

[2] Appeal and Error 30 ↪ 781(1)

30 Appeal and Error

30XIII Dismissal, Withdrawal, or Abandonment

30k779 Grounds for Dismissal

30k781 Want of Actual Controversy

30k781(1) k. In General. Most Cited Cases

Public interest exception to mootness doctrine warranted Supreme Court's consideration of claims that Governor's item vetoes of appropriations bills were invalid, even though fiscal year at issue was over.

[3] Statutes 361 ↪ 33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For purposes of Governor's item veto power, an "item" is a sum of money dedicated to a particular purpose. Const. Art. 2, § 15.

[4] Statutes 361 ↪ 25.1

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k25.1 k. In General. Most Cited Cases

A veto that does not delete or reduce the amount of money appropriated is not a valid exercise of the Governor's item veto power. Const. Art. 2, § 15.

151 Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in appropriations bills, which made appropriations for Alaska Seafood Marketing Institute (ASMI) contingent on ASMI having no employees outside of Alaska whose positions were classified at more than Range 21 on state salary schedule, was not an "item" subject to Governor's item veto power; language did not appropriate a sum of money dedicated to a stated purpose. Const. Art. 2, § 15.

161 Statutes 361 ↪32

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k32 k. Disapproval and Return with Objections. Most Cited Cases

In exercising his item veto power, Governor sufficiently stated his objections to vetoed items in appropriations bill, by stating that he was following "long-standing gubernatorial tradition of vetoing intent language." Const. Art. 2, § 15.

171 Statutes 361 ↪32

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k32 k. Disapproval and Return with Objections. Most Cited Cases

When reviewing Governor's statement of objections when Governor uses item veto, courts apply "minimum of coherence" standard, under which courts look to see whether objection makes comprehensible reference to provision being vetoed. Const. Art. 2, § 15.

181 States 360 ↪132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

To satisfy confinement clause of Alaska Constitution, the qualifying language in appropriations bill must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent; it must not administer the program of expenditures; it must not enact law or amend existing law; it must not extend beyond the life of the appropriation; and the language must be germane, that is appropriate, to an appropriations bill. Const. Art. 2, § 13.

[9] States 360 ↪ 132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Confinement clause of Alaska Constitution is not violated when the legislature amends a prior appropriation in an appropriation act. Const. Art. 2, § 13.

[10] States 360 ↪ 132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

(Formerly 92k48(1))

In approaching confinement clause disputes, court assumes that an act of the legislature is constitutional. Const. Art. 2, § 13.

[11] Constitutional Law 92 ↪ 1002

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1001 Doubt

92k1002 k. In General. Most Cited Cases

(Formerly 92k48(3))

Constitutional Law 92 ↪ 1030

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1030 k. In General. Most Cited Cases

(Formerly 92k48(1))

The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality.

[12] States 360 ↪ 132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Language in appropriations bills, which made appropriations for Alaska Seafood Marketing Institute (ASMI) contingent on ASMI having no employees outside of Alaska whose positions were classified at more than Range 21 on state salary schedule, violated confinement clause of Alaska Constitution; language expressed legislature's intent about how other ASMI appropriations were to be spent, language effectively administered ASMI's program, language was not germane to marketing seafood, and language created substantive law. Const. Art. 2, § 13.

[13] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, was not an "item" subject to Governor's item veto authority. Const. Art. 2, § 15.

[14] States 360 ↪132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, did not violate confinement clause of Alaska Constitution. Const. Art. 2, § 13.

[15] Constitutional Law 92 ↪2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

States 360 ↪132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, did not violate constitutional principle of separation of powers; language did not preclude Department from fulfilling its statutory mandate. Const. Art. 3, § 1.

[16] Statutes 361 ↪33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program was not an "item" subject to Governor's item veto authority; language did not appropriate any sum of money to a particular purpose. Const. Art. 2, § 15.

[17] States 360 ↪132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program, "where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions," did not violate confinement clause; one permissible reading of quoted language was that it was descriptive and non-binding. Const. Art. 2, § 13.

[18] Constitutional Law 92 ↪2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

States 360 ↪132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program, "where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions," did not violate constitutional principle of separation of powers; one permissible reading of quoted language was that it did not direct executive branch to take any action. Const. Art. 3, § 1.

[19] States 360 ↩️ 132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

Invalidation of entire appropriation item is not necessarily required if it contains language violating confinement clause. Const. Art. 2, § 13.

*369 Pamela Finley, Legislative Affairs Agency, Juneau, for Appellant/Cross-Appellee.

James L. Baldwin and John B. Gaguine, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellees/Cross-Appellants.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

Governor Tony Knowles, invoking the governor's constitutionally granted power to veto "items" in appropriation bills, struck descriptive language from five appropriations the Alaska legislature enacted in 1997. Were the vetoes constitutionally invalid, as the superior court declared, either because the vetoed passages were not "items" or because the governor did not adequately explain his vetoes? ^{FN1} And if the vetoes were invalid, were the struck passages nonetheless invalid, as the superior court held, because they violated the constitution's requirement that appropriation bills be confined to appropriations? ^{FN2} Applying our independent judgment to these constitutional issues, we conclude that three of the five passages violated the confinement clause and that the four vetoes which have been challenged on the grounds that the struck passages were not "items" are invalid on that basis.

^{FN1}. See Alaska Const. art. II, § 15 ("The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.").

FN2. See Alaska Const. art. II, § 13 (“Bills for appropriations shall be confined to appropriations.”).

II. *FACTS AND PROCEEDINGS*

Among the appropriation bills the Alaska legislature enacted in 1997 were chapters 98 and 100.^{FN3} In July 1997 Governor Tony Knowles signed these two appropriation bills into law, but only after invoking the governor's item veto power and striking out specific parts of them.^{FN4} Five of these vetoes, relating to three subjects, are challenged here. Appendix A contains the relevant appropriations and shows the vetoed words in strikeout form.

FN3. See chs. 98, 100, SLA 1997.

FN4. See Alaska Const. art. II, § 15.

In October 1997 the Alaska Legislative Council sued Governor Knowles and Commissioner of Administration Mark Boyer (collectively “the governor”) seeking a declaration that the vetoes were invalid. Counterclaiming, the governor asserted that the vetoed language violated the Alaska Constitution's confinement clause.^{FN5} Both parties moved for summary judgment.

FN5. See Alaska Const. art. II, § 13. The parties later agreed to treat the governor's counterclaims as defenses, to avoid the question of legislative immunity.

In a well-reasoned opinion, the superior court held that: (1) four of the vetoes were invalid exercises of the item veto power because the vetoed language was not an “item” (the court not reaching the “item” issue as to the fifth appropriation); (2) one veto was invalid because the governor did not sufficiently explain his objections; (3) despite the invalidity of the five vetoes, all five vetoed passages were nonetheless invalid because *370 they violated the constitution's “confinement clause” requirement that appropriation bills be confined to appropriations; and (4) the invalid passages were severable from the remainder of their bills.^{FN6}

FN6. As to other vetoes not at issue in these appeals, the superior court held that the council's challenges were moot, because the appropriated money had already been spent.

Both sides appeal.^{FN7}

FN7. We commend all counsel for the quality of their briefs and oral arguments.

III. *DISCUSSION*

A. *Standard of Review*

[1] These appeals raise constitutional issues of law which we decide by applying our independent judgment.^{FN8} In doing

so we will adopt “ a reasonable and practical interpretation in accordance with common sense’ based upon ‘the plain meaning and purpose of the provision and the intent of the framers.’ ”^{FN9} Moreover, because these are questions of law, we will consider precedent, reason, and policy.^{FN10}

FN8. *See Cook v. Botelho*, 921 P.2d 1126, 1128 (Alaska 1996).

FN9. *Id.* at 1128-29 (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

FN10. *See Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988).

B. Mootness

[2] The governor argues that the issues relating to the validity of his vetoes are moot because the fiscal year at issue is now over. But we agree with the council that we should consider these issues under the public interest exception to the mootness doctrine.^{FN11} Appropriations are enacted every year and are often spent before any dispute can reach this court.^{FN12} Further, the public interest is directly affected by disputes about the constitutional provisions implicated here.^{FN13} We therefore reach the merits of these appeals.

FN11. *See Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995). The public interest exception requires us to consider: (1) the possibility of recurrence or repetition of the issue; (2) the danger that mootness would repeatedly circumvent review of the issue; and (3) the importance of the issue to the public interest. *See id.* at 1196.

FN12. *See Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (“[A] challenge to an item veto may not come within sufficient time to fully litigate the matter....”).

FN13. *Cf. Fordice v. Bryan*, 651 So.2d 998, 1001 (Miss.1995) (“[P]ublic policy and the magnitude of the importance of these issues require[] this Court to review the Governor's actions with respect to the ... appropriations bills as such actions may continue to be repeated and forever escape review....”).

There is a second mootness issue. In Part III.C.3, we hold that the vetoed language in the three Alaska Seafood Marketing Institute (ASMI) appropriations violated the confinement clause. This holding technically moots any question about the validity of those vetoes. And our conclusions in Parts III.C.1 and III.E.1—that four of the struck passages were not “items”—also moot the dispute about the adequacy of the governor's statements of objections for those passages. But again, the public interest exception to the mootness doctrine prompts us to consider these issues.

C. The Alaska Seafood Marketing Institute Appropriations

The legislature enacted three appropriations for ASMI.^{FN14} Each contained identical language which made the appropriation “[c]ontingent on [ASMI] having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011....”^{FN15} The governor struck this language from the three ASMI appropriations.

FN14. See ch. 98, § 6, SLA 1997; ch. 100, §§ 47, 70, SLA 1997. Section 70 of chapter 100 amends section 6 of chapter 98.

FN15. Ch. 98, § 6, SLA 1997; ch. 100, §§ 47, 70, SLA 1997. The state salary schedule specifies twenty-six ranges, labeled five to thirty. See AS 39.27.011(a). In 1997 a Range 21 Step A employee was to be paid \$4,155 monthly, subject to cost-of-living adjustments. See AS 39.27.011(a), (e), (f) (1996).

Although it held that the governor adequately explained his objections, the superior *371 court held that the attempt to veto “the contingency language” in the ASMI appropriations was “illegal and of no effect,” reasoning that “the item veto power encompasses only the power to reduce or strike sums of money.” It nonetheless struck the disputed language because its inclusion violated the confinement clause.

The council argues that these vetoes are invalid, because the vetoed language was not an “item” within the meaning of the Alaska Constitution, and also because the governor failed to adequately state his objections to the vetoed language, contrary to the constitution. The governor responds that the vetoes were valid and that, in any event, the vetoed language is invalid because its inclusion in appropriation bills violated the confinement clause.

1. *Is the vetoed language an “item”?*

Article II, section 15 of the Alaska Constitution gives the governor power to exercise two different types of vetoes. Its first sentence confers the general power to veto a bill. FN16 Its second sentence confers the power, “by veto, [to] strike or reduce items in appropriation bills.” FN17 At issue here is this power to “strike or reduce items” by exercising the item veto while approving other parts of the same bill.

FN16. Alaska Const. art. II, § 15 (“The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.”).

FN17. *Id.*

The question is whether the item veto power permits the governor to strike from an appropriation bill descriptive language that does not specify the amount appropriated. The superior court held that it does not. It held that “the item veto power encompasses only the power to reduce or strike sums of money.” FN18 We agree.

FN18. The Uniform Rules of the Alaska State Legislature state that “[a]n item in an appropriation bill includes a line item, an allocation, and an appropriation.” Uniform Rules Alaska State Legislature R. 42(c) (1998). But this definition does not address what constitutes an “item” in the context of the item veto power.

Our analysis focuses on the meaning of “item.” We have never addressed what “item” means in context of the item veto power. Our constitution does not define the term.

[3] Based on the language of our constitution, the historical purposes of the item veto, and the pertinent public policy considerations, we now define "item" as "a sum of money dedicated to a particular purpose." ^{FN19}

^{FN19}. Cf. *Bengzon v. Secretary of Justice*, 299 U.S. 410, 414-15, 57 S.Ct. 252, 81 L.Ed. 312 (1937) ("An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."); *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 195 (Minn.1991) (defining "item of appropriation" within context of specific statute as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose"); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120, 127 (1940) (defining an "item in an appropriation bill" as "an indivisible sum of money dedicated to a stated purpose").

Our analysis begins with the Alaska Constitution. It gives the legislature the power to legislate ^{FN20} and appropriate. ^{FN21} It gives the governor the power to influence the state's budget by requiring him or her to submit a proposed budget and general appropriation bill to the legislature ^{FN22} and by striking or reducing items appropriated by the legislature. ^{FN23} The governor's item veto power is thus one of limitation. The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.

^{FN20}. See *Alaska Const. art. II, § 1*.

^{FN21}. See *Alaska Const. art. II, § 13*. Cf. *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (implicitly recognizing that appropriation power resides in legislature and cannot be delegated to executive).

^{FN22}. See *Alaska Const. art. IX, § 12*.

^{FN23}. See *Alaska Const. art. II, § 15*.

This approach is consistent with our earlier discussion of the governor's budgetary power. In *Thomas v. Rosen* we noted that *372 Alaska's constitutional convention delegates intended to "create a strong executive branch with 'a strong control on the purse strings' of the state." ^{FN24} But this control gives the governor no appropriation power. The item veto permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve. The governor's power to control the purse strings is fully realized by recognizing the governor's constitutionally defined-and limited-role in the appropriations process.

^{FN24}. *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (quoting 3 Proceedings of the Alaska Constitutional Convention (PACC) 1740 (Jan. 11, 1956)).

The council argues that the governor's item veto power is negative. ^{FN25} We agree. True, striking out language might be characterized as an act of positive creation to some extent; in the broadest sense a new bill results. But such characterizations are semantic. Our constitution does not give the governor the power to rewrite appropriation bills except by striking or

reducing items, and if the constitutional delegates had intended to give the governor the power to add or divert, they easily could have done so.^{FN26}

FN25. See, e.g., *Caldwell v. Meskill*, 164 Com. 299, 320 A.2d 788, 791-92 (1973).

FN26. During discussion of the item veto, one delegate cautioned that while the governor should be allowed to veto an item in an appropriation bill, he should not be “entitled to the right to amend.” 3 PACC 1758 (Jan. 11, 1956). The minutes do not imply that any delegate intended the item veto to give the governor power to affirmatively amend appropriations.

The council also argues that the item veto power is an executive exercise of legislative power, and therefore should be strictly construed. Professor Briffault reasons that such arguments fail to recognize the difference between the item veto and the traditional veto.^{FN27} However the item veto power is characterized, we conclude that it was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power permitting appropriations the legislature never enacted.^{FN28}

FN27. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L.Rev. 1171, 1185 (1993).

FN28. Consider, for example, the effect of striking from an appropriation's descriptive language a negative, a limiting date for expending the money, or one of several purposes.

The definition we adopt here also seems most consistent with the words of our constitution. First, the power expressly applies to “items in appropriation bills.”^{FN29} The word “item” conveys a notion of unity between two essential elements of an appropriation: the amount and the purpose.^{FN30} Altering the purpose of the appropriation by striking descriptive words interferes with that unity because the result is no longer the item the legislature enacted. In comparison, striking the amount is the equivalent of a complete veto of a particular appropriation. And reducing the amount is a result the constitution expressly permits.^{FN31}

FN29. Alaska Const. art. II, § 15.

FN30. Cf. AS 24.08.030 (“Bills for appropriation ... shall include the amount involved and the purpose....”).

FN31. See Alaska Const. art. II, § 15.

Second, the governor may either “strike” or “reduce” an item. Reduction implies diminution. This suggests that an item reduction must have a quantitative effect, implying that reduction must affect the appropriation's amount. It seems unlikely that the constitutional drafters intended the word “item” to have two widely divergent meanings, one incorporating the essential element of amount and the other not, depending on whether a governor chooses to reduce or strike.^{FN32} We therefore think that “item” was intended to include the element of amount.

FN32. See *Cenarrusa v. Andrus*, 99 Idaho 404, 582 P.2d 1082, 1090 (1978) (“Obviously the word item can not be given different meanings within the same sentence.”).

[4] Third, the phrase “strike or reduce” also implies a greater/lesser relationship between these two forms of exercising the item veto power. Reducing an item appears to be a lesser form of striking an item. This implies that these two forms are qualitatively *373 similar and have equivalent effects, i.e., they diminish the amount appropriated. Reducing an item lessens its amount; striking it lessens its amount to nothing. This implies that an “item” must include a sum of money. Likewise, a passage that does not include a “sum of money dedicated to a particular purpose” is not an “item” which the governor can strike or reduce. Therefore, a veto that does not delete or reduce the amount of money appropriated is not a valid exercise of the power article II, section 15 grants.

The historical purposes of the item, or partial, veto also support our analysis. It originated as a reform measure to prevent legislators from “logrolling” when they enact appropriation bills which necessarily address many subjects and need not be confined to a single subject, and to give governors some ability to limit state expenditures.^{FN33} These purposes seem most directed at the amount of an appropriation. Permitting a governor to strike descriptive language would not limit expenditures or help balance a budget. And, although striking language that is only descriptive might reduce logrolling, doing so would only alter purpose, not amount. For reasons discussed below, this could result in an appropriation at odds with what the legislature passed.

FN33. See *Bengzon*, 299 U.S. at 415, 57 S.Ct. 252; *Cenarrusa*, 582 P.2d at 1091; see also Briffault, *supra* note 27, at 1177-80; Roger H. Wells, *The Item Veto and State Budget Reform*, 18 Am. Pol. Sci. Rev. 782, 786 (1924). Professor Briffault describes “logrolling” as “the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority.” Briffault, *supra* note 27, at 1177.

Finally, public policy disfavors a reading of “item” that would permit the executive branch to substantively alter the legislature's appropriation bills, effectively resulting in appropriations passed without the protections our constitution contemplates.^{FN34}

FN34. See article II, section 14 of the Alaska Constitution, providing in part:

No bill may become law unless it has passed three readings in each house on 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.

Other states with the item veto have announced a range of judicial definitions.^{FN35} Professor Richard Briffault considers these definitions to reflect three general approaches, which he describes as (1) favoring the legislature, (2) balancing legislative and executive prerogatives, or (3) favoring the executive.^{FN36} The governor urges us to adopt an approach favoring the executive; the council asks us to adopt an approach favoring the legislature. The superior court adopted an approach generally favoring the legislature. As Professor Briffault recognizes, however, item veto decisions “resist easy classification,” and his three-approach categorization risks “enormous oversimplification.”^{FN37} This case does not require us to adopt any of

these approaches.

FN35. See Briffault, *supra* note 27, at 1184-85.

FN36. See *id.* at 1184-98.

FN37. *Id.* at 1184.

Many courts have defined "item" in a way that makes the amount of an appropriation an essential part of the item.^{FN38} They reason that the item veto power is a "negative" power, limiting the governor's authority to create new legislation through the creative use of item vetoes. As one court held:

FN38. See, e.g., *Dodson*, 11 S.E.2d at 127 (defining an "item in an appropriation bill" as "an indivisible sum of money dedicated to a stated purpose").

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items.... Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.^[FN39]

FN39. *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975, 981 (1974) (citations omitted); see also *Rush v. Rav.* 362 N.W.2d 479, 482 (Iowa 1985) ("[T]he governor's power is a negative one that does not allow him to legislate by striking qualifications in a manner which distorts legislative intent."); *Welden v. Rav.* 229 N.W.2d 706, 713 (Iowa 1975) (" 'It is obvious that the item veto power does not contemplate striking out conditions and restrictions alone as items, for that would be affirmative legislation, whereas the governor's veto power is a strictly negative power, not a creative power.' ") (quoting Note, *Item Veto Amendment to the Iowa Constitution*, 18 Drake L.Rev. 245, 249-50 (1969)).

*374 A few states define "item" as something less than a coupling of a sum and a purpose. An example is found in *State ex rel. Wisconsin Senate v. Thompson*.^{FN40} The Wisconsin Supreme Court there held that "the governor may, in the exercise of his partial veto authority over appropriation bills, veto individual words, letters and digits ... as long as what remains after veto is a complete, entire, and workable law."^{FN41} No other state seems to have followed Wisconsin's lead, although the Washington Supreme Court held in *Washington State Legislature v. Lowry* that "[t]he Governor's line item veto should extend to nondollar provisos in appropriations bills."^{FN42}

FN40. 144 Wis.2d 429, 424 N.W.2d 385 (1988).

FN41. *Id.* at 388 (citations omitted).

FN42. 131 Wash.2d 309, 931 P.2d 885, 896 (1997).

A few courts prefer to focus on the circumstances of the particular appropriation provision at issue. As in *Colorado General Assembly v. Lamm*,^{FN43} these courts determine that whether there is an “item” subject to the item veto power is “best accomplished on a case-by-case basis.”^{FN44}

FN43. 704 P.2d 1371 (Colo.1985).

FN44. *Id.* at 1381 (citations omitted).

Each general approach has benefits and drawbacks. An approach more favorable to the executive would certainly advance the item veto's historic purposes. But our definition of “item”-“a sum of money dedicated to a particular purpose”-does not prevent the governor from using the item veto for those purposes. We are therefore not persuaded by Professor Briffault's suggestion that this result may erode the item veto's anti-logrolling function.^{FN45}

FN45. *See* Briffault, *supra* note 27, at 1185.

Courts upholding gubernatorial item vetoes have sometimes done so by invoking confinement clause policies in defining an “item.”^{FN46} Doing so seems problematic. First, it allows the governor to exercise the item veto not because the struck passage *is* an item of appropriation, but because it is *not*,^{FN47} i.e., because the struck language violates the requirement that appropriation bills “be confined to appropriations.”^{FN48} Second, allowing the governor to veto language because the governor thinks it violates the confinement clause would confer on the chief executive an amendatory power Alaska's constitution does not grant. We are therefore unpersuaded by cases relying on this rationale. *Lowry*, on which the governor bases much of his argument, is among these cases.^{FN49} An assertion that a bill violates the confinement clause should be resolved by debate squarely focusing on that issue, rather than by allowing the confinement clause to be used to enhance a gubernatorial power having different historical origins.

FN46. *See Welsh v. Branstad*, 470 N.W.2d 644, 649-50 (Iowa 1991) (inquiring as to whether provision was related to neighboring appropriation); *Henry v. Edwards*, 346 So.2d 153, 158 (La.1977) (inquiring as to whether provision was general legislation more appropriately dealt with elsewhere).

FN47. *See Lowry*, 931 P.2d at 896.

FN48. Alaska Const. art. II, § 13. *See infra* Part III.C.3.

FN49. *See Lowry*, 931 P.2d at 896.

[5] Applying the “item” definition here, we conclude that the language struck from the ASMI appropriations is not an “item.” It does not appropriate a sum of money dedicated to a stated purpose. By striking this language, the governor was not vetoing by striking or reducing, but rather editing the ASMI appropriations. Upholding these vetoes would give the governor the power to spend appropriated monies without observing limitations enacted by the legislature. This would permit a de facto re-appropriation. Granting that power here would not advance the anti-logrolling and budget-balancing purposes*375 underlying the item veto, because these vetoes did not reduce the amount of the ASMI appropriations.

Our conclusion in Part III.C.3-that these passages cannot constitutionally be part of appropriation bills-does not alter our analysis of the “item” issue. Even if these passages did not violate the confinement clause, they would not be “items” subject to the item veto.

We therefore hold that the governor did not validly exercise the item veto power when he struck this language from the three ASMI appropriations.

2. *Did the governor deliver a constitutionally adequate statement of objections to the vetoed ASMI language in chapter 100?*

The governor must return “any vetoed bill, with a statement of his objections, to the house of origin.”^{FN50} We have never decided what the governor must do to satisfy the “statement of objections” requirement.

FN50. Alaska Const. art. II, § 15.

The three ASMI appropriations became parts of chapters 98^{FN51} and 100.^{FN52} The veto message concerning what became chapter 98 stated: “In taking final action on the FY98 operating budget, I followed a long-standing gubernatorial tradition of vetoing intent language because it is not appropriate in an appropriations bill.”^{FN53} That message also stated:

FN51. Ch. 98, § 6, SLA 1997. Chapter 98 also contains the Community Residential Center provisions. *See* ch. 98, § 39, SLA 1997.

FN52. Ch. 100, §§ 47, 70, SLA 1997. Chapter 100 also contains the Valdez Treatment Center provisions. *See* ch. 100, § 74(a), SLA 1997.

FN53. 1997 House Journal 1993.

I also vetoed language which purported to make the appropriation for ASMI conditional on having no upper level employees located outside the state because it violates the constitutional limits placed on appropriation bills. To prevent any unnecessary impediment to marketing efforts Outside during the current salmon crisis, fish processors, fishers, and the ASMI board urged me to veto this as a prudent exception to the general rule of having state jobs located in Alaska.^[FN54]

FN54. 1997 House Journal 1994.

The governor's veto message concerning what became the chapter 100 ASMI appropriations contained the same general "intent" objection first quoted above, but did not include a separate explanation of the sort set out in the quotation indented above.^{FN55}

FN55. See 1997 Senate Journal 2114.

[6] The council argues that although the governor adequately stated his objections to the language he struck from the ASMI appropriation in chapter 98, his objection to the identical language in the two ASMI appropriations in chapter 100 was inadequate, invalidating those vetoes. The superior court held that the legislature had adequate notice of the reasons for the governor's chapter 100 ASMI vetoes because it received both the governor's chapter 100 objection and the more complete chapter 98 objections at "literally the same minute."

The council objects to this "adequate notice" theory. It argues that the governor should be required to give the legislature specific notice of the objections to each bill to avoid constant questions about the sufficiency of notice. The council also argues that a governor might provide unclear objections for purposes of delay and making untimely any attempt to override the veto.^{FN56} The governor asserts that the legislature's argument elevates form over substance, because the vetoes in this case were submitted at "the same minute."

FN56. The legislature must meet "immediately" and reconsider passage of a vetoed bill or item if it receives a veto message during a regular session of the legislature. See *Alaska Const. art. II, § 16*. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered no later than the fifth day of the next regular or special session of that legislature, and bills vetoed after adjournment of the second regular session shall be reconsidered no later than the fifth day of a special session of that legislature, if one is called. See *id.*

The requirement that the governor explain the reasons for a veto serves at least two *376 principal functions. It allows the legislature to determine what it must do to avoid incurring another veto.^{FN57} And it forces the governor to reveal his or her reasoning, "so that both the Legislature and the people might know whether or not he was motivated by conscientious convictions in recording his disapproval."^{FN58}

FN57. See *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 40 (1938).

FN58. *Id.*

We need not decide whether receipt of the explanation for the chapter 98 veto gave "adequate notice" of the governor's objections to chapter 100, because we hold that the governor's "intent" objection for chapter 100 was itself sufficient.

We accept for discussion's sake the council's argument that the governor's chapter 100 "intent" objection would have been clearer if it had disclosed whether the governor would also consider language which validly conditioned an appropriation to be invalid intent language.

But in our view such a detailed disclosure is not necessary. And attempting to distinguish between an objection which asserts a facially valid ground for veto, and an identical objection which arguably mischaracterizes the struck appropriation language, would create complex and case-by-case interpretive disputes. Subjecting the substantive adequacy of each objection to judicial scrutiny would be unavoidably time-consuming. Judicial involvement would be unlikely to generate bright-line distinctions that would provide guidance useful in avoiding future disputes and litigation. And ultimately such disputes are inherently political because they implicate the appropriations and budgetary powers of the legislature and the executive, and the political relationship between those branches of government. The judiciary has no special competence to settle these types of inherently political disputes. We also think the purposes underlying the statement-of-objections requirement do not demand case-by-case judicial review. The legislature, through knowledge accumulated in dealing with the governor, is capable of interpreting the sufficiency of an objection, and is thus able to decide whether to enact an amended appropriation or to seek a veto override. It is no less able than the judiciary to compare the governor's words and the struck language to decide for itself whether the governor was motivated by "conscientious convictions." And the ultimate arbiter of that question is the electorate.

[7] The best way to resolve such disputes is to apply the "minimum of coherence" standard when reviewing gubernatorial objections. The Colorado Supreme Court adopted this approach in *Romer v. Colorado General Assembly*, ^{FN59} and we adopt it here for Alaska. Under this approach, courts look to see whether the objection makes comprehensible reference to the provision being vetoed, and do not attempt to evaluate the reasoning underlying the objection.^{FN60} In the words of the Colorado Supreme Court, "[t]o disallow a veto for the complete absence of reasons is to establish an objective standard-one with which meddlesome courts cannot tamper."^{FN61}

^{FN59}. 840 P.2d 1081 (Colo.1992).

^{FN60}. See *id.* at 1084-85.

^{FN61}. *Id.* at 1085 (quoting *Jones v. Rockefeller*, 172 W.Va. 30, 303 S.E.2d 668, 683 (1983) (Neely, J., dissenting)).

The governor's chapter 100 "intent" objection meets the minimum-of-coherence standard. The language struck from chapter 100 can be fairly characterized as "intent" language, and the objection clearly refers to the vetoed passages. We therefore conclude that the objection is constitutionally adequate.

3. Does the vetoed language in the ASMI appropriations violate the constitution's confinement clause?

We next consider the governor's argument that the legislature violated the confinement clause by including the vetoed language in the three ASMI appropriations. Our constitution provides that "[b]ills for appropriations shall be confined to appropriations."^{FN62} *377 We have never delineated the boundaries of this requirement.

^{FN62}. Alaska Const. art. II, § 13; see also AS 24.08.030 ("Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner, and other related conditions of payment.").

The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for

enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, “ ‘to ensure that the legislature knows what it is passing’ and to ensure an opportunity for the expression of public opinion and due deliberation.” ^{FN63} This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13-a requirement meant to avoid logrolling. ^{FN64} Allowing substantive enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor. ^{FN65} Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.

^{FN63.} State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 772 (Alaska 1980) (quoting North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 543 n. 11 (Alaska 1978) and citing 3 PACC 1751-54 (Jan. 11, 1956)).

^{FN64.} See Suber v. Alaska State Bond Comm., 414 P.2d 546, 557 (Alaska 1966) (noting that this requirement is 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”). More specifically, the South Dakota Supreme Court has observed that South Dakota's equivalent clause is intended to allow members of the legislature to be free to vote on an appropriation bill “ ‘knowing that appropriations and nothing else were involved.’ ” South Dakota Educ. Ass'n v. Barnett, 582 N.W.2d 386, 391 (S.D.1998) (quoting Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666, 669 (1933)).

^{FN65.} See Uniform Rules Alaska State Legislature 42(b)-(d) (1998).

[8] The superior court here applied a confinement clause test first articulated in 1983 by the superior court, Judge Walter L. Carpeneti presiding, in Alaska State Legislature v. Hammond. ^{FN66} The superior court there addressed, among other issues, claims that eleven appropriations violated the confinement clause. The superior court wrote that to satisfy the confinement clause,

^{FN66.} No. 1JU-80-1163 CI (Alaska Super., May 25, 1983).

the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill. ^{FN67}

^{FN67.} *Id.* at 44-45.

We find the authority the superior court cited in Hammond persuasive, ^{FN68} and we approve the five-part Hammond formulation as a non-exclusive test for deciding whether an appropriation violates the confinement clause. We further elaborate

on this test before applying it.

FN68. See *Henry v. Edwards*, 346 So.2d 153, 158 (La.1977); *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (1970); *Biles v. Commonwealth Dep't of Pub. Welfare*, 44 Pa.Cmw.lth. 274, 403 A.2d 1341, 1343 (1979); *Flanders v. Morris*, 88 Wash.2d 183, 558 P.2d 769, 772 (1977).

The council suggests that the “minimum necessary” language is best understood simply as a requirement that “appropriation language explain how, when, or on what the money is to be spent. Therefore, this part of the test is better expressed as simply requiring the language to explain the legislature's purpose regarding the appropriation.” We agree generally with the first of these propositions, but we believe that this factor is better stated in terms of what it permits rather than what it requires. This factor *378 limits the legislature's ability to include in an appropriation bill legislation cloaked as a “description.”

[9] The council suggests that the *Hammond* formulation quoted above is deficient because an appropriation should be able to change existing law on the subject of appropriations. The council argues that the confinement clause is not violated when the legislature amends a prior appropriation in an appropriation act. We believe that this is an accurate statement of law. But the *Hammond* formulation would not seem to preclude this practice in any event, because the new appropriation bill would amend only a prior appropriation, not an “existing law.”

The council proposes additional illumination of the prohibition on enacting or amending substantive law. The council characterizes case law from other states as generally dictating that an appropriation for a statutory program may not include provisions changing the requirements of that program, even temporarily for the purposes of that appropriation.^{FN69} The council cites three Florida cases in support. *Chiles v. Milligan* considered appropriation language that would have taken money to be awarded under the statutory education funding formula and adjusted it according to the ratio of classroom salaries to total salaries.^{FN70} The court struck this language as an enactment of new law.^{FN71} In a subsequent but similarly named case, *Chiles v. Milligan*, the court struck down appropriation language that would have allowed education funds to be used for purposes other than those specified by statute.^{FN72} But in *Department of Education v. School Board of Collier County*, the court upheld an appropriation provision that increased funds for all schools except those with a millage value per student of more than twenty percent of the statewide average; the court reasoned that the appropriated money was in *addition to* the standard education funding and therefore did not amend existing law.^{FN73}

FN69. See, e.g., *Moreau v. Lewis*, 648 So.2d 124, 126-28 (Fla.1995) (holding that provision in appropriation bill requiring co-payment for pharmacy expenses was invalid); *Murray v. Lewis*, 576 So.2d 264, 265-67 (Fla.1990) (declaring requirement in appropriation bill that participants in tuition waiver program exhaust other resources invalid).

FN70. 659 So.2d 1055, 1056-59 (Fla.1995).

FN71. See *id.* at 1059.

FN72. See 682 So.2d 74, 75-77 (Fla.1996).

FN73. See *Department of Educ. v. School Bd. of Collier County*, 394 So.2d 1010, 1011-13 (Fla.1981); see also *Biles*, 403 A.2d at 1342-43 (upholding provision stating that no part of appropriation could be used to pay assistance to full-time college student who had not participated in federal program for dependent children); *Pannell v. Thompson*, 91 Wash.2d 591, 589 P.2d 1235, 1237, 1239-40 (1979) (upholding limit in appropriation bill on amount that could be spent on entire general relief assistance program, even though statute specified payments of certain amounts).

We agree with the council's assertion that the differences between such cases reflect the tension between a desire to prevent legislatures from using appropriation bills to make programmatic changes (even for a year) and the realization that legislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs), and in fact may choose to fund programs that are subject to conditions or contingencies.

With regard to the germaneness requirement, the council's brief usefully discusses cases from other jurisdictions concerning what their confinement clauses permit and prohibit. The council lists the following conditions and contingencies that state courts have upheld as sufficiently "related" or "germane" to the money appropriated: FN74 (1) limits on amounts that could be spent at an individual facility; FN75 (2) limits on the number of employees for which the money could be spent; FN76 (3) a prohibition against using the *379 money for new construction; FN77 (4) a requirement related to federal funds; FN78 (5) a provision making an appropriation for driver education contingent on the enactment of a tax on drivers' licenses; FN79 and (6) a requirement that funds for contracted work be spent only if a state laboratory could not perform the work. FN80

FN74. We paraphrase the council's description of these decisions, without necessarily endorsing either its description of the holding or the result in each cited case.

FN75. In support of this proposition the council cites *Welden v. Rav*, 229 N.W.2d 706 (Iowa 1975).

FN76. In support of this proposition the council cites *Welden*.

FN77. In support of this proposition the council cites *Welden*.

FN78. In support of this proposition the council cites *Welden* and *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974).

FN79. See *In re Advisory Opinion to the Governor*, 239 So.2d 1, 10 (Fla.1970).

FN80. See *Kirkpatrick*, 524 P.2d at 982-83.

On the other hand, the council notes that courts have struck down these provisions because they were not sufficiently connected with the expenditures: (1) a requirement that the money not be spent for trade delegations unless there was

nonpartisan executive council representation; ^{FN81} (2) a requirement that the inmate population at a specified facility be reduced; ^{FN82} (3) a provision conditioning a department of health appropriation on the department relinquishing federal money to a private family planning council; ^{FN83} (4) a requirement for giving notice of prisoners' escapes and transfers; ^{FN84} and (5) a prohibition against electioneering by district attorneys in a certain parish. ^{FN85}

FN81. See *Welsh v. Branstad*. 470 N.W.2d 644, 647, 649-50 (Iowa 1991).

FN82. See *Brown v. Firestone*. 382 So.2d 654, 657, 669 (Fla.1980).

FN83. See *Colton v. Branstad*. 372 N.W.2d 184, 186, 191-92 (Iowa 1985).

FN84. See *Henry*. 346 So.2d at 163.

FN85. See *id.* at 159-60.

The council characterizes the differences between these cases as follows:

In general it appears that courts will uphold conditions that could (albeit with some effort) be written as purposes, *e.g.*, which facilities, which employee positions, which buildings or types of buildings, the money could be spent on. This would be true even if the conditions were written in the negative, *e.g.*, "money from this appropriation may not be used to fund employee contracts;" "money from this appropriation may not be used to fund new construction." See *Welden v. Rav*. 229 N.W.2d 706, 710 (Iowa 1975). It also appears that contingencies will be upheld if they relate to the receipt or nonreceipt of specific funds, *e.g.*, federal funds, matching funds, the tax intended to fund the expenditure, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable.... However, contingencies that relate to things other than the need for or use of the money or the need for the activity, seem more vulnerable to being found insufficiently "connected" to the appropriation.

We agree with the council's characterizations of the limits on the legislature's appropriation power. We do so not to predict the outcome of future disputes or to minimize the importance of the *Hammond* factors when analyzing a confinement clause dispute, but because the legislative council, speaking for the legislature, has usefully given examples of appropriation provisions which it regards as unconstitutional.

[10][11] In approaching confinement clause disputes, we assume that an act of the legislature is constitutional. ^{FN86} The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality. ^{FN87}

FN86. See *Baxley v. State*. 958 P.2d 422, 428 (Alaska 1998).

FN87. See id.: *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 608 P.2d 792, 800 (App.1980); *Barnett*, 582 N.W.2d at 392.

[12] With this background, we now apply the five *Hammond* factors to the vetoed language in the ASMI provisions.

a. *Intent*

The vetoed language required ASMI to move upper level employees to locations in *380 Alaska in order for ASMI to carry forward monies from appropriations in prior years. These three ASMI appropriations did not themselves appropriate monies for upper level staffing. Rather, they addressed the “marketing [of] Alaska seafood products.” FN88 The vetoed language therefore expressed the legislature's intent about how *other* ASMI appropriations were to be spent, not its intent about how *these* appropriations were to be used. FN89

FN88. See ch. 98, § 6, SLA 1997; ch. 100, § 70, SLA 1997.

FN89. See *infra* Part III.C.3.c.

b. *Administering the program*

The vetoed language did not specify how these three appropriations were to be used, and instead addressed staffing funded under separate appropriations. This language effectively administered ASMI's program because it limited the executive's exercise of discretion in staffing and locating executive-branch offices whose operations were funded by separate appropriations.

Because this language did not specify how these three appropriations were to be spent, we do not need to decide here whether, as the council argues, the appropriation power gives the legislature authority to decide where executive-branch personnel will be located. Likewise, we need not decide whether, as the governor asserts, the appointment of executive officers is an executive function, FN90 and whether the geographic location of particular levels of state officials is the type of “close supervision” of state government that is essentially executive in character. FN91

FN90. See *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

FN91. Cf. *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620, 623-24 (1978) (finding that “the making of specific staffing and resource allocation decisions” are “powers of close supervision that are essentially executive in character”).

c. *Germaneness*

The council argues that the vetoed language is germane to marketing seafood. The governor argues that it is not, because employee location does not relate to ASMI's statutory duties. We conclude that the vetoed language is not sufficiently germane because these three appropriations do not fund staffing at any location affected by the struck language. These appropriations were for purchasing contractual services, expenditures unrelated to encouraging “local hire.” The superior court correctly observed that separate appropriations funded state employee positions. The vetoed language therefore is not germane to these

three appropriations. Given the absence of any direct relationship, it is insufficient that the language arguably has some general relationship-because it generally concerns ASMI and the performance of ASMI's duties-to the ASMI appropriations in chapters 98 and 100.

d. New substantive law

The superior court found the vetoed language objectionable because it addressed an issue of substantive law, local hire, that the legislature has repeatedly addressed with substantive legislation. We agree that this language has the effect of creating a "mini-local hire law." According to the legislature's drafting manual, "an appropriation bill may not contain substantive provisions." ^{FN92} Permitting it to enact substantive policy in one appropriation bill by imposing conditions on another appropriation bill would reduce the public scrutiny and debate which accompany policy making, and could encourage logrolling and free-riders to achieve results not politically attainable in non-appropriation bills.

FN92. *Manual of Legislative Drafting*, 35 (1999). That manual states:

These limitations have two basic effects on drafting. One effect is that when a requestor wants to establish a new agency or program, there usually must be two bills drafted. One bill sets up the agency or program, the other bill appropriates money for the agency or program. The effective date of the appropriation bill would be tied to the effective date of the related substantive bill.

A second effect of the limitations of art. II, sec. 13, of the state constitution, is that a drafter must avoid including "riders" on appropriation bills. Money should be appropriated for a specific purpose or program, but further limitations on the program itself must be in a separate bill unless they can be drafted as a lawful condition on the appropriation.

*381 The council argues that the legislature could have accomplished the same result with line-item appropriations and that the legislature followed the equivalent of that process. But we think that the process followed here was not equivalent. Line-item appropriations would have been subject to item vetoes, and would have required the legislature to give individualized consideration to each ASMI budget item. The legislature did not follow that course. The vetoed language here substantively affected the use of other appropriations, and cannot be considered merely a condition attached to the chapter 98 and 100 appropriations. In reaching beyond these appropriations, the struck language created new substantive law.

e. Life of the appropriations

These appropriations did not state whether the out-of-state staffing limitation expired with the fiscal year. And the vetoed language does not direct how these appropriations were to be spent. It was instead intended to limit other appropriations. It is therefore unclear whether the life of the staffing limitation actually extended beyond the duration of the ASMI appropriations in chapters 98 and 100.

f. ASMI conclusion

Regardless of whether the vetoed language was to extend beyond the life of these three ASMI appropriations, it violates the other four *Hammond* factors. We therefore conclude that including the vetoed language in the chapter 98 and 100 ASMI appropriations violated the confinement clause. The superior court correctly reached the same conclusion.

D. *Community Residential Center Appropriation*

The legislature appropriated funds to the Department of Corrections for “new community residential centers” (CRCs).^{FN93} This appropriation included the following passage: “This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid.” The governor vetoed all three sentences in this passage.

FN93. See ch. 98, § 39, SLA 1997. The legislature separately appropriated funds for existing CRCs. This appeal concerns only the veto of language from the appropriation for new CRCs.

1. *Was the struck CRC language an “item”?*

[13] Having decided that the veto of this passage was invalid because the governor's veto explanation was inadequate, the superior court did not decide whether the struck passage was an “item.” The council only tangentially suggests that it was not an item. The governor does not appear to address the issue on appeal.

Our discussion of the item veto in Part III.C.1, in context of the ASMI appropriations, clearly indicates that the language struck from the CRC appropriation was not an “item.”

2. *Was the governor's statement of objections adequate?*

The governor's veto message for chapter 98 stated: “In taking final action on the FY98 operating budget, I followed a long-standing gubernatorial tradition of vetoing intent language because it is not appropriate in an appropriations bill.”^{FN94} Does this objection adequately explain this veto?

FN94. 1997 House Journal 1993.

The superior court held that it did not. The court reasoned that the governor's general “intent” objection could not be said to cover the vetoed CRC language because the vetoed passage “clearly was not intent language,” and no other explanation arguably applied.

For reasons discussed above in Part III.C.2, this is the type of interpretation that courts should avoid when considering the constitutional sufficiency of a statement of objections. The reviewing court should simply determine whether the objection makes comprehensible reference to the provision being vetoed, and should not attempt to evaluate*382 the reasoning underlying the objection.^{FN95}

FN95. See *supra* Part III.C.2; *Romer*, 840 P.2d at 1084-85.

The governor's “intent” objection meets this minimum-of-coherence standard. The struck language can permissibly be characterized as merely expressing the legislature's intent. The governor's explanation for vetoing the CRC language is therefore constitutionally adequate.

3. *Did the language struck from the CRC appropriation violate the confinement clause?*

[14] Applying the *Hammond* factors and the presumption of constitutionality discussed in Part III.C.3, we next determine whether including the struck passage violated the confinement clause.

Some of the factors seem to be in relative balance. The qualifying language in the first sentence is the “minimum necessary to explain the Legislature’s intent” about how the money is to be spent. The second sentence also describes how the money is to be spent, but can be read to specify standards; the third specifies procedures and does not describe what the money is for. These two sentences can be read to administer the program or to impose substantive requirements better addressed in a substantive bill. Likewise, the first sentence is clearly germane and appropriate to an appropriation bill, the second may be, and the third is not. None of the vetoed language seems to extend beyond the life of the appropriation. Therefore, the first, second, and fifth *Hammond* factors are in balance and the fourth favors finding no violation.

Further, the struck language does not clearly offend the third *Hammond* factor (no enactment of new law or amendment of existing law). The governor argues that because the words “not owned or controlled by municipalities” ^{FN96} prevented the department from using this appropriation to contract with municipalities to provide CRC space, they substantively changed existing law, which allowed the commissioner to contract with municipalities. ^{FN97} The council responds that AS 33.30.031(a) allows for use of public or private facilities, ^{FN98} and that a decision to fund one type of facility over the other does not enact new law. We agree with the council. Alaska Statute 33.30.031 authorizes the commissioner to contract with municipalities. But it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space. The appropriation therefore does not preclude the commissioner from fulfilling the department’s statutory mandate. Instead, it specifies the type of CRC space the money covers. ^{FN99}

FN96. Ch. 98, § 39, SLA 1997.

FN97. Counsel for the governor asserted at oral argument that the condition here violated AS 33.30.031(a), which gives the commissioner broad power to contract with public agencies. But this statute does not specify municipalities. The governor’s argument simply restates why this condition allegedly violates AS 33.30.031(a).

FN98. AS 33.30.031(a) provides, in pertinent part:

The commissioner shall determine the availability of state correctional facilities suitable for the detention and confinement of persons held under authority of state law or under agreement entered into under (e) of this section. If the commissioner determines that suitable state correctional facilities are not available, *the commissioner may enter into an agreement with a public or private agency to provide necessary facilities.*

(Emphasis added.)

FN99. Cf. Welden, 229 N.W.2d at 710 (holding that conditions and restrictions on how money is to be spent are proper in appropriation bills).

We conclude that the CRC appropriation does not violate the confinement clause.

4. Does the vetoed language in the CRC appropriation violate the principle of separation of powers?

[15] The Alaska Constitution provides that “[t]he executive power of the State is vested in the governor.” ^{FN100} The governor argues that the vetoed language violates this *383 provision and thus the principle of governmental separation of powers because it eliminates the department’s discretion to contract with public agencies to provide CRC space. The council argues that the policy decision to fund privately owned CRCs rather than publicly owned CRCs was a legitimate exercise of legislative power. We agree with the council. We held above that this language does not preclude the department from fulfilling its statutory mandate. Instead, this language embodies a permissible policy decision on how to spend the CRC money. It therefore does not violate the separation-of-powers principle.

FN100. Alaska Const. art. III, § 1. We addressed this provision in Bradner, 553 P.2d at 3-8, and the topic of separation of powers generally in Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975).

E. Valdez Therapeutic Treatment Program Appropriation

The governor vetoed language in a bill appropriating funds to the Department of Corrections for a therapeutic treatment community program in Valdez. ^{FN101} The vetoed language refers to the efficiency of the program, apparently without legal effect. ^{FN102}

FN101. See ch. 100, § 74(a), SLA 1997.

FN102. See *id.*

1. Is the vetoed language an “item”?

[16] Applying the standard discussed in Part III.C.1, we first consider whether the vetoed language is an “item.” The council argues that it is not, because it directed the appropriation’s use. Alternatively, we think this language may be read simply to describe the program. Either way, the vetoed language is not an “item” because it does not appropriate any sum of money to a particular purpose. The veto was therefore invalid.

2. Was the governor’s statement of objections adequate?

The council argues that the governor’s veto explanation is inadequate. ^{FN103} This appropriation was part of what became chapter 100. The question is whether the governor’s general “intent” objection adequately explained his veto, the same question discussed in Part III.D.2 in context of the CRC appropriation. Applying the minimum-of-coherence standard described there, we conclude that it did. The vetoed passage can be characterized as intent language and the governor’s objection coherently refers to the vetoed provision.

FN103. We choose to reach this issue although it is technically mooted by our ruling that the vetoed language was not an “item.”

3. Does the vetoed language in the treatment program appropriation violate the confinement clause?

[17] This bill appropriated \$400,000 for an inmate program in Valdez “where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions.” ^{FN104} The governor struck the

quoted language. Did including the vetoed language violate the confinement clause? The correct answer is not obvious, primarily because it is not clear what effect, if any, this language has. It is unclear whether it conditions the way the Valdez facility was to be run or simply describes the program. The former reading would violate the confinement clause; the latter would not.

FN104. Ch. 100, § 74(a), SLA 1997.

Despite this ambiguity, we conclude that this language does not violate the confinement clause. Because one permissible reading of the language is constitutional, and because we think it preferable to choose the reading that avoids unconstitutionality, FN105 we conclude that this language is descriptive and non-binding. We therefore hold that its inclusion did not violate the confinement clause.

FN105. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (stating that validly enacted statutes enjoy presumption of constitutional validity); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965) (stating that if statute may be reasonably construed to avoid unconstitutionality, court must do so); cf. *Parker v. State*, 667 P.2d 1272, 1274 (Alaska App.1983) (noting that ambiguous statutes should be interpreted to avoid conflict with constitution).

4. *Does the vetoed language in the treatment program appropriation violate the principle of separation of powers?*

[18] The governor contends that the vetoed treatment program language impermissibly*384 interferes with the administration's discretion in managing the program and therefore violates article III, section 1 of the Alaska Constitution and the separation-of-powers principle. The council counters that there is "little point" to this language, but that it is a legitimate attempt to minimize costs.

We concluded above that this language did not violate the confinement clause because it could be read as a description of the program. The same reasoning applies here. Because this language can permissibly be read not to direct the executive branch to take any action, it does not interfere with executive discretion. We therefore conclude that this language does not violate the principle of separation of powers.

F. *Other Issues*

[19] The council contends that if an appropriation is unconstitutional because it violates the confinement clause, the violative language is not severable. Accepting that contention would inevitably require us to invalidate an entire appropriation item if we found it contained language violating the confinement clause. If we were to routinely invalidate an entire appropriation whenever a part violates the confinement clause, we would chill potentially meritorious lawsuits seeking to litigate confinement clause issues. We decline to create such a disincentive. We conclude that after the offending language is removed from the ASMI appropriations, the remaining language is independent and complete. We therefore presume that the legislature would have enacted the valid parts without the invalid parts. FN106

FN106. See *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992); see also AS 01.10.030 (creating weak presumption in favor of severability).

The parties also dispute whether the vetoed ASMI language violated the principle of separation of powers. Given our conclusion that this language must be struck because it violated the confinement clause, it is unnecessary for us to reach the

separation-of-powers issue as to the ASMI appropriations.

IV. CONCLUSION

As to the three ASMI appropriations, the language the governor struck was not subject to a valid exercise of the item veto power. Nonetheless, the disputed language must be struck from these appropriations because its inclusion violated the confinement clause. We therefore agree with the result the superior court reached with respect to these appropriations.

As to the new community residential centers (CRC) appropriation, we hold that including the disputed language did not violate the confinement clause. We also conclude that the governor's statement of objections was constitutionally sufficient. Ordinarily these two conclusions would require a remand to the superior court to resolve the issue which the court left undecided as to this appropriation, namely, whether the disputed language was an item subject to an item veto. But because we have indicated based on the briefing in this case relating to the other appropriations that the disputed language was not an item subject to line-item veto, and because this issue is moot, it is sufficient merely to VACATE the judgment of the superior court insofar as it relates to the CRC appropriation.

As to the Valdez therapeutic treatment program appropriation, we hold that the disputed language was not subject to the item veto and that including the disputed language did not violate the confinement clause. We therefore REVERSE the result reached by the superior court with respect to this appropriation.

BRYNER, Justice, with whom CARPENETI, Justice, joins, dissenting in part.

CARPENETI, Justice, dissenting in part.

BRYNER, Justice, with whom CARPENETI, Justice, joins, dissenting in part.

I join in all parts of the opinion except its conclusion that the confinement clause allowed*385 the legislature to include language in the Valdez Therapeutic Treatment Program appropriation that was merely descriptive. I would hold that the disputed language violates the confinement clause, even though it is merely descriptive. Because this language is wholly superfluous, it violates *Hammond*'s necessity factor; as a superfluous and ineffectual appendage, its presence necessarily prevented the appropriation measure from being confined to an appropriation. Nor should this descriptive appendage be excused on the ground that it is "apparently without legal effect." ^{FN1} Its presence is almost as damaging as if it were binding. The governor and other executive branch officials have no way of knowing whether gratuitous language like this is mandatory or descriptive. They must choose between guessing that the language means nothing, at the risk of being wrong, or challenging the language in court to find out what it means. Either way, the language creates a problem by constraining executive branch action. By holding that the legislature is free to include superfluous descriptions in appropriation measures without violating the confinement clause, the court's opinion allows it to do so routinely in the hope that the executive branch will mistake the language as directory and follow it.

FN1. Op. at 383.

CARPENETI, Justice, dissenting in part.

I agree with all parts of the court's opinion except two dealing with the confinement clause. Under the same test that the court applies to conclude that the ASMI appropriations violated the confinement clause, I believe that the struck language in the appropriations for both the Valdez Therapeutic Treatment Program and Community Residential Center also violated the confinement clause. I join Justice Bryner's dissent concerning the former. As he persuasively shows, even merely descriptive

language can cause mischief in the balance of powers between the legislature and the executive.

In my view, the struck language concerning the CRC appropriation is at least equally objectionable: In limiting the expenditures to facilities “not owned or controlled by municipalities,” the legislature prevented the department from using this appropriation to contract with municipalities to provide CRC space. This language substantively changed the existing law that allowed the commissioner to contract with municipalities.^{FNI} The struck language therefore inappropriately interfered with the discretion previously granted to the executive branch by substantive law.

FNI, AS 33.30.031 provides in relevant part:

(a) The commissioner shall determine the availability of state correctional facilities.... If the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities....

....

(e) The commissioner may enter into an agreement with ... a municipality of this state ... to provide a correctional facility....

The court says there is no confinement clause violation because, while AS 33.30.031 authorizes the commissioner to contract with municipalities, “it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space.” (Op. at 382, emphasis in original.) With respect, I do not believe that is the issue. The issue is whether the language amends existing law, and I believe it does: For purposes of this appropriation only, it repeals AS 33.30.031(e), which otherwise gives the commissioner the power to contract with municipalities. The language purports to take away from the commissioner a power she clearly enjoys under AS 33.30.031(e). Thus, it violates the confinement clause. I would affirm the superior court's holding to that effect.

APPENDIX A

The appropriations at issue are as follows with the vetoed language struck out:

A. ASMI Appropriations

1. *Chapter 98, Section 6, SLA 1997* (as amended)

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose *386 positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011, an amount equal to the unexpended and unobligated balance on June 30, 1997, of the fiscal year 1997 general fund receipts from the salmon marketing tax (AS 43.76.110), from the seafood marketing assessment (AS 16.51.120), and from the fishery resource landing tax (AS 43.77.011) is appropriated from the general fund to the Alaska Seafood Marketing Institute for marketing Alaska seafood products during fiscal year 1998.~~

2. *Chapter 100, Section 70, SLA 1997*

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011.~~ an amount equal to the unexpended and unobligated balance on June 30, 1997, of the fiscal year 1997 general fund receipts from the salmon marketing tax (AS 43.76.110) and from the seafood marketing assessment (AS 16.51.120) is appropriated from the general fund to the Alaska Seafood Marketing Institute for marketing Alaska seafood products during fiscal year 1998.

3. Chapter 100, Section 47, SLA 1997

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011,~~ and subject to the conditions set out in (b)-(d) of this section, the appropriation made by section 31, ch. 117, SLA 1996, page 58, lines 8-11, lapses into the general fund on June 30, 2000.

B. CRC Appropriation

Chapter 98, Section 39, SLA 1997

As one of the appropriations for the Department of Corrections, \$310,000 was appropriated for "new community residential centers." The vetoed language at issue in this appeal immediately followed this appropriation:

~~this appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid.~~

C. Valdez Therapeutic Treatment Program Appropriation

Chapter 100, Section 74(a) SLA 1997

The sum of \$400,000 is appropriated from the federal receipts crime funds to the Department of Corrections for a therapeutic treatment community program of up to 100 beds in Valdez ~~where cost per inmate day (exclusive of treatment costs) will not exceed the state wide average cost per inmate day for correctional institutions.~~

Alaska, 2001.

Alaska Legislative Council v. Knowles

21 P.3d 367

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479 A.2d 403
 97 N.J. 483, 479 A.2d 403
 (Cite as: 97 N.J. 483, 479 A.2d 403)

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Supreme Court of New Jersey.

In the Matter of Alan J. KARCHER, individually and as Speaker of the General Assembly of the State of New Jersey, and
 Carmen A. Orechio, individually and as President of the Senate of the State of New Jersey, Appellants and Cross-
 Respondents,

v.

Thomas H. KEAN, Governor of the State of New Jersey, Respondent and Cross-Appellant.

Argued March 20, 1984.

Decided Aug. 6, 1984.

SYNOPSIS

Appeal was taken from a decision of the Superior Court, Appellate Division, 190 N.J.Super. 197, 462 A.2d 1273, which ruled that Governor had properly exercised his line-item veto power with respect to several of the controverted provisions in appropriations act and which overruled government's veto of several appropriations. The Supreme Court, Handler, J., held that: (1) provisions relating to state aid to municipalities were appropriations and therefore subject Governor's line-item veto power; thus, Governor properly employed his line-item veto power when he reduced amount of state aid to the municipalities from utilities franchise and gross receipt taxes; (2) Governor properly employed his line-item veto power in deleting provisions purporting to authorize abolition of vacant positions supported by appropriated funds and provision dealing with particular consequences attendant upon insufficiency of funds appropriated for "any program" since such provisions could be regarded as limitations, restrictions or conditions on expenditure of appropriated monies; and (3) Governor's line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful; rather, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated funds.

Affirmed in part and reversed in part.

West Headnotes

[1] States 360 ↪ 129.1

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k129.1 k. In General. Most Cited Cases

(Formerly 360k129)

Power and authority to appropriate funds are vested in legislative branch of government. N.J.S.A. Const. Art. 8, § 2, par. 2.

[2] States 360 ↪ 129.1

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k129.1 k. In General. Most Cited Cases

(Formerly 360k129)

An "appropriation" is an authorization, statutorily enacted by Legislature for withdrawal of money from State treasury for governmental purposes.

[3] States 360 ↪ 129.1

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k129.1 k. In General. Most Cited Cases

(Formerly 360k129)

Inherent in the power to appropriate is the power to specify how the money shall be spent.

[4] Statutes 361 ↪ 33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Provisions relating to state aid to municipalities were appropriations and therefore subject to Governor's line-item veto power; thus, Governor properly employed his line-item veto power when he reduced amount of state aid to the municipalities from utilities franchise and gross receipt taxes. N.J.S.A. Const. Art. 5, § 1, par. 15; N.J.S.A. 54:30A-16 et seq., 54:30A-24.

54:30A-24.1, 54:30A-49 et seq., 54:30A-60, 54:30A-61, 54:30A-61.1.

[5] Statutes 361 33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor properly exercised his line-item veto power to eliminate two appropriations and reduced a third appropriation for particular highway projects consisting of parts of the total appropriation designated for capital construction by the Department of Transportation and Governor lawfully exercised his constitutional authority not to reduce the larger capital construction appropriations or the total appropriation. N.J.S.A. Const. Art. 5, § 1, par. 15.

[6] Statutes 361 33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor properly employed his line-item veto power in deleting provisions purporting to authorize abolition of vacant positions supported by appropriated funds and provision dealing with particular consequences attendant upon insufficiency of funds appropriated for "any program" since such provisions could be regarded as limitations, restrictions or conditions on expenditure of appropriated monies. N.J.S.A. Const. Art. 5, § 1, par. 15.

[7] Statutes 361 33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Primary standard for determining if line-item veto authority is properly exercised turns on whether the subject matter is included in appropriations act and whether the subject is intended to be covered by the constitutional line-item veto power in terms of its relationship to the appropriations made and expenditures authorized by the act. N.J.S.A. Const. Art. 5, § 1, par. 15.

[8] States 360 132

360 States

360IV Fiscal Management, Public Debt, and Securities

360k129 Appropriations

360k132 k. Operation and Effect. Most Cited Cases

A condition or limitation on expenditure of appropriated funds may properly be included in an appropriations act.

[9] Statutes 361  **33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

General conditions, limitations, or restrictions found in an appropriations act can be the discrete subject of gubernatorial line-item veto. N.J.S.A. Const. Art. 5, § 1, par. 15.

[10] Statutes 361  **33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor is empowered to make selective reductions or eliminations of appropriations and discrete elements or parts of included appropriations that he deems excessive, unwise, improper, unlawful, or unconstitutional and the selective veto power may be exercised with respect to any subject matter that is included in the appropriations act and is broadly related to state's fiscal affairs as reflected in the act. N.J.S.A. Const. Art. 5, § 1, par. 15.

[11] Statutes 361  **33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor's line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful; rather, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated funds. N.J.S.A. Const. Art. 5, § 1, par. 15.

[12] Statutes 361  **33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Provision in appropriations act prohibiting Department of Corrections from placing a new correctional facility in Hunterdon County related to the purpose of the particular appropriation and therefore was subject to Governor's line-item veto power. N.J.S.A. Const. Art. 5, § 1, par. 15.

****404 *486** Albert Burstein, Newark, and Leon J. Sokol, Hackensack, for appellants and ****405** cross-respondents (Rosen, Gelman & Weiss, Newark, and Greenstone & Sokol, Hackensack, attorneys; Albert Burstein, Newark, Leon J. Sokol,

Hackensack, and Lawrence T. Marinari, Trenton, of counsel; James H. Laskey, Jill E. Haley, Newark, and Priva H. Simon, Hackensack, on the briefs).

Michael R. Cole, First Asst. Atty. Gen., for respondent and cross-appellant (Irwin I. Kimmelman, Atty. Gen., attorney; William Harla, Deputy Atty. Gen., on the brief).

Albert Burstein and *Leon J. Sokol* argued the cause for appellants and cross-respondents (*Rosen, Gelman & Weiss*, and *Greenstone & Sokol*, attorneys; *Albert Burstein*, *Leon J. Sokol*, and *Lawrence T. Marinari*, of counsel; *James H. Laskey*, *Jill E. Haley* and *Priva H. Simon*, on the briefs). *Michael R. Cole*, First Assistant Attorney General, argued the cause for respondent and cross-appellant (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *William Harla*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

HANDLER, J.

This appeal requires our consideration of the nature and extent of the Governor's constitutional power to veto line-items *487 in the state budget that are encompassed in the annual appropriations act. The instant controversy was triggered by the Governor's exercise of this constitutional veto power with respect to matters included in the Appropriations Act for fiscal year 1983.

I

On June 30, 1982, the last day of fiscal year 1982, Governor Thomas H. Kean signed Senate Bill 1600 into law, *L. 1982, c. 49* (generally, Appropriations Act, Act, or Senate Bill 1600). Although the Governor indicated in his message to the Senate that he had "seriously considered vetoing the entire budget," he had "resolved that this course would not be prudent and that the resulting fiscal crisis would severely damage the State." Accordingly, Governor Kean exercised his line-item veto power, pursuant to *N.J. Const. (1947) art. V, § I, para. 15*, appending to the bill a statement in which he deleted and reduced certain items of appropriation, and also deleted several general provisions that he determined to be in violation of constitutional principles.^{FN1}

^{FN1} The Governor certified the availability of revenues sufficient to support the appropriations made in *L. 1982, c. 49*, as required by *N.J. Const. (1947) art. VIII, § II, para. 2*.

The Legislature did not exercise its constitutional power, pursuant to *N.J. Const. (1947), art. V, § I, para. 15*, to override any part of the Governor's line-item veto of the Appropriations Act. However, on August 13, 1982, Alan J. Karcher, Speaker of the General Assembly, and Carmen A. Orechio, President of the Senate, filed with the Appellate Division a Notice of Appeal from the final action of the Governor approving the Appropriations Act as modified by the line-item veto, contending generally that the Governor had exceeded the constitutional authority vested in him.

*488 The Appellate Division ruled that the Governor had properly exercised the line-item veto power with respect to several of the controverted provisions. *190 N.J. Super. 197, 462 A.2d 1273 (1983)*. It upheld the Governor's veto of part of the appropriation for municipal state aid and the veto of several general provisions in the Appropriations Act that arguably were unconstitutional and were not items of appropriation or sufficiently related to any specific appropriation. The court, however,

overruled the Governor's veto of several appropriations for specific highway projects encompassed in a larger appropriation for highway capital projects. Appellants then filed with this Court a notice of appeal as of right, in response to which the Governor filed a cross-appeal as of right. (We have generally referred to the legislative parties as appellants.) See *R. 2:2-1(a)(1)*.

II

Our Constitution mandates that withdrawals of monies from the state treasury can be accomplished only by legislative appropriation, and, further, that there shall be "one general appropriation law covering one and the same fiscal year." Its exact terms in this respect are:

No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall **406 be provided for in one general appropriation law covering one and the same fiscal year. * * * [*N.J. Const. (1947) art. VIII. § II. para. 2.*]

The constitutional requirement of a unitary general appropriations law covering but a single fiscal year is the center beam of the state's fiscal structure. It expresses the basic understanding that fiscal soundness and integrity are the foundations for proper governmental operations. The constitutional plan for the expenditure of public revenues for governmental purposes centralizes and simplifies state financial affairs, serving to improve the operations of government, define fiscal commitments, and clarify official responsibility. *City of Camden v. Byrne*, 82 N.J. 133, 146, 411 A.2d 462 (1980) (citing *Report of the Commission on Revision of the New Jersey Constitution 26-27 (1942)*); *489 G. Skillman & S. Goldmann, "The Single Budget, Single State Fund and Single Fiscal Year" (Monograph 1951), II *Proceedings of the New Jersey Constitutional Convention of 1947 1668, 1669, 1680-83* [hereinafter cited as G. Skillman & S. Goldmann, "Single Budget"]; *New Jersey League of Women Voters, New Jersey: Spotlight on Government 94-98* (3d ed. 1978)).

[1] The power and authority to appropriate funds are vested in the legislative branch of government. *City of East Orange v. Palmer*, 52 N.J. 329, 337, 245 A.2d 327 (1968); *Fitzgerald v. Palmer*, 47 N.J. 106, 108, 219 A.2d 512 (1966); *Gallena v. Scott*, 11 N.J. 231, 238-39, 94 A.2d 312 (1953); *Amantia v. Cantwell*, 89 N.J. Super. 7, 12-13, 213 A.2d 251 (App.Div.1965). Although this power to appropriate and expend state monies is reserved exclusively to the Legislature, the Governor nonetheless plays a vital constitutional role in the budget process. The ultimate legislative authority over appropriations is subject to checks and balances from the executive. The Governor is statutorily authorized to "examine and consider all requests for appropriations" and to "formulate * * * budget recommendations to be forwarded to the Legislature for its consideration and ultimate approval." *N.J.S.A. 52:27B-20*. Further, and of critical relevance in this case, the Governor is constitutionally empowered to object to any item or items included in an appropriation bill through the exercise of a selective veto. *N.J. Const. (1947) art. V. § I. para. 15*. The enabling constitutional clause states:

If any bill presented to the Governor shall contain one or more items of appropriation of money, he may object in whole or in part to any such item or items while approving the other portions of the bill * * * and each item or part so objected to shall not take effect.

The Governor's statutory authority to propose the State budget, and his constitutional power to exercise a selective veto over legislative appropriations, constitute significant responsibilities for the State's fiscal affairs, and are essential to an efficient, modern system of government. See *City of Camden v. Byrne, supra*, 82 N.J. at 150, 411 A.2d 462; G. Skillman & S. Goldmann, *490 "Single Budget," *supra*, at 1683-84; S. Goldmann & B. Bland, "The Governor's Veto Power" (Monograph

1951), II *Proceedings of the New Jersey Constitutional Convention of 1947* 1418, 1428; A. Wildavsky, *Budgeting: A Comparative Theory of Budgetary Processes* 175 (1975).

Reflecting the ultimate authority of the Legislature over the appropriations function, the Constitution provides that the Governor's veto may be overridden by a two-thirds vote of both the Senate and the General Assembly. The same constitutional provision that authorizes the executive line-item veto of appropriations continues:

If upon reconsideration * * * one or more of such items or parts thereof [is] approved by two-thirds of all the members of each house, the same shall become a part of the law, notwithstanding the objections of the Governor. [*N.J. Const. (1947) art. V, § 1, para. 15.*]

With the ultimate constitutional responsibility for appropriations vested in the Legislature, and with executive responsibilities **407 so clearly involved in the budget process, the judiciary has accepted its own absence of authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one. See *City of Camden v. Byrne, supra*, 82 N.J. at 149, 411 A.2d 462 (even if amendment to appropriations act were held unconstitutional, no relief would be available through courts in absence of legislative appropriation); *Doe v. Mathews*, 420 F.Supp. 865, 870-72 (D.N.J. 1976); Mountain, "The Role of Judicial Activism: Neither Sword Nor Purse?," 10 *Seton Hall L. Rev.* 6, 11 (1979).

The claims made in this appeal focus not so much on the existence of the constitutional budgetary and appropriations authority that is both centered in and shared by the legislative and executive branches, but on the form and manner in which that authority has been exercised. The Governor takes the position that in several aspects the appropriations power of the Legislature has not been exercised correctly or lawfully in the Appropriations Act. The Legislature contends that the Governor has not properly exercised the line-item veto power. Resolution*491 of this controversy requires further examination of the basic features of an appropriations law.

[2] An appropriation is an authorization, statutorily enacted by the Legislature, for the withdrawal of monies from the State treasury for governmental purposes. *City of Camden v. Byrne, supra*, 82 N.J. at 149, 411 A.2d 462; *Brown v. Honiss*, 74 N.J.L. 501, 521, 68 A. 150 (E. & A. 1906); *Borough of Glassboro v. Byrne*, 141 N.J. Super. 19, 24, 357 A.2d 65 (App.Div.), cert. den., 71 N.J. 518, 366 A.2d 674 (1976). There are, however, no specific constitutional standards or rules for determining the content or format of an appropriations act. Therefore, some inherent flexibility and discretion attend the fiscal-formulation process.

[3] Items of appropriation have, historically and traditionally, been expressed in two different ways: as "budgeted revenue" and "appropriated revenue." An allocation of funds from "budgeted revenue" is a reservation or designation of a specific amount of money for a particular purpose. By contrast, "appropriated revenue" is reflected in the budget not as a specific numerical figure but by means of general language committing funds in an unspecified amount for a particular purpose.^{FN2} See *Hopkins v. Ford*, 534 S.W.2d 792, 795 (Ky.1976). Appropriated revenue generally includes monies collected by the State and directly utilized by a state agency or paid to a local government in the form of state aid for a specific purpose enumerated by statute. In addition to the specification of monies appropriated for governmental uses, either expressed numerically as "budgeted items" or generally as "appropriated revenues," appropriations enactments have customarily included provisions that establish conditions, restrictions, or limitations on the expenditure,*492 use, or application of appropriated funds. *Welden v. Ray*, 229 N.W.2d 706, 710 (Iowa 1975) (all legislative appropriations are qualified to some degree: "[i]nherent in the power to appropriate is the power to specify how the money shall be spent"); *In re Opinion of the*

Justices, 294 Mass. 616, 2 N.E.2d 789, 791 (1936) (absent restrictive words in state constitution, legislative body can attach conditions to expenditure of money appropriated by it); *see, J. Burkhead, Government Budgeting* 313, 324 (1963).

FN2. "Appropriated revenues" have been defined as:

Those revenues not previously anticipated or budgeted, which upon receipt increase appropriation balances as authorized in the Appropriations Act, and from which agencies may incur obligations or make expenditures for specific purposes. [*Budget Message of Governor Kean, March 15, 1982, Glossary, p. 21b.*]

An appreciation of these characteristics of appropriations legislation is important to an understanding of the issues implicated by the Governor's exercise of his line-item veto power in this case. In his veto statement, appended to the Appropriations Act *408 and filed with the Legislature, the Governor expressed his general reasons for reducing and deleting specific items of appropriations set forth both as budgeted revenue and appropriated revenue.

My veto recommendations are predicated on two issues. First, a budget totalling \$6.2 billion must have an adequate surplus. Second, I feel it is inappropriate for the Legislature to increase the spending levels I initially recommended, and to fund new programs, in a budget that doesn't provide adequately for essential State services.

The Governor also deleted or vetoed general provisions in the Appropriations Act relating to the terms and conditions for the expenditure or application of appropriated funds. The veto message stated:

In addition to various specific dollar appropriations in the budget, the Legislature has inserted certain language and provisions into Senate Bill No. 1600 to direct the manner in which the Chief Executive is to execute some of his responsibilities. Some of these legislatively imposed provisos and conditions are integrally and permissibly tied to specific items of appropriation. Other provisions, however, place broad restrictions on the way in which the Executive Branch administers particular areas of the State government on a day-to-day basis and, in some cases, authorize a Legislative Subcommittee to share responsibility with the Executive in matters traditionally and inherently assigned to the Executive Branch.

The challenges raised by the parties relate to the constitutional authority of the Governor's veto in four areas: (1) funds appropriated from the franchise and gross receipts taxes of*493 public utilities as state aid to municipalities; (2) funds appropriated or designated for particular highway projects included in the capital construction appropriations to the Department of Transportation; (3) general provisions relating to salaries, compensation, and the status of various state employee positions; and (4) a general provision restricting the funds appropriated for capital construction by the Department of Corrections. Each of these challenges touches upon a different facet of the Governor's line-item veto power.

III

Two of the challenges raised by appellants concern the propriety of the Governor's veto of the appropriation of monies for specific governmental purposes. One such fiscal grant provides for the appropriation of public utilities' franchise and gross receipts tax revenues for municipal state aid. The other concerns specific appropriations for designated highway projects. As a matter of analysis, these claims concern both appropriated and budgeted revenues.

A

[4] Appellants challenge the Governor's line-item veto of an appropriation of the proceeds from the franchise and gross receipts taxes of public utilities as state aid to particular municipalities. These taxes are authorized by N.J.S.A. 54:30A-16 et seq. and 54:30A-49 et seq. N.J.S.A. 54:30A-24, -24.1, -60, -61, and -61.1 provide for the distribution and the apportionment of these revenues as state aid for eligible municipalities. As approved by the Legislature in the Appropriations Act, the appropriation of state aid provided:

Notwithstanding the provisions of C.54:30A-24.1 and C.54:30A-61.1, public utilities franchise and gross receipts tax payments to those municipalities apportioned pursuant to those sections in an amount in 1982 greater than that received in 1981, shall be limited to an amount equal to that which each such municipality received in 1981 plus an amount equal to 92.221235 percent of the difference between the amount each received in 1981 and the amount each is apportioned in 1982 pursuant to those sections; provided, however, that the *494 amount not distributed shall be anticipated as revenue for general State purposes.**409 [Senate Bill 1600 at 143, lines 56-65.]

The Appropriations Act as passed also contained the following limitation on the payment of the state aid appropriated by the above language:

Notwithstanding the provisions of C.54:30A-24.1 and C.54:30A-61.1, the payments to municipalities from the public utilities franchise and gross receipts taxes in June, 1983 shall be limited in the aggregate to \$140 million in the manner outlined above and any amount collected in excess of this sum shall be anticipated as revenue for general State purposes. [*Id.* at lines 65A-65F.]

The appropriation at issue basically provides that no more than 92.221235% of the difference between the amount paid in aid in 1981 and the amount to be apportioned in 1982, if the statutory formulas were applied, shall be paid to the local governments. The balance-7.778765%-is not to be paid but instead anticipated by the State as revenue for general state purposes. The Governor used his line-item veto to reduce this percentage (of the difference between the amount paid in 1981 and the amount to be apportioned in 1982) to 67.811935, so as to bring the distribution of gross receipts tax revenue "into conformance with [his] original budget recommendations," according to his message to the Senate. The effect of the Governor's line-item veto in this respect was to reduce the amount of state aid by \$27,000,000. The Governor also reduced the aggregate limit on the June 1983 aid payment from \$140,000,000 to \$125,000,000. Thus, by changing the percentage and lowering the aggregate limit on the aid payment, the Governor effectively reduced the amount of state aid to the covered municipalities by \$32,000,000.^{FN3} The money obtained from these reductions is retained in the General Fund.

FN3. As passed by the Legislature, it was estimated that the retention of the 7.778765% difference would yield \$8,603,594 for the General Fund. Senate Bill 1600, at 4. In the revenue certification included in his line-item veto statement, the Governor certified that the State could anticipate retaining \$35,603,594 in 1982 from retention of the local share of public utility taxes. The \$27,000,000 difference between \$8,603,594 and \$35,603,594 is the result of the Governor's line-item veto.

However, it should be noted that the reduction of the aggregate state aid limits from \$140,000,000 to \$125,000,000 does not necessarily result in an increase in General Fund revenues by \$15,000,000. The aggregate amount collected depends on the total utilities bill. Revenue estimates made in the spring, at the time the budget is first proposed, do not always prevail at the time a budget becomes law on July 1. In Senate Bill 1600, the Legislature estimated that the revenue that would be obtained by retaining for the state a portion of the 1983 local share would be \$39,400,000. To retain that amount, and gain an additional \$5 million that the Governor thought should go

toward creating a budget surplus, he reduced the \$140 million limit to \$125 million. Accordingly, his revenue certification anticipates that the State will retain \$44,400,000 in 1983 from the local share. This certification reflects his judgment at the time of signing the budget that, because of the state of the economy, anticipated receipts would decline by \$10 million from the amount previously anticipated to make the June 1983 payment.

*495 Appellants claim that the state aid provisions contained in the Appropriations Act constitute only conditions or qualifications upon an appropriation. They contend that the statutes providing for the tax on utilities, *N.J.S.A. 54:30A-24, -24.1, -60, -61, -61.1*, constitute the operative appropriations and that the language in the Appropriations Act provides merely a distribution formula for the franchise and gross receipts tax revenues and does not itself constitute an appropriation. The provisions in the Appropriations Act, therefore, are not themselves amenable to the Governor's line-item veto.

We disagree. The Appellate Division ruled, as do we, that the Governor properly employed his line-item veto power when he reduced the amount of state aid to the municipalities from the utilities franchise and gross receipt taxes. *190 N.J. Super. at 221, 462 A.2d 1273*.

The two controverted provisions constitute appropriations. They provide the statutory authorization to make expenditures **410 of state funds for state aid to municipalities. Such an authorization clearly constitutes an appropriation of revenues. *E.g., Borough of Glassboro v. Byrne, supra, 141 N.J. Super. at 23, 357 A.2d 65; see Jessen Assocs., Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex.1976)* (“If the language is intended to set aside funds for a specified purpose, it is an ‘item of appropriation’ and is therefore*496 subject to veto by the Governor.”); *see also Hopkins v. Ford, supra, 534 S.W.2d at 795* (appropriation is “not so limited as to require fixing dollar amounts in order to validate allocation of surplus revenue”).

It is also obvious that the operative statutes imposing the public utilities franchise and gross receipts taxes and providing for their distribution are not themselves appropriations. In *City of Camden v. Byrne, supra, 82 N.J. at 146, 411 A.2d 462*, we concluded that separate statutes imposing the sales and use tax, the bus franchise replacement tax, and the transfer-inheritance tax, and providing generally for their distribution

do not constitute legislative appropriations in and of themselves. Additionally, these separate enactments have not been aggregated or included within a single appropriation law encompassing one fiscal year. They cannot serve, therefore, as valid authority for the withdrawal of monies from the State treasury under the State Constitution. [*82 N.J. at 146, 411 A.2d 462.*]

Accordingly, the underlying taxing statutes were not considered “self-executing as current appropriations,” *id. at 147, 411 A.2d 462*, and “[could not] have the legal effect of appropriation laws,” *id. at 150, 411 A.2d 462*.

Like the three tax statutes considered in *City of Camden v. Byrne*, the public utilities franchise and gross-receipts tax statutes now before us also provide a formula for the distribution and apportionment of those revenues as state aid to eligible municipalities. *N.J.S.A. 54:30A-24, -24.1, -60, -61, -61.1*. It is precisely because these statutory apportionment provisions “do not constitute legislative appropriations in and of themselves,” *City of Camden v. Byrne, supra, 82 N.J. at 146, 411 A.2d 462*, that the Appropriations Act included the specific appropriations implementing the existing law. *Id. at 150, 411 A.2d 462*.

Appellants, however, further complain that the Governor's action impermissibly resulted in the transfer of monies from municipalities to the state. It is doubtful that such an asserted effect, even if demonstrable, would serve to invalidate the

line-item veto. Moreover, the premise of appellants' argument is dubious. It is difficult to conclude that these revenues are *497 municipal revenues as such. See *City of Camden v. Byrne, supra*, 82 N.J. at 155-56, 411 A.2d 462. At any rate, they most certainly qualify as state revenues. In 1980 the Legislature provided that the franchise tax be imposed, assessed, and collected by the state, with the revenues from that tax thereafter paid into the state's General Fund. L. 1980, c. 10; L. 1980, c. 11. Further, that same year the Legislature specifically committed these revenues for state aid in the Appropriations Act for fiscal year 1981. L. 1980, c. 56. See 1981 *Appropriations Handbook* 439. Plainly, the public utilities franchise and gross receipts taxes are state taxes, and the resultant revenues are state revenues.

Appellants also assert that a governor may not invoke his veto power to strike conditions or restrictions on the use of an appropriation without vetoing the accompanying appropriation as well. This assertion, however, is inapplicable here since the challenged provisions constituted direct appropriations and were not conditions or restrictions governing appropriated funds. See discussion *infra* commencing at 413.

In sum, because the provisions relating to state aid to municipalities are appropriations, they are subject to the Governor's line-item veto power. The Governor exercised this power with respect to these appropriations in the most traditional and long-sanctioned sense. His effectuation of **411 a reduction of the state-aid appropriation to eligible municipalities represents precisely the sort of measure that the line-item veto power was intended to permit. See *Blanch v. Cordero*, 180 F.2d 856 (1st Cir.), cert. den. 340 U.S. 819, 71 S.Ct. 49, 95 L.Ed. 601 (1950); *Fitzsimmons v. Leon*, 141 F.2d 886 (1st Cir.1944) (Organic Act of Puerto Rico empowers governor to scale down as well as to disapprove items in appropriation bills since governor may object to an item, part, or portion thereof). Each type of appropriation was properly subject to the line-item veto power, and that power was lawfully exercised.

*498 B

[5] The second challenge to matters concerning appropriated funds is directed to the Governor's veto of a portion of a capital-construction appropriation to the Department of Transportation. As passed by the Legislature, the Appropriations Act contained such an appropriation in the amount of \$12,000,000. Of this amount, \$7,000,000 was designated to provide State matching funds for federally-aided interstate highway projects; the remaining \$5,000,000 was to fund non-federal highway projects. Senate Bill 1600 at 148-49. The Appropriations Act further provided for the expenditure, out of the total appropriation of \$12,000,000, for three particular projects. One related to Route 541, viz:

Funds hereinabove shall be available as matching funds for federal monies derived from the redesignation of I-895 and such funds shall be used to purchase the right-of-way of Route 541. [*Id.* at 149A, lines 78-81.]

The Governor used his line-item veto to eliminate in its entirety this appropriation to supply matching funds for Route 541. Although the Legislature estimated this expenditure to be \$3,000,000, the Governor did not reduce either the lump-sum appropriation of \$7,000,000 or the total appropriation of \$12,000,000 by any corresponding amount.

A second authorized expenditure dealt with Laurelton Circle, viz:

Of the amount hereinabove appropriated, \$1,000,000 in funds shall be made available for the reconstruction of Laurelton Circle, Ocean County. [*Id.* at lines 70-72.]

The Governor deleted this language in its entirety. He left intact, however, the lump-sum appropriation of \$5,000,000 for

non-federal highway projects, as well as the total appropriation of \$12,000,000 for capital construction, unreduced by the deletion of \$ 1,000,000.

Finally, the Act contained a specific appropriation for a bridge across Overpeck Canal, viz:

Of the amount hereinabove appropriated, \$700,000 shall be made available for construction of a vehicular bridge across Overpeck Canal in the vicinity of *499 Cedar Lane and Sheffield Avenue, Englewood, with access road to Route 4. [*Id.* at lines 73-77.]

The Governor utilized his line-item veto power to reduce the \$700,000 recommended appropriation to \$70,000, a difference of \$630,000. However, he did not reduce by this amount either the sub-total appropriation of \$5,000,000 or the total appropriation of \$12,000,000.

Appellants argue that the “executive's item veto power may be used only to nullify the whole or part of an item of appropriation of money by eliminating or reducing it and then returning the amount eliminated or reduced to the State General Fund as surplus revenue.” The Appellate Division agreed, holding that striking these items of appropriation without lowering the overall appropriations subverted the legislative intent and was an improper “affirmative” use of the line-item veto. It concluded that the three portions “of the appropriations vetoed by the Governor were conditions upon which the [larger] appropriations were made, and thus could not be deleted or otherwise changed without a corresponding change in the amount of the general**412 appropriation.” 190 N.J.Super. at 229, 462 A.2d 1273 (citations omitted).

We disagree with this determination. The Governor's action fully conformed to the provisions of the constitutional line-item veto clause. N.J. Const. (1947) art. V, § I, para. 15. In its traditional sense, a “line-item” is defined as “[a]ny single line account for which an appropriation is provided in an Appropriations Act.” Budget Message of Governor Kean, March 15, 1982, Glossary 22b; accord Brown v. Firestone, 382 So.2d 654, 668 (Fla.1980) (an appropriation is the “smallest identifiable fund to which a qualification or restriction is or can be directly and logically related”).

Courts in other jurisdictions that have specifically considered this issue in the context of similar constitutional provisions for a gubernatorial line-item veto power have upheld the executive's right to reduce or eliminate specific appropriations without reducing by a like amount the total appropriation in which *500 the specific item is included. *E.g., Reardon v. Riley, 10 Cal.2d 531, 76 P.2d 101 (1938); Green v. Rawls, 122 So.2d 10 (Fla.1960); State ex rel. Brotherton v. Blankenship, 158 W.Va. 390, 214 S.E.2d 467, 481-83 (1975)*. In *Reardon v. Riley*, the court expressly ruled that the governor's refusal to make a corresponding reduction in a total appropriation equal to the reduction of a lesser-included appropriation does not constitute an unlawful “affirmative” use of the constitutional veto power. By upholding this exercise of the line-item veto power, the court reasoned that it not only gave full effect to the intent of the legislature, but also preserved the governor's power to reduce or eliminate items of appropriation, as well as to approve them. Thus, although the legislature intended to authorize the total appropriation “regardless of the subsequent fate of the specific and included items of further appropriation,” the governor could properly reduce that total by an amount less than the sum of the vetoed included items. Reardon v. Riley, supra, 10 Cal.2d at 536, 76 P.2d at 103. Such action on the part of the governor, in the court's opinion, did not

improperly increase an appropriation without legislative action, nor did it constitute an unauthorized veto of conditional or provisional language used in connection with the specific and included items of appropriation. It was an ‘elimination’ of the specific and included items and a reduction of the general and inclusive item of appropriation. Such a conclusion appears to

effectuate the intent of the Legislature without depriving the Governor of the full effect of the veto power granted him. [*Id.* 76 P.2d at 104.]

See also Beckman, "The Item Veto Power of the Executive," 31 *Temp.L.Q.* 27, 32 (1957) (noting conflict of authority whether power to veto separate items or parts of items of appropriation bill confers authority to change amount of a single item).

The result espoused by the Appellate Division in the instant case—disallowing the deletion of an included appropriation without a corresponding reduction of the total appropriation—would too easily permit the Legislature to circumvent the Governor's line-item veto power and upset the system of checks and balances that must operate in the budget-making arena. For example, in *501 *People ex rel. State Bd. of Agriculture v. Brady*, 277 Ill. 124, 115 N.E. 204 (1917), the legislature adopted a lump-sum appropriation followed by subdivisions calling for the expenditure of the lump-sum in specified amounts for enumerated purposes. The legislature argued that the governor could not item-veto one of the subdivisions without vetoing the total, asserting that the subdivisions constituted qualifications upon the overall appropriation. The court held that to find the whole bill constituted but one item would effect a legislative evasion of the governor's authority to veto distinct items.

We conclude that the Governor properly exercised his line-item veto power to eliminate two appropriations and reduce a third appropriation for particular highway projects consisting of parts of the total **413 appropriation designated for capital construction by the Department of Transportation. This action fully conforms to his constitutional authority to reduce or eliminate items of appropriation. At the same time, the Governor lawfully exercised his constitutional authority not to reduce the larger capital construction appropriations of \$7,000,000 and \$5,000,000, respectively, or the total appropriation of \$12,000,000. His determination not to disturb the larger appropriation was within his constitutional prerogative to approve portions of appropriations bills.

IV

Appellants' other major challenges to the Governor's veto relate to the application of the line-item veto power to certain general provisions in the Appropriations Act. These provisions, relating to various aspects of governmental operations, were vetoed by the Governor as violative of constitutional standards. Appellants assert that these general provisions are not appropriations *per se* and, further, comprise general restrictions that are constitutional and therefore not subject to the line-item veto. Another provision, relating to the purposes of a capital construction project in the Department of Corrections, was *502 similarly challenged before the Appellate Division, which, although no longer at issue, we determine to address.

A

Appellants originally challenged the Governor's deletion of nine paragraphs in the Appropriations Act, asserting that his action was outside the line-item veto authority. According to the Attorney General, the Legislature had inserted several provisions in the Appropriations Act intending to condition and direct the manner in which the Governor is to execute state programs funded by items of appropriations contained in the budget. Some of these legislatively-imposed conditions were integrally and permissibly tied to specific items of appropriation in the Act. Other provisions, however, were not ostensibly tied to any particular appropriation. As argued by the Attorney General, they purportedly placed specific restrictions on the way in which the executive branch administers particular areas of the state government on a day-to-day basis, in matters in which the executive traditionally and properly exercises broad discretion. The Governor's position is that the nine paragraphs injected into the Appropriations Act were constitutionally offensive because they violated the doctrine of separation of powers, the prohibition against the delegation of the whole of the Legislature's power to just a few of its members, the requirement that a bill be devoted to a single object, and the principle that a permanent law may not be amended by reference

only to its title.

The Governor exercised his line-item veto power by deleting these provisions. On appeal before the Appellate Division, appellants challenged only three of the vetoes. Before this Court they challenge only two of the vetoes. ^{FN4} With the exception*503 of these, they do not contest the Governor's veto of the other provisions. The Appellate Division ruled that the nine provisions as a whole "would have infringed unconstitutionally upon the Governor's day-to-day administration of government,"² and that they violated the doctrines of bicameralism and separation of powers. 190 N.J. Super. at 210, 462 A.2d 1273. On these grounds, the court upheld the governor's veto.

^{FN4} The provision challenged in the Appellate Division but no longer contested in the appeal was numbered 35 on page 173 of Senate Bill 1600. It provided

The Director of the Division of Budget and Accounting is hereby authorized to review the total complement of positions now maintained among the various Executive Departments and abolish 2,500 vacant budgeted positions exclusive of those positions that are vital to the safety and health of the residents in our State institutions, the State Police, or other critically important functions of the government. [Senate Bill 1600 at 173, ¶ 35.]

The entire text of the nine provisions originally challenged are set forth *verbatim* in the Appellate Division opinion. 190 N.J. Super. at 208 n. 4, 462 A.2d 1273.

**414 [6] The statutory paragraphs that appellants continue to assert still survive the Governor's line-item veto are numbered 36 and 47. Paragraph 36 provides:

As of July 1, 1982, all full-time salaried vacant authorized, special services and temporary positions supported by the funds hereinabove appropriated, exclusive of those positions in the Legislature, the Office of the Chief Executive and the Judiciary, are abolished. [Senate Bill 1600 at 173, ¶ 36.]

Paragraph 47 states:

If, as a result of an insufficiency of appropriations in any program account, it is required or determined that there will be a reduction in the number of State offices, positions or employees in that program account, the head of the department which administers the program shall effect that reduction in personnel from among all offices, positions or employment at salaries which exceed \$15,000.00 in the unclassified service of the civil service before effecting any reduction in personnel from the classified service. [*Id.* at 175, ¶ 47.]

As noted, the Attorney General argued successfully before the Appellate Division that the Legislature's attempt, through paragraph 36, to control the elimination of particular positions in the executive branch usurps and interferes with the Governor's constitutional responsibility for administering the executive branch of government. This intrusion upon constitutional executive prerogatives was found to violate the doctrine of separation of powers.

*504 The Attorney General also persuaded the Appellate Division that paragraph 47 violates both the doctrine of separation of powers and the single-object clause of the Constitution. By generally mandating that all unclassified positions be eliminated before there can be any reductions in the classified service, the provision arguably offends the doctrine of

separation of powers, insofar as its application would severely hamper the Governor's discretion in the efficient administration of government. In addition, according to the Attorney General, the single-object clause is violated. The establishment of authority to regulate the manner of layoffs of state employees for reasons of economy, it is argued, involves a subject matter other than, and not merely incidental to, the allocation of revenue or the regulation of the State's spending program.

[7] We affirm the judgment of the Appellate Division with respect to its sustaining the Governor's line-item veto of paragraphs 36 and 47. We do not, however, predicate our conclusion on the reasoning of the Appellate Division in reaching this result. It may be that these particular provisions offend relevant constitutional doctrine, as argued by the Attorney General and determined by the Appellate Division. See, e.g., Enourato v. New Jersey Bldg. Auth., 90 N.J. 396, 448 A.2d 449 (1982); General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982). Nevertheless, we need not determine whether a constitutional deficiency of this kind is necessary to invoke or validate the Governor's constitutional power to veto general conditions as items in an appropriations act. The primary standard for determining if the line-item veto authority is properly exercised turns on whether the subject matter is included in the appropriations act and whether the subject is intended to be covered by the constitutional line-item veto power in terms of its relationship to the appropriations made and expenditures authorized by the act.

In this case, both paragraphs 36 and 47 were included within the Appropriations Act. However, these provisions, separately *505 considered, are not themselves an appropriation of funds, that is, an authorization that state funds be spent for a particular purpose. They do not *per se* constitute an appropriation or an item of appropriation, at least in the most restrictive and narrow sense of these terms. See, e.g., Brown v. Firestone, *supra*, 382 So.2d at 668; Jessen Assocs., Inc. v. Bullock, *supra*, 531 S.W.2d at 599. Rather, these provisions may, **415 more broadly, be regarded as limitations, restrictions, or conditions on the expenditure of appropriated monies. It is of course entirely possible that a proviso or condition may be utterly extraneous to the appropriations contained in an appropriations act. See, e.g., Bengzon v. Secretary of Justice, 299 U.S. 410, 414-15, 57 S.Ct 252, 254, 81 L.Ed. 312, (1937) ("An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."). See also Givens, "The Validity of a Separate Veto of Nongermane Riders to Legislation," 39 *Temp.L.Q.* 60, 63 (1965) ("[A] piece of substantive legislation attached to an appropriation act might be deemed an unrelated rider if it had nothing to do with the appropriations authorized."). Nevertheless, it is inaccurate to conclude that because they constitute "general conditions," the provisions still challenged in this appeal are unrelated to any appropriation.

Paragraph 36 purports to authorize the abolition of vacant positions supported by appropriated funds. The obvious, albeit indirect, consequence of this condition, if effectuated, is the avoidance of expenditures of appropriated funds for the particular positions, and the resultant transfer of a proportionate amount of the appropriated monies into the General Fund for state purposes.^{FNS} Paragraph 47 deals with the particular consequences*506 attendant upon an insufficiency of funds appropriated for "any program." In effect, it is a limitation or condition subsequent triggered or effectuated by the expenditure of appropriated monies that results in the insufficiency of funds to carry on programs for which appropriations were made.

^{FNS} Similarly, paragraph 35, the veto of which is no longer contested, authorizes the Director of the Division of Budget and Accounting to abolish certain vacant budgeted positions. As such it is a general condition, comparable to paragraph 36, that affects the subject matter of appropriations. Its indirect effect would be to bar the expenditure of appropriated funds for particular purposes with a concomitant increase in the General Fund.

[8] As a condition or limitation on the expenditure of appropriated funds, each of these provisions is generally tied or sufficiently related to the appropriations made by the Appropriations Act. As such, they properly have been included in the

Act. See State ex rel. Turner v. Iowa State Highway Comm'n. 186 N.W.2d 141, 148-50, 153 (Iowa 1971) (for purposes of exercise of line-item veto a general condition may be sufficiently related to an appropriation when its effectuation entails the use of other appropriated funds); cf. Green v. Rawls. *supra.* 122 So.2d at 16 (provision constitutes "item" regardless of its inclusion within larger, more general item if it relates to any detail or particular of matters treated in appropriation bill and if it specifies amount and purpose for expenditure).

Further, if there be any doubt as to whether such provisions are intended to be related to appropriations as general conditions on the expenditure of appropriated funds, that doubt must be resolved in favor of a legislative purpose to effect such a connection or relationship. We must assume that the Legislature intended to act constitutionally. See, e.g., Right to Choose v. Byrne. 91 N.J. 287, 311, 450 A.2d 925 (1982); New Jersey Ass'n on Correction v. Lan. 80 N.J. 199, 218, 403 A.2d 437 (1979). If the Legislature included provisions that were totally alien to the central subject of the appropriations law and completely divorced from either the appropriations of funds for state purposes or the manner in which appropriated monies are to be spent, such action would most certainly be in constitutional jeopardy. See N.J. Const. *507 (1947) art. IV, § 7, para. 4; New Jersey Association on Correction v. Lan. *supra.* 80 N.J. at 215, 403 A.2d 437. Thus, the fact that the Legislature has included such provisions in the Appropriations Act itself can, in the absence of totally preclusive language dictating a contrary conclusion, be determinative of an implied intention to **416 relate such conditions to the appropriations contained in the Act. It is fair to presume that the Legislature, by including such conditions, intended to act constitutionally in exercising its fiscal power over appropriations and that such conditions were intended to relate to and govern the expenditure of appropriated funds.

[9] It follows, in terms of the constitutional scheme, governmental policy, and plain logic, that such general conditions, limitations, or restrictions found in an appropriations act can be the discrete subject of the gubernatorial line-item veto. The validity and propriety of the procedure followed by the Governor in this case is illuminated when viewed against the backdrop of the appropriations process. The constitutional framework, as noted, mandates that state government be financed through a single, balanced appropriations act covering the entire fiscal year. See discussion, *supra*, at 405. The constitutional plan has carefully orchestrated the roles of the popular branches of government, meticulously structuring their interactions in the fashioning of the State budget. This process invokes the authority and cooperation of both the Legislature and the Executive.

[10] The constitutional line-item veto power serves the governmental need to have a balanced budget in place at the start of the fiscal year. *Supra* at 406. It reflects a realistic appreciation of the fiscal and operational exigencies that attend the striking of the state's budget. See Opinion of the Justices. 384 Mass. 828, 428 N.E.2d 117, 120 (1981) ("[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the *508 careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers * * * would be substantially undermined."). For that fundamental reason, in the budget-making function the Governor is not remitted to the use of only the absolute or conditional veto. The Governor is empowered to make selective reductions or eliminations of appropriations and discrete elements or parts of included appropriations that he deems excessive, unwise, improper, unlawful, or unconstitutional. This authority reasonably is to be implied in order to avoid a stalemate with the Legislature that would arise if the Governor were otherwise required either to veto the entire statutory appropriation or to suffer the nullification of his own constitutional responsibility.

In our opinion, the selective veto power may be exercised with respect to any subject matter that is included in the appropriations act and is broadly related to the State's fiscal affairs as reflected in the act. State ex rel. Turner v. Iowa State Highway Comm'n. *supra.* 186 N.W.2d 141; Opinion of the Justices. 384 Mass. 820 at ---, 425 N.E.2d 750 at 754 (1981) (to maintain constitutional balance and preserve separation of powers, gubernatorial partial veto power must extend to any

separable provisions contained in general appropriation bill); *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974) (partial veto power extended or enlarged to cover bills of general legislation, which contain incidental items of appropriation, as well as general appropriation bills, and to cover "items or parts" thereof in addition to "items of appropriation"); *State ex rel. Brown v. Ferguson*, 32 Ohio St.2d 245, 251, 291 N.E.2d 434, 438 (1972) (those provisions in appropriation bill that are separate and distinct from other provisions in same bill, insofar as subject, purpose, or amount of appropriation is concerned, constitute "items" subject to gubernatorial veto); *State ex rel. Sundby v. Adamany*, 71 Wis.2d 118, 134, 237 N.W.2d 910, 918 (1976) (item veto of governor valid in that portions vetoed, although not actually items of appropriation, *509 were separable provisions, not constituting provisos or conditions to an item of appropriation, and remaining portions constituted a complete and workable law). This executive power would encompass general and broad conditions**417 affixed to the expenditure or use of appropriated funds.

Furthermore, the exercise of this power on general conditions in this case is not contrary to the language line-item veto clause itself. Fairly read, that clause empowers the Governor to object not only to an item of appropriation "in whole" but also to "part" of an appropriation. *N.J. Const. (1947) art. V, § I, para. 15*. The constitutional choice of language was obviously premised on the expectation that only items of appropriation of money, or conditions on their expenditure, would be included in a general appropriations act. The Governor is thus authorized by the constitutional clause to object "in whole or in part" to any item of appropriation; consequently, any item or "part thereof" that has been subject to the Governor's objection shall be ineffective. Construing this language sensibly, to accord with the constitutional scheme, we are satisfied that a general condition on appropriated funds may itself be regarded as a "part" of an appropriation. Consequently, such conditions are within the ambit of the Governor's line-item veto power and may be eliminated without necessarily and simultaneously eliminating or reducing any specific item of appropriated funds.

We are aware of authority that supports the reasoning of the Appellate Division that such a condition when not related to a specific item of appropriation can be vetoed if the condition is otherwise unconstitutional. *E.g., Henry v. Edwards*, 346 So.2d 153, 162 (La.1977) (court upheld governor's deletion of language in general appropriations act calling for legislative review of monies spent and of prisoner transfers on grounds such language violated single object and special legislation principles). However, we need not in this case determine whether the constitutional line-item veto clause necessarily requires this expansive interpretation in order to fulfill its essential purpose and vindicate its underlying intent.

*510 [11] We are satisfied that the Governor had the constitutional authority pursuant to his line-item veto power to delete these general provisions because they are sufficiently related to the appropriations that they purport to condition. Hence, the veto of these provisos is committed to the broad discretion of the Governor without regard to whether they were otherwise unlawful or unconstitutional.

B

Another general condition was included with the appropriation of \$13,325,000 to the Department of Corrections to fund its correctional capital construction program. Following that appropriation, the Appropriations Act provided:

The Department of Corrections is prohibited from placing a new correctional facility in a county with a population exceeding 85,000 but less than 100,000 in which another State correctional facility is located. [Senate Bill 1600 at 145, lines 9-13.]

The Governor eliminated this language in its entirety. The deleted paragraph would have prohibited the construction of a new correctional facility only in Hunterdon County, since that is the only county in the State that meets the criteria of the

provision. The appellants no longer challenge this result. Nevertheless, the matter was fully briefed and argued before the Appellate Division, which rendered a decision. Because the issue raised by this challenge is important, capable of recurrence, and was disposed of by the court below on grounds that necessitate our consideration, we have decided to deal with the meritorious issue. *See, e.g., State v. Union Co. Park Comm'n*, 48 N.J. 246, 248-49, 225 A.2d 122 (1966).

[12] It is asserted that this purported limitation on the executive's discretion to establish the siting of necessary state correctional facilities is not tied to any particular item of appropriation. As with other provisions containing general conditions or limitations, the Governor concluded that such language offended several constitutional principles, namely, separation of powers, the prohibition against special legislation, the single-object clause, and the prohibition against amending a law by reference only to its title. These reasons impelled his veto of the provision.

The Appellate Division determined that this paragraph was not tied to any particular appropriation under the budget and that it would more properly be the subject of a conventional bill. *190 N.J. Super.* at 224, 462 A.2d 1273. Accordingly, the court concluded that inclusion of the language was unconstitutional and, for that reason, it sustained the Governor's veto. *Id.* at 231, 462 A.2d 1273.

We do not agree that this provision is unrelated to the particular appropriation for the construction of correctional facilities. *See State ex rel. Turner v. Iowa State Highway Comm'n, supra*, 186 N.W.2d 141. We consider the proviso to be a part of the capital construction appropriation for the Department of Corrections. The provision serves to define or specify the purpose of the appropriation and is, in reality, a condition on the expenditure of the appropriated sums. By virtue of this condition, the Legislature, in effect, appropriated \$13,325,000 to the Department of Corrections for the construction of a correctional facility anywhere in the state except in Hunterdon County. The provision, thus understood, relates to the purpose of the particular appropriation. The Governor's veto of this exception constitutes the veto of "part" of an item of appropriation, which he is empowered to assert under the line-item veto clause of the Constitution. *Supra* at 417.

Consequently, we affirm this result, although for purposes of this opinion we do not rely on the reasoning of the Appellate Division. As already determined, the line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful. Rather, as we have ruled, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated sums. *Supra* at 416-417.

***512 V**

For the reasons set forth in this opinion, we affirm in part and reverse in part the judgment of the Appellate Division. So ordered.

For affirmance in part; reversal in part-Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK and GARIBALDI join in this opinion.

Opposed -None.

N.J., 1984.

Karcher v. Kean

97 N.J. 483, 479 A.2d 403

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Supreme Court of Kentucky.

The LEGISLATIVE RESEARCH COMMISSION, By and Through Joseph W. PRATHER, Senator, and Bobby H. Richardson, Representative, Kentucky General Assembly, Individually and as Co-Chairmen of the Legislative Research Commission,
 Appellants,

v.

John Y. BROWN, Jr., Governor, Commonwealth of Kentucky, and Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Appellees.

Jan. 19, 1984.

As Modified on Denial of Rehearing March 1, 1984.

Appeal was taken from a judgment of the Franklin Circuit Court, Squire N. Williams, J., declaring unconstitutional statutes conferring powers on Legislative Research Commission. The Supreme Court, Stephens, C.J., held that: (1) General Assembly may not constitutionally delegate its legislative power to the Legislative Research Commission, and while in adjournment, General Assembly may not legislate through the Commission as its agent; (2) statute declaring that LRC is an "independent" agency of state government was unconstitutional; (3) statutes setting out plan and rules for providing review of proposed regulation by General Assembly or Legislative Research Committee were unconstitutional as in violation of separation of powers, and as a legislative encroachment into power of executive branch; and (4) General Assembly, in enacting laws pertaining to budget and budgetary process, could properly authorize LRC to exercise certain reporting and oversight powers.

Affirmed in part, reversed in part with directions.

West Headnotes

[1] Constitutional Law 92 2340

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B) 1 In General

92k2340 k. Nature and Scope in General. Most Cited Cases

(Formerly 92k50)

General Assembly, as legislative branch, has all powers which are solely and exclusively legislative in nature.

[2] Constitutional Law 92 2330

92 Constitutional Law

92XX Separation of Powers

92XX(A) In General

92k2330 k. In General. Most Cited Cases

(Formerly 92k50)

Any statute subject to scrutiny of separation of powers sections of State Constitution should be judged by strict construction of those provisions. Const. §§ 27, 28.

[3] Constitutional Law 92 2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k60)

General Assembly cannot delegate its power to make a law; it can, however, establish standards for administration and delegate authority to implement a law.

[4] Constitutional Law 92 2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k60)

State constitutional section vesting legislative power in General Assembly does not absolutely prohibit General Assembly's delegation of legislative power. Const. § 29.

[5] Constitutional Law 92 ↪ 2407

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2405 To Executive, in General

92k2407 k. Standards for Guidance. Most Cited Cases

(Formerly 92k62(2))

General Assembly's delegation of legislative power, to be lawful, must not include exercise of discretion as to what the law shall be; in addition, such delegation must have standards controlling exercise of administrative discretion, and delegating authority must have right to withdraw the delegation.

[6] Constitutional Law 92 ↪ 2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k60)

General Assembly may not constitutionally delegate its legislative power to the Legislative Research Commission, and while in adjournment, General Assembly may not legislate through the Commission as its agent. Const. § 29.

[7] States 360 ↪ 24.1

360 States

360II Government and Officers

360k24 Legislature

360k24.1 k. In General. Most Cited Cases

(Formerly 360k24)

A legislative body ceases to exist at moment of its adjournment.

[8] Constitutional Law 92 ↪ 2340

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)1 In General

92k2340 k. Nature and Scope in General. Most Cited Cases

(Formerly 92k50)

Legislative Research Commission is an "oversight" and service organization for and on behalf of the General Assembly, and, as such, is part of the General Assembly; therefore, statute declaring that the Commission is an "independent" agency of

state government was unconstitutional as in violation of separation of powers provisions of State Constitution. KRS 7.090. 7.090(1); Const. §§ 27-29.

[9] Constitutional Law 92 ↪ 2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k50)

States 360 ↪ 32

360 States

360II Government and Officers

360k24 Legislature

360k32 k. Sessions and Meetings. Most Cited Cases

Statute authorizing Legislative Research Commission to conduct any and all business of legislative department while General Assembly is not in session was impermissible under State Constitution's separation of powers provisions, and a third section of Constitution, as bringing new life to General Assembly following its adjournment. Const. §§ 27, 28, 42; KRS 7.100(8).

[10] Constitutional Law 92 ↪ 2620

92 Constitutional Law

92XX Separation of Powers

92XX(D) Executive Powers and Functions

92k2620 k. Nature and Scope in General. Most Cited Cases

(Formerly 92k76)

Adoption of administrative regulations necessary to implement and carry out purpose of legislative enactments is executive in nature and is ordinarily within constitutional purview of executive branch of government. Const. §§ 27, 28, 42, 88, 89.

[11] Constitutional Law 92 ↪ 2411

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2410 To Executive, Particular Issues and Applications

92k2411 k. In General. Most Cited Cases

(Formerly 92k62(5.1), 92k62(5))

Statutes setting out plan and rules for providing review of proposed regulation by General Assembly or Legislative Research Committee were unconstitutional as in violation of separation of powers doctrine, and as a legislative encroachment into power of the executive branch. KRS 13.085(1)(d, e), 13.087(4-9), 13.092(1, 2); Const. §§ 27, 28.

[12] Constitutional Law 92 ↪ 2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

Statutory nonseverability clause providing, in essence, that if Legislative Research Committee or its subcommittee could not constitutionally veto proposed administrative regulations, then executive department could not issue any more regulations, was unconstitutional as limiting and interfering with governor's mandated duties. KRS 13.092(3); Const. §§ 69, 81.

[13] Constitutional Law 92 ↪ 2391

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2391 k. Appointment, Tenure and Removal of Public Employees and Officials. Most Cited Cases

(Formerly 92k58)

Officers and Public Employees 283 ↪ 30.3

283 Officers and Public Employees

283I Appointment, Qualification, and Tenure

283I(C) Eligibility and Qualification

283k30 Holding Other Office or Employment

283k30.3 k. Membership in Legislature and Other Office. Most Cited Cases

(Formerly 92k58)

States 360 ↪ 46

360 States

360II Government and Officers

360k46 k. Appointment or Election of Officers. Most Cited Cases

(Formerly 92k58)

Statutes empowering house speaker and president pro tem. of the Senate to appoint members of particular boards, making house speaker and president pro tem. of the Senate ex officio members of certain boards and commissions, conferring on Legislative Research Commission or joint interim legislative committee power to advise and consent to governor's

appointments to boards or commissions, directing governor to make appointments solely from list submitted to him by LRC, and permitting LRC or its chairman to make appointments to certain boards and commissions, were unconstitutional as restricting and subverting the government's executive prerogative, thereby violating separation of powers. KRS 31.015(1)(b, c), 42.500, 117.015(2), 163.505, 164.010, 174.105(2), 230.220(1), 230.620, 247.090(1)(f); Const. §§ 27, 28, 69.

[14] Constitutional Law 92 ↪ 2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

States 360 ↪ 121

360 States

360IV Fiscal Management, Public Debt, and Securities

360k121 k. Administration of Finances in General. Most Cited Cases

(Formerly 92k58)

Statute requiring each branch of government, when submitting budget request to General Assembly, to develop and submit plan for reduction of that budget in event Commonwealth suffered revenue shortfall in amount of 2 1/2 to 5% of basic revenue estimates upon which overall budget was premised was not unconstitutional as an interference by General Assembly in purely executive function of administering budget, as General Assembly retained power to adopt and modify such plan. KRS 48.130.

[15] Constitutional Law 92 ↪ 2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

Constitutional Law 92 ↪ 2525

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applications

92k2525 k. Taxation and Public Finance. Most Cited Cases

(Formerly 92k70.1(12))

States 360 ↪ 121

360 States

360IV Fiscal Management, Public Debt, and Securities

360k121 k. Administration of Finances in General. Most Cited Cases

(Formerly 92k58)

Statute requiring governor, chief justice and Legislative Research Commission to make allotment reductions for budget units of their respective branches of government was not unconstitutional as in violation of separation of powers doctrine, and was not an incursion into executive duty to administer budget of executive branch of government. KRS 48.600; Const. §§ 27, 28, 69.

[16] Constitutional Law 92 ↪ 2390

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2390 k. In General. Most Cited Cases

(Formerly 92k58)

States 360 ↪ 121

360 States

360IV Fiscal Management, Public Debt, and Securities

360k121 k. Administration of Finances in General. Most Cited Cases

(Formerly 92k58)

Statute directing executive branch to monitor Commonwealth's financial position and to give monthly reports to each branch was not unconstitutional as an incursion into an executive function, as it placed responsibility on executive branch to participate in overall statutory scheme dealing with revenue shortfalls. KRS 48.400; Const. § 69.

[17] Constitutional Law 92 ↪ 2393

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)3 Encroachment on Executive

92k2393 k. Veto Power. Most Cited Cases

(Formerly 92k58)

States 360 ↪ 121

360 States

360IV Fiscal Management, Public Debt, and Securities

360k121 k. Administration of Finances in General. Most Cited Cases

(Formerly 92k58)

Statute requiring each branch of government to interpret provisions of appropriation act in conformity with budget memorandum adopted by General Assembly did not unconstitutionally permit veto of executive action in administering budget by legislative committee, as decision on interpretation was ultimately left up to affected branch. KRS 48.500; Const. § 69.

[18] Statutes 361 ↪22

361 Statutes

361I Enactment, Requisites, and Validity in General

361k22 k. Introduction and Passage of Joint Resolutions. Most Cited Cases

Statute requiring budget to be introduced as joint resolution, rather than a bill, was unconstitutional, as section of Constitution in describing governor's veto power in appropriation matters referred to budget document as a "bill," and second section, which requires that all revenue matters be introduced in House of Representatives, referred to such documents as "bills." KRS 48.310; Const. §§ 47, 88.

[19] Constitutional Law 92 ↪2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k60)

United States 393 ↪82(2)

393 United States

393VI Fiscal Matters

393k82 Disbursements in General

393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases

General Assembly may constitutionally preserve and keep secure its legislative power and allow Legislative Research Commission, or another delegate, to monitor applications for federal block grants, so long as authority delegated is not legislative. KRS 45.351(1), 45.351(2), 45.355.

[20] States 360 ↪44

360 States

360II Government and Officers

360k44 k. Creation and Abolition of Executive Offices in General. Most Cited Cases

Statute providing that before governor may temporarily reorganize executive department governor's plan must be approved

by the Legislative Reorganization Commission was unconstitutional, as in exercising such a veto LRC would be making legislative decisions properly to be made by entire General Assembly. KRS 12.028(2).

*909 Gross C. Lindsay, Henderson, Kathleen L. Patterson, Frankfort, for appellants.

Bert T. Combs, Wyatt, Tarrant & Combs, Sheryl G. Snyder, Wyatt, Tarrant & Combs, Louisville, Edward F. Prichard, Jr., Prichard & Stallard, Rush Dozier, Jr., General Counsel, Robert L. Chenoweth, Asst. Deputy Atty. Gen., Frankfort, for appellees.

Jane V. Fitzpatrick, Brooks, Coffman & Fitzpatrick, Lexington, for amicus curiae, Kentucky Educ. Ass'n; John J. Slattery, Jr., General Counsel, Kentucky Educ. Ass'n, Louisville, of counsel.

STEPHENS, Chief Justice.

On this appeal, we address the constitutionality of several acts of the Kentucky General Assembly passed by that body's 1982 regular session. This case has been trumpeted abroad as a test of the relative constitutional powers of the Governor of the Commonwealth as opposed to those of the General Assembly and has further been described as a power struggle between these two particular branches of our state government.

It is more accurately a case which deals with legislative enactments that confer certain powers on the Legislative Research Commission,^{FN1} most of which are designed to be exercised by that body when the General Assembly is adjourned. The basic legal issues involved deal with the delegation of powers by the General Assembly to the LRC and the application of the historical doctrine of the separation of powers to the particular statutes in question. An answer to the questions posed by this litigation necessarily requires consideration of the nature and limitations of the LRC.

FN1. For brevity, we will hereinafter describe the Legislative Research Commission as "LRC".

I. PROCEDURAL HISTORY

The LRC, acting by and through appellants Prather, President Pro Tem of the Senate, and Richardson, Speaker of the House of Representatives, Co-Chairmen of the LRC, filed this action in Franklin Circuit Court. The complaint sought a declaration of rights as to the validity of several statutes, following a challenge thereto by the Governor. The appellees, by counterclaim, impleaded certain additional statutes^{FN2} in order to insure that all issues were litigated. Following an evidentiary hearing, the trial court rendered a written opinion and a judgment.

FN2. The statutes, grouped by subject matter, will be discussed in detail at a later point in this opinion.

Based on agreements and stipulations of the parties, not all of the statutes in question were submitted to the trial court for judgment, and we will not, perforce, decide those issues. The general subject matters of the controverted statutes are as follows: *910 the power of the LRC to act in the stead of the General Assembly while it is adjourned; the power of the Speaker of the House and the President Pro Tem of the Senate to make appointments to and to serve as members of certain boards and commissions; the power of the LRC to determine or to approve budget reductions when the General Assembly is

adjourned; the power of the LRC to approve the action of the executive in applying for so-called Federal "Block Grants;" the power of the LRC to grant or withhold legal effect from any executive order promulgated by the Governor which reorganizes the administrative structure of the executive branch of government; and the power of the LRC to delay the legal effect of administrative regulations adopted by the Governor.

II. JUDGMENT OF THE TRIAL COURT

The trial court ruled that each and every questioned statute was constitutionally defective; in effect, ruling in favor of the appellees.

In summary, the court declared that the powers of the LRC were limited to "oversight" and that a statutory attempt to authorize the LRC to conduct the business of the General Assembly was a violation of Kentucky's separation of powers doctrine. The right of the appellants to make certain appointments to boards and commissions was declared invalid for the reason that the power of appointment was an executive function. The right of the LRC to veto executive decisions concerning the administration of the budget was held to be executive in nature and not the subject of proper delegation by the General Assembly. The legislative power of the LRC to approve an executive request for a Federal Block Grant was held to be void because such action constitutes "lawmaking after adjournment of the full General Assembly." The power of the LRC to, in effect, veto a Governor's reorganization plan was similarly held invalid as being the unconstitutional exercise of lawmaking authority following the adjournment of the General Assembly. Finally, the power given to the LRC to delay the effect of executive administrative regulations was declared to be a violation of the separation of powers doctrine.

Subsequent to the entry of the above judgment and following an appropriate motion, this Court, for obvious reasons, transferred this case from the trial court. CR 76.18.

III. CONTENTIONS OF THE PARTIES

In essence, the appellants, representing the LRC, argue that the LRC is a "legitimate arm" of the General Assembly, and that it may carry out any and all necessary functions of the General Assembly, following the adjournment of the General Assembly. In furtherance of this argument Appellants claim that even though some of the authority given to the LRC under the questioned statutes may be technically executive in nature, such incursion by the legislative branch into the powers of the executive is constitutionally permissible under a so-called "liberal" construction of the Kentucky constitutional provisions creating the separation of powers doctrine.

Predictably, appellees urge that the powers given to the LRC by the statutes constitute far more than mere "oversight" and actually constitute the power to *legislate*. Moreover, appellees argue that this Court has consistently ruled that the doctrine of the separation of powers in this Commonwealth must be strictly construed and that all such incursions by one branch of government into the sphere of influence of another branch are constitutionally prohibited.

IV. A HISTORY OF THE LRC

Because the statutes in question grant the LRC much power, authority and responsibility, it will be helpful to discuss the nature of this organization, and to identify its role in the constitutional scheme of the organization of state government.

The parent of the present LRC, The Legislative Council, was given birth by the 1936 session of the General Assembly.^{FN5} It was *911 composed of fifteen members: five Senators appointed by the Lieutenant Governor, five Representatives appointed by the Speaker of the House, and five state officials appointed by the Governor. It was empowered solely to engage in

fact-finding. In 1944, the Legislative Council's membership was enlarged to sixteen members, none of whom were appointed by the Governor.^{FN4} The eight Senators and eight Representatives serving were appointed by the Lieutenant Governor and the Speaker of the House, respectively. The Council's powers were expanded to include organizational functions prior to each regular session of the General Assembly. In 1948, the Council was renamed the Legislative Research Commission, and its membership was reduced to seven: the Governor as Chairman, the President Pro Tem of the Senate, the Speaker of the House, and the majority and minority floor leaders of the Senate and the House.^{FN5} Its powers were essentially unchanged. Subsequently, the Lieutenant Governor replaced the Governor as Chairman.^{FN6} In 1974, the Lieutenant Governor was removed as a member and under the present statute all members of the LRC are members of the legislative branch of government.^{FN7}

FN3. §§ 4618–138 through 4618–142, Carroll's Kentucky Code (1936).

FN4. 1944 Kentucky Acts, Chapter 149.

FN5. 1948 Kentucky Acts, Chapter 15.

FN6. 1956 Acts, First Extraordinary Session, Ch. 7, Art. XII, § 1.

FN7. 1974 Kentucky Acts, Chapter 353.

It is patently clear that the LRC as it currently exists, and as it has existed since 1974, is as appellants concede, an “arm” of the General Assembly. It is beyond cavil that the primary role, if not the exclusive role, of the LRC has been historically that of a research, fact-finding, secretariat and general support agency for the General Assembly. Since the LRC's membership consists of a small percentage of the total membership of the two houses of the General Assembly, no one could argue that it has any powers not given to it by its parent, the General Assembly, and no one could argue that it can legislate. The legislative power lies solely within the province of the General Assembly *and its entire, publicly elected membership*. Our constitution makes that clear. Ky. Const. Sec. 29 states, “[T]he legislative power shall be vested in a House of Representatives and a Senate, which, together shall be styled the ‘General Assembly of the Commonwealth of Kentucky’.” Whatever else the LRC may constitutionally do, it may not legislate.^{FN8}

FN8. For an extensive discussion of the governmental scheme set up by the framers of the Constitution see *Brown v. Barklev*, Kv., 628 S.W.2d 616 (1982).

V. THE SEPARATION OF POWERS DOCTRINE

President George Washington, in his farewell address, described the problem which is addressed by the separation of powers doctrine when he said:

The spirit of encroachment [of one branch of government into the functions of another] tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. XIII, *Writings of George Washington*, 277, 306 (Ford ed., N.Y., 1892).

Montesquieu, the father of the doctrine of separation of powers, articulated the concept by writing:

Here then is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. 1 Montesquieu, *The Spirit of Laws*, Book XI, Chapter VI, 159 (1823).

The extent to which a country can successfully resolve the conflict among the three branches of government is, to a very great extent, the measure of that nation's capacity to self-govern.

The framers of Kentucky's four constitutions obviously were cognizant of the need for the separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express *912 separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach:

Section 27 *The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.*

(Emphasis added.)

Section 28 No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Subsequent provisions of the Constitution proceed logically and consistently with the policy established in Sections 27 and 28 that grant powers to the three branches of government. Section 29 vests the legislative power in the General Assembly, Section 69 vests the executive power in the Governor and finally, Section 109, as amended by the people in 1975, establishes the judicial power in the Court of Justice.^{FN9}

FN9. A reading of these sections of the constitution shows that certain normal functions of one branch were specifically granted to another branch, e.g. the veto power of the Governor over Acts of the General Assembly, Ky. Const. Sec. 88 and 89, the power of the General Assembly to remove its own member, Ky. Const. Sec. 39.

A motivating factor that led to the drafting and eventual adoption of our present constitution was a strong desire on the part of the people to curb the power of the General Assembly. Convention delegate John D. Carroll from Henry County exemplified that spirit when he stated,

“It is a well known fact that one of the prime causes for the calling of this convention was the abuses practiced by the

legislative department of this state....” 1 Debates of Constitutional Convention of 1890, p. 1482.

According to delegate J.F. Askew, there was a great necessity to “reform the legislative department....” *Id.* at 3821. A noted Kentucky constitutional historian, Dr. Robert Ireland, clearly established in his testimony before the trial court that the desire to curb the power of the General Assembly was the primary motivation for calling the 1891 Constitutional Convention.

Even a cursory reading of Kentucky history reveals the factual basis for the conclusions of delegates Carroll and Askew and the opinion of Dr. Ireland. The then General Assembly was dominated by a few, powerful special interests who wielded that power for their own benefit. This situation obviously does not exist today; however, constitutions are operative until and unless changed by the people.

A case which was contemporaneously decided with the adoption of our present constitution, *Pratt v. Breckinridge*, 23 Ky.Law Rep. 1858, 112 Ky. 1, 65 S.W. 136 (1901) stated:

From this it seems clear that the makers of the constitution intended the legislature to discuss and enact laws, and *to do nothing else*. 65 S.W. at 140. (Emphasis added.)

Moreover, it has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be “strictly construed.” *Arnett v. Meredith*, Ky., 275 Ky. 223, 121 S.W.2d 36, 38 (1938). In *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455 (1922), we expounded at some *913 length on the history and the purposes of Sections 27 and 28:

“Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson... 246 S.W. at 457.

... *We conceive it to be the duty of the courts to adopt the construction most conducive ... [to prevent] ... the destruction of the edifice as contemplated.*” 246 S.W. at 458. (Emphasis added.)

Appellants urge this court to adopt a so-called liberal construction of the separation of powers doctrine and argue that the General Assembly is the “dominant” branch of government. In support of this argument, they claim that in *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982), we denigrated the power of the Governor and gave the General Assembly a dominant role in the tripod, by allegedly giving to the General Assembly all “residual” powers. We do not agree and we do not so interpret *Barkley*.

In *Barkley*, following a lengthy discussion of the inherent or implied powers of the Governor, we said:

The extent that the Governor has any implied or inherent powers in addition to those the Constitution expressly gives him, it seems clear that such unexpressed executive power is subservient to the overriding authority of the legislature.... 628 S.W.2d at 621.

Practically speaking, except for those conferred upon him specifically by the Constitution, his powers like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him. 628 S.W.2d at 623.

These words, plus the following, are seized upon by appellants in their argument as proof that somehow, this Court has sawed off one of the legs of the tripod, viz., that of the executive, and that we have made that branch of government less than equal to the other two branches. Appellants remind us that we also said in *Barkley*:

It is axiomatic that under our Constitution *the General Assembly has all powers not denied to it or vested elsewhere by the Constitution*. (Emphasis added.)

and:

Whereas the judicial branch must be and is largely independent of intrusion by the legislative branch, the executive branch exists principally to do its [the legislature's] bidding. 628 S.W.2d at 623.

The inference appellants draw from this language is that the General Assembly possesses all powers and authority to act which are not specifically denied it by the Constitution and has the authority to act in exercising those powers. It is argued that *all powers*, residual in nature, belong to the legislative branch. We do not agree.

[1] To place this interpretation on that language would be tantamount to saying that we were repealing Sections 27 and 28 of the Kentucky Constitution. We would in effect be eliminating the separation of powers doctrine. We would reach a result which would fly in the face of history and the legal precedents of this Commonwealth. Our review of that doctrine's history and our description of its language most assuredly confirm this. Nothing in *Barkley* can be construed to deny the existence of the doctrine of separation of powers and the equality of the three coparceners in government. Implicit in *Barkley* is that the General Assembly as the legislative branch, has all powers *which are solely and exclusively legislative in nature*. To argue that any other power is given to the General Assembly simply won't wash. The power referred to in *Barkley* is *legislative power and legislative power only*. In summation, our view is best expressed in *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455 (1922), which we reaffirm. There we stated:

But a deeper probing into and investigation of the subject will reveal the truth *914 that the rule so generally stated means, not that the Legislature has "all powers" not withheld by the Constitution, but that it "may pass any acts that are not expressly or by necessary implication inhibited by their own Constitutions or by the Federal Constitution." *In other words, the Legislature may perform all legislative acts not expressly or by necessary implication withheld from it, but it may not perform or undertake to perform executive or judicial acts, except in such instances as may be expressly or by necessary implication directed or permitted by the constitution of the particular state. To adopt the latitudinous construction that the Legislature may do anything not expressly or impliedly prohibited by the Constitution would, to our minds, at once destroy the separation of the powers of government into the three great departments.* 246 S.W. at 457 (Emphasis added.)

Nearly every one of our sister state courts have similarly resisted any weakening of the doctrine of the separation of powers. See, e.g., *In re Opinion of the Justices*, N.C.App., 295 S.E.2d 589 (1982), and *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982). In like manner, the United States Supreme Court, in striking down a federal statute, has spoken to the issue. The Court ruled that an attempt by Congress to vest veto authority in itself over executive action violated the separation of powers doctrine of the United States Constitution. *Immigration and Naturalization Service v. Chadha*, Et

al., 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). There the court said:

“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” 103 S.Ct. at 2784.

We should not abandon the philosophical principles that were incorporated by the framers of our present constitution. The purpose of the separation of powers doctrine is uncontroverted. The precedents established by this court have been uniform in retaining the goals set out by the framers. The separation of powers doctrine is set in the concrete of history and legal precedent. We will not overrule those cases and we will not, by the fiat of judicial legislation, change the clear and imperative meaning of our constitution. Such action is within the sole province of the voters of this Commonwealth.

[2] We conclude that any statute subject to the scrutiny of Sections 27–28 of the Kentucky Constitution should be judged by a strict construction of those time-tested provisions.

VI. POST-ADJOURNMENT POWERS OF THE GENERAL ASSEMBLY AND THE LRC

Two major legal questions dominate this area: (1) can the General Assembly delegate its authority to legislate to the LRC and (2) can the General Assembly legislate through its agent, the LRC, while the General Assembly is in adjournment? The answers to these legal questions are inextricably intertwined and relate to the nature and role of the LRC.

We premise this discussion on our previous conclusion that the LRC is part and parcel of the General Assembly and is under its control. It must also be remembered that the LRC is a service agency of the General Assembly. Its functions are limited. Its nature, role and authority do not change our form of government from a tripod into a quadrapod.

(1) Can the General Assembly Delegate its Authority to Legislate to the LRC?

Ky. Const. Sec. 29 reads:

“The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the ‘General Assembly of the Commonwealth of Kentucky.’ ”

Ky. Const. Sec. 60 provides: “No law ... shall be enacted to take effect upon the approval of any other authority than the *915 general assembly.” While this is not a precise, written constitutional prohibition preventing the General Assembly from delegating its legislative powers to another entity, we have spoken many times on the subject. In Bloemer v. Turner, Ky., 281 Ky. 832, 137 S.W.2d 387, 390 (1940), we declared that the Kentucky Constitution “... made sure that the legislature may not in any degree abdicate its power.” Further firming up its position, the Court in Bloemer said: *It is an accepted principle that “the legislative department has no right to deputize to others the power to perform its governing functions.”* 137 S.W.2d at 391. (Emphasis added.) Recognizing there are practical limitations to the hard and fast rule announced, particularly when it involves the implementation of legislative will, we stated:

But, obviously the legislature cannot deal with subordinate rules or cover the details of administration and execution in its regulatory enactments. Perforce, these must be left to those upon whom the duty of carrying out the legislative will devolves. However, the legislature must lay down policies and establish standards. *Ibid*

[3] Under *Bloemer*, the General Assembly cannot delegate its *power to make a law*. It can, however, establish standards for administration and delegate authority to implement a law. As in so many instances, the principle is easy to state. Its application is difficult.^{FN10}

^{FN10}. The basic rule prohibiting delegation was forcefully reiterated in *Dawson v. Hamilton, Ky.*, 314 S.W.2d 532 (1958).

[4] The practical modification or exception developed in *Bloemer* was further explained and expanded in *Commonwealth v. Associated Industries of Kentucky, Ky.*, 370 S.W.2d 584 (1963). The rule of that case is that Ky. Const. Sec. 29 does not absolutely prohibit the General Assembly's delegation of legislative power.

A more recent statement of the applicable principles is found in *Holsclaw v. Stephens, Ky.*, 507 S.W.2d 462 (1974). In that case we stated:

... when we say that the legislature may not delegate its powers, we mean that *it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer discretion in the administration of the law itself...* Generally speaking a *delegation of discretion* is not unlawful if sufficient standards controlling the exercise of that discretion are found in the act ... such as procedural safeguards *and* the right of the delegating authority to withdraw the delegation. 507 S.W.2d at 471. (Emphasis added.)

[5] It is clear from the aforementioned cases that delegation, of legislative power, to be lawful, must not include the exercise of discretion as to what the law shall be. In addition, such delegation must have standards controlling the exercise of administrative discretion. Finally, the delegating authority must have the right to withdraw the delegation.

[6] Therefore, we conclude that the General Assembly, which constitutionally holds legislative power, cannot delegate that power to the LRC.

(2) While in Adjournment Can the General Assembly Legislate Through its Agent, the LRC?

We begin by reiterating that under Ky. Const. Sec. 29 the General Assembly is the sole legislative branch of government and that its powers, procedures and limitations are set forth in Sections 29 through 68 of that Constitution.

[7] The Kentucky General Assembly is not one of continuous session and a necessary corollary thereto is that it cannot legislate after it has adjourned *sine die*. A legislative body ceases to exist at the moment of its adjournment. *Anderson v. Dunn*, 19 U.S. (6 Wheaton) 204, 5 L.Ed. 242 (1821).

As we have concluded above, the General Assembly may not delegate its authority to *916 legislate. It follows, therefore, that given the inability to delegate said authority, the General Assembly may not bestow upon its agent, the LRC, nor can the LRC seize for itself, the power to legislate.^{FN11}

FN11. See, *State ex rel. McLeod v. McClinnis*, 278 S.C. 307, 295 S.E.2d 633 (1982); *In re Opinion of the Justices*, 305 N.C. 767, 295 S.E.2d 589 (1982); *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975); *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806 (Mo.1957); *State ex rel. Robinson v. Fluent*, 30 Wash.2d 194, 191 P.2d 241 (1948), *cert. denied sub nom. Washington Pension Union v. Washington*, 335 U.S. 844, 69 S.Ct. 66, 93 L.Ed. 394 (1948); *State ex rel. Hamblen v. Yelle*, 29 Wash.2d 68, 185 P.2d 723 (1947); *In re Opinion of the Justices*, 248 Ala. 590, 29 So.2d 10 (1947).

With the preceding background we move on to analyze the challenged statutes. In each instance, one or more legal questions have been raised. We shall apply the law stated above, to each statute and determine its validity. Since certain additional legal issues have been raised, we shall discuss those where appropriate.

VII. POWERS OF THE LRC

KRS 7.090 (1982) created, or more properly re-created, the LRC. In addition, the statute established the LRC's membership, meetings, compensation, direction, personnel and management. Section (1) provides that the LRC is, "... an *independent agency of state government* ... which is exempt from control by the executive branch and from reorganization by the governor." (Emphasis added.)

KRS 7.100 (1982) sets out all the duties and authority of the LRC. Basically, the statute provides that the agency has those duties that involve fact-finding, investigation, information gathering, record-keeping, publishing, research and education. It is a service organization of the General Assembly. However, Section (8) of KRS 7.100 authorizes the LRC to:

Conduct, while the general assembly is not in session, any and all business of the legislative department of government, except for the passage of legislation, which could be conducted by the legislative department of government or the general assembly if the general assembly was in session. (Emphasis added.)

The trial court struck down KRS 7.090(1) which made the LRC an "independent" agency of state government. It declared that under Ky. Const. Secs. 27-28, there are *three* branches of government and that the net effect of the words "independent agency of state government" was to create a fourth branch of government. Moreover, the trial court ruled that the provisions of KRS 7.100(8), that broadened the authority of the LRC, when the General Assembly was in adjournment to include "... any and all business of the legislative department of government, except for the passage of legislation ..." were constitutionally invalid. The trial judge declared that the LRC could not, because of the separation of powers doctrine, exercise any supervision over the executive branch and that for the same reason, the LRC could not exercise any authority over the judiciary. The trial court obviously felt that both violations were possible under the broad grant of powers in the questioned statutes. The trial court also declared that the provisions brought new life to the General Assembly following its adjournment and thus were violative of Ky. Const. Sec. 42.

We agree with the trial court and affirm those portions of its judgment holding KRS 7.090(1) and KRS 7.100(8) unconstitutional.

As we have said, it is clear that the LRC is totally an agent of the General Assembly and may aid and assist that branch of government. As we also have said, the LRC cannot do anything the General Assembly cannot do.

[8] KRS 7.090(1) declares that the LRC is an “independent” agency of state government. This does not comport with our previous analysis of the nature of the LRC, nor *917 does it comport with our constitution which recognizes only three branches of government.

There is, simply put, no fourth branch of government. The LRC was created by, is controlled by, and is a service type agency of the General Assembly. It is independent of the Governor; it is not subject to reorganization by the Governor, it is subject to the control of its creator, the General Assembly. It is an “oversight” and service organization for and on behalf of the General Assembly. As such, it is a part, albeit an important part, of the General Assembly, the legislative branch of government. It is part of the General Assembly by reason of its statutory birth and its statutory nourishing. We therefore, conclude that KRS 7.090(1), which declares the LRC to be an independent agency of state government is constitutionally invalid.

[9] KRS 7.100(8) attempts to grant all authority constitutional and otherwise, express and inherent, save only the power to pass legislation to the General Assembly's agent, the LRC. Such a grant of power includes, but is not limited to the power to confirm executive appointments, the power to reject or modify administrative regulations, and the power to generally exercise supervision over the executive and judicial branches of government. The testimony of a witness for the appellants at trial conceded the potential of such act by saying:

[I] would say that the Legislature has all functions that are not specifically granted to the Governor or that are not specifically granted to the Judicial Branch. All other powers are inherent in the Legislature whether you term them legislative functions *or whatever, they're still in the Legislature.*

Moreover, the same witness stated that while the General Assembly can “delegate” by statute certain powers to the Governor, it can “rightfully put any strings that it wants to on that delegation of power” and that the LRC can, in effect, act for the General Assembly in “putting the strings on.” The witness also described it another way when he said that the LRC could be used to “limit” the power given to the Governor, and that the LRC has “review” authority. He concluded that the LRC could “[d]o *anything short of performing legislative acts ...*”

Such a grant of power clearly is impermissible under Ky. Const. Secs. 27–28. It also violates Ky. Const. Sec. 42, in that such a provision brings new life to the General Assembly (through the LRC) following adjournment.

VIII. LRC REVIEW OF ADMINISTRATIVE REGULATIONS

The General Assembly has in its recent history exercised “oversight” and review of administrative regulations promulgated by the various executive agencies, boards and commissions. KRS 13.080–13.125. This “oversight” and review has been achieved through a subcommittee of the LRC known as the Administrative Regulation Review Subcommittee. KRS 13.087. The effect of this LRC subcommittee's actions was *recommendatory* in nature. KRS 13.087.

However, the 1982 General Assembly made several major changes in the nature of this subcommittee's actions which are the subject of this law suit. KRS 13.085(1)(d) and (e) (effective 7–15–82) provide that no regulation made by any administrative body shall become effective until it has been forwarded to the LRC *and* until it has been *reviewed and accepted* by the LRC, *or* it has been placed before and not disapproved by the General Assembly. KRS 13.087(4) requires that the LRC shall submit all regulations to one of its subcommittees to determine “... *if the regulation conforms to the statutory authority*

under which it was promulgated and if it carries out the legislative intent of the statutory authority under which it was promulgated." (Emphasis added.) The subcommittees' findings are reported to the LRC which then either finds that the regulation conforms*918 to the legislative intent of the statutory authority and accepts the regulation, or attaches a notation of its objection to the regulation and returns it to the promulgating administrative body. KRS 13.087(5) provides that the administrative body may then revise the regulation so as to make it comply with the LRC's determination of the legislative intent or that body may return it unchanged to the LRC. KRS 13.087(6) provides that if the General Assembly is in session when an administrative body returns a regulation, that is objected to by the LRC, then the regulation shall be put before the General Assembly. KRS 13.087(7) requires a monthly reporting to the LRC of all subcommittee actions regarding administrative regulations. KRS 13.087(8) requires that all regulations not accepted by the LRC or one of its subcommittees shall be placed before the General Assembly. KRS 13.087(9) provides that the *General Assembly* may, during its regular sessions, and by joint resolution, or bill, require regulations submitted to the LRC to be laid before the General Assembly and may void any regulation already in effect. KRS 13.088(1) provides a procedure for the Governor to issue an executive order, in the event of an emergency, to permit applicable regulations to become effective immediately, provided that the emergency regulations are submitted to the LRC for review. KRS 13.088(2) provides that an emergency regulation shall expire when final review action is taken as provided by KRS 13.080 and 13.085. KRS 13.088(3) provides that when the LRC or a subcommittee thereof has an objection to a regulation, such regulation cannot be filed as an emergency regulation. KRS 13.092(1) provides that when the General Assembly is not in session, no administrative regulation, excepting an emergency regulation, shall become effective until accepted by the LRC. KRS 13.092(2) provides that until an administrative regulation is accepted by the LRC, it shall be of no force or effect. KRS 13.092(3) states that if any of the provisions of KRS 13.092 are held to be unconstitutional, no administrative body shall have authority to promulgate any regulations, notwithstanding any other provision of the law.

It is clear that if the LRC subcommittee or the LRC itself disapproved of a proposed regulation, the regulation's implementation would be delayed until the next session of the General Assembly. Therefore, KRS 13.085 and KRS 13.087 provide a device whereby the LRC or a subcommittee thereof could block, for a period of nearly twenty-one months, the administrative policy of the executive branch of government. KRS 13.085 and KRS 13.087 have the effect of creating a legislative veto of the administrative policy of the executive branch of government. One of appellants' witnesses testified to this effect when he said:

Q. 43. Well, in practical effect it is a legislative veto?

A. It's a legislative veto; right.

Q. 44. It's a legislative veto...

A. Yes, sir.

Q. 45. ... of proposed regulations by departments of government?

A. Yes, sir.

Under pre-existing law, LRC objections to prepared regulations were precatory. The objections did not have the force of law. The changes in KRS 13.085, 13.087 and 13.092 which require LRC approval or LRC subcommittee approval of

regulations have the effect of preventing the executive from dealing with emergencies. The power to suspend a regulation's effective date for up to twenty-one months is the power to effectively prevent a regulation from having the force of law. In addition, the legislature has statutorily attempted to deliver this power into the hands of seven members of the General Assembly or into the control of a subcommittee thereof.^{FN12}

^{FN12}. In essence, as we have said, a “quadrapod”, instead of a tripod.

The trial court held that such constituted a violation of the separation of powers doctrine. The judgment stated that delegation of legislative powers to the LRC when the *919 General Assembly was in adjournment was improper and declared that neither the General Assembly nor its designee could *legislate* when the General Assembly was not in session.

[10][11] The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government. Ky. Const. Secs. 27-28, 42, 88 and 89. *Brown v. Barklev, Ky., 628 S.W.2d 616 (1982)*. We conclude that KRS 13.085(1)(d) and (e); KRS 13.087(4), (5), (6), (7), (8), (9); KRS 13.088(2)(3); and KRS 13.092(1) and (2) which set out the plan and the rules for providing legislative or LRC review of proposed regulations as those statutes are presently written are violative of Ky. Const. Secs. 27-28 and are a legislative encroachment into the power of the executive branch.^{FN13}

^{FN13}. Under *Chadha, supra*, we conclude that the legislative veto of the action of the executive is also a violation of the separation of powers.

It will also be recalled that the review of the regulations was for the stated legislative purpose of determining if they comported with statutory authority and if they carried out the legislative intent. It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary, the Court of Justice.^{FN14} For this reason, we also conclude that the statutory scheme discussed above violates the separation of powers doctrine. *See, Butler v. United Cerebral Palsy of Northern Kentucky, Inc., Ky., 352 S.W.2d 203 (1961)*.

^{FN14}. This is not to say that any person, or organization including the LRC, does not have the unrestricted right to form an opinion as to whether a proposed action is legal or not. What we do say is that the determination of such as far as it causes the veto of executive action, is invalid.

[12] One further question remains. Appellants argue that KRS 13.092(3), a non-severability clause, is applicable. The statute, in essence, provides that if the LRC or its subcommittee cannot constitutionally veto proposed regulations, then the executive department cannot issue any more regulations.

The trial court declared KRS 13.092(3) to be void as being in contravention of the Governor's constitutional duty to faithfully execute the laws of the Commonwealth under Sections 69 and 81 of the Kentucky Constitution.

Under Kentucky's Constitution, the executive powers and responsibilities of the Commonwealth lie within the province of the Governor. Ky. Const. Sec. 69. Under Section 81 the Governor has the positive duty to go forward and “take care that the laws be faithfully executed”. Ky. Const. Sec. 81. In *Brown v. Barklev, Ky., 628 S.W.2d 616 (1982)*, we reaffirmed this

executive duty when we said:

We do not doubt that if the General Assembly should pass a law that requires implementation, and appropriate funds for that purpose but omit specifying the manner in which it is to be carried out, *the chief executive would be required to carry it out and have the right to choose the means by which to do it.* 628 S.W.2d at 623. (Emphasis added.)

This right, this duty, exists because of the specific constitutional duties conferred on the Governor.

The non-severability clause that appears in KRS 13.092(3) has the effect of throwing the baby out with the bath water. The adoption and use of administrative regulations are important tools in the operation of modern government, at all levels. The purpose is to enable the Governor to successfully carry out the constitutionally mandated executive and administrative duties bestowed upon that office: *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); *Burton v. Mayer*, 274 Ky. 245, 118 S.W.2d 161 (1938). There is no constitutional authority, *920 however, whereby the governor can add, directly or indirectly, to the content of a statute by means of an administrative regulation and, a fortiori, no administrative regulation can be adopted unless it is necessary and is related to the content of the legislative act and to its effective administration.

The statute in question not only impliedly reorganizes the executive duties of the Governor, but also attempts to usurp these powers. Having failed at the first part, it further attempts to restrict the ability of the Governor to carry out his sworn duties. The General Assembly, by enacting the clause, has restricted the power of the Governor to carry out his duties. In *Kenton Water Company v. City of Covington*, 156 Ky. 569, 161 S.W. 988 (1913), we said:

[W]here the Constitution has by express provision denied the Legislature the right to require a particular thing to be done, or to legislate upon a particular subject or in a particular way, then the Legislature cannot by indirection require it to be done by attaching it as a condition to the exercise of some power which it has granted and which is essential to the public welfare that it be exercised. To do this would be to permit the constitutional provision to be indirectly violated and render it a nullity.... 161 S.W. at 992.

The restriction placed on the executive by KRS 13.092(3) effectively and unconstitutionally limits and interferes with the governor's mandated duties. It should also be noted that the General Assembly, through its enactment of KRS 446.090 clearly established the necessity of being able to sever a constitutionally infirm section of any statute from the sound portion thereof.

We, therefore, conclude that Section 3 of KRS 13.092 is void and we affirm the trial court.

IX. DOES THE GENERAL ASSEMBLY HAVE THE POWER TO PRESCRIBE THE METHODS AND APPOINTING AUTHORITY FOR INFERIOR STATE OFFICES?

The next group of controverted statutes deals with the subject of appointments to various boards and commissions. For purposes of clarity and brevity, we divide these 1982 statutes into five categories.

[13] The first category empowers the Speaker of the House of Representatives and the President Pro Tem of the Senate to appoint one or more members of particular boards.^{FN15} In the second category the Speaker of the House of Representatives and the President Pro Tem of the Senate are made ex officio members of certain existing boards and commissions.^{FN16} The

third category is that which confers on the LRC or a joint interim legislative committee the power to advise and consent to the Governor's appointments to boards or commissions.^{FN17} Category four directs the Governor to make appointments solely from a list submitted to him by the LRC.^{FN18} The fifth and final category permits the LRC or its chairmen to make appointments to certain boards and commissions.^{FN19}

FN15. KRS 230.220(1), Kentucky State Racing Commission; KRS 31.015(1)(b)-(c), Public Advocacy Commission; KRS 230.620, Kentucky Harness Commission; KRS 42.500, State Investment Commission; KRS 247.090(1)(f), State Fair Board; KRS 117.015(2), State Board of Elections; KRS 163.505, Commission on Deaf and Hearing Impaired; KRS 174.105(2), Motor Carrier Board; and KRS 164.010, Council on Higher Education; KRS 103.2101(1)(a)-(b), Industrial Revenue Bond Oversight Committee.

FN16. KRS 154.675(1), Enterprise Zone Authority.

FN17. KRS 278.050(1), Enterprise Zone Authority; and KRS 248.510(1)(b).

FN18. KRS 151.560(1)(a), Flood Control Advisory Commission, and KRS 18A.050(2), State Personnel Board.

FN19. KRS 153.380(3), Kentucky Oral History Commission; KRS 441.615(1)(g), Kentucky Local Correctional Facilities Construction Authority; KRS 151.560(1)(b), Flood Control Advisory Commission.

The trial court struck down the provisions in the first and fifth categories, ruling that *921 the power to appoint members of boards and agencies within the executive department of government is an essentially executive power which cannot be exercised by any member of the legislative department, including the Speaker of the House of Representatives and President Pro Tempore of the Senate. It declared that the second grouping of statutes permitting members of the legislature to sit as members of boards or agencies within the executive department was violative of Ky. Const. Sec. 28. Moreover, the trial court ruled that the statutes in the third category in which the General Assembly purported to grant the LRC the power to advise and consent to the Governor's appointments were improper delegations of power by the General Assembly. The trial court also declared the provisions in the fourth grouping requiring that the Governor make appointments to boards from lists of persons nominated by the LRC, to be an improper legislative designation of the appointee.

After limiting the eligibility requirements for re-election to certain statewide offices and after declaring that office holders' duties shall be provided by law, Ky. Const. Sec. 93:

Inferior State officers, not specifically provided for in this Constitution, may *be appointed or elected, in such manner as may be prescribed by law*, for a term not exceeding four years, and until their successors are appointed or elected and qualified. (Emphasis added.)

From a reading of this section, it is evident that the General Assembly may, by law, *create* these various inferior "state officers." It also appears, at first blush, that the General Assembly may provide the manner of appointment or election of these offices. In 1898, close in time to the adoption of the present Constitution, we decided Commission of Sinking Fund v. George, 104 Ky. 260, 47 S.W. 779 (1898), the first of many cases addressing the question of which branch of government has the

constitutional authority to make appointments. The court reviewed an act of the General Assembly which created a Board of Penitentiary Commissioners to regulate the penal institutions of the Commonwealth. The act provided that three members of that commission were to be elected by the General Assembly. It was argued that this "election" of the commissioners was an executive function and not a legislative one and that, therefore, the election provision of the act violated the separation of powers doctrine. In rejecting this contention, we declared that there was no express or implied provision in the Kentucky Constitution which conferred the power to appoint such a commission upon the Governor. In upholding the General Assembly's right to "elect" the commissioners, this Court relied heavily on the specific wording in Section 93:

Under Section 93 of the Constitution, the Legislature could not only provide for inferior state officers, *but could designate how they should be appointed or elected.* 47 S.W. at 781. (Emphasis added.)

The Court specifically rejected the contention that the appointive authority being placed in the General Assembly violated the doctrine of separation of powers:

The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive or judicial departments ... It is an executive function when the law has committed it to the executive ... 47 S.W. at 781.

The import of the decision in this case seems to be that the General Assembly has, under the wording of Ky. Const. Sec. 93, very broad powers in establishing boards and commissions and in determining how the membership thereof is chosen, even to the extent of selecting the membership itself.

However, it was not long before this Court, when confronted with the same principle of law, veered sharply away from the holding in *George*. In Pratt v. Breckinridge, 23 Ky. Law Rep. 1858, 112 Ky. 1, *92265 S.W. 136 (1901), we determined an 1899 election contest for the office of Attorney General. An act of the General Assembly created a three-person state election commission which held the power to resolve election disputes and also had the power to appoint the members of every local election commission in the state. The members of the State Election Commission were to be appointed by the General Assembly.

At the general election of 1899, Breckinridge polled fewer votes than his opponent, Pratt. Breckinridge filed an election contest with the State Election Commission, which declared him the winner, thus overturning the popular vote. Breckinridge filed suit for specific performance of the decision of the Election Commission. On appeal, this Court, in a decision that received much adverse notoriety from both contemporary and subsequent historians, declared that the appointment, by the General Assembly, of members of the Election Commission was violative of the separation of powers doctrine.

Pratt, as appellant, relied on Commission of Sinking Fund v. George, 104 Ky. 260, 47 S.W. 779 (1898), and argued that Ky. Const. Sec. 93 meant that the Governor did not have the executive power of appointment and that the General Assembly was constitutionally authorized to exercise the power of appointment. The Court rejected this argument, overruled *George* and held that Section 93 does nothing more than permit the General Assembly to determine whether boards and commissions are to be popularly elected, or appointed. We said:

The creation of an office is accomplished by the exercise of legislative power. It is done by the enactment of a law. *The filling of it, when not exercised by the people, or in some manner directed or permitted by the constitution, is executive,*

and must be performed by an executive officer. 65 S.W. at 137. (Emphasis added.)

Several years later, in a less volatile atmosphere in the Commonwealth than had existed in *Pratt*,^{FN20} this Court made a veer back towards the holding in *George*. In *Sewell v. Bennett*, 187 Ky. 626, 220 S.W. 517 (1920), the General Assembly, in enacting the Workmen's Compensation Act, created a compensation board and provided that the Governor appoint the Board but omitted the requirement of legislative approval of such appointments. A separate, pre-existing statute provided that all persons to be appointed by the Governor were subject to the advice and consent of the Senate. We applied the separate statute and held that when the General Assembly created a *legislative board* it could make the appointments itself, it could delegate such power to the Governor or it could delegate it to "any other person or body". The Court, indeed, seemed to retreat from *Pratt* and revitalize *George*.

^{FN20}. For those who desire to learn more of the political atmosphere surrounding *Pratt*, See, Chapter 18, *Kentucky Decades of Discord, 1865-1906*, Hambleton Tapp-James C. Klotter, The Kentucky Historical Society.

However, two years later, we decided the landmark case of *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455 (1922). As we have previously said,^{FN21} in *Sibert*, this court ruled on the validity of an act which re-created a State Highway Commission of four members and provided that the members should be elected by the General Assembly. In holding that the appointment powers were executive in nature, we explained:

^{FN21}. See discussion of *Sibert* in Section IV of this opinion, *infra*.

The appointment of officers is intrinsically an administrative or executive act, but this does not imply that no appointment can be made by any department of government other than the executive, for all the authorities agree that the courts and the legislature may appoint those public officers which are necessary to the exercise of their own function. 246 S.W. at 458. The Court specifically declined to follow *George*, saying it was "short lived". *923246 S.W. at 458. It further chose to follow *Pratt*, even though acknowledging that it was a decision with political overtones and ramifications.

Addressing itself to the language in Ky. Const. Sec. 93, the Court said:

So where the Constitution provides that all officers whose appointment is not otherwise provided for in the Constitution shall be chosen in such manner as may be prescribed by law, it is held that, while this provision authorizes the Legislature to provide by law for the appointment or election of such officers, *it does not authorize the Legislature itself to make such appointment or election*. 246 S.W. at 459. (Emphasis added).

The Court used the separation of powers doctrine to bolster its view when it said:

The logical result of the contention, [that the General Assembly, under Section 93, could make appointments] if adopted and followed, would empower the Legislature to appoint or elect the private secretary to the Governor; the Commissioner, sergeant at arms, tipstaff, and bailiff of the Court of Appeals

... [S]uch power on the part of the Legislature, if a full exercise of it should be persisted in, would enable it to gradually

absorb to itself the patronage and control of the greater part of the functioning agencies of the state and county governments, and thus endowed it would be little short of a legislative oligarchy. 246 S.W. at 460.

It is our view that *Sibert* has been unchanged and is therefore dispositive of the central issue present in these contested statutes.

Appellants urge that *Craig v. O'Rear*, 199 Ky. 553, 251 S.W. 828 (1923), decided two years after *Sibert*, constituted another veer by the court and is controlling. We do not agree. In that case, the Court ruled that the General Assembly could appoint "temporary" agents to perform a particular task, to serve without term and without pay and whose functions cease when the purpose of such appointment was accomplished.

One other case merits discussion. In *Rouse v. Johnson*, 234 Ky. 473, 28 S.W.2d 745 (1930), a state highway commission was re-created by an act of the General Assembly. The power of appointment to that commission was removed from the Governor and lodged with an "appointing board" which consisted of the Governor, the Lieutenant Governor and the Attorney General. This act was held valid, as being consistent with Ky. Const. Sec. 93 and with Ky. Const. Secs. 27-28.

It was claimed that the conferring of appointive power on the Lieutenant Governor was violative of Ky. Const. Secs. 27 and 28, because that office was said to be primarily a *legislative* one. That being true, it was argued, the delegation of appointive power (executive in nature), violated the separation of powers. We concluded that even though the Lieutenant Governor presides over the Senate and can vote in case of a tie, under our Constitution, the Lieutenant Governor is a member of the executive branch of government. This being true, the contention fell and it was declared that the power of appointment was indeed properly lodged in the commission, a part of the executive branch of government. We will now apply these principles to the contested statutes.

The provisions in category number one, in which the Speaker and the President Pro Tem are authorized to make appointments, fly in the face of the principle which declares such appointments cannot be made by the General Assembly itself. Such statutes constitute an incursion by the General Assembly, or in this case, its designees, into the separation of powers doctrine. The fifth category of statutes, in which the LRC is empowered to make appointments, is invalid for the same reason. The statutes designated as category number four, which direct the Governor to make appointments from lists submitted to him by the LRC, are similarly invalid. The General Assembly *924 has attempted to do indirectly what it cannot do directly.

The provisions in category number three, which authorize the LRC or an interim legislative committee to advise and consent on certain appointments is invalid.

The statutes contained in category number two, in which the Speaker and the President Pro Tem are made members of certain boards, are also invalid because such constitutes a legislative appointment which infringes on the right of the Governor to make such appointments.

In those statutes where the General Assembly established boards, commissions, etc., and further provided that a member(s) of the General Assembly could actually make the appointment(s) thereto, we declare such appointive powers to be invalid. Therefore, any person(s) so appointed may not properly serve. However, since the General Assembly has properly created the boards and commissions in these situations, the governor should fill such vacancies.

[14] KRS 48.130 simply provides that the submitting branch of government shall provide a plan for reducing expenditures in the event of a revenue shortfall of between 2 1/2 % and 5%. The General Assembly may adopt or modify the plan. If and when such a shortfall occurs, the executive branch is directed to notify the three branches of government of that unhappy fact and the legislatively enacted reduction plan is to be implemented. No control is delegated to the LRC. Each branch of government is simply directed to carry out the reduction plan *which was enacted by the General Assembly*. As we see it, each branch of government is to do what the General Assembly has directed. Such is not a part of the administration of the budget. It is carrying out a legislative mandate. There are no constitutional infirmities here.

[15] KRS 48.600 provides for the situation when a revenue shortfall is in excess (sic) of 5% of the anticipated amount. While no specific plan is required to be submitted in advance, the General Assembly has declared that in the event of such shortfall each branch of government shall be the best judge of how to cope with its problems. The General Assembly, under the statute, recognizes that each branch is best equipped to make its own decisions during a revenue emergency and requires that the branch *report* its actions to the appropriate legislative committee. We find that this act comports with the separation of powers doctrine and is not an incursion into the executive duty to administer the budget of the executive branch of government.

[16] KRS 48.400 directs the Executive branch to monitor the Commonwealth's financial position and to give monthly reports to each branch. When a revenue shortfall is found, the resulting notification, presumably, will cause the three branches to take the action directed and authorized by KRS 48.130 and KRS 48.600. We are at a loss to find a constitutional violation here. The executive branch is directed to be a fact-finder, and to notify the affected branch of government when a shortage occurs. This statute simply provides a means whereby a branch of government is made cognizant of a shortfall and thereby may take the requisite statutory action to remedy the situation. There is no violation of an executive function here, in fact, it places the responsibility *on the executive branch*, to participate in the overall statutory scheme dealing with revenue shortfalls.

[17] The trial court determined that KRS 48.500 was void because it permitted a veto of executive action in administering the budget by a legislative committee. A careful reading of the statute shows that this is not true.^{FN27} Under the terms of the act, each branch of government is required *927 to interpret relative provisions of the appropriations act in conformity with the budget memorandum of the General Assembly. Such interpretation is to be reviewed by the Interim Joint Committee on Appropriations and Revenue. If the committee disagrees with the branch's interpretation, that branch may not implement its plan *unless and until*: (1) its interpretation is amended to conform to that of the committee, or (2) the branch notifies the committee of its intention not to agree with the committee and explains its view for noncompliance. When the branch complies with either of the conditions, it may proceed with its own interpretation. The decision is ultimately left up to the affected branch. While the committee may disagree or object to a contested interpretation, the bottom line is that it may not veto the decision of the affected branch. Thus, there is no legislative veto and there is no out of session action by the General Assembly or its designee, the LRC, that can effectively prevent the affected branch of government from acting on its own budget with respect to matters of interpretation.

^{FN27}. 48.500 Interpretation and legislative review of joint budget resolution. "(1) Subject to the provisions of this section, when the general assembly is not in session, all questions that arise as to the meaning of items in a joint budget resolution shall be decided by the finance and administration cabinet, by the chief justice and by the legislative research commission for their respective branches of government. (2) A decision made under subsection (1) of this section shall conform to the appropriate budget memorandum provided for by KRS 48.300. (3) The secretary of the finance and administration cabinet, the chief justice, and the legislative research commission shall transmit decisions made under subsection (1) of this section to the interim joint committee on appropriations and revenue of the legislative research commission and shall include, in detail, the reasons for such decision. (4) If the

interim joint committee on appropriations and revenue disapproves a decision made under this section, the decision shall not be implemented unless it is: (a) Revised to comply with the objections of the committee; or (b) The committee is informed, in writing, in detail, within thirty (30) days of the committee's disapproval, that a determination has been made not to comply with the objections of the committee.”

Our constitution prohibits the exercise of the functions of one branch of government by another branch, but it also envisions some cooperation between the branches. This statute does not permit a usurpation by the legislative branch of an executive function and the degree of intrusion is so *limited* as to render it entirely reasonable and without any substantial impact.

[18] KRS 48.310 gives us some pause.^{FN28} As stated, this statute requires the budget to be introduced as a joint resolution, rather than as a bill. The statute provides that the joint budget resolution shall be “subordinate” to the Kentucky Revised Statutes and that the resolution shall not contain any language which exempts it from the operation of a statute. 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. This is one of the purposes of KRS 48.310.

FN28. 48.310 Restrictions on joint budget resolutions. (1) A joint budget resolution shall be considered as subordinate to the Kentucky Revised Statutes and temporary in nature. No provision of a joint budget resolution shall be effective beyond the second fiscal year from the date of its enactment. A joint budget resolution enacted at a special session of the general assembly shall not be effective past July 1, of the year in which the next regular session takes place. (2) No joint budget resolution shall contain language which exempts the budget resolution or any appropriation or the use thereof from the operation of a statute. Any language in a joint budget resolution in violation of this section shall be null and void.

Ky. Const. Sec. 88 in describing the Governor's line-by-line veto power in appropriation matters refers to the budget document as a “bill”. Appellees and the trial court seize on this language and argue that a resolution “denigrates” the budget document to the “level” of a joint resolution.

We agree. Ky. Const. Sec. 88, provides the method by which *bills* shall be sent to the Governor, for either approval or disapproval (veto). It also provides how the General Assembly may override the veto. Of particular note is the provision that allows a line-by-line veto of “appropriation bills”. The relevant part is as follows:

“The Governor shall have the power to disapprove any part or parts of *appropriation bills* embracing distinct items, and the part or parts disapproved shall not become a law unless reconsidered and passed, *as in case of a bill*.” (Emphasis added.)

*928 While the Governor's veto power applies to all bills, it is only in the case of “appropriation bills” that a line-by-line veto may be exercised. The appropriation bill is the main ingredient of the budget document, and is specially singled out in Sec. 88, which deals with *bills, and bills only*. Appropriations, therefore, must be in the form of a *bill*. In addition, Ky. Const. Sec. 47, requires that all revenue matters must be introduced in the House of Representatives and such documents are referred to as “bills”.

We can only conclude that KRS 48.310, which authorizes the budget to be introduced as a joint resolution, flies directly in

the face of the provisions of Ky. Const. Secs. 88, 47, and is therefore, unconstitutional to that extent, we affirm the trial court, but we reverse as to other statutes previously discussed.

XI. MAY THE GENERAL ASSEMBLY DELEGATE TO THE LRC CERTAIN AUTHORITY AND RESPONSIBILITY WITH RESPECT TO THE COMMONWEALTH'S APPLICATION FOR FEDERAL BLOCK GRANTS?

Another area of disputed statutes deals with certain duties, responsibilities and authority that the General Assembly gave to the LRC with respect to the Commonwealth's application for Federal Block Grants.

“Block grants” are allocations of sums of money from the United States Government to the various states. Although they are required to be used in nine functional areas, as a practical matter the use of these funds is largely left to the discretion of the recipient state. When the federal tax dollars are delivered to the states they become state controlled money to be spent in accordance with the state budget document. Some block grants consist of 100% federal money, while some require matching state dollars or matching state “in-kind” services. Most block grants require the expenditure of state funds for personnel, administration costs and use of state facilities.

KRS 45.351(1) provides that the various state agencies applying for block grants shall not make “continuing” application requests. Each application shall be a new one. KRS 45.351(2) provides that *no state agency shall submit a block grant application unless it is “... approved by the legislative research commission as provided under KRS 45.351 to 45.359 or by the Kentucky general assembly.”* (Emphasis added.) KRS 45.355 provides a system whereby the applicant state agency shall, prior to applying to the federal government for grants, submit relevant information about the grant application to the LRC. Following a review, the LRC may direct modification of the grant or may prioritize the grant application with all other state block grant applications. The LRC has the power to modify any application or to overrule the applicant agency's decision to seek the federal funds.

KRS 45.356 provides that once the LRC has determined that any grant application should be modified or not sought, it shall notify the applying agency of its decision. Once such notification is received the agency has the right to withdraw or to revise and to resubmit the grant application. The statute in Sections (2) and (3) says that the decision of the LRC as to the content of the grant application or as to whether it shall be submitted is final. KRS 48.160 reiterates that the LRC shall have approval authority over block grant applications.

The trial court declared KRS 45.351(2), KRS 45.355, KRS 45.356(2)–(3) and the described part of KRS 48.160 to be unconstitutional. The court reasoned that the power granted to the LRC under the above statutes constituted “lawmaking” power after the General Assembly is adjourned and that it was a violation of the separation of powers; viz, that the statutes delegated to a “group of legislators” the executive power to implement and execute the state budget. We agree.

The trial court also addressed the validity of KRS 45.359(1) and (2), a purported non*929 -severability statute, which declares that if any section of KRS 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent or allocated unless approved by the General Assembly in regular or special sessions. The court determined that section (1) of KRS 45.359 was unconstitutional because it is an “unconstitutional condition upon the power of the Executive offices to administer the budget”, and that both sections (1) and (2) of KRS 45.359 “contravene the Constitution of Kentucky and thus are void and unenforceable.” We disagree.

The premise upon which the trial court decided the validity of KRS 45.351(2), the designated portion of KRS 45.355,

KRS 45.356(2) and (3) and the described part of KRS 48.160 is that the budget and the budgetary process of the Commonwealth are purely an executive function and that these statutes permit a clear incursion by the LRC into this function, thus violating the separation of powers doctrine. The court also declared that the actions permitted by these statutes constituted "legislating" by the LRC when the General Assembly was out of session.

As we have said, in the preceding section of this opinion, the budget document, its preparation and particularly its adoption, is within the authority of the Kentucky General Assembly. This authority, this responsibility, lies solely within the province of the General Assembly. The preparation and adoption of a budget is a *legislative* matter and the General Assembly may not delegate this law making power to the LRC, and again, the General Assembly while in adjournment may not legislate through its agent, the LRC.

It is obvious that the power and authority granted to the LRC under these statutes are purely legislative in nature. The key to this conclusion lies in KRS 45.3511(2), which states:

"No state administering agency shall submit any block grant applications to a federal administrative agency *unless approved by the legislative research commission...*"

This statute allows the LRC absolute control, without criteria, standards or guidelines, over the process of seeking block grants. Literally tens of millions of dollars are involved in the federal block grant program. Once the money is received, it, in effect, becomes state money. The expenditure of money so received is an appropriation which is a function of the General Assembly.

As we have said, many of the federal grants require that matching state funds be committed as a condition of this grant. Such grants, in most cases, require the expenditure of money, allocation and use of state personnel, and the use of state facilities. Such is also the sole province of the General Assembly and cannot be delegated to the LRC. We therefore declare that the sections in question are unconstitutional and affirm the trial court.

[19] We are not unaware that the General Assembly meets and legislates for limited periods of time. We are also not unaware that block grants form a substantial percentage of the Kentucky budget document. Millions of federal tax dollars come into our state, and presumably serve our people. We believe that the General Assembly may constitutionally preserve and keep secure its legislative power, in this area, and allow the LRC (or other delegatee) to monitor applications for block grants so long as the authority delegated is *not legislative*. The General Assembly may allow the LRC to act—as its agent—in matters where it has established adequate standards, guidelines, criteria, findings of fact, tests and other safeguards which will assure that the delegatee is acting within the framework of a legislative plan, and does not exercise such discretion as would constitute law making by such agency.

One further point remains. As we have said, the General Assembly in ~~*930~~KRS 45.359(1) and (2) enacted a non-severability statute which was declared unconstitutional by the trial court because it imposed an invalid condition on the power of the Governor to administer the budget. Since we have established in Section X of this opinion that the responsibility for the preparation and adoption of the state budget is within the purview of the General Assembly, the premise of the trial court's opinion falls and we find no constitutional infirmity here. We accordingly reverse the trial court.

XII. WHEN THE GENERAL ASSEMBLY GRANTS THE GOVERNOR THE POWER TO REORGANIZE CERTAIN

GOVERNMENTAL AGENCIES, CAN IT GRANT THE LRC THE AUTHORITY TO VETO SUCH PLANS AS ARE PROMULGATED BY THE GOVERNOR?

Prior to the 1982 session of the General Assembly, the Governor was, with certain exceptions, empowered by statute to reorganize the executive department. KRS 12.025. The LRC was permitted to *comment* upon those interim reorganizational actions, but the comments were only advisory, did not bind the Governor and did not have the force of law. Such executive actions, however, were subject to the approval of the General Assembly at its next session.

In 1982, by the terms of KRS 12.028(2), the reorganizational procedure was changed. Under the terms of that statute, any temporary reorganization plan must "be approved by the LRC" before it becomes effective. The intended purpose of the 1982 modification is best described by its sponsor who stated that if the Governor desires to temporarily reorganize he can:

... propose a reorganization plan by way of Executive Order to the LRC. The LRC then can put that reorganization into effect by approval of that temporary reorganization plan.

Noting the difference between the new and old acts, the sponsor commented on the Governor's power under the new act to single handedly reorganize saying, "... he [the Governor] will not be able to unilaterally do that." If the LRC does not agree with the Governor's plan, the sponsor noted that the LRC "... has the prerogative of not approving the plan."

[20] The trial court, in declaring KRS 12.028(2) unconstitutional, reasoned that in exercising the veto so granted, the LRC would be making legislative decisions which should be made "... by the entire General Assembly." We agree.

Even though the Governor has the supreme executive power of the Commonwealth (Ky. Const. Sec. 69), he cannot transfer the functions of an existing, legislatively-created executive agency or department to another without legislative authority. Brown v. Barkley, Ky., 628 S.W.2d 616 (1983). We did say, in that much cited case, that the executive may have the power to transfer those functions if "... it is necessary in order for him to carry out a law or laws that the legislature has created without prescribing in sufficient detail how they are to be executed." 628 S.W.2d at 622.

However, once the General Assembly has made a determination that the power to reorganize state government in the interim periods between legislative sessions does exist, and determines that that power is in the hands of the Governor, such interim action is purely an executive function. As this Court has said: "... the transfer ... [of executive functions] ... is essentially an executive action, like the reassignment of troops or battle missions from one military command to another..." 628 S.W.2d at 622. Any authority given to the LRC to veto or substantially affect this statutorily instituted executive function is a violation of the separation of powers doctrine.

In the 1960 reorganization statute, the General Assembly, by reserving eventual approval of any reorganization to itself, recognized that ultimately reorganization is legislative in nature. In the 1982 version, the Governor is authorized to "... propose *931 to the general assembly, for its approval, changes in the state government..." KRS 12.028(1). As we understand it, such authority is the normal way to present any legislative suggestion to the General Assembly. Implicit in this provision is that final approval of any plan is legislative in nature.

Section (2) of the 1982 statute, KRS 12.028, authorizes an emerging type of reorganization plan to be prepared by the Governor, but such is made subject to the approval of the LRC. Since the Governor has no inherent power to reorganize and since the 1982 session again recognized that reorganization is legislative in nature, we believe that the General Assembly may

not delegate such legislative power to the LRC. Having declared that there may be a need for interim reorganization and having declared that the Governor is the proper agency to undertake such action in the interim period and finally having declared that approval of such action is legislative in nature, the General Assembly cannot delegate such legislative authority to the LRC.

In accordance with the above, the judgment of the Franklin Circuit Court is affirmed in part, and reversed in part with directions that it be modified in accordance with this opinion.

All concur.

Ky., 1984.

Legislative Research Com'n By and Through Prather v. Brown

664 S.W.2d 907

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