ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2553 SJ HJR 1 - HJR 5

2553

AN15.60.010 DOCUMENT= 7 OF 7 PAGE = 1 OF 1

CHAPTER = 15.60
SECTION = 15.60.010
TITLE = 15

CITATION NOTES FOR AS 15.60.010.

ANNOTATIONS

REVISOR'S NOTES.

The word "as" was added following "themselves such" by the revisor of statutes under AS 01.05.031.

EFFECT OF AMENDMENTS.

The 1980 amendment rewrote the section.

OPINIONS OF ATTORNEY GENERAL.

For a list of crimes which constitute felonies involving moral turpitude. Nov. 7, 1980, Op. Att'y Gen.

NOTES TO DECISIONS.

Quoted in Turkington v. City of Kachemak, Sup. Ct. Op. No. 141 (File No. 177), 388 P.2d 593 (1965).

0601 * END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.

AMERICAN
LAW REPORTS
ANNOTATED

109
A. L. R.

the board and the sufficiency of the charges against the petitioner admitted in the petition. The petitioner's demurrer should have been overruled and the respondents' demurrer to the petition sustained.

Order reversed with costs, and petition dismissed.

ANNOTATION.

What offenses involve moral turpitude within statute providing grounds for denying or revoking license of dentist, physician, or surgeon.

[Dentists, §§ 3, 4; Physicians and Surgeons, §§ 7, 10.]

Generally, as to grounds for revocation of valid license of physician, surgeon, or dentist, see annotations in 54 A.L.R. 1504, and 82 A.L.R. 1184 [Dentists, § 4; Physicians and Surgeons, § 10].

As to validity of statute providing for revocation of license of physician, surgeon, or dentist, see annotations in 5 A.L.R. 94, and 79 A.L.R. 323 [Physicians and Surgeons, § 10; Statutes, § 27].

The subject, "Violation of liquor law as infamous crime or offense involving moral turpitude," is discussed in annotations in 40 A.L.R. 1048, and 71 A.L.R. 217 [Attorneys, § 12; Criminal Law, § 196; Intoxicating Liquors, § 55; Witnesses, § 93].

It is now well established that the statutory term "moral turpitude," in connection with the present subject, carries with it a sufficiently definite concept to render it immune from attacks for vagueness and uncertainty. Thus, in Hughes v. State Medical Examiners (1926) 162 Ga. 246, 134 S. E. 42, the court held that a statute providing for the revocation of a physician's license upon the ground of conviction of a crime involving moral turpitude was not so vague, uncertain, and indefinite as to render it void, although it contained no definition of the term "moral turpitude." And see State Medical Examiners v. Harrison (1916) 92 Wash. 577, 159 P. 769, and White v. Andrew (1921) 70 Colo. 50, 197 P. 564, both infra.

With respect to revocation of licenses of dentists, physicians, or surgeons, the nature and extent of the statutory term "moral turpitude" must, of course, depend in the first instance upon the limitations, if any, and the exact wording of the statute. Thus, a statute may provide for revocation in case of conviction of a "felony" involving moral turpitude, or, in more general terms, a "crime" or "offense" involving moral turpitude. Aside from such limitations, the term has apparently acquired a definite or definable meaning, the essentials of which are inherent wrongfulness and antisocial tendency or effect. Thus, in Fort v. Brinkley (1908) 87 Ark. 400, 112 S. W. 1084, under a statute authorizing the revocation of a physician's license upon conviction of a crime involving moral turpitude, in holding that the unlawful selling of intoxicating liquor was not such a crime, the court said: "'Moral turpitude is defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general.' 20 Am. & Eng. Enc. Law, 872. See also Ex parte Mason (1896) 29 Or. 18, 43 P. 651, 54 Am. St. Rep. 772; Re Kirby (1897) 10 S. D. 322, 414, 73 N. W. 92, 907, 39 L.R.A. 856. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude. It seems clearly deducible from the above-cited authorities that the words 'moral turpitude' had a positive and fixed meaning at common law, and that the illegal sale of intoxicating liquors, not being an offense punishable at common law, does not come within the definition of a crime involving moral turpitude. In a statute using a word the meaning of which is well known, and which has a definite sense at common law, the word will be restricted to that sense."

And under the same statute, in

State Medical Bd. v. Rodgers (1935) 190 Ark. 266, 79 S. W. (2d) 83, the court referred to the definition of "moral turpitude" in Fort v. Brinkley (1908) 87 Ark. 400, 112 S. W. 1084, supra, and continued: "Webster defines the term as follows: 'The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita.' Under these definitions we have no hesitancy in saying that the crime of which appellee pleaded guilty is a crime involving moral turpitude. Possession of counterfeit money with intent to corrupt the currency of the country and with intent to cheat and defraud any person to whom it is uttered is a base and infamous crime."

Under a statute providing for revocation of a physician's license for unprofessional conduct, including conviction of any offense involving moral turpitude, a showing that the defendant was convicted in a Federal court of knowingly, by means of the United States mails, giving notice and information to certain persons as to when, how, by whom, and by what means an abortion could be performed and produced, was considered sufficient for a revocation of license in State Medical Examiners v. Harrison (1916) 92 Wash. 577, 159 P. 769, and the court rejected the contention that the term "moral turpitude," as used in the statute, was so vague and uncertain as to render it unreasonable and void, saying that the words were capable of accurate definition and were well understood.

And under an act of Congress permitting the revocation of the licenses of physicians who had been convicted of crimes involving moral turpitude, the court in Kemp v. Medical Supervisors (1917) 46 App. D. C. 173, held that violation of a statute by sending through the mails a letter giving information as to where, by whom, and by what means an abortion might be committed, was such a crime, justifying a revocation of license upon conviction thereof, regardless of whether its commission amounted to a felony or a misdemeanor, saying: "Analyzing the motive which prompted appellant to write the letter for the mailing of which he was convicted, but one conclusion can be reached, namely, a wilful and intentional disposition on his part, for a small pecuniary consideration, to prostitute his high profession by paving the way for the commission of a base felony. It may be that a crime could be committed by merely mailing a letter in violation of the act of Congress, without involving moral turpitude; but that would depend entirely upon the contents of the letter which forms the basis of the forbidden act. The law violated by appellant was not enacted to purge the mails of a particular class of mail matter, but for the protection of public morals and to prevent the promotion of crime. Abortion is an immoral, base crime; and he who aids and abets in its commission by an unlawful use of the mails is guilty of an act involving moral turpitude."

In BRUN v. LAZZELL (Md.) (reported herewith) ante, 1453, under a statute making conviction of a crime involving moral turpitude a basis for revocation of a dentist's license, the court held that the offense of indecent exposure was clearly in that category, especially under a showing that it had been repeated.

Failure of a physician to notify the police authorities when he has knowledge that any common prostitute is afflicted with an infectious or contagious venereal disease, as required by statute, may or may not amount to an offense involving moral turpitude, depending on the circumstances, within the meaning of a statute providing that the Board of Medical Examiners may refuse a certificate to any applicant guilty of "unprofessional conduct," and declaring that the words "unprofessional conduct," should include "wilful disobedience of the law" and "conviction of any offense involving moral turpitude." Ro Reno (1937) — Nev. —, 64 P. (2d) 1036. The court observed: "Whether the misdemeanor of which appellant was convicted . . . was an offense involving moral turpitude depends, in our opinion, upon the circumstances

under which it was committed. It is easily conceivable that a physician of the most ethical type, knowing a prostitute to be afflicted with such a disease, and being about to report the case immediately to the police authorities, might have his attention distracted, before actually doing so, by reason of some emergency, and then forget the matter for several days. Under such circumstances the fact that he unintentionally overlooked reporting the case to the police authorities would not be a defense in a prosecution under the [statute]. . . . No moral turpitude, however, would be involved in such a case. . . . The offense defined in [the statute] does not necessarily involve moral turpitude, nor is disobedience to that law necessarily wilful. The important [question, therefore, is] whether appellant's disobedience . . . was wilful." And the court reached the conclusion that under the particular circumstances the revocation of the physician's certificate should have been temporary rather than permanent.

In State ex rel. Tullidge v. Hollingsworth (1933) 108 Fla. 607, 146 So. 660, the court said, with reference to the allegedly false oath of a physician that he was never convicted of a crime involving moral turpitude (such conviction being advanced as a reason for the cancelation of his license): "Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man, or by man to society. . . . It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent, as when unintentionally committed through error of judgment when wrong was not contemplated." The court granted a peremptory writ of mandamus to the State Board of Medical Examiners for the purpose of affording, among other things, a fair hearing on the sufficiency of the charge and the question as to whether the defendant had been in fact guilty of a crime involving moral turpitude.

And in affirming a judgment dismissing a writ of certiorari from a State Medical Board's action in revoking the license of a physician convicted in a Federal court of the sale of morphine for other than medicinal purposes, to an habitual user thereof, under a statutory provision making conviction of an offense involving moral turpitude one of the statutory grounds for revocation of a physician's license, the court in White v. Andrew (1921) 70 Colo. 50, 197 P. 564, said: "It is proper for the court on certiorari to say whether the crime shown in the evidence involved moral turpitude. We think there can be no question that it did. No other abuse of discretion is suggested, so the board is not guilty of such abuse, and it had jurisdiction of the subject matter and person. Upon certiorari the court could review the board's action only upon a question of jurisdiction or great abuse of discretion. Code 1908, § 331. There was nothing, therefore, upon which the District Court could reverse or modify the board's action, and the judgment of dismissal was right. It is urged that 'moral turpitude' is too indefinite a term, and that therefore the statute is void; but that expression has been used in statutes, textbooks, and opinions on the common law, for too many years to leave any question on that subject." To the same effect see Sapero v. State Medical Examiners (1932) 90 Colo. 568, 11 P. (2d) 555.

But under a statute providing for the revocation of a physician's license after conviction of any offense involving moral turpitude, the court, in State Medical Examiners v. Friedman (1924) 150 Tenn. 152, 263 S. W. 75 (on demurrer), said that there could be no revocation merely because of conviction under the Harrison Anti-narcotic Act of selling morphine contrary to the terms thereof, on the ground that such conviction was evidence of "moral turpitude" within the statutory definition, although violation of the Harrison Act was a felony, especially when taken in connection with a subsequent statute greatly increasing the amount of morphine which physicians might give to pa-

tients, and that it could not be said that "prescribing morphine in considerable quantities is an act involving moral turpitude, or even an illegal act in this State." The court concluded, however, that it was "conceivable" that there might be a conviction under the Harrison Act which would show that the convicted physician had been guilty of acts involving moral turpitude, but considered that the matter should not be decided upon demurrer, and accordingly remanded the cause for answer and proof on the question of moral turpitude; the reason assigned being the possibility that the board stood on its demurrer in the belief that the record of the proceedings before it constituted part of the bill, to which it was not made an exhibit.

It has been held, in cases within the scope of the present subject, that where a statute undertakes to cover the subject of revocation of licenses, specifying causes therefor, it should be strictly construed as regards definitions. Thus, where a statute specifically designated, as a ground for the revocation of a dentist's license, conviction of a felony involving moral turpitude, the court in Kentucky State Dental Examiners v. Crowell (1927) 220 Ky. 1, 294 S. W. 818, in holding that the exercise of the power to revoke such license (originating under and by virtue of the statute) should be confined to the causes and grounds specified therein, ruled that a misdemeanor (possessing intoxicating liquor), although possibly involving moral turpitude, was not a ground for revocation.

And in Forman v. State Bd. of Health (1914) 157 Ky. 123, 162 S. W. 796, under a statute authorizing the revocation of a physician's license upon conviction of a felony involving moral turpitude, it was held that aiding another in conducting a medical institute and practicing medicine for a corporation for hire, in its name, although illegal, was not in itself or under the statutory definition an offense involving moral turpitude, warranting revocation of license, the court saying: "While it is unlawful for a physician to practice medicine in any other name than his own, and he may be punished for this, his license may not be for this revoked, as every unlawful act is not ground for the revocation of a license. There is nothing in our statute regulating the advertising which a physician may properly do, and, though he may in this violate the physicians' code, it will constitute no ground for revoking his license unless his conduct is dishonorable, fraudulent, and involves moral turpitude. . . . The physician who advertises that he can cure a certain disease by a new method may be perfectly sincere in believing that he can do so. On the other hand, the quack and the charlatan who frequently advertise that they can effect cures, when they know the advertisement to be false, and thus deceive and defraud the public, are guilty of fraudulent, dishonorable, and unprofessional conduct involving moral turpitude. Whether the physician's acts were sincere or fraudulent and done for the purpose of defrauding the public is a question to be decided by the board on all the facts. The latter part of the charge against Dr. Forman, in which it was stated that to defraud the public he had made certain false and fraudulent statements which he knew to be untrue, and had thus enabled the institute to practice a fraud on various persons, sufficiently shows conduct on his part that was dishonorable, unprofessional, fraudulent, and involving moral turpitude, and for the purposes of this case must be taken as true. We do not, of course, determine that Dr. Forman is guilty. He has not been heard on the merits of the case. What the facts are will be a question for the board to determine. . . . The intent with which the acts were done is the gist of the matter. If the doctor was sincere in what he did and said, or there was no moral turpitude, his license may not be revoked; but if he had not such reason for his conduct as a man of ordinary prudence would usually act upon under like circumstances, it may be inferred from this that he was not sincere and that his conduct involved moral turpitude. This is a

question to be determined on all the facts shown in the evidence."

Although not directly within the scope of the present subject, it may be observed that some statutes employ the term "gross immorality," in specifying causes for revocation of licenses, and the courts have taken various views of the scope of its definition, some of them linking it with the term "moral turpitude" in the sense of being coextensive. Thus, in Brown v. Hassig (1932) 136 Kan. 384, 15 P. (2d) 401, it was held that a physician who falsely represents to a patient that he has syphilis, for the purpose of obtaining a fee for the treatment of such disease, is guilty of gross immorality under a statute providing for the revocation of a physician's license upon proof of guilt of felony or "gross immorality," the court observing that the latter term had no hard and fast definition, but was descriptive of a course of conduct akin to "moral turpitude."

"Gross immorality," used named in a statute to designate a cause for the revocation of a physician's license, was held in Rose v. Baxter (1908) 7 Ohio N. P. N. S. 132, 18 Ohio Dec. N. P. 658 (affirmed by Circuit Court, which is affirmed without opinion in (1909) 81 Ohio St. 522, 91 N. E. 1138), not so vague, uncertain, broad, and comprehensive as to give the medical board the sole power to determine whether the license should be revoked without providing any standard as to qualification. The court said: "'Gross immorality' is a term which has been used and has received adjudication at the hands of a great many courts. The word 'gross' does not mean great or big or excessive, necessarily, but rather such a wilful, flagrant, and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act. Sometimes the expression is found, under the law, 'gross misbehavior.' The expression 'moral turpitude' is closely akin to the expression at bar, and has received a great many interpretations, but has always been sustained by the courts, so far as I have been able to ascertain, and I find no cases in which it has been held so indefinite as to preclude action against a person guilty thereof." And this statute was held violated, where a physician maintained two offices under different names, intending thereby to perpetrate a fraud upon the public.

Under a statute authorizing a State Medical Board to revoke the license of a physician who has been found "at any time guilty of felony or gross immorality," in approving the revocation of a license upon a showing of twenty-five violations of the Harrison Narcotic Act, the court in Seitz v. Ohio State Medical Bd. (1926) 24 Ohio App. 154, 157 N. E. 304, said that the physician in question had "thereby shown such a contempt of the opinion of the respectable members of the community, and such an indifference to the obligations that rest upon him in the exercise of the responsible duties of his exalted calling, that the minds of men can hardly differ upon the proposition that he has dishonored himself, degraded his profession, and been grossly immoral. If, therefore, the conviction in the Federal court were not of itself such a felony as would warrant the revocation of the certificate in this case, the facts upon which that conviction was based would have been such gross immorality as to have required the revocation of the certificate."

And in Meffert v. State Bd. of Medical Registration (Meffert v. Packer) (1903) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811 (affirmed in (1904) 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790), in construing a statute lodging in a State Medical Board discretion to refuse to grant a certificate to practice medicine to any person guilty of felony or "gross immorality," the court said: "It is contended that the immoral conduct with which plaintiff in error was charged was not practiced by him in the line of his profession, and therefore was not cognizable by the board. The law is not that the board must find that such person has been grossly immoral with his patients, but that he is grossly immoral in his general habits. We only men-

tion this contention to condemn it. The object sought is the protection of the home of the sick and distressed from the intrusion therein, in a professional character, of vicious and unprincipled men—men wholly destitute of all moral sensibilities. It is not the purpose of the lawmakers to clothe a man with a certificate of moral character, and send him out to prey upon the weak and unsuspecting,—upon those who would be entirely at his mercy,—and quietly await the accomplishment of that which observation and experience have taught us is certain to follow, before depriving such person of the indorsement which gave the opportunity to commit such wrong. The law disqualifies one guilty of a felony. It would hardly be contended that the felony for which a license may be revoked must have been committed upon a patient, or against the property of a patient, or while such physician was attending a patient."

H. D. W.

W. D. NEVELS et al., Plffs. in Err.,

v.

H. H. HARRIS.

Texas Supreme Court — February 24, 1937.

(— Tex. —, 102 S. W. (2d) 1046.)

Usury, § 40½ — possibility, in case of acceleration, as cured by disclaimer.

1. Usury in respect of a loan which by its terms was to mature five years after date, so far as it is predicated upon the possibility that an acceleration clause might be exercised at the end of the first year, in which event the amount deducted by the lender from the face of the principal note, plus the interest note for the first year's interest then earned (interest notes representing unearned interest being automatically canceled in that event by virtue of an express provision in that regard), would exceed legal interest is negatived where the contract expressly states that it is the intention of the parties to conform strictly to the usury laws "now" in force, and that "any of said contracts for interest shall be held to be subject to reduction to the amount allowed under said usury laws."

[*See annotation on this question beginning on page* 1471.]

Usury, § 40½ — disclaimer — effect.

2. Lender may not exact from borrower a contract that is usurious under its terms and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done.

[*See annotation on this question beginning on page* 1471.]

Usury, § 1 — constituting instruments together.

3. Principal note, interest notes, and deed of trust, all executed at the same time, are to be treated, together with the application for the loan, as constituting one contract as regards the question of usury.

Usury, § 18 — fees to lender's agents.

4. Payments from the proceeds of a loan of bona fide fees to the lender's special agent for services in inspecting the land securing the loan and passing on the solvency of the borrower's sureties, and for the attorney's services in examining the abstract, drawing the papers pertaining to the loan, and in such other matters as were proper under the circumstances, are not to be considered as interest under the usury laws, where such agents have only limited or special authority and the lender does not participate in the fund so paid.

[See R. C. L. title "Usury," § 39.]

Usury, § 1 — real amount of loan.

5. For the purpose of determining question as to usury, the real amount

BLACK'S LAW DICTIONARY

With Pronunciations

Fifth Edition

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors, Bankruptcy, Mortgages, Constitutional Law, Interpretation of Laws, Rescission and Cancellation of Contracts, Etc.

FIFTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

Contributing Authors

JOSEPH R. NOLAN

Associate Justice, Massachusetts Superior Court

and

M. J. CONNOLLY

Associate Professor of Linguistics and Eastern Languages, Boston College

ST. PAUL MINN.
WEST PUBLISHING CO.
1979

Library of Congress Cataloging in Publication Data

Black, Henry Campbell, 1860-1927.
Black's Law dictionary.

First ed., 1891, has title: A dictionary of law.
1. Law—Dictionaries. I. Nolan, Joseph R.
II. Connolly, Michael J. III. West Publishing Company,
St. Paul. IV. Title. V. Title: Law dictionary.
KF156.B53 1979 340'.03 79-12547
ISBN 0-8299-2041-2
ISBN 0-8299-2045-5 deluxe

oral obligation. See Obligation.

oral turpitude. The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. State v. Adkins, 40 Ohio App.2d 473, 320 N.E.2d 308, 311, 69 O.O.2d 416. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. Lee v. Wisconsin State Bd. of Dental Examiners, 29 Wis.2d 330, 139 N.W.2d 61, 65. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita. People v. Ferguson, 55 Misc.2d 711, 286 N.Y.S.2d 976, 981 See also Turpitude.

orandæ solutionis causa /mərəndiy sal(y)ūwshiyównəs kózə/. Lat. For the purpose of delaying or postponing payment or performance.

ora reprobatur in lege /mórə rèprəbéydər in liyjiy/. Delay is reprobated in law.

oratorium /mòhratór(i)yam/. A term designating suspension of all or of certain legal remedies against debtors, sometimes authorized by law during financial distress. A period of permissive or obligatory delay; specifically, a period during which an obligor has a legal right to delay meeting an obligation. State ex rel. Jensen Livestock Co. v. Hyslop, 111 Mont. 122, 107 P.2d 1088, 1092. Delay or postponement of an action or proceeding. See Injunction; Restraining order.

ore favorable terms clause. A provision in a labor-management contract by which the union agrees not to make more favorable agreements with other and competing employers.

ore or less. About; substantially; or approximately; implying that both parties assume the risk of any ordinary discrepancy. The words are intended to cover slight or unimportant inaccuracies in quantity. Carter v. Finch, 186 Ark. 954, 57 S.W.2d 408; and are ordinarily to be interpreted as taking care of unsubstantial differences or differences of small importance compared to the whole number of items transferred.

oreover. In addition thereto, also, furthermore, likewise, beyond this, besides this.

organatic-marriage. See Marriage.

organgina, or morgangiva /morgənjənə/°javə/. A gift in the morning after the wedding; dowry; the husband's gift to his wife on the day after the wedding.

rgue /mórg/. A place where the bodies of persons found dead are kept for a limited time and exposed to view, to the end that their relatives or friends may identify them.

rmon. A member of the Church of Jesus Christ of Latter-day Saints. The Church was organized in 1830 at Seneca, New York, by Joseph Smith, and today its headquarters are in Salt Lake City, Utah.

rning loan. An unsecured loan to permit the borrower, generally a stockbroker, to carry on his business for the day.

Moron. A term indicating a mentally defective person usually having a mental age of eight to twelve years and an I.Q. of 50 to 70.

Morphinomania, or morphinism /mòrfənaméyn(i)yə /mórfənizəm/. The opium habit. An excessive desire for morphia.

Morris Plan Company. An industrial bank which accepts money from the public for investment in investment certificates which draw interest periodically payable to the investor, and which bank lends money principally to steadily employed salaried people who are required to secure repayment with the endorsement of two other employed salaried people, the contract calling for installment payments over a one year period. Other secured loans are also made. Board of Com'rs of Tulsa County v. Remedial Finance Corporation, 186 Okl. 648, 100 P.2d 240, 242.

Mors /mórz/. Lat. Death. State v. Logan, 344 Mo. 351, 126 S.W.2d 256, 259.

Mors dicitur ultimum supplicium /mórz dísədər áltəməm səplísh(iy)əm/. Death is called the "last punishment," the "extremity of punishment."

Morsellum, or morsellus, terræ /morsélam téhriy /°ləs°/. In old English law, a small parcel or bit of land.

Mors omnia solvit /mórz ómniyə sólvət/. Death dissolves all things. Applied to the case of the death of a party to an action.

Mortal. Destructive to life; causing or occasioning death; exposing to or deserving death, especially spiritual death; deadly; fatal, as, a mortal wound, or mortal sin; of or pertaining to time of death.

Mortality. The relative incidence of death.

Mortality tables. A means of ascertaining the probable number of years any man or woman of a given age and of ordinary health will live. A mortality table expresses, on the basis of the group studied, the probability that, of a number of persons of equal expectations of life who are living at the beginning of any year, a certain number of deaths will occur within that year. National Life & Acc. Ins. Co. v. U. S., D.C.Tenn., 381 F.Supp. 1034, 1037.

Such tables are used by insurance companies to determine the premium to be charged for those in the respective age groups.

Mort civile /mór(t) saviyl/. In French law, civil death as upon conviction for felony. It was nominally abolished in 1854, but something very similar to it, in effect at least, still remains. Thus, the property of the condemned, possessed by him at the date of his conviction, goes and belongs to his successors (*heritiers*), as in case of an intestacy; and his future acquired property goes to the state by right of its prerogative (*par droit de déshérence*), but the state may, as a matter of grace, make it over in whole or in part to the widow and children.

Mort d'ancestor /mórt dènsəstər/. An ancient and now almost obsolete remedy in the English law. An assize of *mort d'ancestor* was a writ which lay for a person whose ancestor died seised of lands in fee

simple, and after h... this writ directed ... assize, who should ... recognize whether ... on the day of his d... were the next heir.

Mortgage /mórgəj/. ... created by a written ... the performance of ...

At common law, ... absolute in its form ... formance of some ... and the like, by the ... to become void if ... the terms prescri... conveyance. The ... of the legal title to ... subject to defeasa... performance of the ...

The above defini... mon-law (*i.e.* estat... gage. Such conce... states. But in m... regarded as a mere ... estate. Zeigler v. ... 894, 896. It is a ... property for the p... ance of some oth... transaction may ta... conveyance in effe... form of a conveya... ed a hybrid or in... mortgage.

See also Assum... gage; Bulk mortg... mortgage; Corpor... *trust)*; In rem m... lease *(Release of* ... Submortgage; Ta... Union mortgage ... see Bona fide.

Amortized mortg... pays the current ... of principal in his ...

Blanket mortgage ... creates a lien on ... stantial portion ... asset.

Closed-end mort... erty mortgaged ... altered during th...

Consolidated mo... replace or to com...

Construction dra... to finance build...

Conventional mo... is a contract by ... property, or a p... to secure the e... without divestin... guished from th... lege which the ... creditor over the ... ulation of the p... general lien at c...

contents thereof had been approved by three justices, or the majority of the grand jury at assizes or quarter sessions. No petition could be delivered by more than ten persons.

Tun. A measure of wine or oil, containing four hogsheads.

Tungreve /təngriyv/. A town-reeve or bailiff.

Tunnage. A duty in England anciently due upon all wines imported, over and above the prisage and butlerage.

Turba /tərbə/. Lat. In the civil law, a multitude; a crowd or mob; a tumultuous assembly of persons. Said to consist of ten or fifteen, at the least.

Turbary /tərbəriy/. Turbary, or common of turbary, is the right or liberty of digging turf upon another man's ground.

Turf and twig. A piece of turf, or a twig or a bough, were delivered by the feoffer to the feoffee in making livery of seisin. 2 Bl.Comm. 315.

Turn, or tourn /tərn/. In English law, the great court leet of the county, as the old county court was the court-baron. Of this the sheriff was judge, and the court was incident to his office; wherefore it was called the "sheriff's tourn;" and it had its name originally from the sheriff making a turn of circuit about his shire, and holding this court in each respective hundred.

Turncoat witness. A witness whose testimony was expected to be favorable but who turns around and becomes an adverse witness.

Turned to a right. In English law, this phrase means that a person whose estate is divested by usurpation cannot expel the possessor by mere entry, but must have recourse to an action, either possessory or droitural.

Turning State's evidence. See State's evidence.

Turnkey. A person, under the superintendence of a jailer, who has the charge of the keys of the prison, for the purpose of opening and fastening the doors.

Turn-key contract. Term used in building trade to designate those contracts in which builder agrees to complete work of building and installation to point of readiness for occupancy. It ordinarily means that builder will complete work to certain specified point, such as building a complete house ready for occupancy as a dwelling, and that builder agrees to assume all risk. Gantt v. Van der Hoek, 251 S.C. 307, 162 S.E.2d 267, 270.

In oil drilling industry a job wherein driller of oil well undertakes to furnish everything and does all work required to complete well, place it on production, and turn it over ready to turn the key and start oil running into tanks. Retsal Drilling Co. v. Commissioner of Internal Revenue, C.C.A.Tex., 127 F.2d 355, 357. A turn-key contract to drill a well involves the testing of the formation contemplated by the parties and completion of a producing well or its abandonment as a dry hole, all done for an agreed-upon total consideration, putting the risk of rising costs, well trouble, weather, and the like upon the driller, but it does not, in the absence of a clear expression, require the driller to guarantee a producing well. Totah Drilling Co. v. Abraham, 64 N.M. 380, 328 P.2d 1083, 1091.

Turntable doctrine. Also termed "attractive nuisance" doctrine. This doctrine requires the owner of premises not to attract or lure children into unsuspected danger or great bodily harm, by keeping thereon attractive machinery or dangerous instrumentalities in an exposed and unguarded condition, and where injuries have been received by a child so enticed the entry is not regarded as unlawful, and does not necessarily preclude a recovery of damages; the attractiveness of the machine or structure amounting to an implied invitation to enter. It imposes a liability on a property owner for injuries to a child of tender years, resulting from something on his premises that can be operated by such a child and made dangerous by him, and which is attractive to him and calculated to induce him to use it, where he fails to protect the thing so that a child of tender years cannot be hurt by it.

Doctrine is that who maintains or creates upon his premises or upon the premises of another in any public place an instrumentality or condition which may reasonably be expected to attract children of tender years and to constitute a danger to them is under duty to take the precautions that a reasonably prudent person would take under similar circumstance, to prevent injury to such children. Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, 5 Wash.2d 599, 105 P.2d 838, 843.

The dangerous and alluring qualities of a railroad turntable gave the "attractive nuisance rule" the name of "Turntable Doctrine." Louisville & N. R. Co. v. Vaughn, 292 Ky. 120, 166 S.W.2d 43, 46.

See also Attractive nuisance doctrine.

Turpis /tərpəs/. Lat. In the civil law, base; mean; vile; disgraceful; infamous; unlawful. Applied both to things and persons.

Turpis causa /tərpəs kɔ́zə/. A base cause; a vile or immoral consideration; a consideration which, on account of its immorality, is not allowed by law to be sufficient either to support a contract or found an action; *e.g.*, future illicit intercourse.

Turpis contractus /tərpəs kəntrǽktəs/. An immoral or iniquitous contract.

Turpis est pars quæ non convenit cum suo toto /tərpəs èst pàrz kwiy nôn kənviynət kəm s(y)úwow tówdow/. The part which does not agree with its whole is of mean account [entitled to small or no consideration].

Turpitude /tərpət(y)úwd/. In its ordinary sense, inherent baseness or vileness of principle or action; shameful wickedness; depravity. In its legal sense, everything done contrary to justice, honesty, modesty, or good morals. An action showing gross depravity. Traders & General Ins. Co. v. Russell, Tex.Civ. App., 99 S.W.2d 1079, 1084.

Moral turpitude. A term of frequent occurrence in statutes, especially those providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility. In general, it means neither more nor less than "turpi-

tude," *i.e.*, anything done contrary to justice, honesty, modesty, or good morals. It is also commonly defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

Although a vague term, it implies something immoral in itself, regardless of its being punishable by law. Thus excluding unintentional wrong, or an improper act done without unlawful or improper intent. It is also said to be restricted to the gravest offenses, consisting of felonies, infamous crimes, and those that are *malum in se* and disclose a depraved mind. Bartos v. United States District Court for District of Nebraska, C.C.A.Neb., 19 F.2d 722, 724.

Turpitudo /tɔ́rpət(y)ûwdow/. Lat. Baseness; infamy; immorality; turpitude.

Tuta est custodia quæ sibimet creditur /t(y)ûwdə èst kəstówd(i)yə kwiy síbaymet krédədər/ That guardianship is secure which is intrusted to itself alone.

Tutela /t(y)uwtíylə/. Lat. In the civil law, tutelage; that species of guardianship which continued to the age of puberty; the guardian being called *"tutor,"* and the ward, *"pupillus."* A power given by the civil law over a free person to defend him when by reason of his age he is unable to defend himself. A child under the power of his father was not subject to tutelage, because not a free person, *caput liberum.*

Tutelæ actio /t(y)uwtíyliy ǽksh(iy)ow/. Lat. In the civil law, an action of tutelage; an action which lay for a ward or pupil, on the termination of tutelage, against the *tutor* or guardian, to compel an account.

Tutelage /t(y)ûwdəlaj/. Guardianship; state of being under a guardian. See Tutela.

Tutela legitima /t(y)uwtíylə lajídəmə/. Legal tutelage; tutelage created by act of law, as where none had been created by testament.

Tutelam reddere /t(y)uwtíyləm rédəriy/. Lat. In the civil law, to render an account of tutelage. *Tutelam reposcere,* to demand an account of tutelage.

Tutela testamentaria /t(y)utíylə tèstəmentɛ́r(i)yə/. Testamentary tutelage or guardianship; that kind of tutelage which was created by will.

Tuteur. In French law, a kind of guardian.

Tuteur officieux. A person over fifty years of age may be appointed a tutor of this sort to a child over fifteen years of age, with the consent of the parents of such child, or, in their default, the *conseil de famille.* The duties which such a tutor becomes subject to are analogous to those in English law of a person who puts himself *in loco parentis* to any one.

Tuteur subrogé. The title of a second guardian appointed for an infant under guardianship. His functions are exercised in case the interests of the infant and his principal guardian conflict.

Tutius erratur ex parte mitiore /t(y)ûwsh(iy)əs ehrévdər èks párdiy mishiyóriy/. It is safer to err on the gentler side [or on the side of mercy].

Tutius semper est errare acquietando, quam in punlendo, ex parte misericordiæ quam ex parte justitiæ /t(y)ûwsh(iy)əs sémpər èst ehrériy əkwàyətǽndow, kwǽm in pyuwniyéndow, èks párdiy mizərəkórdiyiy kwǽm èks párdiy jəstishiyiy/. It is always safer to err in acquitting than punishing, on the side of mercy than on the side of justice.

Tutor /t(y)ûwdər/. One who teaches, usually a private instructor. State ex rel. Veeder v. State Board of Education, 97 Mont. 121, 33 P.2d 516, 522.

In the civil law, this term corresponds nearly to "guardian" (*i.e.*, a person appointed to have the care of the person of a minor and the administration of his estate), except that the guardian of a minor who has passed a certain age is called "curator," and has powers and duties differing somewhat from those of a tutor.

Tutor alienus /t(y)ûwdər éyliyíynəs/. In English law, the name given to a stranger who enters upon the lands of an infant within the age of fourteen, and takes the profits. He may be called to an account by the infant and be charged as guardian in socage.

Tutor proprius /tyûwdər prówpriyəs/. The name given in old English law to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus.*

Tutorship. The office and power of a tutor. The power which an individual, *sui juris,* has to take care of the person of one who is unable to take care of himself. There are four sorts of tutorships: Tutorship by nature; tutorship by will; tutorship by the effect of the law; tutorship by the appointment of the judge. Civ. Code La. art. 247.

Tutorship by nature. Upon the death of either parent, the tutorship of minor children belongs of right to the other. Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted. All those cases are called tutorship by nature. Civ.Code La. art. 250.

Tutorship by will. The right of appointing a tutor, whether a relation or a stranger, belongs exclusively to the father or mother dying last. This is called "tutorship by will," because generally it is given by testament; but it may likewise be given by any declaration by the surviving father or mother, or the parent who is the curator of the other spouse, executed before a notary and two witnesses. Civ.Code La. art. 257.

Tutrix /t(y)ûwtriks/. A female tutor.

T.V.A. Tennessee Valley Authority.

Twa night gest /twównayt gést/. In Saxon law, a guest on the second night. By the laws of Edward the Confessor it was provided that a man who lodged at an inn, or at the house of another, should be considered, on the first night of his being there, a stranger *(uncuth);* on the second night, a guest; on the third night, a member of the family. This had reference to the responsibility of the host or entertainer for offenses committed by the guest.

Twelfhindl. The high
government, who we
were done to such
made according to t

Twelfth Amendment.
tion (1804) which a
presidential election
vote for President
ballots instead of vo
on single ballot as b

Twelve-day writ. A
18 & 19 Vict., c. 67.
of exchange and pr
of court in 1880.

Twelvemonth /twélvm
number), includes a
to be computed ac
every month.

Twelve-month bond.
ute effective Jan. 2
had a double chara
to the Spanish civil
statutory judgment,
other judgment of
it being also a cons

Twelve Tables. The
law, framed by a
upon the return of
been sent abroad
tions. The Twelve
transcribed from
partly of such as
the manners of the
and mainly, perhap
ancient kings. The
tion for the whole
prudence. They c
See 1 Kent.Comm.
ly a codification, a
the customary law
elements in them,
man.

Twentieth Amendm
Amendment to th
changed the begin
dential terms fro
Congressional ter
thereby eliminatin
which had former
even-numbered ye
Congressmen sat
office. The Amen
tial succession un

Twenty-Fifth Amend
tution (1967) wh
offi s of Presider
removal, or resig

Twenty-First Amen
tution (1933) wh
(18th) but prohib
beverages into a
such beverages

RULES OF APPELLATE PROCEDURE OF THE STATE OF ALASKA

Rule 216. Expedited Appeals.

(a) Scope. This rule applies to the following classes of appeals, and supersedes the other appellate rules to the extent that they may be inconsistent with this rule:

(1) Extradition appeals;

(2) Juvenile waiver appeals;

(3) Peremptory challenge appeals.

(b) Definitions.

(1) An appeal from an order of the superior court granting or denying an application for a writ of habeas corpus filed under AS 12.70.090 by a person arrested on a governor's warrant under the Uniform Criminal Extradition Act, is an "extradition appeal." An appeal from any other final judgment of the superior court relating to the extradition of a person charged in this state or elsewhere with a crime is also an "extradition appeal," except that any appeal from a final judgment convicting a person of a crime is not an "extradition appeal."

(2) A "juvenile waiver appeal" is an appeal from an order under AS 47.10.060(a) finding that a minor is not amenable to treatment under AS 47.10.

(3) A "peremptory challenge appeal" is an appeal by a criminal defendant from an order denying the defendant's motion for change of judge under Criminal Rule 25(d).

(c) Jurisdictional Limitation. This rule does not permit an appeal to be taken in any circumstances in which an appeal would not be permitted by Rule 202.

(d) Notice of Appeal. The notice of appeal in an appeal under this rule shall be filed with the clerk of the court which entered the order or judgment being appealed, within ten days after entry of the order or judgment.

The notice shall identify the appeal as an appeal under this rule, but the court of appeals will apply this rule to cases within its scope whether they are so identified or not.

(e) Forwarding Notice of Appeal. Immediately upon the filing of a notice of appeal in an appeal under this rule, the clerk of the trial courts shall notify the parties and the clerk of the appellate courts in the manner provided in Rule 204(b).

(f) Record on Appeal. The appellant shall not designate a record on appeal. The entire superior court file shall serve as

the record on appeal, together with a cassette tape recording of any hearing held in superior court if deemed necessary by the court of appeals. Promptly upon the filing of the appellee's memorandum, the clerk of the trial courts shall transmit the original and copies of the record on appeal to the clerk of the appellate courts in the same manner as for other appeals.

(g) Memoranda on Appeal.

(1) Within 10 days after filing a notice of appeal in an appeal under this rule, the appellant shall file with the court of appeals the original of a typewritten memorandum in support of the appeal together with proof of service on all other parties.

(2) Within 10 days after service of the appellant's memorandum, the appellee may file with the court of appeals the original of a typewritten memorandum in opposition to the appeal.

(3) No reply memorandum may be filed unless ordered by the court.

(4) The memoranda need not comply with the requirements of Rule 212 unless ordered by the court of appeals.

(5) The clerk of the appellate courts shall forthwith duplicate copies of the memoranda for use of the court.

(h) Disposition of Appeals. Appeals under this rule will be disposed of expeditiously by the court of appeals on the record and memoranda. Oral argument may be granted in the court's discretion. (Supreme Court Order 439 effective November 15, 1980)

THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 439

Revising the Rules of Appellate Procedure to reflect the organization of the Court of Appeals

IT IS ORDERED:

1. The Rules of Appellate Procedure of the State of Alaska, and all amendments thereto, are rescinded.

2. Supreme Court Order No. 14, and all amendments and revisions to that order are rescinded.

3. The attached rules, numbered 101 through 611, are adopted as the Rules of Appellate Procedure.

4. The Rules of Appellate Procedure adopted by this order apply to cases and proceedings filed in the Supreme Court or the Court of Appeals on or after the effective date of this order. They also apply on and after that date to cases and proceedings filed before that date, except to the extent that their application would not be feasible, or would work injustice, in which case the rules rescinded by this order apply, notwithstanding their rescission.

DATED: October 21, 1980

EFFECTIVE DATE: November 15, 1980

Jay A. Rabinowitz
Chief Justice

Roger H. Connor
Justice

Edmond W. Burke
Justice

Justice

Justice

Distribution:

SC Justices
Sup Ct Judges
Dist Judges
Magistrates
Mag Supr
Clks Ct
Law Librarian
Probate Masters
Adm Dir
All Members ABA
Gov
Dep Law
Legs Affrs
Pub Def Agency
Dep Pub Safety
Alaska Legal Serv

HJR

2

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

Joe P Joseph - DO PASS IF AMENDED TO REQUIRE the Legislature to establish deadlines

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____
CHAIRMAN

AMENDED TITLE: CSHJR 2(JUD)
PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF ALASKA LIMITING THE LENGTH OF REGULAR SESSIONS OF THE LEGISLATURE

PRIME SPONSOR: HAYES.
CO-SPONSORS: BARNES, FLOOD, PHILLIPS, FURNACE, ABOOD, LISKA, COWDERY, SZYMANSKI, TISCHER, FRITZ, PESTINGER, RUSSELL, LINDAUER.
CURRENT STATUS: 5/25/83 IN (S) JUDICIARY

DATE	SEQ	PAGE	LEGISLATIVE ACTION
01/17/83	01	0053	FIRST READING -- COMMITTEE REPORTS
01/20/83	02	0102	JUD --- CS05, NR02
01/20/83	03	0103	TWO F-NOTES EQUAL ZERO
02/04/83	04	0176	SECOND READING
02/04/83	05	0176	JUD CS ADOPTED BY UNAN CONSENT
02/04/83	06	0177	AM01 NOT ADOPTED BY DIV 13-25-02
02/04/83	07	0178	AM02 NOT ADOPTED BY DIV 12-26-02
02/04/83	08	0178	ADVANCED TO 3RD READING BY UNAN CONSENT
02/04/83	09	0178	THIRD READING
02/04/83	10	0178	PASSED BY DIV 30-08-02
02/04/83	11	0179	NOTICE OF RECONSIDERATION GIVEN
02/07/83	12	0196	FAILD TO RETN 2ND READNG BY DIV 07-33-00
02/07/83	13	0197	PASSED ON RECONSIDERATN BY DIV 31-09-00
****	**	**	*** *** ***

DATE	SEQ	PAGE	LEGISLATIVE ACTION
02/08/83	14	0146	FIRST READING -- COMMITTEE REPORTS
05/25/83	15	1108	S.A. --- CS02, NR01, OTHER01
			JUDICIARY
			RULES
****	**	**	*** *** ***

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Joint Resolution No. 2
Title "Proposing an amendment to the Constitution of the State of
Requested by House Judiciary Date 1/20/83
Alaska limiting the length of regular sessions of the legislature."

II. FISCAL DETAIL
Agency Affected Office of the Governor
Program Category Affected Division of Elections
BRU, Program, Or Subprogram(s) Affected Division of Elections
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

NONE

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No additional fiscal impact is anticipated with House Joint Resolution No. 2.

IV. DATE 1/20/83 PREPARED BY Danith D. Arnoldt, Deputy Director
AGENCY Office of the Governor, Division of Elections
PHONE 465-3181

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HOUSE JOINT RESOLUTION NO. 2
Title Proposing an amendment to the Constitution of the State of Alaska ~~requiring~~ limiting the length of regular sessions Date 1/20/83
of the legislature. Requested by: Representative Charlie Bussell

II. FISCAL DETAIL
Agency Affected Legislative Affairs Agency
Program Category Affected General Government
BRU, Program, Or Subprogram(s) Affected Session
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES	-0-					
200 TRAVEL	-0-					
300 CONTRACTUAL	-0-					
400 COMMODITIES	-0-					
500 EQUIPMENT	-0-					
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-					

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-					
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS None

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

There is no additional cost for the Division of Elections to place an issue before the voters as that is the Division's function.

IV. DATE 01-21-83 PREPARED BY Wally Harrison, Director, Admin. Svcs.
AGENCY Legislative Affairs Agency
PHONE 465-3850

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

HJR
5

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

Alaska State Legislature

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3704
(907) 465-3935

Senate

Committee on Resources

MEMO

To: Senator Bill Ray, Chairman
Senate Judiciary Committee

From: Senator Bettye Fahrenkamp

Date: May 17, 1983

Subject: HJR 5

Enclosed you will find backup materials in support of HJR 5, which was recently read across and referred to your committee.

I strongly support this legislation, and urge your early consideration of the measure.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

FEB 25 1983

February 25, 1983

MEMORANDUM

TO: Representative Mike Syzmanski

FROM: Susan Brody, Director SEB

RE: Regulation Review by the Legislature
Research Request No. 83-87

Mark Higgins of your staff asked us to provide information relating to legislative review and annulment of administrative regulations. The following materials are attached to this memorandum:

- The 1980 Alaska Supreme Court decision in State of Alaska v. A.L.I.V.E Voluntary[1] which declared unconstitutional the legislature's annulment of regulations by concurrent resolution (see Attachment A).

- A memorandum from Billy Berrier, Director of the Legal Services Division, discussing the Supreme Court decision (see Attachment B).

- The November 1980 Voters' Pamphlet description of Ballot Proposition No. 1. The measure, if it had been adopted, would have amended the State Constitution to permit the legislature to annul regulations by resolution (see Attachment C). The ballot measure failed, with 58,808 voting for the measure and 82,010 voting against.

Mr. Higgins asked if we could provide any committee testimony on CS HJR 82 which put the measure on the ballot. We have obtained the tapes of both the Senate and House Judiciary Committee sessions on the resolution; however, we have not had an opportunity as yet to listen to them. The tapes have not been transcribed and there is no additional information on the committee hearings at the Legislative Library. Please let us know if you would like copies of the tapes or if you wish us to summarize the hearings. (It would probably be several weeks before we could complete the summary.)

---

[1] State of Alaska v. A.L.I.V.E. Voluntary [606 P.2d. 769].

We were also asked to identify the number of times regulations had been changed or annulled by the legislature prior to the A.L.I.V.E. decision. To date, we only have had time to compile data on resolutions affecting regulations for the period 1975-80. For that period, there were ten resolutions introduced to annul regulations, two of which were passed by the legislature. In that same period, four resolutions requested a change in regulations, none of which passed. Four additional resolutions were introduced to approve regulations, two of which passed. Similar data for the period from 1959 to 1975 will take additional time to compile.

For your information, we have also attached a 1979 publication of the National Conference of State Legislatures (NCSL) entitled Restoring the Balance: Legislative Review of Administrative Regulations, (see Attachment D). This report provides descriptions of procedures used in other states to review agency regulations and contains recommendations to assist legislators in developing effective review procedures.

We will provide the additional information you requested by March 15. If this completion date will present a problem for you, please let me know.

SB/sj

Attachments

A State v. A.L.I.V.E. Voluntary

B Memo from Legal Services on A.L.I.V.E. decision

C Ballot Proposition No. 1 Legislative Annulment of Regulations

D Restoring the Balance Legislative Review of Administrative Regulations

ATTACHMENT A

State v. A.L.I.V.E. Voluntary

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.

5. 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 appellant.

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

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 Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975).

2. AS 05.15.100.

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

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

9. That is, since 1960, Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. *See* note 6, *supra*.

II

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

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

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

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

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

10. Art. II, § 13 provides:

> *Form of Bills.* Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska." Art. II, § 14 provides:
>
> *Passage of Bills.* The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

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

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

13. Art. II, §§ 15, 16 and 17.

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

15. We also referred to the Art. II, §§ 14 and 15 safeguards in *North Slope Borough v. Sohio*

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

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

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

Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 12[illegible] 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

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 495 (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 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, 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

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 . . . "); *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) ("[.]he resolution expresses only the opinion of that legislative body.").

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]

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

25. The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. *See Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284–85, 96 S.Ct. at 757–58, 46 L.Ed.2d at 836–39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 152 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

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

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

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

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

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

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

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

27. *Id.* at 10.

28. 225 S.E.2d at 848–49.

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

30. U.S.Const. art. I, § 1 provides:

"[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.

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

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

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].

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

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

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

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

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

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

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

35. Art. III, § 26 provides:

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

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

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

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

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

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

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

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

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

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

I

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

38. This clause provides:

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

39. *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 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 recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

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

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

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

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

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

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

II

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

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

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

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

III

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

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

4. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 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*, 152 U.S.App.D.C. 21, 25–29, 559 F.2d 642, 649–50 (D.C.Cir.) (*en banc*) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 257 (1977).

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

8. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif.L. Rev. 983, 998 (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. 553, 595 (1976).

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

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

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

> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view *the power of either House to disapprove as equivalent to legislation* or to an order, resolution or vote requiring the concurrence of both Houses.
>
> 424 U.S. at 284–85, 96 S.Ct. at 757, 46 L.Ed.2d at 838–39 (emphasis added) (footnotes omitted).

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

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

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

IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of

policy. Accordingly, the legislature's power to select the means of participation should be generously construed.[10]

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

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

V

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

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

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

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

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

12. *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574–76, 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, 15–16, 59 S.Ct. 379, 387–388, 83 L.Ed. 441, 451–52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

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

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

14. Article X, section 12, provides:

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

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

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

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

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

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

VI

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

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

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 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 527.

18. 1959 Senate Journal 705.

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

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

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

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

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

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

19. 1959 Senate Journal 1092.

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

21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. *See* AS 46.03.755(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.05.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 54 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 Crucial 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, Commissioner, Department of Health and Social Services, and State of Alaska, Appellee.

No. 4155.

Supreme Court of Alaska.

Feb. 21, 1980.

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

Affirmed.

1. Statutes ⇐223.2(1)

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

2. Infants ⇐19.4

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

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

Statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary

sometimes, recommend statutory action by the legislature.

For a discussion of federal laws on the subject, see note 6 *supra*.

ATTACHMENT B

Memo from Legal Services on A.L.I.V.E. decision

Carol Biggs

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM February 23, 1980

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

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

FROM: Billy G. Berrier
Director
Division of Legal Services

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

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

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

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

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

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

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

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

Essentially the areas affected fall into two classes

(1) regulations and legislative oversight of regulations; and

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

On regulations the majority opinion states broadly:

> "The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists.
>
> * * *
>
> "In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied."

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

> The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law. . ." Id. at 1064. In contrast, the annullment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense, and annulling any one of them effects a change in the law.

The connection and logic totally escape me.

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

> "While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.
>
> "It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee, or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees."

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

> Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev., 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly

> informed, and politically unaccountable legislative action. Id. at 1409-20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against.

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

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

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

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

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

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

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

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

> The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose.

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

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

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

The majority opinion went on the say:

> Of course, when the legislature wishes to act in an advisory capacity if may act by resolution. However, when it means to take action having a binding effect on

those outside the legislature it may do so only by following the enactment procedures.

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

These include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

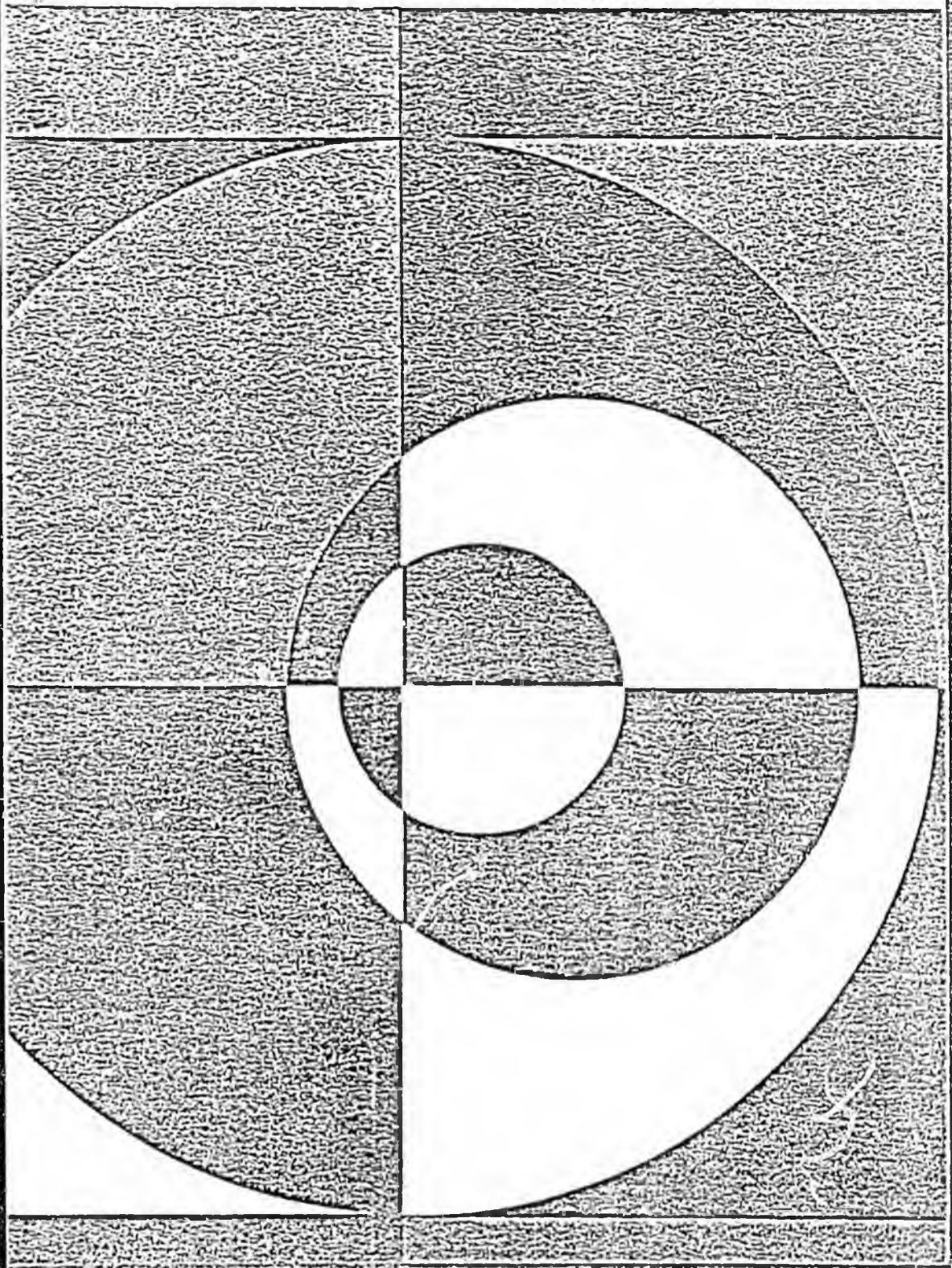
Since the alternative would be to halt, among other things, power development, coastal zone management, and oil and gas sales based on a possibility that the Court will look on legislative oversight in these areas as unfavorably as it does on legislative oversight of regulations, I recommend continuing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

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

BGB:jdn

Restoring the Balance

Legislative Review of Administrative Regulations



RESTORING THE BALANCE

Legislative Review of Administrative Regulations

National Conference of State Legislatures
Legislative Improvement and Modernization Committee
1979

Acknowledgments

The Legislative Improvement and Modernization Committee and the NCSL staff extend our appreciation to the legislators and staff who assisted in gathering information for this report. We would also like to acknowledge the following publications, which were used in preparing this report:

"Administrative Rules — What is the Legislature's Role?," by the Senate Research Service, Task Force on Critical Problems, New York Senate, John M. Flynn and Stephen F. Sloan, (June, 1976).

"Legislative Oversight," by the Institute of Government, University of Georgia, Edwin L. Jackson and Alan J. Howard, (October, 1976).

"Legislative Review of Administrative Regulations," by the Legislative Research Office, Oregon Legislative Assembly (August 8, 1975).

Table of state legislative regulation review procedures and powers, by the Arkansas Legislative Council, Marcus Halbrook, Director, Bureau of Legislative Research.

NCSL staff assistance was provided by William Pound and Fran Valluzzo.

The Legislative Improvement and Modernization Committee of the National Conference of State Legislatures is charged with exploring ways to improve the quality and effectiveness of state legislatures. Over the past two years, the committee has studied the issue of legislative review of administrative regulations, an issue which has been receiving a great deal of attention by state legislatures. This interest has been prompted by public dissatisfaction with the increasing size of state bureaucracies.

This report provides comparative descriptions of the various procedures used by state legislatures to review agency regulations and summary of current state laws on the subject. In addition, the committee has presented nine recommendations to assist legislators in developing effective procedures for regulations review.

NCSL is pleased to present the efforts of the Legislative Improvement and Modernization Committee and is confident this publication will help state legislatures fulfill their responsibilities as equal partners in state government.

State Representative Joe Wyatt, Texas
Chairman, Legislative Improvement
and Modernization Committee

Earl S. Markey
Executive Director
National Conference of State
Legislatures

April, 1978

CONTENTS

PAGE

1 THE NEED FOR LEGISLATIVE REVIEW OF REGULATIONS 7

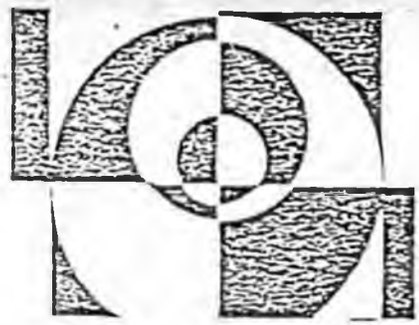
2 SUMMARY OF RECOMMENDATIONS 9

3 REGULATION REVIEW STRUCTURES 11
Standing Committee Review, Joint Committee Review, Standing Committee/Joint Committee Review
Recommendation #2

4 REGULATION REVIEW POWERS 15
Advisory, Repeal of a Regulation by the Legislature, Committee Suspension for a Specified Period of Time, Committee Suspension without Required Legislative Affirmation,
Recommendation #3

5 METHOD OF LEGISLATIVE ACTION 19
Simple Resolution, Joint or Concurrent Resolution, Statute

6 STAFFING 21
Full-time Staff, Staff by Central Agency or Committee,
Recommendation #4



7

PROCEDURES 23

Review of Proposed Regulations, Review of Preexisting Regulations, Time Constraints, Emergency Procedures, Frequency of Review Committee Meetings, Bills Authorizing Promulgation of Rules, Fiscal Notes on Regulations.
Recommendations 5, 6, 7, 8, 9.

8

CONSTITUTIONAL QUESTIONS 27

Legislative Regulation Review Process, Delegation of Legislative Review Authority, Suspension Powers, Method of Legislative Action, Constitutional Regulation Review Powers

9

SUMMARY OF STATE LAWS 31

Includes statute citations for states with regulation review procedures

10

LEGISLATIVE POWERS AND PROCEDURES 41

A table outlining regulation review processes in the states

11

LEGISLATIVE STAFF OFFICES 45

A listing of offices that provide assistance for legislative regulation review

1
THE NEED FOR LEGISLATIVE REVIEW OF REGULATIONS

The past 50 years have seen the growth of government at all levels. The prevailing philosophy behind this growth was that those problems which could not be solved by individual initiative and private action should be solved by the federal, state and local governments.

This philosophy has resulted in a dramatic growth in the executive branch of government as the branch which must implement the programs designed to solve the problems of society. There are numerous reasons for this growth. However, the main reason is that as legislatures passed laws to solve specific problems, a means of enforcing and implementing these laws was necessary.

Legislatures increasingly granted the power to promulgate regulations to the agencies that were created to enforce and implement new programs. Consequently, the expanding number and size of these agencies began to have an effect on the balance of power between the executive and legislative branches of government. The initial question, whether the agencies had the power to promulgate regulations which had the force of law, has been answered in the affirmative by the courts. Judicial decisions have affirmed the legislature's right to delegate a portion of its legislative power to the agencies for the implementation of complex problems.

As more agencies were created or expanded, the number of regulations promulgated to implement laws increased dramatically. In most states today, the body of law created by the rule-making process matches or exceeds the statutory laws of those states. While it was recognized that agency rule-making was necessary for the implementation of laws passed by the legislature, one major concern was the increasing number of regulations that either exceeded the statutory authority of the promulgating agencies or violated the legislative intent of the laws.

Legislatures began to respond to these concerns by establishing formal legislative regulation review procedures. These procedures usually provided, at the very least, that proposed regulations be submitted to a designated legislative committee for review to insure that they were technically correct and within the scope of the statutory authority and legislative intent as stated in the legislation. Most of the laws were part of the

states' administrative procedures act, which set up procedures for the promulgation of regulations.

Thirty-four states currently have formal legislative regulation review authority. The powers of the legislatures under these laws range from review of certain agencies' rules to repeal of rules by the legislature or a legislative committee.

The 1977 legislative sessions were active in providing legislatures with a role in the review of agency rules and regulations. Nine additional states (Georgia, Illinois, Maine, Nevada, New York, North Carolina, Ohio, Texas and Wyoming) established procedures for legislative regulation review. In three other states (New Mexico, North Dakota and Rhode Island), similar bills were vetoed by the governor. Seven states (Alaska, Connecticut, Kansas, Michigan, Missouri, Montana and South Carolina) amended their laws either to clarify existing review procedures or to provide a greater role for the legislature in the review process. Three state legislatures (Colorado, Louisiana and New York) were unable to override the governor's veto of bills amending the regulation review law, while in Michigan and Alaska, the legislature enacted amendments over the governor's veto.

Since in most instances, agency authority stems directly from the legislature, legislative review of regulations can be used to help insure agency compliance with both statutory authority and legislative intent. There have been cases of agencies deliberately attempting to circumvent statutory authority or legislative intent, and in a number of states basic provisions of bills defeated by the legislature have subsequently appeared almost verbatim in agency regulations.

The legislative regulation review process allows the legislature to monitor agency action throughout the year. While the legislature already oversees each agency through the appropriations process, the regulation review process gives it another and more continuous monitoring mechanism. As agency regulations are promulgated, they must pass through a formal review procedure, which includes a legislative review. The legislative review may be advisory in nature or it may allow for disapproval or delay of approval of a regulation.

2
SUMMARY OF RECOMMENDATIONS

In recognition of the need for a legislative regulation review process in each state, the committee makes the following recommendations:

Recommendation #1:

Because of the proliferation of agency regulations and the possibility of promulgation of regulations which violate legislative intent or exceed statutory authority, the committee strongly recommends that legislatures establish procedures for reviewing all agency rules and regulations promulgated with the force of law under authority granted by the legislature, whether or not they are covered by the administrative procedures act. These review procedures should be as strong as the constitution of each state allows. In establishing these procedures, legislatures will be reasserting their legislative prerogatives and regaining the basic lawmaking authority granted to them under state constitutions.

Legislatures should also enact comprehensive administrative procedures acts for their states, or review existing laws, to insure a thorough review of all regulations. These procedures, of which the legislative review process should be a key part, should include 1) a clear definition of an agency regulation; 2) a requirement that agencies' regulations clearly show additions to and deletions from existing regulations; 3) a requirement that all proposed regulations be published in advance of their effectiveness; and 4) a requirement that all regulations be filed with the legislature as provided by the legislative regulation review procedures. The procedures should allow maximum opportunity for public comment both in the promulgation and adoption of regulations as well as in the legislative review process.

To assist legislatures in establishing effective procedures for the legislative review of regulations, the committee makes the following additional recommendations:

Recommendation #2:

After considering the alternative regulation review structures, the committee recommends that a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review

function. The committee should include members representing both houses. Legislatures may also wish to consider including representation from the major substantive standing committees on the review committee.

Recommendation #3:

Recognizing the difference in state constitutions and judicial interpretations, the committee recommends that the strongest possible review structure be created in each state, consistent with the state's constitution.

Recommendation #4:

The committee recommends that the committee or committees designated to perform regulation review be adequately staffed by permanent legislative staff, so that review of regulations is effectively accomplished.

Recommendation #5:

The committee recommends that the review committee in each state have the authority to review all proposed and preexisting regulations.

Recommendation #6:

The committee recommends that reasonable time constraints be imposed on all levels of the regulation review process to provide for adequate review and for expeditious final disposition of regulations by both the committee and the legislature.

Recommendation #7:

The committee recommends that procedures be established for the promulgation of emergency regulations, with reasonable time limitations on committee review and on the effectiveness of those regulations to prevent agency circumvention of the legislative review process.

Recommendation #8:

The committee recommends that the review committee meet often enough to provide adequate review of proposed regulations which agencies file.

Recommendation #9:

The committee recommends that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rule-making authority to administrative agencies be reviewed before introduction to assure that 1) legislative intent is clearly spelled out in the bill, and 2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill.

3
REGULATION REVIEW STRUCTURES

Because of the size of state legislatures, the most effective method of regulation review is through the committee process. The review can generally be divided into three categories: 1) review by substantive standing committees; 2) review by a single joint committee, whether created for that purpose or designated as part of other functions (such as a legislative council); or 3) review by both, with standing committees reviewing during the session and a single joint committee reviewing during the interim.

Standing Committee Review

Regulation review by standing committees is usually initiated in one of two ways. In some states, the agency submits the proposed regulations to the presiding officers of each house for reference to the appropriate standing committee. In other states, the agency submits the regulations directly to a predesignated committee for each agency. Idaho, South Carolina and Louisiana conduct regulation review through the standing committee structure.

In some states, the standing committees perform a second review of regulations after initial review by a joint review committee. Iowa and Minnesota, for example, use this procedure. In Kentucky, a three-tiered system is used. If the review body, a special joint subcommittee of the Legislative Research Commission, objects to a regulation, the agency then submits it to the appropriate standing committee. If that committee objects, the agency submits it to the full legislature.

The standing committee review procedure allows the committee which reported the bill authorizing the promulgation of regulations to review those regulations for compliance with statutory authority and legislative intent. Since committee members and staff usually have the expertise to deal with complex regulations in their substantive areas, their involvement in the review procedure may be advantageous. This system also allows the workload of review to be spread among all the committees.

One disadvantage of this procedure, however, is the possibility of disagreement between house and senate committees reviewing the same

rules. Also, while standing committee members are most familiar with the law authorizing the regulations, they may be too subjective in what they feel is the legislative intent, especially if that intent is not clear in the law. A more serious drawback is the fact that most standing committees have a heavy workload during the session and may not be able to handle a high volume of regulations requiring review. Also, standing committees usually meet much less frequently during the interim, when many new regulations are being promulgated.

Joint Committee Review

The majority of the states with formal regulation review procedures use the single joint committee mechanism. Most of these committees are bipartisan, with either proportional or equal minority representation. Some committees have an equal number of house and senate members while others have more house than senate members.

In some states, the review function is performed by the Legislative Council, the agency which provides all services to the legislature. In Kentucky, the Legislative Research Commission (a joint management body) appoints a three-member regulation review subcommittee composed of at least one member from each house and at least one member of the minority.

One advantage of the joint committee structure is that in nearly all states the committee's primary function is regulation review. It meets fairly regularly, both during the session and during the interim. Another advantage is that the committee acts for the full legislature, not just one house, and makes its recommendations to the full legislature. Unlike the standing committees of each house, the joint committee may be more objective in determining legislative intent from the language of a law.

One disadvantage of this structure is that committee members may have limited knowledge of the substantive areas for which the regulations are promulgated and they may not be familiar with the development of the language of the enabling law which determines legislative intent. Also, there may be the additional cost of staffing the committee, whether with its own full-time staff or with staff from a central staff agency.

Standing Committee/Joint Committee Review

In a number of states the standing committees review regulations while the legislature is in session and a designated joint interim committee performs the review during the interim. Kansas and Nevada both use this system to some extent. In Kansas, all proposed regulations must be submitted by December 31 of each year to the revisor of statutes. During the session, he refers them to both the Joint Committee on Administrative Rules and Regulations and to the appropriate standing committee. The Colorado legislature recently passed legislation to change from a standing

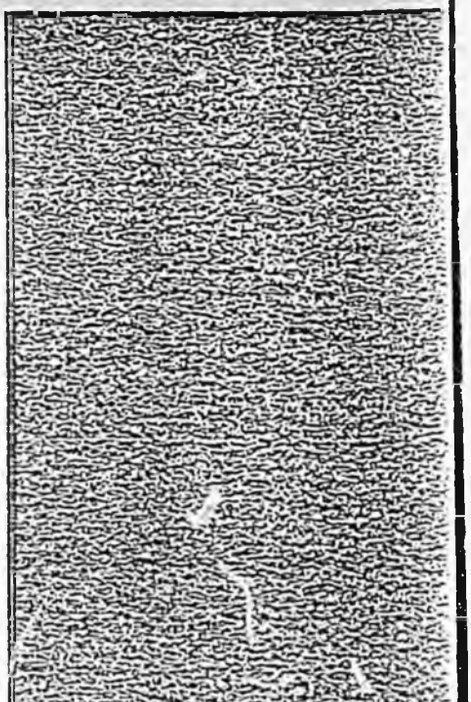
committee/joint committee system to a joint committee review structure, but the bill was vetoed by the governor.

This system combines the advantages of standing committee review with the advantages of interim review by a joint committee.

The major disadvantage is that the review function is split. This may cause a lack of cohesive legislative action and lead to a situation where agencies may wait to promulgate regulations so they can be submitted to the review body which will give the most favorable consideration.

Recommendation #2:

After considering the alternative regulation review structures, the committee recommends that a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review function. The committee should include representation from both houses. Legislatures may also wish to consider including representation from the major substantive standing committees on the review committee.



4
REGULATION REVIEW POWERS

The powers of the legislative committees charged with the responsibility of reviewing regulations generally fall into four categories: 1) advisory; 2) repeal of a regulation by the legislature; 3) committee suspension for a specified period of time; and 4) committee suspension without required legislative affirmation.

Advisory

In general, legislatures which cannot nullify, suspend, amend or modify a regulation are considered to have only advisory review powers. In most advisory states, the review committee may return regulations to the promulgating agency with recommended changes which the agency is not bound to accept. These advisory committees may recommend to the full legislature that the law authorizing the promulgation of rules be amended, requiring passage of a bill. Arkansas, Missouri and Nebraska are states with advisory review powers only.

Iowa has a regulation review process which is advisory, but which places the burden of proof on the agency once objections to a regulation are raised by the committee. The burden of proof shifts to the agency in any future court action and it must prove it did not violate legislative intent or statutory authority in adopting the regulation over the committee's objection.

Regulation review committees with advisory powers only are less likely to be challenged on constitutional separation of power grounds. This procedure does involve review for compliance with statutory authority and legislative intent and offers a basis for passage of a bill that changes the enabling statute. Also, agencies are usually responsive to committee recommendations and grateful when the committee points out errors in the regulations. The Iowa system, while only advisory, does give the legislature an advantage in a subsequent court action, whether that action is brought by the legislature or by a citizen adversely affected by the regulation. The constitutional separation of powers question is not likely to be raised because the legislature has no power to suspend or nullify.

One disadvantage of the advisory review system is that in most cases

the committee has no recourse (except recommending a change in the enabling statute) if an unresponsive agency refuses to accept the committee recommendations. The only other recourse for the legislature is through the judicial system, and in that case, the legislature would have to assume the costs of litigation in challenging agency regulations in court.

Repeal of a Regulation by the Legislature

In some states, the legislature has the authority to repeal or nullify regulations through the passage of either a bill or resolution. This is usually done upon the recommendation of the reviewing committee. In Georgia, if a repealing resolution is passed by a two-thirds majority of each house, the regulation is nullified. If it is passed by less than a two-thirds majority, the resolution must be submitted to the governor for his signature. In Maine, all new regulations automatically expire in five years unless they are repromulgated.

Regulation repeal procedures give the legislature the power to take affirmative action in the face of agency unwillingness to modify objectionable rules. The primary disadvantage may be the constitutional question of whether the legislature has the authority to nullify a regulation promulgated by an executive branch agency.

Committee Suspension for a Specified Period of Time

A third means of reviewing agency regulations is for the committee to have the power to suspend regulations for a specified time, thus delaying or temporarily repealing their effectiveness. Before the specified time has expired, however, the full legislature must affirm the committee's suspension by prescribed means or the regulation goes into effect. Legislative affirmation would permanently nullify the regulations. Minnesota, South Dakota and Wisconsin are states where the committee has the power to suspend regulations subject to the approval of that action by the full legislature within a certain time.

The principal advantage of giving the committee suspension power is that the legislature is able to take immediate action when faced with an agency which refuses to modify objectionable regulations. Also, agencies are more likely to write regulations which are technically correct and in compliance with both statutory authority and legislative intent. And since legislative affirmation is required, arbitrary action by the committee is not possible.

There may be constitutional questions with this structure in two respects. First, there is the issue of whether the legislature even has the authority to suspend or nullify a regulation promulgated by an executive branch agency. Secondly, there may be a question of the legislature's authority to delegate suspension power to a legislative committee, even

though the committee cannot permanently suspend a regulation without a vote of the full legislature.

Another possible disadvantage is the cost to the agency and the public caused by the delay of effectiveness of a regulation. However, most states have procedures for the implementation of emergency regulations on a temporary basis, with legislative review taking place after regulation is in effect.

Committee Suspension Without Required Legislative Affirmation

The fourth method of review is similar to the third. The committee has the power to suspend or delay the effective date of a regulation for a specified time, but unless the legislature overturns the committee's suspension through positive action, the suspension becomes permanent. Connecticut, Michigan, Tennessee and West Virginia are the only states where this structure exists. Connecticut's law says that the legislature "may" vote to sustain or reverse the committee's suspension, but the lack of positive action sustains the suspension. In Tennessee, the suspension is in effect until rescinded by a joint resolution of the legislature. The Tennessee attorney general, however, has advised the governor that this procedure is unconstitutional.

Again this structure allows the legislature to take action when faced with an unresponsive agency and may encourage agencies to write better regulations which are more likely to conform with statutory authority and legislative intent.

The main disadvantage to this structure is the serious constitutional question of whether the committee can, in effect, nullify a regulation without a vote of the full legislature to sustain that action.

Recommendation #3:

Recognizing the difference in state constitutions and judicial interpretations, the committee recommends that the strongest possible review structure be created in each state, consistent with the state's constitution.

Among the particular considerations which should be reviewed are questions such as the following:

1. *How strictly has your state's supreme court interpreted the "separation of powers" clause of your state constitution?*
2. *How strictly has the court enforced the prohibition against delegating legislative power to the executive? What guidelines have been set forth? How "complete" must a bill be when it leaves the legislature? Excluding local acts and constitutional amendments, can the effectiveness or implementation of a bill be conditioned upon future events after enactment by both houses and approval by the Governor? Do laws delegating rule-making power have to have adequate standards spelled out in the act?*
3. *Does your constitution specifically detail the "bicameral" principles?*

Does bicameralism mean that both houses have to agree on all actions (other than internal rules) taken by that body, or that either house can negate the actions of the other?

4. *Is there a constitutional provision in your constitution requiring the approval or veto (or at least presentation to the Governor) of every resolution or order to which the concurrence of both houses may be necessary? If so, how has the court interpreted it? Does your state make a distinction between a concurrent and joint resolution, and for what may each be used?*
5. *How have your courts ruled on "legislative intent"? Is determination of legislative intent solely a judicial function? Can legislators testify as to legislative intent? In court decisions on statutory construction, are courts bound by statements of legislative purpose, intent, and preambles sometimes found within legislative enactments?*
6. *Have the courts ruled on the power of a current legislature to determine the legislative intent of a previous body?*
7. *Do legislative committees have a statutorily-recognized standing? How have courts looked at standing committees — as official entities empowered to take authoritative actions, or as simply internal subunits of a legislative house, with advisory functions only to the full house? Can they be delegated powers of a full house?*
8. *Do agencies have to have a specific grant of rule-making power before adopting rules, or is it only necessary that such rules pertain to the implementation of a statutory or constitutional grant of power or responsibility? Additionally, can agencies have inherent rule making power? (For example, many state supreme courts have established that they — the court — have certain inherent powers — as the power to prescribe rules and regulations for the state bar and rules of procedure within courts. Additionally, governors and the President cite as an inherent power their authority to issue executive orders and take a number of other actions.)*

5
METHOD OF LEGISLATIVE ACTION

The states which require legislative affirmation of a review committee action or recommendation use one of three methods of legislative action: 1) by simple resolution of either house; 2) by joint or concurrent resolution; and 3) by bill or statute.

Simple Resolution

The simple resolution method allows either house to sustain the committee action or recommendation by a simple resolution. Oklahoma, which uses this system, required a concurrent resolution of both houses to sustain the committee recommendation prior to 1975.

The advantage of this method is speedy affirmation of the committee's action or recommendation.

The disadvantages center around the constitutional weakness of the method, since the full legislature is not required to act. Also, this method could cause division between the two houses of the legislature.

Joint or Concurrent Resolution

Another method of affirming a committee action or recommendation is through a joint or concurrent resolution. Under this system, in most states no action by the governor is required. Idaho, Montana and Vermont are among those states which utilize this method.

There are two primary advantages to this method. First, it provides that the full legislature take action, assuring a unified decision. Secondly, in most cases, it does not require gubernatorial action, so the legislature is making the final determination as to legislative intent and compliance with statutory authority.

There may be, however, constitutional problems in some states because in order to change a regulation which has the force of law, a statute has to be passed and signed by the governor.

Statute

The third method of legislative action on a review committee's action or recommendation is by bill. This may be done in the form of a bill either to repeal the regulation or to amend the statute under which the regulation

was promulgated. In Arkansas, Florida and Nebraska, all of which have advisory powers, the legislature can enact a law amending the statute granting the promulgation authority. In Colorado, Minnesota and Wisconsin, the legislatures can nullify a regulation by statute. Kansas provides that a statute be enacted to repeal an existing regulation, but that a concurrent resolution is sufficient to prevent the implementation of a proposed regulation.

The statute method is the most constitutionally sound, since it adheres to the regular lawmaking process. The main disadvantage is that it involves the executive branch in determining whether a regulation was promulgated within the authority granted by the legislature.

6
STAFFING

There are two means of providing staff for the legislative review of regulations: 1) through a full-time staff devoted to the review of regulations; or 2) through a part-time staff provided by a central staff agency or individual committees.

Full-time Staff

The number of full-time staff devoted to regulation review varies greatly among the states that use this structure. Florida's Joint Administrative Procedures Committee has a staff of six full-time attorneys and four administrative personnel. Most states with full-time staff usually have one or two full-time professional staff.

Full-time staff is utilized only by states which have a single joint committee structure. States with standing committees use either committee staff to perform review on a part-time basis or staff from a central agency.

Full-time professional staff are able to handle the volume of proposed regulations and perform a thorough review of all regulations. However, the primary disadvantage of this staffing structure is, of course, the cost of maintaining a full-time staff. Florida has a budget of $310,000 for its regulation review committee. Michigan, with two full-time attorneys, has a budget of $74,000.

Staff by Central Service Agency or Committee

The staff structure used most frequently for reviewing regulations is the assignment of staff on a part-time basis from a central staff agency. Usually, one or more attorneys or research analysts are assigned from the legal services or bill drafting agency, the code revisor's office, or the research agency. Alaska, Connecticut and Maryland all use this type of staff structure. Idaho and Nevada, which use the standing committee review process, provide staff through the central research agency.

The use of staff from the central staff agency allows for staffing of the regulation review function without the higher costs of full-time staff. Also, many research agencies divide their staff by areas of expertise so the staff is familiar with the subjects of the regulations under review. In addition,

since the staff may have helped to draft the enabling legislation, they are familiar with the legislative intent.

However, the disadvantage of this structure is that the staff has other functions to perform and may not be able to devote enough time to the regulation review function.

Recommendation #4:

The committee recommends that the committee or committee designated to perform regulation review be adequately staffed by permanent legislative staff, so that review of regulations is effectively accomplished.

7
PROCEDURES

Review of Proposed Regulations

Effective legislative regulation review can be accomplished either through a review of all proposed regulations or through selective review. In addition, some states have given the reviewing body the power to review all or selected pre-existing regulations.

The process of total review usually requires that all proposed regulations be submitted to the legislative body handling review. The committee, either by law or by tradition, may have the option of reviewing only selectively. In at least one state, Colorado, the staff reviews all proposed regulations and recommends consideration by the committee of selected regulations which may have technical errors or be in violation of either statutory authority of legislative intent. Some states review proposed regulations only upon the complaint of a legislator or citizen, even though the committee has the authority to review all regulations.

Review of all proposed regulations by the committee is designed to assure that no regulations are promulgated which may be in violation of legislative intent or statutory authority. Total review, however, requires much more staff and legislator time, and may not be necessary for a majority of proposed regulations. With selective review, complex and controversial regulations can be given careful scrutiny.

Review of Pre-existing Regulations

The majority of states with regulation review structures has the power to review regulations which are already in effect. In Florida, the review committee is currently examining all pre-existing and proposed regulations. The process of reviewing all pre-existing regulations is expected to take from three to five years. In some other states, review of pre-existing regulations is done on a selective or complaint basis.

This type of review assures that older regulations are brought up to date or repealed if no longer needed. But, it can tie up valuable staff time if not performed on a selective basis. Also, this procedure may raise constitutional questions regarding a legislature's right to determine the legislative intent of a previous legislature.

Recommendation #5:

The committee recommends that the review committee in each state have the authority to review all proposed and preexisting regulations.

Time Constraints

To insure an orderly and expeditious review process, most states have time constraints on the various phases of the process. The agency usually has a certain number of days to file a regulation with the legislature before it can take effect. In some states there is no time limit, but the proposed regulation cannot go into effect without being filed with the legislative review body.

After the proposed regulation is filed by the agency, the committee usually has a certain time period within which to conduct its review. If the committee does not object to the regulation within the time period, it is deemed approved.

Some of the committees which have the power to suspend or recommend nullification of regulations must have the affirmation of the legislature within a certain time period or the regulation goes into effect. In Minnesota and Wisconsin, the legislature must sustain the committee action before the end of the next regular session. In South Dakota, suspension of a regulation during the interim is only valid until 30 days after the beginning of the session without legislative affirmation.

Time constraints on the regulation review process are necessary for three reasons: 1) to prevent agency circumvention of legislative review of regulations; 2) to insure adequate review time for the committee; and 3) to provide expeditious final disposition of regulations by the legislature.

Recommendation #6:

The committee recommends that reasonable time constraints be imposed on all levels of the regulation review process to provide for adequate review and expeditious final disposition of regulations by both the committee and the legislature.

Emergency Procedures

Most states with regulation review procedures have means by which emergency regulations can be promulgated. These procedures may include a limitation on the life of the emergency regulation and a provision for review by the legislature. Michigan's law allows emergency regulations to remain in effect only up to one year without formal legislative approval. This restriction prevents circumvention of the review process by the agency. In Connecticut, under a law passed in 1977, the agency must submit all emergency regulations to the review committee five days prior to their effectiveness. The committee has the authority to suspend those

regulations within the five-day period. In Minnesota, emergency regulations are effective for only 90 days, unless they are repromulgated through the normal process which includes legislative review. Kansas law provides that "temporary" regulations may be implemented by agencies during the interim after they have been approved by the Temporary Rules and Regulations Board, which is composed of the chairman of the Joint Committee on Administrative Rules and Regulations, the Secretary of State and the Attorney General. All temporary regulations expire on the following April 30.

Recommendation #7:

The committee recommends that procedures be established for the promulgation of emergency regulations, with reasonable time limitations on committee review and on the effectiveness of those regulations to prevent agency circumvention of the legislative review process.

Frequency of Review Committee Meetings

The review committees in many states which have legislative regulation review procedures usually meet once a month. Others meet only on call when there are regulations pending review. Some states' committees meet more often during the session than during the interim.

The actual volume of regulations reviewed is difficult to determine because a regulation can be defined as anything from a one-word amendment to an entire volume of new procedures. Many states review about 20 to 25 regulations per meeting.

Recommendation #8:

The committee recommends that the review committee meet often enough to provide adequate review of proposed regulations which agencies file.

Bills Authorizing Promulgation of Rules

One reason why agencies might promulgate rules which do not conform with legislative intent is that the law authorizing such promulgation may not specifically state the legislature intent. Also, the law may be too broad or general and may not provide agencies with specific guidelines for the promulgation of rules. For example, a law may simply state that "reasonable rules be promulgated to prevent unfair banking competition."

Recommendation #9:

The committee recommends that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rule-making authority to administrative agencies be reviewed before introduction to assure that (1) legislative intent is clearly spelled out in the bill,

and (2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill.

Fiscal Notes on Regulations

South Dakota requires that each proposed regulation have a fiscal note stating the effect the regulation will have on state revenue and/or expenditures. This fiscal note, which is prepared by the agency and reviewed by the state Bureau of Finance and Management, must include information on the fiscal impact for the first year and the continuing fiscal impact, the assumptions made in preparing the statement and the source of statistics used. The fiscal note is furnished to both the Interim Rules Review Committee and the Joint Appropriations Committee, either of which may refer it to the relevant standing committee for review. While objections can be made to a regulation because of the fiscal note, it is unclear if a regulation can be suspended on that basis.

The LIM Committee discussed the issue of fiscal notes on regulations and decided that since it is a relatively new procedure, there was insufficient information on state experiences to warrant a committee recommendation at this time.

8
CONSTITUTIONAL QUESTIONS

The legislative review of administrative regulations process has raised a number of constitutional questions which can only be answered by an examination of each state's constitution and relevant court decisions. The eight questions following Recommendation #3 (under "Regulation Review Powers") provide guidelines for this examination. The four major questions being raised relate to 1) the legislative review process itself; 2) the delegation of legislative review authority to a legislative committee; 3) the committee's and the legislature's power to suspend a regulation; and 4) the use of a bill or resolution to sustain committee action.

Legislative Regulation Review Process

Legislative regulation review has frequently been questioned as a violation of the constitutional separation of powers concept. Opponents of legislative review claim that rule-making is an administrative function and that legislative review (and in some states, repeal) of rules is a usurpation of executive authority. The U.S. Supreme Court has ruled in the case of *Buckley vs. Valeo* (No. 74-736, 424 U.S. 2, January 30, 1976) that Congress, in creating the Federal Election Commission with a number of congressionally-appointed members, violated the U.S. Constitution's provision that only the President can appoint administrative officers. This case is significant because it is the first time since 1928 that the Supreme Court has addressed the question of separation of powers. The Buckley case may be cited in challenges to legislative review powers because legislatures, after passing enabling legislation, are retaining some control over what is seen as a wholly administrative function.

Supporters of legislative review contend that since the courts have upheld the legislature's right to delegate rule-making authority to executive branch agencies, it is consistent for legislatures to condition that authority with a legislative review process. Also, agency rule-making is more quasi-legislative than executive, so legislatures should be able to retain control over what is essentially a policy-making function.

Another separation of powers question arises with respect to the legis-

lature usurping the role of the judiciary to interpret the laws. However, it has been argued that regulation review is actually the final step in the legislative process, and that if regulations are reviewed prior to effectiveness, that review is distinguishable from an after-the-fact judicial determination.

In Wisconsin, all legislation authorizing promulgation of regulations also includes a section requiring that those regulations be reviewed by the legislature. This standardized language, as part of the bill signed by the governor, puts the legislature in a stronger constitutional position since the governor has approved the condition placed upon agency rule-making.

Delegation of Legislative Review Authority

The delegation of review authority to a legislative committee may raise constitutional questions, depending on the committee's powers, especially if those powers include suspension of regulations. But, as mentioned above, court decisions have upheld the legislature's right to delegate its power. Since the review power is delegated to an entirely legislative unit, that delegation is proper as long as the full legislature retains control over the committee's actions. The most serious constitutional question arises when a committee is empowered to suspend regulations without affirmation by the legislature.

Suspension Powers

Opponents of legislative review also argue that neither the committee nor the full legislature has the authority to suspend a regulation. The arguments for this position relate to the authority to conduct review in the first place. At the very most, it is argued, the legislature can only have advisory review powers, since once a law is passed, it is solely the executive branch's function to implement that law.

Defenders of legislative regulation review claim that only the legislature can determine legislative intent, and suspension power insures that that intent will not be violated. A state Supreme Court case in Wisconsin challenged the committee's right to suspend a regulation. But the bill upholding the committee's suspension was not passed before the end of the session and the court dismissed the challenge without a definitive decision.

Suspension of a regulation by a committee may pose serious constitutional questions if, as in Connecticut, the legislature is not required to uphold the committee's suspension. In Connecticut, a case is now pending which directly challenges that state's regulation review powers. Connecticut is among the strongest of all states with such powers. The case will be argued on separation of powers grounds and if finally decided by the court either for or against that state's legislative review law, it will provide a basis for court action in other states.

Method of Legislative Action

Another constitutional question revolves around the method by which the legislature repeals or upholds a committee suspension of a regulation. It has been argued that since a regulation has the force of law, only the passage of a statute can repeal it. Attorney General opinions in Michigan and Tennessee ruled that repeal of a regulation should be in the form of a bill.

On the opposite side, it has been argued that since a bill requires a gubernatorial signature to become law, the use of a bill brings the governor into the process of determining legislative intent, a violation of separation of powers.

The use of a joint or concurrent resolution to repeal a regulation has been argued as proper because approval of regulations is one of the contingencies specified in the enabling legislation giving the agencies rulemaking authority.

The use of a simple resolution of either house to disapprove a regulation may be constitutionally the weakest method, since only one house is exercising the power of the legislative branch.

Constitutional Regulation Review Powers

While most states with regulation review authority have acquired that power by statute, Michigan has a constitutional provision giving a joint legislative committee the power to suspend regulations during the interim. The Florida legislature, which has only advisory review powers, attempted to acquire repeal powers through a constitutional amendment, but the proposal was defeated in a statewide referendum in 1976, as was a similar proposal in Missouri.

Other states may try to put the regulation review powers in their constitutions to prevent future challenges to legislative authority in this area.