

# THE ITEM VETO AND THE THREAT OF APPROPRIATIONS BUNDLING IN ALASKA

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## ABSTRACT

*The item veto power forms an important check on the legislature in many states, including Alaska. The power allows the governor to veto individual items in an appropriations bill rather than vetoing or signing the bill as a whole. In 2011 the Alaska State Legislature contemplated challenging this crucial executive power. A proposed draft of the annual capital appropriations bill contained language that linked each energy appropriation to all the others, providing that if the governor struck one item then none of the items would go into effect. Further, the legislature inserted language providing that none of the proposed energy appropriations would go into effect if the section of the bill linking them together were successfully challenged in court. While neither provision was included in the final version of the bill signed into law, they prompted a controversy about whether such language would comport with the requirements of the state constitution. If they had been passed, the provisions would indeed have been unconstitutional and invalid, as they usurp the governor's constitutional item veto power and violate the confinement clause's requirement that the content of appropriations bills be limited to appropriations.*

## INTRODUCTION

At both the state and federal levels, the separation of powers comprises an essential part of the constitutional scheme. The dynamic tension caused by one branch of government limiting the others is designed to ensure that no one branch acquires too much power and engages in tyrannical governance. One of the ways the executive branch

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checks the legislative is through the veto power.<sup>1</sup> Many state governors enjoy a variation on the veto power, the item veto, through which the governor can strike individual items in an appropriations bill rather than veto or sign the entire bill as it is presented to him.<sup>2</sup> The Alaska Constitution vests this power with the governor.<sup>3</sup> Since the item veto is an effective check on the power of the legislature (and especially because this particular power limits legislators' politically essential ability to bring state spending back to their home district), it should come as no surprise that the legislature occasionally chafes at the restrictions placed on them by this executive power.

In the spring of 2011 the Alaska State Legislature contemplated mounting an attack on the governor's item veto power. A preliminary version of that session's capital appropriations bill, Senate Bill ("S.B.") 46, included language that would prevent the governor from striking individual energy appropriations and force him to accept or reject the entire package of energy spending as a whole.<sup>4</sup> The governor's office girded itself for battle, preparing arguments to challenge the language as unconstitutional.<sup>5</sup> In the end, the litigation never came; the legislature removed the language from the version of the appropriations bill that it eventually passed.<sup>6</sup> But the move to limit executive checks on the legislature's lawmaking authority, tentative though it was, raises interesting issues about the interaction of the two branches in Alaska.

The first part of this Note describes a constellation of constitutional provisions, both in Alaska and elsewhere, that pertain to the separation of powers doctrine. Section I discusses the item veto generally, including its theoretical justifications and where it appears. Section II describes the

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1. See, e.g., ALASKA CONST. art. II, § 15 ("The governor may veto bills passed by the legislature.").

2. See *id.* ("He may, by veto, strike or reduce items in appropriations bills.").

3. *Id.*

4. S.B. 46, 27th Leg., 1st Spec. Sess. § 48 (Alaska 2011) (as reported by S. Fin. Comm., April 22, 2011) ("Each of the appropriations made in sec. 4 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.").

5. See generally Memorandum from the Attorney General to the Office of the Governor (Apr. 26, 2011), available at <http://www.law.state.ak.us/pdf/press/042611-memo.pdf> [hereinafter AG Memo] ("This condition is unconstitutional and unenforceable because it deprives the Governor of his constitutional authority to review and reduce or strike individual appropriation items that do not serve the State's best interests.").

6. See S.B. 46, 27th Leg., 1st Spec. Sess. (Alaska 2011) (as reported by H. Fin. Comm., May 13, 2011) (including no provision regarding contingencies based on reductions of appropriations).

item veto power as it is applied in Alaska. Section III addresses the Alaska Constitution's confinement clause, a constitutional provision that augments the item veto power. The second part of this Note turns to the story of a recent controversy that implicates the constitutional powers and restrictions described in the first portion. Section IV outlines the legislative history and language of S.B. 46, the legislation provoking the issue. Section V endeavors to lay out and evaluate the arguments against the constitutionality of the proposed bill. Ultimately, this Note concludes that the language proposed in the bill would have violated the governor's item veto power and the confinement clause. The issue is surely unsettled; the legislature removed the potentially offending language before passing the bill, and so the questions it raised were never brought before the courts for disposition. The lack of resolution means that nothing prevents the legislature, either in Alaska or in other states with similar constitutional provisions, from passing a future bill containing similar language. Thus this Note seeks first to provide an account of the events and attitudes in the spring of 2011 related to the legislature's contemplated attempt to curb the executive's item veto power, and second to take a position on the constitutionality of that attempt in an effort to contribute to the discourse should the issue arise in the future. Section I begins by setting out the constitutional backdrop against which it unfolded.

## I. THE ITEM VETO

Most graduates of a high-school civics class will recall that the veto plays an important role in the checks and balances between the branches of government. For the sake of those who may have forgotten, veto (literally: "I forbid") refers to "[a] power of one governmental branch to prohibit an action by another branch; esp[ecially], a chief executive's refusal to sign into law a bill passed by the legislature."<sup>7</sup> The Federal Constitution and most state constitutions grant general veto power to the chief executive.<sup>8</sup> This power allows the executive to reject a bill passed by the legislature *in toto*, preventing any part of the bill from

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7. BLACK'S LAW DICTIONARY 1700 (9th ed. 2009).

8. U.S. CONST. art. I, § 7, cl. 2 ("If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . ."); *see, e.g.*, ALASKA CONST. art. II, § 15 ("The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills."); *see also* Alaska Legislative Council v. Knowles, 21 P.3d 367, 371 (Alaska 2001) (holding that the Alaska Constitution "confers the general power to veto a bill").

becoming law.<sup>9</sup> However, the power of the executive is usually tempered by a process through which the legislature may override the veto and pass the bill into law despite the executive's objections (often in the form of a super-majority vote).<sup>10</sup> The drafters of the Federal Constitution saw the veto as "both theoretically and realistically necessary to preserve the separation of powers."<sup>11</sup> The general veto is a self-defensive, negative power used to block an act of the legislature, not a creative power wielded by the executive in crafting legislation.<sup>12</sup> Instead, the veto process serves the twin goals of allowing the chief executive an opportunity to consider bills passed by the legislature and allowing the legislature an opportunity to consider any of the executive's objections and, in some cases, override his veto.<sup>13</sup> This give-and-take between the legislative and executive branches comprises an important part of the checks-and-balances system of the American constitutional tradition.

The item veto (or line-item veto) comprises a separate and more rare variation of the veto power. In contrast to the general veto power, through which the executive may either sign or negate an entire piece of legislation, the item veto power allows the executive to "veto some provisions in a legislative bill without affecting other provisions."<sup>14</sup> Unlike the general veto power, which can function only as a negative check on executive power, the item veto grants the governor a more involved role in formulation of the budget; it provides the chief executive with a "limited legislative function."<sup>15</sup> Whereas the general

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9. See, e.g., U.S. CONST. art. I, § 7 (making no mention of vetoing any bill only in part).

10. See *id.* ("If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."); see also, e.g., ALASKA CONST. art. II, § 16 (stating that "vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature").

11. Thirteenth Guam Legislature v. Bordallo, 430 F. Supp. 405, 409 (D. Guam 1977) (citing THE FEDERALIST NO. 73 (Alexander Hamilton)).

12. *Id.* ("Were it capable of creative as well as destructive use, there would be no question that the executive would be able to usurp the legislative function and irreparably undermine rather than preserve the integrity of the separation of powers.").

13. See, e.g., Wright v. United States, 302 U.S. 583, 596 (1938) ("The constitutional provisions have two fundamental purposes; (1) [t]hat the President shall have suitable opportunity to consider the bills presented to him; and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.").

14. BLACK'S LAW DICTIONARY 1700 (9th ed. 2009).

15. Jeffrey A. Scudder, Note, *After Rants v. Vilsack: An Update on Item-Veto*

veto results in either enactment of the law as passed by the legislature or no law at all, the item veto opens the possibility of enactment of a budget different from the appropriations bill passed by the legislature. The chief executive is therefore participating in the process of making the law, an inherently quasi-legislative role. The authority to shape the contours of the law is not unchecked, however. Like the general veto power, the legislature can override the item veto, again usually in the form of a super-majority vote.<sup>16</sup> Thus, the item veto allows the chief executive a greater role in the formulation of legislation, but still functions within the checks-and-balances system.

The justification for the item veto power rests on a variety of policy goals. Professor Richard Briffault identifies three interrelated reasons: preventing log-rolling, imposing fiscal restrictions on the legislature, and fortifying the executive branch's role in the budgetary process.<sup>17</sup> Log-rolling refers to the process in which several provisions supported by an individual legislator or minority of legislators are combined into a single piece of legislation supported by a majority of legislators on a quid pro quo basis: "no one provision may command majority support, but the total package will."<sup>18</sup> The practice is undesirable from both a theoretical and practical standpoint. It leads to government programs that are only supported by a minority of representatives, and it dilutes

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*Law in Iowa and Elsewhere*, 91 IOWA L. REV. 373, 376 (2005) (quoting Welden v. Ray, 229 N.W.2d 706, 709 (Iowa 1975) (Harris, J., dissenting)). *But see* Alaska Legislative Council v. Knowles, 21 P.3d 367, 372 (Alaska 2001) ("The council argues that the governor's item veto power is negative. We agree. True, striking out language might be characterized as an act of positive creation . . . . But such characterizations are semantic.").

16. *See, e.g.*, ALASKA CONST. art. II, § 16 ("Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature."). *See also* NATIONAL CONFERENCE OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS, tbl.98-6.22, available at <http://www.ncsl.org/documents/legismgt/ILP/98Tab6Pt3.pdf> (last visited Feb. 20, 2013) (providing a table listing the type of vote required to override a gubernatorial veto for different types of bills by state).

17. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1177 (1993) ("The item veto represents the coming together of three widespread state constitutional policies: the rejection of legislative logrolling; the imposition of fiscal restrictions on the legislature; and the strengthening of the governor's role in budgetary matters."). Members of the Alaska Legislature and courts are aware not only of these three justifications but the specific article cited. *See* ALASKA H. JUD. COMM. MINUTES, 27th Leg. (May 11, 2011) (statement of John J. Burns, Attorney General at 8:09:33 AM); *see also* Knowles, 21 P.3d at 373 ("[The item veto] originated as a reform measure to prevent legislators from 'logrolling' when they enact appropriation bills which necessarily address many subjects and need not be confined to a single subject, and to give governors some ability to limit state expenditures.").

18. Briffault, *supra* note 17, at 1177.

the executive's general veto power by forcing her to choose to sign or veto the whole of a bill containing many heterogeneous components.<sup>19</sup> Many constitutions attempt to control log-rolling through single-subject or confinement rules (discussed in Section III *infra*) that restrict bills to a single subject, but alone these rules are ineffective because of difficulties in legally defining the scope of a "subject".<sup>20</sup> The item veto better controls log-rolling because it is vested in a political actor (rather than the courts) and narrowly targeted at the budget process (the legislative task most closely related to abusive pork barrel spending).<sup>21</sup>

The other two justifications for the item veto pertain to its role in holding down state spending. The item veto allows governors to restrict legislative spending, making it easier to comply with the balanced-budget rules common to many states.<sup>22</sup> The actual success of the item veto towards this end is unclear as some scholarship suggests it is more likely to be deployed for partisan political reasons than in furtherance of a balanced budget, but nonetheless one hope behind bestowing the item veto power is that the governor will have an additional tool to reduce spending.<sup>23</sup> Finally, the item veto, accompanied by the executive budget, should give the governor greater control over the budgetary process.<sup>24</sup> In most states, the governor drafts a preliminary budget that the legislature modifies and adopts to become the actual budget enacted into law.<sup>25</sup> While the governorship is a statewide office and hence concerned about statewide fiscal goals, the legislature is composed of members with more narrow geographic constituencies. This results in a tension between the incentives acting on the governor and the legislature with respect to the budget; the governor seeks to control spending while the legislators pursue spending projects that benefit their individual districts.<sup>26</sup> The executive budget should give the governor greater control over spending, and the item veto compliments that control by giving the governor the ability to cull spending tacked on to his proposed budget that does not support broader state fiscal goals.<sup>27</sup> Without the item veto, the governor would have no way to eliminate individual appropriations that mar an otherwise ideal state budget without rejecting the entire budget (most of which he suggested in the

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19. *Id.* at 1178.

20. *Id.* at 1177.

21. *Id.* at 1178-79.

22. *Id.* at 1179.

23. *Id.* at 1179-80.

24. *Id.* at 1180.

25. *Id.*

26. *Id.*

27. *Id.* at 1180-81.

first place). As some of the mechanisms that justify the item veto, especially balanced-budget requirements, are near universal at the state level but not present at the federal level, it comes as no surprise that the item veto is a common feature of state constitutions but not the Federal Constitution.

The Constitution of the United States does not grant the President the item veto power.<sup>28</sup> However, the President briefly enjoyed a limited form of the item veto power in the late 1990s. The Line Item Veto Act of 1996 allowed the President to cancel various types of budget provisions already signed into law as long as he found doing so would reduce the budget deficit, not impair essential government functions, and not harm the national interest.<sup>29</sup> The Supreme Court quickly struck down the act in *Clinton v. City of New York* as a violation of the U.S. Constitution's presentment clause.<sup>30</sup> The Constitution describes the process by which bills must be first presented to the President and then signed into law, and it contains no mention of the item veto.<sup>31</sup> Only a constitutional amendment, not a statute, could alter the process.<sup>32</sup> Since *Clinton* much ink has been spilled by legal scholars and political scientists over whether the item veto can or should be returned to the President, either by statute, court decision, or constitutional amendment, but currently the President remains without the item veto.

In contrast to the President, most state governors do possess at least some form of item veto. Currently 44 state constitutions grant their governors the item veto power.<sup>33</sup> With one exception, the item veto is

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28. U.S. CONST. art. I, § 7.

29. *Clinton v. City of New York*, 524 U.S. 417, 436 (2008).

30. *See id.* at 448–49 (holding that the Line Item Veto Act violated art. I, § 7, cl. 2 of the Constitution).

31. *Id.* at 439; U.S. CONST. art. I, § 7.

32. *Clinton*, 524 U.S. at 449.

33. Item veto clauses can be found in the following state constitutions: ALA. CONST. art. V, § 126; ALASKA CONST. art. II, § 15; ARIZ. CONST. art. V, § 7; ARK. CONST. art. VI, § 17; CAL. CONST. art. IV, § 10(e); COLO. CONST. art. IV, § 12; CONN. CONST. art. IV, § 16; DEL. CONST. art. III, § 18; FLA. CONST. art. III, § 8(a); GA. CONST. art. V, § 2, ¶ 4; HAW. CONST. art. III, § 16; IDAHO CONST. art. IV, § 11; ILL. CONST. art. IV, § 9(d); IOWA CONST. art. II, § 16; KAN. CONST. art. 2, § 14(b); KY. CONST. § 88; LA. CONST. art. IV, § 5(g); MD. CONST. art. II, § 17; MASS. CONST. art. LXIII, § 5; MICH. CONST. art. V, § 19; MINN. CONST. art. IV, § 23; MISS. CONST. art. IV, § 73; MO. CONST. art. IV, § 26; MONT. CONST. art. VI, § 10(5); NEB. CONST. art. IV, § 15; N.J. CONST. art. V, § 1, ¶ 15; N.M. CONST. art. IV, § 22; N.Y. CONST. art. IV, § 7; N.D. CONST. art. V, § 9; OHIO CONST. art. II, § 16; OKLA. CONST. art. VI, § 12; OR. CONST. art. V, § 15a; PA. CONST. art. IV, § 16; S.C. CONST. art. IV, § 21; S.D. CONST. art. IV, § 4; TENN. CONST. art. III, § 18; TEX. CONST. art. IV, § 14; UTAH CONST. art. VII, § 8; VA. CONST. art. V, § 6; WASH. CONST. art. III, § 12; W. VA. CONST. art. VI, § 51(11); WIS. CONST. art. V, § 10; WYO. CONST. art. IV, § 9.

limited to appropriations bills.<sup>34</sup> The item veto began to appear in the late 19<sup>th</sup> Century as part of a series of new constitutional mechanisms, also including balanced budget amendments and single-subject rules, designed to reign in what was perceived as profligate state spending.<sup>35</sup> Georgia became the first state to adopt the item veto in 1861, while the most recent was Maine in 1995.<sup>36</sup> Alaska did so while still a territory in 1912.<sup>37</sup> Unlike many older states, which have added item veto power through a constitutional amendment, Alaska's constitution has always included the item veto.<sup>38</sup> In addition to the power to strike individual appropriations items, a smaller number of states, including Alaska, allow the governor to reduce appropriations items.<sup>39</sup>

The presence of the item veto may be common to most state constitutions, but the specific contours of the veto's application vary from state to state. The dissimilarity arises either through different constitutional language or through variations in the interpretation of similar language by state courts.

Given that the majority of state constitutions grant the item veto power, it comes as no surprise that it "has been a fertile source of state constitutional litigation."<sup>40</sup> Most implementations of the item veto share two features: the governor may veto individual items, and those items must be in an appropriations bill. Naturally, this creates two lines of frequent litigation over the subject: determining what constitutes an "item" and what constitutes an "appropriations bill."<sup>41</sup> Professor Briffault describes the first problem:

[T]here is often no easy way to determine whether a particular provision of a bill is itself a freestanding item and not an inseparable part of a larger item. Moreover, legislation is not just a matter of cobbling together discrete provisions into a bill.

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34. Briffault, *supra* note 17, 1176-77. Washington state extends the governor's partial veto power to all legislation, not just appropriations bills. WASH. CONST. art. III, § 12.

35. Briffault, *supra* note 17, at 1176-81.

36. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 16, tbl.98-6.10 (showing the chronological order in which each state adopted the item veto).

37. *Id.* The item veto was included in the governor's powers by the Alaska Home Rule Act of 1912. The Alaska Constitution of 1956 retained the governor's item veto. *Id.*

38. *Id.*

39. GORDON HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 66 (Alaska Legislative Affairs Agency, 5th ed.), available at [http://w3.legis.state.ak.us/docs/pdf/citizens\\_guide.pdf](http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf) (last visited Feb. 20, 2013).

40. Briffault, *supra* note 17, at 1172.

41. *Id.* at 1174.

It is a process of negotiation and compromise in which the votes essential to the passage of a bill are attained by tying different elements together or by modifying minority proposals with new provisions, conditions, or restrictions until there is a majority ready to support the result.<sup>42</sup>

Defining “appropriations bill” is no less problematic. States differ in how they categorize bills that combine spending provisions with general legislation and also in how to treat bills that affect spending without actually apportioning funds.<sup>43</sup> As one of the states with a version of the item veto, Alaska has faced these same questions.

## II. THE ITEM VETO IN ALASKA

Alaska embraces an especially strong form of the item veto, allowing the governor to wield great influence during the budgetary process. The governor’s veto power is described in the state constitution at article II, section 15, which provides “[t]he governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriations bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.”<sup>44</sup> Both forms of veto powers discussed above stem from this section as it grants the governor both the general veto power and the line item veto power for appropriations bills. The section also grants the governor reduction power.<sup>45</sup>

The Alaska Supreme Court has noted that the drafters of the state constitution intended to “create a strong executive branch with ‘a strong control on the purse strings’ of the state,” and a significant part of that control stems from a strong item veto power.<sup>46</sup> The strong item veto power has allowed Alaska to control the rate of spending growth better than the Federal Government and states with weaker item-veto provisions.<sup>47</sup> The inclusion of reduction power, the high number of votes required to override an item veto, and the restriction on the content of appropriations bills guaranteed by the confinement clause make

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42. *Id.*

43. *Id.* at 1198.

44. ALASKA CONST. art. II, § 15.

45. *Id.*

46. *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (citation omitted).

47. David Reaume, *Line-item Veto a Powerful Deterrent*, ANCHORAGE DAILY NEWS (Jan. 1, 2011), <http://www.adn.com/2011/01/01/1627818/line-item-veto-a-powerful-deterrent.html#storylink=misearch> (“Most of the other 42 states with some sort of line-item veto have much weaker versions than does Alaska. That may partly account for why most states have not controlled spending as well as has Alaska.”).

Alaska's veto power unique.

Alaska is one of a small number of states that allows the governor to reduce the amount appropriated for a budget item.<sup>48</sup> The reduction power is included in the National Municipal League's *Model State Constitution*<sup>49</sup> used in the drafting of Alaska's state constitution.<sup>50</sup> However, the committee draft did not include the reduction power. It was added by an amendment from the floor of the convention.<sup>51</sup> Reduction power allows the governor to control state spending more precisely, as it resolves a situation in which meritorious appropriations items have been allocated an excessive amount of funds. In Alaska the governor can merely reduce the amount appropriated to these programs (and in so doing hold down state spending) while preserving the beneficial program itself as a consequence of the state constitution's relatively rare grant of reduction power.

Further, Alaska requires a uniquely high number of votes to override appropriations vetoes.<sup>52</sup> While most states require a two-thirds majority to override, only Alaska requires a three-quarters majority.<sup>53</sup> The unusually large majority required makes override less likely and thereby increases the power the governor wields over the budgetary process.<sup>54</sup>

Finally, the Alaska Constitution's confinement clause (discussed at length in section III below) restricts the content of appropriations bills solely to appropriations.<sup>55</sup> As a consequence of this clause, the only provisions that an appropriations bill, the only type of bill over which the governor wields item veto power, may include are of the type the governor can control via the item veto.

While the power granted to the Alaska governor under the item veto is significant, even compared to other state governors in possession of the item veto power, it is not without limitations. In addition to legislative override, the Alaska Supreme Court case law interpreting item veto power curbs the governor's power. In 2001, the court decided

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48. ALASKA CONST. art. II, § 15. See Briffault, *supra* note 17, at 1176 ("At least ten states allow governors to reduce as well as to disapprove items.").

49. MODEL STATE CONST. § 4.16(b) (Nat'l Mun. League 1968).

50. HARRISON, *supra* note 39, at 5-6.

51. *Id.* at 66.

52. See ALASKA CONST. art. II, § 16 (requiring a three-fourths vote of the membership of the legislature to override an appropriations veto).

53. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 16, tbl.98-6.22.

54. During a Senate Judiciary Committee meeting, one of the senior members present said that he could only recall one gubernatorial veto being overridden. ALASKA H. JUD. COMM. MINUTES, 27th Leg. (May 11, 2011) (statement of Representative Carl Gatto, Committee Chair at 8:20:54 AM).

55. ALASKA CONST. art. II, § 13.

*Alaska Legislative Council v. Knowles*.<sup>56</sup> In *Knowles*, the Alaska Legislative Council sought a declaration from the court that the governor had exceeded his authority under the item veto clause.<sup>57</sup> The governor had struck descriptive language from five appropriations items without eliminating the item entirely or altering the amount allocated.<sup>58</sup> The eliminated language restricted the way the allocated money would be spent, in effect making the appropriation conditional on the fulfillment of requirements included in the provision by the legislature.<sup>59</sup> The Alaska Legislative Council sued the governor, claiming the vetoes were invalid, and the governor counter-claimed that inclusion of the descriptive language violated the confinement clause.<sup>60</sup>

With respect to the item veto power, the question in the case was whether or not the governor could strike descriptive language without affecting the rest of the appropriation. The state constitution clearly guarantees the power to “strike or reduce items in appropriations bills.”<sup>61</sup> To determine what exactly it is that the governor may strike, the Alaska Supreme Court here addressed the meaning of “item” for the first time.<sup>62</sup> The court concluded that “item” means “a sum of money dedicated to a particular purpose.”<sup>63</sup> This holding rested on five lines of analysis, all of which indicate that the amount of an appropriation is the object affected by the item veto power. First, the court noted that the word “item” implies “a notion of unity between two essential elements of an appropriation: the amount and the purpose.”<sup>64</sup> Altering the amount of an item is expressly allowed in the Constitution via the reduction power,<sup>65</sup> but to alter the purpose would destroy that unity by fundamentally changing the item into something else not enacted by the legislature.<sup>66</sup> Second, the use of the word “reduce” implies a quantitative effect, and the drafters likely intended the companion word “strike” to

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56. 21 P.3d 367 (Alaska 2001).

57. *Id.* at 369.

58. *Id.*

59. *See, e.g., id.* at 386 (discussing how the governor left the text appropriating \$400,000 for construction of a new Department of Corrections therapeutic treatment community but struck out the end of the provision, which stated “where cost per inmate day (exclusive of treatment costs) will not exceed the state wide average cost per inmate day for correctional institutions.”).

60. *Id.* at 369.

61. ALASKA CONST. art. II, § 15.

62. *Knowles*, 21 P.3d at 371 (“We have never addressed what ‘item’ means in context of the item veto power.”).

63. *Id.*

64. *Id.* at 372.

65. ALASKA CONST. art. II, § 15.

66. *Knowles*, 21 P.3d at 372.

have the same type of effect as well.<sup>67</sup> Third, “reduce” and “strike” describe the same action applied to different extents: when an amount is “reduced” to the point where it is lessened to nothing, it is effectively “struck.”<sup>68</sup> Thus, the object of the “strike” must be associated with an amount of money to the extent that it can be lessened.<sup>69</sup> Fourth, the historical purpose of the item veto was to curtail the amount of state spending by mitigating the effects of log-rolling, a purpose most closely directed at the amount of the appropriation.<sup>70</sup> Fifth, “public policy disfavors a reading of ‘item’ that would permit the executive branch to substantively alter the legislature’s appropriation bills, resulting in appropriations passed without the protection our constitution contemplates.”<sup>71</sup> For these reasons, the court concluded that the power to “strike” only refers to completely diminishing the amount of an appropriations item, not the descriptive language accompanying it.

The definition of “item” adopted by the court does not allow the governor to cross out descriptive language in appropriations bills as part of his item veto power. The five redactions in question affected only the way the “item” (i.e. the “sum”) was to be spent, not the “item” itself. The only components of an appropriations bill that can be item vetoed are items. Therefore the redactions were not strikes of an item, and were invalid. This holding would seem to severely limit the governor’s ability to control the budget, as it would allow the legislature to exert minute control over spending by including vast swaths of specific, non-item language determining how the money is to be spent. However the second half of *Knowles*, discussed in the next section, prevented this outcome by using Alaska’s confinement clause to severely limit the type of language that the legislature can include in appropriations bills.

### III. THE CONFINEMENT CLAUSE

The discussion in Sections I and II of this Note indicates the importance of the item veto as a tool for the governor in exercising control over the appropriations process. The single subject rule and its close cousin the confinement rule are other constitutional mechanisms that complement the veto power and serve the same ends. The single subject rule, as the name suggests, requires that bills concern only one subject. The existence of the single subject rule can be traced back to the

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67. *Id.*

68. *Id.* at 372-73.

69. *Id.* at 373.

70. *Id.*

71. *Id.*

Roman Empire and was introduced to North America during the colonial period.<sup>72</sup> The first state to amend the single subject rule into its constitution was New Jersey in 1844.<sup>73</sup> Today single subject rules are present in the constitutions of the majority of states.<sup>74</sup> The Nebraska Constitution demonstrates a typical manifestation of the rule: “No bill shall contain more than one subject, and the subject shall be clearly expressed in the title.”<sup>75</sup> While the motivation for the rule is the same across states, the specific requirements of the rule vary greatly between states. Almost all states with a single subject rule include a “title provision” that requires the subject of the bill to be expressed in the title.<sup>76</sup> Many states exempt appropriations bills from the single subject rule.<sup>77</sup> Of those, a subset of states imposes a particular version of the single subject rule pertaining specifically to appropriations: a confinement rule.

A confinement rule, which typically restricts the types of provisions that may be included in an appropriations bill solely to appropriations items, accompanies the single subject rule of some but not all state constitutions.<sup>78</sup> In Alaska, the single subject rule and confinement rule

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72. Michael Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811 (2006) (“The single subject rule can be traced to ancient Rome . . . . Similar legislative misbehavior plagued colonial America.”).

73. *Id.* at 812.

74. Nancy J. Townsend, *Single Subject Restrictions as an Alternative to the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 248 (1984). *See, e.g.*, ALA. CONST. art. IV, § 45; ALASKA CONST. art. II, § 13; ARIZ. CONST. art. IV, pt. II, § 13; CAL. CONST. art. IV, § 9; COLO. CONST. art. V, § 21; DEL. CONST. art. II, § 16; FLA. CONST. art. III, § 6; GA. CONST. art. III, § 5, ¶ 3; HAW. CONST. art. III, § 14; IDAHO CONST. art. III, § 16; ILL. CONST. art. IV, § 8(d); IND. CONST. art. IV, § 19; IOWA CONST. art. III, § 29; KAN. CONST. art. II, § 16; KY. CONST. § 51; LA. CONST. art. III, § 15; MD. CONST. art. III, § 29; MICH. CONST. art. IV, § 24; MINN. CONST. art. IV, § 17; MISS. CONST. art. IV, § 69; MO. CONST. art. III, § 23; MONT. CONST. art. V, § 11; NEB. CONST. art. III, § 14; NEV. CONST. art. IV, § 17; N.J. CONST. art. IV, § VII, ¶ 4; N.M. CONST. art. IV, § 16; N.Y. CONST. art. VII, § 6; OHIO CONST. art. II, § 15(D); OKLA. CONST. art. V, § 57; OR. CONST. art. IV, § 20; PA. CONST. art. III, § 3; S.C. CONST. art. III, § 17; S.D. CONST. art. III, § 21; TENN. CONST. art. II, § 17; TEX. CONST. art. III, § 35(a); UTAH CONST. art. VI, § 22; VA. CONST. art. IV, § 12; WASH. CONST. art. II, § 19; W. VA. CONST. art. VI, § 30; WIS. CONST. art. IV, § 18; WYO. CONST. art. III, § 24.

75. NEB. CONST. art. III, § 14. *See* Gilbert, *supra* note 72, at 812 (identifying Nebraska’s iteration of the single subject rule as typical).

76. Gilbert, *supra* note 72, at 812.

77. Townsend, *supra* note 74, at 248.

78. *Compare, e.g.*, ILL. CONST. art. IV, § 8(d) (“Bills, except bills for appropriations and for the codification, revision, or rearrangement of laws, shall be confined to one subject. Appropriation bills shall be limited to the subject of appropriations.”), *with, e.g.*, GA. CONST. art. III, § 5, ¶ 3 (“No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof.”).

are located in article II, section 13 referred to as the confinement clause: "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."<sup>79</sup> As described above, most state constitutions exclude appropriations bills from the requirements of the single subject rule (i.e. appropriations bills can contain appropriations on a variety of subjects). However, in those states with a confinement clause the only type of provisions allowed in an appropriations bill are appropriations items. The reasoning behind this runs parallel to the justifications for the item veto power.

The confinement clause functions alongside the item veto to prevent legislative log-rolling. For bills enacting new substantive law, over which the governor has only general veto power, the single subject rule prevents tacking on unrelated, potentially unpopular provisions that would complicate the governor's decision whether or not to veto the entire bill. For appropriations bills, over which the governor wields the item veto power, most iterations of the single subject rule allow for multi-subject bills.<sup>80</sup> However, in states with a confinement clause, the only provisions allowed in appropriations bills are appropriations items, guaranteeing that the governor may veto any one provision of an appropriations bill. Logically, if provisions that were not "items," "sum[s] of money dedicated to a particular purpose,"<sup>81</sup> were allowed in appropriations bills, the governor would not be able to strike them via the item veto because that covers only "items in appropriations bills."<sup>82</sup> This would force the governor into the position of either employing the general veto power, through which the entire appropriations bill would be vetoed, or signing the entire bill, including the potentially disagreeable non-item provisions, into law. The confinement clause ideally prevents this situation from transpiring.

Like the item veto, the constitutional boundaries of the confinement clause are somewhat ambiguous, leaving the lower courts to flesh out the limitations. In Alaska, the prevailing test delineating the requirements of the confinement clause as they apply to appropriations was introduced by a superior court in *Alaska State Legislature v. Hammond*.<sup>83</sup> The five-part test from *Hammond* was adopted on a "non-exclusive basis" by the Alaska Supreme Court in *Knowles*.<sup>84</sup> Under the

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79. ALASKA CONST. art. II, § 13.

80. Townsend, *supra* note 74, at 248.

81. Alaska Legislative Council v. Knowles, 21 P.3d 367, 371 (Alaska 2001).

82. ALASKA CONST. art. II, § 15; *see also*, Knowles, 21 P.3d at 371-75 (holding that the item veto applies only to items).

83. No. 1JU-80-1163 CI (Alaska Super., May 25, 1983).

84. 21 P.3d at 377.

*Hammond* test, to satisfy the confinement clause any qualifying language in an appropriations bill (1) must be the minimum necessary to clarify legislative intent on how the money is spent, (2) must not administer the program of expenditures, (3) must not enact law or amend existing law, (4) must not extend beyond the life of the appropriation, and (5) must be germane and appropriate to an appropriations bill.<sup>85</sup> To pass constitutional muster, language need not necessarily satisfy all five factors; rather, the court will apply a balancing test.<sup>86</sup> Courts apply the *Hammond* test under a presumption of constitutionality,<sup>87</sup> and consequently expect that when several interpretations exist, the language in question will be read in favor of constitutionality.<sup>88</sup>

Recall that the discussion in *Knowles* revolved around the presence of descriptive language within an appropriations item specifying how to spend the appropriated amount. The first portion of the opinion determined that gubernatorial striking of such language was not permitted under the item veto power, as the language did not meet the court's adopted definition of an "item."<sup>89</sup> The later portion of the opinion deals with the governor's counter-claim that the descriptive language was inappropriate for inclusion in an appropriations bill under the confinement clause, and should not have been present in the bill in the first place.<sup>90</sup> Like the definition of "item," the boundaries of the confinement clause requirement were addressed by the supreme court for the first time in this case.<sup>91</sup> The court engaged in a fact intensive analysis of the five-factor *Hammond* test for each of the challenged items.<sup>92</sup> With respect to the intent factor, language in an item that demonstrates intent about how *other* items will be spent does not satisfy the first prong of the *Hammond* test.<sup>93</sup> Language that limited executive discretion in executing operations funded by other appropriations items amounted to administration of the program of expenditures, failing the second *Hammond* factor.<sup>94</sup> To satisfy the third factor, germaneness, the language must have a direct rather than general relationship to the

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85. *Id.* (quoting *Hammond*, No. 1JU-80-1163 CI at 44-45).

86. *Id.* at 382 (balancing the factors and weighing them against each other).

87. *Id.* at 379.

88. *See id.* at 382 (interpreting ambiguous language so as not to amend existing law or violate a *Hammond* factor).

89. *Id.* at 371.

90. *Id.* at 375-76. (outlining the governor's objections under the confinement clause).

91. *Id.* at 377 ("We have never delineated the boundaries of this requirement.").

92. *Id.* at 379-84.

93. *Id.* at 379-80.

94. *Id.* at 380.

program funded by the item.<sup>95</sup> As for the fourth factor, language imposing conditions on *other* appropriations legislation impermissibly constitutes an enactment of substantive law.<sup>96</sup> In this case, the failure to meet each of the first four *Hammond* factors was influenced by descriptive language in one appropriations item that interacted with an expenditure in another item.

Ultimately the court came to the conclusion that some of the descriptive language in three of the five of the items in question violated the confinement clause.<sup>97</sup> The court invalidated the descriptive language in these items despite finding that such language could not be struck by the governor via line item veto.<sup>98</sup> After all, the absence of veto power over this type of language is ultimately irrelevant if the language cannot be included in legislation. While the item veto portion of *Knowles* limits executive power to some extent, the confinement clause prevents the legislature from exploiting that limitation. The boundaries imposed on both the executive and legislative branches in *Knowles* speak to whether or not the legislature can employ language that links multiple appropriations items together, a subject recently raised by the Alaska Legislature's flirtation with such language while drafting the capital appropriations budget for the 2012 fiscal year.

#### IV. LEGISLATIVE HISTORY OF S.B. 46

Action by the Alaska Legislature in the spring of 2011 challenged the governor's item veto power and the boundaries of the confinement clause. The senate version of the annual capital projects appropriations bill contained separate sections with language that attempted to bundle a large number of energy appropriations items together such that the governor's striking of any one item would prevent all other items from going into effect. Before discussing the constitutionality of the language in the proposed legislation, establishing a timeline of changes to the bill will be helpful. In Alaska, the budgetary process proceeds as follows: (1) the governor prepares a proposed budget, which he then submits to the legislature; (2) the legislature considers the proposed budget, passes an appropriations bill that reflects their desired scheme of spending, and sends it to the governor; (3) the governor has the opportunity to exercise his item veto power by striking or reducing individual appropriations items; and (4) the legislature has the opportunity to override the veto or

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95. *Id.*

96. *Id.* at 380–81.

97. *Id.* at 384.

98. *Id.*

reductions.<sup>99</sup>

The story of Senate Bill (“S.B.”) 46 begins on January 19, 2011, with then-Governor Sean Parnell sending his proposed budget for fiscal year 2012 to the legislature for its approval.<sup>100</sup> The portion of the budget dealing with capital appropriations was designated S.B. 46 and referred to the Senate Finance Committee.<sup>101</sup> The Committee had not completed work on the bill by the end of the session, so S.B. 46 was one of the bills listed for continued consideration when Parnell called the legislature back for a special session on April 17.<sup>102</sup> On April 22, the Finance Committee adopted Work Draft 27-GS1740\T as the working text of the Committee Substitute (“C.S.”) version of the bill.<sup>103</sup> At the committee meeting, a staffer discussing changes to the draft noted the addition of two new sections related to the section of the bill describing energy appropriations (section 4).<sup>104</sup> The first added section provided that “[e]ach of the appropriations made in sec. 4 of this Act is contingent on passage . . . and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act.”<sup>105</sup> The second provided that if a court found the above invalid, then the referenced contingency is not severable from the section 4 appropriations.<sup>106</sup> These two sections, referred to hereinafter as the contingency section and the non-severability section respectively, would be the subject of controversy in subsequent weeks.

In reaction to the new language, Alaska’s Attorney General (“A.G.”) sent a memorandum to the governor’s office on April 26, advising (1) that the contingency section was unconstitutional and unenforceable, and (2) that the non-severability section was void and severable from the rest of the legislation.<sup>107</sup> While the specific arguments of the memo are examined in more detail in Section V, it suffices to note that the memo concluded that the bundling language would violate both

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99. AG Memo, *supra* note 5, at 1.

100. ALASKA S. JOURNAL, 27th Leg., 1st Sess. 42–43 (Jan. 19, 2011).

101. ALASKA S. JOURNAL, 27th Leg., 1st Spec. Sess. 951, 957 (Apr. 18, 2011).

102. *Id.* at 951.

103. *Senate Bill No. 46*, ALASKA S. FIN. COMM. MINUTES, 27th Leg. (Apr. 22, 2011) (statement of Senator Bert Stedman at 4:52:24 PM).

104. *Id.* (statement of Miles Baker, Staff, Senator Bert Stedman at 4:49:17 PM). Note that in the committee minutes, Mr. Baker refers to the new sections as section 36 and section 37. However, in the final reported Committee Substitute version of Senate Bill 46, these sections ultimately become 48(a) and 49, respectively.

105. S.B. 46, 27th Leg., 1st Spec. Sess. § 48(a) (Alaska 2011) (as reported by S. Fin. Comm., May 10, 2011).

106. *Id.* at § 49.

107. AG Memo, *supra* note 5, at 1–2.

the veto and confinement clauses of the Alaska Constitution. On April 29, the House Finance Committee held a meeting to discuss the constitutionality of S.B. 46, and the A.G. reiterated the positions expressed in the April 26 memo: the contingency section of the bill was unconstitutional, and the risk of litigation over the issue jeopardized the funding of the fiscal year 2012 energy projects.<sup>108</sup>

After continued revision of the S.B. 46 draft, on May 10<sup>th</sup> the Senate Finance Committee adopted a final version of the bill.<sup>109</sup> The language of the contingency section remained unchanged, but was renumbered as section 48(a).<sup>110</sup> The non-severability section was renumbered as section 49 and its language was expanded:

[I]n the event that a court of competent jurisdiction finds the contingency in sec. 48(a) of this Act is invalid, then the contingency in sec. 48(a) of this Act is not severable from the appropriations made in sec. 4 of this act if (1) the governor has vetoed, whether by striking or reducing, any appropriation in sec. 4 of this Act; and (2) the legislature, by action or inaction, has failed to override all vetoes of, including reductions to, appropriations made in sec. 4 of this Act . . .<sup>111</sup>

The Senate Finance Committee adopted the revised language and reported S.B. 46 out of committee with a unanimous “do pass” recommendation.<sup>112</sup> The Senate passed S.B. 46 without amendment by a vote of 13 to 3 later that day and sent it to the House for consideration.<sup>113</sup>

Despite the controversy over the contingency and non-severability sections of S.B. 46, the issue never came to a head because the language was removed in the version of the bill that actually passed into law. On May 13<sup>th</sup> the House Finance Committee adopted a revised version of the capital budget that had passed the Senate three days earlier and reported it out of committee for a floor vote.<sup>114</sup> The new version

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108. *Senate Bill No. 46*, ALASKA H. FIN. COMM. MINUTES, 27th Leg. (Apr. 29, 2011) (statements of John J. Burns, Attorney General at 1:36:35 PM, 1:46:14 PM).

109. *Senate Bill No. 46*, ALASKA S. FIN. COMM. MINUTES, 27th Leg. (May 10, 2011) (statement of Senator Lyman Hoffman at 4:00:59 PM) (reporting bill out of committee with “do pass” recommendation).

110. S.B. 46, 27th Leg., 1st Spec. Sess. § 48(a) (Alaska 2011) (as reported by S. Fin. Comm., May 10, 2011).

111. *Id.* at § 49.

112. *Senate Bill No. 46*, ALASKA S. FIN. COMM. MINUTES, 27th Leg. (May 10, 2011) (statement of Senator Lyman Hoffman at 4:00:59 PM) (reporting out of committee with no objections); ALASKA S. JOURNAL, 27th Leg., 1st Spec. Sess. 1081 (May 10, 2011) (listing committee members who signed with “do pass” recommendations).

113. ALASKA S. JOURNAL, 27th Leg., 1st Spec. Sess. 1086 (May 10, 2011).

114. ALASKA H. JOURNAL, 27th Leg., 1st Spec. Sess. 1239 (May 13, 2011).

completely eliminated the non-severability and contingency sections pertaining to energy appropriations.<sup>115</sup> The same day the full House passed the new version without additional amendment by a vote of 30 to 7 and sent it back to the Senate.<sup>116</sup> The next day the Senate voted 18 to 0 to concur with the revisions made by the House.<sup>117</sup> The final bill was transferred to the governor the next month, and he signed it into law on June 29<sup>th</sup>.<sup>118</sup> Notably, Governor Parnell exercised his veto power on several of the appropriations items in section 4, including the energy appropriations section that would have been covered by the original Senate version's contingency and non-severability language, striking three items and reducing thirteen.<sup>119</sup>

## V. THE CONSTITUTIONALITY OF APPROPRIATIONS BUNDLING

Had the legislature passed the version of the appropriations bill approved by the Senate Finance Committee, Governor Parnell was prepared to challenge its constitutionality. The crux of the argument against the bundling language is laid out in the A.G.'s April 26 memo to the Governor's Office. The memo claims that the contingency and non-severability would be unenforceable because they violate two separate constitutional provisions: the governor's item veto power and the confinement clause.<sup>120</sup> Had the issue been litigated, the Alaska Supreme Court would likely adopt the same conclusion based on relevant case law. The two prongs of the argument against S.B. 46 are laid out below.

### A. Violation of the Item Veto Power

The A.G. argues that the contingency language would negate Governor Parnell's constitutional power to strike or reduce appropriations items.<sup>121</sup> The memo notes that the contingency section links each of the energy appropriations to each other,<sup>122</sup> meaning that

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115. S.B. 46, 27th Leg., 1st Spec. Sess. (Alaska 2011) (as reported by H. Fin. Comm., May 13, 2011).

116. ALASKA H. JOURNAL, 27th Leg., 1st Spec. Sess. 1244-47, 1258 (May 13, 2011).

117. ALASKA S. JOURNAL, 27th Leg., 1st Spec. Sess. 1121 (May 14, 2011).

118. ALASKA S. JOURNAL, 27th Leg., 2d Spec. Sess. 1172-73 (Aug. 24, 2011) (acknowledging signing bill with item vetoes).

119. Line Item Vetoes and Reductions, S.B. 46, 27th Leg., 1st Spec. Sess. (Alaska 2011), available at <http://www.legis.state.ak.us/PDF/27/Vetoes/SB46.PDF>.

120. AG Memo, *supra* note 5, at 2.

121. *Id.*

122. *Id.*

Governor Parnell would be forced to choose between accepting every appropriation and vetoing them all.<sup>123</sup> Citing a New Jersey case, *Karcher v. Kean*,<sup>124</sup> the A.G. contends that contingency language would “too easily permit the legislature to circumvent the Governor’s constitutional veto authority” and should be deemed unenforceable.<sup>125</sup>

Moreover, the non-severability language further weakens the Governor Parnell’s power. The A.G. observes that the non-severability language creates an “all or nothing” approach to appropriations.<sup>126</sup> Even assuming the contingency section cannot survive a judicial challenge, “the legislature would still circumvent the Governor’s line item veto power if a court upholds” the non-severability section, because the non-severability language would achieve the same effect of linking all energy appropriations together by different means.<sup>127</sup> The A.G. argues the non-severability language would grant an unconstitutional power to the legislature and is therefore itself unconstitutional, rendering it severable from the rest of the bill.<sup>128</sup> It is unclear from the brief text of the memo how the non-severability language is itself an independent, unconstitutional usurpation of executive power. The A.G. elaborated on this point in testimony before the House Judiciary Committee, characterizing the non-severability clause as a “poison pill.”<sup>129</sup> Even if the contingency section were ever successfully challenged, the non-severability clause would negate the functional outcome by forcing courts to invalidate all of the energy appropriations.<sup>130</sup> If it is an unconstitutional violation of a governor’s item veto power for the legislature to bundle all the energy appropriations together, it follows that it should also be impermissible for the legislature to oblige the courts to do it. The memo cites another out-of-state case, *Legislative Research Comm’n v. Brown*,<sup>131</sup> to support the notion that it is not permissible to achieve an unconstitutional legislative objective through

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123. *Id.* at 3.

124. 479 A.2d 403 (N.J. 1984).

125. AG Memo, *supra* note 5, at 3.

126. *Id.*

127. *Id.*

128. *Id.*

129. ALASKA H. JUD. COMM. MINUTES, 27th Leg. (May 11, 2011) (statement of John J. Burns, Attorney General at 8:39:49 AM). In finance, “poison pill” refers to the use of “a tactic used by a company threatened with an unwelcome takeover bid to make itself unattractive to the bidder,” thus preventing the takeover. THE NEW OXFORD AMERICAN DICTIONARY 1319 (Elizabeth J. Jewell & Frank Abate eds., 2001).

130. ALASKA H. JUD. COMM. MINUTES, 27th Leg. (May 11, 2011).

131. 664 S.W.2d 907 (Ky. 1984).

judicial fiat.<sup>132</sup> The A.G. claims that, under Alaska's severability statute,<sup>133</sup> the unconstitutional non-severability language is itself severable from the rest of the bill."<sup>134</sup> For these reasons, the memo concludes that both sections of the proposed S.B. 46 are unconstitutional.

The legislature disputes the persuasiveness of the cases cited in the A.G.'s opinion. In a memo written at the request of Hollis French (the "French memo"), the chairman of the Senate Finance Committee, the Division of Legal and Research Services suggests that neither *Karcher* nor *Brown* fully support the A.G.'s claims regarding the unconstitutionality of the contingency and non-severability language.<sup>135</sup> The issue in *Karcher* was whether or not the governor of New Jersey could veto individual budget items without changing the total appropriations amount.<sup>136</sup> The New Jersey Supreme Court allowed the vetoes, as New Jersey's version of the item veto power allows the governor to veto "in whole or in part any such item or items while approving other portions of the bill."<sup>137</sup> The French memo points out that New Jersey's veto power is significantly different from Alaska's, which would not have allowed the type of veto in *Karcher* because of the definition of "item" established in *Knowles*.<sup>138</sup> Whereas New Jersey allows the governor to strike "any part" of an item, in Alaska only an entire item can be eliminated or reduced.<sup>139</sup> Further, reducing the number of projects while not reducing the total funds allocated would have the effect of increasing the amount of money available to the

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132. AG Memo, *supra* note 5, at 3.

133. ALASKA STAT. § 01.10.030 (2012). This statute provides that if a bill lacks a severability clause, it should be treated as if it contains a clause saying that if any provision of the bill is invalidated the remainder of the act is unaffected. *Id.* This statute has been interpreted as creating a presumption of severability, albeit a weak one. *See* Se. Alaska Conservation Council v. State, 202 P.3d 1162, 1172 (Alaska 2009) (quoting *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992)) (holding that the statute inserts a "weak presumption of severability" into every bill passed by the legislature).

134. AG Memo, *supra* note 5, at 3.

135. Memorandum from Doug Gardner, & Pamela Finley, Div. of Legal and Research Servs., Legislative Affairs Agency, to Senator Hollis French, Chair of the Senate Judiciary Comm. (Apr. 28, 2011) (on file with author) [hereinafter French Memo].

136. 479 A.2d 403, 411 (N.J. 1984). Specifically, the Governor eliminated several highway projects but did not remove the expenditures associated with those projects, meaning the dollar amount of the overall appropriation for road construction was unchanged even though it would be spent on fewer projects. *Id.*

137. *Id.* at 406 (citing N.J. CONST. art. V, § 1, ¶ 15).

138. French Memo, *supra* note 135, at 4 (citing *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001)).

139. *Id.* (citing N.J. CONST. art. V, § 1, ¶ 15).

remaining projects, an outcome at odds with the negative characterization of the item veto in *Knowles*, which emphasizes striking or reducing sums from a bill.<sup>140</sup> The French memo concludes that, because each state confers a different version of the item veto power, *Karcher* does not support the A.G.'s contention that S.B. 46's contingency language is unconstitutional.<sup>141</sup>

While the French memo is likely correct that the facts in *Karcher* would result in a different outcome were they litigated in Alaska, that conclusion does not have a significant effect on the A.G.'s claim that the contingency language is unconstitutional. The A.G.'s memo was not attempting to analogize the specific facts or outcome in *Karcher* to the present situation. Instead, it cited *Karcher* as persuasive authority for the theoretical proposition that allowing individual appropriations projects to be linked "would too easily permit the legislature to circumvent the Governor's constitutional veto authority."<sup>142</sup> The way in which projects are linked may be different. In *Karcher* the link was between the total appropriation for a category and a project within that category,<sup>143</sup> while in the current matter the link is between projects within the energy appropriations category.<sup>144</sup> However the point remains the same: preventing a governor from exercising his veto power over individual items in an appropriations bill by tying them to other items in the bill is an unconstitutional encroachment on executive power. The French memo's distinction is irrelevant.

The French memo also suggests that the other out-of-state case cited in the A.G.'s opinion, *Legislative Research Commission v. Brown*,<sup>145</sup> does not support the claim that the non-severability clause of S.B. 46 constitutes a separate violation of executive powers.<sup>146</sup> Again, the memo seeks to distinguish the facts of the case from the current situation. The decision in *Brown* affected two non-severability clauses.<sup>147</sup> The first stated that if the portion of the bill that mandated all administrative regulations be approved by a subdivision of the legislative branch was invalidated, then the executive branch would be unable to issue new regulations while the legislature was not in session.<sup>148</sup> The practical

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140. *Knowles*, 21 P.3d at 372; French Memo, *supra* note 135, at 4.

141. French Memo, *supra* note 135, at 4.

142. AG Memo, *supra* note 5, at 3 (citing *Karcher*, 479 A.2d at 412).

143. See 479 A.2d at 412-13 (describing relationship between different appropriations vetoes).

144. S.B. 46, 27th Leg., 1st Spec. Sess. § 48(a) (Alaska 2011) (as reported by S. Fin. Comm., May 10, 2011).

145. 664 S.W.2d 907 (Ky. 1984).

146. French Memo, *supra* note 135, at 3.

147. *Id.* at 4.

148. *Brown*, 664 S.W.2d at 918-19.

effect of this non-severability clause was a legislative veto, which would be an unconstitutional violation of the separation of power. For this reason, the Kentucky Supreme Court invalidated the non-severability clause and severed it from the rest of the bill.<sup>149</sup> The second non-severability clause stated that if another part of the statute requiring approval of state applications for federal block grants by the same legislative subdivision were invalidated, then no federal block grant money would be spent.<sup>150</sup> The *Brown* court allowed this clause to stand, reasoning that preparation of the budget (including block grant spending) is within the providence of the legislature under Kentucky law. Accordingly, the Kentucky Supreme Court held that this clause did not infringe on executive power.<sup>151</sup> The French memo urges that *Brown* should therefore be viewed not as holding “all non-severability clauses are unenforceable” (as the memo characterizes the A.G.’s position), but rather that a “non-severability clause[,] in the context of appropriation, is enforceable.”<sup>152</sup>

Again, the French memo seeks to draw a parallel where none exists. The second non-severability clause in *Brown* was upheld solely because it was not a separation of powers issue. It is the thrust of the A.G.’s position that the presence of the non-severability clause is itself a separation of powers issue.<sup>153</sup> The inclusion of the non-severability clause in S.B. 46 creates a situation whereby if the governor attempts to assert his item veto power by challenging the contingency clause and is successful, he will in effect have negated all of the appropriations items in the bill, not just the ones he intended to veto. The process of exercising his power to strike individual items (by challenging the contingency language) would negate that power (by invalidating *all* of the items). This catch-22 makes the S.B. 46 language a separation of powers violation, just like the non-severability clause in *Brown* that was invalidated as a separation of powers violation. Despite the claim to the contrary, the A.G. is justified in citing *Brown* as supporting the assertion that a non-severability clause that usurps executive power is itself void and severable.

## **B. Violation of the Confinement Clause**

In addition to amounting to an unconstitutional usurpation of the

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149. *Id.* at 919.

150. *Id.* at 928–29.

151. *Id.* at 928–30.

152. French Memo, *supra* note 135, at 5.

153. AG Memo, *supra* note 5, at 3.

governor's item veto power, there is reason to believe that the contingency and non-severability language in S.B. 46 violates the Alaska Constitution's confinement clause. *Knowles* provides a five factor test, originally laid out in *Hammond*, for determining if the language of a proposed bill violates the clause.<sup>154</sup> To stand, the language in question: (1) must be the minimum necessary to clarify legislative intent on how the money is spent, (2) must not administer the program of expenditures, (3) must not enact law or amend existing substantive law, (4) must not extend beyond the life of the appropriation, and (5) must be germane and appropriate to an appropriations bill.<sup>155</sup> Had it been enacted, the contingency and non-severability language of S.B. 46 would likely fail the first, second, third, and fifth prongs of the *Hammond* test and, if challenged, be rendered unenforceable by the Alaska Supreme Court.

First, the linkage language is more than the "minimum necessary" to establish the purpose for an appropriation. The effect of an appropriations item is to create a unity between purpose and amount.<sup>156</sup> The language describing what the legislature intends the sum to fund establishes the purpose the amount is allocated towards.<sup>157</sup> The language in the contingency and non-severability clauses does not direct the *manner* in which funds are to be spent, as that type of purposive language is contained in the individual appropriations items in section 4. Instead, the contingency and non-severability language controls whether or not the money can be spent at all. In drafting the bill, it appears the legislature attempted to show that *all* the appropriations must be enacted to have the desired effect. However, the presence or absence of the contingency language, or even the other energy appropriations, exerts no influence on the clarity of the description of what each item is to finance. For example, the \$500,000 allocated to "Development & Export Authority - Coal to Liquids Certification Project" does not alter the apparent intent for the \$10 million allocated for the Southeast Energy Fund, and the contingency language does not clarify intent with respect to either except to indicate that the legislature thinks both are worthy appropriations. The contingency and non-severability language goes beyond the "minimum necessary" to determine how the legislature intended the funds to be spent. Consequently, it fails the first prong of the *Hammond* test.

Second, the bundling of energy appropriations represents an

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154. Alaska Legislative Council v. Knowles, 21 P.3d 367, 377 (Alaska 2001).

155. *Id.*

156. *Id.* at 372.

157. *Id.*

attempt to administer the spending program. Interconnected appropriations that combine to dictate the contours of spending policy are precisely the type of language that was disallowed in *Knowles*.<sup>158</sup> Here, the language connecting the items and constraining the executive's discretion with regard to policy decisions is found in a separate section of the bill. The effect is the same as the intra-item language in *Knowles*.

Similarly, the language has the effect of altering or adding to existing substantive law, in violation of the third *Hammond* factor.<sup>159</sup> The language represents an attempt to alter state energy policy through an appropriations bill rather than a bill enacting new substantive law. The intent language of the bill references a state statute setting forth state energy policy. However, that statute makes no reference to bundling appropriations items. An all-or-nothing approach to energy appropriations must therefore be a new aspect of state energy policy, an outcome that *Knowles* determined to have no place in an appropriations bill. By attempting to alter policy and administer the program resulting from that new policy, the bundling language fails the second and third prongs of the *Hammond* test.

Finally, the bundling language is insufficiently germane to the appropriations items it affects. Under *Knowles*, descriptive language must have a direct relationship to the manner in which money will be spent; a general relationship born of commonality of subject is insufficient.<sup>160</sup> The bundling language has *no* relationship to the way any of the affected items will be spent other than the fact that all the affected items relate to energy appropriations. The contingency and non-severability clauses do not prescribe the specific uses of the money appropriated for energy projects except to ensure that all the projects are enacted. But each item covered by the bundling language is a separate and distinct project, with all description of how that money is to be spent contained within the item itself. The bundling language is insufficiently related to the content of each appropriation to pass the germaneness requirement in *Knowles*.

With at least four of the five components of the *Hammond* test weighing against the bundling language's consistency with the

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158. *Id.* at 380 ("The vetoed language did not specify how these three appropriations were to be used, and instead addressed staffing funded under separate appropriations. This language effectively administered [the program] . . . because it limited the executive's exercise of discretion in staffing and locating executive-branch offices whose operations were funded by separate appropriations.").

159. *Id.* at 380-81.

160. *Id.* at 380.

confinement clause, the language would be invalidated if challenged in court. The end result is similar to the outcome in *Knowles*. While the governor lacks the ability to simply strike the contingency and non-severability sections via the line item veto power (since they are not “items”), the legislature likewise lacks the authority to include the language in an appropriations bill. The failure to comport with confinement clause requirements is only compounded by the fact that the bundling language violates the separation of powers by attempting to usurp the governor’s item veto. Taken together, S.B. 46’s breach of the veto and confinement clauses make it unlikely that the bundling language would have survived if it had been enacted.

### CONCLUSION

The saga of S.B. 46 ended not with a bang, but rather with a whimper. The contingency and non-severability sections never made it into the final bill, and the anticipated battle between the legislative and executive branches never occurred. For an observer of Alaskan constitutional law, a court decision definitively settling the issue would have been more instructive (and certainly more interesting) than the détente that emerged. However, the same language might one day find its way into a future appropriations bill, either in Alaska or another state with similar constitutional provisions. If it does, the analysis above indicates that it should be struck down, both as a violation of the governor’s line item veto power and the confinement clause. Allowing the language to stand would mark a shift in the way power is distributed among the branches of the state government and would jeopardize the governor’s ability to check the legislature through his strong item veto power. If a clear system of separation of powers is an essential component of good governance, allowing the bundling language to stand would be a step in the wrong direction for Alaska.