Legislature Me Const Art. 3 Sec. 2 Regulations Legislative Review

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November 4, 1976

Honorable Judy C. Kany
18 West Street
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Dear Mrs. Kany:

Questions:

You have orally requested an opinion of the Attorney General's Office concerning the constitutional authority of the Legislature, or appropriate parts thereof, to oversee the exercise of regulation-making powers by the agencies of the State to whom those powers have been delegated by statute. Two separate questions are raised:

1. Does the Legislature have constitutional authority to review and suspend administrative rules and regulations?

2. If the answer to the first question is affirmative, can a legislative committee be constitutionally empowered to suspend an administrative rule or regulation when the Legislature is not in session?

Answers:

The answer to the first question is affirmative, and to the second question, negative.

Discussion:

Reading the State Constitution strictly, it may appear that several of its provisions, read together, would bar legislative participation in the rulemaking function, which is a function performed by agencies of the Executive Department. Article III, section 1 expressly provides that the powers of the government shall be divided into three branches, and implies that each shall perform only the functions appropriate to it:

> "The powers of this government shall be divided into three distinct departments, the legislative, executive and Judicial."

This implicit segregation is reinforced by Article III, section 2:

> "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted."

Assuming that the adoption of regulations is properly a function of the State's administrative agencies, and that the agencies, being under the direction and control of persons appointed by the Governor, are in the Executive Department, and noting that the Constitution contains no provision "expressly directing or permitting" legislative participation in that function, it would appear that the separation of powers clauses of Article III would prohibit any legislative involvement.

However, the Constitutional question is not so clearly resolved as this analysis would indicate. The first premise above is that the regulation-making power is one properly belonging to the executive agencies. However legal authorities have consistently treated this power as a power legislative in nature, often using the term "quasi-legislative" when the power is exercised by some body other than the legislative body itself. See e.g. Davis, Administrative Law Treatise, § 5.01 (1958), City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387 (Me. 1973). As to the placement of the legislative power, the Maine Constitution is rather unambiguous. Article IV, Part First, section 1 provides:

> "The legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the Legislature of Maine . . ."

The section goes on to reserve certain legislative powers to the people, acting by ballot, but no mention is made of the exercise of the legislative power by agencies of the executive department.

In the early part of this century, the prevailing wisdom on the question of who may exercise legislative power was clear, and the Supreme Judicial Court had no difficulty in interpreting the constitutional provision:

> "The people of Maine, in organizing their government as a State, vested the legislative power of the government in a body "to be styled the Legislature of Maine," (Art. IV. Par. 1. Sec.1.) and did not confer any such power on any other person or body, and did not authorize the legislature to do so. It follows that the legislature alone can exercise the legislative power and alone is responsible for its wise exercise, and hence can transfer neither any of the power nor any of the responsibility to any other department or person. Says Judge Cookey in his Constitutional Limitations (6th Ed.) p. 137: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." The proposition needs no other citation of authority, and we do not find it any where doubted.
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> "Further, the people in their constitution expressly divided the powers of the government into three departments, the legislative, executive and judicial, and declared that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Art. III, Secs. 1, 2. Hence not only is the legislature not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions." State v. Butler, 105 Me. 91, 96, 73 A. 560 (1909)

Subsequent decisions have suggested an interpretation of the constitutional provision substantially narrower than the sweeping language of Butler would indicate. A few years after Butler, the Court considered and upheld the constitutionality of a statute withdrawing powers, including rule-making authority, from a municipality and conferring the same powers on a Commission to be appointed by the Governor. Lemaire v. Crockett, 116 Me. 263, 101 A. 302 (1917). In the course of that opinion, the Court referred to an earlier Opinion of the Justices interpreting Article IV, Part Third, Section 1, as vesting "in the Legislature a superintending authority, under and by virtue of what they might enact all laws, not repugnant to the Constitution, of a police and municipal nature . . . ." Opinion of the Justices, 99 Me. 515, 531, 60A. 85 (1905). The Lemaire opinion continued:

> "A necessary corollary to this fundamental proposition is this, that the Legislature has the constitutional power to designate the instrumentality which shall execute and carry into effect the laws made for the benefit of the people under this section. It may entrust their execution to a board created by itself and to be appointed in a designated way, or to the municipality itself where the power is to be executed." Lemaire v. Crockett, supra at 266.

Since the statute contested in Lemaire conferred rule-making powers upon a Commission to be appointed by the Governor, it might be concluded that the delegation of legislative-type powers was within the scope of the powers to "execute and carry into effect the laws," and that such a delegation to an Executive agency was constitutionally proper.

A few years after Lemaire, the Supreme Judicial Court decided the constitutional limits of rule-making powers, in McKenney v. Farnsworth, 121 Me. 450, 118 A. 237 (1922). By statute, the Legislature had given the Commission of Sea and Shore Fisheries the authority to make certain rules and regulations which would "take precedence over any then existing statute inconsistent therewith." P.L. 1917, c. 293, § 3. Without a moment's hesitation, the Court declared:

> "There can be no controversy regarding the unconstitutionality of the [quoted] clause of that section . . . . The Legislature alone can make and repeal statutes. It cannot delegate its power to do so to any other authority." McKenney v. Farnsworth, supra at 452.

But in the same opinion the Court expressly upheld the challenged regulation, which was not inconsistent with any statute. It did so after lengthy discussion of the practical impossibility of the Legislature "ascertaining the fact, circumstances and conditions" which were necessary to determine the details of their regulatory scheme. The Court viewed the Commission as an agent of the Legislature and denied that any legislative power had been conferred, but called the delegated authority "a ministerial duty." McKenney, supra, at 453.

Many more recent opinions have upheld delegations of rule-making authority and, in the process, have abandoned the fiction that these powers are anything other than legislative in nature. See, e.g., City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387 (Me., 1973); Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d 786 (Me., 1972); Opinion of the Justices, 261 A.2d 58 (Me., 1970); McGary v. Barrows, 156 Me. 250, 163 A.2d 747 (1960) In the Biddeford case, the Court said:

> "It is settled beyond question that the Legislature may properly conclude that the purposes of its legislation may best be carried out through agents and that it may delegate to the agents a portion of its power to facilitate the functioning of the legislative program." (emphasis added) 304 A.2d at 397.

In a separate opinion in the same case, Justice Wernick concluded from his review of the prior cases that "In Maine, . . . this Court basically discarded its earlier conception that law-making powers and authority may not at all be delegated by the Legislature to another body. . . ." Biddeford, supra, at 407. Behind this evolution in constitutional construction from Butler to the recent cases has been the recognition of a simple truth, well-expressed by an approving quotation from a Pennsylvania case by the Maine Court in 1961:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." Locke's Appeal, 72 Pa. 491, 498 (1873), quoted in Kovack v. City of Waterville, 157 Me. 411, 418, 173 A.2d 554 (1961)

Contemporary commentators agree with these notions. Nearly three decades ago Professor Jaffe wrote that every statute is in fact a delegation of legislative powers to the agency or authority empowered to administer and enforce it, since those duties necessarily require interpretation of the statute. Essay on the Delegation of Legislative Power, 47 Columbia Law Review 359, 360 (1947). Professor Davis has noted that a strict interpretation of a separation of powers doctrine would preclude the existence of administrative agencies altogether, since they universally exercise powers both legislative and judicial in nature. Davis, Administrative Law Text, p. 25 (1975).

In sum, the State Constitution has been interpreted to prohibit the delegation by the Legislature of any power to adopt or repeal statutes, but to permit this delegation of rule-making authority so long as that authority has been appropriately guided or confined. McKenney v. Farnsworth, 121 Me. 450, 118 A. 237 (1922); State v. Prescott, 129 Me. 239, 151 A. 426 (1930); Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d 786 (Me., 1972); City of Biddeford v. Biddeford Teachers Association, 304 A.2d 387 (Me., 1973).

No Maine case has been found which goes so far in its constitutional analysis as to determine whether rule-making authority is a legislative function "properly belonging" to the administrative agencies (Me. Constitution, Article III, §2), or simply a part of the executive authority to see that the laws are faithfully executed (Article V, § 12). Without addressing the question squarely, the language of the Law Court's 1973 decision in the Biddeford case suggests a preference for the view that the power is legislative. It is unnecessary, however, to resolve this question, since, as the discussion below concludes, classifying the power as legislative does not give the Legislature any greater flexibility in responding to unsatisfactory regulations.

Since the delegation to administrative agencies of rule-making powers represents a transfer by the Legislature of its powers (even though it may not generally have been feasible for the Legislature to have exercised them), the Legislature has clear authority to take them back, in whole or in part. In Biddeford, concerning an analogous delegation to a municipal body, the Court noted: "There can be no doubt but that the Legislature, which is the source of all municipal authority [citation omitted], has also the power to take back from municipal officers portions of the authority it has earlier given them." 304 A.2d at 397-8 (Me., 1973). In his separate

opinion in the same case, Justice Wernick noted that the gradual acceptance by the courts of delegated rule-making authority involved "acknowledging that legislative power, as such, is constitutionally permissible of delegation under appropriate limitations to check against abuse - the most potent of which is the legislature's retention of power to revise or withdraw the power granted." 304 A.2d at 404-5 (Me., 1973).

Thus, the Legislature plainly holds the power to negate or overrule administrative regulations. The question is by whom or by what means may this power be exercised. May it be exercised by any legislative group or by any means short of the enactment of a statute? As currently proposed, the answer is that it may not.

The legislative power is vested by the Constitution of Maine in two distinct branches, the House of Representatives and the Senate. Me. Const., Art. IV, Pt. 1, §1. In order to take any action which will have the force of law, those bodies must follow the legislative procedures which are set forth in the Constitution. These procedures include the requirement that "every bill or resolution, having the force of law, . . . shall have passed both Houses." Me. Const., Art. IV, Pt. 3, § 2. This language does not appear to permit much variation. No mention is made of any subunits of the two Houses exercising the legislative power; and in the absence of such provision, it must be concluded that the framers intended to authorize only the Houses themselves to so act. Thus, even though the Legislature may, with proper standards, delegate legislative authority to an administrative agency, it may not delegate such authority to one of its own committees.

In this connection, the standard authority on legislative procedure, Mason, Manual of Legislative Procedure, notes:

> "The power of any legislative body to enact legislation or to do any act requiring the use of discretion cannot be delegated to a minority, to a committee, to officers or members or to another body." Mason, § 519 (1962).

Thus, there is clear constitutional authority for the Legislature by Act or Resolve, to prospectively withdraw or limit the authority of an agency to adopt regulations, or amend the substance of the law being interpreted in a particular regulation to preclude

the interpretation provided. In the latter event, the regulation would be voided by making it inconsistent with the statute. Without legislation, or until legislation may be enacted, any interested person may naturally attempt to persuade the agency to change its regulation.

Very truly yours,

Joseph E Brennan

JOSEPH E. BRENNAN
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