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May 2, 1995

The Honorable Dana Hanley
State Senator
State House Station Three
Augusta, Maine 04333

The Honorable George Kerr
State Representative
State House Station Two
Augusta, Maine 04333

Dear Senator Hanley and Representative Kerr:

This is in response to the Appropriation Committee's request for an opinion on the constitutionality of the attached amendments (Nos. H-182 and S-102) to L.D. 1412, Part D and will confirm the advice I gave orally to the Appropriations Committee yesterday.

In a letter of April 27, 1995 and an opinion of May 1, 1995 to Senator John Cleveland, this Department previously expressed its views with respect to L.D. 1412, Part D, as it existed prior to the amendment in question. In those documents we expressed our view that the original version of Section D-4 of L.D. 1412 was unconstitutional.

We have now reviewed the attached proposed amendments to L.D. 1412.[1] Simply stated, it is our view that these amendments appear to eliminate the constitutional problem discussed in the opinion we rendered to Senator Cleveland.

[1]The amendments in question (H-182 and S-102) are identical. It is our understanding that these will be separately offered in each House.

1. Proposed Amendments to Sections D-4 and D-5

The attached amendments change Sections D-4 and D-5 of L.D. 1412 in three respects that bear on our opinion of the validity of those sections.[2] First, and most importantly, they eliminate the provision in Section D-4(3) whereby the Governor could implement proposed amendments to state law if the Legislature failed to act within three days. Instead, they provide that, if within the three day period the Legislature does not enact alternative legislation achieving equivalent savings or fails to act at all, the Governor can exercise the temporary curtailment of allotment power that is already contained in 5 M.R.S.A. § 1668 in order to achieve the necessary savings. The amendments would exempt the General Purpose Aid for Local Schools Program and the Local Government Fund from any curtailment under Section D-4. We believe that the attached amendments to Section D-4 of L.D. 1412 would solve the constitutional problem that now exists with the current version of L.D 1412. In this connection, we note that the curtailment of allotment power contained in 5 M.R.S.A. § 1668 was originally enacted in 1976 and was successfully defended against a constitutional challenge at the Superior Court level in 1991. In our view, legislation authorizing the Governor to use the curtailment power under Section D-4 of L.D. 1412 would be likely to be found to be constitutional as well. The use of the curtailment power is discussed below in further detail.

The remaining two changes effected by the amendments to L.D. 1412 that are relevant to the issue of the validity of Part D involve the language of Section D-5. The first of these changes clarifies that the Governor's authority to transfer positions and appropriation balances is designed to follow a lump sum deappropriation to be made by the Legislature in the 1996-97 biennial budget. This is helpful in demonstrating that the scheme contemplated by Section D-5 is that the Legislature will exercise its appropriation power via a lump sum deappropriation and that the Executive Branch will then have the managerial authority to transfer funds and positions as required to operate the government in light of the reduced funds available. *See* May 1, 1995 opinion to Senator Cleveland at pp. 4-5 (copy attached).

The attached amendments would also provide express standards to guide the exercise of the Governor's authority under Section D-5. In our May 1, 1995 opinion to Senator Cleveland, we expressed the view that Section D-5 would likely be found

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[2]The amendment also makes several other changes to those Sections -- to clarify the timetable for legislative action under Section D-4 and to delete language relating to utilization and elimination of vacant positions in Section D-5. We were not involved in the discussions that led to those changes, which do not affect our views as to the validity of those sections.

to be constitutional even without the inclusion of such express standards. The addition of such standards will provide further guidance for the exercise of gubernatorial authority under Section D-5 and will also make Section D-5 that much more defensible in any court challenge.

In expressing our views as to the constitutionality of the proposed amendment to L.D. 1412, we do not suggest any view as to whether the Legislature should, as a matter of policy, enact L.D. 1412 with the proposed amendments. That is a matter for the Legislature to decide.

I should also add that in expressing our views of the constitutionality of the proposed amendments to Sections D-4 and D-5 of L.D. 1412, we are offering a prediction as to how the courts of Maine would rule on the issue, and there is no guarantee as to how the courts would in fact rule. In this connection, our opinion is by necessity limited to an evaluation of the proposed amendments to L.D. 1412 on their face, while the court's eventual view of the issue may depend in part on how the authority contained in Part D of L.D. 1412 is exercised.

2. Governor's Authority to Curtail Allotments

In light of the proposed inclusion of the temporary curtailment of allotment power in Section D-4, the Appropriations Committee also asked several questions as to how that power would work in the context of L.D. 1412. As we see it, there are two differences between the exercise of the curtailment of allotment power under 5 M.R.S.A. § 1668 and under the attached amendments to L.D. 1412. Under 5 M.R.S.A. § 1668, the Governor's ability to exercise the curtailment power would depend on written notice from the Commissioner of Administrative and Financial Services that anticipated income and other available funds will not be sufficient to meet the expenditures authorized by the Legislature. Under the proposed amendments to L.D. 1412, the triggering event would be the failure of the Legislature to enact legislation that achieves the same projected savings as the legislation submitted by the Governor within three calendar days under Section D-4(3).

In addition, the amendments to L.D. 1412 would exempt General Purpose Aid for Local Schools and the Local Government Fund from the Governor's curtailment

authority under L.D. 1412.[3] In all other respects, in our view, the Governor's curtailment authority under L.D. 1412 would be identical to his authority under the existing provisions of 5 M.R.S.A. § 1668, which require that:

- The Governor must temporarily curtail allotments "equitably so that expenditures will not exceed the anticipated income and other available funds;"

- No allotment may be terminated;

- Any curtailment of allotments "shall, insofar as practicable, be made consistent with the intent of the Legislature" in authorizing the expenditures in question; and

- The Governor must immediately notify the Legislative leadership of the allotments curtailed and the effect of each curtailment on the program so affected.

See 5 M.R.S.A. § 1668.

With respect to the interpretation of the term "equitably" in § 1668, the Superior Court ruled as follows in *Butterfield v. Department of Human Services*, Docket No. CV-91-29 (Superior Court, Kennebec County, Jan. 17, 1991):

> Because of the highly temporary nature of the expenditure curtailment authority which § 1668 extends to the Governor, the directive that such allotment curtailments be imposed 'equitably' is not so vague a standard as to render the statute unconstitutional. Essentially, this statute directs that program cuts must be fair, but need not necessarily be imposed equally by percentage. This recognizes the maxim that there is perhaps no greater unfairness than absolute equality mechanically imposed across a broad spectrum of persons or programs. The term 'equitably' implies making of choices rather than uniform, across the board equality such as would have been directed if the term 'equally' had been used. There is the

[3]In our view, it is permissible for the Legislature, in authorizing the Governor to curtail allotments under Section D-4, to specify areas that will not be subject to any curtailment of that section.

> protection, however, that these cuts 'equitably' imposed cannot be used as a subterfuge to absolutely terminate any program allotment.

Slip op. at 6.[4]

In referring to the highly temporary nature of the curtailment, the Court in *Butterfield* recognized that any curtailment is temporary in the sense that the Legislature, once notified of the curtailment, can enact legislation at any time that achieves the necessary savings and eliminates the problem. Once the Legislature acts, the Governor's curtailment power -- which is conditioned on assuring "that expenditures will not exceed anticipated income and other available funds," 5 M.R.S.A. § 1668 -- will necessarily cease to exist. In the context of the proposed amendments to L.D. 1412, this means that the Governor can temporarily curtail allotments if the Legislature fails to achieve the necessary savings in the three calendar days provided by Section D-4, but the Legislature can lift the curtailment if it takes action to achieve the necessary savings at any point thereafter.

In connection with the interpretation of "equitably" in the context of curtailment, I would also direct your attention to an opinion written by Attorney General Joseph Brennan to Governor Longley on January 7, 1976, which discusses language similar to 5 M.R.S.A. § 1668 that was contained in the Appropriation bills for 1975. The gist of that opinion is that "equitable" in this context means "fair." Across-the-board curtailments would be permitted but are not required. A copy of this opinion is attached.

Finally, I would add that in curtailing allotments "equitably," the Governor may also find himself constrained in some areas by federal requirements. How curtailment would work in other contexts cannot be precisely determined in the abstract but would depend on the amount of the shortfall, the specific statutes and programs involved, and the specific circumstances existing at the time of the curtailment.

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[4]The *Butterfield* case was appealed to the Law Court but became moot while on appeal because the Legislature acted in the meantime.

I hope this responds to your inquiries. Please feel free to seek further clarification if necessary.

Sincerely,

Andrew Ketterer

ANDREW KETTERER
Attorney General

AK/rar

L.D. 1412

DATE: May 2, 1995 (Filing No. S- 102)

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE
SENATE
117TH LEGISLATURE
FIRST REGULAR SESSION

SENATE AMENDMENT " C " to H.P. 1001, L.D. 1412, Bill, "An Act to Make Additional Appropriations and Allocations for the Expenditures of State Government for the Fiscal Year Ending June 30, 1995"

Amend the bill in Part D by striking out all of sections 4, 5 and 6 and inserting in their place the following:

'**Sec. D-4. Implementation of task force recommendations by Governor.** The Governor shall review the recommendations of the task force as presented throughout the fiscal year. Nothing in this Part may be construed to constrain the Governor's authority to exercise the powers granted by the Constitution of Maine or statutes to execute the laws of the State.

Any recommendation of the task force that requires a change to the Maine Revised Statutes, a Public Law or a Private and Special Law enacted by the Legislature, except as expressly authorized by section 5 of this Part, and that the Governor seeks to implement requires the following.

1. The Governor shall immediately notify the Legislature of the specific recommendation or recommendations that require legislation to implement; the departments, programs and positions to be affected; and the projected savings and deappropriations required in fiscal year 1995-96 and fiscal year 1996-97.

2. After having provided at least 2 weeks' notice to the President of the Senate and the Speaker of the House, the Governor shall convene the Legislature into special session to address legislation to implement the specific recommendation or recommendations identified by the Governor in subsection 1. Should the Legislature be in regular session, the Governor shall immediately submit legislation to implement the specific recommendation or recommendations identified by the Governor in subsection 1.

SENATE AMENDMENT

4. Integration of the effective use of technology into state departments, agencies, programs and operations; and

5. Achievement of the most effective delivery of services to Maine citizens.

Sec. D-6. Appropriation. The following funds are appropriated from the General Fund to carry out the purposes of this Part.

	1994-95
ADMINISTRATIVE AND FINANCIAL SERVICES, DEPARTMENT OF	
Productivity Realization Task Force	
All Other	$250,000
Provides for the necessary expenses, including consulting fees, of the Productivity Realization Task Force.	
LEGISLATURE	
Legislature	
Personal Services	($250,000)
Provides for the deappropriation of funds from available balances.	
TOTAL APPROPRIATIONS	$-0-

FISCAL NOTE

This amendment is not expected to have an impact on the ability of the Governor to achieve the savings proposed in the Governor's proposed "current services" budget.

STATEMENT OF FACT

This amendment addresses the constitutional issues raised in the bill.

L.D. 1412

DATE: 5/2/95 (Filing No. H-182)

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE
HOUSE OF REPRESENTATIVES
117TH LEGISLATURE
FIRST REGULAR SESSION

HOUSE AMENDMENT "D" to H.P. 1001, L.D. 1412, Bill, "An Act to Make Additional Appropriations and Allocations for the Expenditures of State Government for the Fiscal Year Ending June 30, 1995"

Amend the bill in Part D by striking out all of sections 4, 5 and 6 and inserting in their place the following:

'**Sec. D-4. Implementation of task force recommendations by Governor.** The Governor shall review the recommendations of the task force as presented throughout the fiscal year. Nothing in this Part may be construed to constrain the Governor's authority to exercise the powers granted by the Constitution of Maine or statutes to execute the laws of the State.

Any recommendation of the task force that requires a change to the Maine Revised Statutes, a Public Law or a Private and Special Law enacted by the Legislature, except as expressly authorized by section 5 of this Part, and that the Governor seeks to implement requires the following.

1. The Governor shall immediately notify the Legislature of the specific recommendation or recommendations that require legislation to implement; the departments, programs and positions to be affected; and the projected savings and deappropriations required in fiscal year 1995-96 and fiscal year 1996-97.

2. After having provided at least 2 weeks' notice to the President of the Senate and the Speaker of the House, the Governor shall convene the Legislature into special session to address legislation to implement the specific recommendation or recommendations identified by the Governor in subsection 1. Should the Legislature be in regular session, the Governor shall immediately submit legislation to implement the specific recommendation or recommendations identified by the Governor in subsection 1.

HOUSE AMENDMENT

4. Integration of the effective use of technology into state departments, agencies, programs and operations; and

5. Achievement of the most effective delivery of services to Maine citizens.

Sec. D-6. Appropriation. The following funds are appropriated from the General Fund to carry out the purposes of this Part.

	1994-95
ADMINISTRATIVE AND FINANCIAL SERVICES, DEPARTMENT OF	
Productivity Realization Task Force	
All Other	$250,000
Provides for the necessary expenses, including consulting fees, of the Productivity Realization Task Force.	
LEGISLATURE	
Legislature	
Personal Services	($250,000)
Provides for the deappropriation of funds from available balances.	
TOTAL APPROPRIATIONS	$-0-

FISCAL NOTE

This amendment is not expected to have an impact on the ability of the Governor to achieve the savings proposed in the Governor's proposed "current services" budget.

STATEMENT OF FACT

This amendment addresses the constitutional issues raised in the bill.

MEAD
J.E.B.

January 7, 1976

Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine 04333

Dear Governor Longley:

Your letter of December 30, 1975, described a fiscal dilemma which the State appears to face today. Briefly stated, anticipated State revenues evidently will not be sufficient to meet appropriated expenditures. You have set forth your intent to meet this problem by asking the Executive Departments to refrain from instituting certain new programs, though funding for these programs has been appropriated by the Legislature, and have asked for our counsel on this matter. In our opinion, the Governor's authority to withhold or reduce allocations of appropriated funds is limited to that authority which has been conferred by statute, and, as such, would not include authority to withhold funds in the manner you have suggested.

The primary source of the Governor's authority is the Constitution, which vests in him the supreme executive power of the State. Article V, Part 1, § 1, Constitution of Maine. One might argue that the executive power includes promotion of sound fiscal policies and, therefore, implies the power to withhold or reduce allocations from appropriated funds. This argument has not been tested by the Maine judiciary, but the same argument, as applied to the President and his subordinates, has been rejected by the Federal courts in several "impoundment" cases. In Sioux Valley Empire Electric Association, Inc. v. Butz, 367 F. Supp. 686 (D.S.C., 1973), a Federal District Court noted that the President has broad powers, but these do not include the power to nullify Congressional action. In other words, there is no inherent executive power to impound legislatively mandated funds. The basis for this decision, which would have equal application in Maine, is the constitutional

doctrine of "separation of powers." [See Art. III, §§ 1 and 2 Constitution of Maine]. If the executive determined to withhold appropriated funding from certain programs, it would frustrate the legislative intent that the programs be funded. Art. IV, Part 1, § 1, Constitution of Maine [See also: Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C., 1973)]. Further, as pointed out in Sioux Valley, an executive impoundment of appropriated funds could be interpreted as displeasure with the programs to be financed, especially when the appropriations were enacted over the executive's veto. In the latter case, such action could be construed as subverting the Legislature's constitutional right to override the Governor's veto, in derogation of the doctrine of "checks and balances." Art. IV, Part 3, § 2 Constitution of Maine. In light of the foregoing, it is clear that there is no constitutional authority for withholding or reducing allocations of appropriated funds.

It should be noted at this point that the Governor obviously does have the authority to institute authentic cost-saving programs. The Governor has the constitutional duty to take care that the laws, which include appropriation acts, are faithfully executed. Art. V, Part 1, § 12, Constitution of Maine. This means that he must promote the legislative intent in all cases. If the Legislature has instituted a particular program, it is clear that it intends the purpose of the program to be carried forward. However, it is also assumed that the Legislature would intend that the program be run as economically as possible. Therefore, the Governor may seek cost-savings in any program, with resultant decreases in allotments, so long as these economies do not detract from performance of the program's original purpose as intended by the Legislature. Carrying this logic a step further, there is some authority for the proposition that an Executive Officer may terminate allotments of appropriated funds for an existing program which is no longer performing its function in accordance with the original legislative intent. Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848 (D.D.C., 1974). However, any executive action performed on this basis would undoubtedly be closely examined.

In the absence of constitutional authority or direction, the Governor's powers in a particular area are limited to those conferred by statute. The statutory direction in the present case is quite clear. Both the Current Service Appropriations Act (P. & S.L. 1975, c. 78) and the Additional Appropriations Act (P. & S.L. 1975, c. 90) included an identical Section 3, which reads:

> "Sec. 3. Temporary curtailment of allotments. Whenever it appears to the Commissioner of Finance and Administration that the anticipated income and other available funds of the State will not be sufficient to meet the expenditures authorized by the Legislature, he shall so report to the Governor and Council and they may temporarily curtail allotments equitably so that expenditures will not exceed the anticipated income and other available funds." (underlining provided)

This section, which is incorporated in most general appropriations bills, acquired its present wording in 1967 with the addition of the two words underlined in the quotation. [P. & S.L. 1967, c. 154]. These words were added during a redrafting of the bill by the Committee on Appropriations and Financial Affairs [Compare L.D. 70 with L.D. 1575]. The intent of the resulting legislation was explained in the Senate as follows:

> "If our actual experience during the next biennium indicates that the State revenues are not meeting these anticipated [revenue] estimates it is the intent of this language that upon the determination that such a situation exists the Legislature shall be called in session as soon as possible to deal with the problem. It is also the intent of this section that there shall be no arbitrary cuts in specified departments in order to balance the budget if such revenues are not anticipated." Legislative Record, Senate, April 11, 1967, p. 1118.

It is reasonable to assume that the legislative intent has not changed since 1967, considering the fact that succeeding Legislatures have used this section verbatim. Therefore, the statutory gubernatorial authority and the procedures to be used in the present case are clear.

First, the Governor has no power, acting alone, to curtail allotments. The Commissioner of Finance and Administration must determine that anticipated State income and other available funds will not be sufficient to meet authorized expenditures, and he must report this fact to the Governor and Council. Then, the Governor and Council have the discretionary authority to

temporarily curtail allotments of appropriated funds on an equitable basis among the departments, but only until such time as the Legislature can meet and correct the problem through the exercise of their legislative power. It is anticipated that the Legislature would meet for this purpose as soon as possible.

The Governor and Council, after receiving the report of the Commissioner of Finance and Administration, would have flexibility in determining how to "equitably" curtail allotments. In construing a statute a word should be given effect according to its common meaning [Canal National Bank of Portland v. Bailey, 51 A.2d 482 (Me., 1947)], unless the word has acquired a special meaning through judicial definition [Acheson v. Johnson, 86 A.2d 628 (Me., 1952)]. In the case of the word "equitably," it appears that both the common and legal definitions are very close. Webster's New International Dictionary (2nd Ed.) gives the common meaning as "justly; fairly; impartially." The same definition was judicially adopted in Pearce v. Wisdom, 165 S.E. 574 (Ga., 1932), which also noted that the word gave flexibility to the defendant school superintendent who was to distribute tax funds "equitably." [See also Gericke v. City of Philadelphia, 44 A.2d 233, 236 (Pa., 1945) for proposition that the word confers an element of discretion]. Further, Black's Law Dictionary (Revised Fourth Edition) defines the adjective form, "equitable," as: "Just, fair, and right, in consideration of the facts and circumstances of the individual case." Any curtailment plan utilized by the Governor and Council would have to fall within these definitions, but latitude is still possible. For example, the Governor and Council could make across-the-board cuts which would affect each agency and program equally. Alternatively, each department head might be asked to determine what programs or governmental functions could most fairly stand curtailments, consistent with the legislative intent, and the amounts concerned. These examples are not exhaustive, but it is clear that a complete withholding of funds for a program mandated by the Legislature would not be an alternative available to the Governor and Council under current law. Indeed, complete withholding of funds would, in effect, amount to an item veto, a power which the Governor of the State of Maine does not possess under present law.

There are two additional points which should be discussed in light of the fact that your letter primarily concerned new programs funded by the Additional Appropriations Act (P. & S.L. 1975, c. 90). First, although this Act does involve some new programs, the "new or expanded programs" prohibition of Section 9 of that Act would not apply because all of the programs contained

therein have been reviewed by the Budget Office and the Legislature has made funds available for their use by appropriations in the Act. Second, the foregoing discussion concerning the Governor's statutory authority would apply equally to both the Current Service and Additional Appropriations Acts since the identical provision for temporary curtailment of allotments is found in both Acts. In addition, this statutory authority is also applicable to all other appropriations measures, as provided in the last introductory section of both Acts.

In summary, the Governor has certain powers conferred on him by statute which he may exercise, together with the Executive Council, in the situation where estimated State revenues will not be sufficient to meet authorized expenditures. These powers to temporarily curtail allotments on an equitable basis pending legislative action, allow the Governor certain flexibility, but do not include withholding all funds from new, legislatively-approved programs. The Governor has no constitutional powers in this area to augment those conferred by statute, though cost-saving programs which further legislative intent are not prohibited. Therefore, the Governor does not have the power to withhold funds in the manner you have suggested, for such action is not authorized by statute and would violate the constitutional doctrine of "separation of powers" and "checks and balances."

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

JEB/ec