STATE EX. REL. STEPHAN v. KAN. HOUSE OF REPRESENTATIVES

236 Kan. 45 (1984) | Cited 24 times | Supreme Court of Kansas | August 29, 1984

The opinion of the court was delivered by

This is an original action in quo warranto and mandamus broughtby the state on relation of the attorney general against therespondents Kansas House of Representatives, Kansas Senate andKansas Governor, John Carlin, seeking a determination of theconstitutionality of K.S.A. 1983 Supp. 77-426(c) and (d).This statute provides the legislature may adopt, modify or revokeadministrative rules and regulations by concurrent resolutionspassed by the legislature without presentment to the governor. Itis challenged as being violative of the constitutional doctrineof separation of powers by authorizing the legislature to usurpthe executive power to administer and enforce laws. It is alsoargued the statute violates the procedures mandated in art. 2, §§14, 20 of the Kansas Constitution concerning the proper enactmentof laws. Concurrent resolutions were adopted by the legislaturepursuant to this statute during the 1983 and 1984 legislativesessions. This action is brought not only to test the validity ofthe statute, but also to challenge the actions of the legislaturepursuant to the statute. The governor was named a respondent forthe stated reason that it is necessary for this court to issue anorder directing the governor as to the proper law to be executedby the executive branch of government.

The legislature in its memorandum filed with this court doesnot brief the merits of this case addressed by the attorneygeneral in this quo warranto and mandamus action. Therefore, weshall first address the issues raised by the legislature in itsMotion to Dismiss, filed as its response.

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The legislature contends the doctrine of sovereign immunitybars this lawsuit, stating the familiar rule that the state,being a sovereign power, cannot be subjected to suit in its owncourts> except where consent has been given by the legislature.See, e.g., Sinclair Pipe Line Co. v. State Commission of Revenue& Taxation, 181 Kan. 310, 315, 311 P.2d 342 (1957); Perry v.City of Wichita, 174 Kan. 264, Syl. ¶ 2, 255 P.2d 667 (1953);Linderholm v. State, 146 Kan. 224, Syl. ¶ 1, 69 P.2d 689(1937), cert. denied 306 U.S. 630 (1939). Cf., Brown v.Wichita State University, 219 Kan. 2, 547 P.2d 1015, cert.denied 429 U.S. 806 (1976). Governmental immunity, originallyjudicially created, was abrogated by this court in Carroll v.Kittle, 203 Kan. 841, 457 P.2d 21 (1969), in situations wherethe state or its agencies are engaged in proprietary activities.The Kansas Legislature quickly passed K.S.A. 46-901 et seq.(Weeks), reimposing governmental immunity in Kansas. This wasrepealed in 1979 when the Kansas Tort Claims Act, K.S.A. 1983Supp. 75-6101 et seq., was enacted, which subjects governmentalentities to liability for damages caused by the negligence ofits employees acting within the scope of their

employment. K.S.A.1983 Supp. 75-6103(a). However, K.S.A. 1983 Supp. 75-6104(a)specifically exempts the government from liability for damagesresulting from "legislative functions, including, but not limitedto, the adoption or failure to adopt any statute, regulation,ordinance or resolution."

The difficulty with the legislature's argument is that thecases and authorities cited relate to liability for moneydamages in actions by private individuals or other entitiesagainst a governmental entity. These cases provide no support forthe proposition that an original action seeking declaratoryrelief may not be brought on behalf of the state to question theauthority of legislative acts and the authority of administrativeagencies to act under the rules and regulations propounded bysuch legislation. Courts> have recognized state officials, asdistinguished from the state itself, are not immune from actionsto restrain them from enforcing, or attempting to enforce, statelaws which violate the constitution or from takingunconstitutional action under color of state law, and thereforeactions not seeking money damages are not barred. See GrovePress, Inc. v. State of Kansas, 304 F. Supp. 383, 388 (D. Kan.1969). Moreover, the mere existence of other actions heard bythis court in the nature of quo warranto or

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mandamus against officers of the executive and judicial branchesmakes it obvious that sovereign immunity does not protectgovernmental entities from actions for equitable or extraordinaryrelief. See, e.g., State ex rel. Stephan v. Carlin,229 Kan. 665, 630 P.2d 709 (1981); State ex rel. v. Bennett,222 Kan. 12, 564 P.2d 1281 (1977); State ex rel. v. Bennett,219 Kan. 285, 547 P.2d 786 (1976); Sinclair v. Schroeder, 225 Kan. 3,586 P.2d 683 (1978).

The legislature also contends service of process upon theSpeaker of the House of Representatives and the President of theSenate is insufficient to subject the legislative body as a wholeto the jurisdiction of this court. The legislature maintains: "There is no entity such as the House of Representatives or the Senate which can be served with process through substituted service upon only one member thereof even albeit an officer. . . . "The only conceivable manner in which the petition could proceed against the Kansas Legislature . . . would be to name [and serve with process] all the members thereof individually as respondents in this action."

The petitioner argues, on the other hand, the legislature is alegal entity created by the constitution which has an existenceseparate and apart from the individuals who hold legislativeoffice and comprise the body of the legislature. The legislativebody may be served with process similar to the Office of Governoror the Supreme Court. If the legislative branch is not subject toservice of process the judicial branch has no means with which tocheck abuses of power by the legislative branch, and themechanism of checks and balances built into the constitutionwould be destroyed. This argument is supported by the declarationin State v. Brewing Association, 76 Kan. 184, 191, 90 P. 777(1907):

"No principle of the common law is better established than that plenary power is vested in all courts>

to protect and preserve their jurisdiction so that the exercise of granted functions may be made effectual . . . ."In that case the court held: "This court has original jurisdiction in proceedings in quo warranto, mandamus and habeas corpus only. It has no original jurisdiction to issue injunctions or to appoint receivers. But in order to protect, preserve and render effectual its original jurisdiction the court may restrain the use and transfer of property and appoint a receiver for property owned and employed by a foreign brewing company unlawfully conducting its business in this state, pending proceedings in quo warranto to oust it." 76 Kan. 184, Syl.

The legislative branch of the government of this state and the

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powers and functions of that branch are addressed in art. 2 ofthe Kansas Constitution. To say the legislative branch is not alegal entity which can be served with process is tantamount tosaying the legislature may never be brought before this court inan original action challenging its alleged abuse of power. As thepetitioner correctly points out, this effectively destroys theauthority of this court to check abuses of power by the other twobranches of government. Prior actions by the legislature indicatethe legislature itself has recognized it is a legal entity whichmay participate in litigation before the courts> of this state.K.S.A. 46-1222 establishes the office of legislative counsel. Thepowers and duties of legislative counsel are set forth in K.S.A.46-1224, which provides, in part:

"As directed by the legislative coordinating council, the legislative counsel shall represent the legislature, or either house thereof, in any cause or matter. In cases of quo warranto and mandamus the legislative counsel shall have the same powers and standing in all courts> of this state as any county attorney or district attorney has in his or her county or in the supreme court and as the attorney general has in any court. When the legislature is in session, either house thereof by its resolution, or both houses by concurrent resolution may authorize the legislative coordinating council to direct the legislature counsel to bring or participate in any cause or action by representing the legislature or either house thereof or the legislative coordinating council in any court of this state or of the United States. When the legislature is not in session, the legislative coordinating council may direct the legislative counsel to bring or participate in any cause or action by representing the legislature or either house thereof or the legislative coordinating council in any court of this state or of the United States in accordance with directions of said council."As established in K.S.A. 46-1201(a), the legislativecoordinating council is comprised of the President of the Senate,the Speaker of the House of Representatives, the Speaker Pro Temof the House of Representatives, the Majority Leader of theSenate, the Majority Leader of the House of Representatives, theMinority Leader of the Senate, and the Minority Leader of theHouse of Representatives. K.S.A. 46-1202 provides the legislativecoordinating council shall represent the legislature when thelegislature is not in session. In prior cases before this courtlegislative counsel, on behalf of the legislature or itsrepresentative the legislative coordinating council, hasintervened as a party or as amicus curiae. See, e.g.,Manhattan Buildings, Inc. v. Hurley, 231 Kan. 20, 643 P.2d 87(1982); State ex rel. v. Bennett,

222 Kan. 12; State ex rel.v. Bennett, 219 Kan. 285; Brown v. Wichita State University,219 Kan. 2.

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As a branch of government created by the constitution which isrepresented by its own counsel and intercedes and participates inlitigation before the courts> of this state, it only stands toreason that the legislature as a body comprises a legal entitywhich is subject to service of process in an original proceedingbefore this court challenging its actions.

The legislature contends it may be subjected to thejurisdiction of this court only by service of process upon eachof its members. Under art. 2, § 22 of the Kansas Constitution nomember of the legislature may be served with process during thelegislative session. Service of process was made in this caseupon Speaker of the House Mike Hayden and President of the SenateRoss Doyen on or about May 2, 1984, when this case was filed withthe Clerk of the Appellate Courts>. In compliance with art. 2, §22, service of process was also made on June 1, 1984, after thesine die adjournment of the legislature.

The principal object or purpose of service of process is tonotify a defendant of the proceedings against him so that he mayproperly prepare himself to answer the charge or claim; it is themeans by which he is afforded the opportunity to appear beforeand be heard by the court. It is this notice which gives thecourt jurisdiction to proceed. See 62 Am.Jur.2d, Process § 2.

"The constitutional guaranty of due process of law means notice and opportunity to be heard and to defend before a competent tribunal vested with jurisdiction of the subject matter of the cause; it is essential therefore to the exercise of that jurisdiction, where the defendant does not enter a voluntary general appearance or otherwise waive service of process, that process issue giving notice to those whose rights and interests will be affected." 62 Am.Jur.2d, Process § 3.

Service of process upon the presiding officers of the twohouses of the legislature satisfies the purpose of the concept ofprocess and meets the requirements of due process. Thelegislative body, through its presiding officers, is providednotice of the original proceedings against it before this courtand is thereby afforded the opportunity to prepare its defenseand respond to the petitioner's claims. To require the attorneygeneral, in an original action against the legislative branch, toexecute personal service of process upon each member of thelegislature would constitute an unnecessary and onerous burden.The purpose and object of process is accomplished by service uponthe presiding officers and further notice to each of the membersof the legislature would be unnecessarily duplicative.

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The legislature contends the remedies of mandamus and quowarranto are inappropriate in this

matter. The legislature firstcites authorities for the general principle that the authority ofthe legislature to act in its discretionary function is notsubject to interference by the judiciary. This is true whethersuch action by the legislature is in disregard of its clearlyimposed constitutional duty or is the enactment of anunconstitutional law. See, e.g., Alpers v. City and County ofSan Francisco, 32 F. 503, 507 (N.D. Cal. 1887); 16 Am.Jur.2d,Constitutional Law §§ 144, 315, 316. However, as the petitionerpoints out, this action does not seek to preclude the legislaturefrom exercising its discretion to enact an unconstitutional law,but rather seeks to stop the legislature from acting under theauthority of an unconstitutional enactment. The relief requestedtherefore does not require the court to interfere with thelegislature's constitutional power to exercise its legislativefunction, but to preclude the legislature from exercising anexecutive function. The petitioner argues that because thelegislature is the "agency" empowered to act under 77-426, thisaction is no different than an action against an administrativeagency or other law enforcement body seeking to prevent theenforcement of an invalid legislative enactment.

The legislature argues the remedies of mandamus and quowarranto are not proper because the persons who are affected bythe legislature's actions under 77-426 have a plain and adequateremedy of law available to challenge the constitutionality ofthese actions. The attention of the court is directed to theprovisions of K.S.A. 60-1701 et seq., and K.S.A. 77-434. K.S.A.60-1701 authorizes courts> of record in this state to issuedeclaratory judgments in cases of actual controversy. K.S.A.77-434 provides a declaratory judgment action may be brought inthe district court for the purpose of determining the validity,construction or application of administrative rules andregulations. K.S.A. 77-434 (now superseded by the provisionscontained in L. 1984, ch. 338) provides:

"The validity, construction or application of any rule and regulation may be determined by an action for declaratory judgment thereon addressed to the district court of the county in which the plaintiff resides or has a principal place of business, or in the district court of Shawnee county, when it is alleged that the rule and regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal interest, rights, or privileges of the

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plaintiff. The agency shall be made a party to the action. The declaratory judgment may not be rendered until the plaintiff has first requested the agency to pass upon the validity of the rule and regulation in question. The court shall declare the rule and regulation invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without substantial compliance with statutory rule-making procedures."

The legislature argues that under these provisions moreappropriate and effective relief will be granted because the realparties in interest, i.e., those persons actually affected bythe enforcement of the rules and regulations adopted by thelegislature under 77-426, will be before the courts>.

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The Supreme Court is granted original jurisdiction inproceedings in mandamus and quo warranto by art. 3, § 3 of theKansas Constitution. K.S.A. 60-801 defines mandamus as "aproceeding to compel some . . . person to perform a specifiedduty, which duty results from the office, trust, or officialstation of the party to whom the order is directed, or fromoperation of law." It has been held mandamus is an appropriateproceeding designed for the purpose of compelling a publicofficer to perform a clearly defined duty, one imposed by law andnot involving the exercise of discretion. Manhattan Buildings,Inc. v. Hurley, 231 Kan. 20, Syl. ¶ 2. Numerous prior decisionshave recognized mandamus is a proper remedy where the essentialpurpose of the proceeding is to obtain an authoritativeinterpretation of the law for the guidance of public officials intheir administration of the public business, notwithstanding thefact that there also exists an adequate remedy at law.231 Kan. 20, Syl. ¶ 4; Mobil Oil Corporation v. McHenry, 200 Kan. 211,239, 436 P.2d 982 (1968), and cases cited therein. Where apetition for mandamus presents an issue of great publicimportance and concern, the court may exercise its originaljurisdiction in mandamus and settle the question. Berst v.Chipman, 232 Kan. 180, 183, 653 P.2d 107 (1982).

Original actions in quo warranto may be brought in this courtwhen "any person shall usurp, intrude into or unlawfully hold orexercise any public office." K.S.A. 60-1202(1). This court hasrecognized on several occasions that in a proper case an originalaction in quo warranto is an appropriate procedure to questionthe constitutionality of a statute. E.g., State ex rel. Stephanv. Martin, 230 Kan. 747, Syl. ¶ 1, 641 P.2d 1011 (1982).

It is true that K.S.A. 77-434 establishes a procedure by which

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persons whose interests are affected by the threatenedapplication of the rules and regulations enacted under 77-426 maychallenge the constitutionality of the statute and obtain adetermination of the application of such rules and regulations.However, as pointed out by the petitioner, innumerable lawsuitsinvolving the issue here could be avoided if this court will takejurisdiction of this controversy and determine the issue at thistime. The petitioner argues the various agencies and boardsaffected by the changes in these rules and regulations are unsureof the legal effect and enforceability of such rules andregulations, and require the guidance of this court. Also,because numerous people are affected by these rules andregulations it is argued the case presents an important publicquestion which should be determined at this time rather than inpiecemeal litigation before the district courts>. Withoutquestion, if this court declines to exercise jurisdiction in thisaction, it will be faced with the identical issue in a subsequentappeal from an action before the district court.

Relief in the nature of quo warranto and mandamus isdiscretionary. State ex rel. Stephan v. Carlin, 229 Kan. at666. This court may properly entertain this action in quowarranto and mandamus if it decides the issue is of sufficientpublic concern.

The legislature further argues this case does not present acase or controversy because the state has suffered norecognizable injury. It is apparent from the above discussionrelating to the propriety and purpose of actions in quo warrantoand mandamus that this issue is entirely without merit. Thisaction is brought both to obtain an authoritative interpretationof the law for the guidance of public officials in theiradministration of the public business and to question theconstitutionality of the legislature's actions. In addition, anactual controversy is presented where it is alleged by theattorney general, on behalf of the people of this state, that thelegislature has exceeded its power and usurped the authority ofthe executive branch. "The state is a proper party — indeed theproper party — to bring this action. The state is alwaysinterested where the integrity of its constitution or statutes isinvolved." State ex rel. v. Doane, 98 Kan. 435, 440,158 P. 38 (1916). In INS v. Chadha, 462 U.S. 919, 939, 77 L.Ed.2d 317,103 S.Ct. 2764, 2778 (1983), a similar argument was rejectedwhere the constitutionality of a one-house legislative veto waschallenged.

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The legislature's primary thrust in its Motion to Dismissaddresses the common-law immunity of state legislators from suitarising out of the performance of legitimate legislativefunctions, which is embodied in the Speech or Debate Clause inart. 2, § 22 of the Kansas Constitution. Although there have beenno cases decided by the Kansas courts> construing this clause, theUnited States Supreme Court has been called upon in numerouscases to determine the scope and applicability of the federalequivalent contained in art. I, § 6, cl. 1 of the United StatesConstitution.

In Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct.783 (1951), it was recognized that state legislators enjoycommon-law immunity that is similar in origin and rationale tothat accorded congressmen under the federal Speech or DebateClause. Supreme Court of Va. v. Consumers Union, 446 U.S. 719,732, 64 L.Ed.2d 641, 100 S.Ct. 1967 (1980). The Supreme Court hasalso stated in dicta that the state legislative privilege is on aparity with the similar federal privilege under the Speech orDebate Clause. See United States v. Johnson, 383 U.S. 169, 15L.Ed.2d 681, 86 S.Ct. 749 (1966); Supreme Court of Va. v.Consumers Union, 446 U.S. at 733. The decision in Tenneyconcluding that Congress did not intend the enactment of42 U.S.C. § 1983 to abrogate the common-law immunity of legislatorswas based on the similarity between common-law immunity andfederal Speech or Debate Clause immunity. As stated by the courtin Star Distributors, Ltd. v. Marino, 613 F.2d 4, 8 (2nd Cir.1980), "[t]he shared origins and justifications of [statelegislative immunity and immunity under the federal Speech orDebate Clause] would render it inappropriate for us todifferentiate the scope of the two [doctrines] without goodreason." In this state the common-law immunity for statelegislators is embodied in art, 2, § 22 of our state constitutionand no reason presents itself for not according the statelegislature the same immunity which protects our federalCongress.

The doctrine of legislative immunity arising out of the Speechor Debate Clause was summarized by the Supreme Court in SupremeCourt of Va. v. Consumers Union, 446 U.S. at 731-32:

"We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-503 (1975). The purpose of this immunity is to insure that the legislative function may be performed

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independently without fear of outside interference. Ibid. To preserve legislative independence, we have concluded that `legislators engaged "in the sphere of legitimate legislative activity," Tenney v. Brandhove, [344 U.S. 367, 376(1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)."

The court also pointed out that no distinction has been madebetween actions for damages and those for prospective ordeclaratory relief, as here involved, stating: "[W]e have recognized elsewhere that `a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' Eastland v. United States Servicemen's Fund, [421 U.S.] at 503." 446 U.S. at 733.In Supreme Court of Va., a lawsuit seeking declaratory andinjunctive relief was brought against the Virginia Supreme Courtfor the court's refusal to amend portions of the State Bar Codein the wake of federal cases indicating some provisions of theCode would be held invalid if challenged. It was held that inpropounding the State Bar Code the Virginia Court was acting in alegislative capacity and therefore the court and its members wereimmune from suit challenging their refusal to amend thequestionable provisions. However, it was also held the membershad additional authority to enforce the provisions of the codeand to initiate enforcement proceedings against attorneys, andfor that reason the Court and its members were proper defendantsin a suit for declaratory and injunctive relief, just as otherenforcement officers and agencies are. 446 U.S. at 736.

The purpose and function of the Speech or Debate Clause asdescribed in Eastland v. United States Servicemen's Fund,421 U.S. 491, 502-03, 44 L.Ed.2d 324, 95 S.Ct. 1813 (1975), is ofparticular relevance here:.

"The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently. "`The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.' United States v. Brewster, [408 U.S. at] 507 [(1972)]. In our system `the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.' United States v. Johnson, [383 U.S. at] 178 [(1966)].

"The Clause is a product of the English experience. Kilbourn v. Thompson,

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[103 U.S. 168, (1881)]; United States v. Johnson, supra, at 177-179. Due to that heritage our cases make it clear that the `central role' of the Clause is to `prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary, United States v. Johnson, 383 U.S. 169, 181 (1966),' Gravel v. United States, [408 U.S. at] 617 [(1972)]. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it `must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government. . . .' United States v. Brewster, supra, at 508. Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch. [Citations omitted.]" (Emphasis added.)

Finally, it has also been recognized the legislative privilege isto be read broadly to effectuate its purpose. Eastland v. UnitedStates Servicemen's Fund, 421 U.S. at 501; United States v.Johnson, 383 U.S. at 180.

Under the Speech or Debate Clause legislators are absolutelyimmune from the burden of defending lawsuits based upon acts donewithin "the sphere of legitimate legislative activity." InEastland v. United States Servicemen's Fund, 421 U.S. at503-04, the court defined this by stating: "In determining whether particular activities other than literal speech or debate fall within the `legitimate legislative sphere' we look to see whether the activities took place `in a session of the House by one of its members in relation to the business before it.' Kilbourn v. Thompson, 103 U.S., at 204. More specifically, we must determine whether the activities are "`an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.' Gravel v. United States, 408 U.S. at 625."It has been held that the passing of acts and resolutions is thevery essence of the legislative process. Eslinger v. Thomas,476 F.2d 225, 228 (4th Cir. 1973). It logically follows,therefore, the Kansas Legislature is immune from an actionchallenging the constitutionality of both K.S.A. 1983 Supp.77-426(c) and (d).

The petitioner argues the doctrine of Speech or Debate immunityhas no application to the exercise of an executive function bythe legislature. It is emphasized that this action seeks not onlyto challenge the constitutionality of the statute, but also thevalidity of the action taken by the legislature pursuant to thestatute, i.e., the passing of the resolutions purporting toenact, modify or revoke rules and regulations. The petitionerargues

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that the proposition that the Kansas legislature may not be suedby the state in an original action

before this court, in a casewhere the legislature has exercised a power exclusively withinthe authority of the executive branch, threatens theconstitutional system of checks and balances. The petitioner alsoargues this case does not fall under the broad umbrella ofimmunity conferred by the Speech or Debate Clause because it isthe action of the legislature as a body which is being challengedrather than the actions of individual members of the legislature.This distinction is not a valid one. In Supreme Court of Va.,the court held the Clause protected the Virginia Court, as wellas its members, from suit. This further comment by the court inthat case makes it clear where an action is brought against thelegislature as a whole for enacting a law in its officialcapacity, the legislature is immune from suit the same as if thelawsuit was directed against individual legislators: "Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity." 446 U.S. at 733-34. (Emphasis added.)

We come then to the question whether the enactment of thestatute or the passing of the concurrent resolutions does notfall within the sphere of legitimate legislative activity, as thepetitioner contends. In Tenney, the court noted "[l]egislaturesmay not of course acquire power by an unwarranted extension ofprivilege. . . . This court has not hesitated to sustain therights of private individuals when it found Congress was actingoutside its legislative role." 341 U.S. at 376-77. The courtlater stated:

"The courts> should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." 341 U.S. at 378.

The legislature counters this argument by pointing to thefamiliar rule that the constitutionality of a statute ispresumed; that all doubts must be resolved in favor of itsvalidity; and before a statute may be stricken it must clearlyappear that the statute violates the constitution. State ex rel.Stephan v. Martin,

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230 Kan. 759, 760, 641 P.2d 1020 (1982). It is argued, therefore,that the legislature had a right to presume the statute wasconstitutional until such time as a court of competentjurisdiction, in an appropriate case, has declared the law to beunconstitutional.

It is clear that if this case merely challenged theconstitutionality of the statute on the ground that it violatedthe separation of powers doctrine the legislature would have tobe dismissed from the suit on the grounds of absolute legislativeimmunity. However, here the petitioner argues the enactment

ofrules and regulations pursuant to the statute constituteslegislative usurpation of a function exclusively vested in theexecutive. If this is so, this lawsuit would not be barred onthe basis of legislative immunity under the Speech or DebateClause.

We hesitate, however, to establish as precedent at this timethe validity of an action such as this by the attorney general onbehalf of the state directly against the legislature. Cases inthe United States Supreme Court giving sanction to an attack upona legislative enactment exceeding the bounds of legislativepower, where obviously there was a usurpation of functions vestedin the judicial or executive branches of government, were broughtby individuals whose rights were affected by unconstitutionalaction on the part of the legislature. See, e.g., Tenney v.Brandhove, 341 U.S. 367; INS v. Chadha, 462 U.S. 919. Underthese circumstances we sustain the motion of the legislature todismiss the action against it.

The governor, however, was joined as a respondent in this quowarranto and mandamus action. Many state actions on relation ofthe attorney general against the governor of the state have beenrecognized by this court. See, e.g., State ex rel. Stephan v.Carlin, 229 Kan. 665; State ex rel. v. Bennett, 222 Kan. 12;State ex rel. v. Bennett, 219 Kan. 285. Accordingly, we proceedto determine the merits of the action presented. Mandamus is aproper remedy where the essential purpose of the proceeding is toobtain an authoritative interpretation of the law for theguidance of the governor in his administration of the publicbusiness of the state.

It is argued the provisions of K.S.A. 1983 Supp. 77-426, whichallow the legislature to modify, reject, or revoke administrativerules and regulations by concurrent resolution, constitute an

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unlawful usurpation of the executive power to administer andenforce laws, thereby violating the constitutional doctrine ofseparation of powers.

Like the Constitution of the United States, the KansasConstitution contains no express provision establishing thedoctrine of separation of powers. However, it has been recognizedthat the very structure of the three-branch system of governmentgives rise to the doctrine. State v. Greenlee, 228 Kan. 712,715, 620 P.2d 1132 (1980); State ex rel. v. Bennett, 219 Kan.at 287; Leek v. Theis, 217 Kan. 784, 804, 539 P.2d 304 (1975);Van Sickle v. Shanahan, 212 Kan. 426, 440, 511 P.2d 223 (1973).The doctrine of separation of powers is an outstanding feature ofthe American constitutional system. The governments, both stateand federal, are divided into three branches, i.e.,legislative, executive and judicial, each of which is given thepowers and functions appropriate to it. Thus, a dangerousconcentration of power is avoided through the checks and balanceseach branch of government has against the other. Van Sickle v.Shanahan, 212 Kan. at 439-40; State, ex rel. v. Bennett, 219Kan. at 287; State v. Greenlee, 228 Kan. at 715. Generallyspeaking, the legislative power is the power to make, amend, orrepeal laws; the executive power is the power to enforce thelaws; and the

judicial power is the power to interpret and applythe laws in actual controversies. Van Sickle v. Shanahan, 212Kan. at 440.

The fact that the powers of one department may overlap withanother department's powers has long been a recognized fact.Recent cases have taken a pragmatic, flexible and practicalapproach to the doctrine, giving recognition to the fact theremay be a certain degree of blending or admixture of the threepowers of government and that absolute separation of powers isimpossible. State v. Greenlee, 228 Kan. at 715-16; Leek v.Theis, 217 Kan. at 805-06; Manhattan Buildings, Inc. v.Hurley, 231 Kan. at 32. The following general principlesconcerning the separation of powers doctrine were summarized inState v. Greenlee, 228 Kan. at 716: "(1) A statute is presumed to be constitutional. All doubts must be resolved in favor of its validity, and before a statute may be stricken down, it must clearly appear the statute violates the constitution. Leek v. Theis, 217 Kan. 784.

"(2) When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented.

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Leek v. Theis, 217 Kan. at 785; State, ex rel., v. Fadely, 180 Kan. 652, 308 P.2d 537 (1957).

"(3) A usurpation of powers exists when there is a significant interference by one department with operations of another department. State, ex rel, v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976). "(4) In determining whether or not a usurpation of powers exists a court should consider (a) the essential nature of the power being exercised; (b) the degree of control by one department over another; (c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by actual experience over a period of time. State, ex rel., v. Bennett, 219 Kan. 285."See also Manhattan Buildings, Inc. v. Hurley, 231 Kan. at 32.

To determine whether the procedure established under 77-426constitutes a violation of the separation of powers doctrine wemust consider the factors set forth above. First we look to thenature of the power being exercised. It has consistently beenheld in this state that the power to adopt rules and regulationsis essentially executive or administrative in nature, notlegislative. See, e.g., Woods v. Midwest Conveyor Co.,231 Kan. 763, 771, 648 P.2d 234 (1982), and cases cited therein; State exrel. v. Bennett, 219 Kan. at 297-98. This power is delegated tothe executive branch by law. This is not to say the legislaturecannot modify the statute which grants an agency the authority toadopt regulations. Once the legislature has delegated by law afunction to the executive, it may only revoke that authority byproper enactment of another law in accordance with the provisionsof art. 2, § 14 of our state constitution.

Secondly, we must seek to determine the degree of control bythe legislature over the executive

branch. Under the procedureestablished in 77-426 the legislature has total and absolutecontrol to modify, reject or revoke any rules or regulations byconcurrent resolution. There is no provision allowing forpresentment to the executive branch for approval of thelegislature's actions. As such, the executive branch and theagencies involved have no control whatsoever over the actionstaken by the legislature in this regard.

The third and fourth factors require us to look at theobjective sought to be obtained and the practical result. Herethe apparent objective and result actually accomplished is thecontrol by the legislature over the adoption of rules andregulations by administrative agencies and the exclusion ofparticipation by the executive branch in this area.

A consideration of these factors and of all the facts before us

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leads to the conclusion that K.S.A. 1983 Supp. 77-426(c) and(d) is a significant interference by the legislative branchwith the executive branch and constitutes an unconstitutionalusurpation of powers. Several recent federal and state decisionsholding similar legislative oversight mechanisms to beunconstitutional support this conclusion.

In INS v. Chadha, 462 U.S. 919, the Supreme Court struck downas a violation of the doctrine of separation of powers aprovision of the Immigration and Nationality Act allowing eitherhouse of Congress to veto by resolution a suspension ofdeportation granted by the attorney general. The Immigration andNaturalization Service ruled Chadha could remain in the UnitedStates even though he was deportable. The House vetoed thisdecision and the I.N.S. issued a final order of deportation.Chadha petitioned for appellate review. The court held thepassage of a resolution under this Act was essentiallylegislative because it had the purpose and effect of altering thelegal rights, duties and relations of persons, including theattorney general, executive branch officials, and Chadha, alloutside the legislative branch. 103 S.Ct. at 2784. The court madethe following pertinent comments: "The nature of the decision implemented by the one-House veto in this case further manifests its legislative character. After long experience with the clumsy, time consuming private bill procedure. Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation — that is, Congress' decision to deport Chadha — no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 103 S.Ct. at 2786.The court concluded that such legislative action was subject

tothe express procedures contained in art. I, § 7 for legislativeaction: passage by a majority of both houses and presentment tothe President. 103 S.Ct. at 2787.

In Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425 (D.C. Cir.1982), aff'd sub nom. Process Gas Consumers Group, et al. v.Consumer Energy Council of America, et al., 463 U.S. 1216

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(1983), a one-house legislative veto provision of the Natural GasPolicy Act of 1978 was challenged as violating the doctrine ofseparation of powers and the requirement of bicameralism andpresentment contained in art. I, § 7 of the United StatesConstitution. The challenged provision allowed certain rulings ofthe Federal Energy Regulatory Commission to take effect only ifneither house of Congress adopted within 30 days a resolutiondisapproving such rules. The House of Representatives voted itsdisapproval of one of the F.E.R.C.'s rules. The court held theone-house veto violated art. I, § 7 by depriving the President ofhis veto power and violating the requirement of bicameralism bypermitting legislative action by only one house of Congress. Thecourt stated "there is no question that the effect of acongressional veto is to alter the scope of the agency'sdiscretion. In this case, the practical effect probably was towithdraw the discretion altogether." 673 F.2d at 469. The courtheld the veto of the rules effectively changed the law byaltering the scope of the F.E.R.C.'s discretion and preventingone otherwise valid regulation from taking effect. Accordingly,the Senate's concurrence and presentation to the President werenecessary prerequisites to the effectiveness of the disapprovalresolution. 673 F.2d at 465. The court also held the one-houseveto contravened the separation of powers principle because itauthorized the legislature to share powers properly exercised bythe other two branches, stating: "The Supreme Court has held that rulemaking is substantially a function of administering and enforcing the public law. As such, Congress may not create a device enabling it, or one of its houses, to control agency rulemaking. Congress' duty to oversee agency action is connected with its ultimate power of revising the laws under which the agency operates. The creation of further congressional power violates the Constitution." 673 F.2d at 471.The court further explained the problems inherent in theone-house legislative veto device:

"The one-house veto, on the other hand, effectively enables Congress to participate prospectively in the approval or disapproval of . . . law "enacted" by the executive branch pursuant to a delegation of authority by Congress.' In effect, Congress is able to expand its role from one of oversight, with an eye to legislative revision, to one of shared administration. This overall increase in congressional power contravenes the fundamental purpose of the separation of powers doctrine. Congress gains the ability to direct unilaterally, and indeed unicamerally, the exercise of agency discretion in a specific manner considered undesirable or unachievable when the enabling statute was first passed. Not only

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does this expand the congressional power, but it may also expand the total national power. Because

of the veto, the rulemaking agency is given greater power than Congress might otherwise delegate, and Congress normally will let rules take effect unless so clearly undesirable that a veto is deemed warranted." 673 F.2d at 474-75.

The court concluded: "The fundamental problem of the one-house veto, then, is that it represents an attempt by Congress to retain direct control over delegated administrative power. Congress may provide detailed rules of conduct to be administered without discretion by administrative officers, or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. It may not, however, insert one of its houses as an effective administrative decisionmaker." 673 F.2d at 476.This decision was followed in Consumers Union of U.S., Inc. v.F.T.C., 691 F.2d 575 (D.C. Cir. 1982), aff'd sub. nom. UnitedStates Senate v. F.T.C., 463 U.S. 1216 (1983), where a similarlegislative oversight mechanism contained in the provisions ofthe Federal Trade Commission Improvements Act of 1980 was held toviolate the separation of powers doctrine.

In State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980),the Alaska Supreme Court held the legislative enactmentprovisions of the Alaska Constitution were violated by a statuteproviding that the legislature, by concurrent resolution adoptedby both houses, could annul a regulation of an agency ordepartment. The Alaska constitutional enactment provisionsrequire a majority vote of each house of the legislature inaddition to presentment to the governor for the passage of abill, much like the provisions contained in the KansasConstitution. In a similar case, the New Jersey LegislativeOversight Act, which allowed the New Jersey Legislature to vetoby concurrent resolution passed by both houses all rules proposedby state agencies, was held unconstitutional. General Assemblyof State of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438(1982). The New Jersey Supreme Court held the legislative vetoprovision violated both the separation of powers principle andthe presentment requirement of the New Jersey Constitution. 90N.J. at 385-92. Other states have also found similar legislativeoversight mechanisms to be unconstitutional on similar grounds.See Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981);State ex rel. Barker

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v. Manchin, 279 S.E.2d 622 (W. Va. 1981). See also Maloney v.Pac, 183 Conn. 313, 439 A.2d 349 (1981).

We are persuaded by our analysis of the law in this state and areview of the above-discussed decisions that the legislative vetomechanism contained in subsections (c) and (d) of K.S.A. 1983Supp. 77-426 violates not only the separation of powers doctrinebut also the presentment requirement contained in art. 2, § 14 ofour state constitution. As made clear by the court in Chadha, aresolution is essentially legislative where it affects the legalrights, duties and regulations of persons outside the legislativebranch and therefore must comply with the enactment provisions ofthe constitution. 103 S.Ct. at 2784. See also State v.A.L.I.V.E. Voluntary, 606 P.2d at 773-74. Where our legislatureattempts to reject, modify or revoke administrative rules andregulations by concurrent resolution it is enacting

legislationwhich must comply with the provisions of art. 2, § 14. A billdoes not become a law until it has the final consideration of thehouse, senate and governor as required by art. 2, § 14. Harrisv. Shanahan, 192 Kan. 183, Syl. ¶ 1, 387 P.2d 771 (1963). Thiswas not done here.

The fact that K.S.A. 1983 Supp. 77-426 was passed in accordancewith the provisions of art. 2, § 14 of our state constitution andthe governor had the opportunity to veto it does not rendersubsequent acts of the legislature under the statuteconstitutional. The legislature cannot pass an act that allows itto violate the constitution. General Assembly of State of NewJersey v. Byrne, 90 N.J. at 391. As stated by the court inState v. A.L.I.V.E. Voluntary, 606 P.2d at 779: "In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto. It would also do away with the formal safeguards of article II which are meant to accompany law making. The requirements of the constitution may not be eliminated in this fashion."

We agree with the following conclusion stated by the New JerseySupreme Court in General Assembly of State of New Jersey v.Byrne, 90 N.J. at 395-96:

"The Legislative Oversight Act is unconstitutional. It violates the separation of powers by giving the Legislature excessive power to impede the Executive in its constitutional mandate to faithfully execute the law. Further, the Act permits the

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Legislature to effectively amend or repeal existing laws without the participation of the Governor. Foreclosing the Governor from the law-making process offends the separation of powers and the Presentment Clause. This is an exercise of legislative power that the Constitution forbids."

In accordance with the foregoing opinion, the motion of thelegislature for dismissal of the action against it is sustained;sections (c) and (d) of K.S.A. 1983 Supp. 77-426 are adjudgedto be unconstitutional; and the following resolutions adopted bythe legislature during the course of its 1983 and 1984 sessionsare adjudged invalid: House Concurrent Resolution Nos. 5066,5069, 5070 and 5094; Senate Concurrent Resolution Nos. 1612,1648, 1652, 1654, 1655, 1656 and 1657.

The respondent Governor John Carlin is precluded from actingunder the authority of the above invalid resolutions, and isordered to enforce administrative rules and regulations asadopted by executive agencies and as filed with the Revisor ofStatutes and not as modified, rejected or revoked by concurrentresolutions of the legislature.

The various rules applied to determine the future applicationof the law declared in a decision of this

nature were discussedand considered in Vaughn v. Murray, 214 Kan. 456, 465, 521 P.2d 262(1974). We think the rule of retroactive effect which willbest serve the lawyers, litigants, governmental officials,governmental agencies and the courts> of this state is as follows:The law declared herein will be given retroactive effectgoverning the rights of the parties herein, and to other casespending when this decision is filed with the Clerk of theAppellate Courts> and all future cases, but limited so the new lawwill not govern the rights of parties to cases terminated by ajudgment or verdict before this opinion is filed.

HOLMES, J., not participating.