

May 6, 1992

Hon. Pete T. Cenarrusa
Secretary of State
State of Idaho
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Cenarrusa:

You have asked the Attorney General's Office to provide a written opinion pertaining to the powers of the Board of Examiners pursuant to Idaho Code § 67-3512. Specifically, you ask whether the State Board of Examiners has the authority to reduce appropriations as a means of balancing the state budget in the current fiscal year when there is a specific statute in place which would remedy current budgetary problems. The reference is to section 47 of SB 1464 which was enacted by the 1992 Idaho Legislature and which provides an appropriation of \$5.4 million from the "rainy day account" to balance the state's budget.

This question was raised as a result of a presentation by the administrator of the Department of Financial Management ("DFM") to the Board of Examiners ("Board") at the April 22, 1992, meeting. Mr. Charles Moss presented the Board with DFM's revised revenue projection for fiscal year 1992 and recommended a \$1.4 million holdback from the legislative appropriation provided to the executive branch pursuant to Idaho Code § 67-3512. DFM's recommendation to the Board, if adopted, would require an expenditure of only \$2.2 million from the rainy day fund in order to balance the budget in the current fiscal year.

ANALYSIS

An analysis of the question initially requires a review and discussion of the appropriation powers vested in state government. Art. 7, § 13 of the Idaho Constitution, provides:

No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

Although the constitution does not define the term "appropriation," or specify when or how an appropriation shall be made, the Idaho Supreme Court has consistently held that appropriation authority is exclusively vested with the legislative branch of government.

McConnell v. Gallet, 31 Idaho 386 6 P.2d 142 (1931); Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); Herrick v. Gallet, 35 Idaho 13, 204 P. 477 (1922); In re Huston, 23 Idaho 231, 147 P. 1064 (1915); "Appropriation" has been defined by the court as: "1) authority from the Legislature, 2) expressly given, 3) in legal form, 4) to public officers, 5) to pay from public moneys, 6) a specified sum and no more, 7) for a specified purpose, and no other." Leonardson v. Moon, 92 Idaho 796, 804, 451 P.2d 542, 550 (1969).

The doctrine of separation of powers contained in Idaho Constitution, art. 2, § 1, precludes one branch of government from exercising the powers vested with another branch. This gives rise to the question whether reduction of appropriations by the Board of Examiners results in an unconstitutional usurpation of a legislative function.

The constitution provides for the creation of the State Board of Examiners:

The governor, secretary of state, and attorney general shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law: provided, that in the administration of moneys in cooperation with the federal government the legislature may prescribe any method of disbursement required to obtain the benefits of federal laws. And no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board.

Art. 4, § 18, Idaho Constitution (emphasis added). The authors of the constitution provided for the powers of the Board to be expanded by statute. The power to reduce appropriations is provided pursuant to § 67-3512, Idaho Code, which states:

Reduction of appropriations.—Any appropriation made for any department, office or institution of the state may be reduced in amount by the state board of examiners upon investigation and report of the administrator of the division of financial management; provided, that before such reduction is ordered the head of such department, office or institution shall be allowed a hearing before said state board of examiners and may at such hearing present such evidence as he may see fit. No reduction of appropriations made to executive department agencies shall be made without hearing unless and until the head of such department, office or institution shall file his consent in writing thereto. No reduction of appropriations for the elective officers in the executive department shall be made to a level which prohibits the discharge of constitutional duties. No

reduction of appropriations for the legislative and judicial departments shall be made without the permission in writing of the head of such department.

As previously noted, the doctrine of separation of powers contained in the Idaho Constitution, art. 2, § 1, precludes one branch of government from exercising the powers vested with another branch. However, as articulately stated by Justice Oliver Wendell Holmes in Springer v. Phillipine Islands, 277 U.S. 189, 209, 211 (1928):

[G]reat ordinances of the Constitution do not establish and divide fields of black and white . . . however we may disguise it by veiling words, we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into water tight compartments

The powers provided to each branch of government are not neatly compartmentalized and a discussion of separation of powers often delves into grey areas of the law. To aid in the discussion, it is helpful to examine the parallel issues presented at the federal level by presidential impoundment of funds.

In its broadest sense, impoundment occurs whenever the President spends less than the Congress appropriates for a given period. Where the executive branch has been given statutory support for spending less than the appropriation allows, generally no constitutional issue emerges. Where the power provided to the executive to impound or reduce appropriations is provided by a general act—*e.g.*, the Economic Stabilization Act of 1970 or the Anti-Deficiency Act of 1950—the executive should be limited to reductions which do not thwart major policies of Congress. *See Note, Impoundment of Funds*, 86 Harv. L. Rev., 1505 (1973); Fisher, *Funds Impounded by the President; the Constitutional Issue*, 38 Geo. Wash. L. Rev., 124 (1969). An example of thwarting the major policies of Congress would be an attempt on the part of the executive branch to use the power of impoundment to preclude going forward with a program the executive does not support. However, where the impoundment of funds is to effect economies and realize savings in times of economic hardship, and is done pursuant to the authority granted by Congress, the executive branch acts within the scope of its authority.

As presented here, the executive branch, through the Board of Examiners, is empowered to reduce appropriations pursuant to the statutory limitations provided by § 67-3512. This power is tempered by the doctrine of separation of powers which precludes each branch of government from interfering with the powers vested in another branch. Miller v. Meredith, 59 Idaho 385, 83 P.2d 206 (1938). Thus, the Board has authority to act during periods of economic hardship or where, in the opinion of the Board, there is a need to reduce spending. The constitutional soundness of the Board's actions may be called into question only if it selectively reduces appropriations for

programs with which the Board does not agree or attempts to use its power to stymie the programs or policies of the legislature.

The action questioned here is the \$1.4 million or .3% holdback on executive budgets accepted by the Board pursuant to the report and recommendation of the administrator of DFM at the April 27, 1992, meeting. It is clear the Board has the power to reduce appropriations in light of the limitations previously discussed and pursuant to the limitations provided in § 67-3512. Neither statutory nor constitutional limitations prevent the Board from acting in situations where the legislature has provided its own budgetary solutions. Therefore, subject to the limitations previously discussed, the Board has broad discretion to exercise its power to reduce appropriations where, upon report of the administrator of the Division of Financial Management, the Board deems such action necessary.

CONCLUSION

Pursuant to Idaho Code § 67-3512, the State Board of Examiners has the authority to reduce appropriations made by the legislature to the executive branch of government. The statute provides the Board of Examiners with broad discretion to exercise its authority to reduce appropriations. This discretion is limited to the extent that reductions may not thwart the programs and policies of the legislature nor prevent constitutional officers from exercising their constitutional duties. However, the Board is not limited to budget remedies provided by the legislature.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division