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## The Constitutionality of an Executive Spending Plan

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### Recommended Citation

Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L.J. 149 (2003-2004).

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## The Constitutionality of an Executive Spending Plan

### Notes/Citation Information

Kentucky Law Journal, Vol. 92, No. 1 (2003-2004), pp. 149-216

# The Constitutionality of an Executive Spending Plan

BY PAUL E. SALAMANCA\*

## INTRODUCTION

Operation of government in the absence of appropriations has become relatively common in the United States, particularly when projected expenses exceed projected revenue, making adoption of a budget a difficult task for the legislature.<sup>1</sup> As of July 1, 2003, at least three states were operating largely without legislative appropriations,<sup>2</sup> and in one of

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\* James & Mary Lassiter Associate Professor of Law, University of Kentucky College of Law. I am indebted to several individuals who helped me put this Article together, including Richard Ausness, Michael Cox, Dan Kelly, Harland Hatter, Chris Lilly, Craig Maffet, and Douglas L. McSwain. In August 2002, I was admitted pro hac vice to represent David L. Williams, President of the Senate, in litigation over the constitutionality of the Governor's spending plan, and I remain on staff as a consultant to Senator Williams. The views expressed herein are my own, however, and not necessarily those of Senator Williams.

<sup>1</sup> The constitutions of most states require the legislature to enact a balanced budget. For this reason, and because of the dependence of most states' revenue upon the condition of the economy, states have particular difficulty enacting budgets in periods of economic distress. *See generally* Henry S. Wulf, *Trends in State Government Finances*, in COUNCIL OF STATE GOVERNMENTS, 34 THE BOOK OF THE STATES 273 (2002) ("When the economy sneezes, the states catch cold."). Although the federal government can operate at a deficit without violating any constitutional proscription, other difficulties can prevent the timely enactment of appropriations at the federal level. *See* Alan L. Feld, *Shutting Down the Government*, 69 B.U. L. REV. 971, 976 (1989) (noting that legislation designed to enhance fiscal planning at the federal level inadvertently impeded the appropriations process); Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party in Government*, 100 COLUM. L. REV. 702, 727 (2000) ("[T]he structure of congressional budgeting leads almost inevitably to stalemate. Stalemate is not an acceptable long-term outcome because appropriations bills must be passed to keep the government running. . . .").

<sup>2</sup> *See* Laura Mansnerus, *Trenton Reaches a Tentative Deal on State Budget*, N.Y. TIMES, July 1, 2003, at A1 (indicating that California, Connecticut, and Nevada had failed to adopt budgets for the fiscal year beginning July 1, 2003).

these states, California, the prospect of quick adoption of a budget seemed exceedingly small.<sup>3</sup> The high stakes of these situations justify careful attention to the issues involved. Politicians do not want to ignore the needs of people who depend on government, nor do they want to appear callous.<sup>4</sup> On the other hand, they want to defend the prerogatives of office and pursue their conceptions of good public policy in the critical context of

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<sup>3</sup> See Jeffrey L. Rabin & Evan Halper, *Amid Dire Warnings, State Again Misses Budget Deadline*, L.A. TIMES, July 1, 2003, at 1. California was experiencing a severe shortfall in revenue that required either an increase in taxes or other sources of revenue, significant cuts in spending, or a combination of both. See *id.* Governor Gray Davis eventually signed a budget for the state on August 2, 2003, that involved a combination of borrowing, cuts, and increases in fees. See Pui-Wing Tam & Aaron Lucchetti, *California Gets \$99.1 Billion Budget*, WALL ST. J., Aug. 4, 2003, at A6.

In Nevada, another extraordinary situation was developing as that state entered the new fiscal year without comprehensive appropriations. On July 10, 2003, the Supreme Court of Nevada granted a writ of mandamus against the state's legislature, obligating that body to enact a balanced budget, to appropriate certain funds for the state's educational system, and to disregard the state's constitutional requirement of a two-thirds vote for an increase in taxes. See *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003). On July 21, the state adopted a comprehensive budget, and on July 22 its Governor signed into law a bill that increased various taxes. See Rochelle Williams, *News In Brief: Nevada Governor Signs Tax Increase*, BOND BUYER, July 23, 2003, at 2. Interestingly, the vote to raise various taxes passed by a margin of more than two-to-one in the legislature. See Ed Vogel, *Divisive tax ruling argued*, LAS VEGAS REV.-J., July 26, 2003, at 1B.

Assembly Minority Leader Lynn Hettrick said Friday he would not be surprised if the state Supreme Court reversed its controversial decision to allow the state tax bill to pass by a simple majority. He made the statement on the same day that Attorney General Brian Sandoval filed a brief in the case, saying a high court rehearing sought by Republican lawmakers is unnecessary because the Legislature successfully passed its tax and spending bill by the constitutionally required two-thirds vote.

*Id.*

<sup>4</sup> Indeed, the political stakes in a budgetary standoff can be prodigious. See generally Garrett, *supra* note 1, at 707 (discussing the consequences of impasse at the federal level) ("Unresolved budgetary train wrecks are intolerable; indeed, the budget is the only legislative matter that must be completed each fiscal year."); GEORGE STEPHANOPOULOS, ALL TOO HUMAN 403-04 (1999) (discussing the impasse reached by Congress and President Clinton in late 1995); DICK MORRIS, BEHIND THE OVAL OFFICE: GETTING REELECTED AGAINST ALL ODDS 183-89 (1990) (same); *id.* at 183 (quoting a note from Morris to the President) ("Our commitment to a balanced budget is getting lost in the partisan confrontation over who is to blame for the shutdown.").

appropriations. Finally, the polity as a whole has a strong interest in preserving lines of authority and separation of power.<sup>5</sup>

From July 1, 2002, until March 26, 2003, a period of almost nine months, Kentucky's executive branch went about its business largely without appropriations by the General Assembly. Instead, money was disbursed from the treasury according to an executive spending plan authorized by Governor Paul E. Patton in late June 2002.<sup>6</sup> Litigation ensued as to the constitutionality of these disbursements, particularly in light of Section 230 of the Kentucky Constitution, which provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law,"<sup>7</sup> as well as Kentucky Revised Statutes ("K.R.S.") section 41.110, which implements Section 230.<sup>8</sup> In the end, the question of the spending plan's constitutionality was not resolved by the courts because the legislature's enactment of a budget for the executive branch in March 2003 led to the dismissal of the action as moot.

The issues presented by the Governor's spending plan go to the heart of constitutional theory and practical politics. If the chief executive enjoys a general power to disburse money from the treasury without legislative authority, one of the central tenets of separation of powers is undermined. Careful attention to the events surrounding the Governor's plan and its legal ramifications is therefore justified.

This Article proceeds in seven parts. In Part I, this Article recapitulates the history of the spending plan, including the action filed in Franklin

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<sup>5</sup> See generally Feld, *supra* note 1, at 971-72 (discussing the tensions inherent in resolving gaps in appropriations).

<sup>6</sup> The judiciary, known in Kentucky as the "Court of Justice," also operated during this approximate period under a "judicial spending plan" adopted pursuant to an executive order of the Chief Justice, Joseph E. Lambert. See *infra* note 27 and accompanying text. In the abstract, the issues presented by a judicial spending plan are the same as those presented by an executive spending plan.

<sup>7</sup> KY. CONST. § 230. As it turns out, the litigation was not initiated by parties opposing the plan, but instead by the Commonwealth's Treasurer, who was anxious about releasing money from the treasury without appropriations. See *infra* note 28 and accompanying text.

<sup>8</sup> KY. REV. STAT. ANN. [hereinafter K.R.S.] § 41.110 (Michie 1997). This statute provides as follows:

No public money shall be withdrawn from the Treasury for any purpose other than that for which its withdrawal is proposed, nor unless it has been appropriated by the General Assembly or is a part of a revolving fund, and has been allotted as provided in KRS 48.010 to 48.800 [portions of the chapter on the budget], and then only on the warrant of the Finance and Administration Cabinet.

*Id.*

Circuit Court to affirm its constitutionality.<sup>9</sup> In Part II, this Article discusses certain theoretical, historical, and legal principles that inform analysis of the plan.<sup>10</sup> In Part III, it considers certain deviations and possible deviations from the general rule that the legislature controls disbursements of public funds.<sup>11</sup> In Part IV, this Article discusses certain learned opinion from jurisdictions outside the Commonwealth of Kentucky that bears on the expenditure of public funds without appropriations.<sup>12</sup> In Part V, it considers the issue of standing, which could inhibit judicial review of an executive spending plan.<sup>13</sup> In Part VI, it discusses the issue of justiciability, which could likewise inhibit judicial review of such a plan.<sup>14</sup> Finally, in Part VII, this Article evaluates some options and identifies two that the public officials of Kentucky should consider.<sup>15</sup> Under the first option, the General Assembly would enact legislation authorizing disbursements from the treasury in the event of a budgetary impasse solely for essential public services, which the legislature would define with some specificity. Under the second option, the Attorney General of Kentucky would issue a formal opinion confirming that the power of the purse lies in the legislature and describing the limited exceptions to this rule that have been recognized by the courts and by officials considering analogous issues in other jurisdictions. Only by pursuing one of these two options, or an option of a similar nature, can separation of powers be adequately respected.

## I. BACKGROUND

Gaps in appropriations, such as the one experienced by Kentucky's executive and judicial branches in 2002-2003, arise at the intersection of law and politics, and attract significant attention from both the public and political leaders. As a consequence, courts called upon to intervene in such matters may prefer to exercise whatever discretion is available to them to avoid making a decision that would preclude political resolution of the situation. This will tend to obscure fine distinctions between legal and political matters, justifying a wider focus in the review of facts.

On Tuesday, April 15, 2002, the General Assembly adjourned from its regular session without having adopted a budget for the executive or

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<sup>9</sup> See *infra* notes 16-41 and accompanying text.

<sup>10</sup> See *infra* notes 42-71 and accompanying text.

<sup>11</sup> See *infra* notes 72-143 and accompanying text.

<sup>12</sup> See *infra* notes 144-200 and accompanying text.

<sup>13</sup> See *infra* notes 201-62 and accompanying text.

<sup>14</sup> See *infra* notes 263-85 and accompanying text.

<sup>15</sup> See *infra* notes 286-96 and accompanying text.

judicial branches of government for the fiscal biennium commencing July 1 of that year.<sup>16</sup> In particular, the two chambers of the legislature, the House of Representatives and the Senate, were not able to agree on whether to fund so-called “partial public financing” (“PPF”) of gubernatorial elections in the state.<sup>17</sup> The House insisted on providing this funding, but the Senate refused to concur. Few, if any, other issues seriously divided the two chambers.<sup>18</sup>

Two days later, the Governor called the legislature back into extraordinary session to adopt comprehensive budgets for the executive and judicial branches.<sup>19</sup> Although some hope for a compromise over PPF emerged during the extraordinary session,<sup>20</sup> disagreement over fundamental issues persisted.<sup>21</sup>

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<sup>16</sup> See Tom Loftus, *2002 Kentucky General Assembly; Special Session to Start Monday; Patton Calls on Lawmakers to Deal with Budget, Tax Issues*, COURIER-J. (Louisville, Ky.), Apr. 18, 2002, at B1. The General Assembly had previously enacted a budget for the legislative branch for this period. See 2002 Ky. Acts ch. 172 (signed by the Governor on April 2, 2002).

<sup>17</sup> For a description of “PPF,” see Jennifer Moore, Note, *Campaign Finance Reform in Kentucky*, 85 KY. L.J. 723 (1997). After the publication of Ms. Moore’s article, the Sixth Circuit upheld the most salient features of PPF against constitutional challenge. See *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), cert. denied, 525 U.S. 1177 (1999). The merits of PPF are not pertinent to this Article.

<sup>18</sup> See Al Cross, *2002 Kentucky General Assembly; Future of Public Financing of Governor’s Race Hinges on Special Session*, COURIER-J. (Louisville, Ky.), Apr. 21, 2002, at A1 (describing the future of PPF as “the key dispute as lawmakers reconvene tomorrow for a special session to resolve the impasse over a state budget”); Tom Loftus, *2002 Kentucky General Assembly; THE BUDGET; Campaign Financing Aside, House and Senate Aren’t Far Apart*, COURIER-J. (Louisville, Ky.), Apr. 21, 2002, at A8.

<sup>19</sup> See Paul E. Patton, Proclamation (issued Apr. 17, 2002). The Governor’s power to call the legislature into extraordinary session is conferred in Section 80 of the constitution.

<sup>20</sup> See Joseph Gerth, *Deadlock on Budget Might Be Easing; House Speaker Signals Willingness to Talk on Campaign Finance*, COURIER-J. (Louisville, Ky.), Apr. 24, 2002, at A1 (“House Speaker Jody Richards yesterday signaled a willingness by Democrats to talk with Senate Republicans about how much public financing should go into next year’s gubernatorial campaigns.”).

<sup>21</sup> See Joseph Gerth, *Kentucky House OKs Budget; Democrats’ Motion Blocks*, COURIER-J. (Louisville, Ky.), Apr. 26, 2002, at A1.

House Democrats slammed the door yesterday on budget amendments as the House voted to pass the same \$35 billion budget bill proposed by Gov. Paul Patton on Monday . . . .

. . . .

On May 1, 2002, the General Assembly adjourned from this session, again without having adopted the remaining budgets.<sup>22</sup>

Meanwhile, on April 25, the Attorney General delivered a letter to the Governor's Counsel indicating that the Governor had both the power and the duty under the Constitution to "take whatever action he deems necessary" to carry out his constitutional duties, including ordering funds to be drawn from the treasury in the absence of appropriations.<sup>23</sup>

In accordance with this letter, the Governor issued an executive order on June 26, 2002, in which he asserted a power to promulgate a comprehensive executive spending plan in the absence of appropriations by the legislature.<sup>24</sup> In paragraph six thereof, the Governor declared:

[T]he Secretary of the Finance and Administration Cabinet is hereby authorized to issue warrants for the payment of all claims as may be made by the Executive Branch of government in accordance with the Executive Spending Plan outlined in the order of the [Secretary] issued concurrently herewith, and to assist the Court of Justice as may be necessary to implement lawful expenditures for its operation.<sup>25</sup>

On the same day, the Secretary issued an order implementing the Governor's spending plan.<sup>26</sup> The next day, June 27, the Chief Justice promulgated

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The move enraged Republicans, who charged that Democrats were making a mockery of the budget process to avoid voting on important and sensitive amendments—particularly some that would have diverted \$9 million in public financing of the 2003 campaigns for governor to other state programs.

*Id.*

<sup>22</sup> Al Cross et al., *2002 Kentucky General Assembly; Lawmakers Fail to Pass State Budget; Special Session Adjourns Without Resolving Campaign Finance Dispute*, COURIER-J. (Louisville, Ky.), May 2, 2002, at A1 ("The special legislative session to pass a \$35 billion state budget adjourned last night after failing to reach agreement on spending limits and partial public financing of campaigns for governor.").

<sup>23</sup> See Letter from Albert B. Chandler III & Ryan M. Halloran, to Denis Fleming (Apr. 25, 2002) (on file with author) ("The rule that no money may be drawn from the state treasury without an appropriation does not hold in the face of other legal mandates which provide for the needs of the public.").

<sup>24</sup> See Exec. Order No. 2002-727 para. 6, at 4.

<sup>25</sup> *Id.*

<sup>26</sup> See Commonwealth of Kentucky, Finance and Administration Cabinet, Office of the Secretary, An Order Directing the Implementation of the Executive



an executive order implementing a spending plan to cover the expenses of the judiciary from July 1 forward.<sup>27</sup>

June 26 also saw the beginning of litigation over the issues presented by the plan. On that day the Treasurer brought suit against the Secretary in Franklin Circuit Court, seeking an order declaring that the plan comported in all respects with the Kentucky Constitution, and permitting the Treasurer to draw funds from the treasury pursuant to the plan without liability.<sup>28</sup> Within a short period of time, several parties successfully moved to intervene in this matter, including David L. Williams, President of the Senate, the Kentucky Retirement Systems Board of Trustees ("Kentucky Retirement"), and Cicely Jaracz Lambert, Executive Director of the Administrative Office of the Courts ("AOC").

The Treasurer moved for summary judgment on August 22. Although the scheduling order pursuant to which the Treasurer filed this motion called for a relatively quick response from certain of the intervening parties (Senator Williams and Kentucky Retirement), this aspect of the order was suspended in late August after Senator Williams brought a motion for temporary injunctive relief.<sup>29</sup> This motion was taken under advisement and discovery ensued. In accordance with a new scheduling order, Kentucky Retirement and Senator Williams responded to the Treasurer's motion for summary judgment and filed their own motions on February 6 and 7, 2003, respectively; the Secretary filed his own dispositive and responsive papers

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Spending Plan Authorized and Approved by Executive Order 2002-727 para. 2 (2002).

<sup>27</sup> Cf. Tom Loftus, *Judicial Spending Questioned; Chief Justice to Use Budget That Didn't Pass*, COURIER-J. (Louisville, Ky.), June 23, 2002, at B1 ("In a budget decision mirroring Gov. Paul Patton's spending plan, Chief Justice Joseph Lambert says he will run the state court system beginning July 1 based on a budget that the General Assembly never passed.").

<sup>28</sup> See Complaint for Declaratory Relief para. 3, at 8, Ky. Dep't of the Treasury *ex rel.* Miller v. Ky. Fin. and Admin. Cabinet (Franklin Cir. Ct., filed June 26, 2003) (Civil No. 02-CI-00855) [hereinafter "*Spending Plan Litigation*"].

<sup>29</sup> Senator Williams sought to prevent the expenditure of proceeds from the coal severance tax in contravention of statute. See Notice—Motion to Amend Answer paras. 7-14, at 6-7, *Spending Plan Litigation*, *supra* note 28. Under the executive spending plan, certain funds from this source were expended in a manner not consistent with statute. Senator Williams based his argument upon Section 15 of the constitution, which vests exclusive power to suspend statutes in the legislature. See KY. CONST. § 15 ("No power to suspend laws shall be exercised unless by the General Assembly or by its authority.").

on February 24; and Senator Williams and Kentucky Retirement filed final papers on March 10.<sup>30</sup>

Meanwhile, progress had taken place, and was continuing to take place, in the political arena. Shortly after the general election in November 2002, Lieutenant Governor Steve Henry, at that time a possible candidate for governor in 2003, announced that because of the Commonwealth's pending fiscal difficulties he would not participate in PPF even if the program were funded.<sup>31</sup> Other political leaders were reaching the same conclusion, and

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<sup>30</sup> Senator Williams argued that comprehensive disbursements from the treasury without legislative approval violated separation of powers. See Memorandum in Opposition to Plaintiff Department of the Treasury's Motion for Summary Judgment and in Support of Defendant David L. Williams's Motion for Summary Judgment at 31-32, *Spending Plan Litigation*, *supra* note 28. Senator Williams asked the court either to require the Treasurer and Secretary to adhere to the constitution or to pursue the appointment of a commissioner to supervise the disbursement of funds until the legislature acted. See *id.* at 32.

Kentucky Retirement argued that the Governor lacked authority under the constitution to suspend K.R.S. § 61.565, which requires the Commonwealth to contribute to the state's retirement plan at a rate identified as actuarially sound by Kentucky Retirement. See Memorandum of Kentucky Retirement Systems Board of Trustees in Support of the Motion for Summary Judgment on its Cross-Claim at 1-2, *Spending Plan Litigation*, *supra* note 28.

The Secretary defended the spending plan as a "reasonable and constitutional basis for avoiding a government shutdown" before the General Assembly enacted a budget. Response of the Finance and Administration Cabinet to the Motions for Summary Judgment on Behalf of David L. Williams and Kentucky Retirement Systems and Memorandum in Support of the Cabinet's Motion for Summary Judgment at 3, *Spending Plan Litigation*, *supra* note 28. Specifically, the Secretary argued that Sections 69 and 81 of the constitution empower the Governor to adopt a comprehensive spending plan absent a budget enacted by the legislature. See *id.* at 31. See *infra* notes 131-43 and accompanying text for a discussion of the scope of executive power under these sections of the constitution. The Secretary asked the court to validate the spending plan in its entirety, subject only to the requirement that it not be arbitrary and capricious. See *id.* at 30-31. See *infra* note 285 for a discussion of the applicability of this standard to the spending plan.

On February 24, 2003, Cicely Jaracz Lambert, Executive Director of the AOC, filed a Response to the Treasurer's Motion for Summary Judgment, *Spending Plan Litigation*, *supra* note 28. In a Judgment tendered with this response, the AOC asked the court to grant the Treasurer's motion for summary judgment and to uphold the judicial spending plan adopted by Chief Justice Lambert. See *id.* at 1-2.

<sup>31</sup> See Mark B. Chellgren, *Death Knell is Sounded on Public Financing*, COURIER-J. (Louisville, Ky.), Nov. 11, 2002, at B8.

the issue that had vexed the legislature to the point of impasse evaporated without fanfare.<sup>32</sup>

On January 7, 2003, the General Assembly went back into regular session in its first meeting since the Constitution had been amended to permit short odd-year sessions.<sup>33</sup> Legislators recognized the importance of enacting a budget and dedicated most of their attention to that subject.<sup>34</sup> Although PPF was no longer a divisive issue, the Commonwealth was expecting a shortfall in revenue,<sup>35</sup> and disagreement over the raising of taxes or the cutting of spending seemed likely.<sup>36</sup> In the end, however, legislators were able to resolve fundamental issues regarding taxing and

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<sup>32</sup> *See id.*

<sup>33</sup> *See* KY. CONST. § 36(1). The amendment was proposed by 2000 Ky. Acts ch. 407 and ratified by the voters in the regular election of November 2000. Odd-year sessions last only thirty days. *See* KY. CONST. § 36(1).

<sup>34</sup> Al Cross, *GOP Scores Political Points in Lengthy Budget Process*, COURIER-J. (Louisville, Ky.), Mar. 9, 2003, at A12.

During a break in budget talks, House Speaker Jody Richards was asked what major legislation—other than the budget—would pass the soon-to-end 2003 General Assembly.

He couldn't think of any, illustrating how intent lawmakers were on avoiding another political deadlock like the one that prevented passage of a budget last year.

*Id.*

<sup>35</sup> On November 20, 2002, the Consensus Forecasting Group ("CFG") predicted a total diminution in revenues for the General Fund of \$199.8 million for the fiscal year beginning July 1, 2002 (FY '03), and of \$203.1 million for the fiscal year beginning July 1, 2003 (FY '04). *See* Letter from T. Kevin Flanery, Secretary of the Finance and Administration Cabinet, to Crit Luallen, Secretary of the Governor's Executive Cabinet, et al. 1 (Nov. 20, 2002). On January 29, 2003, the CFG revised its estimate somewhat, reducing the expected diminution by \$94.3 million for FY '03, and by \$4.9 million for FY '04; *see* Letter from Gordon C. Duke, Secretary of the Finance and Administration Cabinet, to Mary E. Lassiter, State Budget Director, et al. 1 (Jan. 29, 2003); *see also* Tom Loftus, *State Trims Estimate of Budget Shortfall; Severe Problems Still Expected in Next Fiscal Year*, COURIER-J. (Louisville, Ky.), Jan. 22, 2003, at A1.

<sup>36</sup> *See* Tom Loftus, *2003 Kentucky General Assembly: The Budget Shortfall: Patton, Lawmakers at Odds on Remedy; Governor Wants Tax Increases; Legislature Favors Spending Cuts*, COURIER-J. (Louisville, Ky.), Feb. 2, 2003, at X3 ("Interviews with [Senate President David] Williams and other key lawmakers show the Democratic governor, the Democrat-controlled House and Republican-controlled Senate remain far apart in reaching a consensus on the crisis. And some fear there may be no agreement before this year's short session ends March 25.").

spending.<sup>37</sup> On March 7, 2003, the judicial branch's budget for the fiscal biennium commencing July 1, 2002, became law,<sup>38</sup> and on March 26, 2003, the executive branch's budget for the same period became law.<sup>39</sup> In addition, on March 31, the Governor signed Senate Bill 48, which appropriated funds to cover any spending under the executive and judicial spending plans that was not incorporated into the enacted budgets for the executive and judicial branches.<sup>40</sup> These three items arguably eliminated any outstanding legal issues in the Treasurer's suit against the Secretary. On April 28, 2003, Judge Graham dismissed the case as moot.<sup>41</sup>

With the adoption of budgets for the executive and judicial branches of government, and the dismissal of the Treasurer's lawsuit as moot, a serious constitutional and political dispute simply came to an end. But comprehensive disbursements from the treasury without legislative authorization constitute extraordinary and dubious exercises of executive power. As I hope to demonstrate in the following part, had the Treasurer's suit against the Secretary been resolved on the merits, judgment ideally would have entailed a substantial limitation on the power of the executive to expend money from the treasury without legislative approval.

## II. SEPARATION OF POWER AND THE POWER OF THE PURSE

### A. *Theory and History*

Separation of power is so familiar to us that it is easy to overlook its theoretical basis. First and foremost, we separate power so that no one branch of government can become too powerful and too much at liberty to act in its own self-interest. Second, we separate power to enhance the performance of elected officials, believing that deliberation and consideration of competing points of view will, on the whole, produce more pleasing results than centralized decision-making. Indeed, separation of power is arguably the average citizen's best protection against poorly

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<sup>37</sup> See Tom Loftus, *State Budget Passes; Leaders Hail Spending Plan Without Tax Increase*, COURIER-J. (Louisville, Ky.), Mar. 11, 2003, at B1.

<sup>38</sup> See 2003 Ky. Acts ch. 14 (signed by the Governor on March 7, 2003).

<sup>39</sup> See *id.* ch. 156 (delivered to the Secretary of State on March 26, 2003, after override of certain line-item vetoes).

<sup>40</sup> See 2003 Ky. Acts ch. 182.

<sup>41</sup> See Order of Dismissal, Ky. Dep't of the Treasury *ex rel.* Miller v. Ky. Fin. and Admin. Cabinet (Franklin Cir. Ct. Apr. 28, 2003) (Civil No. 02-CI-00855). Gordon Duke succeeded T. Kevin Flanery as Secretary of the Finance and Administration Cabinet.

conceived or self-serving policy. After keeping track of job and family, the average citizen has relatively little time to investigate how government conducts its business, and often may not get to the bottom of what the government is doing anyway, even with a fair amount of attention.<sup>42</sup> Arguably, such a person's best security against arbitrary government lies in pitting the various branches of the government against each other and letting each branch act as a check on every other. As James Madison wrote in support of the federal Constitution over two hundred years ago:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>43</sup>

The "auxiliary precautions" to which Madison was referring are the structural devices in a constitution that divide areas of authority. Thus, the branch of the federal government that provides for an army and navy is not the branch that commands it in the field.<sup>44</sup> Similarly, the branch that defines crimes is not the branch that prosecutes them.<sup>45</sup> As the old saw tells us, if two people are to split a pie, the simplest way to ensure a fair division is to have one person cut the pie and the other choose which half to eat.

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<sup>42</sup> See generally Thomas G. West, *The Constitutionalism of the Founders versus Modern Liberalism*, 6 NEXUS 75, 94 (2001) ("I have hardly ever met an ordinary citizen who understands how federal policies are made today."); Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 751 (1997) ("The writings of cognitive psychologists reenforce the theoretical underpinnings of the conclusion that the average voter often poorly comprehends the public policies affecting him.").

<sup>43</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>44</sup> Compare U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies."), and *id.* cl. 13 ("The Congress shall have Power . . . To provide and maintain a Navy."), with *id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

<sup>45</sup> Compare *id.* art. I, § 8, cl. 6 ("The Congress shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."), and *id.* cl. 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."), with *id.* art. II, § 3 (The President "shall take Care that the Laws be faithfully executed.").

In the scheme of separated power, the legislature sets basic policy,<sup>46</sup> and the executive carries it into effect. The legislature decides what the government's priorities will be; it determines how much money is to be raised from the private sector for public purposes; and it sets the general duties, rights, privileges, and immunities of the population that do not arise directly from a constitution.

As an allocation of power, the foregoing makes sense. Unlike the judiciary, the legislature is not constrained to adhere to precedent or text (other than constitutional limitations on its authority); it may take into account public sentiment and ideological principles that a court may consider ephemeral, or in any case a matter of subjective choice. And, unlike the executive branch, the legislature is uniquely suited for the mooting of important public issues. More than any other branch of government, the legislature is deemed to reconstitute and speak for the polity.<sup>47</sup> In Kentucky, for example, the General Assembly has 138 members, from 138 distinct geographic districts, sitting in two distinct chambers.<sup>48</sup> No member reports to any other, and each member has a direct, inalienable role in the process of deliberation and voting. In effect, the legislature replicates the separation of powers within its ranks.

Perhaps the most significant exclusive power that lies in the legislature is the so-called "power of the purse"—the exclusive power to levy taxes against the populace and to order disbursement of funds from the treasury. This power has a long historical pedigree. Indeed, one of the rallying cries behind the American Revolution was "no taxation without representation," articulating the colonists' opposition to being taxed by Great Britain with-

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<sup>46</sup> See generally *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992).

The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.

*Id.*

<sup>47</sup> See generally *Taylor v. Beckham*, 56 S.W. 177, 179 (Ky. 1900).

The legislative branch of the government more nearly represents the people than any other branch, and it is charged by the constitution and laws of this state with many important interests directly affecting the people, to secure which their independence of the executive is absolutely necessary.

*Id.* In this case, the Governor attempted to adjourn the General Assembly without constitutional authority. The Court held this attempt invalid. See *id.*

<sup>48</sup> See KY. CONST. §§ 29, 33, 35.

out having an effective voice in Parliament.<sup>49</sup> But the precedent that the government needs the consent of the legislature to exact money from the population,<sup>50</sup> or to spend it in any particular way,<sup>51</sup> is much older than the American Revolution, and in fact represents the culmination of centuries of struggle between the Crown and Parliament. As one commentator has summarized the matter:

The evolution of British representative democracy and the power of the purse are inextricably intertwined. English monarchs traditionally used Parliament as a means of raising revenues, usually to finance their military adventures. Over the centuries, British Parliaments began to use this revenue-raising authority to exact legislative concessions from the Crown, threatening to withhold funds if their demands were not met. Parliamentary insistence on a voice in governing the nation inevitably lead to struggle with the monarchy, which was not eager to surrender its royal prerogatives. The struggle came to a head during the reign of the Stuart kings in the 17th century. By the end of the century, the nation had suffered a protracted civil war, one king had lost his head, another had been deposed in a bloodless coup, and the supremacy of Parliament had been established. By the time of the American Revolution, Parliament's dominance over the British public fisc was complete.<sup>52</sup>

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<sup>49</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 177 (1969) ("The Americans' objection to parliamentary taxation was 'not because we have no vote in electing members of Parliament, but because we are not, and from our local situation never can be, *represented* there.' " (quoting a tract from the eighteenth century)).

<sup>50</sup> See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 239-40 (1988) (describing the theory according to which the Crown would request funds from Parliament, and Parliament was empowered to levy taxes against the populace); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 28-44 (1998) (summarizing the development of Parliament's power of the purse).

<sup>51</sup> See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1353 n.48 (1988) ("That appropriations may be spent only on the objects for which they are appropriated is a fundamental underpinning of our democratic order. There were early impeachments of officials in England for misapplication of appropriated funds.").

<sup>52</sup> Rosen, *supra* note 50, at 28-29. Legislative control over taxation also played a crucial role in the French Revolution. A fiscal crisis compelled Louis XVI of France to convene the Estates-General to approve new taxes, and disputes about

In addition to having a long historical pedigree, the principle of exclusive legislative control over taxation and appropriations occupies a central position in the scheme of separated powers.<sup>53</sup> Very little that government does can be effected without cost, vesting substantial authority in the branch of government that ultimately controls spending. Although the increasing complexity of the modern world has tended to enhance the authority of the executive, the legislature's retained power to control the purse strings leaves it with a certain irreducible ability to make public policy.<sup>54</sup> Without this retained power, firmly established in both text and precedent, the role of the legislature would be seriously compromised.<sup>55</sup>

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the role of the bourgeoisie in that body set in motion a series of events that indirectly culminated in the storming of the Bastille. *See* SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 289 (1989) ("[A] government instituted by the Estates-General would be a more dependable debtor. Broader consensus would remove the obstacles to new sources of revenue, and those in turn would be a firmer security for more loans."); *id.* at 290 ("This, then, was the vision of a constitutional reformation in which the grandes of France would have the senior role. . . . What they got instead was a revolution.").

<sup>53</sup> *See* 4 Op. Off. Legal Counsel 16, 19-20 (1980) (describing the goal that "Congress will determine for what purposes the government's money is to be spent and how much for each purpose" as "elementary to a proper distribution of governmental powers").

<sup>54</sup> The prerogative of the legislature to formulate policy is no less true in the context of appropriations than in other contexts. As the court noted in *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 683 (Ky. 1994):

The cases which have considered the relationship between budget questions and statutes reflect the fact that budgeting can be in many ways the most dramatic means by which a legislature can express itself. "Since the budget is the principal instrument of resource allocation and policy planning, it reflects state government's public policy priorities."

*Id.* (quoting PENNY MILLER, *KENTUCKY POLITICS AND GOVERNMENT: DO WE STAND UNITED?* 227 (1994) (citations omitted)).

<sup>55</sup> *Cf.* Stith, *supra* note 51, at 1345 (discussing separation of powers at the federal level).

The Constitution presupposes a distinction between the public sphere and the private sphere and permits expansion of the public sphere only with legislative approval. The appropriations requirement both reflects and implements these fundamental constitutional choices. In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government.

*Id.* *Cf.* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 72 (1991) (discussing the use of non-appropriated funds in foreign policy).



*B. Text and Precedent**1. The United States*

The power of the purse is a key aspect of separation of powers at the federal level. It is articulated in the so-called “Appropriations Clause” of the federal Constitution, which provides: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>56</sup> The people who praised, defended, and first expounded the Constitution laid great stress on this provision and the principle underlying it. For example, in exhorting the people of New York to ratify the federal Constitution, Alexander Hamilton wrote that “[t]he legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.”<sup>57</sup> A few years later, James Madison noted in the House of Representatives that “appropriations of money [are] of a high and sacred character; [they are] the great bulwark which our Constitution [has] carefully and jealously established against Executive usurpations.”<sup>58</sup>

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The framers do not appear to have believed that Americans were perfectible; nor did they believe that a democracy is composed of persons committed above everything else to being good citizens. They knew that most Americans were, and would remain, principally interested in their homes, their families, their churches and other religious institutions, their farms and businesses. Therefore the Constitution provides a crucial link between the citizens of the democracy and the actions of the government in a way that is calculated to engage the attention of a busy and preoccupied people. That link is the oversight of how their money is being spent; this, and not native virtue, was supposed to make the American people pay attention to what was being done in their name.

*Id.*

<sup>56</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>57</sup> THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>58</sup> 3 THE FOUNDERS’ CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987) (debate of Mar. 1, 1793); cf. THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) (discussing the requirement that bills to raise revenue must originate in the House).

They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all

Similarly, Justice Joseph Story noted that the “object” of the Appropriations Clause

is to secure the regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. *If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.* The power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof. It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. *Congress is made the guardian of this treasure.*<sup>59</sup>

## 2. Kentucky

Section 230 of Kentucky’s Constitution tracks the provision of the federal Constitution to which Hamilton, Madison, and Story were referring.<sup>60</sup> The federal language provides that: “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>61</sup> Section 230 provides that: “[n]o money shall be drawn from the State

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the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

*Id.*

<sup>59</sup> JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1342 (1833), reprinted in 3 THE FOUNDERS’ CONSTITUTION, *supra* note 58, at 378-79 (emphasis added).

<sup>60</sup> In fact, a provision along the lines of the federal Appropriations Clause can be found in the constitutions of many states.

<sup>61</sup> U.S. CONST. art. I, § 9, cl. 7.

Treasury, except in pursuance of appropriations made by law.”<sup>62</sup> It would be hard to imagine two more similar provisions.<sup>63</sup>

The highest court of Kentucky has interpreted Section 230 with a fair degree of strictness over the years, frequently recognizing the exclusive role of the legislature in controlling the Commonwealth’s finances. As the Supreme Court explained in *Commonwealth ex rel. Armstrong v. Collins*, a decision handed down in 1986, “[i]t is clear that the power of the dollar—the raising and expenditure of the money necessary to operate state government—is one which is within the authority of the legislative branch of government.”<sup>64</sup> The court similarly noted in *Legislative Research Commission v. Brown*, a seminal case involving separation of powers in the state, that “[t]he budget, which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter.”<sup>65</sup>

In keeping with the strong command of Section 230, the court has repeatedly refused to permit disbursements from the treasury beyond appropriated amounts. For example, in *Ferguson v. Oates*, a 1958 decision, the court refused to order the Commissioner of Finance to allocate unappropriated funds from the treasury where the Attorney General claimed that appropriations for his office were insufficient.<sup>66</sup> The court noted that “in such cases the problem necessarily addresses itself to the Legislature and should not be solved by a court order directing expenditures of funds not appropriated to the uses of the department.”<sup>67</sup> Similarly, in *Dishman v. Coleman*, the court held the Treasurer and his surety liable

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<sup>62</sup> KY. CONST. § 230.

<sup>63</sup> See generally Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 KY. L.J. 165, 225 (1984) (“It is an axiom of American government that the legislature holds the purse strings.”). These writers go on to note:

The federal and most state constitutions, for example, require that the budget originate in the House of Representatives, the arm of government most representative of the populace. This is traditionally viewed as the means by which the representatives of the people hold their most powerful check and balance upon the executive branch.

*Id.* (footnote omitted).

<sup>64</sup> *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 441 (Ky. 1986).

<sup>65</sup> *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 925 (Ky. 1984).

<sup>66</sup> See *Ferguson v. Oates*, 314 S.W.2d 518, 520 (Ky. 1958).

<sup>67</sup> *Id.*

for payments made beyond the authority of appropriations by the legislature, noting that “[t]he discretion vested in the treasurer did not include the right to increase any salaries fixed by statute, or to incur an expense beyond the appropriation.”<sup>68</sup> Other decisions in this vein include *Rhoads v. Fields*,<sup>69</sup> *Hager v. Shuck*,<sup>70</sup> and *Bosworth v. Shuck*.<sup>71</sup>

### III. EXCEPTIONS TO THE GENERAL RULE OF SECTION 230

To be sure, the highest court of Kentucky has not interpreted Section 230 as an absolute bar to non-legislative disbursements from the treasury, but the exception it has recognized tends more to prove the rule than to undermine it. Specifically, the court will allow non-legislative disbursements from the treasury to protect human life and property or to maintain the specific essentials of government. It is also conceivable that the court will allow spending without legislative approval where another, arguably self-executing provision of the Constitution calls for the disbursement of funds, but this possibility presents doctrinal problems and has never been the rationale for a decision.

#### A. Preventing Disaster

In *Miller v. Quertermous*,<sup>72</sup> the most famous (and perhaps only) case in this category, the court addressed a situation in which appropriations by the legislature for the construction, maintenance, and operation of the

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<sup>68</sup> *Dishman v. Coleman*, 50 S.W.2d 504, 506 (Ky. 1932).

<sup>69</sup> *Rhoads v. Fields*, 292 S.W. 809, 810 (Ky. 1927) (commissioners of the Sinking Fund of the Commonwealth could not be compelled to provide funds to reconstruct a dormitory destroyed by fire without statutory authorization).

<sup>70</sup> *Hager v. Shuck*, 87 S.W. 300, 301-02 (Ky. 1905) (auditor could not agree to pay a clerk a salary that would obligate the Commonwealth beyond the amount appropriated for that purpose by the General Assembly).

<sup>71</sup> *Bosworth v. Shuck*, 81 S.W. 240, 241 (Ky. 1904) (warrant for the payment of salary payable from a specific appropriation cannot exceed the unexhausted amount of that appropriation); cf. Letter from Scott White, Assistant Deputy Attorney General, to Representative Brent Yonts, at 3 (Aug. 20, 1999) (on file with author) (“[I]t is the opinion of this Office that, absent a statutory provision indicating otherwise, a state agency may not enter into [a Memorandum of Agreement], or other contractual agreement, which extends beyond [a fiscal biennium], regardless of the source of the contract’s funding without approval from the Legislature.”).

<sup>72</sup> *Miller v. Quertermous*, 202 S.W.2d 389 (Ky. 1947).

state's hospitals and prisons had run out because price controls imposed during the Second World War had been lifted unexpectedly. This created what the court described as a "critical emergency—as a matter of fact a life or death crisis."<sup>73</sup> At stake were the government's obligations not to release its wards yet also to provide for their sustenance. In the words of the court, the Commonwealth was faced with "an inexorable necessity coupled with an inescapable responsibility."<sup>74</sup> Against this backdrop, the court reasoned that Section 230 "would not necessarily be so narrowly limited as to mean that the Legislature has exclusive control" over appropriations.<sup>75</sup> Accordingly, the court allowed mandamus against the state's Commissioner of Finance and Treasurer, ordering them to make the necessary payments beyond amounts previously appropriated by the legislature.<sup>76</sup> In the course of reaching this decision, the court emphasized that the legislature had intended to provide funding for these needs but had failed to anticipate the extent of the deficiency that would arise.<sup>77</sup>

The exact doctrinal basis for *Quertermous* is hard to discern, because the court in that case seemed to rest its exception to exclusive legislative control over appropriations on manifestly humanitarian concerns.<sup>78</sup> Perhaps the court was suggesting that the language of Section 230 is merely precatory, but such a suggestion would have serious consequences for the rule of law. If Section 230 were merely precatory, why would a court—or any other department of the government—be precluded from ignoring other provisions of the Constitution?

Three possible doctrinal grounds for *Quertermous* present themselves. First, one might seek to explain *Quertermous* in terms of what the Constitution expressly says about the support of prisoners. Section 254 requires the Commonwealth to "maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts."<sup>79</sup> Section 252 similarly requires the General Assembly to establish and maintain institutions for youthful offenders.<sup>80</sup> On this view, *Quertermous* was correct because it implemented these sections of the Constitution. This

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<sup>73</sup> *Id.* at 390.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 391.

<sup>76</sup> *Id.* at 392.

<sup>77</sup> *Id.* at 390.

<sup>78</sup> *See id.* (noting that this action for mandamus was a "claim solely for the purpose of feeding, clothing, housing, and providing for the attendants and guards for the wards of the state, [and] no claim is entitled to a higher priority").

<sup>79</sup> KY. CONST. § 254.

<sup>80</sup> *See id.* § 252.

approach, however, cannot fully account for the holding in *Quertermous*, which applied to wards other than prisoners. Second, one might argue that the first two sections of Kentucky's Bill of Rights prevent the government from taking individuals into custody and then depriving them of the means of survival.<sup>81</sup> This has greater plausibility than the first theory because it seems to account for the expenditures ordered in *Quertermous*. On the other hand, depending upon its interpretation, this approach could fail to account for other services that many would deem specific and essential but that would not be necessary to maintain the welfare of individuals in custody.<sup>82</sup> Third, one might argue that legislative authorization to support individuals in the government's custody is implicit in the very statutes pursuant to which the state incarcerates or commits such individuals to its facilities. This approach has the virtue of being faithful to Section 230 of the Constitution, but it requires a degree of reading into statutes that one would not want courts to use on a general basis.<sup>83</sup> In short, no doctrinal ground for *Quertermous* is perfect.

In any case, the facts of *Quertermous* were so extreme, and so conducive to an exception to Section 230, that further litigation was necessary to establish the contours of the notion it seemed to espouse. This happened some eleven years later in the case of *Ferguson v. Oates*.<sup>84</sup> In this

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<sup>81</sup> See *id.* § 1.

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

....

Third: The right of seeking and pursuing their safety and happiness.

*Id.*; see also *id.* § 2 ("Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.").

<sup>82</sup> The first and second theories would also fail to explain precisely why certain constitutional provisions, such as Sections 252 and 254, or Sections 1 and 2, would control another provision of the same document, Section 230. Indeed, the entire concept of judicially ordered disbursements from the treasury is conceptually problematic. See *infra* notes 126-27 and accompanying text.

<sup>83</sup> See *infra* notes 144-62 and accompanying text for a discussion of the federal Anti-Deficiency Act, which prohibits federal officers from incurring obligations against the United States in the absence of appropriations, "unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). The Attorney General of the United States has opined that this exception will not permit a federal agency to obligate the United States on the mere strength of an organic statute charging it with a particular duty. See 5 Op. Off. Legal Counsel 1, 4-5 (1981).

<sup>84</sup> *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

case, the Attorney General sought mandamus to compel the Statutory Chief of Finance to issue warrants sufficient to pay certain expenses for which the legislature had made an appropriation that proved inadequate.<sup>85</sup> The court refused and took pains to distinguish *Quertermous*, describing the circumstances of the earlier case as “most extreme” and admonishing that *Quertermous* “should not be considered as precedent except under comparable conditions.”<sup>86</sup>

A case that preceded *Quertermous* and is similar to it in some respects is *Talbott v. Burke*.<sup>87</sup> In this case, the Treasurer refused to honor the warrant of a county tax commissioner because of insufficient funds in the Treasury. The court noted, however, that the General Assembly had expressly authorized payment in a statute enacted after the budget went into effect.<sup>88</sup> In this context, the court ordered payment on the warrant, noting that “[h]ere we have a necessary governmental expense incurred under the express authority of the legislature and a failure of the legislature, through an error, to provide sufficient funds therefor.”<sup>89</sup>

An appropriation also existed in *Rhea v. Newman*,<sup>90</sup> another case that preceded *Quertermous*. In *Rhea*, the legislature had appropriated money for the state fair, but the Treasurer had refused to honor warrants presented by the fair’s chairman, claiming insufficient funds. The Treasurer had also refused to endorse the warrants as interest-bearing notes, as required by separate legislation, arguing that the state had already exceeded its limit on casual debt under Section 49 of the Constitution. Ordering the Treasurer to endorse the warrants, the court held that Section 49 does not automatically preclude casual debt to defray costs for which an appropriation exists, reasoning that “the validity of an appropriation of money by the Legislature beyond the limit [set by Section 49] must depend in each case upon the

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<sup>85</sup> See *id.* at 519.

<sup>86</sup> *Id.* at 520. Professor Oberst and then-law student Tom Lewis made a similar (and prescient) observation about the ultimate limitation of *Quertermous* in an article published in 1953, six years after *Quertermous* and five years before *Ferguson*. In this article, Professor Oberst and Mr. Lewis discussed claims against the Commonwealth, and noted that, under the expansive dictum of *Quertermous*, “[w]here the legislature fails, the court will step in.” Paul Oberst & Thomas Lewis, *Claims Against the State of Kentucky*, 42 KY. L.J. 65, 77 (1953). They went on to say: “This thought, projected further (*which it will not be*), could provide a basis for satisfying all claimants.” *Id.* (emphasis added).

<sup>87</sup> *Talbott v. Burke*, 152 S.W.2d 586 (Ky. 1941).

<sup>88</sup> See *id.* at 587.

<sup>89</sup> *Id.* at 588.

<sup>90</sup> *Rhea v. Newman*, 156 S.W. 154 (Ky. 1913).

character of the appropriation, or the manner of its payment.”<sup>91</sup> In essence, the court took the fairly reasonable position that the present-value of debt is a function of the date on which the obligation is incurred, the date on which it must be repaid, and the amount of principal and interest that becomes due at any given time.<sup>92</sup> Given the idiosyncratic nature of this ruling, it would be difficult to extrapolate from *Rhea* a rule that Section 230 does not preclude non-legislative disbursements from the Treasury.

Putting to one side its facts and holding, *Rhea* also contains dictum that could plausibly be described as hyperbolic, asking:

But should the Legislature fail in its plain duty under Section 171, by refusing to levy any tax whatever, should the state cease to govern? Would its courts of justice and its penal and charitable institutions close their doors? Would its peace officers, for want of support, be compelled to turn the state over to the passions of the lawless and vicious elements? . . . No one would hesitate to answer these questions in the negative.<sup>93</sup>

The *Quertermous* court picked up on this rhetoric and repeated it some forty-four years later.<sup>94</sup> But nothing in *Rhea* actually called this florid language into play; the legislature had levied taxes. In any case, any broader interpretation of this case would be fully subject to the limiting construction imposed upon *Quertermous* by *Ferguson v. Oates* in 1958.<sup>95</sup>

Another case that appears to follow *Quertermous*—at least by way of dictum—is *Jones v. Commonwealth*.<sup>96</sup> The issue in this case was whether the court could order a county to pay for counsel to represent indigent defendants in criminal prosecutions, notwithstanding lack of an appropriation. Noting that the government has an independent constitutional obligation to provide counsel to such individuals, the court characterized the expense at issue in the case as “essential,” citing *Quertermous*.<sup>97</sup> The court then concluded that it could order payment, although it ultimately

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<sup>91</sup> *Id.* at 159.

<sup>92</sup> *Id.* at 159-60.

<sup>93</sup> *Id.* at 157.

<sup>94</sup> See *Miller v. Quertermous*, 202 S.W.2d 389, 391 (Ky. 1947).

<sup>95</sup> See *Ferguson v. Oates*, 314 S.W.2d 518, 520 (Ky. 1958).

<sup>96</sup> *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970).

<sup>97</sup> *Id.* at 632.



decided against doing so for practical reasons, including the difficulty of assessing “reasonable” attorney’s fees.<sup>98</sup>

Two other decisions that merit discussion are *Fulton County Fiscal Court v. Southern Bell Telephone & Telegraph Co.*<sup>99</sup> and *First National Bank of Manchester v. Hays*.<sup>100</sup> *Fulton County Fiscal Court* involved a county emerging from a period of unlawful management by its fiscal officers.<sup>101</sup> In this context, the court allowed the county to incur debt in excess of the limit set by Section 158 of the constitution in order to pay the “compulsory obligations” of government,<sup>102</sup> which it defined as “essential expenses.”<sup>103</sup> The court was careful to note, however, that not all evidences of debt would qualify for payment: “Any money paid out and any obligation assumed . . . for *non-essential matters* was illegally paid and assumed. And such outstanding obligations, being void, cannot be funded.”<sup>104</sup>

In *First National Bank of Manchester*, taxpayers instituted suit to determine the amount and validity of a county’s debt in excess of limits set by Section 158 after a fire had destroyed records.<sup>105</sup> The matter was referred to a commissioner, who examined claims of indebtedness. The circuit court overruled demurrers to the commissioner’s report, stating: “After a careful consideration of this voluminous record the Court has reached the conclusion that only the expenditures remaining unpaid which represent *actual, indispensable government charges of the county* can be upheld and allowed as fundable in this case.”<sup>106</sup>

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<sup>98</sup> See *id.* Ironically, courts today routinely make such determinations. See, e.g., K.R.S. § 61.848(6) (Michie 1993) (authorizing the assessment of “reasonable attorneys’ fees” for willful violations of the Open Meetings Act).

Although the *Jones* Court cited *Quertermous* as authority, its observation that the government has a constitutional obligation to provide counsel for indigent accused obliquely suggested a distinct doctrinal basis for non-legislative disbursements from the treasury—disbursements predicated directly on the Constitution. See *infra* notes 113-27 and accompanying text for a discussion of this possibility.

<sup>99</sup> *Fulton County Fiscal Court v. S. Bell Tel. & Tel. Co.*, 146 S.W.2d 15 (Ky. 1940).

<sup>100</sup> *First Nat’l Bank of Manchester v. Hays*, 156 S.W.2d 121 (Ky. 1941).

<sup>101</sup> See *Fulton County Fiscal Court*, 146 S.W.2d at 25-26.

<sup>102</sup> *Id.* at 24.

<sup>103</sup> *Id.* at 25.

<sup>104</sup> *Id.* (emphasis added, citations omitted).

<sup>105</sup> See *First Nat’l Bank of Manchester*, 156 S.W.2d at 122-23.

<sup>106</sup> *Id.* at 123 (emphasis added).

Arguably, *Fulton County Fiscal Court* and *First National Bank of Manchester* do little more than confirm the limited nature of the exception to Section 230 recognized in *Quertermous*. Indeed, the *Quertermous* court cited *Fulton County Fiscal Court*.<sup>107</sup> By limiting debt in excess of constitutional limitations to the amount necessary to support the “compulsory obligations” and “essential expenses” of government, in the language of *Fulton County Fiscal Court*,<sup>108</sup> or “indispensable government charges,” in the language of *First National Bank of Manchester*,<sup>109</sup> these cases simply anticipated *Quertermous*, albeit in a different context.

In addition, any attempt to infer broad authority for non-legislative disbursements from these cases would be squarely precluded by *Ferguson v. Oates*, in which the court limited Section 230 to the context presented in *Quertermous*. Moreover, these cases involved municipal corporations, in which power may not be strictly divided among the branches of government<sup>110</sup> and whose fiscal affairs are necessarily more circumscribed than those of a state, with less margin for error.<sup>111</sup> Finally, these cases involved a constitutional limitation on indebtedness, which does not implicate separation of powers in the same way as a prohibition on non-legislative disbursements from the Treasury. Public debt must be sold to creditors who believe they will be repaid. Thus, the market will tend to check extravagance in this area of policy. Unlawful disbursements from the treasury are not subject to similar constraints.<sup>112</sup>

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<sup>107</sup> See *Miller v. Quertermous*, 202 S.W.2d 389, 391 (Ky. 1947).

<sup>108</sup> *Fulton County Fiscal Court*, 146 S.W.2d at 24-25.

<sup>109</sup> *First Nat'l Bank of Manchester*, 156 S.W.2d at 123.

<sup>110</sup> See *Dieruf v. Louisville & Jefferson County Bd. of Health*, 200 S.W.2d 300, 302 (Ky. 1947) (noting that Sections 27, 28, and 29 of the Constitution, which strictly separate power between the three branches, “do not apply to municipal governments”).

<sup>111</sup> There is also some question as to whether any government would want to emulate the practices of certain fiscal courts in bygone days. See *Fulton County Fiscal Court*, 146 S.W.2d at 25-26.

<sup>112</sup> The Governor’s spending plan of 2002-2003, for example, did not include unappropriated disbursements to serve debt. See PAUL E. PATTON & JAMES R. RAMSEY, EXPLANATION OF GOVERNOR PATTON’S 2003 SPENDING PLAN 6 (2002) (“Four general categories of provisions contained in [the version of the budget that passed the House in the Special Session of 2002] were determined to be excluded from Governor Patton’s fiscal year 2003 Spending Plan. These include . . . [p]rovisions for the authorization and issuance of bonds.”).

*B. Enforcing Arguably Self-Executing Provisions of the Constitution*

After a review of precedent, one could reasonably conclude that the courts of Kentucky will permit non-legislative disbursements from the treasury only to prevent humanitarian disaster or to maintain the specific essentials of government. On the other hand, nothing precludes a provision of the constitution from directly requiring disbursements from the treasury, and this possibility should at least be examined. At least in theory, the framers and ratifiers of a Constitution could impose a direct duty upon the government to pay for a particular public service. Although the idea of a “self-executing” funding provision is problematic because of its implications for separation of powers and sovereign immunity,<sup>113</sup> it nevertheless merits discussion.

Perhaps the most famous case illustrating this concept, albeit obliquely, is *Rose v. Council for Better Education, Inc.*<sup>114</sup> In this case, the Kentucky Supreme Court declared that the means by which Kentucky paid for its primary and secondary schools was not “efficient” in the sense required by Section 183 of the Constitution.<sup>115</sup> This section provides that “[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”<sup>116</sup> If Section 183 had expressly called for the disbursement of funds from the treasury, the court arguably could have gone on from its conclusion to order the state’s fiscal officers to pay for an “efficient” system, but the language of Section 183 falls short of expressly calling for the disbursement of funds, and the court did not pursue this possibility. In fact, the state Supreme Court did not instruct the legislature to take any particular action,<sup>117</sup> and issued no form of mandatory relief whatever.<sup>118</sup>

Several provisions of the Constitution impose duties analogous to the duty imposed by Section 183. These provisions include Section 220, which

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<sup>113</sup> See *infra* notes 126-27 and accompanying text.

<sup>114</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>115</sup> See *id.* at 215.

<sup>116</sup> KY. CONST. § 183.

<sup>117</sup> See *Rose*, 790 S.W.2d at 216 (“The General Assembly must provide adequate funding for the [educational] system. How they do this is their decision.”); see also *id.* at 214 (noting with approval that “the trial judge specifically denied that he was directing the General Assembly to enact any *specific legislation*”).

<sup>118</sup> See *id.* at 215 (“We decline to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus.”).

pertains to the militia;<sup>119</sup> Section 223, which pertains to military records and paraphernalia;<sup>120</sup> Section 252, which pertains to youthful offenders;<sup>121</sup> and Section 254, which pertains to adult offenders.<sup>122</sup> In addition, Sections 14 and 120 appear to impose certain duties relative to the judiciary. Section 14 provides that: "All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay,"<sup>123</sup> and Section 120 provides that: "All justices and judges shall be paid adequate compensation which shall be fixed by the General Assembly. All compensation and necessary expenses of the Court of Justice shall be paid out of the State Treasury. The compensation of a justice or judge shall not be reduced during his term."<sup>124</sup> Close examination of these provisions will reveal that none expressly calls for the disbursement of funds from the treasury without authority from the Legislature, although each imposes a general duty that cannot be discharged without the expenditure of money.<sup>125</sup> Taken to their logical extremes, each of these

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<sup>119</sup> See KY. CONST. § 220 ("The General Assembly shall provide for maintaining an organized militia.").

<sup>120</sup> See *id.* § 223 ("The General Assembly shall provide for the safekeeping of the public arms, military records, relics and banners of the Commonwealth of Kentucky.").

<sup>121</sup> See *id.* § 252.

<sup>122</sup> See *id.* § 254 (requiring the Commonwealth to "maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts").

<sup>123</sup> *Id.* § 14.

<sup>124</sup> *Id.* § 120.

<sup>125</sup> For an interesting analysis of how a constitutional funding provision can be self-executing, see *White v. Davis*, 108 Cal. App. 4th 197, 216-23 (Cal. Ct. App. 2002) (determining whether certain provisions of a state constitution require disbursements from the treasury without appropriations). Although the Supreme Court of California reviewed the Court of Appeal's decision in *White*, it left standing this aspect of the lower court's decision, and ordered its opinion published. See *White v. Davis*, 68 P.3d 74, 98 n.14 (Cal. 2003). In this case, the Court of Appeal concluded that a provision of California's Constitution relating to funding for education was not self-executing such that the state's controller had to pay out funds without legislative authority. See *White*, 108 Cal. App. 4th at 221. The court reasoned that, because the provision at issue set forth only a minimum level of funding, it left implementation to the legislature.

[T]he provisions of California Constitution, article XVI, section 8, although mandatory, simply establish the parameters of the principle enunciated and leave the specific means by which it is to be achieved for the people of

provisions would arguably support a judicial order requiring the expenditure of public funds without legislative approval.

But the idea of such a provision is doctrinally problematic, given its implications for separation of powers and sovereign immunity. In truth, no provision of a constitution can ever be “self-executing” in the sense that it enforces itself, and a “self-executing” provision of law is actually just a provision that can be enforced directly by the courts without an affirmative act by the legislature. On the other hand, the idea of a court ordering money released from the treasury is something of a historical and theoretical anomaly. As Alexander Hamilton famously noted in *The Federalist No. 78*:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse.<sup>126</sup>

At least in theory, the concepts of separated powers and sovereign immunity preclude the idea of a judgment against the state absent consent by the legislature and an appropriation sufficient to satisfy the judgment.<sup>127</sup>

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California . . . to the Legislature. We therefore conclude that they do not constitute a self-executing authorization to disburse funds.

*See id.* (internal quotation marks, brackets, and citation omitted). The court went on, however, to hold that another provision of the state’s constitution pertaining to educational funding was self-executing. *See id.* at 223; *see also id.* at 222 (quoting *Cal. Teachers Ass’n v. Hayes*, 5 Cal. App. 4th 1513, 1530 (Cal. Ct. App. 1992)).

The measure is self-executing; it requires no legislative action. . . . Section 8.5 does not extend the Legislature’s spending power to excess revenues; rather it imposes a self-executing, ministerial duty upon the Controller to transfer such excess revenues to a restricted portion of the school fund and thence to allocate such revenues to school districts and community college districts on a per-enrollment basis. Section 8.5 specifically restricts the purposes for which those funds may be expended.

*Id.* (discussing article XVI, § 8.5 of the California Constitution) (ellipsis added by the *White* court).

<sup>126</sup> THE FEDERALIST NO. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>127</sup> *See Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133, 138 (Ky. 1991) (Palmore, J., dissenting) (“[A]s duty requires, we defer to the sovereign immunity of the central state government mandated by §§ 230 and 231 of the Constitution, but we reject extending sovereign immunity

In light of this analysis, the *Rose* court appropriately refrained from issuing any mandatory orders in that case. At any rate, even if the constitution did contain a handful of self-executing funding provisions, the enumeration of these obligations presupposes something not enumerated. Otherwise Section 230 would stand for nothing, and the fundamentally legislative character of the appropriating process would be lost. Indeed, in a 1985 opinion taking into account both *Quertermous v. Miller* and *Jones v. Commonwealth*, the Attorney General of Kentucky drew the following important conclusion:

*Miller* [v. *Quertermous*] and *Jones* . . . seem to instruct that if the General Assembly has not made an appropriation for the particular purpose in question, then only in those rare instances when it is determined that the particular item constitutes an essential or necessary governmental function or expense will the court consider a judicial order for payment from state funds.<sup>128</sup>

C. “Non-Exceptions” to Section 230

In addition, reference must be made to two important “non-exceptions” to Section 230. As noted earlier, this section requires legislative authority for disbursements from the treasury, but it does not require the legislature to use magic words, nor does it require the legislature to appropriate money only via omnibus acts covering a fiscal biennium. Instead, the General Assembly is at liberty to effect an appropriation however it chooses and to appropriate money on a no-year or multi-year basis. In *Commonwealth ex rel. Meredith v. Johnson*, for example, the court sustained a broad dele-

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beyond “what the Constitution demands.” (quoting *Cullinan v. Jefferson County*, 418 S.W.2d 407, 411 (Ky. 1967))). Section 231 provides that “The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” KY. CONST. § 231. *See generally* Mark J. Coleman, *Mandel v. Myers: Judicial Encroachment on Legislative Spending Powers*, 70 CAL. L. REV. 932, 953 (1982) (“[T]o the extent that the doctrine [of sovereign immunity] acts as a check on violations of the separation of powers, it remains vital. Modern sovereign immunity protects the powers and immunities of the separate branches of government, reflecting the constitution’s allocation of power among the three branches.”).

<sup>128</sup> Ky. Op. Att’y Gen. No. 85-132, at 5-6 (1985). The Attorney General did not refer to this opinion in his letter to the Governor’s Counsel of April 25, 2002. *See* Letter from Albert B. Chandler III & Ryan M. Halloran, to Denis Fleming, *supra* note 23.

gation of authority from the General Assembly to the Governor to expend appropriated funds for emergencies.<sup>129</sup> The Attorney General argued that the legislature's express delegation of discretion to the Executive was too broad, but the court disagreed, reasoning that the legislature has leeway to determine the form that appropriations will take.<sup>130</sup>

#### *D. The Governor's Inherent Powers*

Finally, one must pay attention to the question of whether the Governor's inherent powers under the constitution somehow limit the scope of Section 230. With support from the Attorney General, the Governor argued in 2002 that his inherent powers and duties as chief executive provided authority for the spending plan.<sup>131</sup> As he and Budget Director James R. Ramsey argued in support of the plan:

It is not in the best interests of the people of Kentucky to operate state government with an undefined "continuation" spending program nor is it in the best interest of the people to shut down government services totally or partially. Kentucky state government provides a myriad of needed services to its people; the delivery of these services and the day-to-day operation of state government is important to the health and well-being of our citizens and to the economic prosperity of the state.<sup>132</sup>

Nevertheless, the constitutional dimension of this argument is difficult to sustain.

Specifically, the Governor argued that the aggregate of powers vested in him by virtue of Sections 69 and 81 of the constitution permitted him to adopt a comprehensive spending plan.<sup>133</sup> But close inspection of these

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<sup>129</sup> *Commonwealth ex rel. Meredith v. Johnson*, 166 S.W.2d. 409, 415 (Ky. 1942).

<sup>130</sup> *See id.* at 414 ("It will be observed that [the language of Section 230] does not undertake to prescribe the form to be used in making appropriations nor does it require that appropriations shall be detailed, definite, or specific."); *see also* Ky. Op. Att'y Gen. Nos. 74-863, 74-600 (1974).

<sup>131</sup> *See* Exec. Order No. 2002-727 para. 6, at 4 (June 26, 2002); Letter from Albert B. Chandler III & Ryan M. Halloran, to Denis Fleming, *supra* note 23.

<sup>132</sup> PATTON & RAMSEY, *supra* note 112, at 1.

<sup>133</sup> *See* Exec. Order No. 2002-727 para. 6, at 4 ("The authority of the Governor, pursuant to Sections 69 and 81 of the Kentucky Constitution, to cause the expenditure from the State Treasury of such available funds as may be necessary for the operation of government and the execution of laws of the Commonwealth is hereby recognized.").

provisions strongly indicates that the Governor misapprehended the scope of authority the constitution vests in his office.

Section 69, one of the provisions the Governor cited, is the Executive Vesting Clause: "The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky.'" <sup>134</sup> Like analogous clauses vesting legislative power in the General Assembly and judicial power in the Court of Justice, <sup>135</sup> this section begs the question, in that it simply vests a certain power in a particular branch of government without specifying the attributes of that power. Even if certain powers are vested exclusively in the Governor, it still does not follow that he possesses powers assigned to the other two branches of government. <sup>136</sup>

The other constitutional provision cited by the Governor, Section 81, offers relatively little additional support. This section provides that the Governor "shall take care that the laws be faithfully executed." <sup>137</sup> Although this section certainly supports the argument that the Governor may not ignore laws that impose a duty upon him, it too begs the question in that it assumes that the Governor has authority to go beyond the specific duties imposed by law and to cause public funds to be drawn from the treasury in the absence of appropriations. Indeed, one may note that Section 230 of the constitution, which forbids non-legislative disbursements, and K.R.S. section 41.110, which implements Section 230, are among the laws that the Governor is bound to execute.

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<sup>134</sup> KY. CONST. § 69.

<sup>135</sup> See *id.* § 29 (Legislative Vesting Clause); *id.* § 109 (Judicial Vesting Clause).

<sup>136</sup> Indeed, under Kentucky's Constitution, the crossing of lines in the exercise of power is expressly prohibited. See *id.* § 28 ("No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."). See also *Ex parte* Auditor of Pub. Accounts, 609 S.W.2d 682, 684-85 (Ky. 1980) (referring to Kentucky's "unusually forceful" separation of power); see generally ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE 48 (1999) (describing separation of powers as "one of the most significant legacies of the American Revolution," and noting that Thomas Jefferson, "[o]ne of the most zealous proponents of the doctrine," wrote the original versions of Sections 27 and 28 of the Kentucky Constitution). Section 27 begins: "The powers of the government . . . shall be divided into three distinct departments, and each of them shall be confined to a separate body of magistracy." KY. CONST. § 27.

<sup>137</sup> KY. CONST. § 81.



An instructive federal case in this regard is *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>138</sup> This case involved an attempt by the President of the United States to seize certain steel mills to prevent a strike during the Korean War. The President did not purport to rely on any statutory authority to seize the mills.<sup>139</sup> Instead, he defended his actions solely in terms of the aggregate of his implied powers under the federal Constitution—which in his case included the federal Executive Vesting, Take Care, and Commander-in-Chief Clauses.<sup>140</sup>

The Supreme Court of the United States rejected each of these grounds for justifying the seizures. The Commander-in-Chief Clause, it held, could not be read so broadly as to permit seizure of domestic industries outside the theater of war.<sup>141</sup> With regard to the Executive Vesting and Take Care Clauses, the Court reasoned as follows:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States."<sup>142</sup>

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<sup>138</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>139</sup> *See id.* at 585.

<sup>140</sup> *See id.* at 587.

<sup>141</sup> *See id.* ("This is a job for the Nation's lawmakers, not for its military authorities."). In his motion for summary judgment, the Treasurer obliquely referred to the Governor's authority as commander-in-chief of the militia as a justification for the spending plan. *See Memorandum in Support of Plaintiff Department of the Treasury's Motion for Summary Judgment* at 15-18 (on file with author), *Spending Plan Litigation*, *supra* note 28. This argument would be difficult to sustain, however, for much the same reason that President Truman's similar argument failed in *Youngstown*. Although the Governor commands the militia, *see* KY. CONST. § 75, his authority to do so is fully subject to the Constitution, which allocates the power of the purse to the General Assembly. *See Franks v. Smith*, 134 S.W. 484, 492 (Ky. 1911).

[A]ny military order, whether it be given by the Governor of the state or an officer of the militia or a civil officer of a city or county, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state is unreasonable and unlawful.

*Id.*

<sup>142</sup> *Youngstown*, 343 U.S. at 587-88 (quoting U.S. CONST. art. I, § 1).

The teaching of *Youngstown* undermines defense of the spending plan. At bottom, this defense rested on the assumption that execution of every law on the books required continuing, comprehensive appropriations, notwithstanding other laws and precedent that limit the appropriating power to the legislature, absent a need to pay for specific and essential public services. Although grounded in good intentions, the Governor's defense of the plan misapprehended the system of separated power and the precedential basis for disbursements from the treasury in the absence of appropriations.<sup>143</sup>

The next part of this Article reviews learned opinion of officials in other jurisdictions who have wrestled with the problem of gaps in appropriations. This review supports the conclusion that a comprehensive, non-legislative spending plan violates separation of powers.

#### IV. LEARNED OPINIONS FROM OTHER JURISDICTIONS

A jurisdiction facing an unusual and difficult situation, such as a gap in appropriations, is always well advised to seek guidance from other jurisdictions that may have addressed the issue. As it turns out, attorneys general in at least three jurisdictions—the United States and the states of Tennessee and Connecticut—have opined on the proper scope of governmental activities if the legislature fails to enact appropriations on a timely basis. Review of these opinions reveals a relatively high degree of formalism, that is, adherence to text, precedent, and the fundamental rules of government by separated power.

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<sup>143</sup> In his motion for summary judgment, the Treasurer also argued that K.R.S. chapter 39A, which enables certain functions of government in the case of emergency, supported the spending plan. See Memorandum in Support of Plaintiff Department of the Treasury's Motion for Summary Judgment at 18, *Spending Plan Litigation*, *supra* note 28 (citing K.R.S. ch. 39A (Michie 1998 & 2002 Supp.)). At first impression, this argument is plausible, if one construes the term "emergency" to include a gap in funding. But this is not the case. In K.R.S. § 39A.010, the General Assembly defines the kinds of events that would justify the use of emergency powers in classic terms of natural disaster, civil disorder, or actual war. A gap in funding does not constitute such an emergency, and any catch-all phrase found in these chapters must be read in the context of the maxim that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999) (defining *ejusdem generis*). See *Robinson v. Ehrler*, 691 S.W.2d 200, 204 (Ky. 1985).

*A. The United States**1. Background*

Article I of the federal Constitution provides that “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>144</sup> Although no direct action has ever been brought on the federal Appropriations Clause, this clause is substantially implemented by the Anti-Deficiency Act, which has been the subject of litigation for the most part not relevant to this Article. In addition to having been the focus of litigation, however, this Act has also been the focus of numerous opinions of the Attorney General of the United States. Additionally, this Act has been the subject of memoranda written by various other executive officials, and many of these opinions and memoranda pertain specifically to the validity of disbursements from the treasury in the absence of appropriations.<sup>145</sup>

Perhaps the most famous opinion in this regard was written by Attorney General Benjamin R. Civiletti in the last month of the Carter Administration. In late September 1980, it appeared that Congress was not going to enact most of the regular appropriations bills or a continuing resolution to cover the period between regular appropriations.<sup>146</sup> Under these circumstances, General Civiletti approved certain “guidance” in the form of a

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<sup>144</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>145</sup> See, e.g., Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1 (1981) (discussed *infra* notes 146-60 and accompanying text); Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriation, 4 Op. Off. Legal Counsel 16 (1980) (regarding the Federal Trade Commission); 30 Op. Att’y Gen. 157 (1913) (regarding the authority of the Postmaster General to employ auxiliary services beyond appropriations); Support of the Army, 15 Op. Att’y Gen. 209 (1877) (regarding the use of private contributions to support the army during an absence in appropriations for that purpose); Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department’s Appropriations, Mem. Op. for the Attorney General, 19 Op. Off. Legal Counsel 337 (1995); Participation in Congressional Hearings During an Appropriations Lapse, Mem. Op. for the Attorney General, 19 Op. Off. Legal Counsel 301 (1995); Authority to Employ the Services of White House Office Employees During an Appropriations Lapse, Mem. Op. for the Counsel to the President, 19 Op. Off. Legal Counsel 235 (1995).

<sup>146</sup> See 5 Op. Off. Legal Counsel 1, 1 (1981). The fiscal year for the federal government begins on October 1. See *id.*

memorandum that was provided to the directors of the various units of the federal government on September 30, 1980. When the dust settled from that particular situation, President Carter asked General Civiletti for “a close and more precise analysis of the issues raised by the September 30 memorandum.”<sup>147</sup>

General Civiletti presented his analysis to the President on January 16, 1981, just before President Carter left office. The essential burden of this opinion was that, upon an expiration of appropriations, officers and employees of the federal government may continue to incur liabilities, but only to the extent permitted by two sections of the Anti-Deficiency Act, now codified at 31 U.S.C. §§ 1341 and 1342.<sup>148</sup> General Civiletti analyzed these sections one at a time.

*a. 31 U.S.C. § 1341*

In its present form, 31 U.S.C. § 1341 provides in pertinent part that:

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*.<sup>149</sup>

Attorney General Civiletti began his treatment of this section by noting that it confirmed the basic rule that payments from the treasury require appropriations.<sup>150</sup> He then went on to discuss the section’s exception for obligations in advance of appropriations “authorized by law.” The issue with respect to this exception was whether an agency’s broad statutory authority to carry out a particular program, such as the Post Office’s authority to deliver the mail, constitutes an obligation “authorized by law.” His answer was essentially in the negative:

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<sup>147</sup> *Id.*

<sup>148</sup> They were then codified at 31 U.S.C. § 665(a), (b). *See id.*

<sup>149</sup> 31 U.S.C. § 1341 (2003) (formerly codified at 31 U.S.C. § 665(a) (1950)) (emphasis added).

<sup>150</sup> *See* 5 Op. Off. Legal Counsel at 2 (discussing 4 Op. Off. Legal Counsel 16 (1980)).

[S]tatutory authority to incur obligations in advance of appropriations may be implied as well as express, but *may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies.* The authority must be necessarily inferable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees [in question].<sup>151</sup>

He went on to add:

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsibilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations.<sup>152</sup>

In other words, General Civiletti concluded that, in the main, executive agencies may not rely upon organic legislation vesting them with broad responsibilities as a ground for obligating the United States in advance of appropriations. Instead, they need to find fairly specific or particularized statutory authority to incur an obligation before they may do so without an express appropriation.

The Attorney General then went on to address certain issues pertaining to the President's constitutional status as the chief executive officer of the United States. Specifically, General Civiletti reasoned that the President may have enhanced authority to obligate the federal government "in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President,"<sup>153</sup> which he refused to define.<sup>154</sup> Although this aspect of the opinion has been reasonably criticized by at least one commentator,<sup>155</sup> General Civiletti indicated that the degree of statutory authority for the obligation at issue is highly relevant to its validity, even in the context of the President's "peculiar institutional powers and competency," echoing Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>156</sup>

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<sup>151</sup> *Id.* at 4 (emphasis added).

<sup>152</sup> *Id.* at 4-5.

<sup>153</sup> *Id.* at 6-7.

<sup>154</sup> *See id.* at 7.

<sup>155</sup> *See* Feld, *supra* note 1, at 982-86.

<sup>156</sup> *See* 5 Op. Off. Legal Counsel at 6-7 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

*b. 31 U.S.C. § 1342*

In its present form, 31 U.S.C. § 1342 provides in pertinent part:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.<sup>157</sup>

The main issue with regard to this section was the extent of the exception for “emergencies involving the safety of human life or the protection of property.” General Civiletti interpreted this exception to permit a relatively limited category of services to continue to be provided by the federal government during a gap in funding, provided the following two-part test was satisfied.

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.<sup>158</sup>

The Attorney General also reasoned, in connection with his interpretation of this section, that Congress would expect federal employees to be able to procure, even without appropriations, the necessary equipment to carry out the functions contemplated by the exception.<sup>159</sup> To illustrate this point, General Civiletti opined that Congress, “having allowed the government to hire firefighters[,] must surely have intended that water and firetrucks be available to them.”<sup>160</sup>

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<sup>157</sup> 31 U.S.C. § 1342 (2003) (formerly codified at 31 U.S.C. § 665(b) (1950)). At the time the Attorney General rendered his opinion, the last sentence of this section was not present. Congress added it in 1990. *See* Act of Nov. 5, 1990, P.L. 101-508, Title XIII, Subtitle B, § 13213(b), 104 Stat. 1388-621 (amending 31 U.S.C. § 1342 (1982)).

<sup>158</sup> 5 Op. Off. Legal Counsel at 8.

<sup>159</sup> *Id.* at 11.

<sup>160</sup> *Id.*

In 1990, Congress amended 31 U.S.C. § 1342 to clarify that it intended the exception for emergencies to be narrow.<sup>161</sup> As a consequence, the Department of Justice revisited its interpretation of the exception set forth in § 1342. In a memorandum submitted to Alice Rivlin, Director of the Office of Management and Budget, on August 16, 1995—just before a significant gap in appropriations at the federal level—Walter Dellinger, Assistant Attorney General, opined that exceptions to this section should satisfy the following slightly modified test:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some [significant] degree, by delay in the performance of the function in question.<sup>162</sup>

## *2. Implications for Kentucky*

The insight of the Civiletti Opinion and its progeny is remarkably apt for Kentucky for three distinct reasons. First, the Appropriations Clause of the federal Constitution and Section 230 of the Kentucky Constitution are almost identical. Second, although Kentucky has no law completely analogous to the federal Anti-Deficiency Act, it does have a number of provisions in K.R.S. chapter 45, the chapter on budget and financial administration, which limit disbursements from the treasury to amounts and purposes specified by the General Assembly, much like the federal legislation. K.R.S. section 45.229, for example, will not permit an officer to obligate funds appropriated for a particular fiscal year after that year has expired.<sup>163</sup> Similarly, K.R.S. section 45.242 will not permit an officer to

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<sup>161</sup> Act of Nov. 5, 1990, P.L. 101-508, Title XIII, Subtitle B, § 13213(b), 104 Stat. 1388-621 (amending 31 U.S.C. § 1342 (1982)) (“As used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”)).

<sup>162</sup> Memorandum from Walter Dellinger, Assistant Attorney General, to Alice Rivlin, Director, Office of Management and Budget (Aug. 16, 1995) (on file with author).

<sup>163</sup> See K.R.S. § 45.229(1) (Michie 1997).

No state officer or budget unit shall, after the close of any fiscal year, incur, or vote, order, or approve the incurring of, any obligation or expenditure

obligate the state beyond the unencumbered balance of an allotment.<sup>164</sup> K.R.S. section 45.244, in turn, reiterates that officers may not obligate the government beyond appropriations, and provides that any purported obligation in the absence of appropriations does not bind the government.<sup>165</sup> Finally, K.R.S. section 45.251, echoing K.R.S. section 41.110, provides that “[e]xpenditures shall be limited to the amounts and purposes for which appropriations are made.”<sup>166</sup> Third, although the Civiletti Opinion and its progeny tend to display some degree of institutional bias in favor of the executive,<sup>167</sup> their interpretation of the federal Anti-Deficiency Act tends

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under any appropriation for that fiscal year, and no expenditure shall be made from or charged to any appropriation for any fiscal year that has expired at the time the obligation of the expenditure was incurred.

*Id.* See also KENTUCKY MODEL PROCUREMENT CODE K.R.S. § 45A.145(1) (“Unless otherwise provided in the statute making appropriations therefor, multiyear contracts for supplies and services may be entered into for periods not extending beyond the end of the biennium in which the contract was made.”). The negative implication of K.R.S. § 45A.145—that officers and employees of the Commonwealth may not obligate public funds beyond the end of a fiscal biennium—was expressly recognized in a letter from the Office of the Attorney General dated August 20, 1999. See Letter from Scott White, Assistant Attorney General, to Representative Brent Yonts, *supra* note 71.

<sup>164</sup> See K.R.S. § 45.242 (Michie 2001 Cum. Supp.).

No head of a budget unit or assistant designated by him shall approve any advice of employment, purchase order, contract requisition for reservation of funds, or letter of travel authorization request for travel outside of Kentucky that will involve an expenditure of any sum in excess of the unencumbered balance of the allotment to which the resulting expenditure will be chargeable.

*Id.*

<sup>165</sup> See K.R.S. § 45.244 (Michie 1997).

Except as expressly authorized in this chapter, no person shall incur, or order or vote to incur, any obligation against the Commonwealth in excess of, or any expenditure not authorized by, an appropriation of the General Assembly and an allotment of funds provided by KRS Chapter 48. Any such obligation so incurred shall not be binding against the Commonwealth, and shall be void and incapable of ratification by any administrative authority of the Commonwealth.

*Id.*

<sup>166</sup> See K.R.S. § 45.251(1) (Michie 1997). For the text of K.R.S. § 41.110, see *supra* note 8.

<sup>167</sup> See Feld, *supra* note 1, at 972-73 (“Unfortunately, the legal analysis of the 1981 OAG reflects the clear institutional stake of the executive branch in the outcome, so as to flaw the result.”).



to corroborate the limited exceptions to Section 230 that the highest court of Kentucky has recognized. Thus, the exception for services reasonably necessary to save human life or to protect property set forth in 31 U.S.C. § 1342 and analyzed by the various authorities discussed above reflects the teaching of such cases as *Miller v. Quertermous*.<sup>168</sup> In addition, although the exception recognized by General Civiletti for obligations arising directly from the President's "peculiar institutional powers and competency" has no direct analog in Kentucky case law, the Governor could find authority to spend money for his or her comparable powers in the dictum of *Jones v. Commonwealth*, where the court brought the government's constitutional obligation to pay for counsel for indigent accused under the umbrella of *Quertermous*.<sup>169</sup> Finally, the exception set forth in § 1341 of the Anti-Deficiency Act for obligations in advance of appropriations "authorized by law" simply reflects what has been described as a "non-exception" to Section 230—an instance in which the General Assembly has authorized executive officials to incur an obligation outside the concept of a conventional appropriation.<sup>170</sup>

One notable difference between *Quertermous* and the exceptions to the Anti-Deficiency Act is that *Quertermous* will permit actual disbursements from the treasury without appropriations to pay for specific, essential services, whereas the federal law will only permit officials to incur obligations, with actual disbursements having to await an act of Congress.<sup>171</sup> Given the fairly strict limits on the Commonwealth's ability

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<sup>168</sup> *Miller v. Quertermous*, 202 S.W.2d 389 (Ky. 1947) (requiring disbursements from the Treasury to pay for certain essential public services).

<sup>169</sup> See *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970). Of course, it must be borne in mind that the Governor would lack constitutional authority to construe his powers in such a manner as to usurp the authority of another branch of government. See KY. CONST. § 28. See generally Snyder & Ireland, *supra* note 63, at 207 n.213.

[T]here are two types of separation of powers cases: (1) cases in which one branch of government usurps powers properly belonging to another branch of government; and (2) cases in which one branch of government exercises powers properly belonging to it, but encroaches upon the responsibilities of a coequal branch of government in the course of exercising its rightful powers.

*Id.*

<sup>170</sup> See *supra* notes 129-30 and accompanying text.

<sup>171</sup> See Authority to Employ the Services of White House Office Employees During an Appropriations Lapse, Mem. Op. for the Counsel to the President, 19 Op. Off. Legal Counsel 235, 236 (1995) ("To reiterate, employees who perform

to contract casual debt,<sup>172</sup> as well as the short duration of the General Assembly's sessions,<sup>173</sup> however, this makes sense.

## B. Tennessee

### 1. Background

Tennessee is another jurisdiction that has wrestled with the issue of whether and to what extent the government may operate after appropriations expire. In fact, on July 1, 2002, Tennessee found itself in roughly the same circumstances as Kentucky. A new fiscal year had begun, but the legislature had not enacted a budget. Unlike the Governor of Kentucky, however, the Governor of Tennessee did not adopt a comprehensive spending plan. Indeed, had the legislature of that state not enacted the "Essential Government Services Act of 2002,"<sup>174</sup> it is not clear that the state would have had any authority to pay its employees.<sup>175</sup>

The same basic restrictions apply to the fiscal operations of government in Tennessee as in Kentucky, with the exception that Tennessee appears to lack precedent along the lines of *Quertermous*. Like Section 230 of the Kentucky Constitution and the federal Appropriations Clause, the Tennessee Constitution provides that "[n]o public money shall be expended except pursuant to appropriations made by law."<sup>176</sup> Similarly, like K.R.S. § 41.110, a provision of the Tennessee code reiterates the constitutional

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excepted functions may not be paid until appropriations are enacted.").

<sup>172</sup> See KY. CONST. § 49.

<sup>173</sup> See *id.* § 36(1) ("The General Assembly, in odd-numbered years, shall meet in regular session for a period not to exceed a total of thirty (30) legislative days."); *id.* § 42 ("[N]or shall a session occurring in odd-numbered years extend beyond March 30; nor shall a session of the General Assembly continue beyond sixty legislative days, nor shall it extend beyond April 15.").

<sup>174</sup> See Richard Locker & Paula Wade, *Tennessee Goes into Partial Shutdown; Lawmakers Fail to Settle Budget Crisis; 22,000 Face Furloughs*, COM. APPEAL, July 1, 2002, at A1.

<sup>175</sup> See Tom Sharp, *Tenn. Faces 'Many Lawsuits' if a Budget Isn't Passed*, COM. APPEAL (Memphis, Tenn.), June 14, 2002, at B2 ("If lawmakers do not pass a balanced budget by the state constitutional deadline of July 1, the state will be 'in a financial mess of monumental proportions,' Atty. Gen. Paul Summers told the House Finance Committee on Thursday. . . . Without an appropriations bill, Summers said, the state cannot legally spend any money. It could not honor its contracts or pay its employees.").

<sup>176</sup> TENN. CONST. art. II, § 24.

provision limiting the power of the purse to the legislature.<sup>177</sup> In accordance with this precedent, Paul G. Summers, Attorney General of Tennessee, has issued two opinions confirming that the power to appropriate funds from the treasury lies exclusively in the legislature, emphasizing that the government may not spend money after appropriations expire. In his opinion of May 4, 2000, when the state was facing the possibility of a gap in appropriations, he stated:

Our Office has concluded in the past that, absent the enactment of an appropriations bill for the ensuing fiscal year, there is no authority for the State of Tennessee to spend money as of the beginning of the next fiscal year. The appropriations act for fiscal year 1999-2000 reflects no general intent to make appropriations for any subsequent year. . . . Therefore, as a general matter, absent the enactment of an appropriations bill for fiscal year 2000-2001, there will be no authority in most circumstances for the State of Tennessee to spend money.<sup>178</sup>

Attorney General Summers went on to opine, however, that the various agencies of the government could continue to perform their statutory duties, notwithstanding the absence of funding, unless the statutes imposing those duties expressly prohibited performance absent appropriations:

The duties and responsibilities of the various state agencies are set forth in general statutes, and not in the appropriations act. As a result, unless it is expressly forbidden by statute, these agencies may continue to carry out these duties and responsibilities regardless of whether an appropriations act has been enacted. But the money that may be expended to support these activities is subject to the limitations discussed [previously].<sup>179</sup>

In other words, upon the expiration of appropriations, employees of the state may perform statutory duties, but only as volunteers.<sup>180</sup>

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<sup>177</sup> See TENN. CODE ANN. § 9-4-601(a) (1999) (“No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.”).

<sup>178</sup> Failure to Enact Appropriations Act, Tenn. Att’y Gen. Op. No. 00-083, at 4 (2000) (citation omitted).

<sup>179</sup> *Id.* at 5.

<sup>180</sup> Lee Anderson, *A Tennessee Budget Nonoption*, CHATTANOOGA TIMES FREE PRESS, May 11, 2002, at B7 (quoting from General Summers’ testimony regarding a gap in appropriations before a committee of the legislature: “All state functions and services would shut down. Why? No employees. There is no legal authority to

As it turns out, Tennessee did not experience a gap in appropriations in 2000,<sup>181</sup> but it did in the summer of 2002. On March 15, 2002, General Summers issued a second opinion, largely reiterating his opinion of two years before, except for taking into account legislation that had been enacted in the intervening period that provided for certain continuing appropriations.<sup>182</sup> General Summers later testified directly to a committee of the legislature, noting that, if the state entered the new fiscal year without a budget,

[a]ll state functions and services would shut down. . . . No one guards the prisons. No one patrols the highways. No one treats the patients in state hospitals. No one serves the mentally ill. No one processes child support payments. No one handles TennCare applications and payments. No one teaches summer classes in state schools. No one assists the appellate judges. These are just the tip of the iceberg. . . . Everything the state does stops cold.<sup>183</sup>

On the eve of the new fiscal year, the General Assembly of Tennessee enacted emergency legislation appropriating funds for essential public services for a period of five days.<sup>184</sup> Within a few days, the legislature enacted a comprehensive budget for the state.<sup>185</sup>

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make them come to work without pay.”).

<sup>181</sup> See Bonna M. de la Cruz, *Budget Fight Ends Without New Taxes*, TENNESSEAN (Nashville, Tenn.), June 29, 2000, at 1A (“The state legislature ended one of its longest sessions in history yesterday with a budget that includes no new taxes but raises prospects of another round of debate over tax changes later this year or early in 2001.”).

<sup>182</sup> See Failure to Adopt a Budget, Tenn. Att’y Gen. Op. No. 02-034 (2002).

<sup>183</sup> Pat Wilcox, *What if the State Shuts Down?*, CHATTANOOGA TIMES FREE PRESS, May 11, 2002, at B6 (setting forth excerpts from Attorney General Summers’ testimony).

<sup>184</sup> See Lindsay Riddell, *Most College Workers Off Job*, CHATTANOOGA TIMES FREE PRESS, July 1, 2002, at A1 (“Area workers were among the 22,000 state employees the Sundquist administration began calling Sunday to tell them not to show up for work this week.”); *id.* (“The notification is part of a five-day partial shutdown that would limit state government to essential services, such as highway patrol, prisons, mental health, child support and TennCare.”); *id.* (“The House and Senate approved Sunday night the emergency appropriations bill.”); *id.* (“Gov. Don Sundquist was expected to sign the bill by midnight Sunday.”).

<sup>185</sup> See Michael Finn, *State Breaks Budget Impasse—Tax Increase Largest in History*, CHATTANOOGA TIMES FREE PRESS, July 4, 2002, at A1.

## 2. *Implications for Kentucky*

When asked to opine on the fiscal activities of government if appropriations expire, the Attorney General of Tennessee, much like the Attorney General of the United States, issued a formalist opinion confirming that the power of the purse lies in the legislature. Indeed, unlike U.S. Attorney General Civiletti, Tennessee Attorney General Summers did not even recognize an exception for essential services, presumably because the legislature of Tennessee has not authorized such expenditures, nor have the courts of Tennessee issued an opinion along the lines of *Quertermous*. But the position taken by the Governor of Kentucky in 2002 was decidedly nonformalist because, not only did it ignore the general rule set forth in Section 230 of the Kentucky Constitution, but it also went far beyond any fair reading of the authority conferred by *Quertermous*, especially as limited by *Ferguson v. Oates*.<sup>186</sup> Of course, it can be argued that Tennessee had to resolve its budgetary impasse because it faced an enormous shortfall in revenue,<sup>187</sup> but the position taken by the Attorney General of that state was clearly predicated on the rule of law, not on political expedience.

### C. *Connecticut*

#### 1. *Background*

An opinion issued by the Attorney General of Connecticut in 1991 plows many of the same fields as the Civiletti Opinion of 1981, although the authority with which the Attorney General of Connecticut was working was slightly different. Unlike the Constitutions of the United States and Tennessee, the Constitution of Connecticut does not contain a provision virtually identical to Section 230 of the Kentucky Constitution. It does, however, include a provision requiring the treasurer of the state to “receive all moneys belonging to the state, and disburse the same *only as he may be*

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<sup>186</sup> See generally Ky. Op. Att’y Gen. No. 85-132 (recognizing the limited scope of *Quertermous* and *Jones v. Commonwealth*) (quoted *supra* in text accompanying note 128).

<sup>187</sup> See Tom Loftus, *Court Hearing Held as State Operate[s] Without Budget; Judge Will Hear Debate on Patton Spending Plan*, COURIER-J. (Louisville, Ky.), July 2, 2002, at B1 (“Unlike Kentucky, Tennessee’s failure to pass a budget stems from a lack of revenue. Tennessee’s legislature needs to raise about \$800 million to keep state services at current levels, and the legislature has been unable to agree on a plan to do that.”).

*directed by law*,”<sup>188</sup> and the Attorney General of Connecticut has construed this provision to require “an authority from the legislature.”<sup>189</sup>

In addition to this, however, the courts of Connecticut have also laid down a precedent similar to *Quertermous*. In *State v. Staub*, a decision handed down in 1892, the Supreme Court of Errors of Connecticut was asked to review a mandamus against the comptroller of the state.<sup>190</sup> The mandamus had been issued to require the comptroller to disburse certain funds to towns for educational purposes, as (apparently) required by statute.<sup>191</sup> Complications had arisen because the legislature of the state had “made no appropriation for said expenses or for any other expenses of the state,” and another statute prohibited the expenditure of funds without appropriations by the legislature.<sup>192</sup> Perceiving a conflict between procedural and substantive rules, the court concluded that “[t]he paramount must control. The command to provide for the essential operations of government must prevail against a rule of procedure in applying the funds raised by taxation for the support of the government.”<sup>193</sup>

The decision in *Staub* may be subject to criticism because the statute that called upon the comptroller to distribute certain funds to towns may itself have constituted an appropriation, thus providing an easy ground for sustaining the mandamus.<sup>194</sup> Indeed, the *Staub* court appeared to recognize this, reasoning: “In the absence of a special appropriation the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose, and the law imposes on the comptroller the duty of settling and adjusting demands against the state for such expenses.”<sup>195</sup> Putting this to the side, the continuing significance of *Staub*, recently reaffirmed by the Supreme Court of Connecticut,<sup>196</sup> is roughly analogous to that of *Quertermous*. Indeed, in 1991 Attorney General Richard Blumenthal of Connecticut recognized that, under *Staub*, “essential services of government must continue and must continue to be paid for in the absence of a

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<sup>188</sup> CONN. CONST. art. IV, § 22 (emphasis added).

<sup>189</sup> Conn. Att’y Gen. Op. No. 91-019 (June 7, 1991), 1991 Conn. AG LEXIS 79, \*15 (quoting *Shattuck v. Kincaid*, 49 P. 758 (Ore. 1897), and other decisions).

<sup>190</sup> See *State v. Staub*, 23 A. 924, 924-95 (1892).

<sup>191</sup> See *id.* at 925.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 927.

<sup>194</sup> See *supra* notes 129-30 and accompanying text for a discussion of a legislature’s flexibility in making appropriations.

<sup>195</sup> *Staub*, 23 A. at 926.

<sup>196</sup> See *Pellegrino v. O’Neill*, 480 A.2d 476, 480 (1984).

budget.”<sup>197</sup> General Blumenthal went on, however, to advise against the invocation of this precedent, owing to the complexity of its administration:

The *Staub* decision has not been applied in modern times in the absence of an entire State budget. Practical problems would inevitably arise in applying the *Staub* standard. The *Staub* standard itself suffers from a significant lack of clarity, rendering the choice among spending options difficult to make and support. The necessity to select expenses actually allowable could cause uncertainty and confusion in the operation and delivery of State services. Doubt and anxiety would be rampant not only among State employees, but also among recipients of services and the public in general. It would prevail even after the initial determination as to which services and programs would continue to be funded in the absence of a budget, since the initial decisions very likely would be reviewed and possibly challenged in the courts.

In order to avoid these problems and others, we strongly advise that a continuing resolution be passed by the General Assembly and signed by the Governor prior to June 14, 1991.<sup>198</sup>

## 2. *Implications for Kentucky*

Attorney General Blumenthal’s opinion is particularly apt for Kentucky because of the decision in *Staub*, which corresponds somewhat to *Quertermous*. As General Blumenthal indicated, however, *Staub* does not apply to all expenses of government, but only those properly characterized as essential. Consequently, his opinion does not provide support for the spending plan adopted by the Governor of Kentucky in 2002. Of course, General Blumenthal was undeniably correct in his observation that identifying essential public services would be difficult, and his advice was well-founded that the legislature of Connecticut should enact some kind of continuing resolution appropriating funds on an interim basis. But this should not be interpreted to suggest that such determinations could not possibly be made, either by an executive implementing a properly constructed spending plan or by a court exercising jurisdiction over a challenge to a comprehensive plan.<sup>199</sup>

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<sup>197</sup> Conn. Att’y Gen. Op. No. 91-019 (June 7, 1991), 1991 Conn. AG LEXIS 79, \*11.

<sup>198</sup> *Id.* at \*13.

<sup>199</sup> See *infra* notes 274-85 and accompanying text for a discussion of a court’s capacity to distinguish essential from non-essential public services.

#### D. Summary

Learned opinion in the foregoing jurisdictions, all of which are subject to rules analogous to Section 230, confirms that the spending plan adopted by the Governor of Kentucky in 2002 did not comport with fundamental rules of divided government.<sup>200</sup> These opinions reflect a high degree of formalism and attentiveness to the principles of separated power as laid down in the applicable constitution, and none would support a spending plan along the lines of that adopted by the Governor in 2002. Were another Governor to adopt a similar plan, it would be properly vulnerable to constitutional challenge.

#### V. THE QUESTION OF STANDING

As noted earlier, the Franklin Circuit Court never ruled on the validity of the Governor's spending plan. Instead, it dismissed the action to confirm the plan's constitutionality as moot in March 2003.<sup>201</sup> Because the case never proceeded to a final ruling, one cannot know with certainty that it would have overcome procedural hurdles that, at least in theory, could have prevented it from being decided on the merits. Among these is the requirement that the parties seeking relief have standing to sue, discussed in this part of the Article. In the next part, another of these hurdles is discussed, the requirement that the case be justiciable. In point of fact, the court never fully resolved either of these issues, although on one occasion it did strongly indicate that one of the intervening parties, Senator Williams, had standing to participate.<sup>202</sup> This part of the Article concludes

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<sup>200</sup> Most likely, the office of every attorney general in the United States has opined on some aspect of a gap in appropriations. In 1982, for example, Attorney General Robert Abrams of New York was asked whether New York could lawfully pay its employees in scrip, for which it would have only a moral obligation of repayment, during a gap. *See* N.Y. Op. Att'y Gen. 82-F1 (1992), 1982 N.Y. AG LEXIS 100, \*1. General Abrams indicated that it could. *See id.* at \*2-3 ("[T]he existing legal authority leads to the conclusion that the issuance of scrip would probably be upheld by the courts. The question, however, is not free from doubt."). Similarly, in 1981 Attorney General Wilson L. Condon of Alaska opined that money could be disbursed from the state's treasury after the legislature had passed a budget, but before the governor had signed it. *See* Alas. Op. Informal Att'y Gen., File No. J-66-866-81 (1981), 1981 Alas. AG LEXIS 492, \*2-3. These opinions are important, but I have not discussed them in the text because they do not comprehensively address the issues presented by a gap in appropriations.

<sup>201</sup> *See supra* note 41 and accompanying text.

<sup>202</sup> Senator Williams was the only party whose standing was expressly called into question.



that at least someone would most likely have standing to test the validity of an executive spending plan. Before the analysis in support of this conclusion is set forth, however, this Article discusses analogous issues at the federal level, where it appears by contrast that a more limited conception of standing would most likely preclude an action to test the constitutionality of an executive spending plan.

### *A. The United States*

As noted earlier, the federal Appropriations Clause and the Anti-Deficiency Act, as interpreted by the Attorney General of the United States, would almost certainly preclude comprehensive disbursements from the treasury in the absence of appropriations. The reader may be interested to note, however, that actual enforcement of these provisions of law is quite possibly limited to the prospect of civil or criminal actions under the Anti-Deficiency Act. The Anti-Deficiency Act does not confer a private right of action, and a direct action on the Appropriations Clause would most likely be untenable.

As one can readily imagine, the individuals most obviously hurt by disbursements from the treasury in the absence of appropriations are members of the taxpaying public and members of the legislature, whose prerogative is usurped. But both legislative and taxpayer standing are difficult to maintain in the federal courts on a federal predicate.

#### *1. Legislative Standing*

In the case of *Raines v. Byrd*, six members of Congress—four Senators and two Representatives—brought suit against the Secretary of the Treasury and the Director of the Office of Management and Budget, seeking to overturn legislation that authorized the President to exercise a line-item veto.<sup>203</sup> They asserted an injury to their persons in their political capacities by virtue of the fact that their votes on expenditures meant less under the threat of such a veto.<sup>204</sup> The Court rejected their claim, however, reasoning that these members could not claim to have been “deprived of something to which they *personally* [were] entitled—such as their seats as members of Congress after their constituents had elected *them*.”<sup>205</sup> The Court was not willing to recognize standing on the basis of an injury that arises from an altered playing field.

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<sup>203</sup> *Raines v. Byrd*, 521 U.S. 811, 814 (1997).

<sup>204</sup> *See id.* at 816.

<sup>205</sup> *Id.* at 821.

The *Raines* Court took pains to distinguish *Coleman v. Miller*, a case in which just over half of Kansas's Senators brought suit to challenge that state's purported ratification of an amendment to the federal Constitution.<sup>206</sup> In *Coleman*, a resolution to ratify the proposed amendment was laid before the Kansas Senate and received twenty votes in favor and twenty opposed. The Lieutenant Governor of the state, the chamber's presiding officer, then voted in favor of the resolution, and the House followed suit, adopting the resolution. The twenty Senators who voted against the resolution, joined by one who voted in its favor and three Representatives, then sought mandamus to restrain various officials from giving the state's assent to the proposed amendment. Although the Supreme Court ruled against the legislators on the merits, it agreed that they had standing to sue. Specifically, the Court reasoned that the legislators could sue because they claimed to have been deprived of their opportunity to vote on the ratification and because the measure could not have been enacted without their collective votes.<sup>207</sup> The collective votes of the plaintiffs in *Raines v. Byrd*, by contrast, would not have been sufficient to prevent Congress from enacting the legislation at issue in that case.

Taken together, *Raines* and *Coleman* indicate that judicial enforcement of the federal Appropriations Clause at the instance of an action by legislators, if possible at all, would require suit by enough legislators to prevent enactment of an appropriation. This would be a majority of either house of Congress—51 Senators or 218 Representatives. Without the votes of this number of federal legislators, no appropriation could pass. Consequently, a non-legislative disbursement from the treasury would arguably deprive them of a prerogative assigned to them by the Constitution. Needless to say, these are large numbers. Furthermore, the *Raines* Court was careful to note that other considerations could preclude applying the apparent rule of *Coleman* at the federal level.<sup>208</sup>

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<sup>206</sup> See *Coleman v. Miller*, 307 U.S. 433, 436 (1939).

<sup>207</sup> See *id.* at 438, 441, 446.

<sup>208</sup> See *Raines*, 521 U.S. at 824. The Court went on to suggest other possible grounds for distinguishing *Raines* from *Coleman*. See *id.* at 824 n.8.

There is another aspect of *Raines* that merits attention. After distinguishing *Coleman* and engaging in a lengthy historical analysis, the *Raines* Court went on to suggest that the President of the United States, who personifies the executive branch of government, lacked standing to challenge an incursion on his prerogative to remove high-ranking executive officials. The Court did not cite a case in this portion of its opinion, however. See *id.* at 826-28; *id.* at 827 ("It occurred to neither of these Presidents [Grant and Cleveland] that they might challenge the [Tenure of

## 2. *Taxpayer Standing*

Taxpayer standing is similarly elusive in the federal system. In fact, it is generally not allowed. In the famous case of *Frothingham v. Mellon*,<sup>209</sup> a federal taxpayer brought suit against the Secretary of the Treasury to restrain him from disbursing money from the federal treasury under the Maternity Act, which provided federal funds to reduce mortality among mothers and infants to states willing to comply with its requirements.<sup>210</sup> Frothingham argued that the Act intruded upon the reserved powers of the states. The Court affirmed a non-suit against her on the ground that her opposition to the act in question was political and that her injury from the disbursements at issue was purely speculative and likely non-existent.<sup>211</sup>

A number of years after *Frothingham*, the Supreme Court of the United States did allow a limited form of taxpayer standing in the case of *Flast v. Cohen*.<sup>212</sup> In this case, federal taxpayers brought suit against the Secretary of Health, Education, and Welfare to restrain that official from disbursing certain funds from the federal treasury under the Elementary and Secondary Education Act of 1965.<sup>213</sup> In particular, these individuals opposed disbursement of funds for the benefit of children in private, sectarian schools, arguing that such disbursements would constitute an establishment of religion.<sup>214</sup> The lower court held that the plaintiffs lacked standing on the authority of *Frothingham*,<sup>215</sup> but the Supreme Court reversed, setting forth a variant test for standing that the plaintiffs in this case satisfied. Under this test, a plaintiff has standing to challenge a federal action if there is a nexus between the plaintiff's status and the type of federal action at issue, and if there is also a nexus between the type of federal action at issue and the particular provision of federal law that the plaintiff argues the action violates.<sup>216</sup> The plaintiffs in this case were said to satisfy this "double nexus" test because of the nexus between their status as taxpayers and the

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Office] Act in an Article III Court."). This analysis can thus readily be described as dictum.

<sup>209</sup> *Frothingham v. Mellon*, 262 U.S. 447, 479 (1923).

<sup>210</sup> *Id.* at 479.

<sup>211</sup> *See id.* at 487-88.

<sup>212</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>213</sup> *Id.* at 85.

<sup>214</sup> *Id.* at 86.

<sup>215</sup> *Id.* at 88.

<sup>216</sup> *See id.* at 102-03.

type of federal action at issue—an expenditure from the federal treasury—and because of the nexus between the federal government's power to spend money and the clause of the First Amendment prohibiting an establishment of religion.<sup>217</sup> The Court reasoned that one of the specific evils the Establishment Clause was intended to prevent was the expenditure of public money for sectarian purposes.<sup>218</sup>

But the exception to the general rule against taxpayer standing recognized in *Flast v. Cohen* is not broad and, in fact, has not been satisfied in any context other than a challenge by a federal taxpayer to a federal expenditure alleged to constitute an establishment of religion. Thus, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court rejected a challenge to the administrative transfer of surplus federal property to a sectarian educational institution on the ground that plaintiffs lacked standing to sue.<sup>219</sup> The Court distinguished *Flast* on two grounds. First, an executive agency, not Congress, had effected the transfer.<sup>220</sup> Second, authority for the transfer did not rest on the federal government's power to tax and spend but instead rested on the Property Clause.<sup>221</sup> Similarly, in *Schlesinger v. Reservists Committee to Stop the War*,<sup>222</sup> the Court turned back a challenge to service by members of Congress in the Armed Forces Reserve, reasoning that the Committee had not challenged an exercise of the legislature's spending power but instead had simply challenged the executive's practice of allowing members of Congress to maintain their status in the reserve.<sup>223</sup>

Most importantly, for purposes of this Article, the double nexus test of *Flast* failed to suffice in *United States v. Richardson*, a case involving the duty of the federal government to report moneys expended by the Central Intelligence Agency ("CIA").<sup>224</sup> Richardson argued that the Constitution required publication of the CIA's expenditures.<sup>225</sup> This has great significance for the issues presented in this Article because the Statement and Account Clause, which was at issue in *Richardson*, is located in the same

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<sup>217</sup> See *id.* at 103-04.

<sup>218</sup> *Id.* at 103.

<sup>219</sup> See *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489-90 (1982).

<sup>220</sup> See *id.* at 479.

<sup>221</sup> See *id.* at 480.

<sup>222</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

<sup>223</sup> *Id.* at 228.

<sup>224</sup> See *United States v. Richardson*, 418 U.S. 166, 167-69 (1974).

<sup>225</sup> *Id.* at 167.

clause of the Federal Constitution as the Appropriations Clause, which forbids non-legislative disbursements from the treasury.<sup>226</sup> The Court held that Richardson lacked standing and distinguished *Flast* on the ground that Richardson was not complaining about the CIA's expenditures per se; he was complaining about his inability to know what it was doing.<sup>227</sup>

The fact that a federal taxpayer lacked standing to invoke the Statement and Account Clause suggests, but certainly does not dictate, that such a taxpayer might also lack standing to invoke the Appropriations Clause. This, combined with the high, if not insuperable, hurdle for legislative standing in the federal system, indicates that a direct action on the Appropriations Clause would be problematic. As a consequence, the federal polity must rely principally upon the willingness of the executive branch to adhere strictly to the terms of the Appropriations Clause and the Anti-Deficiency Act. Fortunately for the scheme of separated power, the executive tends to do this.<sup>228</sup> In addition, as we have seen, Congress has not been a silent partner in the process. Instead, it has enacted legislation as recently as 1990 to confirm that it expects the Anti-Deficiency Act to be interpreted with a fair degree of strictness. As the following sub-part will demonstrate, plaintiffs seeking to challenge an executive spending plan will most likely find the courts of Kentucky more accessible than their federal counterparts.

### *B. Kentucky*

The basic rule for standing in Kentucky is that, in order to bring suit, a person must have a "judicially recognizable interest in the subject matter of the suit."<sup>229</sup> This language has the potential for being broad, but it is

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<sup>226</sup> See U.S. CONST. art. I, § 9, cl. 7. This clause provides in full:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

*Id.*

<sup>227</sup> See *Richardson*, 418 U.S. at 175-77.

<sup>228</sup> Indeed, the Anti-Deficiency Act provides for civil and criminal enforcement, and the Department of Justice has notified federal officials that it will seek indictments for violations of the act in appropriate situations. See 4 Op. Off. Legal Counsel 16, 20 (Apr. 25, 1980) ("[T]he Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged.").

<sup>229</sup> *Ashland v. Ashland FOP No. 3, Inc.*, 888 S.W.2d 667 (Ky. 1994).

written in such vague terms that it does not provide much guidance in isolation. This sub-part will consider the prospects for standing by members of the legislature and by taxpayers to challenge non-legislative disbursements from the treasury.

### 1. *Legislative Standing*

The courts of Kentucky seem to take a broader view of when a public official can go to court to defend the prerogatives of office than did the Supreme Court of the United States in *Raines v. Byrd*. In *Legislative Research Commission v. Brown*,<sup>230</sup> for example, the Supreme Court of Kentucky addressed a challenge to certain enactments that arguably altered the separation of power between the legislative and executive branches of government. The case had begun as a declaratory action by the Legislative Research Commission to validate its authority under certain parts of the legislation, and the original defendants, the Governor and Attorney General of Kentucky, had by counterclaim called in question other parts.<sup>231</sup> The legislation in question, it was argued, enlarged the authority of the General Assembly to act through its agent the Legislative Research Commission, particularly when the General Assembly was not in session, and the court quite clearly recognized that these enlargements would largely come at the expense of the executive branch.<sup>232</sup>

The Kentucky Supreme Court went on to strike down many provisions of the legislation at issue. It must be noted, however, that neither the Governor nor the Attorney General, who in filing a counterclaim took on the functional status of plaintiffs, alleged that the legislation interfered with his activities in a particular or concrete way, such as by preventing him from receiving a paycheck, or taking office, as the *Raines v. Byrd* Court's

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<sup>230</sup> *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984).

<sup>231</sup> *Id.* at 909.

<sup>232</sup> *See id.* at 911-14. The court held:

The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government. We conclude that [the statutory provisions at issue, which provide for] legislative or [Legislative Research Commission] review of proposed regulations as those statutes are presently written are violative of Ky. Const. Secs. 27-28 and are a legislative encroachment into the power of the executive branch.

*Id.* at 919 (citation omitted).

dictum would seem to require. Nevertheless, the issue of representative standing was not addressed in the *Legislative Research Commission* court's opinion.<sup>233</sup>

There is another interesting possibility that remains to be fully explored. Because of the unique status of the presiding officers of the two chambers of the General Assembly, either of those individuals may have an enhanced capacity to maintain suit to prevent non-legislative disbursements from the treasury. Section 56 of the Kentucky Constitution calls for a dramatic series of events by the presiding officer of each chamber before any bill, including a bill appropriating money, can become law. This suggests that the presiding officer's duties are indispensable to the enactment of legislation. In pertinent part, this section provides:

No bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses in open session; and before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become law. The bill shall then be read at length and compared; and, if correctly enrolled, he shall, in the presence of the House in open session, and before any other business is entertained, affix his signature, which in fact shall be noted in the journal, and the bill immediately sent to the other House.<sup>234</sup>

Read in conjunction with Section 230, which forbids non-legislative disbursements from the treasury, Section 56 supports the argument that, if funds were disbursed from the treasury without appropriations, the power of the President of the Senate or the Speaker of the House to sign legislation that could properly appropriate funds would be usurped. This would support the argument that the officer at issue is asserting a personal interest or seeking to vindicate a power uniquely associated with his or her office that has been usurped.<sup>235</sup>

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<sup>233</sup> In addition, in *Patton v. Sherman*, No. 01-CI-00660, slip op. at 2 (Franklin Cir. Ct. (Ky.) Jan. 11, 2002), the court reasoned that "the Governor has a judicially recognizable interest in the Executive Branch's ability and duty to faithfully execute the law," *id.*, strongly suggesting that a mere threat to the ability of a public official to carry out the duties of office suffices to establish standing to sue.

<sup>234</sup> KY. CONST. § 56.

<sup>235</sup> It is also possible that the elected leader of a chamber would have enhanced authority to bring suit on behalf of the membership. *See id.* § 34 (providing for the choosing of the Speaker of the House); *id.* § 85 (providing for the choosing of the

In fact, the above-quoted language from Section 56 played an important role in a case decided long ago by the highest court in Kentucky styled *Kavanaugh v. Chandler*.<sup>236</sup> In this case, the Lieutenant Governor, who served as presiding officer of the Senate at that time, refused to sign several pieces of engrossed legislation on the ground that they improperly had been given their first reading in the Senate on the same day they had passed the House.<sup>237</sup> As the court explained in the opening paragraph of its decision, the issue presented therein was “whether or not the signature of the presiding officer of the Senate is essential to the enactment of a legislative bill into law.”<sup>238</sup> Answering in the affirmative, the court concluded that, because the bills in question “did not have the requisite impress of legislative sanction,” they were “wanting in the constitutional essentials of due enactment” and “[did] not have the force of law.”<sup>239</sup> The court did reason, however, that mandamus could lie to compel the presiding officer of the Senate to sign properly engrossed legislation. The problem in that case, however, was that the legislature in question had adjourned.<sup>240</sup>

In fact, the *Kavanaugh v. Chandler* issue had come up in another, earlier case, *Hamlett v. McCreary*, in which the presiding officer of the Senate had failed to sign an engrossed bill out of inadvertence instead of design.<sup>241</sup> In this case as well the court held that the legislation in question was not valid. Referring to Section 56, the court noted that:

This language is express, sweeping, and mandatory. It provides, in express terms, that no bill shall become law until the same shall have been signed by the presiding officer of each of the two houses in open session, and after certain specified and formal prerequisites have been complied with.<sup>242</sup>

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President of the Senate).

<sup>236</sup> *Kavanaugh v. Chandler*, 72 S.W.2d 1003 (Ky. 1934).

<sup>237</sup> *See id.* at 1004.

<sup>238</sup> *Id.* at 1003.

<sup>239</sup> *Id.* at 1006.

<sup>240</sup> *See id.* at 1005-06.

<sup>241</sup> *See Hamlett v. McCreary*, 156 S.W. 410 (Ky. 1913), *overruled in part by D&W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420 (Ky. 1980).

<sup>242</sup> *Id.* at 411. The court also held:

We have been referred to no case which upholds the validity of an act of the Legislature which bears the approving signature of the presiding officer of one house only; and certainly, under the strong language of section 56 of our Constitution, no such bill can be permitted to become a law.

*Id.* at 413.



Given the language of Section 56 and of the cases that have applied it, this provision of the constitution puts the President of the Senate and the Speaker of the House not only in the position of persons with a personal stake in the outcome of the litigation but also in a position similar to that of the Senators who brought suit in *Coleman v. Miller*.<sup>243</sup> This is because the presiding officer of either of the chambers alone is competent to forestall any disbursement by refusing to affix his or her signature to the bill in question. In other words, because of Section 56, either of these presiding officers can claim to have been “deprived of something to which [he or she] *personally* is entitled.”<sup>244</sup> Specifically, a presiding officer can claim he or she was deprived of the right to sign legislation that appropriates funds.

Another case possibly in this vein is *Rose v. Council for Better Education, Inc.*<sup>245</sup> In *Rose*, the state’s highest court was called upon to decide whether a collection of school boards had standing to sue certain officers of the government to cause them to consider legislation to improve the educational system in Kentucky.<sup>246</sup> The court began its analysis by stating the familiar rules that, “[i]n order to have standing to sue, a plaintiff need only have a real and substantial interest in the subject matter of the litigation, as opposed to a mere expectancy,”<sup>247</sup> and that “in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit.”<sup>248</sup> The *Rose* court then went on to reason that the school boards had standing because they “were statutorily obligated to promote public education for their respective constituents,” and because it was their duty “to make every effort to remedy [the] situation” if the school system was not “efficient,” as required by Section 183 of the constitution.<sup>249</sup> It seems plausible to argue on this basis that the presiding officers of the two chambers of the legislature each have standing to challenge non-legislative disbursements from the treasury because they each have a duty to ensure that actions that require statutory authorization bearing their signatures in fact do so.

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<sup>243</sup> *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>244</sup> *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

<sup>245</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>246</sup> *Id.* at 193.

<sup>247</sup> *Id.* at 202.

<sup>248</sup> *Id.* (quoting *HealthAmerica Corp. of Ky. v. Humana Health Plan of Ky.*, 697 S.W.2d 946, 947 (Ky. 1985)).

<sup>249</sup> *Id.* at 202.

The upshot of the foregoing is that legislative standing to challenge an executive spending plan would most likely exist in Kentucky, and this was the indication of the Franklin Circuit Court in the recent litigation over the Governor's spending plan.

## 2. *Taxpayer Standing*

Kentucky's test for taxpayer standing is quite lenient, and, unlike the federal system, most likely would permit a challenge against non-legislative disbursements from the treasury. An important case in this regard is *Price v. Commonwealth*, a decision by the Court of Appeals that involved taxpayer standing to challenge an expenditure relating to non-public schooling.<sup>250</sup> In this decision the Court of Appeals set forth strong language that distinguished Kentucky's law of taxpayer standing from its federal counterpart<sup>251</sup> and emphasized the breadth of taxpayer standing in the Commonwealth.<sup>252</sup> In fact, the *Price* court cited several cases that suggest Kentucky's rules for standing are generally broad.<sup>253</sup>

## 3. *Citizen Standing, or Standing by Necessity*

There is also the prospect in Kentucky of citizen standing, or of "standing by necessity"—that any citizen of the Commonwealth—official, taxpayer, both, or neither—should be deemed to have standing to challenge non-legislative disbursements from the treasury because someone must have standing to do so, and the plaintiff before the court may be as good as anybody else. This reasoning was just below the surface in the case of *Gay v. Haggard*, a mandamus to compel a county road supervisor to let contracts by competitive bidding, as required by statute.<sup>254</sup> The highest court of Kentucky recognized the plaintiff's status as a taxpayer, but it suggested a much broader conception of standing in the following language:

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<sup>250</sup> See *Price v. Commonwealth*, 945 S.W.2d 429, 430 (Ky. Ct. App. 1996).

<sup>251</sup> See *id.* at 431 n.2 and accompanying text.

<sup>252</sup> See *id.* at 431 ("From the more recent case of *Gillis v. Yount*, Ky., 748 S.W.2d 357 (1988), to cases from the last century, Kentucky has consistently recognized taxpayer standing to challenge the constitutionality of city, county and state taxes and expenditures.").

<sup>253</sup> See *id.* at 431-32 (discussing *State Text-Book Comm'n v. Weathers*, 213 S.W. 207 (Ky. 1919), which recognized a party's standing to sue as "a citizen and patron of [the Commonwealth's] common schools," and other cases).

<sup>254</sup> *Gay v. Haggard*, 118 S.W. 299, 303-04 (Ky. 1909).

The right of a single taxpayer to maintain such an action is no longer in doubt. It would seem to follow that where a ministerial act was required by law to be done, which if done would inure to the benefit of the public, the tardy official might be set in motion and compelled to act by a suit by one of the public affected, suing on his own behalf and on behalf of others. *Nor is it necessary that the plaintiff should show a special interest to be affected by the act. The reason it is public is because all the public are equally affected by it at least theoretically; and, if no one of the public could maintain the suit, none less than all could, which would be practically a denial of the right to sue, for it is scarcely possible that all citizens of a county or other territory could be got to act together in any matter.*<sup>255</sup>

Finally, it should be noted that courts often treat standing as a pragmatic concept, not one driven by bright lines. *Flast v. Cohen*, as noted earlier, involved standing at the federal level.<sup>256</sup> In this case, certain taxpayers brought suit to challenge certain federal expenditures as constituting an establishment of religion.<sup>257</sup> The government argued that they lacked standing to sue because they lacked the requisite stake in the litigation.<sup>258</sup> The Court rejected this argument, however, and held that the plaintiffs had standing.<sup>259</sup> In the course of doing so, the Court recognized that standing is a fairly amorphous concept driven by a variety of jurisprudential considerations, noting

[s]tanding is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of the most amorphous [concepts] in the entire domain of public law. . . . In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.<sup>260</sup>

The Court went on to note that the *constitutional* limitations on standing are actually quite modest.<sup>261</sup> It held that, “in terms of Article III limitations on

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<sup>255</sup> *Id.* at 301 (emphasis added).

<sup>256</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>257</sup> *Id.* at 85.

<sup>258</sup> *Id.* at 88.

<sup>259</sup> *Id.* at 103.

<sup>260</sup> *Id.* at 99 (internal quotation marks and citations omitted).

<sup>261</sup> *Id.* at 101.

federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."<sup>262</sup> Whether this approach to standing is advisable is beyond the scope of this Article. For purposes of this Article, it suffices to note that this approach exists.

## VI. THE QUESTION OF JUSTICIABILITY

Another possible impediment to judicial review of an executive spending plan involves the justiciability of a challenge to such a plan. Justiciability, the susceptibility of a dispute to judicial resolution, has many dimensions, two of which present themselves for consideration here. The first concerns whether the positions of the parties to the dispute are sufficiently adverse to merit the attention of the judiciary and to give the issues at hand their fullest elaboration. The second concerns whether a court would be capable of making the kinds of decisions required to bring a spending plan within the scope of Section 230. Depending on who sued whom, and for what kind of relief, these issues may not arise.

### A. *Absence of a Legally Adverse Relationship*

If someone supporting the constitutionality of an executive spending plan sued another party who also supported such a plan, the danger of a collusive suit would arise; that is, a suit in which the parties' positions were not actually adverse. Courts prefer not to exercise jurisdiction over these kinds of cases because they do not present real controversies, and because courts cannot generally rely upon parties who fundamentally agree with each other to delineate issues fully for the court's consideration. An illustrative case in this regard is *United States v. Johnson*.<sup>263</sup> In this case, a tenant who lived in a rent-controlled dwelling brought suit against his landlord, arguing that the latter was charging him rent in excess of the amount permitted by law. The landlord answered that the statute was unconstitutional because it improperly delegated legislative power to an administrative official, and the lower court agreed, dismissing the complaint.<sup>264</sup> The United States then moved the court to reopen and dismiss the case on the ground that the suit had been "collusive and did not involve

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<sup>262</sup> *Id.*

<sup>263</sup> *United States v. Johnson*, 319 U.S. 302 (1943) (per curiam).

<sup>264</sup> *See id.* at 302-03.

a real case or controversy.”<sup>265</sup> The district court refused, but the Supreme Court was receptive to this argument on appeal.<sup>266</sup> Noting that the landlord had dominated both sides of the litigation,<sup>267</sup> the Court vacated the judgment below with instructions to dismiss.<sup>268</sup> As the Court reasoned, an “‘honest and actual antagonistic assertion of rights’ to be adjudicated” is “essential to the integrity of the judicial process” and “indispensable to adjudication of constitutional questions.”<sup>269</sup>

If a party who supported the constitutionality of an executive spending plan brought suit against another party taking essentially the same position, the teaching of *United States v. Johnson* might apply. Indeed, the recent litigation over the Governor’s spending plan may have implicated that teaching. In this case, the Treasurer brought suit against the Secretary of the Finance and Administration Cabinet, asking the court to affirm the constitutionality of the plan in all respects.<sup>270</sup> Although the Secretary did not confess judgment, in his answer he tended more to agree with the Treasurer than to disagree with him, asking the court to validate the spending plan in its entirety, subject only to the requirement that it not be arbitrary and capricious.<sup>271</sup> Later, in his tendered Judgment, the Secretary asked the court to grant both its motion for summary judgment and that of the Treasurer.<sup>272</sup> Given the significant congruence between the positions

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<sup>265</sup> *Id.* at 303.

<sup>266</sup> *See id.* at 305.

<sup>267</sup> *See id.* at 303-04.

<sup>268</sup> *See id.* at 305.

<sup>269</sup> *Id.* (citations for internal quotations omitted).

<sup>270</sup> *See* Complaint for Declaratory Relief para. 3, at 8, *Spending Plan Litigation*, *supra* note 28.

<sup>271</sup> *See* Response of the Finance and Administration Cabinet to the Motions for Summary Judgment on Behalf of David L. Williams and Kentucky Retirement Systems and Memorandum in Support of the Cabinet’s Motion for Summary Judgment at 30-31, *Spending Plan Litigation*, *supra* note 28. *See infra* note 285 for a discussion of the applicability of this standard to the spending plan.

<sup>272</sup> Judgment tendered with Response of the Finance and Administration Cabinet to the Motions for Summary Judgment on Behalf of David L. Williams and Kentucky Retirement Systems and Memorandum in Support of the Cabinet’s Motion for Summary Judgment at 2, *Spending Plan Litigation*, *supra* note 28. It was reported that the two sides conferred over the suit before filing. *See* Tom Loftus, *Patton Asserts Power Over State Spending; Treasurer Seeks Court’s OK for Governor’s Budget Plan*, *COURIER-J.* (Louisville, Ky.), June 27, 2002, at B1 (“[Governor] Patton also said that, after consultation with administration officials and the attorney general’s office, state Treasurer Jonathan Miller would file a lawsuit asking Franklin Circuit Court to declare his plan permissible and neces-

taken by these two officers, a court confronting the same situation in the future could quite plausibly choose to dismiss the matter for lack of subject-matter jurisdiction, owing to the absence of a sufficiently adverse relationship between the parties. Of course, the Treasurer and Secretary were not the only parties to the litigation, but they were the original parties.<sup>273</sup>

### *B. Absence of Judicially Manageable Standards*

A second possible ground upon which a court could deem a challenge to an executive spending plan non-justiciable would be that administering a judgment against the executive would be an unmanageable task for the judiciary.<sup>274</sup> Without doubt, a challenge to comprehensive executive spending plan, calling for strict adherence to Section 230, as interpreted by such cases as *Quertermous* and *Jones*, would require a significant amount of judicial attention. In particular, a court could well be called upon to decide what kinds of public services qualify as "specific and essential" and therefore merit a disbursement from the treasury in the absence of appropriations. This would undoubtedly be a difficult task,<sup>275</sup> but it would not be insuperable. Similar and even identical projects have been undertaken by the courts in the past. In *Rose v. Council for Better Education, Inc.*,<sup>276</sup> for example, courts undertook to evaluate exactly how Kentucky paid for its system of common schools, examining a volume of evidence that the Supreme Court described as a "tidal wave."<sup>277</sup> More to the point of this Article, in *First National Bank of Manchester v. Hays* the circuit court relied upon a commissioner to examine claims of indebtedness against a

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sary.").

<sup>273</sup> One may note with interest that in *Miller v. Quertermous* the Treasurer and the Secretary's predecessor, the Commissioner of Finance, were on the same side of the litigation, each having been named as defendants in an action by the Commissioner of Welfare to compel the disbursement of certain funds from the treasury. See *Miller v. Quertermous*, 202 S.W.2d 389, 390 (Ky. 1947).

<sup>274</sup> See generally *Philpot v. Haviland*, 880 S.W.2d 550, 553 (Ky. 1994) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that a court may deem an action non-justiciable for lack of "judicially discoverable and manageable standard[s] for resolving" the case)).

<sup>275</sup> See Conn. Att'y Gen. Op. No. 91-019 (June 7, 1991), 1991 Conn. AG LEXIS 79, \*13 (describing the complexity of separating essential from non-essential public services).

<sup>276</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>277</sup> *Id.* at 197.

county and to separate claims pertaining to “indispensable governmental charges,” which were deemed “fundable,” from other claims.<sup>278</sup> Given the complexity of the evidence evaluated in *Rose*, the nature of the decisions rendered in *First National Bank of Manchester*, and the ample guidance provided by such authority as *Quertermous*, *Jones*, and the Civiletti Opinion, “judicially discoverable and manageable standard[s]” for adjudicating a challenge to an executive spending plan exist.<sup>279</sup>

In addition, adjudicating such a challenge would simply involve the courts in doing what courts are uniquely suited to do—interpreting a provision of the constitution and the cases and other authority pertaining thereto. Indeed, determining the extent to which Section 230 will permit non-legislative disbursements from the treasury is strictly a matter of law—just as interpreting Section 183 of the constitution, which requires the legislature to “provide for an efficient system of common schools throughout the state,”<sup>280</sup> was a pure legal issue in *Rose*.<sup>281</sup> In this case, the appellants argued that the judiciary should not “substitute its judgment for the judgment of the General Assembly,”<sup>282</sup> as to whether the state’s system of common schools was constitutionally efficient. The court rejected this argument, stating:

The ultimate issue [before us] is whether the system of common schools in the Commonwealth established by the General Assembly . . . is in compliance with the constitution. Specifically, we are asked—based solely on the evidence in the record before us—if the present system . . . is “efficient” in the constitutional sense. *It is our sworn duty, to decide such questions when they are before us by applying the constitution.* The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary.<sup>283</sup>

The court went on to note:

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<sup>278</sup> *First Nat’l Bank of Manchester v. Hays*, 156 S.W.2d 121, 123 (Ky. 1941).

<sup>279</sup> *Philpot*, 880 S.W.2d at 553 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In any case, a court could pursue the appointment of a commissioner. *See* K.R.S. ch. 31A.040 (Michie 1998).

<sup>280</sup> KY. CONST. § 183.

<sup>281</sup> *Rose*, 790 S.W.2d at 196 n.11.

<sup>282</sup> *Id.* at 208.

<sup>283</sup> *Id.* at 209 (emphasis added).

The issue before us—the constitutionality of the system of statutes that created the common schools—is the only issue. To avoid deciding the case because of “legislative discretion,” “legislative function,” etc., would be a denigration of our own constitutional duty. *To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.*<sup>284</sup>

Given *Rose*, it is at least arguably “unthinkable” that a court would refuse to adjudicate a challenge to an executive spending plan on the simple ground of difficulty—or a request for deference from the executive branch. No matter where the constitution draws the line between the legislature and the executive or between the executive and the judiciary, the responsibility to identify that line lies exclusively with the courts, at least with regard to cases that come before them. As the highest court of Kentucky went on to note in *Rose*:

The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action serves as a check on the activities of another branch of government.<sup>285</sup>

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<sup>284</sup> *Id.* (emphasis added).

<sup>285</sup> *Id.* See also *Commonwealth Revenue Cabinet ex. rel. Gillis v. Graham*, 710 S.W.2d 227, 229 (1986); *Ex parte Farley*, 570 S.W.2d 617, 622 (1978) (“The final authority to say what the law is must reside somewhere in any governmental structure. In our systems, state and federal, it resides in the judicial department.”). See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments.

*Id.*

In his motion for summary judgment, the Secretary also argued that the Court should review the spending plan only for abuse of discretion. See Response of the Finance and Administration Cabinet to the Motions for Summary Judgment on Behalf of David L. Williams and Kentucky Retirement Systems and Memorandum in Support of the Cabinet’s Motion for Summary Judgment at 18-20, *Spending Plan Litigation*, *supra* note 28. This argument substantially misapprehended the nature of the issues presented in the case. The litigation over the constitutionality



## VII. OPTIONS AND RECOMMENDATIONS

The Governor's spending plan for the fiscal year commencing July 1, 2002, did not comport with the Kentucky Constitution. Although adopted for understandable reasons, the plan lacked a constitutional basis, and the Governor should have limited non-legislative disbursements to specific and essential government services. Indeed, the prospect of another executive spending plan would pose a fundamental threat to separation of powers—particularly to the requirement that the General Assembly act only in a bicameral manner.

In Kentucky, the General Assembly can override a gubernatorial veto by a simple majority vote.<sup>286</sup> Given the relative ease with which the legislature can override a veto, the prospect of another executive spending plan does not really pose a threat to the General Assembly's power as a whole to control spending. In other words, if the Governor does not approve of the legislature's budget but the legislature as a whole is united, its version of the budget will most likely become law. Key to this scenario, however, is the General Assembly's willingness and ability to present a united front. With an executive spending plan available as an option, a Governor can exploit disagreement between the chambers when such disagreement is fundamental in nature.

The following hypothetical situation may suffice to illustrate this point. Suppose, as is occasionally the case, that each house of the legislature is dominated by a different political party. Given the nature of politics in Kentucky, the Governor is likely to be a member either of the party that dominates the Senate or of the party that dominates the House. If the Governor could adopt a comprehensive, non-legislative spending plan, the ability of the chamber not in political sympathy with the executive to advocate in favor of its version of a budget would be seriously compromised. The two houses could stick to their respective versions of the budget; the legislature would adjourn; and the Governor could adopt as an executive spending plan the version of the budget most in keeping with his or her conception of the best public policy. In many respects, we would have a unicameral legislature.<sup>287</sup>

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of the Governor's spending plan was not a case about determinations of fact by an administrative agency, but instead about the meaning of Section 230 of the Constitution—an issue of pure law.

<sup>286</sup> See KY. CONST. § 88.

<sup>287</sup> In the situation presented by the Governor's recent spending plan, for example, the Governor chose the House's version of the budget as the starting point in formulating his spending plan. See PATTON & RAMSEY, *supra* note 112,

But Kentucky has a bicameral legislature,<sup>288</sup> and that structure was specifically chosen to enhance separation of powers. As the highest court of Kentucky noted in *Legislative Research Commission v. Brown*:

Here then is the fundamental constitution of the government we are treating of. *The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting.* They are both restrained by the executive power, as the executive is by the legislative.<sup>289</sup>

The requirement of bicameralism ensures that neither house of the legislature is able to enact its wishes into law without the consent of the other. In other words, although no one chamber can make legislation, it can prevent legislation by refusing to concur. This power was recognized by the framers of the federal Constitution as essential to a government of separated powers.<sup>290</sup>

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at 3 ("The goals for [the] fiscal year 2003 Spending Plan are to . . . mirror, to the maximum degree possible, the financial provisions provided for in House Bill 1 as introduced during the Special Session and as adopted by the House of Representatives.").

<sup>288</sup> See KY. CONST. § 46 ("No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to *each House*, and a majority of the members voting."); *id.* § 56 ("No bill shall become a law until the same shall have been signed by the presiding officer of *each of the two Houses* in open session." (emphasis added)).

<sup>289</sup> *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 911 (Ky. 1984) (quoting 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. XI, ch. VI, at 159 (1823) (emphasis added)).

<sup>290</sup> See *INS v. Chadha*, 462 U.S. 919, 948 (1983) ("The bicameral requirement . . . was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent."); *id.* at 951 ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.").

One unavoidable result of separation of powers is that law-making requires public officials, who often have diametrically opposed views on policy, to reach consensus. Allowing any participant in this process to implement his or her will without the consent of the others deprives the citizenry of the very protection separation of powers is meant to provide. Often the result of this process will be ugly and aesthetically satisfying to no one, but not so repugnant to any one participant that such an individual would refuse to concur. For an interesting description of the process by which public officials reached consensus on a budget for California in July 2003, see Evan Halper & Peter Nicholas, *Both Sides Needed a Budget Deal; Neither Burton nor Brulte Surrendered. But They Came to Realize*

The Commonwealth appears to have at least three options for handling another gap in funding, in addition to the option of simply waiting for the case to be litigated once again. One is the option of enacting legislation that would provide for omnibus automatic interim funding in the event of impasse over the budget. A second is the option of enacting legislation that would provide for automatic interim funding only of essential services in the event of impasse. A third is adoption by the executive of policies that would implement Kentucky Constitution Section 230 and K.R.S. section 41.110 in the event of impasse. For the reasons set forth herein, I recommend either the second or third of these options.

#### *A. Legislative Options*

##### *1. Omnibus Automatic Interim Appropriations*

The General Assembly could prevent gaps in appropriations simply by enacting legislation that provides for continuing, comprehensive interim appropriations if the Commonwealth enters a new fiscal year without a budget. Such legislation could, for example, fund activities at the lower of the rates last proposed by the House and the Senate, or could fund activities on a straight-line basis from the previous fiscal biennium. These are options to which a number of states,<sup>291</sup> but not Congress,<sup>292</sup> have turned. The

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*They Had to End the Impasse*, L.A. TIMES, July 27, 2003, Cal. Metro, Pt. 2, at 1:

What finally broke the stalemate and triggered last week's announcement of a budget deal was not so much a breakthrough, not an instance in which one side surrendered. It grew out of a mutual realization that the gridlock simply couldn't continue—that with schools and vendors panicked about losing state money, and with the Legislature's poll numbers plummeting, they needed to make a deal.

*Id.* For a description of a somewhat similar series of events in Nevada, see Sean Whaley, *Budget Impasse: Lawmakers Talk of 'Last Day'*, LAS VEGAS REV.-J., July 21, 2003, at A1 ("A supermajority for a tax bill is not necessary, according to a controversial state Supreme Court ruling. But lawmakers want the two-thirds vote to give any tax plan they send to the governor a stamp of legitimacy and to avoid further legal challenges.").

<sup>291</sup> See National Conference of State Legislatures, *Fiscal Affairs—Legislative Budget Procedures: Enactment of the Budget—Provisions and Procedures to Finance Agency Operations If the Appropriations Act Is not Passed by the Beginning of the Fiscal Year*, at <http://www.ncsl.org/programs/fiscal/lbptabls/lbpc6t4.htm> (posted June 27, 2003).

<sup>292</sup> When appropriations expire at the federal level, Congress will often enact continuing resolutions that provide funding on an interim basis. Although these resolutions provide funding during a gap in appropriations, they are not permanent

advantage of this kind of legislation is that it would reduce, or even eliminate, the dislocation and anxiety that might arise from a gap in appropriations and give legislators an opportunity (assuming the Governor calls them back into session) to deliberate further before agreeing on a comprehensive budget.

But this kind of legislation has at least one serious flaw, in that it would give whoever prefers the result of the interim spending mechanism an upper hand in the legislative process. For example, if the General Assembly provided for automatic interim funding that simply extended existing funding on a straight-line basis, those who favored the status quo would have reduced incentive to compromise. Similarly, if the General Assembly provided for automatic interim funding that adopted the lower of the two houses' figures for any given line, legislators interested in cutting spending would have an incentive to lowball undesired line-items and then to refuse to budge. Finally, if the General Assembly provided for automatic interim funding that adopted the average of the two houses' figures for any given line, legislators would have reduced incentive to compromise during the session, knowing that interim spending would take into account their last position. The bottom line is simple: whoever's funding preference is implemented in the absence of a timely, enacted budget has an obvious advantage in the event of impasse and will lack full incentive to compromise.

Further complicating the analysis here is the fact that the General Assembly meets much less often than its federal counterpart—which also, by the way, has no legislation in place providing for automatic interim funding in the event of impasse. Whereas Congress adjourns largely at its own discretion,<sup>293</sup> the General Assembly meets for limited periods of time, and never after July 1, the commencement of the state's fiscal period, without a call from the Governor for a special session.<sup>294</sup> Because of this,

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pieces of legislation; they are enacted on an ad-hoc basis.

<sup>293</sup> See U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”).

<sup>294</sup> See KY. CONST. § 36(1) (“The General Assembly, in odd-numbered years, shall meet in regular session for a period not to exceed a total of thirty (30) legislative days.”); *id.* § 42 (“[N]or shall a session occurring in odd-numbered years extend beyond March 30; nor shall a session of the General Assembly occurring in even-numbered years continue beyond sixty legislative days, nor shall it extend beyond April 15.”); *id.* (“A legislative day shall be construed to mean a calendar day.”); *id.* § 80 (The Governor “may, on extraordinary occasions, convene the General Assembly at the seat of government . . . . When he shall convene the

if the General Assembly enacted legislation providing for automatic interim funding in the case of budgetary impasse, discretion would lie entirely in the hands of the Governor whether to call the legislature back into session to resolve the impasse and bring interim spending to a close. If the interim spending were disagreeable to the Governor, of course, he or she would have incentive to call the legislature back into session.

## *2. Automatic Interim Appropriations Solely for Essential Services*

A second option for the General Assembly would be to enact legislation authorizing disbursements from the treasury in the event of a budgetary impasse solely for essential services. This kind of legislation would have several advantages. First, like omnibus automatic interim appropriations, this kind of legislation would tend to reduce the anxiety that might arise from a gap in appropriations and give legislators some breathing room (assuming the Governor called them back into session) to deliberate before agreeing on a comprehensive budget. Second, this kind of legislation would arguably provide less incentive to lawmakers to manipulate the system to achieve a desired result. It stands to reason that few lawmakers would avoid the give-and-take of the legislative process if funding only for essential services were waiting in the wings. The manipulation referred to earlier would only occur if somebody's preferred budget would become law in the event of impasse. Presumably, no legislator would prefer a budget limited to essential public services. Finally, legislation authorizing automatic interim appropriations solely for essential services in the event of impasse would affirm that the power of the purse lies in the General Assembly.

On the negative side, legislation appropriating funds solely for essential services would not completely preclude the dislocation and anxiety that may arise from gaps in funding. In addition, the prospect of automatic interim appropriations for essential services in the event of impasse would reduce an important source of pressure upon the legislature to formulate a budget. In this regard, it may be recalled that Tennessee's "Essential Government Services Act of 2002" was set to expire after only five days. On the other hand, *Quertermous* already provides a rough analog to this act, and codifying *Quertermous* would arguably give the General Assembly an added measure of control over appropriations.

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General Assembly it shall be by proclamation, stating the subjects to be considered, and no others shall be considered.”).

*B. An Executive Option—Adoption of “Phase-Down” Policies*

A third option would be for the executive branch to adopt policies that conform to Section 230 of the Kentucky Constitution and K.R.S. section 41.110. Although such policies would not prevent all of the dislocation and anxiety that could arise from a gap in funding, they would preserve separation of powers and provide a continuing incentive to the political branches of government to compromise their differences and enact a budget. This option would play out as follows:

Upon a request from the Governor, the Attorney General would issue a formal opinion affirming that the power of the purse lies in the General Assembly, and recognizing the exception to this general rule set forth in *Quertermous* as limited by *Ferguson v. Oates*.<sup>295</sup> The Secretary of Finance and Administration would then formally adopt a policy implementing this opinion, providing specific guidelines for heads of executive units to follow. Third, the Secretary would require the heads of units in the executive branch to submit for approval “phase-down plans” in the event of a gap in funding. These plans would identify with specificity those services provided by each unit that could properly be deemed “essential” within the meaning of the authorities noted in this Article. These plans would also identify employees who perform these services, as well as employees who would be subject to furlough in the event of a gap in funding.<sup>296</sup> Fourth and finally, the Governor would require these heads to adhere to these plans in the event that impasse precludes adoption of a budget.

Proper adherence to separation of powers would require pursuit of one of these last two options, or an option of a similar nature.

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<sup>295</sup> *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

<sup>296</sup> Whether such employees would have a contractual right to payment for time elapsed during a furlough upon resumption of funding is beyond the scope of this Article.