

BOARD OF REGENTS OF HIGHER EDUCATION v. JUDGE Mont. 1323

Cite as 543 P.2d 1323

While an apparent unnecessary duplication of effort in the preparation of two budgets and an apparent lack of cooperation may exist between the executive and the legislature in this matter, which results in a waste of taxpayers' money, these are insufficient grounds upon which to find a legislative enactment constitutionally invalid.

[11] The rule that the constitutionality of an act of the legislature must be presumed unless rebutted by proof beyond a reasonable doubt is well established in Montana. *State ex rel. Mills v. Dixon*, 66 Mont. 76, 84, 213 P. 227. This presumption has not been overcome here; and thus we hold as to S.B. 333, specifically as to Section 7, the legislature has acted properly.

This opinion, together with the opinion in the companion case No. 13069, shall constitute a declaratory judgment.

JAMES T. HARRISON, C. J., and DALY, HASWELL and JOHN C. HARRISON, JJ., concur.



BOARD OF REGENTS OF HIGHER EDUCATION of the State of Montana,
Plaintiff,

v.

Thomas L. JUDGE, Governor of the State of Montana, Defendant,
and

Legislative Finance Committee of the Montana Legislative Assembly, Intervenor.
No. 13069.

Supreme Court of Montana.

Submitted Sept. 10, 1975.

Decided Dec. 12, 1975.

The Board of Regents of Higher Education brought original action for a declar-

atory judgment seeking rulings on constitutionality of statutes appropriating monies for university system for biennium and providing for a Legislative Finance Committee to approve budget amendments. The Supreme Court, Castles, J., held that power to approve budget amendments, vested in Legislative Finance Committee, constituted an unconstitutional delegation of legislative power; that conditioning of university system appropriations and summary procedure for compliance with conditions were proper exercises of legislature's appropriation power to extent that conditions did not infringe on constitutional powers granted the Regents; that to extent certification requirement attempted to exert any control over private monies restricted by law, trust agreement, or contract or to grant any discretion over such funds to department of administration, it was unconstitutional; and that certification condition limiting salary increases for presidents of units of university system was unconstitutional infringement on powers of Regents.

Judgment entered.

1. Colleges and Universities ¶2

Statute providing no state agency shall expend in excess of appropriation except under authority of budget amendment approved by Legislative Finance Committee was not in conflict with statute giving Board of Regents of Higher Education authority for budgetary amendments whenever certain funds became available unless otherwise provided by law. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

2. Constitutional Law ¶12

Constitution must receive broad and liberal interpretation consistent with purpose of framers and People in adopting it.

3. Constitutional Law ¶26

State Constitution, unlike the United States Constitution, is prohibition upon legislative power, rather than grant of power.

4. Constitutional Law ¶15

All provisions of constitution bearing upon same subject matter are to receive appropriate attention and be construed together.

5. Constitutional Law ¶48(1, 3)

Constitutionality of legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond reasonable doubt.

6. States ¶131

Legislative appropriation power extends beyond general funds and encompasses all public operating funds of state government; however, power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement or contract, overruling *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 and *State Aeronautics Commission v. Board of Examiners*, 121 Mont. 402, 194 P.2d 633 to extent they are inconsistent. Const.1972, art. 6, § 9; art. 8, §§ 9, 12; R.C.M.1947, §§ 79-409 to 79-416; Const.1889, art. 21, § 1 et seq.

7. States ¶127

Statute providing that federal and private revenue fund consists of all expendible monies deposited in state treasury from federal or private sources, including trust income, could not be used as basis for legislative control over expenditures of types of private money enumerated therein and was invalid to extent it could be so read. R.C.M.1947, § 79-410.

8. States ¶132

General appropriation contained in statute appropriating additional money to university system was limited to public operating funds of state government and could not extend to private funds received by state government which were restricted by law, trust agreement or contract. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

9. States ¶131

State trust and legacy fund established by constitution was fund outside appropriation process; overruling *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 and *State Aeronautics Commission v. Board of Examiners*, 121 Mont. 402, 194 P.2d 633 to the extent they are inconsistent. Const. 1889, art. 21, § 1 et seq.

10. Constitutional Law ¶62(13)**States** ¶123

Statute giving Legislative Finance Committee power to approve budget amendments constituted unconstitutional delegation of legislative power to Legislative Finance Committee. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

11. Colleges and Universities ¶7

Legislative control of higher education through appropriation process remains; Board of Regents of Higher Education is constitutional body in state government subject to legislature's power to appropriate and make public policy of state. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.; Const.1889, art. 21, § 1 et seq.

12. States ¶131

Legislature has power to make appropriations to the university system for biennium through line item system. Const. 1972, art. 5, § 10; art. 8, §§ 9, 12; art. 10, § 9(1); Laws 1975, H.B. 271, § 12 R.C.M. 1947, § 43-1117 et seq.

13. States ¶131

Legislature cannot do indirectly through means of line item appropriations and conditions what is impermissible for it to do directly.

14. Constitutional Law ¶58**States** ¶131

Line item appropriations by legislature become constitutionally impermissible when authority of Board of Regents of Higher Education to supervise, coordinate, manage and control university system is infringed by legislative control over expenditures. Const.1889, art. 11, § 11, art. 21, § 1 et

seq.; Const.1972, art. 3, § 1; art. 5, § 1; art. 8, §§ 9, 12; art. 10, § 9; R.C.M.1947, §§ 43-1117 et seq., 79-409 to 79-416; Laws 1975, H.B. 271.

15. States ⇐131

Budget items and corresponding line items of statute appropriating monies for university system for biennium were reasonably related to purpose of providing funds for necessary services and other responsibilities of legislature. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

16. Constitutional Law ⇐58

States ⇐131

Conditioning of appropriations to university system by 1975 legislature and summary procedure for compliance were proper exercises of legislature's powers to extent that such conditions did not infringe on constitutional powers granted Board of Regents of Higher Education. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

17. Constitutional Law ⇐58

Legislative conditions imposed on university system for appropriations must be individually scrutinized to determine their propriety; fact that there are numerous conditions and requirement of blanket compliance does not, in itself, infringe upon constitutional powers of Board of Regents of Higher Education. Laws 1975, H.B. 271; R.C.M.1947, § 43-1117 et seq.

18. States ⇐131

To extent that certification requirement of statute appropriating monies for university system attempted to exert any control over private monies restricted by law, trust agreement, or contract which were beyond appropriation power or to grant any discretion over such funds to department of administration, it was unconstitutional. Laws 1975, H.B. 271, § 12(4, 6); R.C.M.1947, § 43-1117 et seq.

19. Constitutional Law ⇐58

States ⇐131

Section of statute providing limitation on salaries to be paid presidents of units of

university system and commissioner of higher education specifically denied Board of Regents of Higher Education power to function effectively by setting its own personnel policies and determining its own priorities, and thus limitation was unconstitutional to condition appropriations. Laws 1975, H.B. 271, § 12(4, 6); R.C.M.1947, § 43-1117 et seq.

Datsopoulos & MacDonald, Missoula, Milton Datsopoulos, argued, Missoula, for plaintiff.

Robert L. Woodahl, Atty. Gen., Helena, John P. Atkins and Lon J. Maxwell, argued, Asst. Atty. Gen., Helena, for defendant.

John W. Northey, argued, Helena, for intervenors.

Berg, Angel, Andriolo & Morgan, Bozeman, Gregory O. Morgan, argued, Bozeman, for intervenors amicus curiae.

CASTLES, Justice.

This is an original proceeding for a declaratory judgment brought by the Board of Regents of Higher Education of the State of Montana against the Governor of the State. The Board of Regents seeks definitive rulings on the constitutionality of two bills passed during the 1975 legislative session and signed into law by the Governor. House Bill 271 appropriates monies to the university system for the biennium. Senate Bill 401 provides for a legislative finance committee to approve budget amendments. More will be said about these two bills later in this opinion.

The Board of Regents, hereinafter referred to as the Regents, sought original jurisdiction in this Court. This Court set the matter for adversary hearing. Hearing was had. Defendant Governor, hereinafter referred to as Governor, moved to dismiss on procedural grounds. The motion was denied. The Legislative Finance

Committee and the Legislative Audit Committee of the Montana Legislative Assembly moved to intervene. Hereinafter these committees will be referred to in the singular as the Finance Committee. Such intervention was granted, and no challenge is made to the status of legislative committees as party litigants. The Associated Students of Montana State University and University of Montana were allowed to submit a brief and appear as *amicus curiae*.

By order this Court accepted original jurisdiction on the basis of the emergency nature of the controversy and set a prehearing conference pursuant to Rule 28, M.R.App.Civ.P., to consider simplification of the issues. Thereafter the Court directed the Governor and his agents to refrain from withholding payments on claims and warrants by the university system until further order of this Court.

Following the prehearing conference this Court ordered in part:

"I. The Forty-Fourth Legislature of the State of Montana passed House Bill 271 which purports to appropriate money to the University System for the biennium. During the same session, the Legislature passed Senate Bill 401 which provides for a legislative finance committee to approve budget amendments. Pursuant to House Bill 271, the budget director declared the appropriation to the University System void in the absence of a letter certifying compliance with the provisions of the bill. The Board of Regents declined to certify and brought this action for disposition of the issues involved.

"II. The issues to be resolved in this action are as follows: 1) whether Section 1(3) of House Bill 271, in light of the provisions of Senate Bill 401 is an unconstitutional infringement on the powers and duties of the Board of Regents; 2) whether (a) the certification

requirement contained in the origination clause of Section 12 of House Bill 271 is unconstitutional as an improper legislative infringement on the management authority of the Board of Regents, and (b) whether Section 12(6) of House Bill 271 is unconstitutional as a direct invasion of the management prerogatives granted to the Board of Regents by Article X, Section 9 of the Montana Constitution."

The pertinent parts of the two enactments are:

HOUSE BILL 271.

"Section 1. For the purposes of this act, unless otherwise stated:

"* * *

"(3) 'Approved budget amendment' means approval by the board of regents unless otherwise provided by law, of a request to:

"(a) obtain financing for new or expanded programs from funds which were not available for consideration by the legislature but which have become available from a source other than the state's general fund; or

"(b) transfer not more than fifteen percent (15%) of any single university system unit's appropriations, including general fund appropriation between units and transfer appropriations between programs within a university system unit; or

"(c) expend remaining balances of the first fiscal year of the biennial appropriations, including general fund appropriations, during the second fiscal year of the biennium.

"* * *

"Section 12. The provisions set forth in this section are limitations on the appropriations made in this act. It is the purpose of the legislature in enacting *this bill only to appropriate funds and to re-*

strict and limit by its provisions the amount and conditions under which the appropriations can be expended. Except as otherwise provided in this act, the expenditures of appropriations are hereby contingent upon the board of regents certifying to the budget director that the university units shall comply completely with the following general and specific provisions: * * *

"(4) All moneys collected or received by university system units subject to this act from any source whatsoever, including federal grants for research and operations, and any moneys received from a foundation shall be deposited in state treasury pursuant to the provisions of Title 79, R.C.M.1947, except that the department of administration may, pursuant to section 79-603, R.C.M.1947, permit any university system unit subject to this act to retain in its possession moneys that would otherwise be deposited in the state treasury, provided that the anonymity of private foundation donors shall be maintained and that private donations shall not be used as an offset to general fund appropriations.

* * *

"(6) Salary increases for presidents of units of the university system and for the commissioner of higher education shall not exceed five percent (5%) each year of the biennium using the respective fiscal year 74-75 salaries previously approved by the regents as the basis for determining such increases.

"In the absence of such certification of compliance, the appropriations in this act are null and void.

"The regents shall grant classified university employees salaries in accord with House Joint Resolution, 37, forty-fourth legislature." (Emphasis supplied.)

House Bill 271 was amended by the Forty-Fourth Legislature in its House Bill No. 1 (Special Session) by adding Section 13 to H.B. 271:

"Section 13. In addition to the appropriations contained in this act, all other monies received from sources other than the general fund and which were not available for consideration by the legislature are hereby appropriated. Such monies may be made available for expenditure only by a budget amendment approved by the legislative finance committee."

SENATE BILL 401:

"Section 1. * * * Definitions. In this act: * * *

"(2) 'Budget amendment' means a request submitted through the budget director to the committee for executive branch agencies to expend funds in excess of those appropriated by the legislature.

"Section 2. * * * Approval of budget amendments. All budget amendments for state agencies must be submitted through the budget director to the committee. No state agency shall expend in excess of the appropriation except under authority of a budget amendment approved by the committee. The committee shall approve, with or without modification, or disapprove, each proposed budget amendment of any state agency."

The Governor does not oppose the Regents with respect to the legislative budget process put forth in Issue No. 1, (but see Governor's stand in companion case, Cause No. 13201, *Governor v. Legislative Finance Committee*, 543 P.2d 1317). The Finance Committee does oppose the Regents with respect to the legislative budget process in Issue No. 1. Amicus Curiae support the Regents.

Prior to discussing Issue No. 1, it will be helpful to give some background. House Bill 271 appropriates money to the university system for the biennium by various line items from various state operating funds. The Commissioner of Higher Education, the University of Montana, Mon-

tana State University, and the various other college units are each appropriated certain funds.

For example, the University of Montana is appropriated \$17,782,106.00 for the year ending June 30, 1976, in ten line items:

Instruction	10,114,000
Research	176,768
Public Service	131,718
Academic Support	1,737,215
Student Services	886,183
Institutional support	1,730,230
Operation & maintenance of plant	1,941,316
Forest Experiment Station	241,591
Scholarships and fellowships	525,000
Malmstrom Air Force Base instruction	298,085
Total	17,782,106
From the general fund	9,808,239
From the earmarked revenue fund	
02106 University millage ERA	3,041,786
02650 U.M. Student fee ERA	4,336,999
From the federal and private revenue fund	
04308 UM interest and income FPRA	75,000
04515 UM federal program FPRA	346,944
Social Rehabilitation Services transfer	173,138
Total	17,782,106

H.B. 271 provides for budget amendment by the Regents whenever funds become available from sources outside the general fund for new or expanded programs, or in transfers of not more than 15% of any appropriation of a single unit of the university system to another unit, and expending balances remaining at the end of the first fiscal year during the second fiscal year.

Additional monies are appropriated by section 3 of H.B. 1, (Special Session) Laws of 1975, which adds an additional section to H.B. 271, Section 13 as previously quoted. The contingency of additional appropriations by budget amendments is taken from the Regents by definition in H.B. 271, Section 1(3), "'Approved budget amendment' means approval by the board of regents *unless otherwise provided by law* * * *." (Emphasis supplied.)

[1] S.B. 401 provides that no state agency shall expend in excess of an appropriation except under authority of a budget

amendment approved by the legislative finance committee. Thus both by the section 13 amendment in the Special Session to H.B. 271 and by S.B. 401, the authority for budget amendments is in the legislative finance committee.

Thus, the question and conflict arises between the Regents and the legislative finance committee.

The Regents urge that line item appropriations of general fund monies by the legislature to the Board of Regents infringe on the authority of the Board granted by the Constitution of Montana 1972. Their position is hinged on this language contained in Article X, Section 9, 1972 Montana Constitution:

"(2)(a) The *government and control* of the Montana university system is vested in a board of regents of higher education which shall have *full power, responsibility, and authority to supervise, coordinate, manage and control* the Montana

university system * * *." (Emphasis supplied.)

The Regents in part state their position: "This provision [Article X, Section 9(2)(a)] clearly indicates the broad scope of authority vested by the framers in the Board of Regents. The grant of power is clear and unambiguous. * * * Given their plain meaning, the words * * * grant a high degree of autonomy to the Board of Regents."

During oral argument, in response to a question from the bench, counsel went so far as to state that indeed the university system and its Board of Regents was a fourth branch of government. In support of that construction, the Regents note particular changes in the 1972 constitutional provision which, they insist, are indicative of the intent of the framers to vest complete control in the Regents to the exclusion of legislative and executive bodies.

First, the 1889 Constitution vested control and supervision in the state board of education, but limited its powers to those which "shall be prescribed and regulated by law," Art. XI, Sec. 11. Thus, the Regents urge that a board regulated by law is clearly under the control of the law-making body to some extent. The qualifying phrase is absent in the 1972 Montana Constitution, indicating that the powers of the Regents are not to be prescribed by the legislature. Second, the language of the new provision is much stronger and more comprehensive than that of the old provision. Under the 1889 Constitution, the board of education was given "general control and supervision" of the university system; under the 1972 Montana Constitution, the Board of Regents was given "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system * * *."

At this point we observe that if Article X, Section 9, 1972 Montana Constitution, was read literally without reference to the rest of the Constitution, the Regents' argument and position would be correct; but,

as will be hereinafter developed, the Constitution is not so read.

Article III, Section 1, 1972 Montana Constitution, reads:

"The power of the government of this state is divided into *three distinct branches*—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one *branch* shall exercise any power properly belonging to either of the others, *except as in this constitution expressly directed or permitted*. (Emphasis supplied.)

Article V, Section 1, 1972 Montana Constitution, reads:

"*The legislative power is vested in a legislature* consisting of a senate and house of representatives. The people reserve to themselves the powers of initiative and referendum." (Emphasis supplied.)

Article VIII, Section 12, 1972 Montana Constitution, reads:

"*The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local government entities*." (Emphasis supplied.)

It is the opinion of this Court that these provisions of the 1972 Montana Constitution and Article X, Section 9, should stand together. To be sure, that constitutional provision, like most, is couched in broad language, but it must not be read or construed in isolation. To aid our analysis of this section we rely on several rules of construction used previously by this Court.

[2] First, *Arps v. State Highway Commission*, 90 Mont. 152, 160, 300 P. 549, 553, provides:

"* * * the Constitution must receive a broad and liberal interpretation consistent with the purpose of the framers and the people in adopting it, that it may serve the needs of a growing state; 'the proper interpretation of any constitutional provision requires us to remember that it is a part of the organic law—or-

ganic not only in the sense that it is fundamental, but also in the sense that it is a living thing designed to meet the needs of a progressive society, amid all the detail changes to which a progressive society is subject.' *State ex rel. Fenner v. Keating*, 53 Mont. 371, 163 P. 1156, 1158."

[3,4] Next, this rule stated in *Cottingham v. State Board of Examiners*, 134 Mont. 1, 11, 17, 328 P.2d 907, 912:

"It has also frequently been stated that the Montana Constitution, unlike the Constitution of our United States, is a prohibition upon legislative power, rather than a grant of power. [Citing cases]"

Also valuable are these rules from *Cottingham*:

"A constitution, or provision thereof, should receive a reasonable and practical interpretation in accord with common sense.' 16 C.J.S. Constitutional Law § 14, pp. 66, 69. * * *

"All of the provisions of the Constitution bearing upon the same subject matter are to receive appropriate attention and be construed together." (Emphasis supplied.)

[5] Since our construction will determine the validity or invalidity of legislative acts, citing the presumption of constitutionality and burden on the party seeking to overcome the presumption stated in *State ex rel. Mills v. Dixon*, 66 Mont. 76, 84, 213 P. 227, 229, is also appropriate:

"* * * the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt."

Our task then is to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system. At the outset we note that there is not always a clear distinction between these powers and therefore limit

our ruling here to these specific legislative enactments.

[6] It is also necessary when speaking to issues arising out of the appropriation process to clarify our conception of the funds subject to that power. Previous rulings of this Court have limited the scope of appropriation to the general fund. *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 76, 195 P. 841; *State Aeronautics Commission v. Board of Examiners*, 121 Mont. 402, 410, 194 P.2d 633, and cases cited therein. Statutory changes, as well as the 1972 Montana Constitution, cause us to reexamine that definition at this time.

In 1963 the legislature enacted the "Treasury Fund Structure Act", section 79-409, R.C.M.1947, with a purpose:

"* * * to make possible the full utilization of modern accounting methods, to provide the legislative assembly with a greater measure of control over public moneys, and to enable the financial records of the state to accurately reflect governmental costs and revenues." (Emphasis added.)

We note here that the structure of the 1972 Constitutional provisions have changed to a considerable extent the connotation to be placed on the word "control" as used in section 79-409.

Section 79-410 of the Act provides for these funds in the state treasury: 1) General fund. 2) Earmarked revenue fund. 3) Sinking fund. 4) Federal and private revenue fund. 5) Federal and private grant clearance fund. 6) Bond proceeds and insurance clearance fund. 7) Revolving fund. 8) Trust and legacy fund. 9) Agency fund.

Then section 79-415 states in part:

"(1) Moneys deposited in the general fund, the earmarked revenue fund, and the federal and private revenue fund, with the exception of trust income and refunds authorized in subsection (3) of this act, shall be paid out of the treasury only on appropriation made by law. * * *" (Emphasis supplied.)

The 1972 Constitution also broadens the scope of the appropriation power. Article VI, Section 9, commands the governor to submit a budget to the legislature "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state". (Emphasis supplied.)

Article VIII, Section 9, 1972 Montana Constitution states:

"Appropriations by the legislature shall not exceed anticipated revenue."

Section 12 of the same Article provides:

"The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities." (Emphasis added.)

Thus the legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government. Prior to the 1972 Constitution, the Treasury Fund Structure Act, sections 79-409 through 79-416, R.C.M.1947, provided for the nine funds heretofore listed.

[7,8] However we emphasize that the power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement or contract. Accordingly, we limit subsection (4) of section 79-410 which provides:

"(4) Federal and private revenue fund. The federal and private revenue fund consists of all expendable moneys deposited in the state treasury from federal or private sources, including trust income, which are to be used for the operation of state government." (Emphasis supplied.)

This provision, in view of our conception of the appropriation power, cannot be used as a basis for legislative control over expenditures of the types of private moneys enumerated above and is invalid to the extent it may be so read. Similarly, the general appropriation contained in H.B. 1 (Special Session) is also limited to the

public operating funds of state government.

[9] An example of such a fund outside the appropriation process was the Montana Trust and Legacy Fund established by Article XXI, 1889 Montana Constitution. Therefore, to the extent they are inconsistent with this discussion of the legislature's power to appropriate, our earlier rulings in *State ex rel. Bonner v. Dixon*, supra, and *State Aeronautics Commission v. Board of Examiners*, supra, are overruled.

[10] These funds—subject to the appropriation process—concern us in the Regents' challenge to the approved budget amendment requirement of Section 1(3) of H.B. 271. If the approval of budget amendments by the Finance Committee is a proper exercise of the legislative appropriation power, then the Regents as part of state government are subject to those requirements. But, as developed in this Court's opinion in the companion case, *State ex rel. Judge v. Legislative Finance Committee*, Cause #13201, 543 P.2d 1317, also decided today, the power to approve budget amendments in S.B. 401 constitutes an unconstitutional delegation of legislative power to the Finance Committee. Thus for the reasons enumerated in that opinion, the Regents' challenge to the approved budget amendment requirement of H.B. 271 succeeds.

To reach the Regents' constitutional challenge of the certification requirement in the origination clause of Section 12 of H.B. 271, we must consider the power of the legislature to make line item appropriations.

We repeat the provision of H.B. 271:

"Section 12. The provisions set forth in this section are limitations on the appropriations made in this act. It is the purpose of the legislature in enacting this bill only to appropriate funds and to restrict and limit by its provisions the amount and conditions under which the appropriations can be expended. Except as otherwise provided in this act, the ex-

penditures of appropriations are hereby contingent upon the board of regents certifying to the budget director that the university units shall comply completely with the following general and specific provisions * * *." (Emphasis supplied.)

If the legislature cannot make line item appropriations for the university system, it does not have the authority to require certification by the Regents. The position of Amicus, which was adopted by the Regents in oral argument, is that the "autonomy" and "uniqueness" of the Regents precludes line item appropriations by the legislature. However, we find no constitutional limitations or judicial interpretation of this Court to bottom such a conclusion. The Regents' assertion of autonomy based on an isolated analysis of one article of Montana's Constitution does not show a basic violation of fundamental law of this long standing legislative practice. Even the Regents' cases from other jurisdictions cited in support of this principle, two of which we discuss later, do not challenge the authority of the legislature to itemize appropriations.

An early Michigan case, *Sterling v. Regents of University of Michigan*, 110 Mich. 369, 68 N.W. 253, 257, sets the precedent for regent autonomy according to the Regents, but this Court notes this discussion in the decision which illuminates the background of the constitutional provision giving the regents control over "expenditures from the university interest fund" (similar to the Montana Trust and Legacy Fund, Article XXI, 1889 Constitution):

"It is significant that, at the time of the adoption of the constitution, this fund constituted the sole support of the university, aside from fees which might be received from students. The state had made no appropriations for its support, and there is nothing to indicate that any such appropriations were contemplated." (Emphasis supplied.)

The present Michigan Constitution grants the regents control of "expenditures

from the institution's funds." Based on this provision regent autonomy recently prevailed over these legislative appropriation bills described in *Regents of University of Michigan v. State of Michigan*, 47 Mich.App. 23, 208 N.W.2d 871, 874-875:

*"Furthermore a careful reading of 1972 P.A. 260 discloses that the Legislature has in no way abandoned its intention to substitute its judgment for that of the constitutionally created boards of control. * * **

"Whether it be under the guise of the police power or a reporting requirement, the simple fact remains that the legislature still is attempting through 1972 P.A. 260 to do the same thing it sought to do through 1971 P.A. 122 and prior acts: i. e., determine who shall teach and who shall not, who shall learn and who shall not." (Emphasis supplied.)

[11] Regent autonomy has not been asserted over the bare legislative power to appropriate in the above instances. That power, by implication in these cases and expressly in others cited by the Regents, is secure even in Michigan with its strong constitutional provision and long judicial recognition of autonomy of the regents. We recognize here that while Montana's Constitution is not as explicit or broad as that of Michigan, the principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution. At the same time, just as in Michigan, legislative control of higher education through the appropriation process remains. The Regents are a constitutional body in Montana government subject to the power to appropriate and the public policy of this state. For a discussion of the impact of the 1972 constitutional provision see: Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 Mont. Law Review 189.

[12] Going hand in hand with the power to appropriate has been legislative exercise of control over expenditures through

itemization. Historically the English Parliament during the reign of William in the seventeenth century appropriated sums for particular purposes with penalties for disobedience. See 4 Thomson, *A Constitutional History of England—1642–1801*, p. 206. After two years of lump sum appropriations the United States Congress in 1793 began to itemize expenditures in its appropriation acts. Act of February 28, 1793, Ch. 18, § 1, 1 Stat. 325. In Montana too, itemization of appropriations is well established. Laws of Montana, Second Session 1891, pp. 129, 130. In addition to these historical bases, itemization of appropriations is vital to the legislative decision-making process involved in providing a balanced budget (Article VIII, Section 9), in providing a system of strict accountability (Article VIII, Section 12), and in fulfilling the audit responsibility of Article V, Section 10. Also, Article X, Section 9(1) provides that:

"It [state board of education] shall submit unified budget requests."

These constitutional bases justify the legislature's use of line items in its appropriations.

[13–15] However, the legislature cannot do indirectly through the means of line item appropriations and conditions what is impermissible for it to do directly. Line item appropriations become constitutionally impermissible when the authority of the Regents to supervise, coordinate, manage and control the university system is infringed by legislative control over expenditures. On their face, the budget items and corresponding line items of H.B. 271 are reasonably related to the purpose of providing funds for necessary services and the other responsibilities of the legislature enumerated above.

Within these parameters we now consider the certification requirements of Section 12, House Bill 271.

That section, as previously quoted, requires the Regents to certify full compliance to certain conditions to the budget

director. Without such certification of compliance the appropriations in the bill are null and void. At the same time the Regents concede that the conditioning of appropriations has been a traditional and recognized legislative prerogative. Despite this, the Regents contend that compliance with numerous conditions erodes their authority granted them by the Constitution. But, the Regents' argument sheds little light on specific intrusions; hence our ruling here is necessarily limited due to the facts presented us.

We think this description adopted by Minnesota in *State ex rel. U. of Minnesota v. Chase*, 175 Minn. 259, 220 N.W. 951, 955 to be a realistic approach to the issue of the propriety of legislative conditions to university system appropriations:

"* * * At the one extreme, the Legislature has no power to make effective, in the form of a law, a mere direction of academic policy or administration. *At the other extreme it has the undoubted right within reason to condition appropriations as it sees fit. In such case the regents may accept or reject such appropriation. * * * If they accept, the conditions are binding upon them.*" (Emphasis supplied.)

[16, 17] As noted above, the Regents are not mentioned in either Article III, Section 1, which creates the three branches of government, nor in Article V, which limits the powers of the legislature. Similarly, the legislature is not mentioned in Article X, Section 9(2), which entrusts the government and control of the university system to the Regents. By no rule of construction then can the powers of one be exercised or encroached upon by the other. In other words, the conditioning of university system appropriations by the 1975 Montana legislature and the summary procedure for compliance were proper exercises of its appropriation powers to the extent the conditions do not infringe on the constitutional powers granted the Regents. This means the conditions must be *individually scrutinized* to determine their propri-

ety. The fact that there are numerous conditions and a requirement of blanket compliance does not in itself infringe upon the Regents' constitutional powers.

Nevertheless we cannot neglect the fact that certain of the certification requirements do exceed the limits to the exercise of the appropriation power which we have outlined above. We note particularly these provisions of Section 12, H.B. 271:

"(4) *All moneys collected or received by university system units subject to this act from any source whatsoever, including federal grants for research and operations, and any moneys received from a foundation shall be deposited in the state treasury pursuant to the provisions of Title 79 R.C.M.1947, except that the department of administration may, pursuant to section 79-603, R.C.M.1947, permit any university system unit subject to this act to retain in its possession moneys that would otherwise be deposited in the state treasury, provided that the anonymity of private foundation donors shall be maintained and that private donations shall not be used as an offset to general fund appropriations.*" (Emphasis supplied.)

[18] Based on our earlier discussion of the legislative appropriation power, certification cannot be used as a bootstrapping device to gain legislative control over private moneys. As noted heretofore, private moneys restricted by law, trust agreement, or contract are beyond the appropriation power. To the extent then that the certification requirement of Section 12(4) attempts to exert any control over such private moneys or to grant any discretion over such funds to the department of administration, it is unconstitutional.

[19] The Regents' challenge to Section 12(6) of House Bill 271 on its face, in the final issue presented to this Court, provides us an opportunity to more fully define the limits within which the legislature may condition appropriations to the university system. That section provides:

"(6) *Salary increases for presidents of units of the university system and for the commissioner of higher education shall not exceed five percent (5%) each year of the biennium using the respective fiscal year 74-75 salaries previously approved by the regents as the basis for determining such increases.*" (Emphasis supplied.)

The question presented is whether this condition is a direction of academic policy or administration by the legislature. The Regents argue this condition represents an effort to abrogate the powers and prerogatives granted expressly and absolutely to them by the 1972 Montana Constitution. The Governor and Finance Committee assert the condition is a proper exercise of the legislative appropriation power.

The problem of delineating the area forbidden to the legislature in conditioning appropriations of the university system is not easily resolved, as was noted by the Michigan Court of Appeals in *Regents of University of Michigan v. State*, 47 Mich. App. 23, 208 N.W.2d 871, 877, quoting from 55 Mich.L.Rev. 728, 729:

"While it must be recognized that the legislature's power to make appropriations to a constitutional university does not include and is separate from the power to control the affairs of such a university, the legislature can within reason attach conditions to its university appropriations. If a constitutional university accepts such conditioned funds, it is then bound by the conditions. *There are not many decisions in this area, however, so the line between conditions the legislature can validly attach and those it cannot has not been drawn in a distinct fashion.* Conditions which require the university to follow prescribed business and accounting procedures have generally been found to be valid. The courts have also sustained conditions which require, on penalty of losing part of the appropriation, annual reports to the governor, and fair and equitable distribution of an appropriation among the depart-

ments of the university or maintenance of university departments. It has also been held that the legislature can properly make non-teaching employees subject to the state's workmen's compensation law, and can require loyalty oaths by the teachers. On the other side of the line, a condition that the university move a certain department of the school has been held to be invalidly attached, an attempt to limit the amount of funds that can be spent for a given department is likewise an invalid condition. It is clear that limits should be placed on the use of the conditioned appropriation, for without such limits the legislature could use the conditioned appropriation to strip the university of its constitutional authority." (Emphasis supplied.)

Clearly any decision with respect to appropriations affects the management of the university system to some degree. We assume the 1972 Constitutional Convention was aware of this fact when it drafted Article V. That Article, as was noted, does not limit the legislature's power to appropriate funds for the university system. Therefore, we look to the impact of the appropriation condition on the management and control exercised by the Regents.

Returning now to the restrictions contained in Section 12, we note no legislative explanation of the breadth of the restrictions. Neither is there any provision for the Regents to object. The Regents either comply or forego the funds. Seemingly minor conditions could ultimately affect academic, administrative and financial matters of substantial importance to the system.

But, control over college president salaries is not a "minor" matter. It does dictate university personnel policy. That such effect was meant need only be found in the final sentence of the bill following Section

6 which states "The regents shall grant classified university employees salaries in accord with House Joint Resolution 37, forty-fourth legislature." Such a limitation on significant expenditures indicates a complete disregard for the Regents' constitutional power.

Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education. An important priority is the hiring and keeping of competent personnel. The limitation set forth in Section 12(6), H.B. 271, specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its own priorities. The condition is, therefore, unconstitutional.

This opinion together with the companion opinion of *State ex rel. Judge v. Legislative Finance Committee*, Cause No. 13201, 543 P.2d 1317, decided today, shall constitute the declaratory judgment of this Court with regard to Issues 1) and 2) to be resolved in this action as set out in the order of this Court dated July 17, 1975.

The order of this Court dated July 2, 1975, staying further actions or proceedings by any party hereto or his agent outside the scope of this proceeding and the order dated July 7, 1975, directing the Governor and his agents, servants and employees to desist and refrain from withholding payment on warrants and claims submitted by the Montana university system, are vacated. The Regents shall have a reasonable time to complete their certification as to the other general matters contained in Section 12, H.B. 271.

JAMES T. HARRISON, C. J., and
JOHN C. HARRISON, DALY and HASWELL, JJ., concur.