

# WHEN THE GOVERNOR LEGISLATES: POST-ENACTMENT BUDGET CHANGES AND THE SEPARATION OF POWERS IN NEVADA

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## I. INTRODUCTION

The Nevada State Governor is the elected supreme executive of the state and is charged with ensuring state law is “faithfully” executed.<sup>1</sup> This responsibility includes overseeing the execution of budgetary law, enacted as appropriations.<sup>2</sup> The Nevada Constitution requires that these spending appropriations not exceed a balanced budget,<sup>3</sup> thereby necessitating adjustments to spending when tax revenue projections fall short of budgeted spending.<sup>4</sup> In 2008, when the Legislature was out of session, Governor Jim Gibbons attempted to unilaterally cut 2007 spending appropriations in order to balance the budget in light of falling tax revenues. His 2008 order called for a 4.5% reduction of spending by all departments.<sup>5</sup> Although Governor Gibbons claimed statutory authorization to make the cuts without consulting the Legislature, key legislators objected.<sup>6</sup> Critics characterized his order as a violation of Nevada’s separation of powers. They argued that the statute, or at least the Governor’s interpretation of it, amounted to an unconstitutional grant of a post-enactment veto power.<sup>7</sup> When State Controller Kim Wallin, relying on an Attorney General Opinion, refused to implement the order without legislative consultation and approval, the Governor acquiesced to the Legislators’ complaints. He submitted his cuts to the Legislature’s Interim Finance Committee (“IFC”), which

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<sup>1</sup> NEV. CONST. art. V, §§ 1, 7.

<sup>2</sup> *Id.*; see generally NEV. REV. STAT. § 353 (2007).

<sup>3</sup> DIV. OF BUDGET & PLANNING, NEV. DEP’T OF ADMIN., BUDGET 101—INTRODUCTION TO STATE BUDGETING 2 (6th ed. 2009), available at [http://budget.state.nv.us/Bud101Man/budget\\_101\\_manual\\_6th\\_ed.pdf](http://budget.state.nv.us/Bud101Man/budget_101_manual_6th_ed.pdf).

<sup>4</sup> NEV. CONST. art. IX, § 2, cl. 1.

<sup>5</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Announces 4.5% Reductions to State Budget (Dec. 14, 2007), available at [http://gov.state.nv.us/PressReleases/2007/2007-12-14\\_ReductionsStateBudget.htm](http://gov.state.nv.us/PressReleases/2007/2007-12-14_ReductionsStateBudget.htm).

<sup>6</sup> Letter from Bob Coffin, Nev. State Senator, to Randolph Townsend, Nev. State Senator (Jan. 21, 2008), reprinted in Cy Ryan, *Left Out of the Loop, Lawmakers Mull Suing to Overturn Gibbons’ Budget Cuts*, LAS VEGAS SUN, Jan. 23, 2008, <http://www.lasvegassun.com/news/2008/jan/23/left-out-loop-democratic-lawmakers-mull-suing-gibb/>.

<sup>7</sup> *Id.*

subsequently approved the reduction.<sup>8</sup> The parties resolved the conflict without separation of powers litigation.

Although the Governor and IFC temporarily averted a constitutional crisis, it again reached the boiling point in August of 2009 when the Governor issued an Executive Order announcing his plan to unilaterally spend federal stimulus money without approval from the IFC.<sup>9</sup> The Governor acted in response to State Controller Wallin's refusal to implement work program changes designed to spend the stimulus money because she claimed that the revisions lacked IFC approval as required by Nevada Revised Statutes ("NRS") section 353.220.<sup>10</sup> In an opinion issued the same day as the Governor's Executive Order, the Attorney General sanctioned the Governor's claim that he has the sole and broad discretion to spend the money under Nevada law if he alone determines the spending is necessary for the protection of life or property.<sup>11</sup> The Attorney General stated further that the State Controller should comply with his requests and process the funds without prior approval from the IFC.<sup>12</sup> Essentially, this authorization provided the Governor with "carte blanche" power to unilaterally spend over \$2.2 billion dollars.<sup>13</sup>

Unless properly addressed by the Legislature or settled by the Supreme Court of Nevada, the likelihood is great that this separation of powers conflict will continue to escalate. Because executive officers are not bound by the Attorney General's Opinions,<sup>14</sup> future governors could simply choose to revive past precedent and continue the practice of cutting budgets and demanding reserves, or follow in Governor Gibbons's footsteps, spending federal funds in derogation of enacted budgets and without legislative approval. Moreover, the political process may prove an inadequate safeguard for securing the separation of powers. Future key players in the executive and legislative branches may be reluctant to check an aggrandizing or encroaching Governor, thereby permitting an executive to claim control of law-making functions. Accordingly, this Note addresses two key questions. First, it addresses whether Governor Gibbons's

<sup>8</sup> See Press Release, Jim Gibbons, Governor of Nev., Legislative Committee Approves Budget Cuts (May 23, 2008), available at <http://gov.state.nv.us/PressReleases/2008/PDF/Pr-2008-05-23-IFC-Approval.pdf>; Press Release, Jim Gibbons, Governor of Nev., Governor Submits Spending Reductions to Legislative Panel (May 9, 2008), available at <http://gov.state.nv.us/PressReleases/2008/2008-05-09-IFCSubmission.htm>.

<sup>9</sup> See Exec. Order by the Governor Implementing the Provisions of the American Recovery and Reinvestment Act of 2009 in the State of Nevada (Aug. 14, 2009), available at [http://gov.state.nv.us/EO/2009/EO-2009-08-14\\_ARRA.pdf](http://gov.state.nv.us/EO/2009/EO-2009-08-14_ARRA.pdf).

<sup>10</sup> NEV. REV. STAT. § 353.220 (2007); Press Release, Jim Gibbons, Governor of Nev., Governor Reports on Stimulus Funding as Required by Law (Aug. 24, 2009), available at [http://gov.state.nv.us/PressReleases/2009/2009-08-24\\_IFC.htm](http://gov.state.nv.us/PressReleases/2009/2009-08-24_IFC.htm); Letter from Kim Wallin, Nev. State Controller, to Lorne J. Malkiewich, Sec'y to Interim Fin. Comm. (Aug. 19, 2009), available at [http://media.lasvegassun.com/media/pdfs/blogs/documents/2009/08/21/Controller\\_Letter\\_August\\_20\\_2009\\_IFC.pdf](http://media.lasvegassun.com/media/pdfs/blogs/documents/2009/08/21/Controller_Letter_August_20_2009_IFC.pdf).

<sup>11</sup> Letter from Catherine Cortez Masto, Nev. Attorney Gen., to Kim Wallin, Nev. State Controller 2-3 (Aug. 24, 2009), available at [http://media.lasvegassun.com/media/pdfs/blogs/documents/2009/08/24/AG\\_Opinion\\_8-24-09.pdf](http://media.lasvegassun.com/media/pdfs/blogs/documents/2009/08/24/AG_Opinion_8-24-09.pdf).

<sup>12</sup> *Id.* at 3.

<sup>13</sup> David McGrath Schwartz, *As Gibbons Gains Power, Lawmakers See Danger*, LAS VEGAS SUN, Aug. 25, 2009, at 1, available at <http://www.lasvegassun.com/news/2009/aug/25/gibbons-gains-power-lawmakers-see-danger/>.

<sup>14</sup> *Cannon v. Taylor*, 493 P.2d 1313, 1314 (Nev. 1972).

attempt to unilaterally cut the budget violates Nevada law and the Nevada Constitution. Second, it addresses whether the Governor's continued spending of federal stimulus money pursuant to allegedly delegated authority also violates Nevada law and the presentment requirements of the Nevada Constitution. Alternatively, would a Nevada statute granting the Governor power to unilaterally increase, reduce, or withhold the budget of state agencies constitute an excessive and unconstitutional delegation of legislative power to the Governor?

These questions are of paramount importance as the 2007 revenue projections were mere harbingers of difficulty to come. Exacerbated by the mortgage crisis, by August of 2008, Nevada's deficit had grown to twenty-one percent of Nevada's overall budget and the situation has continued to decline throughout 2009.<sup>15</sup> The current Governor, as well as those that hold the office in the future, will need an appropriate and constitutional means to deal efficiently with deficiencies in anticipated revenues, unforeseen budget crises, and the spending of federal stimulus money. Accordingly, this Note attempts to answer these questions through a multi-faceted and detailed discussion examining Nevada's current budgetary law, the historical background and text of the Nevada Constitution, doctrines of constitutional interpretation and statutory construction, and the approach taken by other state high courts and the U.S. Supreme Court in answering similar constitutional challenges. Part II begins by detailing the political controversy surrounding Governor Gibbons's unsuccessful efforts to implement cuts to the state budget without legislative approval and the most recent controversy over his spending of federal stimulus money. Part III discusses the constitutional requirements regarding the creation of laws and the apparent conflict in Nevada's existing statutes governing revisions and the setting aside of reserves. Part IV examines the historical backdrop for the drafting of the Nevada State Constitution and its importance to a meaningful interpretation of constitutional provisions. Part V addresses the potential approaches to the interpretation of state constitutional provisions and identifies the approach taken in this Note. Part VI contains a comparison of the current constitutional issue with Nevada precedent, decisions by the U.S. Supreme Court, and the outcomes of similar constitutional challenges from other state jurisdictions. Part VII presents possible alternative solutions that may be enacted to circumvent future conflicts. Part VIII concludes with some final thoughts.

## II. CATALYST FOR CRISIS: THE NEVADA STATE BUDGET PROCESS & THE FEDERAL STIMULUS PROGRAM

The economic downturn in Nevada became the catalyst for a potential constitutional crisis in late 2007. Indeed, state revenues were suffering and projections estimated the state coffer would be drastically short during fiscal years 2007-2008 and 2008-2009.<sup>16</sup> By October 2007, sales tax revenue for the

<sup>15</sup> Juliet Williams, *States Face Tough Choices as Budget Crisis Deepens*, USA TODAY, July 31, 2008, available at [http://www.usatoday.com/news/nation/2008-07-31-3490075796\\_x.htm](http://www.usatoday.com/news/nation/2008-07-31-3490075796_x.htm).

<sup>16</sup> Press Release, Jim Gibbons, Governor of Nev., *supra* note 5.

2007 fiscal year was already down over \$6.5 million.<sup>17</sup> In response, Nevada Governor Jim Gibbons asked state offices, agencies, and departments to prepare an eight percent reduction in spending.<sup>18</sup> After reviewing the severe impact such a large cut would have on state services, the Governor announced he would require a lower, broad-based reduction of 4.5% in general fund appropriations.<sup>19</sup> Rather than cutting individual programs, the Governor requested a reduction in nearly all state agencies' funding.<sup>20</sup> Additionally, this plan called for the withdrawal of up to \$200 million from the Fund to Stabilize the Operation of the State Government (aka The Rainy Day Fund) to be used during the 2009 fiscal year.<sup>21</sup> The Governor officially released his adjustments to the state budget in January 2008, at which time revenue projections estimated the budget was shy nearly \$517 million.<sup>22</sup>

Legislative reactions to Governor Gibbon's reductions were anything but tepid. The impassioned debate paralleled partisan politics. In a letter to Republican State Senator Randolph Townsend, the Chairman of the Legislative Commission, Democratic State Senator Bob Coffin characterized the Republican Governor's actions as an unconstitutional line item veto of the budget.<sup>23</sup> Specifically, Senator Coffin expressed his concern that inaction on the part of the Legislature could result in an unintentional ratification of gubernatorial line item veto, a power not granted to the Governor in Nevada's Constitution.<sup>24</sup> In part, Senator Coffin's dissatisfaction relied on the fact that the Governor purportedly failed to comply with Assembly Bill 628, the Appropriation Act, as he had failed to provide any notice of the reductions to the Legislature.<sup>25</sup> Consequently, Senator Coffin called on the Legislative Commission to serve notice on the Governor, informing him that the Commission would seek legal action if he continued his efforts to unilaterally cut the state budget.<sup>26</sup> Senator Townsend, reluctant to sue the Governor, agreed to share the letter with the Legislative Commission, but argued that the appropriate measure was to revise the statutes.<sup>27</sup> Expressing similar concerns, State Assembly Speaker Barbara Buckley (Democrat) and State Assemblywoman Sheila Leslie (Democrat) joined Senator Coffin and stressed that substantial budget cuts should include consultation with the Legislature. Speaker Buckley further stated that the Gov-

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<sup>17</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Gibbons' Statement Regarding Current Fiscal Budget Projections (Oct. 22, 2007), available at <http://gov.state.nv.us/PressReleases/2007/2007-10-22GovernorStatementBudgetProjections.htm>.

<sup>18</sup> Press Release, Jim Gibbons, Governor of Nev., *supra* note 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Gibbons Announces Adjustments to State Budget (Jan. 11, 2008), available at <http://gov.state.nv.us/PressReleases/2008/2008-01-11BudgetReport.htm>.

<sup>23</sup> Letter from Bob Coffin, Nev. State Senator, to Randolph Townsend, Nev. State Senator, *supra* note 6.

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

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

<sup>26</sup> *Id.*

<sup>27</sup> Ryan, *supra* note 6, at 2.

ernor was denying the public and its lawmakers an opportunity to voice their opinions about the reductions.<sup>28</sup>

Despite mounting tensions, the crisis was temporarily averted due to the nature of Nevada's non-unitary executive.<sup>29</sup> In particular, elected State Controller Kim Wallin (Democrat) refused to implement the reductions immediately following their January 2008 release by Governor Gibbons.<sup>30</sup> Citing conflicting statutes as the reason for not carrying out the cuts, she awaited an opinion from the State Attorney General's Office.<sup>31</sup> Specifically, she sought interpretation of NRS section 353.225 and its apparent conflict with NRS section 353.220.<sup>32</sup> NRS section 353.225 authorizes the Chief of Budget Division, in order to meet fiscal emergencies, with written approval of the Governor, to require the State Controller or head of each department to set aside a reserve.<sup>33</sup> However, NRS section 353.220 requires prior legislative approval on work program changes that result in a more than ten percent or \$50,000 change in appropriated funds, whichever is less.<sup>34</sup> Controller Wallin characterized the Attorney General Opinion she received as requiring the reductions be approved by the Legislature or the IFC and, accordingly, refused to implement the budget cuts.<sup>35</sup>

Governor Gibbons, not willing to change a precedent he believed that previous governors already established, requested an Attorney General Opinion of his own.<sup>36</sup> Subsequently, on May 9, 2008, the Governor announced that he would submit his budget reductions to the IFC based on the Attorney General's Opinion stating he should do so, despite a long-standing practice that neither the Legislature nor its IFC had previously required approval for the Governor's such changes.<sup>37</sup> Notably, two weeks later, the IFC approved the Governor's 4.5% across the board cut to the current budget.<sup>38</sup> In June of 2008, the Governor called for an off-year special session to address the state's continued shortfall.<sup>39</sup> The special session lasted only twelve hours and resulted in a

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<sup>28</sup> *Id.* at 1.

<sup>29</sup> *See* NEV. CONST. art. V, §§ 1, 17, 19.

<sup>30</sup> Geoff Dornan, *Cuts Ordered Weeks Ago Still Not Posted to Agency Budgets*, NEV. APPEAL, Feb. 11, 2008, at A1, available at <http://www.nevadaappeal.com/article/20080211/NEWS/808528020/0/FRONTPAGE>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> NEV. REV. STAT. § 353.225 (2007).

<sup>34</sup> *Id.* § 353.220.

<sup>35</sup> Sean Whaley, *Gibbons Seeks Ruling on Budget Cut Proposal*, LAS VEGAS REV. J., Apr. 26, 2008, at 3B, available at <http://www.lvrj.com/news/18252444.html>.

<sup>36</sup> *Id.*

<sup>37</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Submits Spending Reductions to Legislative Panel, *supra* note 8.

<sup>38</sup> Press Release, Jim Gibbons, Governor of Nev., Legislative Committee Approves Budget Cuts, *supra* note 8. The constitutionality of the IFC itself is beyond the scope of this paper.

<sup>39</sup> Press Release, Jim Gibbons, Governor of Nev., Governor to Call Special Session (June 13, 2008), available at <http://gov.state.nv.us/PressReleases/2008/2008-06-13SpecialSession.htm>.

budget agreement that passed in both houses and was enacted by the Governor.<sup>40</sup>

Seemingly settled for a short time, the bitter controversy over who has power over spending came to a head again in August of 2009, as evidenced by a series of cantankerous disagreements between the Governor and the IFC over how to spend federal stimulus money and the staff that would oversee it.<sup>41</sup> Striking down Governor Gibbons's proposal to add ten staff to oversee stimulus money spending and rejecting the Housing Division's plan to spend \$10.5 million for weatherizing homes, the IFC clearly demonstrated its intent to have legislative involvement in the spending.<sup>42</sup> In addition, the IFC refused to provide the Governor's office with an American Recovery and Reinvestment Act ("ARRA") director as requested; instead, it created a position under the authority of the executive branch's State Controller.<sup>43</sup> According to Governor Gibbons, lawmakers "stuck their partisan political noses in the middle of it and screwed everything up."<sup>44</sup> Moreover, the Governor threatened to challenge the authority of the IFC and proceeded to establish the position of ARRA Director through an executive order.<sup>45</sup>

In a further effort to bypass the IFC and spend the \$2.2 billion in federal stimulus money granted to the state under the ARRA, Governor Gibbons submitted work programs to State Controller Kim Wallin that exceeded the limits permitted in NRS section 353.220 and thus, in the Controller's opinion, required IFC approval.<sup>46</sup> Attempting to comply with state law, Controller Wallin forwarded the work programs to the IFC and sought an opinion from the State Attorney General to guide her in the future.<sup>47</sup> Subsequently, the Attorney General addressed two questions: 1) "Do these work programs require Interim Finance approval as is usually required for work programs of this magnitude under NRS 353.220 since it is by Executive Order," and 2) "Is the Governor's declaration of necessity for the 'protection of life or property' sufficient to permit the Controller to process these work programs without approval of the

<sup>40</sup> Press Release, Jim Gibbons, Governor of Nev., The Governor Issued the Following Statement Today After Signing the Bills from the Special Session Balancing the Budget for the Remainder of the Biennium (June 30, 2008), available at <http://gov.state.nv.us/PressReleases/2008/2008-06-30-SigningStatement.htm>; *2008 Legislature Special Session Ends After 12 Hours*, LAS VEGAS REV. J., June 27, 2008, <http://www.lvrj.com/news/22266679.html>.

<sup>41</sup> David McGrath Schwartz, *Legislature Reins in Gibbons*, LAS VEGAS SUN, Aug. 5, 2009, at 1, available at <http://www.lasvegassun.com/news/2009/aug/05/legislature-reins-gibbons/>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1-2; Press Release, Jim Gibbons, Governor of Nev., Governor Signs Executive Order to Take Control of Stimulus Funds (Aug. 14, 2009), available at [http://gov.state.nv.us/PressReleases/2009/2009-08-14\\_EO\\_Stimulus.htm](http://gov.state.nv.us/PressReleases/2009/2009-08-14_EO_Stimulus.htm).

<sup>44</sup> Schwartz, *supra* note 41.

<sup>45</sup> Exec. Order by the Governor Implementing the Provisions of the American Recovery and Reinvestment Act of 2009 in the State of Nevada (Aug. 14, 2009), available at [http://gov.state.nv.us/EO/2009/EO-2009-08-14\\_ARRA.pdf](http://gov.state.nv.us/EO/2009/EO-2009-08-14_ARRA.pdf); Press Release, Jim Gibbons, Governor of Nev., Talking Points for ARRA Press Release (Aug. 14, 2009), available at [http://gov.state.nv.us/PressReleases/2009/PDF/STIMULUS\\_IFC\\_TALKING\\_POINTS.pdf](http://gov.state.nv.us/PressReleases/2009/PDF/STIMULUS_IFC_TALKING_POINTS.pdf).

<sup>46</sup> Schwartz, *supra* note 13; Letter from Kim Wallin, Nev. State Controller, to Lorne J. Malkiewich, Sec'y to Interim Fin. Comm., *supra* note 10.

<sup>47</sup> *Id.*; Letter from Catherine Cortez Masto, Nev. Attorney Gen., to Kim Wallin, Nev. State Controller, *supra* note 11, at 1.

Interim Finance Committee as is usually required for work programs of this magnitude under NRS 353.220?"<sup>48</sup> The Attorney General concluded that if the Governor declares the work programs to be for the "protection of life or property," he need not submit changes to work programs to the IFC, even for changes of such magnitude.<sup>49</sup>

Furthermore, the Attorney General stated that NRS sections 353.220(5)(a)-(b) "place the discretion solely with the Governor to determine that, due to an emergency or for the protection of life or property, immediate action is necessary requiring the revision of a work program."<sup>50</sup> Even though NRS section 353.220(5)(a) requires the Governor report the reason for his actions to the IFC at its next meeting following the action, the Governor's report is purely informational because, by that point, the money is spent.<sup>51</sup> Although the "protection of life or property" provision has historically been invoked only during natural disasters or like circumstances,<sup>52</sup> the Attorney General's Opinion arguably provides the Governor with unchecked power to spend whenever he deems fit.<sup>53</sup> This is a monumental expansion of the Governor's spending power and he, as well as future governors, may choose to cite this authority and avoid the well-founded tenet that "the power of controlling the public purse lies within legislative, not executive authority."<sup>54</sup>

These conflicts are not unique to Nevada.<sup>55</sup> As states struggle to adjust to revenue shortfalls, legislators and executive officers are likely to continue to clash over who has the power to spend the federal stimulus and other federal funds. In Nevada, the debates and separation of powers issues that these conflicts invoke are unlikely to be settled without a determination from the Supreme Court of Nevada.

### III. STATUTORY CONFLICT: THE BIRTH AND REVISION OF AN APPROPRIATIONS BILL

To fully understand the conflicts that arose over the Governor's proposed budget cuts and stimulus spending, one must take a precursory look at the current state of Nevada's budgetary law. The State Budget Act governs budget formation and revision.<sup>56</sup> Nevada operates on a biennial budget cycle with the fiscal year beginning annually on July 1st.<sup>57</sup> Each biennium, the Legislature enacts two annual appropriations.<sup>58</sup> Nevada is one of only eleven states operat-

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Catherine Cortez Masto, Nev. Attorney Gen., to Kim Wallin, Nev. State Controller, *supra* note 11, at 1-2.

<sup>50</sup> *Id.* at 2 (citing Nev. Op. Att'y Gen. No. 2006-01 (2006)).

<sup>51</sup> NEV. REV. STAT. § 353.220(5)(a) (2007); Schwartz, *supra* note 13.

<sup>52</sup> Schwartz, *supra* note 13.

<sup>53</sup> *Id.*

<sup>54</sup> State Employees Ass'n v. Daines, 824 P.2d 276, 279 (Nev. 1992).

<sup>55</sup> See Nat'l Conference of State Legislatures, *General Overview of Legislative v. Executive Appropriations Issues*, <http://www.ncsl.org/default.aspx?tabid=18190> (last visited Feb. 28, 2010); see also Patrick McGreevy, *Steinberg to Take Governor to Court*, L.A. TIMES, Aug. 8, 2009, at A7.

<sup>56</sup> NEV. REV. STAT. § 353.220.

<sup>57</sup> DIV. OF BUDGET & PLANNING, NEV. DEP'T OF ADMIN., *supra* note 3, at 2.

<sup>58</sup> *Id.*

ing in this fashion; thirty states convene annually to enact annual budgets; nine states convene annually to create two-year appropriations.<sup>59</sup> The Nevada method gives the Legislature more time to concentrate on policy issues rather than budgetary details and enhances stability among state agencies through long range planning.<sup>60</sup> However, the biennial system provides less oversight and supervision of executive branch activities and puts the Legislature at a disadvantage when quick adjustments to actual revenue deficiencies are required.<sup>61</sup> Compounding the potential disadvantages of biennial appropriations is the fact that Nevada's Constitution requires the state operate on a balanced budget, a requirement taken seriously by Governor Gibbons.<sup>62</sup>

Budget formation begins with an executive budget created by synthesizing the Governor's priorities, agency funding requests, and available funding.<sup>63</sup> The Governor's Executive Budget outlines his goals and is considered to be a policy document.<sup>64</sup> The Governor submits this document to the Legislative Counsel Bureau's Fiscal Staff two weeks prior to the regular biennial convening of the Legislature during which time necessary hearings are held with legislative money committees.<sup>65</sup> Upon the beginning of the session, joint subcommittees comprised of four members of each house thoroughly review the budgets, making any necessary recommendations prior to the formalization of the Legislatively Approved Budget Document.<sup>66</sup> The full money committees then vote to accept the budget, accept with modifications, or reject the entire budget and implement their own.<sup>67</sup> Next, an appropriations bill must pass the Legislature through the same bicameral and presentment process as other bills: by approval of a majority of both houses followed by presentment to the Governor for his approval or veto in its entirety.<sup>68</sup> A two-thirds vote of the total members in both houses is required to override a gubernatorial veto.<sup>69</sup> Once the Governor or Legislature enacts the appropriations bill, NRS section 353.220 (Revisions), NRS section 353.225 (Reserves), and the Assembly Bill applicable to the current budgetary period govern changes to that appropriations bill.<sup>70</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 3.

<sup>61</sup> *Id.*

<sup>62</sup> NEV. CONST. art. IX, § 2, cl. 1; *see* Press Release, Jim Gibbons, Governor of Nev., *supra* note 10.

<sup>63</sup> DIV. OF BUDGET & PLANNING, NEV. DEP'T OF ADMIN., *supra* note 3, at 5, 7.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* at 7-8. The "money committees" are the Senate Committee on Finance and the Assembly Committee on Means and Ways.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 8.

<sup>68</sup> NEV. CONST. art. IV, §§ 18, 19, 35; MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION: A REFERENCE GUIDE 59 (1993).

<sup>69</sup> NEV. CONST. art. IV, § 35.

<sup>70</sup> NEV. REV. STAT. §§ 353.220, 353.225 (2007); Assem. 562 § 64, 2009 Leg., 75th Gen. Sess. (Nev. 2009); Assem. 628 § 67, 2007 Leg., 74th Gen. Sess. (Nev. 2007).



A. *NRS Section 353.220 Procedure for Revision of Work Programs and Allotment*

It is the revision process that gave rise to the current conflicts. NRS section 353.220 provides the procedure for revision of work programs and allotments.<sup>71</sup> A work program is the proposed work plan of an administrative agency during a particular period.<sup>72</sup> The term “work program” is also used to refer to an amendment to the Legislatively Approved Budget.<sup>73</sup> NRS section 353.220 states that agencies may submit a written request to the Governor (through the Chief of Budget Division) for the revision of its department’s work program at any time during the fiscal year if necessary.<sup>74</sup> Whenever a revision in an amount above \$20,000 would increase or decrease the expenditure level approved by the Legislature of any of the allotments within the work program by ten percent or \$50,000 (whichever is less), the request must be approved by the IFC, which has forty-five days to consider the revision.<sup>75</sup> If not considered within the forty-five day period, the revision is deemed approved.<sup>76</sup> Additionally, if the Governor determines expedited action is required, he may so certify and the IFC has only fifteen days to consider the revision.<sup>77</sup>

The law requires presentment to the IFC unless the Governor deems the revision necessary because of an emergency or for the protection of life or property.<sup>78</sup> When the Governor acts upon an emergency, he must simply report his actions to the IFC at its next meeting, along with his reasons for determining that action was necessary.<sup>79</sup> An emergency pursuant to this statute means “invasion, disaster, insurrection, riot, breach of the peace, substantial threat to life or property, epidemic or the imminent danger thereof.”<sup>80</sup> A qualifying emergency also includes damage or disintegration of state owned buildings or their electrical or mechanical systems if immediate repairs are necessary to maintain the buildings’ integrity.<sup>81</sup> In this way, the law grants the Governor flexibility to respond quickly when needed.

B. *NRS Section 353.225 Procedure for Reserves*

NRS section 353.225 states that “in order to provide some flexibility to meet emergencies arising during each fiscal year . . . and for operation and maintenance of the various departments, institutions, and agencies” the Governor may require the heads of departments or the state controller to set aside a

<sup>71</sup> NEV. REV. STAT. § 353.220.

<sup>72</sup> BUDGET & PLANNING DIV., DEP’T OF ADMIN., WORK PROGRAM MANUAL: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND IMPLEMENTING WORK PROGRAMS IN THE STATE OF NEVADA 30 (4th ed. 2006), available at [http://budget.state.nv.us/WrkPrgmManual/work\\_program\\_manual\\_4th\\_edition\\_R1.pdf](http://budget.state.nv.us/WrkPrgmManual/work_program_manual_4th_edition_R1.pdf).

<sup>73</sup> *Id.* at 5.

<sup>74</sup> NEV. REV. STAT. § 353.220.

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

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

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

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 353.263.

<sup>81</sup> *Id.*

reserve from the funds appropriated in an amount as the chief of budget division may determine.<sup>82</sup> A reserve is made up of funds that are available to be carried forward to the next fiscal year or which may be returned to the reserve for future obligations.<sup>83</sup> The conflicts between NRS sections 353.220 and 353.225 induced Controller Wallin to seek a legal opinion from the State Attorney General regarding the 4.5% cuts.<sup>84</sup>

Although the Legislature enacted NRS sections 353.225 and 353.220 together, section 353.225 makes no reference of, and is separated textually from NRS section 353.220.<sup>85</sup> Furthermore, NRS section 353.225 does not provide for involvement by the Legislature or IFC, nor does it add extraneous terms, guidelines, or parameters.<sup>86</sup> In addition, historically, reserves were treated differently than the work programs revisions governed by NRS section 353.220 and governors were given great deference in creating reserves.<sup>87</sup> In fact, the Legislature did not add the requirement to NRS section 353.220 that the IFC approve work programs until 1979; thus, Nevada law previously permitted governors unilateral discretion to implement changes to both reserves and work programs.<sup>88</sup>

The Work Program Manual prepared by the Department of Administration Budget and Planning Division also evinces this historical gubernatorial discretion. Specifically, this manual contains instructions on how to determine if a work program requires submission to the IFC.<sup>89</sup> For example, the Department of Administration's Work Program Packet Checklist form contains a section where an applicant indicates the reason why the work program does not require IFC approval; among the choices is the statement "[i]ncreases revenue and places funds in reserve only."<sup>90</sup> Appendix E of the Work Program Manual contains a Work Program Checklist and also includes a box "places funds in reserve only," again indicating that this option does not require IFC approval.<sup>91</sup>

### C. Analysis of the Current Conflict

Although both situations invoke the same statutory and constitutional dilemmas, there are essentially two separate issues to analyze. First, if successful, would Governor Gibbons's attempt at unilaterally cutting the budget have resulted in a violation of state law and the Nevada Constitution's separation of powers and bicameralism requirements? Second, is the Governor's unilateral spending of federal stimulus funds violative of the same provisions?

<sup>82</sup> *Id.* § 353.225.

<sup>83</sup> BUDGET & PLANNING DIV., DEP'T OF ADMIN., *supra* note 72, at 28.

<sup>84</sup> Dornan, *supra* note 30.

<sup>85</sup> NEV. REV. STAT. §§ 353.220, 353.225.

<sup>86</sup> *Id.* § 353.225.

<sup>87</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Submits Spending Reductions to Legislative Panel, *supra* note 8.

<sup>88</sup> See Act of May 15, 1979, ch. 364, 1979 Nev. Stat. 609-10.

<sup>89</sup> BUDGET & PLANNING DIV., DEP'T OF ADMIN., *supra* note 72, at 43-44.

<sup>90</sup> *Id.* at 43.

<sup>91</sup> *Id.* at 44.

### 1. Governor Gibbons's 2007 Proposed Budget Cuts

There is no evidence that the Governor's attempted 4.5% reductions in 2007 were ever purported to satisfy the emergency exception under NRS section 353.220. Therefore, facially, it appears the Governor's unilateral demand for reducing agency spending by 4.5% violated NRS section 353.220 requiring IFC approval. The 4.5% reductions would have resulted in a decrease in the expenditure level approved by the Legislature well over the \$50,000 limit, and thus required IFC approval.<sup>92</sup> However, it can be argued that the characterization of the spending reductions may have a significant impact on whether a violation would have actually occurred.

On January 11, 2008, Governor Gibbons characterized the reduction in spending as an *adjustment* to the state budget, in effect a work program, subjecting the cuts to NRS section 353.220.<sup>93</sup> If successful, such cuts would have violated section 353.220. If, however, Governor Gibbons's demand for a reduction in spending was simply a demand to set aside a *reserve*, the governing statute is NRS section 353.225.<sup>94</sup> In fact, on May 9, 2008, the Governor indeed referred to his 4.5% adjustment as the setting aside of reserves.<sup>95</sup> In doing so, the Governor sought to rely on the "long standing practice and procedure that neither the Legislature nor the IFC have required their prior approval for work programs implementing reserves."<sup>96</sup>

It appears, when viewed in isolation, that NRS section 353.225 would not have required the Governor to submit his demand for reserves to the IFC; therefore, an argument can be made that his actions are indeed consistent with the law and previous precedent.<sup>97</sup> However, a provision in Assembly Bill 628 enacted July 1, 2007 further complicates matters as it requires the Governor, under specific circumstances, to submit a report to the Legislature, or, if the Legislature is out of session, the IFC, prior to implementing reserves under NRS section 353.225.<sup>98</sup>

When NRS section 353.225 is read in conjunction with Assembly Bill 628, section 67, the Governor's attempted demand for reserves again appears, on its face, to violate the statute.<sup>99</sup> However, statutes regarding the same subject matter should be "construed so as to make each effective."<sup>100</sup> Unlike NRS section 353.225, Assembly Bill 628 actually enumerates the particular circumstances in which it applies.<sup>101</sup> Effective July 1, 2007, section 67 of the bill states that if projections of the ending balance of the State General Fund, as determined by the State Board of Examiners, is expected to fall below \$80 million for Fiscal Year 2007-2008 or 2008-2009, the Governor may direct state

<sup>92</sup> NEV. REV. STAT. § 353.220 (2007).

<sup>93</sup> Press Release, Jim Gibbons, Governor of Nev., *supra* note 22.

<sup>94</sup> NEV. REV. STAT. § 353.225.

<sup>95</sup> Press Release, Jim Gibbons, Governor of Nev., Governor Submits Spending Reductions to Legislative Panel, *supra* note 8.

<sup>96</sup> *Id.* (internal quotation marks omitted).

<sup>97</sup> *See id.*

<sup>98</sup> Assem. 628 § 67, 2007 Leg., 74th Reg. Sess. (Nev. 2007).

<sup>99</sup> Compare *id.*, with NEV. REV. STAT. § 353.225.

<sup>100</sup> *City of Reno v. Stoddard*, 167 P. 317, 322 (Nev. 1917) (quoting *Abel v. Eggers*, 136 P. 100, 103 (Nev. 1913)) (internal quotation marks omitted).

<sup>101</sup> Assem. 628 § 67, 2007 Leg., 74th Reg. Sess. (Nev. 2007).

agencies to set aside a reserve pursuant to NRS section 353.225.<sup>102</sup> This reserve may not exceed more than fifteen percent of the total amount of operating expenses or total appropriations and other money available to the departments and requires the approval of the Legislature or, if the Legislature is not in session, the approval of the IFC.<sup>103</sup>

Part three of this provision evinces the Legislature's intent to participate in the setting aside of significant reserves specifically applicable to the 2007-2008 and 2008-2009 fiscal years.<sup>104</sup> It requires the IFC's approval and sets clear parameters and guidelines for its application.<sup>105</sup> However, and most significantly, it nevertheless creates a loophole in which the Governor may act without any legislative oversight.<sup>106</sup> If reserves are set aside before the General Fund is projected to be less than \$80 million, the law apparently allows the Governor to act pursuant to the more general statute NRS section 353.225.<sup>107</sup> At the time the Governor sought to implement his reductions, the 2007 Fiscal Report prepared by the Fiscal Analysis Division indicated the projected balance of the General Fund had not yet reached the critical \$80 million amount required to trigger the requirements of Assembly Bill 628.<sup>108</sup>

Governor Gibbons's attempted 4.5% across the board budget cuts did not exceed the fifteen percent maximum, nor did the General Fund Balance fall below the required limit; therefore, the enumerated specific circumstances arguably never triggered the legislative approval requirements of Assembly Bill 628 and, accordingly, the Governor complied with the requirements of NRS section 353.225.<sup>109</sup> In addition, when read in a manner which gives all three statutes effect, NRS section 353.220 would be inapplicable if Governor Gibbons's demand was simply to set aside "reserves" because his attempt would indeed be operating within a valid loophole under NRS section 353.225.<sup>110</sup> Despite the outcome, the question remains as to whether such actions are permitted by the Nevada Constitution.

## 2. *Governor Gibbons's 2009 Unilateral Spending of Federal Stimulus Money*

Addressing the most recent conflict, the question is whether the Governor properly found authority under NRS section 353.220 to submit work program

<sup>102</sup> *Id.* In 2009, the same language was adopted in the Budget Act governing fiscal years July 1, 2009 to June 30, 2010 and July 1, 2010 to June 30, 2011. Assem. 562 § 64, 2009 Leg., 75th Reg. Sess. (Nev. 2009).

<sup>103</sup> Assem. 628 § 67, 2007 Leg., 74th Reg. Sess. (Nev. 2007).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Ryan, *supra* note 6.

<sup>107</sup> Letter from Bob Coffin, Nev. State Senator, to Randolph Townsend, Nev. State Senator, *supra* note 6.

<sup>108</sup> THE FISCAL ANALYSIS DIV., LEGISLATIVE COUNSEL BUREAU, FISCAL REPORT: SEVENTY-FOURTH NEVADA LEGISLATURE 9-11 (2007), available at <http://www.leg.state.nv.us/lcb/fiscal/Fiscal%20Report/2007/SECTION%20II%20-%20GENERAL%20FUND%20PROJECTED%20FUND%20BALANCE.pdf>.

<sup>109</sup> NEV. REV. STAT. § 353.225 (2007); see generally Press Release, Jim Gibbons, Governor of Nev., *supra* note 5.

<sup>110</sup> NEV. REV. STAT. §§ 353.220, 353.225.

changes spending federal stimulus funds to State Controller Wallin in August of 2009 without IFC approval. The examination begins by looking at the language of NRS section 353.220 relied upon by the Governor to justify his unilateral spending of the ARRA federal stimulus. The Supreme Court of Nevada has adopted the fundamental tenets of statutory construction, the objective of which is to give effect to the Legislature's intent.<sup>111</sup> First, the court examines the plain language of the statute. However, if the language is ambiguous or unclear, the court construes the statute according to that which "reason and public policy would indicate the legislature intended."<sup>112</sup> "Under such circumstances, the intent of the legislature may be determined by examining the entire statutory scheme"<sup>113</sup> and the interpretation should always avoid absurd results.<sup>114</sup> Furthermore, the intent of the Legislature prevails over the literal sense of the words.<sup>115</sup> In addition, statutes should be construed so as to give all words significance, avoiding an interpretation that renders words superfluous.<sup>116</sup> Notable exceptions exist and courts may reject words as surplusage if they are inconsistent with legislative intent, contrary to other canons of construction and common sense, inadvertently inserted, or are otherwise meaningless.<sup>117</sup>

On August 24, 2009, apparently applying the plain meaning rule of statutory construction, the Attorney General stated that pursuant to NRS section 353.220(5)(a), the Governor has the discretion to declare future work program changes concerning ARRA funds are necessary for the protection of life or property and spend such funds without IFC approval.<sup>118</sup> However, this interpretation is fraught with problems. First, the words "for the protection of life or property" are ambiguous, arguably including a broad range of state activity. Second, the words have been plucked out of the statute and the Attorney General is not interpreting those words within the context of the surrounding language. Subsections 5(a)-(c) read as follows:

5. If a request for the revision of a work program requires additional approval as provided in subsection 4 and:

(a) Is necessary because of an emergency as defined in NRS 353.263 or for the protection of life or property, the Governor shall take reasonable and proper action to approve it and shall report the action, and his reasons for determining that immediate action was necessary, to the Interim Finance Committee at its first meeting after the action is taken. Action by the Governor pursuant to this

<sup>111</sup> *Cleghorn v. Hess*, 853 P.2d 1260, 1262 (Nev. 1993).

<sup>112</sup> *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers, Local 357*, 50 P.3d 170, 172 (Nev. 2002) (citing *Dep't of Motor Vehicles & Pub. Safety v. Lovett*, 874 P.2d 1247, 1249-50 (Nev. 1994)) (internal quotation marks omitted).

<sup>113</sup> *Id.*

<sup>114</sup> *State Dep't of Health, Welfare & Rehab. v. Washoe Co. Welfare Dep't*, 503 P.2d 457, 459 (Nev. 1972).

<sup>115</sup> *Id.* at 458 (quoting *State ex rel. O'Meara v. Ross*, 14 P. 827, 828 (Nev. 1887)) (internal quotation marks omitted).

<sup>116</sup> LINDA D. JELLUM & DAVID CHARLES HRICK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 147 (2006).

<sup>117</sup> *Id.* at 147-48.

<sup>118</sup> NEV. REV. STAT. § 353.220 (5)(a) (2007); Letter from Catherine Cortez Masto, Nev. Attorney Gen., to Kim Wallin, Nev. State Controller, *supra* note 11, at 3-4.

paragraph constitutes approval of the revision, and other provisions of this chapter requiring approval before encumbering money for the revision do not apply.

(b) The Governor determines that the revision is necessary and requires expeditious action, he may certify that the request requires expeditious action by the Interim Finance Committee. Whenever the Governor so certifies, the Interim Finance Committee has 15 days after the request is submitted to its Secretary within which to consider the revision. Any request for revision which is not considered within the 15-day period shall be deemed approved.

(c) Does not qualify pursuant paragraph (a) or (b), it must be submitted to the Interim Finance Committee. The Interim Finance Committee has 45 days after the request is submitted to its Secretary within which to consider the revision. Any request which is not considered within the 45-day period shall be deemed approved.<sup>119</sup>

Notably, subsection (a) provides two exceptions where the Governor may act without the IFC: in an emergency *or* for the protection of life or property. Because the Legislature implements most state actions and appropriations in order to protect Nevadans' lives and property, reading "protection of life or property" in isolation and applying the "plain meaning rule" could refer to any expenditure. Hence, this interpretation leads to absurd results because it essentially allows the Governor to make any revision he wishes, at any time, so long as he states that the revision is intended to protect life or property.<sup>120</sup> For example, construing the statute in this manner would allow the Governor to spend millions in taxpayer funds to create a thousand-officer graffiti taskforce without legislative approval, simply because it is for the protection of property. Furthermore, subsection (b) located immediately below gives the Governor an option to get approval of the IFC but forces the committee to act quickly when the action is imperative.<sup>121</sup> Therefore, an interpretation of subsection (a) that provides the Governor such broad authority over funds necessary to protect life or property without IFC approval essentially renders section (b) superfluous.

In addition, although she appears to have disregarded the "protection of life or property" language, when previously asked to give an opinion on the procedures the Governor was required to follow in revising agency work programs, the Attorney General concluded that "unless the Governor declares that a qualifying emergency situation exists under NRS 353.220(5)(a), a revision for a work program under section .220 must first be submitted to the IFC for approval."<sup>122</sup> In making this statement, the Attorney General followed a more logical construction and one that is harmonious with the Legislature's intent; subsection (a) applies to emergencies, subsection (b) applies when expedited measures are needed, and subsection (c) applies to all other revisions. In August of 2009, Governor Gibbons justified his use of NRS section 353.220(5)(a)'s emergency provision to bypass the IFC by stating that progress reports are due under ARRA by early October 2009 or else future funds may be

<sup>119</sup> NEV. REV. STAT. § 353.220(5)(a)-(c).

<sup>120</sup> Editorial, *Checks and Balances*, LAS VEGAS SUN, Aug. 26, 2009, at 4.

<sup>121</sup> NEV. REV. STAT. § 353.220(5)(b).

<sup>122</sup> Letter from Catherine Cortez Masto, Nev. Attorney Gen., to Jim Gibbons, Governor of Nev. 3 (May 6, 2008).

at risk.<sup>123</sup> This justification is insufficient as NRS section 353.220(5)(b) provides a satisfactory mechanism for expediting the approval of the IFC the Governor claims is needed.<sup>124</sup> Subsection (b)'s expedited procedure would provide the Governor IFC approval well within the reporting deadlines and thus, there is no need to declare an emergency under subsection (a) to protect future ARRA funds.<sup>125</sup>

Furthermore, the Legislature added section 5 to NRS section 353.220 by Senate Bill 255 in 1979.<sup>126</sup> The Legislature intended Senate Bill 255 to “[s]ubstantially increase[ ] legislative control over state financial administration.”<sup>127</sup> This 1979 original version of the statute did not include the language “emergency” but simply “for the protection of life or property.”<sup>128</sup> Interpreting the provision as granting the Governor unfettered discretion to spend billions is not what the Legislature intended because such a construction in no way effectuates the three main purposes of Senate Bill 255. As explained by Senator Kosinski, the purposes in enacting Senate Bill 255 were increasing legislative: 1) position control; 2) control of federal funds and gifts; and 3) control over work program revisions.<sup>129</sup> Moreover, the Legislature added the language “because of an emergency as defined in NRS 353.263” to NRS section 353.220 in 1991 by passing Assembly Bill 158.<sup>130</sup> The Board of Examiners “wanted to expand the definition of emergency, so work programs could be approved immediately and reported later to the Interim Finance Committee.”<sup>131</sup> In fact, the added definition of emergency includes “*substantial threat* to life or property.”<sup>132</sup> Although NRS section 353.220's language “because of an emergency . . . or for the protection of life or property” is written in the disjunctive,<sup>133</sup> they should be read together in light of the entire provision and with the Legislature's intent in mind. It is not uncommon in statutory construction for courts to interpret “or” to mean “and” when the literal meaning gives rise to an absurd result.<sup>134</sup> Importantly, why would the 1979 Legislature, in an effort to increase legislative control over state finances, grant the Governor broad and sole discretion to spend funds? A more reasonable construction of the statute is that the Legislature gave the Governor three options for fiscal flexibility: 1) receive authorization from the IFC within the standard forty-five days; 2) expedite IFC approval to fifteen days if necessary; or 3) bypass IFC approval altogether in the case of emergencies.

<sup>123</sup> Exec. Order by the Governor Implementing the Provisions of the American Recovery and Reinvestment Act of 2009 in the State of Nevada (Aug. 14, 2009), available at [http://gov.state.nv.us/EO/2009/EO-2009-08-14\\_ARRA.pdf](http://gov.state.nv.us/EO/2009/EO-2009-08-14_ARRA.pdf).

<sup>124</sup> NEV. REV. STAT. § 353.220(5)(b).

<sup>125</sup> *Id.*

<sup>126</sup> 1979 Nev. Stat. 609-10.

<sup>127</sup> *Minutes of the S. Comm. on Gov't Affairs: Hearing on S.B. 255*, 1979 Leg., 60th Sess. 5 (Nev. 1979).

<sup>128</sup> 1979 Nev. Stat. 610.

<sup>129</sup> *Minutes of the Nev. State Leg. Ways & Means Comm.*, 1979 Leg., 60th Sess. 3 (Nev. 1979).

<sup>130</sup> 1991 Nev. Stat. 277.

<sup>131</sup> *Minutes of the S. Comm. on Fin.*, 1991 Leg., 66th Sess. 3 (Nev. 1991).

<sup>132</sup> NEV. REV. STAT. § 353.263 (2007) (emphasis added).

<sup>133</sup> *Id.* § 353.220(5)(a) (emphasis added).

<sup>134</sup> JELLUM & HRICIK, *supra* note 116, at 65-66.

Even if the Governor is deemed to have legislative authority to unilaterally spend the \$2.2 billion of stimulus funds, the question remains as to whether such authority is violative of Nevada's Constitution and its separation of powers provision.

#### IV. THE NEVADA CONSTITUTION: HISTORICAL BACKDROP

Interpretation of the Nevada Constitution requires an understanding of its historical origins.<sup>135</sup> Nevada ratified its constitution in 1864, and is one of a minority of states that continues to operate under its original constitution.<sup>136</sup> The Legislature heavily adopted constitutional provisions from the constitutions of both California and New York during a period when many states were revising, and often re-revising, their constitutions.<sup>137</sup> Revisions were so rampant, in fact, that between 1800 and 1900 ninety-four new state constitutions were adopted.<sup>138</sup> This repeated revising demonstrates that states viewed state constitutions as a progressive enterprise, unlike the U.S. Constitution, which, by that time, had become venerated as the work of an "extraordinary political generation" deserving preservation by future generations.<sup>139</sup> In contrast, state drafters viewed their predecessors as less experienced and looked to modern state constitutions for guidance rather than older models such as the U.S. Constitution.<sup>140</sup>

Additionally, state drafters approached the separation of powers problem differently than the drafters of the U.S. Constitution.<sup>141</sup> As a result, the Nevada Constitution differs textually from the U.S. Constitution in several important aspects. The most notable is found in the Nevada Constitution's separation of powers clause, article III, section 1. Just like the U.S. Constitution, article III divides the government into three distinct departments: the legislative, executive, and judicial; however, unlike the U.S. Constitution in which the separation of powers is merely implied, the Nevada Constitution explicitly requires a separation of duties between the three branches.<sup>142</sup> Specifically, article III, section 1 states:

The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.<sup>143</sup>

The effects of this clause are two-fold: 1) it requires the branches to maintain entirely separate duties and separate personnel thereby protecting one

<sup>135</sup> G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329 (2003).

<sup>136</sup> BOWERS, *supra* note 68, at 12.

<sup>137</sup> *Id.*; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94 (1998).

<sup>138</sup> TARR, *supra* note 137, at 94.

<sup>139</sup> *Id.* at 97.

<sup>140</sup> *Id.* at 98.

<sup>141</sup> BOWERS, *supra* note 68, at 12.

<sup>142</sup> NEV. CONST. art. III, § 1.

<sup>143</sup> *Id.*



branch from intrusion upon its duties by another; and 2) it prevents the delegation of duties from one branch to another unless expressly permitted.<sup>144</sup>

Another notable difference distinguishing Nevada's document from the U.S. Constitution is that the Nevada Constitution provides for a non-unitary executive branch.<sup>145</sup> Unlike the hiring discretion granted to the President under the U.S. Constitution,<sup>146</sup> the Nevada Constitution does not grant the Governor significant appointment power of other principle executive officers. In particular, article V of the Nevada Constitution provides for the independent elections of the Lieutenant Governor, Secretary of State, Treasurer, Controller, and the Attorney General.<sup>147</sup> This plural executive drastically weakens the Governor's power over the executive branch as these officers have a separate electoral mandate and do not serve at the pleasure of the Governor.<sup>148</sup> As is currently the situation in Nevada, these officers may be of an opposing political party with different partisan agendas or be simply recalcitrant.<sup>149</sup> Although a plural executive may create numerous opportunities for conflict, it furnishes a valuable *intrabran*ch check on state executive power.<sup>150</sup>

Weakening the Governor's authority even further, the Nevada Constitution does not grant him the power of a line item veto; bills must be signed or vetoed in their entirety.<sup>151</sup> Currently, forty-four states provide their Governors line item veto authority.<sup>152</sup> Again, Nevada is in the minority as one of only six states denying the Governor power to veto specific items in appropriations bills.<sup>153</sup> While the Line Item Veto Act of 1996 granted the President similar item veto power, as discussed below, the Supreme Court struck down the statute as unconstitutional just two years later.<sup>154</sup>

The Nevada Constitution does parallel the U.S. Constitution in its creation of a bicameral legislature.<sup>155</sup> However, it is more dissimilar than similar in its other terms regarding legislative authority. Article IV, section 2 of the Nevada Constitution provides that the Legislature is biennial, commencing on the first Monday of February in odd-numbered years, and convenes for only 120 days, resulting in a Legislature that is out of session more often than not.<sup>156</sup> Another significant difference is that the U.S. Constitution limits federal legislative

<sup>144</sup> BOWERS, *supra* note 68, at 47.

<sup>145</sup> See NEV. CONST. art. V, §§ 1, 17, 19.

<sup>146</sup> U.S. CONST. art II, § 2.

<sup>147</sup> See NEV. CONST. art. V, §§ 17, 19.

<sup>148</sup> BOWERS, *supra* note 68, at 78-79.

<sup>149</sup> *Id.*; see also William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006) ("In states where the Governor and the Attorney General are independently elected, the two officers may come from different political parties with diametrically opposed partisan agendas. If so, they can be expected to be in constant political opposition to each other.").

<sup>150</sup> Marshall, *supra* note 149, at 2451-55.

<sup>151</sup> ELEANORE BUSHNELL & DON W. DRIGGS, THE NEVADA CONSTITUTION: ORIGIN AND GROWTH 115 (6th ed. 1984).

<sup>152</sup> Gubernatorial Veto Authority with Respect to Major Budget Bill(s), <http://www.ncsl.org/programs/fiscal/lbptabls/lbpc6t3.htm#me> (last visited Feb. 28, 2010).

<sup>153</sup> *Id.*

<sup>154</sup> See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

<sup>155</sup> NEV. CONST. art. IV, § 1.

<sup>156</sup> *Id.* § 2 (Nevada voters approved the 120-day limitation in the 1998 general election).

power by enumerating the powers Congress does enjoy whereas the Nevada State Legislature exercises plenary powers constrained only by enumerated constitutional limitations.<sup>157</sup>

The Governor is granted a modicum of power in the state legislative process as he retains the sole power to call the Legislature into special session.<sup>158</sup> The Legislature itself lacks the power to do so.<sup>159</sup> Although lacking authority in other areas, the Governor's position is strengthened during a special session because the Legislature is restricted to exclusively transacting only the business the Governor provides to them.<sup>160</sup> Consequently, the inability of the Legislature to call itself into special session to respond to fiscal emergencies makes it imperative an alternative solution exist.

#### V. INTERPRETING THE NEVADA CONSTITUTION: A MIDDLE COURSE

The historical origins and textual dissimilarities between the Nevada State Constitution and that of its national counterpart may affect the approach one should use in its interpretation.<sup>161</sup> The question of how state constitutions ought to be interpreted has become a contentious problem for academia.<sup>162</sup> Scholars disagree as to whether interpretation of state constitutions should be analogous to the interpretation of similar provisions of the U.S. Constitution, which is often referred to as "lockstep jurisprudence."<sup>163</sup> However, state courts are under no obligation to follow federal precedent in interpreting analogous state provisions that create the structure and operation of state government because there is no federally mandated form of state government, nor is separation of powers required at the state level unless expressly provided for in the state constitution.<sup>164</sup>

Opinions as to the relationship between state and national constitutional law span a broad spectrum.<sup>165</sup> At one end, scholars argue that national law completely controls state constitutional law, requiring state judges follow national law to determine the meaning of state constitutional provisions.<sup>166</sup> This approach is problematic because in a federal system, the state maintains some degree of independence and self-governance.<sup>167</sup> Strict adherence to this approach would "render the State rules a mere row of shadows."<sup>168</sup> At the

<sup>157</sup> See U.S. CONST. art. I, §§ 1-10; *Nevadans for Nev. v. Beers*, 142 P.3d 339, 345 (Nev. 2006); *Moore v. Humboldt County*, 232 P. 1078, 1080 (Nev. 1925).

<sup>158</sup> *Bowers*, *supra* note 68, at 74.

<sup>159</sup> *Id.* (citing Nev. Op. Att'y Gen. 622 (1948)).

<sup>160</sup> NEV. CONST. art. V, § 9.

<sup>161</sup> See Tarr, *supra* note 135, at 329.

<sup>162</sup> James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1245 (2005).

<sup>163</sup> See Tarr, *supra* note 135, at 331.

<sup>164</sup> *Id.* at 330.

<sup>165</sup> Gardner, *supra* note 162, at 1265.

<sup>166</sup> *Id.*

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

<sup>168</sup> Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1525 (2005) (emphasis omitted) (citing *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring)).

other end of the spectrum, scholars deem that state constitutions are completely independent of the U.S. Constitution and its interpretational precedents.<sup>169</sup> Courts taking the latter approach often consult decisions from other jurisdictions.<sup>170</sup> This approach is reversely problematic, providing national constitutional interpretations no weight, and treating federal precedents as entirely external to the state provisions.<sup>171</sup> The better approach is one equidistant from both extremes. Although state constitutional law is somewhat independent of the national, it retains some dependency upon it.<sup>172</sup> In addition, the language of the Nevada Constitution often parallels that of other states and the U.S. Constitution, providing a natural and logical argument justifying an examination into the jurisprudence of both. Therefore, this Note will discuss Nevada state constitutional provisions in light of both national jurisprudence and similar decisions from other jurisdictions.

Having identified an approach, there are additional presumptions to be applied when the constitutionality of a Nevada statute is challenged. When the constitutionality of the Legislature's enactment is questioned, it is presumed to be constitutional and valid; the burden rests upon the challenger to prove it is unconstitutional by a "clear showing of invalidity."<sup>173</sup> As stated earlier, statutes regarding the same subject matter should also be read and "construed so as to make each effective."<sup>174</sup>

#### VI. DO THE GOVERNOR'S ACTIONS VIOLATE NEVADA'S SEPARATION OF POWERS AND CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER?

If Nevada's non-unitary executive had not prevented the implementation of the 2007 reserves and forced the Governor to seek approval for his reductions from the IFC, he would likely have been successful in making the reductions unilaterally pursuant to NRS section 353.225. Additionally, backed by the August 24, 2009 opinion of the Attorney General, it appears the Governor will succeed in spending federal stimulus money without legislative involvement. Regardless of whether it's determined that the Governor is violating Nevada's statutory law by attempting to make reductions and spend funds unilaterally, there is a strong argument that any unilateral reductions or spending by the executive violates the bicameralism, presentment, and separation of powers requirements of the Nevada Constitution. Work program revisions, regardless of whether they increase or decrease spending, are a change of the budgetary law *post* enactment, and, as such, this delegation of legislative power is constitutionally dubious. As discussed later, although controversies pertaining to NRS section 353.225 have come before the Nevada Supreme Court on two separate occasions, the court has explicitly declined to address the question

<sup>169</sup> Gardner, *supra* note 162, at 1265.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1265-66.

<sup>172</sup> *Id.* at 1266.

<sup>173</sup> Castillo v. State, 874 P.2d 1252, 1259 (Nev. 1994) (internal quotation marks omitted).

<sup>174</sup> City of Reno v. Stoddard, 167 P. 317, 322 (Nev. 1917) (internal quotation marks omitted).

of the statute's constitutionality.<sup>175</sup> In comparison, the U.S. Supreme Court as well as the high courts of several states have declared similar actions by head executives as violative of their respective constitutions.<sup>176</sup>

A. *Nevada Supreme Court Separation of Powers Case Law*

Although the Nevada Supreme Court declined to consider the constitutionality of NRS section 353.225 governing reserves, it has made some telling statements regarding the authority of the Governor over the state budget.<sup>177</sup> *State Employees Ass'n v. Daines* involved a refusal by the Governor and the Board of Examiners to implement a legislative bill appropriating funds for a four percent salary increase for certain Nevada state employees.<sup>178</sup> The court observed that it was "well established that the power of controlling the public purse lies within legislative, not executive authority."<sup>179</sup> Thus, the Governor must be empowered by either the Nevada Constitution or by statute.<sup>180</sup> The court concluded that the Governor had no authorization, either statutory or constitutional, to defer salary increases enacted by the Legislature.<sup>181</sup> In support of its decision, the court cited *State v. Fairbanks* in which the Supreme Court of Alaska rejected a statute giving the Governor power to reduce the budget of state agencies as an unconstitutional delegation of legislative power.<sup>182</sup> The *Daines* court also cited *State ex rel. Holmes v. State Board of Finance* in which the New Mexico high court struck down a statute permitting the State Board of Finance to reduce the annual operating budgets as violative of the separation of powers doctrine.<sup>183</sup> Moreover, the *Daines* court rejected the argument that the Legislature intended NRS section 353.225 to delegate authority to the executive branch to invalidate the acts of the Legislature or that the Legislature meant NRS section 353.225 to be an authorization for a "blanket repeal" of the pay raise enacted by the Legislature.<sup>184</sup> Rather, the court stated that the statute was simply a means to provide flexibility to meet fiscal emergencies.<sup>185</sup> Because the court finally determined NRS section 353.225 to be irrelevant to the *Daines* case, it declined to consider the constitutional challenges to the statute.<sup>186</sup> The court's choice of jurisdictions cited for issues regarding the public purse may be indicative of how it will decide a future constitutional challenge as both the Alaska and New Mexico courts strictly applied the separation of powers doctrine.<sup>187</sup>

<sup>175</sup> *State Employees Ass'n v. Daines*, 824 P.2d 276, 280 (Nev. 1992); *State Employees Ass'n v. State ex rel. ITS Dept. of Prisons*, 724 P.2d 732, 733 (Nev. 1986).

<sup>176</sup> *Clinton v. City of New York*, 524 U.S. 417, 436, 448 (1998).

<sup>177</sup> *Daines*, 824 P.2d at 280; *ITS Dept. of Prisons*, 724 P.2d at 734.

<sup>178</sup> *Daines*, 824 P.2d at 277.

<sup>179</sup> *Id.* at 279.

<sup>180</sup> *See id.* at 277-78.

<sup>181</sup> *Id.* at 280.

<sup>182</sup> *Id.* at 279 (citing *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987)).

<sup>183</sup> *Id.* (citing *State ex rel. Holmes v. State Bd. of Fin.*, 367 P.2d 925 (N.M. 1961)).

<sup>184</sup> *Id.* at 280.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 279.

Further evidence that the Supreme Court of Nevada will apply a strict construction is its decision in *Commission on Ethics v. Hardy*.<sup>188</sup> Although not addressing the precise issue herein, the Supreme Court of Nevada made clear its position on Nevada's Constitution and its separation of powers clause. Specifically, the *Hardy* court addressed the ability of the Nevada Commission on Ethics to conduct proceedings regarding ethical violations allegedly committed by a Nevada senator.<sup>189</sup> Although the Legislature created the Commission on Ethics, the court determined it to be an agency of the executive branch.<sup>190</sup> Because Article IV section 6 of the Nevada Constitution provides that any discipline of the Legislature "is a function constitutionally committed to each house of the Legislature," the court held that any delegation of such disciplinary power is an unconstitutional delegation in violation of the separation of powers provision.<sup>191</sup> Furthermore, the court recognized that the law does not require states to incorporate the separation of powers doctrine into their constitutions and stressed that Nevada has gone even further by expressly prohibiting "any one branch of government from impinging on the functions of another."<sup>192</sup> Consequently, this express prohibition supports the court's finding that "neither the Legislature nor the executive branch can agree to waive the structural protections of separation of powers."<sup>193</sup> The court further stated, "[T]he Legislature cannot, by enacting a statute that delegates certain powers to another branch of the government, waive any separation of powers violation inherent in such a delegation."<sup>194</sup> Accordingly, this strict construction of Nevada's separation of powers clause is indicative of how the court will likely rule on the Governor's power over the purse under NRS section 353.220 and NRS section 353.225 should the issue come before it.

#### B. U.S. Supreme Court Separation of Powers Case Law

In 1996, Congress granted the President the power of line item veto in the Line Item Veto Act.<sup>195</sup> This act empowered the President to cancel three types of provisions after they were signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."<sup>196</sup> Precise procedures, such as notification to Congress within five calendar days and a requirement that he first consider the purpose and legislative history of the appropriation prior to its cancellation, constrained the President when he was exercising this authority.<sup>197</sup> Subsequently, an action was brought before the Supreme Court challenging the statute's constitutionality on the grounds that it violated Article I of the U.S. Constitution by permit-

<sup>188</sup> *Comm'n on Ethics v. Hardy*, 212 P.3d 1098 (Nev. 2009).

<sup>189</sup> *Id.* at 1100.

<sup>190</sup> *Id.* at 1101.

<sup>191</sup> *Id.* at 1104, 1109.

<sup>192</sup> *Id.* at 1103-04.

<sup>193</sup> *Id.* at 1108.

<sup>194</sup> *Id.* at 1109.

<sup>195</sup> Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by* *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

<sup>196</sup> *Clinton*, 524 U.S. at 436 (internal quotation marks omitted).

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

ting unilateral executive branch cancellation of previously enacted provisions.<sup>198</sup>

Article I, Section 7 of the U.S. Constitution, known as the Presentment Clause, provides for presidential veto power.<sup>199</sup> If the President exercises his veto, the Presentment Clause specifies for the return of the bill to Congress *prior* to the bill becoming a law.<sup>200</sup> The Constitution is silent on any unilateral power of the President to amend or repeal parts of statutes that have been previously enacted.<sup>201</sup> The Supreme Court in *Clinton v. City of New York* interpreted this silence to be strong evidence of an express prohibition.<sup>202</sup> Examination of the historical record supports this argument. For example, George Washington interpreted the Presentment Clause as meaning he must either “approve all the parts of a Bill, or reject it in toto.”<sup>203</sup> Following this interpretation, Presidents of the United States had not previously enjoyed line item veto power or the power to amend statutes post enactment. The power granted in the 1996 statute was “not the product of the ‘finely wrought’ procedure that the Framers designed”; rather, it was a design produced through modern convenience and compromise.<sup>204</sup>

Despite the proponents’ argument that the Line Item Veto Act, in practice, resulted in the mere power to decline to spend money or to implement specific tax measures, the Court held this Act actually empowered the President with the ability to repeal laws, “for his own policy reasons, without observing the procedures set out in Article I, § 7.”<sup>205</sup> “Repeal of statutes, no less than enactment, must conform with Art[icle] I.”<sup>206</sup> The U.S. Constitution requires three distinct steps be taken before a bill becomes a law: 1) the identical text must be read and passed by each house; 2) the bill must then be presented to the President; and 3) the bill must be signed into law.<sup>207</sup> If the text of the bill changes during any of the three steps, the bill does not become a valid law.<sup>208</sup> Because the Line Item Veto Act authorized the President to create a law textually different than that voted on by the Legislature and signed by the President, the Constitution did not authorize the procedures and the Court held the Line Item Veto Act invalid.<sup>209</sup>

An issue expressly omitted by the Court but addressed in Justice Kennedy’s concurrence is the issue of the delegation of power between the branches.<sup>210</sup> “The Constitution’s structure requires a stability which transcends

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<sup>198</sup> *Id.* at 421.

<sup>199</sup> U.S. CONST. art. I, § 7.

<sup>200</sup> *Id.*; *Clinton*, 524 U.S. at 439.

<sup>201</sup> *Clinton*, 524 U.S. at 439.

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

<sup>203</sup> *Id.* at 440 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)) (internal quotation marks omitted).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 445.

<sup>206</sup> *Id.* at 438 (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)) (internal quotation marks omitted).

<sup>207</sup> U.S. CONST. art. I, § 7; *Clinton*, 524 U.S. at 448.

<sup>208</sup> *Clinton*, 524 U.S. at 448.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 449 (Kennedy, J., concurring).

the convenience of the moment.”<sup>211</sup> The framers designed the structure of the Constitution’s separation of powers to prevent the concentration of power from accumulating in the hands of a single branch, thereby putting liberty in harm’s way.<sup>212</sup> Although the Legislature did not intend the Line Item Veto Act as a means to enhance the President’s power, its effect granted power beyond what the framers had intended.<sup>213</sup>

The issue addressed in *Clinton* is analogous to Nevada’s current controversy in many respects. Like the President prior to the Line Item Veto Act, Nevada’s Governors have not been granted *any* line item veto power.<sup>214</sup> In addition, the Nevada Constitution’s Presentment Clause is nearly identical to that of the U.S. Constitution’s Article I, Section 7, requiring all bills having passed the Legislature be presented to the Governor.<sup>215</sup> Both require the chief executive’s signature for enactment, and both provide the opportunity for his veto of the bill in its entirety.<sup>216</sup> The only significant difference appears to be in the amount of time the chief executive has to consider the bill. In Nevada, the Governor has only five days; the President is granted ten. In both cases, failure to return the bill approved or vetoed within the respective timeframes results in its enactment as law.<sup>217</sup>

The near identical text of these clauses leads to the reasonable conclusion they should be interpreted similarly. A Nevada budget is a law.<sup>218</sup> Accordingly, the Governor’s sweeping reductions or increases in spending are modifications of that law *post*-enactment. Even if the courts determine that this power has been explicitly delegated to the Governor by the Legislature, convenience does not excuse a constitutional violation, nor does it justify the shifting of power from one branch of government to the other. Drafters of state constitutions were equally wary of the accumulation of power in the hands of any one group or person and cognizant of the danger it posed to liberty.<sup>219</sup> As a result, many state constitutions, including Nevada’s, have a much more rigid separation of powers clause than the U.S. Constitution, in which the separation of powers must be inferred.<sup>220</sup> Nevada’s explicit prohibition of any sharing of duties between the branches makes the power of the Governor to reduce spending without legislative approval even more offensive to the Nevada Constitution. Whether the result is broad across the board cuts, targeted reductions, or increases of specific appropriations, such authority grants the Governor the same overreaching power to modify the law based on his own policy and without the requirements of the Presentment Clause.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 450.

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

<sup>214</sup> BUSHNELL & DRIGGS, *supra* note 151, at 115.

<sup>215</sup> Compare U.S. CONST. art. I, § 7, with NEV. CONST. art. IV, § 35.

<sup>216</sup> U.S. CONST. art. I, § 7; NEV. CONST. art. IV, § 35.

<sup>217</sup> U.S. CONST. art. I, § 7; NEV. CONST. art. IV, § 35.

<sup>218</sup> NEV. CONST. art. IV, § 19.

<sup>219</sup> *Id.* art. III, § 1; Tarr, *supra* note 135, at 337.

<sup>220</sup> NEV. CONST. art. III, § 1; Tarr, *supra* note 135, at 337.

Senator Coffin's characterization of Governor Gibbons's cuts as an exercise of "unconstitutional line item veto" power was correct.<sup>221</sup> Line item veto authority theoretically encompasses the power to make cuts to every department equally as well as individually. Only by executive grace did the Governor choose to propose a broad, across the board cut rather than inserting his own policy discretion as to which specific programs or departments should be required to reduce spending. To his credit, in attempting to implement the cuts without legislative approval, the Governor did not try to substitute his own spending priorities for that of the Legislature's. However, the same cannot be said of his unilateral spending of the ARRA federal stimulus money.

C. *An Examination of Other State Positions*

1. *Alaska Supreme Court*

Compellingly analogous to the issue at hand, and cited by the *Daines* court, the State of Alaska experienced a similar revenue crisis in 1986, resulting in a constitutional challenge to the Governor's authority over budgetary law.<sup>222</sup> Alaska Governor Bill Sheffield, relying on revenue projections provided to him by the State's Department of Revenue, submitted his proposed budget for fiscal year 1987.<sup>223</sup> Due to continually decreasing oil prices, the budget actually passed by the Legislature was approximately \$400 million less than that initially proposed by the Governor.<sup>224</sup> Revenue projections continued to deteriorate and the Governor exercised his power of veto and further reduced appropriations in an attempt to bring spending within projections of available funds.<sup>225</sup> The Governor's veto reductions proved inadequate, and if left unchanged, expenditures would have resulted in deficit spending, a situation expressly prohibited by the Alaska Constitution.<sup>226</sup> In response, the Governor acted by announcing he would "withhold expenditure authority for certain appropriations."<sup>227</sup> He failed to call the Legislature into special session and unilaterally decreased the spending of certain agencies by up to fifteen percent, while leaving others unaffected.<sup>228</sup> The reductions totaled approximately \$450 million.<sup>229</sup>

In addition to the powers vested in him by the Alaska Constitution, the Governor relied upon Alaska Statutes ("AS") section 37.07.080(g)(2) for his authority to issue the reductions.<sup>230</sup> This statute provided the Governor power to order the withholding or reduction of appropriations if the Governor determined that: "(1) the planned expenditures can no longer be made due to factors

<sup>221</sup> Letter from Bob Coffin, Nev. State Senator, to Randolph Townsend, Nev. State Senator, *supra* note 6.

<sup>222</sup> *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1141 (Alaska 1987); *State Employees Ass'n v. Daines*, 824 P.2d 276, 279 (Nev. 1992).

<sup>223</sup> *Fairbanks*, 736 P.2d at 1141.

<sup>224</sup> *Id.*

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

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 1141-42.

<sup>229</sup> *Id.* at 1142.

<sup>230</sup> *Id.*



outside the control of the state which make the expenditure factually impossible; or (2) estimated receipts and surpluses will be insufficient to provide for appropriations.”<sup>231</sup>

The Alaska Supreme Court determined that AS section 37.07.080(g)(2) was an unconstitutional delegation of legislative power because it endowed the Governor with unfettered power to amend the budget if revenue projections were insufficient to fulfill appropriations.<sup>232</sup> The statute failed because it gave the Governor “sweeping power” over the budget in its entirety and failed to restrain his changes or provide guidance.<sup>233</sup>

The Alaska court, recognizing the value of examining views taken by federal courts, noted the standard set forth *Synar v. United States*.<sup>234</sup> The *Synar* court stated that the constitutionality of a delegation of power from one branch to another is determined by examining the scope of the power delegated and the specificity of the standards required to execute the power.<sup>235</sup> The greater the scope of power, the more precise the standards in executing it must become.<sup>236</sup> Constitutionality turns on whether the guidance sufficiently outlines the “field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.”<sup>237</sup> Therefore, the Alaska Supreme Court recognized that broad delegation of power, similar to the power granted in NRS section 353.220, would not be constitutional without standards for precise execution.

The Alaska court’s holding is also significant because, in contrast to the Nevada Governor who has no line item veto authority of appropriations bills, the Alaska Governor has the power to veto any line item appropriation at any level within a bill.<sup>238</sup> Despite Alaskan Governors’ broad power over appropriations *prior* to enactment, the court did not give deference to the Legislature in providing him broad *post*-enactment authority.<sup>239</sup>

## 2. Applying Alaska and Federal Case Law to Nevada Statutes

Similar to the Alaska statute, NRS section 353.225 governing the setting aside of reserves does not provide precise standards nor does it outline the field within which the Governor should act when implementing reserves and reducing spending.<sup>240</sup> In addition, the Governor’s interpretation that NRS section 353.220(5)(a) provides him with limitless discretionary authority to change appropriations for the protection of life or property may fail for the same rea-

<sup>231</sup> *Id.* at 1142 n.4.

<sup>232</sup> *Id.* at 1143.

<sup>233</sup> *Id.* at 1142-43.

<sup>234</sup> *Id.* at 1143.

<sup>235</sup> *Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (per curiam), *aff’d*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1387 (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1994)) (internal quotation marks omitted).

<sup>238</sup> Gubernatorial Veto Authority with Respect to Major Budget Bill(s), *supra* note 152.

<sup>239</sup> *Fairbanks*, 736 P.2d at 1142-43.

<sup>240</sup> NEV. REV. STAT. § 353.225 (2007).

son.<sup>241</sup> The mere fact an intense controversy arose between key legislative figures and the Governor gives support to the conclusion that both statutes are lacking precision. Applying the *Synar* test, NRS section 353.220 could be held as a constitutional delegation of legislative power as it distinctly limits the Governor's changes of allotted funds to a maximum of 10% or \$50,000, whichever is less, despite the fact section (5)(a) contains some ambiguity as to what is necessary "for the protection of life or property."<sup>242</sup> However, it is important to note the different approach the U.S. Supreme Court took in *Synar* decided in 1986 and *Clinton* nearly twelve years later.<sup>243</sup> In *Synar*, the Court struck down the law as unconstitutional because the law gave one officer broad and unfettered power to cut the budget without parameters, whereas in *Clinton* the law was an impermissible delegation of legislative power to the executive branch.<sup>244</sup> If the Nevada court were to apply the *Clinton* rationale, as its decision in *Hardy* indicates it might, it may determine *any* authorization granted the Governor over budgetary reductions is an unconstitutional delegation of legislative power despite the presence of specific guidelines.

### 3. Florida Supreme Court

The Supreme Court of Florida chose a lockstep approach following federal precedents in determining the outcome of a similar challenge stemming from a \$621.7 million revenue shortfall.<sup>245</sup> In 1991, Florida Governor Lawton Chiles reacted to the shortfall by requiring departments to prepare plans to reduce their operating budgets, which the state subsequently implemented.<sup>246</sup> The statute at issue provided that, if "in the opinion of the governor" a deficit in the General Revenue Fund would occur, he shall certify so to the Administrative Commission<sup>247</sup> who may then reduce all approved state agency budgets to prevent a deficit.<sup>248</sup> To determine the constitutionality of the statute, the Florida Supreme Court looked to interpretation of the U.S. Constitution and the principles underlying separation of powers at the federal level.<sup>249</sup>

The Florida Constitution contains the same express separation of powers clause as Nevada's, prohibiting any person from one branch to exercise any powers appertaining to either of the other branches unless expressly permitted by the constitution.<sup>250</sup> The court explained that this doctrine of separation of powers encompasses two cardinal restrictions: (1) "no branch may encroach upon the powers of another"; and (2) "no branch may delegate to another

<sup>241</sup> *Id.* § 353.220(5)(a); Press Release, Jim Gibbons, Governor of Nev., Governor Demands Action to Get Stimulus Funds in the Hands of the People Now (August 21, 2009), available at [http://gov.state.nv.us/PressReleases/2009/PDF/PR-2009-08-21\\_StimulusIFC.pdf](http://gov.state.nv.us/PressReleases/2009/PDF/PR-2009-08-21_StimulusIFC.pdf).

<sup>242</sup> NEV. REV. STAT. § 353.220(4).

<sup>243</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>244</sup> *See Clinton*, 524 U.S. at 465-66 (Scalia, J. dissenting) (citing *Bowsher*, 478 U.S. at 733).

<sup>245</sup> *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 262 (Fla. 1991).

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

<sup>247</sup> *Id.* at 263. The Administrative Commission includes the Governor and Cabinet. *Id.* at 262 n.2.

<sup>248</sup> *Id.* at 263.

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

<sup>250</sup> FLA. CONST. art. II, § 3; NEV. CONST. art. III, § 1.

branch its constitutionally assigned power.”<sup>251</sup> To explain the rationale behind such prohibitions, the court cited John Locke’s *Second Treatise of Government*: “[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.”<sup>252</sup> As is the case in Nevada, Florida appropriations are law and, as such, the power to appropriate state funds lies solely with the Legislature through duly enacted statutes.<sup>253</sup> Similar to the U.S. Supreme Court’s holding in *Clinton*, the Florida court held that the Legislature cannot delegate by statute the authority to modify a law post enactment as it is “an impermissible attempt by the legislature to abdicate a portion of its lawmaking.”<sup>254</sup> The Florida court rejected the argument that reducing budgetary spending is not the same as appropriating funds and stated that if Florida law grants the executive branch the power to reduce, nullify, or change fiscal priorities, the legislative power of appropriations is “totally abandoned.”<sup>255</sup> However, the Florida court did not ban all future attempts to provide Governors with flexibility, clarifying that delegation of some duties may be permitted if there are sufficient guidelines to assure that the Governor follows legislative intent and clear parameters are set for the Governor to operate within.<sup>256</sup>

#### 4. Applying Florida Case Law to Nevada Statutes

The state constitution in Nevada is much the same as that in Florida. Both state constitutions require appropriations bills be enacted as law,<sup>257</sup> and both contain an express separation of powers clause.<sup>258</sup> In fact, the provisions are almost textually identical.<sup>259</sup> It follows that the Nevada Supreme Court could apply similar reasoning that the broad authorization to decrease or increase spending is indeed violative of bicameralism and presentment, making the Nevada statutes an unconstitutional delegation of legislative authority.

#### 5. Other Approaches

Not all states have taken the approach held by the Alaska and Florida courts. Although arguably unconstitutional, some state courts have found delegation of fiscal responsibilities to be an acceptable sharing of a necessary duty arising because of the limited time the Legislature is in session and the complexity of modern governments.<sup>260</sup> In *State ex rel. Schneider v. Bennett*, the Supreme Court of Kansas reviewed a challenge to a statute giving broad fiscal power to the State Finance Council.<sup>261</sup> Unlike Nevada, Kansas’s Constitution lacks an express provision requiring the separation of powers, but it has repeat-

<sup>251</sup> *Chiles*, 589 So. 2d at 264.

<sup>252</sup> *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 193 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690)).

<sup>253</sup> *Id.* at 264-65.

<sup>254</sup> *Id.* at 267-68.

<sup>255</sup> *Id.* at 265.

<sup>256</sup> *Id.* at 268.

<sup>257</sup> FLA. CONST. art. VII, § 1(c); NEV. CONST. art. IV, § 19.

<sup>258</sup> FLA. CONST. art. II, § 3; NEV. CONST. art. III, § 1.

<sup>259</sup> FLA. CONST. art. II, § 3; NEV. CONST. art. III, § 1.

<sup>260</sup> *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 791 (Kan. 1976).

<sup>261</sup> *Id.* at 789.

edly been inferred by Kansas courts.<sup>262</sup> Recently however, the Kansas court has altered its approach to the separation of powers doctrine, no longer enforcing strict compliance with the theoretical doctrine.<sup>263</sup> In its place, the court applies a modified doctrine and denies that separation of powers has ever purely existed except in political theory.<sup>264</sup> The Kansas court determined that “a strict application of the separation of powers doctrine is inappropriate today in a complex state government” where circumstances require governmental agencies to blend together legislative, judicial, and executive powers.<sup>265</sup> Although the court invalidated several provisions of the Kansas statute for failure to provide adequate guidelines or legislative standards required for proper delegation, its approach to the separation of powers doctrine was quite distinct from that of the Alaskan and Florida high courts.<sup>266</sup>

It is difficult to determine which approach the Supreme Court of Nevada would choose if and when this constitutional issue comes before it. In *Daines*, the court looked to states applying a stricter application of the separation of powers doctrine.<sup>267</sup> Furthermore, the court itself recently applied a strict separation of powers interpretation in *Commission on Ethics v. Hardy*.<sup>268</sup> Based on these holdings, it is likely that the Nevada Supreme Court would reject the more radical and modern approach of the Kansas courts due to Nevada’s express separation of powers clause. In an effort to avoid a constitutional crisis, the Nevada Legislature could circumvent future conflicts through revision of existing budgetary law.

## VII. POTENTIAL SOLUTIONS

In light of the recent financial and housing crisis resulting in substantially decreased state revenue, budgetary flexibility is important. The rules governing budget reductions and increases cannot be unworkable; adjustments must be made when it becomes apparent that the budget is in danger of becoming unbalanced.<sup>269</sup> This problem is not unique and other states have responded by providing various degrees of executive authority to cut an enacted budget.<sup>270</sup> Potential constitutional violations, such as the one at issue, may be averted through the enactment of proper legislation or by amending the Nevada Constitution. It is arguable a strict construction of separation of powers is unrealistic with a biennial legislature. However, there are many options available to the Legislature to provide the Governor flexibility to meet fiscal emergencies that are not violative of the Nevada Constitution.

The existing solution to combat the problem of a biennial legislative session is the IFC. As a legislative alternative, the IFC has been granted the

<sup>262</sup> *Id.* at 790.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 790-91.

<sup>265</sup> *Id.* at 791.

<sup>266</sup> *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 799-800 (Kan. 1976).

<sup>267</sup> *State Employees Ass’n v. Daines*, 824 P.2d 276, 279 (Nev. 1992).

<sup>268</sup> *Comm’n on Ethics v. Hardy*, 212 P.3d 1098, 1109 (Nev. 2009).

<sup>269</sup> DIV. OF BUDGET & PLANNING, NEV. DEP’T OF ADMIN., *supra* note 3, at 2.

<sup>270</sup> Nat’l Conference of State Legislatures, *Table 7-1: Executive Authority to Cut the Enacted Budget*, September 2008, <http://www.ncsl.org/default.aspx?tabid=12589>.

authority to modify previously enacted legislative budgets.<sup>271</sup> The IFC consists of seven state senators and fourteen assemblymen.<sup>272</sup> Although not discussed in full here, the constitutionality of the IFC itself is dubious in that it is not fully representative of the people and post-enactment modifications by a small group of legislators arguably violates the bicameralism and presentment requirements of the Nevada Constitution as well. Continued conflicts between the Governor and the IFC may result in the Governor bringing this issue before the Nevada Supreme Court.

The Nevada Constitution prohibits deficit spending thereby creating a need for the government to respond rapidly when there are impending shortages.<sup>273</sup> A significant obstacle to fiscal flexibility is the biennial nature of Nevada's State Legislature, making strict adherence to full legislative involvement impracticable. One obvious solution is to amend the Nevada Constitution to provide the Legislature the power to call special sessions to respond to fiscal emergencies or to provide more frequent regular sessions. Unfortunately, in 2006, Nevada voters rejected an amendment that would have granted the Legislature the ability to call special sessions<sup>274</sup> and attempts to establish annual sessions have likewise been unsuccessful.<sup>275</sup> In addition, even if the Legislature had this authority, it might not use it. Budget reductions are unpleasant and legislators may be influenced by a reasonable concern that cutting certain programs would anger their particular local electorate. In contrast, the Governor's electorate is the entire state; therefore, he may be better suited to make objective decisions over the state's fiscal troubles as he is less influenced by the needs of one particular locale.

Even if successful in providing more direct legislative involvement, the reality of creating a balanced budget in advance is that it will not remain so; there will always be a deficit or a surplus.<sup>276</sup> At least one state high court has made an attempt to remedy this issue through a less than literal interpretation of a similar constitutional provision requiring a balanced budget.<sup>277</sup> The Court of Appeals of New York recognized the Governor's constitutional duty to *propose* a balanced budget but disclaimed any constitutional obligation on the part of the state to *maintain* a balanced budget.<sup>278</sup> It is possible, however remote, the Nevada Supreme Court could adopt a similar position relieving the Governor of the burden to make revenues and expenditures match throughout the fiscal year.<sup>279</sup>

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<sup>271</sup> See Nevada Legislature Interim Finance Committee, <http://www.leg.state.nv.us/lcb/interim.cfm> (last visited Feb. 28, 2010).

<sup>272</sup> Interim Finance Committee (NRS 218.6825), <http://www.leg.state.nv.us/74th/Interim/Interim/ifc/> (last visited Feb. 28, 2010).

<sup>273</sup> DIV. OF BUDGET & PLANNING, NEV. DEP'T OF ADMIN., *supra* note 3, at 2.

<sup>274</sup> Initiative & Referendum Inst., *Election Results 2006*, BALLOTWATCH, Nov. 2006, [http://www.iandrinstitute.org/BW%202006-5%20\(Election%20results\).pdf](http://www.iandrinstitute.org/BW%202006-5%20(Election%20results).pdf).

<sup>275</sup> PATRICK GUINAN & MICHAEL J. STEWART, FACT SHEET: A BRIEF HISTORY ON THE COMMENCEMENT AND LENGTH OF NEVADA'S LEGISLATIVE SESSIONS, (2009), [http://www.leg.state.nv.us/lcb/research/FactSheets/Commencement\\_Length\\_Sessions.pdf](http://www.leg.state.nv.us/lcb/research/FactSheets/Commencement_Length_Sessions.pdf).

<sup>276</sup> *In re Oneida County v. Berle*, 404 N.E.2d 133, 136 (N.Y. 1980).

<sup>277</sup> *See id.*

<sup>278</sup> *Id.*

<sup>279</sup> *See id.*

Perhaps the best solution is an amendment to the Nevada Constitution to grant the Governor the power of line item veto. A majority of states have found this to be an effective means of dealing with legislatures that are out of session more often than not.<sup>280</sup> As discussed above, the disadvantage of granting the Governor line item veto power is that it permits him to substitute his spending priorities for that of the Legislature. To alleviate this concern, a constitutional amendment could be specifically tailored and constrained by supplementary statutory law permitting the Governor to make only broad nondiscriminatory reductions in spending.<sup>281</sup> Currently ten states have done so either through their constitution or by statute.<sup>282</sup> This solution permits the Governor to make necessary adjustments while preserving the integrity of the Legislature's fiscal priorities.

The Legislature could also revise existing statutes to provide the Governor authorization to increase or cut particular programs, while protecting certain programs from across the board cuts. For example, Alabama permits the Governor to unilaterally make reductions but excludes particular programs, such as the School for the Deaf and Blind and the Department of Youth Services.<sup>283</sup> Similarly, nine other states provide Governors unilateral discretion to make across the board reductions to appropriations under certain enumerated conditions.<sup>284</sup> Although it is probable NRS section 353.220, the statute governing revisions, will withstand a constitutional challenge because it sufficiently details the parameters within which the Governor must operate, it is likely the general reserve provision in NRS section 353.225 would not. The Legislature should draft guidelines into NRS section 353.225 providing clear criteria and frameworks alleviating doubt and uncertainty as to the legislative intent and authority of the Governor to demand reserves.

The Legislature should also close the loophole that exists between NRS section 353.225 (Reserves) and Assembly Bill 628 in future appropriations bills.<sup>285</sup> The legislative approval requirements of Assembly Bill 628 and its successor, Assembly Bill 562, appear to be triggered only when certain criteria have been met, and when read in conjunction with NRS section 353.225, the latter appears to be a general statute that provides the Governor the power to order agencies to set aside reserves "for operation and maintenance of the various departments, institutions and agencies."<sup>286</sup> While NRS section 353.225 is an important mechanism providing flexibility for fiscal emergencies, greater statutory standards in exercising this delegated authority would help alleviate

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<sup>280</sup> Ronald K. Snell, *Annual and Biennial Budgeting: The Experience of State Governments*, <http://www.ncsl.org/Default.aspx?TabId=12658#point4> (last visited Feb. 28, 2010); Gubernatorial Veto Authority with Respect to Major Budget Bill(s), *supra* note 152; Nat'l Conference of State Legislatures, *supra* note 270.

<sup>281</sup> Nat'l Conference of State Legislatures, *supra* note 270.

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

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> In 2009, the same language was adopted in the Budget Act governing fiscal years July 1, 2009 to June 30, 2010 and July 1, 2010 to June 30, 2011. Assem. 562 § 64, 2009 Leg., 75th Gen. Sess. (Nev. 2009).

<sup>286</sup> NEV. REV. STAT. § 353.225 (2007).

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future conflict and fulfill the Legislature's intent to control the setting aside of significant reserves.

#### VIII. CONCLUSION

A constitutional crisis is brewing and the potential for problems will remain until either the matter is settled by the Nevada Supreme Court, or appropriate revisions to existing law are made. Although Governor Gibbons chose to follow the nonbinding opinion provided to him by the Attorney General regarding budget cuts, a legal loophole remains open. Also, unless the Legislature revises state law to prohibit it, the current Governor, as well as his successors, may continue to bypass legislative involvement when spending federal stimulus money. Consequently, as the law currently stands, efforts by future Governors to exploit these deficiencies are likely to succeed. Such success will result in changes to budgetary law post enactment and is violative of Nevada's express separation of powers clause.