Chapter 2: State and Local Government

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CHAPTER 2

State and Local Government

JOHN W. DELANEY*

§2.1. Separation of Powers: Constitutional Questions Relating to the Powers and Jurisdictions of Courts. The need to address the deficiencies in the Massachusetts court system was addressed in an organized fashion during the Survey year by the Governor's Select Committee on Judicial Needs (popularly known as the Cox Commission).¹ This Committee submitted a report to the Governor which suggested a number of reforms, including the focusing of ultimate responsibility for the overall business management of the judicial system in a single judicial head subject to the power of "general superintendence" belonging to the Supreme Judicial Court.² The Committee also urged administrative reforms to aid in planning and coordination, modifying the existing structure of the courts to improve efficiency, and state assumption of the financial obligations of the court system.³

The proposed reorganization legislation, House No. 4400 of 1977, embodied these reforms. It raised in the eyes of the General Court a number of constitutional questions, the answers to which were sought in a request by the Senate for an opinion from the Supreme Judicial Court. The Court answered in Opinion of the Justices to the Senate,⁴ and in doing so, provided the legal foundation for the court reform legislation of 1978. This landmark law, chapter 478 of the Acts of 1978, generally followed the recommendations of the Cox Commission.

This section will deal not with the detail of chapter 478 but with the Opinion rendered by the Court during this Survey year answering

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§2.1. ¹ The Committee was appointed in January, 1976, and was charged with the task of making legislative and administrative recommendations for reducing backlog and delay in the Massachusetts courts. It was chaired by Mr. Archibald Cox, Professor of Law at Harvard Law School.

² GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF MASSACHUSETTS COURTS 83 (1976).

³ Id.


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seven questions regarding the constitutionality of provisions of the legislation as proposed in House No. 4400.

The first question was whether the appointment of the chief justice of the Supreme Judicial Court as the executive head of the judicial system conflicted with the constitutional inference that these powers are vested in the Court as a whole. The proposed law would give the chief justice the power to prepare and submit the courts' budgets, to appoint and remove all officers and employees in the judicial system, and establish, revise, or abolish such divisions of the superior or district courts as he deems advisable, including the power to assign justices from the superior or district courts to sit temporarily in the other court.

The Court's opinion noted that article 29 of the Declaration of Rights provides only that the judges of the Supreme Judicial Court should hold office as long as they behave themselves well. But section 3 of chapter 211 of the General Laws provides that the "justices of the supreme judicial court shall have general superintendence of the administration of all courts of inferior jurisdiction ... and it may issue ... such orders ... as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration." The Court stated that the provision is declaratory of the Supreme Judicial Court's inherent powers of judicial administration. Therefore, the Court noted, legislation purporting to remove these powers from the full Court would be constitutionally ineffective. Still, the Court found that most of the proposed new duties of the chief justice, sweeping though they be, would not be inappropriate. Indeed, the Court stated, the purpose of the proposed section 2A is "clear and compelling. The courts of the Commonwealth are burdened with intolerable caseloads ... The resultant delay ... is exacerbated by ... 'the extraordinary fragmentation of jurisdiction and responsibility.'" The Court concluded that the method suggested would make the most effective and efficient use of judicial facilities. The chief justice could not exercise powers reserved to the full Court, but the Court refused to assume that a chief justice would not perform his duties within constitutional limits. The Court therefore concluded that there is no inherent infirmity that practice could not correct.

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5 Mass. Const. pt. 1, art. XXIX.
7 House No. 4400, § 2A.
8 Mass. Const. pt. 1, art. XXIX.
9 372 Mass. at 889, 363 N.E.2d at 657.
10 Id.
11 Id. at 890, 363 N.E.2d at 657.
12 Id.
13 Id. at 891, 363 N.E.2d at 658.
The second question was whether the power of the chief justice to revise or abolish divisions of the superior and district courts as he deems the sound administration of justice to require, conflicts with the legislative power as set forth in article 30 of the Declaration of Rights—the famous "separation of powers" provision. Although the Constitution gives the legislature full power to constitute courts, the Court concluded that the provision would not be an impermissible delegation of legislative power. The Court reviewed cases holding that the separation of powers does not require three "watertight compartments" within the government. Article 30 "does not prevent one branch of government from assuming those functions which would aid its internal operations without unduly restricting the endeavors of another coordinate branch." The inherent power of the judiciary includes certain functions ancillary to adjudication, including judicial administration.

The test used by the Court for evaluating the constitutionality of the proposed act was whether the statute authorizes the courts to perform a function so closely connected with and so far incidental to strictly judicial proceedings that the courts in obeying the statute would not be exercising executive or nonjudicial powers. The Court noted with approval cases which concluded that assignments by the chief justice are simply the arranging of work to transact business in the most efficient manner, and involve the "performance of a strictly judicial duty." In affirming that the chief justice may properly act in the sweeping manner provided in section 2A, the Court concluded with a strong affirmation of the capability of the judicial branch to manage its operations:

We think that the Legislature might justifiably conclude that the establishment, revision or abolition of functional divisions, or the decision to operate without divisions, might best be made by those

14 Id. at 884, 891, 363 N.E.2d at 655, 658. Article XXX provides:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

15 Mass. Const. pt. 2, c.1, § 1, art. III.


17 Id. at 892, 363 N.E.2d at 659.

18 Id.


20 372 Mass. at 893, 363 N.E.2d at 659.

who are closest to the judicial processes and who would be in the most knowledgeable position to alter the structure as experience might prove desirable. We conclude, moreover, that the decisions involved are so fundamentally related to the ongoing operation of existing statutory courts as to be appropriately within the realm of judicial authority and thus properly subject to a legislative decision to repose the power therefor in a judicial officer.\(^\text{22}\)

The Court made short work of the third question, which asked whether the powers of the chief justice to transfer cases from the superior court of one county to an adjoining county or from one division of the district court to another division were in conflict with article 13 of the Declaration of Rights relating to venue.\(^\text{23}\) The Court quoted from an early opinion which declared that article 13 does not grant substantive rights to a trial in the vicinity of a crime, but is merely declaratory of the public sentiment.\(^\text{24}\) The Court stated:

Selection of the general term "vicinity" rather than the more precise, technical term "county" by the drafters of article 13, men learned in the law, manifests an intention that a narrow, technical interpretation of the word is to be avoided.\(^\text{25}\)

The legislature has long been accorded flexibility in setting venue requirements for criminal trials consistent with the public interest and the interests of justice.\(^\text{26}\) Since the proposed legislation is aimed at reducing the staggering case loads of the courts, the Court deemed it related to "matters of great public concern and to the interests of justice."\(^\text{27}\) The proposed legislation was thus held to be "wholly consistent with the intent of article 13. . . ."\(^\text{28}\)

The proposed legislation also allowed for the appointment of a court administrator by the chief justice. The Senate asked in question four, as in question one, whether this provision would interfere with the powers of the full Court.\(^\text{29}\) The Court responded that it was an appropriate delegation of power, but as in the case of the chief justice


\(^{23}\) Id. at 884-85, 896, 363 N.E.2d at 655, 661. "In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen." \textit{See Mass. Const.}, pt. 1, art. XIII.


\(^{25}\) 372 Mass. at 897, 363 N.E.2d at 661.

\(^{26}\) Id., 363 N.E.2d at 662.

\(^{27}\) Id. at 898, 363 N.E.2d at 662.

\(^{28}\) Id.

\(^{29}\) Id. at 885, 898, 363 N.E.2d at 655, 662.
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himself, any legislative attempt to give the administrator powers inherent in the full Court would be without effect.\textsuperscript{30} Again, the Court presumed that the chief justice would not attempt to confer upon the administrator any of the full Court's inherent powers without authorization by the full Court.\textsuperscript{31}

The fifth question related to a proposal to merge the land, probate, and housing courts into the superior court, and specifically asked whether making the chief judge of those courts associate judges of the superior court constitutes demotions in violation of the constitution.\textsuperscript{32} In answering this question, the Court noted several occasions where it had confirmed the power of the legislature to change and transfer the duties and powers of courts and officers as the times and public interest have required.\textsuperscript{33} While such transfers would not be considered demotions, and thus not constitutionally forbidden, the Court suggested to the Senate that having divisions within a unified trial court system with a chief judge for each division might be a preferred solution.\textsuperscript{34}

Similarly, the merging of the municipal, juvenile, and district courts into one district court and the transferring of the justices and special justices of the several courts involved into the new district court was held not violative of the tenure of the justices' commissions guaranteed by the constitution.\textsuperscript{35} The merger of the various courts would not abolish the offices but would merely transfer the justices along with their judicial offices to an expanded court that would become a confederation of their predecessor courts.\textsuperscript{36}

The seventh and final question asked whether it would be constitutionally permissible to merge the probate court into the superior court, despite the fact that the probate court is referred to in the constitution.\textsuperscript{37} The Court determined that the constitutional reference to judges of probate was not tantamount to the establishment of a probate court.\textsuperscript{38} It stated, "The short answer is that "[t]he only court established by the Constitution is the Supreme Judicial Court." \textsuperscript{39} The Court
further stated, "[M]ere mention of an office in the Constitution does not necessarily endow that office with constitutional status."¹⁰

The lengthy opinion is full of concern about the crisis in the trial courts, the backlog of cases, and the need for streamlined judicial administration. The Court seemed to bend over backwards to resolve all doubts in favor of the proposed legislation. Its opinion cleared the way for the extensive legislative debate of 1978 which culminated in the enactment of the comprehensive court reform in Acts of 1978, c. 478.

§2.2. Separation of Powers: Legislative-Executive Conflicts. The continuing disputes concerning the division of powers between the executive and legislative branches, and even within the executive branch, were raised in several ways during the Survey year. The controversy over state funding of abortions was a matter on which a majority of the General Court and the Governor disagreed in 1977-1978. Having failed to override the Governor's veto of restrictive language on abortion funding legislation, the opponents of state-funded abortions included restrictive language in the general appropriation act under, for example, the item for medicaid payments. The constitution of the commonwealth permits the Governor to disapprove or reduce items in any bill appropriating money.¹ Thus the Governor could, and did, veto only the medicaid appropriation item to eliminate the restrictive language. The legislature then sought to place the restrictive language in a so-called "outside section" at the end of the general appropriation act in the belief that the Governor's power of "item veto" under article 63 is limited to appropriation items. In short, the General Court sought to force the Governor to veto the entire budget if he wished to oppose the restrictive language on abortions placed at the end of the appropriation items. The Supreme Judicial Court was asked by the Governor whether he could properly veto only the offending language, even if it were at the end of the budget and not strictly within an "item." In Opinion of the Justices to the Governor,² the Court said that he could. The Court found that the legislature actually had enacted an appropriation item for a medical assistance program as a line item in the budget, and then added a restriction on that item in a section at the end of the bill: "In substance and effect the Legislature is striking out that item in the precise form previously enacted and adding a new item under the same heading."³ The Court determined that "[t]he Legislature cannot narrow the Governor's

¹ 372 Mass. at 910, 363 N.E.2d at 668-69.
² §2.2. 1 Mass. Const. art. LXIII of the Amendments, § 5.
³ Id. at 2341, 370 N.E.2d at 1352.
power to disapprove such an item by stating it in words and phrases rather than in figures." The consequence of not permitting the Governor to veto such words and phrases was obvious to the Court: "The Legislature could first make a non-controversial appropriation. Once that was enacted, it could then insert the controversial restriction as a separate section in an essential supplementary appropriation bill. The very vice of 'log-rolling' against which the item veto is a safeguard would be reintroduced." The Court did not, however, consider or comment on the Governor's power to disapprove general legislation attached as a "rider" to an appropriation bill. For example, there have been amendments to the General Laws included as "outside sections" in the general appropriation act, and it is arguable that the Governor's power to veto those changes is limited to his vetoing the entire appropriation act.

Two other cases decided during the Survey year involved disputes between parts of the executive branch. In one, the Governor's Council inquired as to whether its powers of advice and consent applied to gubernatorial appointments to the Boston Licensing Board, even though Acts of 1964, chapter 740, had removed the confirmation powers of the Council on executive—as opposed to judicial and quasi-judicial—appointments. The Court, in Opinion of the Justices to the Council, noted that Acts of 1964, chapter 740, the result of a successful initiative petition, repealed statutory powers of the Council "which interfere with the efficient operation of the executive department of the Commonwealth." The words "executive department" specifically excluded any instrumentality or agency of a city or town. The question of

4 Id. at 2342, 370 N.E.2d at 1352.  
5 Id. at 2342-43, 370 N.E.2d at 1352.  
6 See, e.g., Acts of 1975, c. 684, the General Appropriation Act for fiscal year 1976. By section 90 of chapter 684, the General Laws were amended in an "outside section" to reduce from ten to five the number of months in which the Department of Public Utilities could suspend the operation of a rate request filed by certain public utilities. Acts of 1975, c. 684, § 90 adding G.L. c. 25, § 18.  
7 1978 Mass. Adv. Sh. 347, 372 N.E.2d 759. This was the second advisory opinion sought by the Executive Council on this matter during the Survey year. In Answer of the Justices to the Council, 1977 Mass. Adv. Sh. 1737, 366 N.E.2d 730, the Court determined that the Council's request did not state that a sitting member of the Boston Licensing Board had been appointed by Governor Dukakis, that a vacancy was "pending or impending," or that the Council had before it a matter over which doubts existed as to its authority to act. Id. at 1739, 366 N.E.2d at 731. The Court thus ruled that there was not then before it "one of the 'solemn occasions' contemplated by the Massachusetts Constitution, Part II, c. 3, art. 2, as amended by art. 85 of the Articles of Amendment . . . ," for the rendition of an advisory opinion and therefore declined to do so. Id. at 743-44, 366 N.E.2d at 733.  
whether the Boston Licensing Board was excluded from the definition of "executive department" was determined in the negative.\textsuperscript{10} The Court noted that the members are appointed by the Governor, rather than the City of Boston, and the Board is required to present an annual report to the Governor.\textsuperscript{11} The Court further found that the purpose of the 1964 initiative petition was to restore the Governor's Council to its function as set forth in the Massachusetts Constitution, which, as noted, was confined to judicial confirmations.\textsuperscript{12} Finally, the Court considered the practice of those responsible for executing the laws, and noted that no appointment to the Boston Licensing Board since 1964 had received the Council's advice and consent.\textsuperscript{13} The Court stated:

It seems clear, from its inaction since the adoption of St. 1964, c. 740, that Governors and the Council have treated the Boston Licensing Board as part of the "executive department," and not as an "instrumentality or agency of a city or town."\textsuperscript{14}

Another Survey year decision—one of vital significance—found the Supreme Judicial Court ruling that the Attorney General has the power to prosecute an appeal from a court judgment, even though the state officials who were parties to the action objected to the appeal. In \textit{Feeney v. Commonwealth},\textsuperscript{15} Mrs. Feeney had challenged the action of the state Division of Civil Service in not certifying her for a state position as the result of the application of the Massachusetts "veterans' preference" statute. A majority of a three-member federal court ruled that the veterans' preference law was unconstitutional.\textsuperscript{16} After this decision, the Civil Service Commission voted to request the Attorney General not to appeal the decision on behalf of the Commission and its members. The Personnel Administrator made a similar request. The Governor too, in writing, requested the Attorney General not to appeal.\textsuperscript{17} Although the legislature expressed a different viewpoint by a nonbinding resolution, all the defendants in fact had requested that the appeal not be filed. Nonetheless, the Attorney General filed a notice of appeal to the United States Supreme Court.\textsuperscript{18}

\textsuperscript{11} Id. at 352, 372 N.E.2d at 761.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 353, 372 N.E.2d at 761-62.
\textsuperscript{14} Id., 372 N.E.2d at 762.
\textsuperscript{16} Id. See G.L. c. 31, § 23.
\textsuperscript{19} Id. at 1961-62, 366 N.E.2d at 1264.
The United States Supreme Court, on its own motion, certified to the Supreme Judicial Court the question of whether Massachusetts law permitted the Attorney General to appeal without the consent and over the objections of the state officers against whom the judgment was entered. 20

In answering the question of the United States Supreme Court, the Supreme Judicial Court discussed Secretary of Administration and Finance v. Attorney General. 21 (The Stigmatine Fathers land taking case). There it was held that the Attorney General, as chief law officer of the commonwealth, has control over the conduct of litigation involving the commonwealth, including the power not to prosecute the appeal of a state official who wishes it. 22 The Feeney Court observed that the General Court has "consolidated the responsibility of all legal matters involving the Commonwealth in the office of the Attorney General." 23 The legislature "empowered, and perhaps required, the Attorney General to set a unified and consistent legal policy for the Commonwealth." 24 The question in the Feeney case, the converse of Secretary of Administration and Finance, was whether this power includes the authority to chart a course of legal action opposed by the administrative officers represented by the Attorney General. 25 The Court concluded that he possesses such authority. 26

In sweeping language the Court found that the Attorney General, besides his duty to represent the commonwealth and administrative officials in the action, is under a common law duty to represent the public interest. 27 The Court found that these duties impose on the Attorney General the responsibility to look beyond the immediate concerns of the public official and his agency: "To fail to do so would be an abdication of official responsibility." 28 In the Court's view, permitting state administrative officials, "who represent a specialized branch of the public inter-

20 Massachusetts v. Feeney, 429 U.S. 66, 66-67. While the Attorney General filed "on behalf of the Personnel Administrator of the Commonwealth and the Massachusetts Civil Service Commission," these very parties wrote to the Clerk of the United States Supreme Court informing him that the appeal was without their authorization, and asked that the appeal be dismissed. Id. For subsequent history of the case in the federal courts, see note 17 supra.
23 Id. G.L. c. 12, § 3.
26 Id. at 1969, 366 N.E.2d at 1267.
27 Id. at 1966, 366 N.E.2d at 1266.
28 Id.
to dictate legal policy to the Attorney General would prevent him from "establishing a uniform and consistent legal policy for the Commonwealth." The Court distinguished the ordinary lawyer-client relationship from that of the Attorney General by finding that chapter 12, section 3, of the General Laws empowers him to decide matters of legal policy which would normally be reserved to a client. There is no difference between a case pending in federal court or one in a state court; the power to decide is the same. The Court seemed to say that only the Attorney General's perception of the public interest in a given situation can determine his course of action on appeal. If he "believes important interests of the Commonwealth will be sacrificed if the state officers' unwillingness to consent to appeal is permitted to prevail..." he can, and in fact must, take action contrary to their requests. He cannot, of course, formulate legal policy in an arbitrary, capricious, or illegal manner, and there is no suggestion that such was the case here. The Stigmatine Fathers case set forth the proposition that the Attorney General could decline to appeal even if all his "clients," state agency officials, including the Governor, direct him not to. These two cases are dramatic confirmation of the significant independent power of the office of the Massachusetts Attorney General.

§2.3. Home Rule: Powers of Local Governments. Adoption of the Home Rule Amendment, article 89 of the Amendments to the Massachusetts Constitution, has led to a continuing series of cases delineating what the cities and towns may and may not do without permission of the commonwealth. During the Survey year, in three cases involving police officers, the respective powers of the legislature and the cities and towns were further clarified.

In Doris v. Police Commissioner of Boston, the Supreme Judicial Court upheld the constitutionality of a 1971 law requiring police officers to reside within the commonwealth and within ten miles of the limits of the city or town in which they are employed. The law was attacked as being in conflict with the Home Rule Amendment. In answer to this, the Court noted that the General Court has the power under section 8 of the Home Rule Amendment to act in relation to cities and towns by general laws applicable to all cities, or to all towns, or to all cities and

29 Id.
30 Id.
31 Id. at 1967, 366 N.E.2d at 1266-67.
32 Id. at 1968, 366 N.E.2d at 1267.
33 Id. at 1969, 366 N.E.2d at 1267.
34 Id.

2 Acts of 1971, c. 956, § 1 amending G.L. c. 41, § 99A. The amendment also transformed the statute from a local option law to a mandatory provision.

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towns, or to a class of not fewer than two.\(^3\) The Court found no evidence that the statute in question was directed at a particular city or town.\(^4\) It further rejected the idea that the residency of police officers is solely a “local” question, stating that it could not find that the obvious purpose of the statute—insuring the availability of police in times of emergency—was not a matter of general concern.\(^5\) Unless the objecting party can show that a general law clearly singles out an individual city or town for special treatment without its consent, legislative action on matters affecting the operation of cities and towns will be upheld. In a companion case,\(^6\) the Court dealt with the practical question of how to measure the ten miles. It found that the proper measurement was not road miles, but a straight line from the nearest boundary of the city or town to the officer’s house.\(^7\)

The third case, *Broderick v. Mayor of Boston*,\(^8\) considered the question of whether a city which has accepted a local option statute is bound by later amendments to the statute. Boston had accepted General Laws chapter 32B, section 7A, which authorizes the purchase of life, accident, and hospital and medical insurance for municipal employees, and obliges the accepting municipality to pay at least fifty percent of the premiums. In 1973, the legislature amended section 7A to provide that no governmental unit shall provide different subsidiary or additional rates to any group or class within the unit.\(^9\) The police and firefighter unions of Boston claimed that the amendment entitled their members to premium contributions by the city up to the higher level being furnished to other groups of city employees.\(^10\)

The Supreme Judicial Court found for the plaintiff unions and held that the city must equalize its contribution rates for all employees.\(^11\) In so holding the Court found that the amendment became binding on the city from its effective date, and was not dependent on acceptance by the municipality.

The Court saw the issue as one of legislative intent: whether the 1973 amendment “looked to separate acceptance by the [municipalities] which had previously accepted . . . the basic legislation . . . .”\(^12\) The Court

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\(^4\) Id.
\(^5\) Id.
\(^7\) Id. at 428, 373 N.E.2d at 951.
\(^11\) Id. at 1072, 374 N.E.2d at 1351.
\(^12\) Id. at 1068, 374 N.E.2d at 1349.
found some guidance in previous decisions involving different statutes, but cautioned that no previous case could provide a ready answer. The Court found that the form of an amendment might indicate whether the General Court contemplated renewed acceptance by municipalities. It noted that original acceptance cannot easily be withdrawn, even in the absence of a provision to the original legislation forbidding withdrawal of acceptance. The Court went on to state:

Sometimes there will be room for interpretation whether the first acceptance holds despite an amendment of the original statute. Thus the fact that the amendment was not germane to the subject of the original would tend to look to a fresh acceptance.

The Court indicated that such was not the case here. Without actually saying so, it viewed the amendment of section 7A as no more than a clarification of the original legislation. It then turned to and dismissed the argument that the statute interferes with the city’s right to establish benefits through the collective bargaining law, stating that no collective bargaining agreement may override a validly enacted law to the Commonwealth.

What is a municipality to do, then, when considering original acceptance? The Court seems to require a municipality to rely on the legislature’s good faith in enacting and amending local option statutes. The Court said that it would not rest its decision on a “view of the Commonwealth or the Legislature as engaged in a stealthy ame with municipalities.” The Court did not think the cities and towns powerless to prevent subsequent surprise. It warned them that they had better keep a sharp eye on the legislative process!

The solution presented by the Court is not without its drawbacks. There is often no way, as in this case, for a city or town to rescind its previous acceptance of a statute, short of a home rule petition. This is
so even if the statute is amended in a manner, as here, that has a significant and substantive effect. So long as the amendment is related to the original statute, *Broderick* seems to indicate that the Court will impute a legislative intent that renewed local acceptance is not required.

Another *Survey* year case illustrates the ongoing dispute between the state and its cities and towns over the latter's right to regulate a business which is already regulated by the state. *Town of Milton v. Attorney General* involved a local by-law prohibiting self-service gasoline stations. The Attorney General disapproved the by-law as inconsistent with a regulation of the state Board of Fire Prevention Regulation. The Supreme Judicial Court disagreed, holding that the by-law was valid as not inconsistent with the state regulations. The Court found that the purpose of the state regulation was merely to insure the safety of self-service gas stations, where they might exist, rather than to encourage the opening of such stations. The by-law in no way derogates from safety, and therefore was not inconsistent with the state regulations. The Court was interpreting a statute which allowed the Board to make regulations, and also allowed cities and towns to make and enforce ordinances and by-laws which are "not inconsistent" with the regulations.

The result reached by the Court is similar to one reached in the landmark case relating to billboards in which the banning of billboards in a community by by-law was held not inconsistent with the state's regulation of billboards which were permitted to be erected. The legal standards in the two cases are consistent and reasonable, even though the "public" or "consumer" has arguably benefited in the one and been disadvantaged in the other.

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24 Id. n.1, 363 N.E.2d at 680 n.1. The by-law provided in pertinent part:

SECTION 36—No person owning or operating a gasoline filling station shall allow the pumping of gasoline for retail sale without an attendant employed by the station present to hold the gas nozzle while gasoline is being pumped into the tank of the vehicle.

25 372 Mass. at 694-95 n.2, 363 N.E.2d at 680 n.2. The rule provided in pertinent part:

Rule 43. The dispensing of gasoline by means of self service automated gasoline dispensing systems shall be permitted provided that the applicant for such a system has submitted complete plans and specifications of the proposed installation to the Marshal and obtained approval of same and further provided:

(b) that said gasoline shall be dispensed only by a competent licensed motor vehicle operator or by the station attendant.

27 Id.
30 Id. at 215, 339 N.E.2d at 715.
§2.4. Disclosure of Financial Interests of Public Employees. The national interest in promoting a higher ethical standard for public employees, a direct result of the Watergate scandals, reached Massachusetts and its Supreme Judicial Court during the Survey year. In Opinion of the Justices to the Senate, the Court was asked its opinion of a comprehensive initiative petition filed by Common Cause, a citizens’ lobbying group, which would require certain state and county public officials and employees, as well as candidates for elective and certain appointive offices, to publicly disclose their financial interests each year. In a lengthy opinion the Court found no constitutional prohibitions to requiring strict financial disclosure. There was no violation of the public official’s or the candidate’s right to privacy, even though his financial interests would be completely open to public inspection. The disclosure requirement was held not to constitute an “unreasonable search” within the meaning of article 14 of the Massachusetts Declaration of Rights or the fourth amendment to the United States Constitution. Neither did it infringe any implicit right to privacy under the “right of free speech” provision of article 16 of the Declaration of Rights. Further, there was no interference with the rights of citizens under the broad language of article 1 of the Declaration of Rights.

The second question propounded by the Senate asked whether the bill, as applied to the six constitutional offices would impermissibly add to the constitutional qualifications for such offices. It also asked whether

2 House No. 5151 (1978).
4 See id. at 1124-29, 376 N.E.2d at 816-18 for summary of bill’s disclosure provisions.
5 Id. at 1132-33. See Mass. Const. pt. 1, art. XIV.
7 Id. at 1133, 376 N.E.2d at 819.
Article XVI provides:
The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.
8 1978 Mass. Adv. Sh. at 1133-34, 376 N.E.2d at 819. Article I declares:
All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.
9 These offices are the offices of Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer, and State Auditor.
10 1978 Mass. Adv. Sh. at 1118, 1134, 376 N.E.2d at 814, 820. Section 6(b) of the bill would prohibit election officials from accepting a declaration of candidacy or petition to appear on the ballot if the proper financial disclosure is not made. Section 6(d) would prohibit a public official from taking the oath of office, entering the same, or receiving public compensation unless the disclosure requirements are met.

http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/5
the bill, as applied to any candidate for public office, would violate such a candidate’s right to seek office and the electorate’s right to vote for him contrary to article 9 of the Declaration of Rights or the fourteenth amendment to the United States Constitution. The Court responded in the negative. As for the former, the Court held that the requirements would not alter the qualification and eligibility requirements; it would simply require disclosure of financial interests, and in no greater measure than for all other office seekers. As for the latter, the Court noted that the legislature possesses broad power to regulate elections. The Court went on to offer that the bill might be thought to enhance the voters’ right to free elections by giving them information about conflicts of interest which might arise from a given candidate’s election. The Court stated, “the right to be ‘elected’ preserved in article 9 is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives.” The Court then found that a rational relationship existed between the legitimate objective—free elections—and the means to be employed—financial disclosure to expose conflicts of interest. In so doing the Court also upheld the constitutionality of the bill under the fourteenth amendment to the United States Constitution.

The third question related to the power of the General Court to regulate public employees in the judicial department. Article 30 of the Declaration of Rights prohibits the legislative and executive departments from exercising powers entrusted to the judicial department, and vice versa. The Court noted the importance of observing this division of powers, but also found the need for some flexibility, quite realistically pointing out that each branch, to some extent, exercises executive, legislative, and judicial powers. The critical test is whether the disclosure would interfere with the functions of the judicial branch. The ability of the Court to establish standards of conduct for judicial employees was held not to
preclude legislation establishing complementary standards and providing administration through a commission whose decisions would be subject to judicial review.\(^{23}\)

An initiative petition, the method by which this measure reached the legislature, cannot be utilized for changes in laws relating to the powers of courts.\(^{24}\) Since the disclosure rules would apply to judicial department employees, the Senate questioned whether the bill could properly be advanced.\(^{25}\) The Court found that the proposed measure "only incidentally concerns the powers of the courts" and thus could be enacted into law by the initiative petition route.\(^{26}\)

As applied to senators and representatives, the Court pointed out that the constitutional right of each branch to be the judge of the elections, returns, and qualifications of its members\(^{27}\) would invalidate the suggested provision prohibiting a public official from taking his oath of office or entering upon his duties unless he has filed a statement of financial interest.\(^{28}\) But even so, the fact does not prevent the bill from being voted on by the people.\(^{29}\) Restrictions in the proposed law on the practices of legislators were found not to conflict with the right of the branches to establish their own rules.\(^{30}\) Indeed, the Court pointed out that often the operating procedures of the branches were established by statute rather than rule, as for example the regulation of travel expenditures and the holding of certain public hearings.\(^{31}\)

The imposition of sanctions, including a civil penalty of not more than $1000, was found to be constitutionally valid,\(^{32}\) as was the provision that the Secretary of State and Attorney General would appoint members of the proposed State Ethics Commission.\(^{33}\)

The Court's Opinion led directly to negotiations between the legislature and the sponsors of the initiative petition, and resulted in the enactment of a financial disclosure law and the creation of the State Ethics Commission in the 1978 session of the General Court,\(^{34}\) a law in all respects consistent with the Court's Opinion.

\(^{23}\) Id. at 1140, 376 N.E.2d at 822.
\(^{26}\) Id. at 1141-42, 376 N.E.2d at 823.
\(^{27}\) See Mass. Const. pt. 2, c. 1, § 2, art. IV (the Senate) and pt. 2, c.1, § 3, art. X (the House).
\(^{29}\) Id.
\(^{30}\) Id. at 1144-45, 376 N.E.2d at 824.
\(^{31}\) Id. at 1145, 376 N.E.2d at 824. See G.L. c. 3, § 32A (travel expenditures) and G.L. c. 3, § 38B (public hearings).
\(^{32}\) Id. at 1146-49, 376 N.E.2d at 825.
\(^{33}\) Id. at 1149-50, 376 N.E.2d at 826.
§2.5. Abrogation of Doctrine of Governmental Immunity. In a landmark decision, the Supreme Judicial Court finally reversed the common law rule of governmental immunity from suit. In *Whitney v. City of Worcester*, the Court noted that it had previously warned the public and the legislature that it was dissatisfied with the doctrine and invited legislative action. In the absence of legislative action, however, the Court stated that it would abrogate the doctrine of municipal immunity in the first case it reached after the conclusion of the 1978 session of the legislature, unless the legislature acted first. The Court reviewed the current limits on municipal liability in Massachusetts, pointing out that there presently is immunity from injuries resulting from the negligent acts of municipal officers or employees in the performance of strictly public functions imposed or permitted by the legislature, and that liability would attach only if the agent/employee was engaged in a commercial activity of the municipality at the time of the tort.

The Court felt that the distinction between “public” functions and “commercial” functions has obfuscated the issue of whether a particular plaintiff should recover for his injuries and has prevented a systematic and rational scheme of government liability that is consistent with accepted tort principles. The Court found it impossible to bring order out of this dichotomy, and thus abandoned the idea of determining immunity or liability based on categories of activities and persons. The Court instead analyzed the problem governed by the principle of governmental liability but with limits thereon.

Concerned with the fact that governmental activities often involve a high degree of discretion and judgment that should be insulated from liability, the Court found the appropriate dividing line between planning and policymaking functions on one hand and functions involving the implementation and execution of governmental policy or planning on the other. The Court cited the Federal Tort Claims Act and eighteen state statutes in support of this discretionary function exception. Using this test, the proper focus is not the nature of the gov-

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4 *Id.* at 1718-20, 366 N.E.2d at 1213-14.
5 *Id.* at 1721-22, 366 N.E.2d at 1214-15.
6 *Id.* at 1723, 366 N.E.2d at 1215.
7 *Id.*
8 *Id.* at 1724, 366 N.E.2d at 1216.
ernmental enterprise as a whole and the capacity in which the officer/agent was acting, but is instead the specific act or omission complained of as tortious. Admitting that this new general rule is "hardly a model of precision," the Court set out what it deemed to be relevant inquiries for deciding whether liability would attach. The Court stated:

Was the injury-producing conduct an integral part of governmental policymaking or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative and executive branches? Is there an alternative remedy available to the injured individual other than an action for damages? These considerations, in a particular case, indicate whether governmental immunity should attach. Where such considerations are not determinative, governmental liability should be the general rule.

The Court added to this list of considerations the reasonable expectations of the injured person from the governmental body, the nature of the duty owed by that body to the individual, and the nature of the injury. The personal immunity of the public officer himself, as distinct from the governmental body, should also rest on the discretionary-ministerial criteria set forth in the usual test of governmental liability.

In the Whitney case, plaintiff was a handicapped first-grader who was blinded as the result of being struck on the head by a defective door at his public school. Joined as parties to the complaint were the teacher who ordered the child to leave the room and go through the door, the teacher and assistant principal who ordered him to stay in the classroom even after the injury, and the school committee and school superintendent who had directed that he attend the particular school. The Court viewed the first two allegations as setting forth failure to take appropriate action, which would not have been misfeasance under the old standard, so that liability would have been avoided. Under the new standard, however, their actions were characterized as ministerial rather than discretionary, for which they would be held personally liable.

11 Id. at 1726, 366 N.E.2d at 1216.
12 Id. at 1727, 366 N.E.2d at 1217.
13 Id. at 1727-28, 366 N.E.2d at 1217.
14 Id. at 1728, 366 N.E.2d at 1217.
15 Id. at 1730, 366 N.E.2d at 1218.
16 Id.
17 Id. at 1731, 366 N.E.2d at 1218.
18 Id. at 1732, 366 N.E.2d at 1218-19.
19 Id. at 1732-33, 366 N.E.2d at 1219.
however, would continue to enjoy immunity as their actions were discretionary and not ministerial. This is because the decision to order the child to attend a school is a policymaking function, for which no liability attaches.\textsuperscript{20}

In response to the \textit{Whitney} case, the legislature enacted Acts of 1978, chapter 512, which added substantially to chapter 258 of the General Laws, setting limits on the amounts recoverable for governmental liability in tort, standards for that liability, and procedures to settle claims and indemnify public employees.

\textbf{§2.6. Voting Rights and Elections}. The important question of the extent of state prisoners' voting rights was considered in two cases decided during the Survey year concerning inmates of the state prisons at Concord and Norfolk.

In \textit{Dane v. Board of Registrars of Voters of Concord}\textsuperscript{1} a voter of the town sought injunctive relief against the town registrars. The plaintiff sought to have set aside action by the registrars whereby about 300 inmates of the Massachusetts Correctional Institute at Concord were registered as voters of that town.\textsuperscript{2} It was urged at trial and before the Supreme Judicial Court that since the inmates did not voluntarily reside in the town, they lacked the necessary intent to establish legal domicil in Concord, and therefore were not entitled to register as voters there.\textsuperscript{3} In deciding the issue the Court noted that the Massachusetts Constitution\textsuperscript{4} and statutes\textsuperscript{5} make clear that each inmate of a Massachusetts correctional institution who is a duly qualified, registered voter in a Massachusetts city or town enjoys the right to vote in state elections.\textsuperscript{6} However, the word "reside" has long been construed to require that

\textsuperscript{20} \textit{Id.} at 1733-34, 366 N.E.2d at 1219.


\textsuperscript{2} \textit{Id.}, 378 N.E.2d at 1360.

\textsuperscript{3} \textit{Id.}

\textsuperscript{4} \textit{Mass. Const.} pt. 1, art. 1 states in relevant part: "All men are born free and equal and have certain natural and inalienable rights . . . ." As the \textit{Dane} Court noted, 1978 Mass. Adv. Sh. at 31, 371 N.E.2d at 1364, the Court has previously held that one of the "rights" guaranteed by article I is the right to vote. \textit{See} Attorney General v. Suffolk County Apportionment Comm'rs., 224 Mass. 598, 601, 113 N.E. 581, 584 (1916). Other constitutional provisions affecting the right to vote are \textit{Mass. Const.} art. III of the Amendments, \textit{as amended} by art. XL of the Amendments, and arts. XCVII-XCV and C.

\textsuperscript{5} \textit{See} G.L. c. 51, § 1. This section, which is essentially a codification of the constitutional provisions cited at note 4 \textit{supra}, disqualifies from voting only persons under eighteen years of age, persons who do not have a residence in the municipality where they claim the right to vote, and persons under guardianship or legal disqualification. The only disqualification due to conviction of a crime is for conviction of the crime of corrupt practices respecting elections.

the voter have his domicil in the community in which he is registered.\(^7\) While domicil is normally the place one considers home,\(^8\) the Court noted cases concerning military persons,\(^9\) students,\(^10\) and patients in state hospitals\(^11\) where domicil has been found even though in each case residency in the particular town was required. However, the suggestion that registrars are not able to inquire of the prospective voter-inmate about his domicil prior to registering him was rejected. The Court held that while prisoners do have the capacity to form the requisite intent to make their place of incarceration their place of domicil,\(^12\) their involuntary presence in the town creates a presumption of failure to acquire a new domicil “requiring more than unsubstantiated declarations to rebut.”\(^13\) The registrars were directed to strike the names of the 300 inmates and hold another registration session\(^14\) where questions as to past addresses, prior voter registrations, employment, driver’s licenses, bank accounts, payment of taxes, and future plans were suggested as relevant evidence of the prisoners’ “...attachment to the community and their desire and intent to remain.”\(^15\)

The second case, *Ramos v. Board of Registrars of Voters of Norfolk,*\(^16\) involved a similar fact situation. In *Ramos,* the registrars held a registration session for 621 inmates of Massachusetts Correctional Institution, Norfolk, asking the kinds of questions that the Concord registrars failed to ask.\(^17\) Only two of the inmates were registered; both had been domiciled in the town at the time of their sentencing.\(^18\) The inmates thereupon filed a complaint seeking injunctive relief against the registrars’ failure to register them as town voters on the strength of their affidavits of domicil in Norfolk.\(^19\)


\(^13\) *Id.* at 45, 371 N.E.2d at 1370.

\(^14\) *Id.* at 51, 371 N.E.2d at 1372.

\(^15\) *Id.* at 46-47, 371 N.E.2d at 1370.


\(^17\) *Id.* at 53, 371 N.E.2d at 1373. The questions concerned sentence, prior residences, prior voter registration, marital status, and parole eligibility. Some of the inmates answered these questions while others refused. *Id.*

\(^18\) *Id.*

\(^19\) *Id.* at 54, 371 N.E.2d at 1373. The 621 inmates had previously brought an action to compel the town registrars to conduct a voter registration session at the...
§2.6 STATE AND LOCAL GOVERNMENT

The Supreme Judicial Court, after holding that the 619 rejected inmates were properly certified as a class for the purposes of the action, went on to hold that the town registrars were not required to register the inmates merely on the strength of their affidavits of domicil. The Court stated:

[By virtue of G.L. c. 51, § 47 the registrars were authorized to decline to accept the affidavits of registration if it appeared to them from the facts set forth and from further questions asked that the applicants were not qualified to be registered as voters.]

The Court then stated that the questions propounded by the town registrars were proper as a test of domicil.

While the Court’s recognition that inmates have the capacity to intend to make the town of their imprisonment their domicils, the standards laid down by the Court to measure that intent will, in all but a few cases, prove an insuperable barrier to inmate voter registration in the towns of their confinement. For this reason, local officials and citizens need not fear that resident inmates will become voting political blocs in their towns.

Election results are not automatically invalidated even if there are irregularities, the Court held in Citizens for a Referendum Vote v. City of Worcester. The case, tried on a statement of agreed facts, arose from a vote in favor of a bond issue which carried by less than two-tenths of a percent of all the votes cast. Ballots failed to reach seven of seventy-nine precincts for periods ranging from twelve to eighty minutes after the polls were to open. In three precincts the delay in delivery of ballots was caused by an inexperienced driver who became lost and had an accident. In three other precincts the delay was...
caused by a truck breakdown.\textsuperscript{28} The Court was unable to find from the facts any evidence that any voters were prevented from voting or that the delays were caused by official misconduct.\textsuperscript{29} The Court stated that not every deviation from the election laws will invalidate an election.\textsuperscript{30} It declared, “The case is a close one because the election was close.”\textsuperscript{31} Nevertheless, the Court went on to hold that either official misconduct or some showing “that enough votes were involved to affect the outcome . . .” is required to invalidate the election.\textsuperscript{32} It appears from the Court’s holding that a new election will not be ordered unless plaintiffs can show either intentional misconduct or that unintentional irregularities prevented as many people from voting as equals the margin of victory. The problems of proof under the latter standard are considerable, and become even greater where the margin of victory is higher.

\textsection{2.7.} Vital Statistics. “What’s in a name?” Whatever the people want to call themselves is all right with Massachusetts, the Supreme Judicial Court decided in \textit{Secretary of the Commonwealth v. City Clerk of Lowell}.\textsuperscript{1} The Attorney General had issued three opinions elaborating on the common law principle that people may select or change their names freely if there is no fraudulent intent.\textsuperscript{2} Several city and town clerks refused to follow the Attorney General’s opinion, and asserted a power to determine people’s surnames according to customary rules, regardless of the desires of the people concerned.\textsuperscript{3} The Secretary of State sued to settle the matter.\textsuperscript{4}

The Supreme Judicial Court held that the Attorney General was correct. Even though usage in Massachusetts for over two hundred years was that legitimate births were recorded in the surname of the father and illegitimate births in the surname of the mother,\textsuperscript{5} there is a common law right to change one’s name.\textsuperscript{6} After rather testily noting that the

\textsuperscript{28} Id.
\textsuperscript{29} Id., 375 N.E.2d at 721-22.
\textsuperscript{30} Id., 375 N.E.2d at 722.
\textsuperscript{31} Id.
\textsuperscript{32} Id.

\textsuperscript{2} Id. at 1674-75, 366 N.E.2d at 719.
\textsuperscript{3} Id. at 1675, 366 N.E.2d at 719-20. This position was further evidenced by a resolution of the Massachusetts City Clerks’ Ass’n, Inc. adopted on January 14, 1976. The Association took the position that legitimate births would only be recorded in the father’s surname and illegitimate births only in the mother’s surname, following two centuries of custom and usage. Id. at 1677, 366 N.E.2d at 720.
\textsuperscript{4} Id. at 1675, 366 N.E.2d at 720.
\textsuperscript{5} Id. at 1677, 366 N.E.2d at 720.
\textsuperscript{6} Id. at 1679, 366 N.E.2d at 721, \textit{citing} Merolevitz, Petitioner, 320 Mass. 448, 450, 70 N.E.2d 249, 250 (1946).
city and town clerks have no right to substitute their legal judgment for that of the Attorney General,\textsuperscript{7} the Court commented on recent developments in the rights of women, freedom of choice as found in the fourteenth amendment, and the rights of minors.\textsuperscript{8} A woman may choose to use her married or maiden name, or a combination of the two, or any other name.\textsuperscript{9} A married couple may choose the husband's or the wife's surname for that of their child.\textsuperscript{10} Illegitimate children's surnames may possibly be that of the father, depending on the circumstances and honesty of purpose.\textsuperscript{11}

In a dissenting opinion, Justices Quirico and Liacos emphasized the need for keeping accurate records,\textsuperscript{12} and suggested that the Court could have aided the maintenance of an accurate vital records system and at the same time permit a person to "indulge his desire for a different name for himself or his children outside the sphere of vital records."\textsuperscript{13}

\textbf{§2.8. Public Records.} Two cases decided during the \textit{Survey} year illustrate the difficulties public officials face in reconciling the competing interests of the openness of public records and individual rights to privacy. In \textit{Attorney General v. School Committee of Northampton},\textsuperscript{1} the school committee advertised for applicants for the position of school superintendent, receiving over ninety applications. A screening committee submitted a list of sixteen candidates, describing them by number rather than by name.\textsuperscript{2} At a public meeting of the school committee, the list was narrowed to five names, which were released, and the candidates were interviewed at another public meeting.\textsuperscript{3} A newspaper reporter requested a list of all applicants, which request was rejected by the school committee on the grounds that the information was not a public record.\textsuperscript{4} The Attorney General sued to enforce the decision of the state Supervisor of Public Records that the names were public information.\textsuperscript{5}

The Supreme Judicial Court affirmed the judgment of the superior court which found that the open meeting law had been violated and

\begin{itemize}
  \item \textsuperscript{7} 1977 Mass. Adv. Sh. at 1679, 366 N.E.2d at 721.
  \item \textsuperscript{8} \textit{Id.} at 1682-83, 366 N.E.2d at 722-23.
  \item \textsuperscript{9} \textit{Id.} at 1685, 366 N.E.2d at 723-24.
  \item \textsuperscript{10} \textit{Id.} at 1688, 366 N.E.2d at 725.
  \item \textsuperscript{11} \textit{Id.} at 1690-91, 366 N.E.2d at 726.
  \item \textsuperscript{12} \textit{Id.} at 1699, 366 N.E.2d at 729.
  \item \textsuperscript{13} \textit{Id.} at 1700, 366 N.E.2d at 730.
  \item \textsuperscript{1} 1978 Mass. Adv. Sh. 1108, 375 N.E.2d 1118.
  \item \textsuperscript{2} \textit{Id.}, 375 N.E.2d at 1189.
  \item \textsuperscript{3} \textit{Id.} at 1109, 375 N.E.2d at 1189.
  \item \textsuperscript{4} \textit{Id.}
  \item \textsuperscript{5} \textit{Id.}
\end{itemize}
that the information was presumptively a public record. But the decision is not an easy one to implement. As to the sixteen "finalists," the Court noted that those applicants should expect open discussion of their competence and do not have the right to seek confidentiality on the grounds of invasion of privacy. The argument that disclosure would discourage potential future applications might have merit, the Court noted, but that was a policy question for the legislature to deal with by amending the statute.

The question of whether the public records law was superseded by the law creating a statutory right of privacy presents the most difficulties of administration. The privacy law refers to an "unreasonable, substantial or serious interference" with a person's privacy. In the instant case the superior court judge had noted that the school committee had made an adequate showing that some applicants' privacy might be invaded by disclosure of their names, citing such factors as the attempt to obtain future employment, the ability to function in the job then held, and standing in the community. But the fact that some names should not be disclosed does not permit the shielding of all the names on the list. The judge concluded that the school committee should inquire of each applicant whose name had not been previously disclosed whether he consented to disclosure. Those who consented would of course have their names disclosed. As to the others, the superior court judge himself would make individual in camera determinations of whether the individual's privacy might be affected.

The Supreme Judicial Court's affirmation of the decision below and the judge's procedure was certainly appropriate for the case at bar, but it leaves considerable confusion in the minds of public hiring authorities for future disclosure requests. It suggests, for example, that the school committee should inquire of the applicant whether he will permit disclosure of his name. If he agrees, disclosure seems required. If he does not, must the school committee undertake to interpret chapter 214, section 1B, and determine whether disclosure would be an "unreasonable, substantial or serious interference" with the applicant's privacy?

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6 Id. at 1109-10, 375 N.E.2d at 1190.
7 Id. at 1112, 375 N.E.2d at 1190.
8 Id.
9 G.L. c. 66, § 10.
10 G.L. c. 214, § 1B. That Act provides:
   A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.
11 Id.
13 Id., 375 N.E.2d at 1191-92.
14 Id. at 1110, 375 N.E.2d at 1190.
Either an applicant who would not agree to disclosure, or a newspaper reporter or someone else who might be seeking disclosure, would be aggrieved and presumably could seek redress in the superior court. The end result would be that the court makes its own determination as in the Northampton case. The case suggests that the legislature should consider amending the public records law to either clearly prevent or require the disclosure of the names of applicants for public positions.

The legislature's own records, ironically, are excluded from public scrutiny as they are exempted from the open records law. In Westinghouse Broadcasting Company, Inc. v. Sergeant-at-arms of the General Court,\textsuperscript{15} the operator of television station WBZ wished access to long-distance telephone billing records of the legislature.\textsuperscript{16} A lower court authorized access, but the Supreme Judicial Court reversed, holding that records of the General Court are not subject to public disclosure under chapter 66, section 10.\textsuperscript{17} The Court based its holding on three grounds. First, the Court stated, "The legislature is not one of the instrumentalities enumerated in G.L. c. 4, § 7, twenty-sixth, whose records are subject to public disclosure."\textsuperscript{18} While the General Court has been referred to by the Court as one of the "three great departments of government,"\textsuperscript{19} the Court ruled that "department" as used in section 7 of General Laws chapter 4 has a more restrictive meaning.\textsuperscript{20} Second, the Court held that the telephone records are specifically exempted from the records law by General Laws chapter 66, section 18.\textsuperscript{21} The Court found untenable the lower court's distinction between records created by the legislature which would be exempt from disclosure and records, such as telephone billings, which the legislature receives,\textsuperscript{22} and thirdly, the Court disagreed with the plaintiff's contention that section 18's legislative records exemption embraces only those records kept under force of law.\textsuperscript{23}

\textbf{§2.9. Administrative Law: Review of Agency Decisions.} The judiciary found itself reviewing a number of administrative agency decisions during the Survey year, and seemed anxious to uphold agency actions wherever substantial evidence could be found in the record which would support the position taken by the agency. Utility regulation was a major subject of appeal.

\begin{footnotes}
\item{16} \textit{Id.} at 1214, 375 N.E.2d at 1206.
\item{17} \textit{Id.} at 1219-1221, 375 N.E.2d at 1208-09.
\item{18} \textit{Id.} at 1219, 375 N.E.2d at 1208.
\item{20} 1978 Mass. Adv. Sh. at 1219, 375 N.E.2d at 1208.
\item{21} \textit{Id.} at 1220, 375 N.E.2d at 1208.
\item{22} \textit{Id.}
\item{23} \textit{Id.} at 1220-21, 375 N.E.2d at 1208-09.
\end{footnotes}
Direct review from final orders of the Department of Public Utilities provided the Court with several major cases. In *New England Tel. & Tel. Co. v. Department of Public Utilities*, the company sought tariff revisions which would provide for a new product line, a private branch exchange system called Dimension PBX. The Department, exercising its statutory duty to disapprove rates that are unjust, unreasonable, or otherwise discriminatory, rejected one of the company's proposed methods of payment for the new service. The Department determined that the payment method would create revenue deficiencies that would require cross-subsidization from, and thus lead to unjust discrimination against, other telephone service users.

In upholding the action of the Department of Public Utilities, the Supreme Judicial Court stated that the Department was not required to choose the company's proposed rate structure, even if it were reasonable, if it chose instead to take another approach which was also just, reasonable, and nondiscriminatory, and not confiscatory or otherwise illegal. The Department had gathered substantial evidence, within the meaning of chapter 30A, section 14(7)(e) of the General Laws, and the Court would not reverse the administrative decision.

The importance of a complete evidentiary record to success on appeal for the agency was again seen in *Boston Edison Company v. Department of Public Utilities*. Edison had filed several requests for rate increases, none of which were granted to the extent requested. It contended that the rates approved were confiscatory, and sought direct relief from the Supreme Judicial Court. The Court again used the standard of review in chapter 30A, section 14(7), which includes consideration of whether the decision was based on substantial evidence, and whether it was arbitrary or capricious, or involved an abuse of discretion. The Court found that the Department had substantial evidence in the record relating to comparative cost figures on rate of return on equity and debt. It found that the Department's calculation of the rate base of the utility was generally proper, stating that it is not compelled to use any particular method of calculation, as long as the end result is not confiscatory. Even the
decision to exempt the users of the first 384 kilowatt hours of electricity from any of the approved rate increases, on the ground that residential users as a class had not contributed significantly to the growth in peak load demand for electricity, was approved. Different treatment for different classes of customers, reasonably classified, has long been held to be within the statutory powers of the Department.

These two utility rate cases taken together make very clear that the Department of Public Utilities has great discretion in determining how rates are structured and what they are to be. These decisions, however, must be based on substantial evidence in the record and conform to the standard of review in section 14(7). The Court has not hesitated in the past to grant rate relief to utilities if the Department’s record fails to substantiate its decision, but here it seemed pleased and almost relieved to be able to “reward” a well-prepared and documented rate decision by affirming on appeal.

In Boston Edison Company v. Boston Redevelopment Authority, Edison brought a statutory appeal to the superior court to review action taken by the Boston Redevelopment Authority (BRA) in approving a project under General Laws chapter 121A to allow the construction of an electric generating and steam power plant. The plant would supply several hospitals and a Harvard University housing development in the Fenway area of Boston. Among the claims of Edison were that the energy plant did not constitute a “project” under chapter 121A, that the site for the plant was not a decadent or substandard area, and that the project was not a public use or benefit. After determining that Edison would be harmed by the construction of the energy plant and therefore had standing to sue, the Court agreed with Edison that the proper scope of review would be application of the “substantial evidence” test. This is a more stringent test than the previously applied “arbitrary and capricious” standard, and was justified by the Court on the grounds that projects approved under chapter 121A are privately-planned and initiated, privately-owned, subsidized by substantial property tax concessions, and not subject to significant future control by a public agency. The

14 Id. at 988, 375 N.E.2d at 333.
17 Acts of 1960, c. 652, § 13 provides that when an authority takes a final vote with respect to a chapter 121A project in Boston, any person aggrieved by the vote may petition the Supreme Judicial Court or Superior Court for Suffolk County for a writ of certiorari to correct errors of law in the vote.
19 Id. at 2681-85, 371 N.E.2d at 735-37.
20 Id. at 2688, 371 N.E.2d at 738.
21 See G.L. c. 121A, § 10.
Court found a need for detailed consideration of the project apparent in the requirements for public notice and hearing, a written report containing the reasons for decision, and express provision for judicial review. The Court distinguished publicly-initiated projects, which continue to be subject to the lesser review standard of "arbitrary and capricious." Having established the higher standard of "substantial evidence" as the test in judicial review of the BRA’s decision, the Court then upheld the agency’s decision. It found that the proposed plan was a “project” within the meaning of the statute, that the proposed site was within a decadent and/or substandard area and constituted a public use and benefit, and rejected the remaining arguments of plaintiff Edison. The partial concurrence of Justice Quirico would not have imposed the higher standard of review, and pointed out that the Court in a series of cases involving the taking of private property by eminent domain did not apply the “substantial evidence” test. Mr. Justice Quirico would not apply a more stringent test in 121A cases, which do not involve the taking of any property.

The decision requires a higher degree of justification by a public agency which grants permission for a tax benefit to a private developer than it does for the taking of private property by eminent domain under the power of eminent domain. It also places redevelopment authorities on notice that they need a more extensive justification and more complete record for their decisions, at least on chapter 121A projects, than has been required in the past.

Review of the question of how to calculate the fair rate of return on rental property was considered by the Appeals Court in Niles v. Boston Rent Control Administrator. The Appeals Court found that a housing court judge had incorrectly interpreted the rent control enabling law and “perhaps the Federal and State Constitutions,” in requiring that owners be permitted a reasonable return on the fair market value of

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25 *Id.* at 2693, 371 N.E.2d at 740.
26 *Id.* at 2698-99, 371 N.E.2d at 742-43.
27 *Id.* at 2703, 371 N.E.2d at 744.
28 *Id.* at 2704-05, 371 N.E.2d at 745.
their property. The court pointed out that the Supreme Judicial Court had set forth the rule that rents be set to assure a reasonable return on their investment, not on the fair market value of the property. A review of a federal case concluded with a determination that federal law does not require a fair return based on fair market value. The Appeals Court further noted that the purpose of rent control legislation was to deal with the problems of limited adequate housing and increased costs of existing housing. Thus, requiring in the rental formula a fair market value rate of return would contribute to inflated rents, the very element which the statute sought to alleviate.

Whether the review standard of “substantial evidence” was met in the awarding of on premise liquor licenses was at issue in Board of Selectmen of Barnstable v. Alcoholic Beverages Control Commission. The town was entitled, due to population increase, to award seven new on premise liquor licenses, also called pouring licenses. The selectmen received twenty-seven applications, and awarded all seven licenses. One of the three selectmen was the wife of one of the successful applicants. The Board had first voted the license for the selectwoman’s husband’s restaurant, the selectwoman abstaining. The three selectmen then participated jointly in consideration of the twenty-six other applicants, awarding six licenses. The Alcoholic Beverage Control Commission, on appeal, held that there was procedural impropriety, withheld approval of all seven licenses, and remanded the matter for new hearings, indicating that the selectwoman should take no part in any resumed hearings. A judge of the superior court reversed the Commission, and ordered approval of the six licenses granted by the Board, which the Supreme Judicial Court in turn reversed.

The Court noted the finding of the Alcoholic Beverages Control Commission that while Mrs. Montagna had not exercised improper influence, “the manner in which the proceedings were held and the participation of Mrs. Montagna in decisions relating to the locations of potential competitors was improper. . . . [T]he appearance of conflict and the

34 Id. at 249-50, 374 N.E.2d at 300, quoting Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 703, 266 N.E.2d 876, 888 (1971).
37 Id. at 252, 374 N.E.2d at 302.
38 Id. at 253, 374 N.E.2d at 302.
40 Id., 369 N.E.2d at 1012.
41 Id. at 2435, 369 N.E.2d at 1012.
42 Id. at 2437, 369 N.E.2d at 1013.
43 Id. at 2435, 369 N.E.2d at 1013.
44 Id.
potential for deference by other selectmen to her interests is too real and obvious to be ignored." The Court then held that the Commission did not exceed its authority in refusing to give approval to the licenses on the grounds of procedural irregularity. The Court noted that under chapter 138, sections 12 and 67, of the General Laws, approval by both the Commission and the local licensing authority is needed for a pouring license. The Court reviewed Connolly v. Alcoholic Beverages Control Commission for the proposition that the Commission, in approving pouring licenses, is possessed with broad powers to review the substantive correctness of the local approval. The Court went on to hold that review of procedural correctness is also within the Commission’s domain:

It is scarcely believable that a commission so empowered as to substance is disempowered as to procedural claims that might, as in the present case, go to the integrity of the process by which the local board reaches its decision. The statutory power to give or withhold approval contains no such express limit . . . and should be read as including a capacity to consider these matters of procedure.

The Court would not find the Commission’s power in this area limited by the state conflict of interest statute, and thus would not venture an opinion on whether that law had been violated. The Commission’s action was seen as a proper means of insuring that the decision would be reached fairly and with the appearance of fairness. In sum, the Court thought that the standards of propriety to which the Commission appealed were commonsensical and supported by substantial evidence.

§2.10. Administrative Law: Scope of Authority Delegated to State Administrative Agencies. In two cases, the Supreme Judicial Court considered questions of statutory construction in deciding the validity of regulations adopted to implement the so-called “lead paint law” and the power of the Energy Facilities Siting Council to regulate the “Pil-

45 Id. at 2438 n.7, 2438-39, 371 N.E.2d at 1014 n.7, 1014.
46 Id. at 2441, 371 N.E.2d at 1015.
47 Id.
50 Id. at 2444, 369 N.E.2d at 1016.
51 G.L. c. 268A.
53 Id. at 2446, 369 N.E.2d at 1017.
54 Id. at 2439, 369 N.E.2d at 1014.

§2.10. 1 G.L. c. 111, §§ 190-99.
§2.10 STATE AND LOCAL GOVERNMENT

grim 2" nuclear generating plant proposed to be operated in Plymouth by the Boston Edison Company.

In 1971 the legislature enacted a law providing for a comprehensive program of lead paint poisoning control. The law requires the Department of Public Health to establish a statewide program for the prevention, screening, diagnosis, and treatment of lead poisoning, including elimination of the sources of such poisoning. The law also mandates that owners of dwellings take affirmative measures to eliminate sources of lead paint poisoning where children under six reside or will reside. Violations of the law are to be treated as a violation of the state sanitary code, and procedure was made available by the code to correct or punish violations. Under this authority, the director of the lead paint program promulgated rules and regulations not in conflict with state laws or the sanitary code. In Commonwealth v. Racine, the state brought an action against a property owner for failure to comply with the director's order. The defense, in part, was that the regulations were "in excess of the authority" granted by the legislature and, hence, invalid. The Court found the defense to be without merit, and reaffirmed the principle that the legislature may delegate to a board or an individual officer the working out of the details of a policy adopted by the legislature. Although the legislature in this case did not provide for specific penalties, the Court noted that it did have available a body of administrative regulations concerning the area of the statutory enactment—the State Sanitary Code—which the legislature could properly use as a reference for the enforcement scheme. The Court assumed the legislature was aware of the contents of the code, including its penalty provisions, when it enacted the lead paint law. The contents of the code were viewed as substantial evidence that the legislative reference to it in chapter 111, section 198, of the General Laws includes the similar authority to define offenses under the lead paint statute. The Court would not attribute to the legislature an intent to cripple enforcement of a law in an area which

3 G.L. c. 111, § 190.
4 Id., § 197.
5 G.L. c. 111, § 127A. The State Sanitary Code is actually enabling legislation which requires local boards of health to adopt regulation of rental housing in the interest of public health and well-being.
6 G.L. c. 111, § 198.
8 Id. at 632, 363 N.E.2d at 501.
9 Id. at 635-36, 363 N.E.2d at 503-04.
10 Id. at 636, 363 N.E.2d at 504.
11 Id.
12 Id.
it has singled out for special concern. The Court even upheld the director's regulation that violations be corrected in seven days if lead paint is found in the home of a child under six. The State Sanitary Code's recognition of emergency measures, and its allowance of enforcement action to ensure compliance if violations are not corrected within a "reasonable time" led the Court to find that the director did not act in an arbitrary manner in setting forth a seven-day time limit for correction of the problem. The legislature has found as a fact that high levels of lead present a grave danger to children. The Court stated, "If the goal of the statute is to remove the offending condition, and if the danger to the class of children under six is particularly acute, then speed is necessary." The Court did hold that since the provisions of chapter 111, section 197, refer to the removal of lead paint in homes with children under six, the director could not authorize the eviction of tenants; he can only order the removal of the lead paint, as the law clearly states that the paint is the problem which should be removed, not the potential victims.

In Plymouth County Nuclear Information Committee, Inc. v. Energy Facilities Siting Council the Supreme Judicial Court construed the statute that established the siting council. When the statute was amended in 1975, the General Court provided that projects under construction prior to May 1, 1976, would not be subject to siting council review or approval.

In April 1976 Boston Edison filed with the Council a long-range forecast for electric power needs as required by chapter 164, section 611, of the General Laws. In this forecast, Edison stated that the "Pilgrim 2" nuclear power plant was an exempt facility. A hearing officer to whom the Council referred the matter found that the "Pilgrim 2" plant was not exempt. The officer determined that there had been no "placement, assembly or installation of facilities or equipment on the plant site" and that even if the term "construction" includes contractual obligations, that Edison's obligations were de minimus. The Council reversed this ruling, holding that the definition of construction in sec-

13 Id. at 639, 363 N.E.2d at 505.
14 Id. at 640, 363 N.E.2d at 506.
15 Id. at 640-41, 363 N.E.2d at 506.
16 Id. at 640, 363 N.E.2d at 506.
17 Id. n.8, 363 N.E.2d at 506 n.8.
19 G.L. c. 164, §§ 69G-69R.
22 Id. at 140-41, 372 N.E.2d at 231.
23 Id. at 141, 372 N.E.2d at 231.
tion 696 was appropriate, and that while a *de minimus* test was correct, Edison's contractual obligations to purchase facilities or equipment were in fact substantial.

The Court affirmed the Council's ruling. While Edison's obligations on May 1, 1976, were only 2.5 percent of the projected construction cost, in monetary terms this percentage equalled $34.7 million. To the Court this was not *de minimus*. The Court held that the Council's interpretation of its enabling statute was "plainly correct" on the point that construction of the plant had commenced prior to May 1, 1976.

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24 Id.
25 Id. at 141-42, 372 N.E.2d at 231.
26 Id. at 142, 150, 372 N.E.2d at 231, 235.
27 Id. at 144, 372 N.E.2d at 232.
28 Id. at 144-45, 372 N.E.2d at 232.
29 Id. at 145, 372 N.E.2d at 232.