SJC-13081

K.J. vs. SUPERINTENDENT OF BRIDGEWATER STATE HOSPITAL & another.[1]

Suffolk. April 5, 2021. - September 8, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Practice, Civil, Commitment of mentally ill person.
Constitutional Law, Separation of powers, Severability.
Commissioner of Correction. Pretrial Detention.
Incompetent Person, Commitment. Mental Health. Statute, Validity, Severability.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 3, 2021.

The case was reported by Georges, J.

Karen Owen Talley, Committee for Public Counsel Services, for the plaintiff.
Edward J. O'Donnell for the defendants.
Tatum A. Pritchard, Jennifer Honig, & Martin F. Murphy, for Disability Law Center, Inc., & others, amici curiae, submitted a brief.
Patricia Reilly, Assistant District Attorney, for District Attorney for the Plymouth District & others, amici curiae, submitted a brief.

[1] Commissioner of Correction.

LOWY, J. This is a case about the separation of powers concerns implicated by the placement of a pretrial detainee or prisoner who is involuntarily committed on account of mental illness. In this context, G. L. c. 123 requires a judge in a commitment proceeding to determine first whether the person requires involuntary commitment and, if so, whether that commitment should take place at the Bridgewater State Hospital (Bridgewater) or at a lower security Department of Mental Health (DMH) facility.[2] See G. L. c. 123, §§ 8, 18 (a). Giving the judge authority not only over the commitment decision, but also over whether placement will occur at Bridgewater or a DMH facility, is in line with the purpose of c. 123, which the Legislature completely revised in 1970 to expand access to courts for those committed involuntarily because of mental illness, and which also requires that involuntary commitments occur in the least restrictive option available. See Commonwealth v. Nassar, 380 Mass. 908, 912 n.5, 917-918 (1980).

The plaintiff, K.J., is a pretrial detainee who was previously committed to Bridgewater under G. L. c. 123,

[2] Bridgewater State Hospital (Bridgewater) is a medium security Department of Correction facility. It has a secure perimeter, composed of a double fence, topped with razor wire. Conditions of confinement are more restrictive than at Department of Mental Health (DMH) facilities, although DMH facilities are also locked.

§ 18 (a), the provision of c. 123 that deals with commitment of pretrial detainees and prisoners. Section 18 (a) also incorporates §§ 7 and 8 for subsequent commitment hearings. After a hearing on a petition to recommit K.J. to Bridgewater for one year, the judge determined that K.J. was mentally ill, posed a likelihood of serious harm if not confined, and therefore required commitment. See G. L. c. 123, §§ 8 (a), 18 (a). To commit a person[3] to Bridgewater, however, a judge must additionally find that strict custody is required. See G. L. c. 123, §§ 8 (b), 18 (a). The judge here found that K.J. did not require strict custody and, thus, as the statute required him to do, issued an order committing K.J. to a DMH facility. See id.

Despite that order, however, the Commissioner of Correction (commissioner) utilized what we call the "commissioner's certification" provision in § 18 (a) to retain K.J. at Bridgewater.[4] We must now determine whether the commissioner's

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[3] Bridgewater only houses male patients. G. L. c. 123, § 7 (b).

[4] The commissioner's certification provision in G. L. c. 123, § 18 (a), states:

> "[N]otwithstanding the court's failure, after an initial hearing or after any subsequent hearing, to make a finding required for commitment to the Bridgewater state hospital, the prisoner shall be confined at said hospital if the findings required for commitment to a facility are made and

exercise of this provision violates art. 30 of the Massachusetts Declaration of Rights, which, among other things, protects the independence of the judiciary by prohibiting other branches from overturning court orders.[5] We hold that it does.[6]

Background. K.J. is an adult man who currently faces criminal charges in the Worcester Division of the District Court and in the Superior Court.[7] K.J. initially was charged in the District Court on December 10, 2018, and held on bail. On December 11, 2018, K.J. was committed involuntarily to Bridgewater. In April of 2019, K.J.'s commitment to Bridgewater was extended for a period of six months, and then, in December of 2019, for an additional period of one year. See G. L.

> if the commissioner of correction certifies to the court that confinement of the prisoner at said hospital is necessary to insure his continued retention in custody."

[5] K.J. also argues that his substantive and procedural due process rights were violated, and that the statute violates equal protection principles. Because we base our holding on art. 30, we do not address these arguments.

[6] We acknowledge the amicus letters submitted in this case: one by Disability Law Center, Inc., the Mental Health Legal Advisors Committee, and the Boston Bar Association; and the other by the district attorney for the Plymouth district, joined by the district attorney for the eastern district, the district attorney for the Bristol district, and the district attorney for the middle district.

[7] K.J. is charged in the District Court with assault and battery on a police officer, G. L. c. 265, § 13D, and in the Superior Court with armed assault with intent to murder, G. L. c. 265, § 18 (b).

c. 123, §§ 7, 8, 18 (a). On December 2, 2020, the medical director of Bridgewater petitioned to have K.J. again recommitted for one year under § 18 (a). See id.

The Brockton Division of the District Court, sitting at Bridgewater, held a hearing via Zoom video conferencing on January 6, 2021.[8] In support of its petition, Bridgewater called a licensed psychologist as its sole witness. The psychologist testified that K.J. meets the diagnostic criteria for schizoaffective disorder, bipolar type, and that he currently experiences auditory hallucinations, paranoia, and somatic delusions. The psychologist testified that historically the exacerbation of K.J.'s symptoms has led to aggressive behaviors and serious bodily injury to other people, but that he had not engaged in any physical assaults or altercations since July or August 2020. The psychologist also testified that K.J. currently was incapable of returning to a penal setting because such an environment would not be able to enforce his court-ordered medication plan and because it could be destabilizing. The psychologist testified that a DMH facility would be able to enforce K.J.'s medication plan, although a transfer to such a

[8] Zoom Video Communications, Inc., is an Internet-based video conferencing platform. See Vazquez Diaz v. Commonwealth, 487 Mass. 336, 336 (2021).

facility could be destabilizing. Finally, the psychologist testified that K.J. had never attempted to escape.

K.J. testified on his own behalf. He stated that he knew he had a mental illness. He also testified that he takes all his medications as prescribed and has had no signs or incidences of violence in more than six months. K.J. asserted that he hoped that he would be recognized for doing well and would have the opportunity to transfer to a DMH facility.

After hearing the testimony, the judge ordered that K.J. be transferred to a DMH facility. In the ruling, the judge found that K.J. was mentally ill, that failure to retain him in a facility would create a likelihood of serious harm, and that there was no less restrictive alternative. Following its receipt of the judge's order, Bridgewater filed a certification by the commissioner pursuant to § 18 (a). The one-sentence certification stated only that commitment to Bridgewater was "necessary to ensure his continued retention in custody."

K.J. then filed a motion to find Bridgewater in contempt of a court order, requesting immediate release to a DMH facility, which Bridgewater opposed. The same judge who had issued the § 18 (a) order held a nonevidentiary hearing where he further explained his ruling from the prior hearing: that while there was some evidence that K.J. required strict security, it did not

rise to the level of beyond a reasonable doubt. Moreover, the judge noted, there was no evidence that K.J. was a flight risk.

Despite this, the judge ultimately denied K.J.'s motion to hold Bridgewater in contempt. The judge wrote:

> "[T]his court is troubled by [Bridgewater]'s arbitrary application of the provisions of [§ 18 (a)] and the clear separation of powers issues raised by the certification process. However, the appropriate avenue is a direct appeal of the certification process and any other issue(s) raised by the hearing on the petition."

K.J. filed a petition pursuant to G. L. c. 211, § 3, seeking release from Bridgewater and enforcement of the District Court judge's commitment order to a DMH facility. A single justice reserved and reported the case to the full court.

Discussion. 1. Separation of powers. "Massachusetts is one of only a few States to articulate an explicit separation of powers in our Constitution." Commonwealth v. Cole, 468 Mass. 294, 301 (2014). Article 30 is that explicit statement; it 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."

Although we have "recognized that separation of powers does not require three 'watertight compartments' within the government" (citation omitted), Opinions of the Justices, 372

Mass. 883, 892 (1977), this recognition does not dissipate the importance of art. 30. The limitations of art. 30 must still be "scrupulously observed." Commonwealth v. Gonsalves, 432 Mass. 613, 619 (2000). Among other ways, the executive and legislative branches violate art. 30 where they "impermissibly interfere with judicial functions when they purport to restrict or abolish a court's inherent powers, or when they purport to reverse, modify, or contravene a court order" (citations omitted). Gray v. Commissioner of Revenue, 422 Mass. 666, 671 (1996).

K.J. alleges that the commissioner's certification causes both types of interferences. Because the judge ordered K.J. to be committed to a DMH facility as the statute instructed him to do, see G. L. c. 123, § 8 (b), and because the commissioner essentially overruled that order by deciding to keep K.J. at Bridgewater anyway, we agree with K.J. that the commissioner's certification allows the executive branch to "reverse, modify, or contravene a court order." Gray, 422 Mass. at 671. Thus, it violates art. 30.[9]

a. Legal principles. As far back as 1861, we have held that an act passed by the Legislature violated art. 30 where it

[9] We need not address whether the commissioner's certification also "purport[s] to restrict or abolish a court's inherent powers." See Gray v. Commissioner of Revenue, 422 Mass. 666, 671, (1996)

effectively annulled a court decree in a case properly before the court:

> "It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding. . . . A fortiori, an act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority. . . . Indeed it is difficult to see how the legislature could more palpably invade the judicial department and effectually usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties." (Emphases added.)

Denny v. Mattoon, 2 Allen 361, 378-379 (1861). The same principle has been recognized by Federal law for even longer.[10] See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995), citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (Hayburn's Case "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the

[10] "Article 30 is more explicit than the Federal Constitution in calling for the separation of powers, but the underlying rationale is the same: to 'diffus[e] power the better to secure liberty.'" Gray, 422 Mass. at 671 n.5, quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution").

Executive Branch"). See also Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113-114 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments . . . that are subject to later review or alteration by administrative action").

Since deciding Denny, we have made clear that it is a fundamental principle of separation of powers that the executive and legislative branches cannot overrule a court order. See, e.g., Department of Revenue v. Jarvenpaa, 404 Mass. 177, 184 (1989) ("The Legislature may not constitutionally enact a law that, in effect, vacates final judgments . . ."); Spinelli v. Commonwealth, 393 Mass. 240, 241-242 (1984) (statute restoring specific dismissed case to active status violated art. 30 because it nullified court judgment). To do so would amount to usurping the function of the judiciary. See Opinion of the Justices, 234 Mass. 612, 621-622 (1920) ("The judgment of a court must stand as final. It can be reversed, modified or superseded only by judicial process. It is wholly under the control of the judicial department of government").

Although the paradigmatic case of another branch overriding a court order is the Legislature's enactment of a law that retroactively alters a final judgment, see, e.g., Jarvenpaa, 404 Mass. at 184; Spinelli, 393 Mass. at 241-242, our cases have contemplated analogous ways in which art. 30 could be violated.

For example, in Gray, 422 Mass. at 674, we concluded that the Department of Revenue's (department's) seizure of funds from the plaintiff to satisfy child support arrearages did not unconstitutionally modify a judicial order mandating that the plaintiff satisfy the same arrearages. This was because a statute in effect at the time, G. L. c. 119A, § 6, empowered the department to enforce the judge's order through such a seizure. Id. Thus, that possibility was incorporated into the judge's order. In reaching this holding, however, we stressed its limits. Had the judge also "order[ed] the department to refrain from collection activities," then the statute's effect would have been negated and the department's subsequent actions would have subjected it to contempt charges. Id. at 675 n.13. In other words, art. 30 does not allow the Legislature preemptively to empower executive officials to overturn court orders that otherwise forbid a desired course of action.

This proposition follows from the fact that our focus in separation of powers cases is on "the essence of what cannot be tolerated under art. 30": "interference by one department with the functions of another." Gray, 422 Mass. at 671, quoting Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n, 404 Mass. 53, 56 (1989). Determining interference is nuanced. The flexibility inherent in art. 30 allows the legislative and executive branches to take actions consistent

with a court order or that affect only an ancillary detail. See, e.g., Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 622 (2011) (Doe No. 10800) (statute that increased probation supervision fee did not violate art. 30 because court's judgment was imposition of lifetime probation, and specific amount of fee was "ancillary" to this); Ierardi, petitioner, 366 Mass. 640, 650 (1975) (no art. 30 violation because executive branch's extradition of sentenced prisoner "serves only to postpone" execution of court order and did not "nullify or set [it] aside"). This flexibility reaches its breaking point, however, when such actions "'supersede' a judgment of a court by [an executive official's] direct declaration to that effect." Opinion of the Justices, 234 Mass. at 622. In short, although the legislative and executive branches may modify ancillary details of a court order, they may not reverse it.

b. Section 18 (a). General Laws c. 123, § 18 (a), prescribes procedures for civil commitments of pretrial detainees and prisoners. Because declaring a statute to be unconstitutional is among "the gravest and most delicate" of our duties, Blodgett v. Holden, 275 U.S. 142, 148 (1927), we closely detail the framework that governs these subsequent commitment decisions. Given that the proceeding at issue in this case was one that considered whether to recommit K.J. on account of his

mental illness rather than whether initially to commit him, we focus on the provisions of § 18 (a) that guide a judge's determination of whether to recommit and, crucially, where.

Under § 18 (a), a person may be initially committed for examination and observation for up to thirty days. After that, the first longer-term commitment order is valid for six months. See G. L. c. 123, § 18 (a) ("An initial court order of commitment issued subject to the provisions of this section shall be valid for a six-month period . . ."). Subsequent commitments thereafter are valid for one year. See id. ("all subsequent commitments . . . shall be valid for one year"). Section 18 (a) expressly provides that at these subsequent commitment hearings, the judge must apply the standards contained in §§ 7 and 8. See G. L. c. 123, § 18 (a) ("all subsequent commitments . . . shall take place under the provisions of [§§ 7 and 8]").

Turning to §§ 7 and 8, a judge must make a series of separate findings. First, the judge must determine whether "(1) such person is mentally ill, and (2) the discharge of such person from a facility would create a likelihood of serious harm." G. L. c. 123, § 8 (a). For convenience, we will call these the commitment findings. If the judge finds both that the detainee or prisoner is mentally ill and that discharge would

pose a likelihood of serious harm, then the judge shall order subsequent commitment. See id.

Once the judge has made the commitment findings, the judge must again consult § 8 -- this time, § 8 (b) -- to determine where the subsequent commitment will take place. We call this determination the placement findings. In making the placement findings, the judge must consider whether the person is not a proper subject of commitment to a DMH facility and whether "the failure to retain such person in strict custody would create a likelihood of serious harm" (emphasis added). G. L. c. 123, § 8 (b). If the judge affirmatively finds both elements, then the judge orders that the person be recommitted to Bridgewater. See id. But if the evidence does not support making these placement findings, then the judge must order the person to be committed to a DMH facility. The language is emphatic: upon making certain findings, "the court shall order the commitment of the person" to a DMH facility. Id. (emphasis added). A judge cannot stop at the crossroads and decline to issue an order concerning placement. To do so would be an abdication of the judge's own statutorily imposed duty.

In sum, when assessing a petition for a subsequent commitment under § 18 (a), a judge must do the following:

- Determine whether subsequent commitment is warranted under § 8 (a).

- If it is, the judge must then determine whether commitment to Bridgewater is warranted pursuant to § 8 (b).
- If commitment to Bridgewater is not warranted, then the judge must follow the final sentence of § 8 (b) and order the person to be recommitted to a DMH facility.

Finally, § 18 (a) contains the provision that gave rise to this case: the commissioner's certification. Once the judge has issued his or her order concerning placement, the commissioner's certification provision allows the commissioner, notwithstanding the judge's lack of finding that commitment to Bridgewater is necessary and the judge's affirmative determination and order that the person is to be placed at a DMH facility, to "certif[y] to the court that confinement of the [pretrial detainee or] prisoner at [Bridgewater] is necessary to insure his continued retention in custody." G. L. c. 123, § 18 (a). If the commissioner does so certify, she may then retain the person at Bridgewater. In other words, even when the judge has issued an order that recommitment must take place at a DMH facility, § 18 (a) allows the commissioner to send the person to -- or, as in this case, keep the person at -- Bridgewater instead.

c. Application. Section 18 (a) violates art. 30 because it allows the executive branch to reverse a court order. By explicitly referencing and directing the judge to follow § 8 (b) in any recommitment proceeding, § 18 (a) empowers a judge to order that a person be recommitted to a DMH facility. This is what the judge did here: after determining that the strict custody of Bridgewater was unnecessary, the judge ordered the commissioner to transfer K.J. from there to a DMH facility. Despite this determination and court order, § 18 (a) also empowers the executive branch to send the same person to Bridgewater. This, too, happened here, as the commissioner utilized the commissioner's certification to retain K.J. at Bridgewater. Therein lies the art. 30 problem.

To highlight how § 18 (a) violates art. 30, consider a hypothetical framework that likely would not pose any separation of powers problems. Under this approach, the commissioner's certification would be a document that the commissioner would be entitled to submit to the court, advising that in the commissioner's opinion, the person should be placed at Bridgewater because the person presented a flight risk. The commissioner could set out reasons in the document for this opinion and put in evidence on this issue in any hearing. The judge could then consider the commissioner's filing when determining whether strict custody was required. This kind of

provision would both allow input from the commissioner and respect art. 30, as the commissioner would have no authority to ignore the court's order regarding placement.

Section 18 (a), on the other hand, gives two branches the authority to send the same person to two different places, with the executive branch possessing a final veto over the judiciary. This statutory authority does more than allow the commissioner to alter an ancillary detail of the order. Compare Doe No. 10800, 459 Mass. at 622; Ierardi, petitioner, 366 Mass. at 650. The judge's decision to send a person to Bridgewater is one based on statutorily defined and requisite findings and is governed by a judicially required quantum of proof.[11] See G. L. c. 123, § 8 (b); Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 272 (1978) (proof beyond reasonable doubt required for §§ 7 and 8 commitments). Yet the statute essentially treats the court order as an advisory opinion. The executive branch may follow the court order if it deems doing so

[11] Additionally, we disagree with the dissent's contention that the commissioner and the judge are making wholly different findings. If a prisoner poses a likelihood of serious harm to himself or others if not committed to DMH or Bridgewater, and is likely to attempt to escape, flight risk is a legitimate consideration for a judge when deciding whether to commit the prisoner to a DMH facility or Bridgewater. As explained by the parties, DMH facilities and Bridgewater provide different levels of security. Although flight risk is certainly not the only reason that strict custody may be necessary to avoid a likelihood of serious harm, it is a factor that a judge may and presumably often does consider.

to be appropriate, and disregard the order if it does not. Stripped to its basics, the statute mandates that the judge specifically order X, and then the same statute allows the commissioner to do not-X instead.[12] This is precisely what art. 30 forbids.

In reaching the opposite conclusion, the dissent relies on Sheehan, petitioner, 254 Mass. 342, 344-346 (1926). That case is inapposite. Sheehan dealt with the execution of criminal sentences, which we have repeatedly said is a core function of the executive branch. See Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 451, S.C., 484 Mass. 1029 (2020) (execution of criminal sentences is executive function); Cole, 468 Mass. at 302 ("Once a sentence is imposed, the executive branch holds the power and responsibility of executing it"); Sheriff of Middlesex County v. Commissioner of Correction, 383 Mass. 631, 636 (1981) ("Statutory directions concerning the place where a particular criminal defendant is to serve his sentence involve no legislative encroachment on the court's constitutional authority"); Sheehan, petitioner, supra

[12] To harken back to a previous example, it would be as if the judge in Gray had ordered the department to cease its collection activities and the department, pointing to G. L. c. 119A, § 6, nevertheless continued with them. See Gray, 422 Mass. at 675 n.13.

at 345 ("The execution of sentences according to standing laws is an attribute of the executive department of government").

Civil commitments are different. Unlike criminal sentences, where, as soon as the sentence is handed down, the power to execute the sentence is within the executive branch, both G. L. c. 123 in general, and subsequent commitments under § 18 (a) in particular, require the judiciary to make findings and issue an order concerning placement. This is in line with the purpose of c. 123, which was enacted in part to expand access to courts for those subject to civil commitments. See Nassar, 380 Mass. at 912 n.5 (noting that Legislature completely rewrote c. 123 in 1970, and that prior law was thought to be "confusing, inconsistent and inadequate, and the civil rights of the mentally ill [were] not properly protected" [citation omitted]). Moreover, requiring a judge to determine whether the strict security of Bridgewater is required is in line with one of the core concerns of c. 123: ensuring that commitments take place in the least restrictive environment. See id. at 917-918 (detailing how c. 123 imposes least restrictive alternative requirement).

Once the Legislature has properly directed the judiciary to issue an order, that order must be respected by the coequal branches. Cf. Gray, 422 Mass. at 675 n.13 (ignoring explicit court order may subject executive official to contempt charge).

In such cases, there is no room in art. 30 for a provision that allows executive officials to undo what the court has ordered to be done. Consequently, the commissioner's certification provision of § 18 (a) violates art. 30.[13]

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[13] The dissent's proposed solution that the plaintiff seek redress either by means of a civil action in the nature of certiorari pursuant to G. L. c. 249, § 4, or under G. L. c. 123, § 9 (b), does not resolve the art. 30 violation.

Section 9 (b) does not adequately protect a civil committee's rights because on a § 9 (b) petition, the committee bears a much higher burden than at the original § 18 (a) proceeding. See Andrews, petitioner, 449 Mass. 587, 595 (2007) ("an applicant under § 9 [b] bears the burden of proving by a fair preponderance of the evidence that his situation has significantly changed since last his confinement was reviewed judicially, whether on the basis of new factual developments or new evidence, so as to justify his discharge or transfer"). Practice guides reflect this point. See Committee for Public Counsel Services, Mental Health Proceedings in Massachusetts § 6.13.2 (Mass. Cont. Legal Educ. 7th ed. 2020), https://www.publiccounsel.net/mh/wp-content/uploads/sites/3/Chapter-06-CE_LE-Final-DRAFT-March-2020.pdf [https://perma.cc/TPV7-PPA2] ("While a client may file [a § 9 (b)] petition at any time, counsel should advise that the Superior Court is likely to dismiss the petition if filed too soon after the court hearing"). At the original § 18 (a) proceeding, in contrast, the superintendent bears a burden of proof beyond a reasonable doubt.

Neither is certiorari review under G. L. c. 249, § 4, appropriate. "To obtain certiorari review of an administrative decision, the following three elements must be present: (1) a judicial or quasi judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review." Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 726 (2016). The commissioner's certification is a unilateral move absent any hearing, written findings, or record of any kind. It is not "judicial or quasi judicial" in nature and, even if it

2. Severability. "When part of a statute is held unconstitutional, 'as far as possible, [we] will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part.'" Cole, 468 Mass. at 308, quoting Peterson v. Commissioner of Revenue, 444 Mass. 128, 137–138 (2005). Severability entails a two-step examination in which we determine, first, whether the invalid portion of the statute is "capable of separation" and, second, whether "upholding the statute as severed would frustrate the legislative purpose." Chambers v. RDI Logistics, Inc., 476 Mass. 95, 104 (2016). We conclude that the commissioner's certification provision is severable from the remainder of § 18 (a).

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was, there would be no record for a judge to review to determine whether error had occurred.

To take a step back, the procedural mechanics are less important. Assuming that proper judicial review of the commissioner's certification was available, it would only help satisfy procedural due process problems presented by the provision. No amount of review, however, can save the commissioner's certification from violating art. 30. The commissioner's certification still runs contrary to the principle that judicial decisions cannot be "subject to later review or alteration by administrative action." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948). See also Opinion of the Justices, 234 Mass. 612, 621-622 (1920) (court orders are "wholly under the control of the judicial department of government").

First, "[a] statute is capable of separation where, as here, the severed provision 'is not so connected with and dependent upon other clauses of the act as to constitute an essential factor of the whole'" (citation omitted). Chambers, 476 Mass. at 104. The commissioner's certification provision operates independently from the judicial determination. Indeed, the problem with the certification is that it provides the commission an independent override of the judicial determination. Thus, the provision is capable of separation.

Second, we must determine "whether upholding the statute as severed would frustrate the legislative purpose of the . . . statute." Chambers, 476 Mass. at 104. As to all statutes in the Commonwealth, the Legislature has announced its own preference in favor of severability: "The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof." G. L. c. 4, § 6, Eleventh. Further, as detailed supra, c. 123 was enacted to protect the rights of the mentally ill, replacing the prior law that had only "vague and loosely drawn standards of commitability." F.N. Flaschner, The New Massachusetts Mental Health Code -- A "Magna Carta" or a Magna Maze, 56 Mass. L.Q. 49, 50 (1971). It would not frustrate the legislative purpose to retain the provisions of § 18 (a) that allow for a judicial

order of whether a person should be committed to Bridgewater, but to sever the portion that provides that the executive branch may override that decision absent any standards or procedural protections.

Severing the commissioner's certification provision and retaining the remainder of § 18 (a) would also not frustrate the executive branch's statutory responsibility to retain control of detainees and sentenced prisoners. See G. L. c. 124, § 1 (b) (noting commissioner is responsible for, among other things, maintaining security and preventing escapes). See also G. L. c. 125, § 12 ("All persons sentenced to any of the correctional institutions of the commonwealth shall be held in accordance with the sentences or orders of the courts and the rules and regulations of the commissioner"). The parties represent that all inpatient units at DMH facilities are locked, and current DMH policy states that such patients may not have unsupervised privileges outside of locked areas. Finally, should safety concerns nonetheless occur, the statute contains a stop-gap provision allowing for patients to be temporarily transferred from DMH facilities to Bridgewater due to those concerns pending a judicial hearing. G. L. c. 123, § 13.

Conclusion. The commissioner's certification provision of G. L. c. 123, § 18 (a), violates art. 30. The remainder of § 18 (a) is capable of separation, and thus remains intact. The

matter is remanded to the county court for entry of a judgment allowing the defendant's petition pursuant to G. L. c. 211, § 3, and ordering that K.J. be released immediately from Bridgewater and transferred to a DMH facility, pursuant to the District Court judge's § 18 (a) order.

So ordered.

GAZIANO, J. (dissenting, with whom Wendlandt, J., joins). The court today concludes that the "commissioner's certification" provision in G. L. c. 123, § 18 (a), the statute that allows for the involuntary hospitalization of mentally ill prisoners, is constitutionally unsound. Until now, this provision has allowed the Commissioner of Correction (commissioner) to decide that a prisoner who has been committed to a Department of Mental Health (DMH) facility by a judge instead should be held at the more secure setting of Bridgewater State Hospital (Bridgewater) in order to ensure the prisoner's "retention in custody." The court now holds that this arrangement, adopted by the Legislature more than fifty years ago as part of a comprehensive reform of the Commonwealth's mental health system, see Foss v. Commonwealth, 437 Mass. 584, 587-589 (2002), violates the principle of separation of powers in art. 30 of the Massachusetts Declaration of Rights.

I of course share the court's concern that the limitations of art. 30, "though sometimes difficult of application, must be scrupulously observed." Opinion of the Justices, 302 Mass. 605, 622 (1939). But in its zealous defense of the prerogatives of our own branch, the court disregards the well-established rule that "[t]he constitutionality of a statute should be sustained in absence of evidence clearly to the contrary." See Ellis v. Assessors of Acushnet, 358 Mass. 473, 477-478 (1970). This rule

reflects appropriate judicial respect for actions taken by the elected representatives of the people. "[W]hen we overstep our role in the name of enforcing limits on [the Legislature], we do not uphold the separation of powers, we transgress the separation of powers." See United States v. Davis, 139 S. Ct. 2319, 2337 (2019) (Kavanaugh, J., dissenting).

A statute violates art. 30 when it "unduly restrict[s] a core function of a coordinate branch" (quotation omitted). Atwater v. Commissioner of Educ., 460 Mass. 844, 855 (2011), quoting Commonwealth v. Gonsalves, 432 Mass. 613, 619 (2000). As this court long has recognized, however, art. 30 does not require the three branches of government to be "watertight compartments." See Gonsalves, supra, quoting Opinion of the Justices, 372 Mass. 883, 892 (1977). See Opinion of the Justices, 365 Mass. 639, 641 (1974) ("an absolute division of the three general types of functions is neither possible nor always desirable"). Under the arrangement put in place by the Legislature, a judge's decision that an individual must be committed to DMH under G. L. c. 123, § 18 (a), anticipates and leaves room for possible further action by the executive branch in a traditional area of executive concern.[1]

[1] While commitment to a mental health facility is not a sentence, the Department of Correction's authority with respect to the placement of convicted prisoners is instructive. See,

In accord with this view of the executive's role, we have held that "statutes in effect at the time of sentencing which give the executive branch certain authority over the terms of the confinement must be read into the court's sentence," such that subsequent "actions taken by the Executive Department pursuant to that authority . . . do not infringe on the powers of the judiciary." Ierardi, petitioner, 366 Mass. 640, 650 (1975). We therefore discerned no violation of the separation of powers when a juvenile whom a judge had committed to a training school was transferred to the Massachusetts Reformatory after several attempts at escape and commission of other crimes. Sheehan, petitioner, 254 Mass. 342, 343, 346-347 (1926). The statute in effect at the time allowed the board that managed the training school to make transfers to the more restrictive institution. Id. at 343-344. We reasoned that this was "not an infringement of the powers of the judiciary . . . because the liability to such transfer upon specified conditions was a part of the original sentence." Id. at 346.

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e.g., Jackson v. Commissioner of Correction, 388 Mass. 700, 703 (1983) (commissioner has "broad discretion . . . to transfer and to place inmates confined within the Massachusetts correctional system . . . for varied reasons such as security, convenience, and rehabilitation"); G. L. c. 124, § 1 (b) (commissioner shall "maintain security, safety and order at all [S]tate correctional facilities" and shall "utilize the resources of the [Department of Correction] to prevent escapes from any such facility").

Rather than scrutinizing whether the commissioner's certification provision allows one branch to "interfere with the functions of another," which we have identified as the "critical inquiry" for challenges under art. 30 (citation omitted), Chelmsford Trailer Park, Inc. v. Chelmsford, 393 Mass. 186, 194 (1984), the court today relies on an overly rigid test based on whether an executive action can in any way be read as conflicting with a judicial order. With respect to G. L. c. 123, § 18 (a), however, the substance of the judge's and the commissioner's determinations focuses on distinct issues that need not conflict. As in any involuntary commitment proceeding, the judge must decide whether confinement other than in "strict custody" would create a "likelihood of serious harm," and whether "such person is not a proper subject for commitment to any facility of [DMH]." G. L. c. 123, § 8 (b). Although this latter consideration might include as a factor a prisoner's likelihood of escape, a judge need not make a specific finding with respect to this risk, whereas the commissioner explicitly is required to do so by G. L. c. 123, § 18 (a). To the extent that some overlap between the two determinations does occur, in

these specific circumstances, there is no constitutional violation.[2]

I agree that, in general, a court's final judgment "can be reversed, modified or superseded only by judicial process." Opinion of the Justices, 234 Mass. 612, 621 (1920). But as the court concedes, the cases enunciating this principle all involved a statute that retroactively invalidated a decision that already had been issued, as opposed to creating in advance a scheme in which the judiciary and the executive cooperate. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 213, 240 (1995) (invalidating statutory provision requiring Federal courts to reopen final judgments); Department of Revenue v. Jarvenpaa, 404 Mass. 177, 178, 183-184 (1989) (invalidating statute allowing Commonwealth to relitigate issues in paternity actions from before its enactment); Spinelli v. Commonwealth, 393 Mass. 240, 241 (1984) (striking down statute restoring one specific case to active status after dismissal). The

[2] I agree that the commissioner's determination that the plaintiff posed an escape risk is not supported by any evidence in the record before us. But this court should not distort art. 30 jurisprudence because of its displeasure with a single arbitrary decision by the commissioner. Rather, I would allow the plaintiff to seek judicial redress either by a civil action in the nature of certiorari under G. L. c. 249, § 4, or under G. L. c. 123, § 9 (b), which permits petitions for the release of an individual detained at Bridgewater.

commissioner's certification provision is not such an ex post facto attack on specific final judgments.

As the court recognizes, declaring a Legislative enactment unconstitutional is "the gravest and most delicate duty" that courts undertake. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.). Yet today, the court exercises this power without sufficient consideration of the judiciary's obligation to respect coordinate branches by "constru[ing] statutory provisions, when possible, to avoid unconstitutionality." Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167 (1998). Because a reading of the commissioner's certification provision as in line with this court's past decisions on art. 30 is available, I respectfully dissent.