HJR
5

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

Alaska State Legislature

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3704
(907) 465-3935

Senate

Committee on Resources

MEMO

To: Senator Bill Ray, Chairman
Senate Judiciary Committee

From: Senator Bettye Fahrenkamp

Date: May 17, 1983

Subject: HJR 5

Enclosed you will find backup materials in support of HJR 5, which was recently read across and referred to your committee.

I strongly support this legislation, and urge your early consideration of the measure.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

FEB 25 1983

February 25, 1983

MEMORANDUM

TO: Representative Mike Syzmanski

FROM: Susan Brody, Director SEB

RE: Regulation Review by the Legislature
Research Request No. 83-87

Mark Higgins of your staff asked us to provide information relating to legislative review and annulment of administrative regulations. The following materials are attached to this memorandum:

- The 1980 Alaska Supreme Court decision in State of Alaska v. A.L.I.V.E Voluntary[1] which declared unconstitutional the legislature's annulment of regulations by concurrent resolution (see Attachment A).

- A memorandum from Billy Berrier, Director of the Legal Services Division, discussing the Supreme Court decision (see Attachment B).

- The November 1980 Voters' Pamphlet description of Ballot Proposition No. 1. The measure, if it had been adopted, would have amended the State Constitution to permit the legislature to annul regulations by resolution (see Attachment C). The ballot measure failed, with 58,808 voting for the measure and 82,010 voting against.

Mr. Higgins asked if we could provide any committee testimony on CS HJR 82 which put the measure on the ballot. We have obtained the tapes of both the Senate and House Judiciary Committee sessions on the resolution; however, we have not had an opportunity as yet to listen to them. The tapes have not been transcribed and there is no additional information on the committee hearings at the Legislative Library. Please let us know if you would like copies of the tapes or if you wish us to summarize the hearings. (It would probably be several weeks before we could complete the summary.)

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[1] State of Alaska v. A.L.I.V.E. Voluntary [606 P.2d. 769].

We were also asked to identify the number of times regulations had been changed or annulled by the legislature prior to the A.L.I.V.E. decision. To date, we only have had time to compile data on resolutions affecting regulations for the period 1975-80. For that period, there were ten resolutions introduced to annul regulations, two of which were passed by the legislature. In that same period, four resolutions requested a change in regulations, none of which passed. Four additional resolutions were introduced to approve regulations, two of which passed. Similar data for the period from 1959 to 1975 will take additional time to compile.

For your information, we have also attached a 1979 publication of the National Conference of State Legislatures (NCSL) entitled Restoring the Balance: Legislative Review of Administrative Regulations, (see Attachment D). This report provides descriptions of procedures used in other states to review agency regulations and contains recommendations to assist legislators in developing effective review procedures.

We will provide the additional information you requested by March 15. If this completion date will present a problem for you, please let me know.

SB/sj

Attachments

A State v. A.L.I.V.E. Voluntary

B Memo from Legal Services on A.L.I.V.E. decision

C Ballot Proposition No. 1 Legislative Annulment of Regulations

D Restoring the Balance Legislative Review of Administrative Regulations

ATTACHMENT A

State v. A.L.I.V.E. Voluntary

STATE of Alaska and Department of Revenue, Appellants.

v.

A.L.I.V.E. VOLUNTARY, Appellee.

No. 3670.

Supreme Court of Alaska.

Feb. 19, 1980.

Unincorporated association, which was political action committee for unions, brought suit based on allegation that Department of Revenue's denial of permit allowing association to operate lotteries was wrongful for certain reasons including fact that such denial was based on continuing enforcement of a regulation despite its nullification by legislature. The Superior Court, Third Judicial District, Peter J. Kalamarides, J., granted association partial summary judgment, and State and Department of Revenue appealed. The Supreme Court, Matthews, J., held that statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation.

Reversed and remanded with directions.

Boochever, C. J., dissented and filed opinion in which Connor, J., joined.

1. Statutes ⇐107(1)

Constitutional requirements that every bill be confined to one subject and that there be a descriptive title are intended to prevent inclusion of incongruous and unrelated matters in same bill and to guard against inadvertence, stealth and fraud in legislation. Const. art. 2, § 13.

2. Statutes ⇐15, 19

Purpose of state constitutional provision requiring three readings of a bill on three separate days, requiring that vote of each legislator on final passage of a bill be recorded and requiring that no bill pass without an affirmative vote of the majority of the membership of each house is to ensure deliberation prior to passage, to ensure that requisite majority of each house affirmatively votes to enact a bill into law and to provide a public record of the vote cast by each legislator. Const. art. 2, § 14.

3. Statutes ⇐26

Purpose of state constitutional provisions to effect that no bill shall become law unless governor has opportunity to veto it is to preserve integrity of executive branch of government, and thus maintain equilibrium of governmental powers, and to act as a check on hasty and ill-considered legislation. Const. art. 2, §§ 15, 17.

4. Statutes ⇐255

Purpose of state constitutional provision that laws are not to become effective, unless a two-thirds vote of membership of each house provides otherwise, until 90 days after they are enacted is to provide fair opportunity to those people affected by the legislation to learn of it. Const. art. 2, § 18.

5. Statutes ⇐22

Statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation. Const. art. 2, §§ 1 et seq., 5, 13-18; art. 3, § 23; art. 10, § 12; AS 44.62.320(a).

6. Statutes ⇐22

When legislature wishes to act in an advisory capacity it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in State Constitution. Const. art. 2, § 1 et seq.

7. Statutes ⇐22

Legislature has no implied general power to veto agency regulations by informal legislative actions. Const. art. 3, § 23; art. 10, § 12.

5. Administrative Law and Procedure ⇐385

Power granted by state constitutional provisions to effect that, unless they are disapproved by legislature within 60 days, changes in the law by executive order shall become effective at a date thereafter to be designated by governor and that recommendations made by a state local boundary commission become effective 45 days after presentation to the legislature unless vetoed is not rule-making power, but, rather, power to change statutes, and, thus, expression of such power in Constitution does not carry any implication that general administrative rule making is meant to be forbidden. Const. art. 3, § 23; art. 10, § 12.

9. Constitutional Law ⇐60

Though legislature can delegate power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by Constitution; fact that legislature can delegate legislative powers to others, who are not bound by constitutional provisions defining the mechanics of legislation, does not mean that legislature can delegate the same power to itself and, in the process, escape from such constitutional constraints under which it must operate. Const. art. 2, § 1 et seq.

10. Constitutional Law ⇐58

Though power to void agency regulations can be exercised by either legislature or agency, if legislature exercises such power it must do so while acting as a legislature; it may not grant itself the power to act as an agency. Const. art. 2, §§ 1 et seq., 5; art. 3, § 26.

Joseph K. Donohue, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellant.

Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for appellee.

Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for amici curiae Alaska Legislative Council and Administrative Regulation Review Committee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

AS 44.62.320(a) provides:

> The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

This statute encompasses a variant of what has come to be called the legislative veto.[1] The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

I

Chapter 15 of Title 5 of the Alaska Statutes authorizes games of chance and skill to be operated by permit holders. Only certain kinds of games, ("bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill") are allowed,[2] only nonprofit organizations may be issued a permit,[3] and all revenues must be devoted to "the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses".[4] The Commissioner of Revenue has been delegated the authority to adopt rules and regulations "necessary to

1. For excellent histories of the legislative veto, see Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?* 41 Cal.L.Rev. 565 (1953); and Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975).

2. AS 05.15.100.

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

carry out this chapter or protect the best interest of the public."[5]

From 1960 until 1976 one of the Commissioner's regulations prohibited lottery operators from giving prizes exceeding $15,000 in personal property or $30,000 in real property annually.[6] In November of 1976 the regulation was amended by increasing the annual personal property limit to $30,000 and the annual real property limit to $50,000 and by stating that personal property included cash and negotiable instruments.[7]

A.L.I.V.E. Voluntary is an unincorporated association which acts as the political action committee for the Teamster's Union Local No. 959, and affiliated unions. For three years it has operated fund raising lotteries under a permit issued by the Department of Revenue. It applied for a permit for 1977 and reported that during 1976 it had distributed $80,000 in cash prizes. The Department denied A.L.I.V.E. a permit for 1977 on the ground that its prize distribution in 1976 had exceeded the allowable limit.

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation which was in effect for most of 1976 cash prizes were not included within the personal property limitation of $15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by concurrent resolution, 15 AAC 05.410(4).[8]

As a result of the legislative annulment A.L.I.V.E. added another count to its complaint under which it claimed that the denial of its permit was wrongful because it was based on continuing enforcement of the regulation despite its nullification by the legislature. In response, the state claimed that the legislature could not constitutionally annul an administrative regulation by concurrent resolution and therefore the regulation had not been annulled. Both parties moved for summary judgment on this issue. The court granted partial summary judgment in favor of A.L.I.V.E., holding that the legislative annulment power was constitutional and that the regulation in question was void *ab initio*.[9]

5. AS 05.15.060(11).

6. The regulation was designated 15 AAC 05.410(4). It provided:
In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $30,000.00 in any one calendar year.

7. As amended the regulation reads:
(4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of $30,000 in any one calendar year and real property in excess of the sum or value of $50,000 in any one calendar year.

8. Legislative Resolve No. 79, in full, states:
Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.
BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:
WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and
WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to $30,000 in personal property and $50,000 in real property; and
WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and
WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS 05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;
BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

9. That is, since 1960, Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. *See* note 6, *supra*.

II

The Alaska Constitution defines with specificity the mechanics of legislation.[10] Each provision has a purpose "designed to engender a responsible legislative process worthy of the public trust." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[1] Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.[11]

[2] Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978). and to ensure an opportunity for the expression of public opinion and due deliberation.[12] Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[3, 4] In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it.[13] This power is granted " 'to preserve the integrity of . . [the executive] branch of government . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon corrupt or hasty and ill-considered legislation.' " *Thomas v. Rosen*, 569 P.2d 793, 795 n. 5 (Alaska 1977) (citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.[14]

[5, 6] The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that the requirements of Art. II § 14 are mandatory, not permissive.[15]

10. Art. II, § 13 provides:

> *Form of Bills.* Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska." Art. II, § 14 provides:
>
> *Passage of Bills.* The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

11. *See* 3 Proceedings of the Alaska Constitutional Convention 1746–48 (January 11, 1956).

12. *See* 3 Proceedings of the Alaska Constitutional Convention 1751–54 (January 11, 1956).

13. Art. II, §§ 15, 16 and 17.

14. *See* 4 Proceedings of the Alaska Constitutional Convention 3110 (January 25, 1956).

15. We also referred to the Art. II, §§ 14 and 15 safeguards in *North Slope Borough v. Sohio*

The minutes of the proceedings of our constitutional convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

> Now, a majority vote in each house of the legislature is not equivalent to passing a law, because it does not require the signature of the governor, and it does not require conformance with the provisions of this constitution and the provisions of such laws as will be passed under it with respect to the procedure in enacting a law. So, when we say in the second sentence, "The state may by law," we are saying that that law must be passed by the legislature in the manner that is required by the constitution and the statutes, and either signed by the governor or passed over his veto or become law without his signature in the manner provided in the constitution, which we felt was the real intention of the body rather than merely requiring that the legislature by a majority in each house and without adhering to any of those other restrictions and without any reference to the governor could contract debt on behalf of the state.

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity.[16]

Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 12[illegible] Ill. 322, 11 N.E. 180 (1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed by the Illinois Constitution had not been followed. Speaking of them, the court stated:

> That these various provisions, giving the form and mode by which, through the concurrent action of the legislative and executive departments, valid and binding laws are enacted, are, in the highest sense, mandatory, cannot be doubted.

11 N.E. at 185. The court went on to note that

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential. [Citation omitted].

Id.

In *Mullan v. State*, 114 Cal. 578, 46 P. 670 (1896) the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

> A mere resolution . . . is not a competent method of expressing the legislative will, where that expression is to

Pet. Corp., 585 P.2d 534, 543 n. 11 (Alaska 1978), stating: "Our constitution imposes certain requirements of formality on legislative action. . . . The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report."

16. *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 495 (1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition "that any such pledge shall first be approved by joint resolution of the Senate and House of Representatives." *Id.* 218 P.2d at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." *Id.* 218 P.2d at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U.L.Rev. 1031, 1043 n. 56 (1955).

have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

Moran v. La Guardia, 270 N.Y. 450, 1 N.E.2d 961 (1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution:[17]

> A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment . . . To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute . . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days . . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by itself and independent of the others, is necessary. No two of them acting together, much less alone, can make a law." [Citations omitted].[18]

1 N.E.2d at 962.

[7, 8] The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session . . . .", such changes shall "become effective at a date thereafter

17. The other alternative holding was that the statute had not authorized termination by resolution.

18. To the same effect are: *Becker v. Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853 (1934); *Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General*, 85 Ohio St. 251, 97 N.E. 967, 973 (1912) ("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . . ."); *Scudder v. Smith*, 331 Pa. 165, 200 A. 601, 604 (1938) ("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]"); *State ex rel. Todd v. Yelle*, 7 Wash.2d 443, 110 P.2d 162, 165 (1941) ("It is . . . clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill . . . "); *Rowley v. City of Medford*, 132 Or. 405, 285 P. 1111, 1114 (1930) ("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."); *Hawks v. Bland*, 156 Okl. 48, 9 P.2d 720, 721 (1932) ("[a] resolution is the mere expression of an opinion and not an enactment of law."); *Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News*, 307 F.Supp. 1113, 1115 (E.D.Va.1969) ("[.]he resolution expresses only the opinion of that legislative body.").

to be designated by the governor."[19] On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house."[20]

There are several noteworthy aspects of these expressed powers. First, they are accompanied by specific time deadlines. Second, the deadlines are different, sixty days in one case and forty-five days in the other. One may question, if there is an implied legislative veto power in the constitution, whether it is accompanied by a time limit, and if so, what the limit is. Third, the expressed legislative vetoes annul proposed executive action, they do not change existing law. They therefore do not have the same potential for the disruption of public expectations and ongoing executive programs that the blanket veto in question has. Fourth, the legislative vote required for the exercise of each of the expressed vetoes is different. Re-organization orders may be blocked by a resolution of disapproval concurred in by a majority of the members of the legislature in joint session,[21] while boundary change vetoes require disapproval by a resolution concurred in by a majority of the members of each house.[22] Since the Senate has twenty members and the House has forty,[23] these differences can be quite important. The votes of thirty legislators are required to forestall a veto taken in joint session, while ten senators can prevent a veto if the vote is to be by a majority of the members of each house. Here, as with the differing time deadlines mentioned above, one may inquire as to which voting method the constitution would impose as part of an implied general legislative veto power. The answer, of course, is that the constitution contains no clue. In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional.[24] They are *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950); and *Reith v. South Carolina State Housing Authority*, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976).[25]

19. Art. III, § 23.

20. Art. X § 12. We do not agree with the dissent's characterization of the power granted in these two provisions as rule-making power, which we see as the power to interpret and implement statutes. Rather, the power contained in these provisions is the power to *change* statutes; therefore, the expression of these extraordinary powers in the constitution cannot be regarded as carrying an implication that general administrative rule making was meant to be forbidden.

21. Art. III, § 23.

22. Art. X, § 12.

23. Art. II, § 1.

24. The dissent suggests that our comment in *Boeri v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the *constitutionality* of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

25. The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. *See Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284–85, 96 S.Ct. at 757–58, 46 L.Ed.2d at 836–39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 152 U.S.App.D.C. 21, 559 F.2d 642 (D.C.Cir.) (en banc) *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), but Circuit Judge MacKinnon reached the merits in a vigorous

The New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

> The procedure which [the reorganization statute] provides is in distinct contrast to that contemplated by the Constitution. Consent is to be manifested by silence or adjournment, and disapproval by "concurrent resolution" . . . [T]he contemplated procedure violates the constitutional provisions requiring separate action by each house of the Legislature . . . [T]he act would dispense with the "passage" of any measure, as that word is commonly used, and with the requirement of presentation to the Governor. In a sense the act provides for a reversal of the democratic processes required by the Constitution, for under it the Governor would propose the legislative action, rather than approve or disapprove of action taken. 83 A.2d at 741.

In *Reith v. South Carolina State Housing Authority*, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976), the South Carolina Court of Common Pleas considered, *inter alia*, the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution."[26] The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws.[27] On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional.[28] The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue.[29]

Atkins v. United States, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because it contravened article I, section 1 of the United States Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, *en banc*, in a four-to-three decision, upheld the statute.

Atkins is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped its reasoning and conclusion. *Id.* at 1058–60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed *supra*, pp. 772, 773. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution:[30]

dissent criticizing Justice White's conclusion in *Buckley*, 182 U.S.App.D.C. at 64, 559 F.2d at 685.

26. *Reith v. South Carolina State Housing Authority*, Op. at 9.

27. *Id.* at 10.

28. 225 S.E.2d at 848–49.

29. 225 S.E.2d at 848.

30. U.S.Const. art. I, § 1 provides:

"[T]he clause does not itself, as a textural matter, mechanically direct the manner in which Congress must exercise the legislative power." *Id.* at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. *Id.* at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . . ." *Id.* at 1064. In contrast, the annulment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense,[31] and annulling any one of them effects a change in the law.

IV

We turn now to a discussion of the major arguments of Appellee and the Amici.

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied.[32] We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

[9] The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a deligation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.[33]

[10] To illustrate this point we may assume that the legislature has the power to establish an independent agency which would have the power to disapprove of agency regulations. Since the agency would be a part of the executive department the article II constraints on legislative action would not govern its functions. Could the legislature instead convey to its own members the power to act as such an agency free from these constraints? The answer, we think, is clearly no for that would amount to dual officeholding, prohibited by article II, section 5,[34] and would

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

31. 1 Mezines, Stein & Gruff, Administrative Law § 1.02[2] at 1–45 (1977); 2A Sutherland, Statutes and Statutory Construction § 49.05 at 240 (4th ed. Sands 1973), which states:

> An administrative agency may be vested with the power to promulgate legislative interpretive rules which have the force and effect of law. Such powers must be limited by a standard, and, when exercised, the ensuing regulations, if within the standards, have the same efficacy as an original statute enacted by the legislature. [Footnote omitted].

32. The same argument was unsuccessfully made in *Bradner v. Hammond*, 553 P.2d 1, 4 nn. 4 & 5 (Alaska 1976).

33. "A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983, 1067 n. 430 (1975).

34. Art. II, § 5 provides in relevant part:

> *Disqualifications.* No legislator may hold any other office or position of profit under the United States or the State.

infringe on the executive appointment power set out in article III, section 26.[35] While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.

It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee,[36] or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

In *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975), at issue was a statute empowering an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. *Id.* 543 P.2d at 1321.[37] The same reasoning was employed in *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), where the Court of Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an appointment." *Id.* 168 N.E. at 822. *See also, Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 223 (1912); *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257, 264 (1938). *Contra, Opinion of the Justices*, [illegible] N.H. 359, 266 A.2d 823 (1970).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight cannot take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important, the question of

35. Art. III, § 26 provides:

> *Boards and Commissions.* When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

See, e. g., Buckley v. Valeo, 424 U.S. 1, 118–43, 96 S.Ct. 612, 681–693, 46 L.Ed.2d 659, 744–58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress; *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929) discussed *infra*, p. 778.

36. In fact, under AS 24.20.445(a), the Administrative Regulation Review Committee, a permanent joint committee of the legislature, is granted the power to suspend the operation of any regulation adopted after adjournment of the legislature until thirty days after the legislature reconvenes.

37. The people of Alaska recently rejected a constitutional amendment which, like the law struck down in Montana, was designed to vest the power to approve budget revisions in an interim legislative committee. *See* Alaska Const. art. II, § 11 (proposed amend. 1978 Supp.).

whether the legislature might perform a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv.L.Rev. 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. *Id.* at 1409–20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, *supra*, pp. 772, 773.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion *supra*, pp. 772, 773.

Appellee finds it significant that the Alaska Constitution contains no provision like that in section 7, clause 3 of article I of the United States Constitution[38] which authorizes the executive to veto legislative resolutions, and argues that executive involvement in the enactment of resolutions was not deemed necessary by the framers of the state constitution. This point, however, does not advance Appellee's case. Under the United States Constitution joint resolutions are one means by which laws are enacted;[39] they are therefore naturally included among those legislative acts subject to Presidential veto. However, under the state constitution resolutions are not an alternative law enactment process, and therefore there is no need to make them subject to an executive veto.

The Amici contend that since AS 44.62.320(a) was itself passed in accordance with all constitutional mandates and since the governor had the opportunity to veto the statute, constitutional requirements have been satisfied with respect to subsequent acts of the legislature taken pursuant to the statute. In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto.[40] It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.

REVERSED AND REMANDED with directions to enter partial summary judgment in favor of the state as to the effect of the concurrent resolution and for further proceedings.

BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

I

I believe that the legislative power to annul administrative regulations by concur-

38. This clause provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. [Emphasis added].

39. *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 785 (1889).

40. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L.Rev. 983 at 1067 (1975).

rent resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations.[1] Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readings on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature, a public record of the vote cast, being subject to veto by the governor, a 90-day waiting period before becoming effective.[2] Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary for enacting a bill into law.

This issue was considered by this court shortly after statehood in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960), where we stated:

> The legislative power of the state "is vested in a legislature." It is argued that because of this constitutional provision the power may not be delegated.
>
> But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

One of the bases specified in *Boehl* for upholding this power of the legislature to delegate regulatory authority was the identical right to annul regulations which the majority now finds to be unconstitutional. In *Boehl* we stated:

> It also is not essential, in order to sustain the grant of authority, that the legislature circumscribe administrative discretion by express standards of action in order that the opportunity for capricious exercise of power will not exist. There is slight danger of that. The exercise of the board's powers is hedged about by substantial safeguards. Before the board may act it must conduct a public hearing and afford any interested person the opportunity to be heard, and it must then "consider all relevant matter presented to it." There is ample opportunity for judicial review; for "any interested person may obtain a judicial declaration as to the validity of any regulation • • •". Finally, there is legislative supervision. The legislature, which meets annually, may revise the statute and thus restrict the bounds of administrative action; *it has the power by resolution to annul any agency or department rule or regulation*; and the Legislative Council, an interim legislative committee charged with the duty of making recommendations to the legislature, must annually review all agency regulations to determine if the legislative intent is being correctly followed.

349 P.2d at 590 (emphasis added) (footnotes omitted).

1. The constitution does authorize "[r]egulatory, quasi-judicial and temporary agencies" to be established by law. Art. III, § 22. There are no constitutional requirements for promulgation of regulations.

2. AS 44.62.180 does specify that, with certain exceptions, regulations become effective on the 30th day after filing by the lieutenant governor.

In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in *Boehl* that the legislature has that power.

II

The advent of the industrial revolution vastly increased and complicated the tasks of legislatures. Due to limits of time and specialized expertise, legislatures have found it impossible to prescribe laws adequately covering the tremendously varied and intricate forms of social relationships arising out of the proliferation of business, manufacturing, trade, transportation, communication and commercial enterprises.[3] Of necessity, legislative authority had to be delegated to administrative agencies. Nevertheless, both in England and in the United States, efforts were initiated to maintain some controls over broad delegations of authority.[4]

England has long utilized the laying system, whereby an administrative order or regulation must be laid before Parliament for a specified period of time before becoming effective.

> Parliamentary control over administrative rules and regulations . . . is asserted principally through provisions in enabling statutes that rules made under them shall be laid before Parliament. This is customarily combined with a provision in the statute, either that the rule shall not be operative until it is approved by resolution, either of both Houses or of the House of Commons alone . . ., or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void . . .[5]

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years.[6] The early stages of the dispute involved the Reorganization Acts of the 1930's and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that period Congress disapproved by resolution.[7] Federal acts incorporating similar provisions have proliferated in recent years.[8] Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations.[9]

III

I agree with the majority that there is scant case authority on the specific issue in

3. *See generally* Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif.L.Rev. 513 (1964).

4. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 638 (1957); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L.Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U. L.Rev. 1045 (1955).

5. Schwartz, *supra* note 4 at 1032–33.

6. *Clark v. Valeo*, 152 U.S.App.D.C. 21, 25–29, 559 F.2d 642, 649–50 (D.C.Cir.) (*en banc*) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 257 (1977).

7. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569, 576–82 (1953). The 1939 and 1945 Reorganization Acts provided for disapproval by a concurrent resolution; the 1949 Act allowed disapproval by either House. *Id.* at 579, 581.

8. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif.L. Rev. 983, 998 (1975). An appendix to this article lists many statutes giving special effect to congressional resolutions. Many have been passed in the 1970's and involve veto power over actions of executive agencies or the President. *See id.* at 1089–92 app. A.

9. Stewart, *Constitutionality of the Legislative Veto*, 13 Harv.J.Legis. 553, 595 (1976).

the United States. Our court, however, has favorably discussed the legislative veto in *Boehl*.

The holding in *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977) (*en banc*) (*per curiam*), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), supports the position taken in this dissent. *Atkins* upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view *the power of either House to disapprove as equivalent to legislation* or to an order, resolution or vote requiring the concurrence of both Houses.
>
> 424 U.S. at 284–85, 96 S.Ct. at 757, 46 L.Ed.2d at 838–39 (emphasis added) (footnotes omitted).

The majority cites *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. *Id.* 83 A.2d at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." *Id.* 83 A.2d at 741–42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary increases to be approved by a legislative committee prior to submission to the governor for final approval. *Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970). The court, without analysis of its earlier opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. *Id.* 266 A.2d at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of

policy. Accordingly, the legislature's power to select the means of participation should be generously construed.[10]

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the annulling action is taken at the first session of the legislature following promulgation of the regulation.[11]

I believe that a statute can validly condition the delegated power to enact regulations by requiring that the regulations be subject to annulment by resolution, just as it could limit the effective date of the new regulations or the length of time during which they would be in force. I find no material difference between AS 44.62.320 and other statutes, upheld by the United States Supreme Court, that condition the exercise of rule-making authority by approval of private citizens.[12] If private citizens can exercise such power, then certainly the legislature should be able to exercise the same power.

V

As the majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, section 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session," [13] and article X, section 12, concerning local boundaries, which provides that the legislature may veto by resolution local boundary changes proposed by an executive branch commission.[14]

The majority concludes that these two express provisions creating a legislative veto by resolution exclude the possibility of an implied legislative veto. They state:

> In our view, the specificity with which the constitution deals with the legislative

10. We have held that when the legislature exercises power with reference to an essentially executive function those powers should be construed narrowly. *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976). Conversely, when, as here, a basically legislative function is involved, the powers of the legislature should be construed broadly.

11. A long-term scrutiny of executive action taken pursuant to regulations leading to delayed annulment might involve legislative infringement on the executive power to enforce laws. We are not confronted with such a question and need not pass on it because the regulation here in question was annulled at the first legislative session following its promulgation. We are similarly not confronted with an annulment by a single legislator, a committee of the legislature, or by one house.

12. *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574–76, 59 S.Ct. 993, 1013–15, 83 L.Ed. 1446, 1470–72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured); *Currin v. Wallace*, 306 U.S. 1, 15–16, 59 S.Ct. 379, 387–388, 83 L.Ed. 441, 451–52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

13. The full text of article III, section 23, provides:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

14. Article X, section 12, provides:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

In my view, the expression of some powers in these provisions does not lead to the conclusion that the constitution forbids either an expansion of rule-making powers in the executive or a denial of the legislative veto. The Alaska Constitution is silent on the question of administrative regulations. It does not say what powers may be delegated, how rules may be promulgated, or whether the legislature may retain a veto power by resolution. Presumably, these were questions that the constitutional drafters thought could best be resolved by the legislature.

There is an aspect of these two provisions, however, that is worthy of some notice. It seems significant that in the only two instances where the constitution does make a specific grant of rule-making power directly to the executive, it does so with a power reserved in the legislature to veto the rule by resolution. There seems to be little logic to a position that maintains that the constitutional drafters would have sanctioned the use of the resolution here, yet demanded the higher enactment standard when the legislature delegated power on its own.

Finally, the majority argues that where a veto power by resolution exists, it must also specify time limits, the method of voting and so forth. This argument is unconvincing. Having allocated a specific rule-making power to the executive branch, it was appropriate for the constitutional drafters to define in the constitution a specific legislative check to that power. This would seem to be a virtual necessity, because any statute that the legislature might pass to circumscribe these executive powers otherwise would in all likelihood be unconstitutional. But where the legislature delegates rule-making power by statute, the constitutional drafters might well presume that the legislature could also design an appropriate system of checks and balances by statute law, as they have done here in AS 44.62.320(a).

VI

It is also of significance that the Administrative Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature.[15] In fact, two of the more active delegates, Hellenthal and Taylor, introduced House Bill 13 which was enacted as chapter 143, SLA 1959.[16] The bill was passed by a House vote of 37 to 1,[17] and by a unanimous Senate vote.[18]

At that time, the governor of Alaska was William A. Egan, who had presided as President over the Constitutional Convention. In signing House Bill 13 into law, Governor Egan delivered the following message to the legislature:

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

15. Thirteen delegates and Convention Secretary (now Judge) Thomas B. Stewart were legislators in the first session of the Alaska State Legislature.

16. 1959 House Journal 52.

17. 1959 House Journal 527.

18. 1959 Senate Journal 705.

> Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized.[19]

Although the governor saw fit to point out a possible constitutional problem with article VI because it required local governing bodies to hold public hearings, no question was raised about the legislature's power to annul regulations by joint resolution.[20]

What was said by the United States Supreme Court about legislation passed by Congress shortly after the enactment of the United States Constitution is apropos here:

> What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification. It was the Congress that launched the government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. . . . This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions.

Myers v. United States, 272 U.S. 52, 174–75, 47 S.Ct. 21, 45, 71 L.Ed. 160, 189–90 (1926) (citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal government.[21] Such a practice, affording a

19. 1959 Senate Journal 1092.

20. *See* ch. 143 (ch. I, art. VII, § 1), SLA 1959.

21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. *See* AS 46.03.755(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.05.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 54 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 60) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs, annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

> For a review of laws from other states relating to annulment of regulations, *see* Jackson, Legislative Review of Administrative Rules and Regulations 1 (July 1977) (papers prepared for Southern Legislative Conference). A chart at the end of Professor Jackson's paper indicates that the following states allow regulations to be annulled by means of resolution: Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, Tennessee, and Vermont. A New York report gives slightly different figures, stating that fourteen of the twenty-two states with legislative review mechanisms have procedures which can "cause an agency rule to be promulgated, approved, amended, modified, or annulled." Task Force on Crucial Problems, Senate Research Service, New York State Legislature, *Administrative Rules . . . What is the Legislature's Role?*, 7 (June 1976). Appellant states that eight states allow nonstatutory legislative annulment—six by concurrent resolution, two by one-House vetoes.
>
> The states which do not allow annulment of the regulation generally provide that a legislative committee may review regulations to determine if they are consistent with legislative intent, hold hearings on questionable regulations, notify the agencies of its doubts, and

practical means of supervision of the broad delegation of legislative powers required by the complexities of modern society, should not be hastily voided.

I conclude that the legislature's annulment of the cash prize regulation, pursuant to AS 44.62.320(a), does not violate the principle of separation of powers, does not provide a means by which the legislature can enact laws without passage of a bill, and does not unconstitutionally encroach on the power of the executive.

ALASKA CHILDREN'S SERVICES, INC., Appellant,

v.

Francis S. L. WILLIAMSON, Commissioner, Department of Health and Social Services, and State of Alaska, Appellee.

No. 4155.

Supreme Court of Alaska.

Feb. 21, 1980.

Nonprofit corporation owning or operating residential child care facilities brought suit challenging ruling of Department of Administration that Department of Health and Social Services was not required to reimburse corporation for amounts by which actual cost increases in providing child care had exceeded predicted increases The State of Alaska Superior Court, Third Judicial District, J. Justin Ripley, J., affirmed the ruling below, and corporation appealed. The Supreme Court, Connor, J., held that: (1) under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases, and (2) statute did not deprive corporation of due process or deny it equal protection.

Affirmed.

1. Statutes ⇐223.2(1)

Two statutes enacted at same time and dealing with same subject matter are in pari materia and should be construed so as to be consistent with one another and in such manner as to give maximum effect to each.

2. Infants ⇐19.4

Under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, such nonprofit corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases. AS 47.40.010(a)(3), 47.40.040(a).

3. Constitutional Law ⇐242.3(2), 278.7(1)
Infants ⇐12

Statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary

sometimes, recommend statutory action by the legislature.

For a discussion of federal laws on the subject, see note 6 *supra*.

ATTACHMENT B

Memo from Legal Services on A.L.I.V.E. decision

Carol Biggs

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM February 23, 1980

SUBJECT: State of Alaska v. A.L.I.V.E. Voluntary

TO: Representative Nels A. Anderson, Jr.
House Majority Leader

FROM: Billy G. Berrier
Director
Division of Legal Services

You have asked my comments on the decision of the Supreme Court in the case of State of Alaska v. A.L.I.V.E. Voluntary, (File No. 3670). A copy of the decision is attached.

The case concerns a regulation relating to games of skill and chance annulled by the legislature. The authority for annulment was AS 44.62.320(a) which provides:

> The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

The Administrative Procedure Act was adopted by the First State Legislature in 1959. This Act provided, among other things, for the procedure by which regulations of agencies or departments are promulgated and the section was enacted as part of that procedure.

The Court held, with a majority opinion of three justices and a strong dissent by two justices, that regulations could not constitutionally be annulled by concurrent resolution since a resolution is not enacted in accordance with the requirements in Article II of the Constitution for adoption of law. The result, of course, is a non sequitor since the majority opinion avoided addressing the difference between regulation and law and finding that despite the difference, the enactment procedures applied. They, therefore, assumed the middle term of the syllogism and rambled widely to provide a substitute for the missing logic. Various cases were cited, only one of which was relevant and that one is no longer good law in its own jurisdiction.

For this reason, it is very difficult to determine the effect of the decision.

The holding is explicit that regulations may not be annulled by concurrent resolution. Although it is not explicitly stated, there is a clear implication that annulment by bill is constitutional.

Beyond that, the Court made several statements which do not appear necessary to the holding in this case. Much of this dicta is in sweeping terms. It casts doubt over substantial areas and, since the reasoning is essentially stream of consciousness rather than coherent, gives only minimal clues concerning the legal status of these areas.

Essentially the areas affected fall into two classes

(1) regulations and legislative oversight of regulations; and

(2) other areas of law where concurrent resolutions are used to provide legislative oversight.

On regulations the majority opinion states broadly:

> "The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists.
>
> * * *
>
> "In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied."

The case law on regulations which the majority opinion cited is not helpful. One of the cases is on point but is no longer good law in its own jurisdiction, the second is a trial court decision and the last is a federal case where the question of a one-house veto was present but not reached. The discussion of this last case illustrates the difficulty in following the reasoning in the majority opinion. The Court referring to the United States Circuit Court decision in Atkins v. United States, 556 F2d 1028 (1977) said:

> The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law. . ." Id. at 1064. In contrast, the annullment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense, and annulling any one of them effects a change in the law.

The connection and logic totally escape me.

In its discussion of delegation of power to annul regulations, an issue injected into the opinion since no delegation is involved in the case before the Court, the opinion is even less helpful. The majority opinion observes:

> "While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.
>
> "It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee, or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees."

Perhaps the second point made by the majority opinion in discussing the desirability of legislative oversight of administrative regulations gives the best clue. The opinion stated:

> Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev., 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly

> informed, and politically unaccountable legislative action. Id. at 1409-20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against.

It should be pointed out that the facts concerning the annulment which was the subject matter of the case do not support a conclusion that the annulment resulted from "secretive, poorly informed and politically unaccountable legislative action" but that, of course, is not material.

It is my conclusion that any annulment of regulation other than by law would be unconstitutional under this case. Although the question is not discussed since it is not relevant to the case, it is very clear that regulations which have the effect of law require statutory authorization and the legislature can withdraw the authorization or establish standards in whatever degree of specificity the legislature desired. Since in case of conflict between statute and regulation the statute controls, it is also clearly permissible to make the substantive statutes detailed thereby leaving less or no areas which must be dealt with by regulations. This latter course, however, involves a loss of flexibility and administrative expertise.

It appears that any form of legislative oversight of administrative regulations would be regarded with suspicion by the court. However, devices such as providing that no regulation can become effective until it has been before the legislature in session for a set time or even a provision that no regulation may become effective unless approved by law are not clearly precluded.

In Plumley v. Hale, 594 P.2d 497 (Alaska 1979), our Court discussed the question of non-retroactive treatment in civil cases. The Court in that case stated:

> In accord with United States Supreme Court precedent, we have previously identified four conditions indicating the propriety of non-retoractive treatment in civil cases: 1) the holding is one of first impression, or overrules prior law, and was not foreshadowed in earlier decisions; 2) there has been justifiable reliance on an alternative interpretation of the law; 3) undue hardship would result from retroactive application; and 4) the

> purpose and intended effect of the holding is best accomplished by prospective application.

The case concerned approval of free conference committee reports without a recorded roll call vote. The Court held the criteria to be satisfied and the decision to be prospective only. In my opinion the facts here, while not as compelling as the facts in Plumley, would lead to a conclusion that annulment of regulations which occurred prior to this case are not affected by the case.

The second major problem area is legislative oversight exercised by concurrent resolution in other areas than regulation oversight. The majority opinion made a very broad statement saying:

> The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose.

(The dissenting opinion quite correctly pointed out this is not the question at all. Justice Boochever said

> In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in Boehl that the legislature has that power.

This view will be significant in subsequent cases which concern the use of concurrent resolutions in context other than annulment of regulations placing as it does the issue before the Court in focus.)

The majority opinion went on the say:

> Of course, when the legislature wishes to act in an advisory capacity if may act by resolution. However, when it means to take action having a binding effect on

those outside the legislature it may do so only by following the enactment procedures.

While the dissent noted that numerous other statutes provide some specific legislative review function by concurrent resolution, the majority opinion does not specifically address this. The sweeping generality of the majority opinion clouds, and on its face forbids, these other functions.

These include:

1. AS 18.45.025 -- Approval of facilities siting permit for nuclear facilities.

2. AS 18.65.060 -- Disapproval of regulations relating to compilation of criminal justice information and release of this information.

3. AS 28.05.021 -- Approval of compacts with other states relating to motor vehicle registration and driving licenses.

4. AS 28.15.141 -- Approval of regulations relating to classification of drivers licenses.

5. AS 28.15.081 -- Approval of regulations relating to drivers license examination.

6. AS 35.10.080 -- Approval of physical facility procurement and planning policy.

7. AS 37.05.280 -- Approval of leases by the state with a rental in excess of $12,000. (While this has general application, it was adopted as part of and specifically relates to construction of public buildings by ASHA for lease to the state and is necessary for the validity of the revenue bonds issued by ASHA.)

8. AS 37.12.080 -- Approval of investments in a single project or to a single applicant by Alaska Renewable Resources Corporation if the investment exceeds $1,500,000 or five percent of the resources of the corporation.

9. AS 38.05.037 -- Disapproval of zoning by the division of lands in the unorganized borough.

10. AS 38.05.182 -- Disapproval of a determination by the Commissioner of the Department of Natural Resources that the taking of royalty on natural resources in money rather than in kind is in the best interests of the state.

11. AS 38.05.065 -- Approval of disposition of oil and gas and contracts for sale of state owned royalty gas or oil.

12. AS 39.23.080 -- Approval of salary commission recommendations. (This is now repealed but until the pay bill this year went into effect, it was the basis on which higher government officials, including the governor, legislators and judges, were paid.)

13. AS 44.55.110 -- Approval of Alaska Power Authority plans. This approval is a specific condition on bonding.

14. AS 44.57.210 -- Approval of projects of the Alaska Toll Bridge Authority. This approval is required before bonds may be issued.

15. AS 46.03.758 -- Disapproval of regulations establishing civil penalties for discharge of oil.

16. AS 46.40.080 -- Approval of Alaska coastal management programs.

While all of these are clouded by the language in the majority opinion, that language is clearly dicta except on the point of annulment of regulations. In my opinion, an attempt to determine whether in later cases the court would follow the broad sweep in the instant case, narrow that sweep depending on the issue before it, or even confine the case to its facts would be pure speculation. Courts have frequently done all three. The majority opinion with its conclusionary approach unsupported by a coherent rationale is of little assistance in determing the scope of the opinion.

Earlier in the opinion, I discussed retro-activity as it applied to regulations annuled by concurrent resolution before the opinion. There is an even stronger case for holding that retroactive application cannot be given to a decision in the areas where annulment of regulations is not in question.

I am, however, very distrubed by the possibility that a future decision in this area could be retroactive to the date of this decision based on a finding by the Court that this decision "clearly foreshadowed" a subsequent decision that resolutions could not be used as prescribed in these statutes. I do not think this would be the decision since certainly at the time of enactment of the laws referred to there was no foreshadowing and bringing all legislative action to a halt in areas of major concern to the state while the legislature re-wrote the law in these areas is certainly not reasonable.

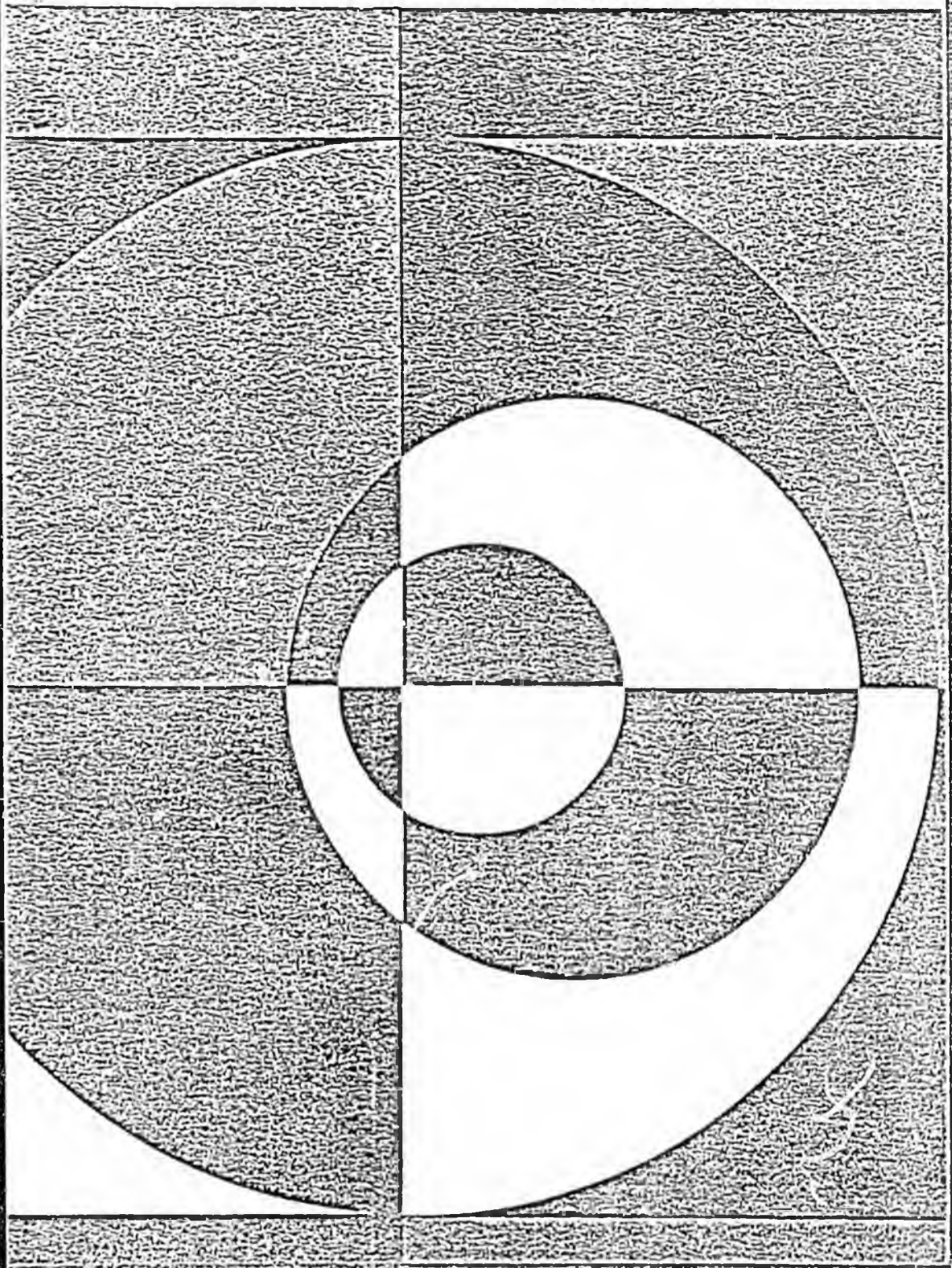
Since the alternative would be to halt, among other things, power development, coastal zone management, and oil and gas sales based on a possibility that the Court will look on legislative oversight in these areas as unfavorably as it does on legislative oversight of regulations, I recommend continuing to operate within the statutory framework now established until the Court, by a subsequent decision, clarifies its position.

I would also recommend that the legislature consider the question of what options are open to it to meet the serious problems created by the case.

BGB:jdn

Restoring the Balance

Legislative Review of Administrative Regulations



RESTORING THE BALANCE

Legislative Review of Administrative Regulations

National Conference of State Legislatures
Legislative Improvement and Modernization Committee
1979

Acknowledgments

The Legislative Improvement and Modernization Committee and the NCSL staff extend our appreciation to the legislators and staff who assisted in gathering information for this report. We would also like to acknowledge the following publications, which were used in preparing this report:

"Administrative Rules — What is the Legislature's Role?," by the Senate Research Service, Task Force on Critical Problems, New York Senate, John M. Flynn and Stephen F. Sloan, (June, 1976).

"Legislative Oversight," by the Institute of Government, University of Georgia, Edwin L. Jackson and Alan J. Howard, (October, 1976).

"Legislative Review of Administrative Regulations," by the Legislative Research Office, Oregon Legislative Assembly (August 8, 1975).

Table of state legislative regulation review procedures and powers, by the Arkansas Legislative Council, Marcus Halbrook, Director, Bureau of Legislative Research.

NCSL staff assistance was provided by William Pound and Fran Valluzzo.

The Legislative Improvement and Modernization Committee of the National Conference of State Legislatures is charged with exploring ways to improve the quality and effectiveness of state legislatures. Over the past two years, the committee has studied the issue of legislative review of administrative regulations, an issue which has been receiving a great deal of attention by state legislatures. This interest has been prompted by public dissatisfaction with the increasing size of state bureaucracies.

This report provides comparative descriptions of the various procedures used by state legislatures to review agency regulations and summary of current state laws on the subject. In addition, the committee has presented nine recommendations to assist legislators in developing effective procedures for regulations review.

NCSL is pleased to present the efforts of the Legislative Improvement and Modernization Committee and is confident this publication will help state legislatures fulfill their responsibilities as equal partners in state government.

State Representative Joe Wyatt, Texas
Chairman, Legislative Improvement
and Modernization Committee

Earl S. Markey
Executive Director
National Conference of State
Legislatures

April, 1978

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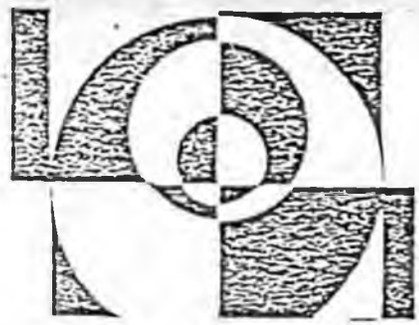


1
THE NEED FOR LEGISLATIVE REVIEW OF REGULATIONS

The past 50 years have seen the growth of government at all levels. The prevailing philosophy behind this growth was that those problems which could not be solved by individual initiative and private action should be solved by the federal, state and local governments.

This philosophy has resulted in a dramatic growth in the executive branch of government as the branch which must implement the programs designed to solve the problems of society. There are numerous reasons for this growth. However, the main reason is that as legislatures passed laws to solve specific problems, a means of enforcing and implementing these laws was necessary.

Legislatures increasingly granted the power to promulgate regulations to the agencies that were created to enforce and implement new programs. Consequently, the expanding number and size of these agencies began to have an effect on the balance of power between the executive and legislative branches of government. The initial question, whether the agencies had the power to promulgate regulations which had the force of law, has been answered in the affirmative by the courts. Judicial decisions have affirmed the legislature's right to delegate a portion of its legislative power to the agencies for the implementation of complex problems.

As more agencies were created or expanded, the number of regulations promulgated to implement laws increased dramatically. In most states today, the body of law created by the rule-making process matches or exceeds the statutory laws of those states. While it was recognized that agency rule-making was necessary for the implementation of laws passed by the legislature, one major concern was the increasing number of regulations that either exceeded the statutory authority of the promulgating agencies or violated the legislative intent of the laws.

Legislatures began to respond to these concerns by establishing formal legislative regulation review procedures. These procedures usually provided, at the very least, that proposed regulations be submitted to a designated legislative committee for review to insure that they were technically correct and within the scope of the statutory authority and legislative intent as stated in the legislation. Most of the laws were part of the

states' administrative procedures act, which set up procedures for the promulgation of regulations.

Thirty-four states currently have formal legislative regulation review authority. The powers of the legislatures under these laws range from review of certain agencies' rules to repeal of rules by the legislature or a legislative committee.

The 1977 legislative sessions were active in providing legislatures with a role in the review of agency rules and regulations. Nine additional states (Georgia, Illinois, Maine, Nevada, New York, North Carolina, Ohio, Texas and Wyoming) established procedures for legislative regulation review. In three other states (New Mexico, North Dakota and Rhode Island), similar bills were vetoed by the governor. Seven states (Alaska, Connecticut, Kansas, Michigan, Missouri, Montana and South Carolina) amended their laws either to clarify existing review procedures or to provide a greater role for the legislature in the review process. Three state legislatures (Colorado, Louisiana and New York) were unable to override the governor's veto of bills amending the regulation review law, while in Michigan and Alaska, the legislature enacted amendments over the governor's veto.

Since in most instances, agency authority stems directly from the legislature, legislative review of regulations can be used to help insure agency compliance with both statutory authority and legislative intent. There have been cases of agencies deliberately attempting to circumvent statutory authority or legislative intent, and in a number of states basic provisions of bills defeated by the legislature have subsequently appeared almost verbatim in agency regulations.

The legislative regulation review process allows the legislature to monitor agency action throughout the year. While the legislature already oversees each agency through the appropriations process, the regulation review process gives it another and more continuous monitoring mechanism. As agency regulations are promulgated, they must pass through a formal review procedure, which includes a legislative review. The legislative review may be advisory in nature or it may allow for disapproval or delay of approval of a regulation.

2
SUMMARY OF RECOMMENDATIONS

In recognition of the need for a legislative regulation review process in each state, the committee makes the following recommendations:

Recommendation #1:

Because of the proliferation of agency regulations and the possibility of promulgation of regulations which violate legislative intent or exceed statutory authority, the committee strongly recommends that legislatures establish procedures for reviewing all agency rules and regulations promulgated with the force of law under authority granted by the legislature, whether or not they are covered by the administrative procedures act. These review procedures should be as strong as the constitution of each state allows. In establishing these procedures, legislatures will be reasserting their legislative prerogatives and regaining the basic lawmaking authority granted to them under state constitutions.

Legislatures should also enact comprehensive administrative procedures acts for their states, or review existing laws, to insure a thorough review of all regulations. These procedures, of which the legislative review process should be a key part, should include 1) a clear definition of an agency regulation; 2) a requirement that agencies' regulations clearly show additions to and deletions from existing regulations; 3) a requirement that all proposed regulations be published in advance of their effectiveness; and 4) a requirement that all regulations be filed with the legislature as provided by the legislative regulation review procedures. The procedures should allow maximum opportunity for public comment both in the promulgation and adoption of regulations as well as in the legislative review process.

To assist legislatures in establishing effective procedures for the legislative review of regulations, the committee makes the following additional recommendations:

Recommendation #2:

After considering the alternative regulation review structures, the committee recommends that a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review

function. The committee should include members representing both houses. Legislatures may also wish to consider including representation from the major substantive standing committees on the review committee.

Recommendation #3:

Recognizing the difference in state constitutions and judicial interpretations, the committee recommends that the strongest possible review structure be created in each state, consistent with the state's constitution.

Recommendation #4:

The committee recommends that the committee or committees designated to perform regulation review be adequately staffed by permanent legislative staff, so that review of regulations is effectively accomplished.

Recommendation #5:

The committee recommends that the review committee in each state have the authority to review all proposed and preexisting regulations.

Recommendation #6:

The committee recommends that reasonable time constraints be imposed on all levels of the regulation review process to provide for adequate review and for expeditious final disposition of regulations by both the committee and the legislature.

Recommendation #7:

The committee recommends that procedures be established for the promulgation of emergency regulations, with reasonable time limitations on committee review and on the effectiveness of those regulations to prevent agency circumvention of the legislative review process.

Recommendation #8:

The committee recommends that the review committee meet often enough to provide adequate review of proposed regulations which agencies file.

Recommendation #9:

The committee recommends that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rule-making authority to administrative agencies be reviewed before introduction to assure that 1) legislative intent is clearly spelled out in the bill, and 2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill.

3
REGULATION REVIEW STRUCTURES

Because of the size of state legislatures, the most effective method of regulation review is through the committee process. The review can generally be divided into three categories: 1) review by substantive standing committees; 2) review by a single joint committee, whether created for that purpose or designated as part of other functions (such as a legislative council); or 3) review by both, with standing committees reviewing during the session and a single joint committee reviewing during the interim.

Standing Committee Review

Regulation review by standing committees is usually initiated in one of two ways. In some states, the agency submits the proposed regulations to the presiding officers of each house for reference to the appropriate standing committee. In other states, the agency submits the regulations directly to a predesignated committee for each agency. Idaho, South Carolina and Louisiana conduct regulation review through the standing committee structure.

In some states, the standing committees perform a second review of regulations after initial review by a joint review committee. Iowa and Minnesota, for example, use this procedure. In Kentucky, a three-tiered system is used. If the review body, a special joint subcommittee of the Legislative Research Commission, objects to a regulation, the agency then submits it to the appropriate standing committee. If that committee objects, the agency submits it to the full legislature.

The standing committee review procedure allows the committee which reported the bill authorizing the promulgation of regulations to review those regulations for compliance with statutory authority and legislative intent. Since committee members and staff usually have the expertise to deal with complex regulations in their substantive areas, their involvement in the review procedure may be advantageous. This system also allows the workload of review to be spread among all the committees.

One disadvantage of this procedure, however, is the possibility of disagreement between house and senate committees reviewing the same

rules. Also, while standing committee members are most familiar with the law authorizing the regulations, they may be too subjective in what they feel is the legislative intent, especially if that intent is not clear in the law. A more serious drawback is the fact that most standing committees have a heavy workload during the session and may not be able to handle a high volume of regulations requiring review. Also, standing committees usually meet much less frequently during the interim, when many new regulations are being promulgated.

Joint Committee Review

The majority of the states with formal regulation review procedures use the single joint committee mechanism. Most of these committees are bipartisan, with either proportional or equal minority representation. Some committees have an equal number of house and senate members while others have more house than senate members.

In some states, the review function is performed by the Legislative Council, the agency which provides all services to the legislature. In Kentucky, the Legislative Research Commission (a joint management body) appoints a three-member regulation review subcommittee composed of at least one member from each house and at least one member of the minority.

One advantage of the joint committee structure is that in nearly all states the committee's primary function is regulation review. It meets fairly regularly, both during the session and during the interim. Another advantage is that the committee acts for the full legislature, not just one house, and makes its recommendations to the full legislature. Unlike the standing committees of each house, the joint committee may be more objective in determining legislative intent from the language of a law.

One disadvantage of this structure is that committee members may have limited knowledge of the substantive areas for which the regulations are promulgated and they may not be familiar with the development of the language of the enabling law which determines legislative intent. Also, there may be the additional cost of staffing the committee, whether with its own full-time staff or with staff from a central staff agency.

Standing Committee/Joint Committee Review

In a number of states the standing committees review regulations while the legislature is in session and a designated joint interim committee performs the review during the interim. Kansas and Nevada both use this system to some extent. In Kansas, all proposed regulations must be submitted by December 31 of each year to the revisor of statutes. During the session, he refers them to both the Joint Committee on Administrative Rules and Regulations and to the appropriate standing committee. The Colorado legislature recently passed legislation to change from a standing

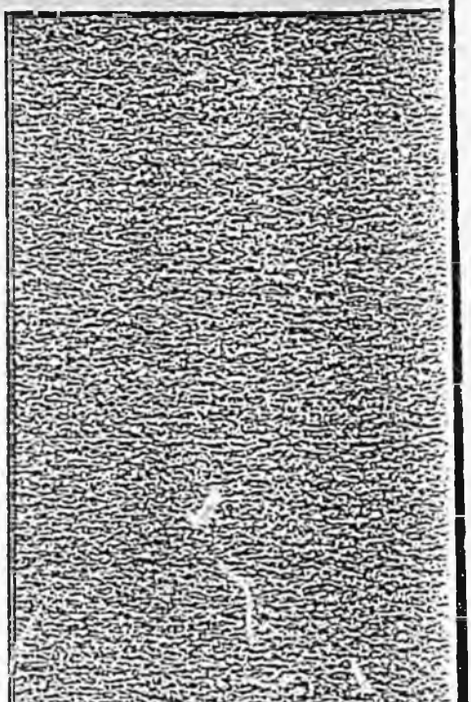
committee/joint committee system to a joint committee review structure, but the bill was vetoed by the governor.

This system combines the advantages of standing committee review with the advantages of interim review by a joint committee.

The major disadvantage is that the review function is split. This may cause a lack of cohesive legislative action and lead to a situation where agencies may wait to promulgate regulations so they can be submitted to the review body which will give the most favorable consideration.

Recommendation #2:

After considering the alternative regulation review structures, the committee recommends that a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review function. The committee should include representation from both houses. Legislatures may also wish to consider including representation from the major substantive standing committees on the review committee.



4
REGULATION REVIEW POWERS

The powers of the legislative committees charged with the responsibility of reviewing regulations generally fall into four categories: 1) advisory; 2) repeal of a regulation by the legislature; 3) committee suspension for a specified period of time; and 4) committee suspension without required legislative affirmation.

Advisory

In general, legislatures which cannot nullify, suspend, amend or modify a regulation are considered to have only advisory review powers. In most advisory states, the review committee may return regulations to the promulgating agency with recommended changes which the agency is not bound to accept. These advisory committees may recommend to the full legislature that the law authorizing the promulgation of rules be amended, requiring passage of a bill. Arkansas, Missouri and Nebraska are states with advisory review powers only.

Iowa has a regulation review process which is advisory, but which places the burden of proof on the agency once objections to a regulation are raised by the committee. The burden of proof shifts to the agency in any future court action and it must prove it did not violate legislative intent or statutory authority in adopting the regulation over the committee's objection.

Regulation review committees with advisory powers only are less likely to be challenged on constitutional separation of power grounds. This procedure does involve review for compliance with statutory authority and legislative intent and offers a basis for passage of a bill that changes the enabling statute. Also, agencies are usually responsive to committee recommendations and grateful when the committee points out errors in the regulations. The Iowa system, while only advisory, does give the legislature an advantage in a subsequent court action, whether that action is brought by the legislature or by a citizen adversely affected by the regulation. The constitutional separation of powers question is not likely to be raised because the legislature has no power to suspend or nullify.

One disadvantage of the advisory review system is that in most cases

the committee has no recourse (except recommending a change in the enabling statute) if an unresponsive agency refuses to accept the committee recommendations. The only other recourse for the legislature is through the judicial system, and in that case, the legislature would have to assume the costs of litigation in challenging agency regulations in court.

Repeal of a Regulation by the Legislature

In some states, the legislature has the authority to repeal or nullify regulations through the passage of either a bill or resolution. This is usually done upon the recommendation of the reviewing committee. In Georgia, if a repealing resolution is passed by a two-thirds majority of each house, the regulation is nullified. If it is passed by less than a two-thirds majority, the resolution must be submitted to the governor for his signature. In Maine, all new regulations automatically expire in five years unless they are repromulgated.

Regulation repeal procedures give the legislature the power to take affirmative action in the face of agency unwillingness to modify objectionable rules. The primary disadvantage may be the constitutional question of whether the legislature has the authority to nullify a regulation promulgated by an executive branch agency.

Committee Suspension for a Specified Period of Time

A third means of reviewing agency regulations is for the committee to have the power to suspend regulations for a specified time, thus delaying or temporarily repealing their effectiveness. Before the specified time has expired, however, the full legislature must affirm the committee's suspension by prescribed means or the regulation goes into effect. Legislative affirmation would permanently nullify the regulations. Minnesota, South Dakota and Wisconsin are states where the committee has the power to suspend regulations subject to the approval of that action by the full legislature within a certain time.

The principal advantage of giving the committee suspension power is that the legislature is able to take immediate action when faced with an agency which refuses to modify objectionable regulations. Also, agencies are more likely to write regulations which are technically correct and in compliance with both statutory authority and legislative intent. And since legislative affirmation is required, arbitrary action by the committee is not possible.

There may be constitutional questions with this structure in two respects. First, there is the issue of whether the legislature even has the authority to suspend or nullify a regulation promulgated by an executive branch agency. Secondly, there may be a question of the legislature's authority to delegate suspension power to a legislative committee, even

though the committee cannot permanently suspend a regulation without a vote of the full legislature.

Another possible disadvantage is the cost to the agency and the public caused by the delay of effectiveness of a regulation. However, most states have procedures for the implementation of emergency regulations on a temporary basis, with legislative review taking place after regulation is in effect.

Committee Suspension Without Required Legislative Affirmation

The fourth method of review is similar to the third. The committee has the power to suspend or delay the effective date of a regulation for a specified time, but unless the legislature overturns the committee's suspension through positive action, the suspension becomes permanent. Connecticut, Michigan, Tennessee and West Virginia are the only states where this structure exists. Connecticut's law says that the legislature "may" vote to sustain or reverse the committee's suspension, but the lack of positive action sustains the suspension. In Tennessee, the suspension is in effect until rescinded by a joint resolution of the legislature. The Tennessee attorney general, however, has advised the governor that this procedure is unconstitutional.

Again this structure allows the legislature to take action when faced with an unresponsive agency and may encourage agencies to write better regulations which are more likely to conform with statutory authority and legislative intent.

The main disadvantage to this structure is the serious constitutional question of whether the committee can, in effect, nullify a regulation without a vote of the full legislature to sustain that action.

Recommendation #3:

Recognizing the difference in state constitutions and judicial interpretations, the committee recommends that the strongest possible review structure be created in each state, consistent with the state's constitution.

Among the particular considerations which should be reviewed are questions such as the following:

1. *How strictly has your state's supreme court interpreted the "separation of powers" clause of your state constitution?*
2. *How strictly has the court enforced the prohibition against delegating legislative power to the executive? What guidelines have been set forth? How "complete" must a bill be when it leaves the legislature? Excluding local acts and constitutional amendments, can the effectiveness or implementation of a bill be conditioned upon future events after enactment by both houses and approval by the Governor? Do laws delegating rule-making power have to have adequate standards spelled out in the act?*
3. *Does your constitution specifically detail the "bicameral" principles?*

Does bicameralism mean that both houses have to agree on all actions (other than internal rules) taken by that body, or that either house can negate the actions of the other?

4. *Is there a constitutional provision in your constitution requiring the approval or veto (or at least presentation to the Governor) of every resolution or order to which the concurrence of both houses may be necessary? If so, how has the court interpreted it? Does your state make a distinction between a concurrent and joint resolution, and for what may each be used?*
5. *How have your courts ruled on "legislative intent"? Is determination of legislative intent solely a judicial function? Can legislators testify as to legislative intent? In court decisions on statutory construction, are courts bound by statements of legislative purpose, intent, and preambles sometimes found within legislative enactments?*
6. *Have the courts ruled on the power of a current legislature to determine the legislative intent of a previous body?*
7. *Do legislative committees have a statutorily-recognized standing? How have courts looked at standing committees — as official entities empowered to take authoritative actions, or as simply internal subunits of a legislative house, with advisory functions only to the full house? Can they be delegated powers of a full house?*
8. *Do agencies have to have a specific grant of rule-making power before adopting rules, or is it only necessary that such rules pertain to the implementation of a statutory or constitutional grant of power or responsibility? Additionally, can agencies have inherent rule making power? (For example, many state supreme courts have established that they — the court — have certain inherent powers — as the power to prescribe rules and regulations for the state bar and rules of procedure within courts. Additionally, governors and the President cite as an inherent power their authority to issue executive orders and take a number of other actions.)*

5
METHOD OF LEGISLATIVE ACTION

The states which require legislative affirmation of a review committee action or recommendation use one of three methods of legislative action: 1) by simple resolution of either house; 2) by joint or concurrent resolution; and 3) by bill or statute.

Simple Resolution

The simple resolution method allows either house to sustain the committee action or recommendation by a simple resolution. Oklahoma, which uses this system, required a concurrent resolution of both houses to sustain the committee recommendation prior to 1975.

The advantage of this method is speedy affirmation of the committee's action or recommendation.

The disadvantages center around the constitutional weakness of the method, since the full legislature is not required to act. Also, this method could cause division between the two houses of the legislature.

Joint or Concurrent Resolution

Another method of affirming a committee action or recommendation is through a joint or concurrent resolution. Under this system, in most states no action by the governor is required. Idaho, Montana and Vermont are among those states which utilize this method.

There are two primary advantages to this method. First, it provides that the full legislature take action, assuring a unified decision. Secondly, in most cases, it does not require gubernatorial action, so the legislature is making the final determination as to legislative intent and compliance with statutory authority.

There may be, however, constitutional problems in some states because in order to change a regulation which has the force of law, a statute has to be passed and signed by the governor.

Statute

The third method of legislative action on a review committee's action or recommendation is by bill. This may be done in the form of a bill either to repeal the regulation or to amend the statute under which the regulation

was promulgated. In Arkansas, Florida and Nebraska, all of which have advisory powers, the legislature can enact a law amending the statute granting the promulgation authority. In Colorado, Minnesota and Wisconsin, the legislatures can nullify a regulation by statute. Kansas provides that a statute be enacted to repeal an existing regulation, but that a concurrent resolution is sufficient to prevent the implementation of a proposed regulation.

The statute method is the most constitutionally sound, since it adheres to the regular lawmaking process. The main disadvantage is that it involves the executive branch in determining whether a regulation was promulgated within the authority granted by the legislature.

6
STAFFING

There are two means of providing staff for the legislative review of regulations: 1) through a full-time staff devoted to the review of regulations; or 2) through a part-time staff provided by a central staff agency or individual committees.

Full-time Staff

The number of full-time staff devoted to regulation review varies greatly among the states that use this structure. Florida's Joint Administrative Procedures Committee has a staff of six full-time attorneys and four administrative personnel. Most states with full-time staff usually have one or two full-time professional staff.

Full-time staff is utilized only by states which have a single joint committee structure. States with standing committees use either committee staff to perform review on a part-time basis or staff from a central agency.

Full-time professional staff are able to handle the volume of proposed regulations and perform a thorough review of all regulations. However, the primary disadvantage of this staffing structure is, of course, the cost of maintaining a full-time staff. Florida has a budget of $310,000 for its regulation review committee. Michigan, with two full-time attorneys, has a budget of $74,000.

Staff by Central Service Agency or Committee

The staff structure used most frequently for reviewing regulations is the assignment of staff on a part-time basis from a central staff agency. Usually, one or more attorneys or research analysts are assigned from the legal services or bill drafting agency, the code revisor's office, or the research agency. Alaska, Connecticut and Maryland all use this type of staff structure. Idaho and Nevada, which use the standing committee review process, provide staff through the central research agency.

The use of staff from the central staff agency allows for staffing of the regulation review function without the higher costs of full-time staff. Also, many research agencies divide their staff by areas of expertise so the staff is familiar with the subjects of the regulations under review. In addition,

since the staff may have helped to draft the enabling legislation, they are familiar with the legislative intent.

However, the disadvantage of this structure is that the staff has other functions to perform and may not be able to devote enough time to the regulation review function.

Recommendation #4:

The committee recommends that the committee or committee designated to perform regulation review be adequately staffed by permanent legislative staff, so that review of regulations is effectively accomplished.

7
PROCEDURES

Review of Proposed Regulations

Effective legislative regulation review can be accomplished either through a review of all proposed regulations or through selective review. In addition, some states have given the reviewing body the power to review all or selected pre-existing regulations.

The process of total review usually requires that all proposed regulations be submitted to the legislative body handling review. The committee, either by law or by tradition, may have the option of reviewing only selectively. In at least one state, Colorado, the staff reviews all proposed regulations and recommends consideration by the committee of selected regulations which may have technical errors or be in violation of either statutory authority of legislative intent. Some states review proposed regulations only upon the complaint of a legislator or citizen, even though the committee has the authority to review all regulations.

Review of all proposed regulations by the committee is designed to assure that no regulations are promulgated which may be in violation of legislative intent or statutory authority. Total review, however, requires much more staff and legislator time, and may not be necessary for a majority of proposed regulations. With selective review, complex and controversial regulations can be given careful scrutiny.

Review of Pre-existing Regulations

The majority of states with regulation review structures has the power to review regulations which are already in effect. In Florida, the review committee is currently examining all pre-existing and proposed regulations. The process of reviewing all pre-existing regulations is expected to take from three to five years. In some other states, review of pre-existing regulations is done on a selective or complaint basis.

This type of review assures that older regulations are brought up to date or repealed if no longer needed. But, it can tie up valuable staff time if not performed on a selective basis. Also, this procedure may raise constitutional questions regarding a legislature's right to determine the legislative intent of a previous legislature.

Recommendation #5:

The committee recommends that the review committee in each state have the authority to review all proposed and preexisting regulations.

Time Constraints

To insure an orderly and expeditious review process, most states have time constraints on the various phases of the process. The agency usually has a certain number of days to file a regulation with the legislature before it can take effect. In some states there is no time limit, but the proposed regulation cannot go into effect without being filed with the legislative review body.

After the proposed regulation is filed by the agency, the committee usually has a certain time period within which to conduct its review. If the committee does not object to the regulation within the time period, it is deemed approved.

Some of the committees which have the power to suspend or recommend nullification of regulations must have the affirmation of the legislature within a certain time period or the regulation goes into effect. In Minnesota and Wisconsin, the legislature must sustain the committee action before the end of the next regular session. In South Dakota, suspension of a regulation during the interim is only valid until 30 days after the beginning of the session without legislative affirmation.

Time constraints on the regulation review process are necessary for three reasons: 1) to prevent agency circumvention of legislative review of regulations; 2) to insure adequate review time for the committee; and 3) to provide expeditious final disposition of regulations by the legislature.

Recommendation #6:

The committee recommends that reasonable time constraints be imposed on all levels of the regulation review process to provide for adequate review and expeditious final disposition of regulations by both the committee and the legislature.

Emergency Procedures

Most states with regulation review procedures have means by which emergency regulations can be promulgated. These procedures may include a limitation on the life of the emergency regulation and a provision for review by the legislature. Michigan's law allows emergency regulations to remain in effect only up to one year without formal legislative approval. This restriction prevents circumvention of the review process by the agency. In Connecticut, under a law passed in 1977, the agency must submit all emergency regulations to the review committee five days prior to their effectiveness. The committee has the authority to suspend those

regulations within the five-day period. In Minnesota, emergency regulations are effective for only 90 days, unless they are repromulgated through the normal process which includes legislative review. Kansas law provides that "temporary" regulations may be implemented by agencies during the interim after they have been approved by the Temporary Rules and Regulations Board, which is composed of the chairman of the Joint Committee on Administrative Rules and Regulations, the Secretary of State and the Attorney General. All temporary regulations expire on the following April 30.

Recommendation #7:

The committee recommends that procedures be established for the promulgation of emergency regulations, with reasonable time limitations on committee review and on the effectiveness of those regulations to prevent agency circumvention of the legislative review process.

Frequency of Review Committee Meetings

The review committees in many states which have legislative regulation review procedures usually meet once a month. Others meet only on call when there are regulations pending review. Some states' committees meet more often during the session than during the interim.

The actual volume of regulations reviewed is difficult to determine because a regulation can be defined as anything from a one-word amendment to an entire volume of new procedures. Many states review about 20 to 25 regulations per meeting.

Recommendation #8:

The committee recommends that the review committee meet often enough to provide adequate review of proposed regulations which agencies file.

Bills Authorizing Promulgation of Rules

One reason why agencies might promulgate rules which do not conform with legislative intent is that the law authorizing such promulgation may not specifically state the legislature intent. Also, the law may be too broad or general and may not provide agencies with specific guidelines for the promulgation of rules. For example, a law may simply state that "reasonable rules be promulgated to prevent unfair banking competition."

Recommendation #9:

The committee recommends that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rule-making authority to administrative agencies be reviewed before introduction to assure that (1) legislative intent is clearly spelled out in the bill,

and (2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill.

Fiscal Notes on Regulations

South Dakota requires that each proposed regulation have a fiscal note stating the effect the regulation will have on state revenue and/or expenditures. This fiscal note, which is prepared by the agency and reviewed by the state Bureau of Finance and Management, must include information on the fiscal impact for the first year and the continuing fiscal impact, the assumptions made in preparing the statement and the source of statistics used. The fiscal note is furnished to both the Interim Rules Review Committee and the Joint Appropriations Committee, either of which may refer it to the relevant standing committee for review. While objections can be made to a regulation because of the fiscal note, it is unclear if a regulation can be suspended on that basis.

The LIM Committee discussed the issue of fiscal notes on regulations and decided that since it is a relatively new procedure, there was insufficient information on state experiences to warrant a committee recommendation at this time.

8
CONSTITUTIONAL QUESTIONS

The legislative review of administrative regulations process has raised a number of constitutional questions which can only be answered by an examination of each state's constitution and relevant court decisions. The eight questions following Recommendation #3 (under "Regulation Review Powers") provide guidelines for this examination. The four major questions being raised relate to 1) the legislative review process itself; 2) the delegation of legislative review authority to a legislative committee; 3) the committee's and the legislature's power to suspend a regulation; and 4) the use of a bill or resolution to sustain committee action.

Legislative Regulation Review Process

Legislative regulation review has frequently been questioned as a violation of the constitutional separation of powers concept. Opponents of legislative review claim that rule-making is an administrative function and that legislative review (and in some states, repeal) of rules is a usurpation of executive authority. The U.S. Supreme Court has ruled in the case of *Buckley vs. Valeo* (No. 74-736, 424 U.S. 2, January 30, 1976) that Congress, in creating the Federal Election Commission with a number of congressionally-appointed members, violated the U.S. Constitution's provision that only the President can appoint administrative officers. This case is significant because it is the first time since 1928 that the Supreme Court has addressed the question of separation of powers. The Buckley case may be cited in challenges to legislative review powers because legislatures, after passing enabling legislation, are retaining some control over what is seen as a wholly administrative function.

Supporters of legislative review contend that since the courts have upheld the legislature's right to delegate rule-making authority to executive branch agencies, it is consistent for legislatures to condition that authority with a legislative review process. Also, agency rule-making is more quasi-legislative than executive, so legislatures should be able to retain control over what is essentially a policy-making function.

Another separation of powers question arises with respect to the legis-

lature usurping the role of the judiciary to interpret the laws. However, it has been argued that regulation review is actually the final step in the legislative process, and that if regulations are reviewed prior to effectiveness, that review is distinguishable from an after-the-fact judicial determination.

In Wisconsin, all legislation authorizing promulgation of regulations also includes a section requiring that those regulations be reviewed by the legislature. This standardized language, as part of the bill signed by the governor, puts the legislature in a stronger constitutional position since the governor has approved the condition placed upon agency rule-making.

Delegation of Legislative Review Authority

The delegation of review authority to a legislative committee may raise constitutional questions, depending on the committee's powers, especially if those powers include suspension of regulations. But, as mentioned above, court decisions have upheld the legislature's right to delegate its power. Since the review power is delegated to an entirely legislative unit, that delegation is proper as long as the full legislature retains control over the committee's actions. The most serious constitutional question arises when a committee is empowered to suspend regulations without affirmation by the legislature.

Suspension Powers

Opponents of legislative review also argue that neither the committee nor the full legislature has the authority to suspend a regulation. The arguments for this position relate to the authority to conduct review in the first place. At the very most, it is argued, the legislature can only have advisory review powers, since once a law is passed, it is solely the executive branch's function to implement that law.

Defenders of legislative regulation review claim that only the legislature can determine legislative intent, and suspension power insures that that intent will not be violated. A state Supreme Court case in Wisconsin challenged the committee's right to suspend a regulation. But the bill upholding the committee's suspension was not passed before the end of the session and the court dismissed the challenge without a definitive decision.

Suspension of a regulation by a committee may pose serious constitutional questions if, as in Connecticut, the legislature is not required to uphold the committee's suspension. In Connecticut, a case is now pending which directly challenges that state's regulation review powers. Connecticut is among the strongest of all states with such powers. The case will be argued on separation of powers grounds and if finally decided by the court either for or against that state's legislative review law, it will provide a basis for court action in other states.

Method of Legislative Action

Another constitutional question revolves around the method by which the legislature repeals or upholds a committee suspension of a regulation. It has been argued that since a regulation has the force of law, only the passage of a statute can repeal it. Attorney General opinions in Michigan and Tennessee ruled that repeal of a regulation should be in the form of a bill.

On the opposite side, it has been argued that since a bill requires a gubernatorial signature to become law, the use of a bill brings the governor into the process of determining legislative intent, a violation of separation of powers.

The use of a joint or concurrent resolution to repeal a regulation has been argued as proper because approval of regulations is one of the contingencies specified in the enabling legislation giving the agencies rulemaking authority.

The use of a simple resolution of either house to disapprove a regulation may be constitutionally the weakest method, since only one house is exercising the power of the legislative branch.

Constitutional Regulation Review Powers

While most states with regulation review authority have acquired that power by statute, Michigan has a constitutional provision giving a joint legislative committee the power to suspend regulations during the interim. The Florida legislature, which has only advisory review powers, attempted to acquire repeal powers through a constitutional amendment, but the proposal was defeated in a statewide referendum in 1976, as was a similar proposal in Missouri.

Other states may try to put the regulation review powers in their constitutions to prevent future challenges to legislative authority in this area.

9
SUMMARY OF STATE LAWS

Legislative Review of Administrative Regulations

ALASKA — (AS §24.20.400 & §44.62.320) The Alaska Legislature in 1975 created the Administrative Regulation Review Committee as a permanent interim committee of the legislature composed of three members each from the house and senate. The committee is empowered to examine all administrative regulations to determine if they properly implement legislative intent. Prior to 1978, the committee could recommend annulment of a regulation to the legislature, which in turn, had to adopt a concurrent resolution to do so. A 1978 law passed over the governor's veto empowered the committee to suspend objectionable regulations until 30 days after the next session begins. During the 30-day period, the legislature must annul the regulation through the passage of a concurrent resolution or it goes into effect.

ARIZONA — (Ariz. Rev. St. 41-511.05) Rules and regulations promulgated by the State Parks Board are the only ones which require legislative review and approval. All other agencies file regulations with the Attorney General and Secretary of State to put them into effect. State Parks Board regulations may be disapproved by concurrent resolution of the legislature for up to one year after they take effect.

ARKANSAS — (Ark. St. 6-608 et seq) All proposed, revised, or amended rules and regulations must be filed with the Legislative Council. Rules are reviewed to determine whether they are consistent with legislative intent or if they exceed statutory authority. The function of the Legislative Council review is advisory. If a proposed rule is determined to be improper, the Legislative Council files a statement with the agency concerned and submits recommendations to the legislature. This review procedure was adopted in 1973.

COLORADO — (Colo. Rev. St. 24-4-103, Subsec 8, para d) Under a law passed in 1976, the Committee on Legal Services, a bipartisan joint committee of four mem-

bers from each house, reviews all new rules during the interim for "legality and constitutionality." During the session, the standing committees of each house review all new rules. After hearing staff recommendations and agency testimony, the committee can vote to amend or repeal the rule and then submit a bill to the full legislature. There are no time constraints for any stage of the procedures. The governor vetoed a bill passed in the 1977 session which would have made the Committee on Legal Services the review committee for all proposed regulations, during both the session and the interim. It also provided for time constraints for agency filing of regulations with the committee, fiscal notes for regulations with a fiscal impact, and review of pre-existing regulations over five years. On April 10, 1978 the veto was overturned by the Colorado Supreme Court on a technicality, and the bill became law.

CONNECTICUT — (Conn. Gen. St. 4-170 et seq) The Legislative Regulations Review Committee is bipartisan and composed of eight representatives and six senators. It reviews all proposed regulations of state departments and agencies and may hold public hearings thereon. The committee may give notice of approval or disapproval within 60 days (failure to act within 60 days constitutes approval). If the committee gives notice of disapproval, no agency may take action to implement the disapproved regulation. The committee reports annually to the general assembly on all disapproved regulations which, after study by an appropriate committee, may vote to sustain or reverse the disapproval. Any committee disapproval of a regulation implementing a federally subsidized or assisted program must be sustained by the general assembly or it is deemed reversed. The committee attempts to resolve questioned regulations with the agency responsible, but has disapproved several regulations each year. A 1977 law provides for a five-day period for prior review of proposed emergency regulations by the committee.

FLORIDA — (Fla. Stat. Sec 11.60) Florida's Administrative Procedures Act was rewritten in 1975 and a Joint Administrative Procedures Committee created. This committee has three specific functions: to review proposed rules as they are adopted; to maintain a continuous review of statutory authority underlying each rule and note when that authority is changed by either the legislature or the courts; to review administrative matters in general as they relate to the APA. The committee makes a legislative observation on each rule but does not have the power to suspend a rule. If an objection is made by the committee to a rule, the agency is requested to withdraw or modify it. In most cases, agencies have been found willing to respond affirmatively to legislative objections. Of the first 840 rules reviewed in 1976, 79% were found to contain some error and 6.3% of these were found to exceed statutory authority. A 1975 amendment to the APA requires an "economic impact statement" to accompany each proposed rule estimating the costs of the rule to those affected by it. The committee has a staff of 13. A constitutional amendment giving the legislature power to suspend rules was rejected in a 1976 referendum.

GEORGIA — (Ga. Stat. 3A-104(c), (f)) A 1977 law provides for legislative review of regulations by standing committees predesignated by the speaker and senate president for each agency. Regulations must be submitted by the agencies 20 days

prior to their effectiveness. If the committee objects to a regulation, it may introduce a resolution repealing or modifying the regulation at the next session. The resolution must be acted upon within 30 days after the beginning of the session in the house of origin and within five days in the other house. Constitutional two-thirds majority approval in both houses is necessary for the rule to be repealed or modified. If the resolution passes by less than a 2/3 constitutional majority, it must go to the governor, who may sign or veto the resolution. The legislature cannot override a veto of such a resolution.

IDAHO — (Idaho Code Sec. 67-5217, 67-5218) All rules authorized or promulgated by any state agency are to be submitted to the legislature in regular session for reference to the appropriate standing committees. Any committee or member of the legislature may propose a concurrent resolution rejecting, amending, or modifying any rule thought to be in violation of the statutory authority or legislative intent of the statute under which the rule was made.

ILLINOIS — (Ill. Rev. Stat., Chap. 127, §1001 et seq) The bipartisan Joint Committee on Administrative Rules reviews all proposed regulations and makes recommendations to the agency to modify or withdraw the rule. While the agency is not bound to accept the committee's recommendations, it must respond to them. Failure to respond constitutes withdrawal. The committee can introduce a bill to modify or nullify a rule to which it has objected.

IOWA — (Iowa Code Ann. Sec. 17A.8) A new Administrative Rules Review Committee was created in 1975, although authority for regulation review had previously existed. The new committee is composed of three members from each house and meets monthly. It is authorized to selectively review promulgated rules, but is currently reviewing all promulgated rules. The review committee may file objections to rules based on the fact they are unreasonable, arbitrary, capricious or beyond the scope of agency authority. Such objections transfer the burden of proof to the issuing agency in any legal challenge to the rule. An agency unable to sustain this burden of proof in a legal challenge may be liable for all court costs of the challenge. The Rules Review Committee may also refer a rule for consideration to the appropriate legislative standing committee at the next regular session.

KANSAS — (K.S.A. 1978 Supplement 77-415 et seq) The revisor of statutes submits a copy of all rules and regulations filed during the previous year to the Joint Committee on Administrative Rules and Regulations (JCARR) at the beginning of each legislative session. The legislature may pass a bill modifying or rejecting an existing regulation or it may pass a resolution rejecting a proposed regulation or a proposed amendment to a regulation. During the interim, agencies may adopt temporary regulations after obtaining the approval of the Temporary Rules and Regulations Board, which is composed of the Chairman of the JCARR, the Secretary of State and the Attorney General, or their designees.

KENTUCKY — (K.R.S. 13.087) The Administrative-Regulations Review Subcommittee (three members) reviews all proposed regulations as to whether they conform to statutory authority and to the legislative intent of the statutes. If nonconforming, a regulation is returned to the agency with the legislative objections. If an agency does not revise the regulation, it is then presented to the appropriate legislative standing committee or joint interim committee for a second review as to statutory authority and legislative intent. If this committee raises objections, it is again returned to the agency for reconsideration, but the legislature does not have power to suspend a rule and the agency is only required to give "affirmative consideration" to legislative objections and is not bound to modify the rule. A 1974 act provided that all existing regulations be rescinded unless repromulgated by the agencies within one year.

LOUISIANA — (LRS 49-968 et seq) The legislature in 1976 passed a law providing that all rules proposed by agencies be submitted to a specified house and senate committee simultaneously upon their filing with the Department of the State Register. The committee may then hold a public hearing and issue a report to the agency expressing approval or disapproval of the rule. Although the committee report is printed in the State Register, the agency is not bound to accept it. A 1977 bill vetoed by the governor would have given the committees the power to stop a rule from going into effect by raising objections within 15 days after it is filed with the committee. The legislature would not have been required to act, but could have overridden the committee's objection by passage of a concurrent resolution. A 1978 law provides that if a committee finds a rule unacceptable, the committee will submit a report to the Governor. The Governor has five days to disapprove the committee report; if he does not, the agency must change or modify the rule.

MAINE — (5MRSA c. 308 §2501 et seq) A law enacted by the 1977 session provides that agencies submit all current rules to the legislature by January 15, 1978 for review by the appropriate standing committees. These committees must hold public hearings and recommend to the legislature an expiration schedule for all rules. A committee may recommend immediate expiration of a current rule. The legislature must then pass bills to implement these expiration schedules. All new rules which go into effect after January 1, 1978 automatically expire five years after their effectiveness unless the legislature passes a bill terminating their effectiveness in less than five years.

MARYLAND — (Md. Ann. Code 1977, Art 40, §40A) The Standing Committee on Administrative, Executive, and Legislative Review (five senators, five delegates) reviews regulations as they are published in the Maryland Register. The committee has no power to suspend or veto proposed regulations, but its views are often persuasive with agencies when it raises questions about proposed regulations.

MICHIGAN — (Mich. St. Ann. 24.201 - 24.315, Act No. 108, Public Acts of 1977) The Joint Committee on Administrative Rules (three senators, five representatives) has a 60-day period in which to approve or disapprove all proposed rules. Under a 1977 law passed over the governor's veto and effective on January 1,

1978, if the committee disapproves a rule or fails to approve it within 60 days, the rule cannot be adopted by the agency unless the legislature overrules the committee action within 60 days. The state supreme court has refused to consider a request by the governor for an advisory opinion on the constitutionality of this law. In addition, opinions of the attorney general have questioned the constitutionality of legislative disapproval of rules by concurrent resolution, rather than by bill. Legislative power to review and suspend regulation during the interim is authorized in Article IV, section 37 of the state constitution. Michigan has more than 50 years experience with some type of legislative oversight of administrative regulations.

MINNESOTA — (Minn. St. 3.965) The Legislative Commission to Review Administrative Rules, composed of five members of each house, may hold public hearings to investigate complaints concerning rules and, on the basis of testimony received, suspend any rule. In practice, however, the committee reviews all proposed rules. If a rule is suspended by the committee, such action must be sustained by the legislature at its next session. Before the committee suspends any rule, it shall submit it to the appropriate standing committees for their review and recommendation. Emergency rules are effective for only 90 days, during which time they must be repromulgated under the regular procedure in order to remain in effect beyond that time.

MISSOURI — (Sec 536.037, RSMo) Under a 1976 law, the legislature created the Joint Committee on Administrative Rules. The committee reviews all proposed rules published in the Missouri Register, but its review is advisory only. A proposed constitutional amendment authorizing legislative rejection of agency rules was submitted to the electorate by the legislature and was defeated in August, 1976. During the 1977 session, the legislature attached to many bills a provision that all agency rules promulgated under the respective bills expired in two years unless approved by a concurrent resolution of the legislature. An additional provision attached to many bills mandated either the expiration of the rules promulgated under the authority of the respective bills, the repeal of the promulgating power, or both, on November 30, 1981.

MONTANA — (Sec. 2-4-401 et seq, MCA 1978) An Administrative Code Committee was established in 1975 to review all proposed rules. This committee makes recommendations for action by the agencies to the legislature which, by joint resolution, can repeal or compel the amendment or adoption of a rule. Legislation enacted in 1977 mandates that all bills authorizing agencies to promulgate rules include a statement of legislative intent. The new law (SB 37) also shifts the burden of proof to the agency in any subsequent legal action challenging the rule as having been adopted in an "arbitrary and capricious disregard" of the purpose of the authorizing statute. Another 1977 law (SB 120) allows the committee to poll the members of the legislature by mail during the interim to determine whether a proposed rule is consistent with legislative intent.

NEBRASKA — (Neb. Rev. St. Section 84-901 et seq) The Administrative Rules and Regulations Review Committee reviews proposed rules and recommends to the

legislatures appropriate action. The legislature may repeal, change, alter, amend, or modify the original law granting the authority to promulgate rules or general program authority. Under a new law, effective January 3, 1979, the committee has the authority to suspend rules if they do not reflect legislative intent or are contrary to the state's Administrative Procedure Act.

NEVADA — (Chap. 233B. 101 et seq NRS) Under a 1977 law, all proposed regulations are submitted to the Nevada Legislative Commission, which must review them at its next monthly meeting. If the commission objects to a regulation, it is returned to the agency, which must resubmit either the same regulation or an amended version to the commission. The regulation is forwarded to the speaker and the senate president for referral to the appropriate standing committee. The legislature can enact legislation amending the statute under which the objectionable regulation was promulgated.

NEW HAMPSHIRE — (NHRSA Sec. 541 A) In 1977, the legislature enacted a law creating a Joint Committee on Review of Agencies and Programs. The committee will have the power to sunset agencies and review their existing rules. In addition, the law provides the standing committees the power to review rules prior to their effective date and may send the rules back to the agency if the rules are not in the proper format.

NEW YORK — (NYSA, Legislative Law, Art. 5-B, Secs. 86-88) A 1978 law formally created the Administrative Regulations Review Commission. The Commission, originally created by joint resolution in 1977, is composed of three senate and three assembly members. Agencies must file their proposed rules with the commission at least 21 days prior to effectiveness. The commission has the power to examine agency rules as to their statutory authority, their compliance with legislative intent, their impact on the economy and government operations, their impact on affected parties. In addition, the commission may hold hearings and has been granted subpoena power.

NORTH CAROLINA — (G.S. 120-30.19 et seq) A 1977 law created the Administrative Rules Review Committee as a permanent committee of the Legislative Research Commission (LRC). All rules adopted by agencies are filed with the director of the LRC, who refers them to the review committee. The committee has up to 60 days to review these rules and may file objections. The agency must respond within 60 days of receipt of the committee's report. Agencies are not bound to comply with the committee's objection, and if they don't, the rule goes to the full LRC for review. The LRC can make recommendations for legislative action to the General Assembly if the agency fails to comply with any commission objections. The law also provides for selective review of all preexisting regulations. It is effective on October 1, 1977 and expires June 30, 1979.

OHIO — (Sec. 101.35, 111.15, 119.01, & 119.03 of Rev. Code) A 1977 law created the Joint Committee on Agency Rules Review with seven members from each

houses. All proposed rules must be submitted to the committee 60 days prior to adoption. If during that time, the committee disapproves a rule, a concurrent resolution to that effect is introduced. The legislature must adopt the resolution within 60 days to nullify the rule. A new rule promulgated during the interim may go into effect, but the committee and the legislature may disapprove the rule by concurrent resolution within the first 60 days of the next regular session. The committee may meet during the interim and may suspend objectionable rules by a two-thirds vote of its members. The suspension must be sustained by the legislature by concurrent resolution within 60 days of the convening of the next regular session.

OKLAHOMA — (75 O.S. Supp. 1977 Sec. 308) Prior to 1976 the law provided that any administrative rule or regulation could be disapproved by the legislature by joint resolution. In 1976, this was amended providing for disapproval by either house by simple resolution, rather than requiring the consent of both. Review of proposed rules and regulations is conducted by the Division of Legal Services under the direction of the Legislative Council.

OREGON — (ORS 171.705 to 171.713) The Legislative Counsel Committee reviews all proposed rules and reports to the legislature. There is no formal procedure for further legislative action beyond this informational review. Rules are reviewed to determine whether they conform with the intent and scope of enabling legislation, have been adopted in accordance with all legal procedures, and are consistent with constitutional provisions. The committee may recommend changes in the statute authorizing the rule-making powers.

SOUTH CAROLINA — (Act No. 176 of 1977) The legislature in 1977 passed legislation amending and clarifying a 1976 law creating the state register and providing for legislative review and approval of agency rules. Under the new law, the Legislative Council supervises the printing of the state register, in which are printed all proposed and promulgated rules. Proposed agency rules are reviewed by the appropriate standing committee in each house. These rules cannot go into effect until 90 days after receipt by the legislature. The legislature may adopt a joint resolution during that time either approving or disapproving the rule. The 90-day review period continues to run as long as the legislature is in session. After *sine die* adjournment, the 90-day period ceases to run until the convening of the next regular session. Emergency rules can be promulgated for 90-day periods only when the legislature is not in session.

SOUTH DAKOTA — (SDCL 1-26-1.1, 1.2) The Interim Rules Review Committee reviews all proposed rules and makes recommendations to agencies and to the legislature on any suggested amendments to the Administrative Procedures Act. By a 5/6 vote of the six-member committee, a proposed rule can be suspended until 30 days after the next legislative session convenes. Unless the committee suspension is sustained by the legislature through passage of a bill within this 30-day period, the rule may take effect. All proposed rules submitted to the committee must have attached to it a fiscal note, prepared by the agency and reviewed

by the Bureau of Finance and Management. The fiscal note must include the fiscal impact on state government, the assumptions made in preparing the statement and the source of statistics used.

TENNESSEE — (Tenn. Code Ann. 4-535) Agency rules are referred in the House to the Government Operations Committee and in the Senate to the appropriate standing committee for review. The reviewing committee of either house may suspend the effectiveness of any agency rule or the amendment or repeal of an agency rule. Such suspension is effective until rescinded by the committee or by joint resolution of the General Assembly. Any suspension must be preceded by 15 days notice to the agency of any contemplated action. Suspension is effective upon written notice from the committee chairman to the Secretary of State. (The Attorney General of Tennessee has advised the Governor that this procedure is unconstitutional and that any suspension of a rule can only be accomplished by passage of a bill by a majority of both houses and approval by the Governor.)

TEXAS — (Chap. 321, Acts of 65th Legislature, 1977) Under a 1977 law enacted by the legislature, agencies must forward to the presiding officers of each house copies of all proposed rules at the same time they are filed with the secretary of state. The proposed rules are then referred to the appropriate standing committees for review. The legislature has a minimum of 30 days to review prior to the rules taking effect. The committees can send statements supporting or objecting to proposed rules to the agency during that time, but its powers are advisory. Standing committees don't meet very often, if at all, during the 19-month interim between biennial sessions.

VERMONT — (3 V.S.A. 817-820) The General Assembly of Vermont in 1976 created an eight-member joint committee on administrative rules. This committee reviews any proposed rule and may recommend its amendment or withdrawal upon a finding that the proposed rule is arbitrary, beyond the authority delegated to the agency, or contrary to legislative intent. Committee recommendations are submitted to the next session of the General Assembly. Objectionable rules may be repealed by joint resolution of the General Assembly.

WEST VIRGINA — (Code of W. Va. Art.3, Chap 29a) The 1976 session created the Legislative Rule-making Review committee composed of six members from each house. All proposed rules must be submitted to the committee, which has six months to review them. If the committee disapproves a rule, the agency cannot take any "action to implement such disapproved rule or regulation" The legislature may, by resolution, reverse the committee's disapproval, but the rule remains suspended unless the legislature acts. Regulations implementing federally-subsidized programs may be disapproved by the committee, but unless the legislature sustains the disapproval by the end of the regular session, the rule goes into effect.

WISCONSIN — (W.S.A. 13.56) The Joint Committee for Review of Administrative

Rules (five senators, five representatives) reviews rules and may suspend them until the next session. Any suspension must be ratified by the legislature by passing a bill at the next session. The committee also reports biennially to the legislature and has the authority to direct an agency to promulgate a statement of policy or an interpretation of a rule under the Administrative Procedures Act.

WYOMING — Wyo. Stat. Sec. 28-82 to 28-89. Under this 1977 law, all existing rules and all future proposed rules must be filed with the Legislative Service Office (LSO). The LSO reviews the rules and reports to the Legislative Management Council. If the LSO has found a rule objectionable and the council agrees, the disapproved rule goes to the governor, who may agree to repeal the rule. If the governor disagrees with the council's recommendation, the council can only recommend that the full legislature act through what is called a "legislative order" (presumably a statute). Legislative action must take place before the end of the legislative session in order to nullify a rule.

10
LEGISLATIVE POWERS AND PROCEDURES

Legislative Review of Administrative Regulations

	STRUCTURE & PROCEDURES								COMMITTEE POWERS					LEGISLATIVE POWERS				
STATE	Statute Citation	Type of Reviewing Committee(s)	Name of Reviewing Committee	Composition of Reviewing Committee	Rules Reviewed: All	Rules Reviewed: Selected	Time Limit for Submission of Proposed Rules to Legislature	Time Limit for Legislative Review of Rules	Review of Proposed Rules Prior to Effec. Date	Review of Existing Rules	Automatic Approval (Rules Without Objections)	Suspension Power Held by Committee	Time Limit of Committee Suspension	Legislature Must Sustain Committee Action or Recommendation	Time Limit for Legislative Affirmation	Method of Legislative Affirmation	Legislature Can Amend or Modify	Advisory Powers Only
ALASKA	AS(24.20.400 & 44.62.320)	Joint	Admin. Regulations Review Committee	3 House 3 Senate (1 minority member from each house)	X		45 Days	None	X	X	X	X	30 days after convening of reg. session	X	30 days after convening of regular session	Concurrent Resolution		
ARIZONA	ARS 41-511.01 (1)	(2)	(2)	(2)		X(3)	Immediately After Adoption	N/A		X	N/A			X	1 year	Concurrent Resolution	X	
ARKANSAS	Ark. Stat. 6-609 et. seq.	Joint	Ark. Legislative Council	15 House 11 Senate	X		30 days before agency hearing	10 days	X	X	X			N/A	N/A	N/A	N/A	X
COLORADO	Colo. Rev. St. 24-4-103	Joint	Committee on Legal Services (7)	4 House 4 Senate (Maj. & Min. Floor Leaders of each House Judiciary Committee Chairmen; 1 minority member from each house)	X (4)		20 days after approval by Atty General	None		X	N/A			X	None	Statute	X	
CONNECTICUT	CGS 4-170 et. seq.	Joint Bipartisan	Legislative Regulation Review Committee	8 House 8 Senate (Equal Maj.-Min. representation)	X		Simultaneously with filing with Atty. General	65 days	X	X	X	X	Until reversed by legislature	(5)		Joint Resolution	X (6)	
FLORIDA	Fla. Stat. Sec. 11.60	Joint	Joint Administrative Procedures Committee	3 House 3 Senate (1 minority member from each house)	X		21 days	20 days	X	X	X			N/A	N/A	N/A	N/A	X
GEORGIA	Ga. Stat. 3A-120(et ?)	Standing Committees (in session)	N/A	N/A	X		20 days	None	X		X			X	End of regular session	Concurrent Session (7)		
IDAHO	Idaho Code Sec. 67-5217, 67-5218	Standing Committees (in session)	N/A	N/A	X		Beginning of each session	45th day of regular session		X	N/A			X	End of regular session	Concurrent Resolution	X	
ILLINOIS	Ill. Rev. Stat. Chap. 127, §1001 et. seq.	Joint Bipartisan	Joint Committee on Administrative Rules	6 House 6 Senate (Equal Maj.-Min. representation)	X		45 days	45 days	X	X	X			N/A	N/A	N/A (8)		X
IOWA	Iowa Code Ann. Chap. 17A	Joint	Administrative Rules Review Committee	3 House 3 Senate (1 minority member from each house)	X		35 days (9)	35 days	X (10)	X (10)	X	(11)	(11)	N/A	N/A (10)	N/A (10)	N/A	X (10)
KANSAS	KSA 1979 Supp. 77-415 et. seq.	Joint	Joint Committee on Administrative Rules and Regulations	5 House 5 Senate	X		By Dec. 31 of each year	May 1	X	X	X			X	End of regular session	(12)	X	
KENTUCKY	KRS 13.087	Joint	Administrative Regulation Review Subcommittee (13)	3 members appointed by Legislative Research Commission (at least 1 minority member)	X		(14)	30 days	X	X	X			(15)	N/A	N/A (15)	N/A (15)	X
LOUISIANA	L.R.S. 49:951 et. seq.	Standing Committees	N/A	N/A	X		15 days prior to adoption of rule (16)	Committee must submit report to legislature by 2nd day of session	X		X			N/A	N/A	N/A	N/A	X

10 LEGISLATIVE POWERS AND PROCEDURES

Legislative Review of Administrative Regulations

	STRUCTURES & PROCEDURES								COMMITTEE POWERS					LEGISLATIVE POWERS				
STATE	Statute Citation	Type of Reviewing Committee(s)	Name of Reviewing Committee	Composition of Reviewing Committee	Rules Reviewed: All	Rules Reviewed: Select Ones	Time Limit for Submission of Proposed Rules to Legislature	Time Limit for Legislative Review of Rules	Review of Proposed Rules Prior to Effective Date	Review of Existing Rules	Automatic Approval of Proposed Rules Without Objections	Suspension Power Held by Committee	Time Limit of Committee Suspension	Legislature Must Sustain Committee Action on Regulations	Time Limit for Legislative Affirmation	Method of Legislative Affirmation	Legislature Can Amend or Modify	Advisory Powers Only
ALASKA	AS 24.20.400 & 44.62.320	Joint	Admin. Regulation Review Committee	2 House 2 Senate (1 minority member from each house)	X		45 Days	None	X	X	X	X	30 days after convening of reg. session	X	30 days after convening of regular session	Concurrent Resolution		
ARIZONA	ARS 41-511.01 (2)	(2)	(2)	(2)		[illegible]	Immediately After Adoption	N/A		X	N/A			X	1 year	Concurrent Resolution	X	
ARKANSAS	Ark. Stat. 5-806 et seq	Joint	Ark. Legislative Council	19 House 11 Senate	X		10 days before agency hearing	10 days	X	X	X			N/A	N/A	N/A	N/A	X
COLORADO	Colo. Rev. St. 24-4-103	Joint	Committee on Legal Services (5)	4 House 4 Senate (Maj. & Min. from Leaders of each house Judiciary Committee Chairmen; 1 minority member from each house)	X (4)		20 days after approval by Atty. General	None		X	N/A			X	None	Statute	X	
CONNECTICUT	CGS 4-170 et seq	Joint Bi-partisan	Legislative Regulation Review Committee	8 House 6 Senate (Equal Maj.-Min. representation)	X		Simultaneously with filing with Atty. General	65 days	X	X	X	X	Until rejected by legislature	(1)		Joint Resolution	X (8)	
FLORIDA	Fla. Stat. Sec. 11.60	Joint	Joint Administrative Procedures Committee	3 House 3 Senate (1 minority member from each house)	X		21 days	20 days	X	X	X			N/A	N/A	N/A	N/A	X
GEORGIA	Ga. Stat. 3A-104(c)(7)	Standing Committees (in session)	N/A	N/A	X		20 days	None	X		X			X	End of regular session	Concurrent Session (7)		
IDAHO	Idaho Code Sec. 67-5217, 67-5218	Standing Committees (in session)	N/A	N/A	X		Beginning of each session	45th day of regular session		X	N/A			X	End of regular session	Concurrent Resolution	X	
ILLINOIS	Ill. Rev. Stat. Chap. 127, [illegible] et seq	Joint Bi-partisan	Joint Committee on Administrative Rules	6 House 6 Senate (Equal Maj.-Min. representation)	X		45 days	45 days	X	X	X			N/A	N/A	N/A (9)		X
IOWA	Iowa Code Ann. Chap. 17A	Joint	Administrative Rules Review Comm'tee	3 House 3 Senate (1 minority member from each house)	X		35 days (9)	35 days	X (10)	X (10)	X	(11)	(11)	N/A	N/A (10)	N/A (10)	N/A	X (10)
KANSAS	KSA 1976 Supp. 77-415 et seq	Joint	Joint Committee on Administrative Rules and Regulations	7 House 5 Senate	X		By Mar. 31 of each year	May 1	X	X	X			X	End of regular session	(12)	X	
KENTUCKY	KRS 13.087	Joint	Administrative Regulations Review Subcommittee (13)	3 members appointed by Legislative Research Commission (at least 1 minority member)	X		(14)	30 days	X	X	X			(13)	N/A	N/A [illegible]	N/A (15)	X
LOUISIANA	LRS 49:951 et seq	Standing Committees	N/A	N/A	X		15 days prior to adoption of rule (16)	Committee must submit report to legislature by 2nd day of session	X		X			N/A	N/A	N/A	N/A	X

STATE	Statute Citation	Type of Reviewing Committee	Name of Reviewing Committee	Composition of Reviewing Committee	Rules Reviewed: Pro.	Rules Reviewed: Exist.	Time Limit for Submission of Proposed Rules to Legislature	Time Limit for Legislative Review of Rules	Review of Proposed Rules Prior to Effect. Hearings	Review of Existing Rules	Automatic Approval of Proposed Rules Without Objections	Suspension Power Held by Committee	Time Limit of Committee Suspension	Legislature Must Sustain Committee Action or Suspension Lapses	Time Limit for Legislative Affirmation	Method of Legislative Affirmation	Legislature Can Amend or Modify	Advisory Powers Only
MAINE	[illegible] et seq. (17)	Joint Standing Committees	N/A	N/A	X (17)		None	None		X (17)	N/A			X (17)	None	Statute (17)		
MARYLAND	Md. Ann. Code [illegible] Art. [illegible]	Joint	Joint Standing Committee on Administrative, Executive and Legislative Review	5 Senate 5 House (Proportion to party representation)	X		None, but cannot go into effect without being printed in Maryland Register	45 days	X	X	X			X	End of regular session	Statute	X	
MICHIGAN	Mich. St. Ann. [illegible] et seq. (18)	Joint	Committee on Administrative Rules	[illegible] House [illegible] Senate	X		20 days before adoption	60 days	X			X (19)	[illegible]			[illegible]		
MINNESOTA	Minn. St. [illegible]	Joint	Legislative Commission to Review Administrative Rules	5 House 5 Senate	X		None	None		X	N/A	X (20)	End of next regular session	X	End of next regular session	Statute		
MISSOURI	Sec. 536.037 R.S. Mo.	Joint	Committee on Administrative Rules	5 House 5 Senate (At least 2 minority members from each house)	X		None	None		X	N/A			N/A	N/A	N/A	N/A	X
MONTANA	MCA [illegible] Sec. [illegible] et seq.	Joint Bi-partisan	Administrative Code Committee	4 House 4 Senate (At least 2 minority members from each house)	X		None	None		X	N/A			X (21)	None	[illegible]	X	
NEBRASKA	Neb. Rev. St. Sec. [illegible] et seq.	Standing Committees	Administrative Rules and Regulations Review Committee	9 members	X		None	None	X	X	N/A	X	During current session	X	N/A	N/A	N/A	X (22)
NEVADA	Code [illegible] et seq.	Joint	Legislative Commission (23)	[illegible] House [illegible] Senate	X		After adoption	Not more than 35 days		X	N/A			N/A	N/A	N/A	N/A	X
NEW HAMPSHIRE	RSA Sec. [illegible]	Standing Committees	N/A	N/A	X		None	30 days	X	X	X			N/A	N/A	N/A	N/A	X
NEW YORK	[illegible]	Joint	Administrative Regulations Review Commission	3 House 3 Senate (1 minority member from each house)	X		30 days prior to effective date	None	X	X				X	None	Statute		X
N. CAROLINA	G.S. 120-[illegible] et seq.	Joint	Administrative Rules Review Committee	7 members of General Assembly	X		Simultaneously with filing with Atty. General	45 days		X	N/A			N/A	N/A	N/A	N/A	X (24)
OHIO	Sec. 101.35, [illegible], 119.03 & 119.031 of Rev. Code	Joint	Joint Committee on Agency Rule Review	5 House 5 Senate (At least 2 minority members from each house)	X		60 days before adoption by agency	60 days	X	X	X	X (25)	60 days after end of next regular session	X	[illegible]	Concurrent resolution	X	

State	Statute Citation	Type of Reviewing Committee(s)	Name of Reviewing Committee	Composition of Reviewing Committee	Rules Reviewed: All	Rules Reviewed: Rules Filed	Time Limit for Submission of Proposed Rules to Legislature	Time Limit for Legislative Review of Rules	Review of Proposed Rules Prior to Effective Date	Review of Existing Rules	Automatic Approval of Proposed Rules Without Objections	Suspension Power Held by Committee	Time Limit of Committee Suspension	Legislature Must Sustain Committee Action to Overturn	Time Limit for Legislative Affirmation	Method of Legislative Affirmation	Legis. Action Can Amend or Modify	Advisory Powers Only
OKLAHOMA	75 O.S. Supp. 1977 Sec. 308	Standing Committees	N/A	N/A	X		10 days after adoption	None		X	N/A			X	90 days	Simple res. of either house		
OREGON	ORS 183.710 to 183.725	Joint	Legislative Counsel Committee	8 House 5 Senate	X		Simultaneously with filing with Sec'y of State	None	X	X	X			N/A	N/A	N/A	N/A	X
S. CAROLINA	Act No. 176 of 1977	Standing Committees	N/A	N/A	X		None, but cannot go into effect until 90 days after submission	90 days	X		X			X	90 days after rule filed with legislature	Joint resolution		
S. DAKOTA	SDCL 1-26 et seq.	Joint	Interim Rules Review Committee	3 House 3 Senate (At least 1 minority member from each house)	X		20 days before agency hearing	20 days after filing with Sec'y of State	X	X	X	X (27)	90 days after convening of regular session	X	30 days after convening of regular session	Statute	X (28)	
TENNESSEE	Tenn. Code Ann. 4-5	House: Gov't Operations Committee; Senate: Standing Committees	N/A	N/A		X	After adoption	None		X	N/A	X (29)	Until rescinded by legislature			Joint resolution		
TEXAS	Chap. 3[illegible] Acts of 65th Leg., 1977	Standing Committees	N/A	N/A	X		30 days prior to adoption		X		X			N/A	N/A	N/A	N/A	X
VERMONT	3 V.S.A. 817-820	Joint	Legislative Committee on Administrative Rules (30)	3 House 3 Senate (At least 1 minority member from each house)	X		2 weeks before adoption	90 days	X	X	X			X	End of next regular session	Joint resolution	X	
W. VIRGINIA	Code of W. Va. Art. 3 Chap. 29A	Joint	Legislative Rule-making Review Committee	6 House 6 Senate (At least 2 minority members from each house)	X		None, but cannot go into effect unless filed with committee	6 Months	X		X	X (31)	Until rescinded by legislature	(31)	(31)	Concurrent resolution		
WISCONSIN	W.S.A. 227.[illegible]	Joint and Standing Committees	Joint Committee for Review of Administrative Rules	5 House 5 Senate (At least 1 minority member from each house)	X		None	60 days	X	X	N/A	X	End of next regular session	X	End of next regular session	Statute	X	
WYOMING	Wyo. Stat. Sec. 28-[illegible] et seq.	Joint	Legislative Management Council	15 members of legislature (33)	X		30 days prior to adoption	Within 90 days after publication by agency (32)		X	N/A			X (32)		Legislative Digest		

FOOTNOTES

1. Provides for legislative review of only the rules promulgated by State Parks Board.
2. Not specified; presumably, review done by appropriate committee.
3. Performs review during interim; during session, standing committees perform review.
4. Staff reviews all new rules and makes recommendations to committee.
5. Legislature "may . . . either sustain or reverse a vote of disapproval" by the committee, but it is not mandatory.
6. Committee may disapprove a part of a rule.
7. Committee must introduce resolution within first 30 days of next regular session. If resolution adopted by two-thirds majority of each house, rule is void. If resolution adopted by less than two-thirds majority, it must be submitted to governor for veto or approval.
8. Committee may submit "appropriate legislation to implement" committee recommendations.
9. Published in Iowa Administrative Code 35 days prior to adoption.
10. If the committee objects to a rule on the grounds it is "unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to that agency," the burden of proof is then on the agency in any judicial review.
11. By a two-thirds vote the committee may delay for further study the effective date of a proposed rule for up to 70 days.
12. By concurrent resolution for proposed rules; by statute for existing rules.
13. Permanent subcommittee of the Legislative Research Commission (LRC).
14. No time limit, but proposed rule can't go into effect unless it is filed with the LRC and reviewed by the Administrative Regulations Review Subcommittee.
15. If proposed rule is found objectionable by the Administrative Regulations Review Subcommittee and by an interim or standing committee, it is submitted to the House and Senate "for such action as (they) may determine to be appropriate."
16. Also, agencies must submit, 30 days prior to regular session, an annual report to the legislature on all rules adopted over the past year.
17. Under this 1977 law, joint standing committees review all existing rules and introduce legislation stating an expiration date of 5 years or less for each rule. All new rules automatically expire in 5 years unless legislation is enacted to terminate them within 5 years.
18. In addition, Article IV - Section 37 of the Michigan constitution provides for the legislative power to review and suspend rules.
19. Suspension power enacted by legislature over governor's veto in 1977 and effective in January 1, 1978.
20. Suspension is delayed for 60 days to allow appropriate standing committee to review rule.
21. During the interim, the committee may poll the members of the legislature by mail to determine if a rule is consistent with legislative intent.
22. Legislature has power to repeal or amend statute granting promulgating or general program authority upon recommendation of the committee.
23. Standing committees review rules if agency returns unchanged a rule objected to by the Legislative Commission. If standing committee also objects, rule is submitted to legislature for "proper" action.
24. If a rule is found objectionable by the committee and agency refuses to modify, the rule is reviewed by Legislative Research Commission. If LRC objects and the agency refuses to modify, LRC reports to the General Assembly, recommending "legislative action."
25. Committee may suspend a rule only during the interim by a two-thirds vote of the members.
26. Committee may suspend a rule by a three-fourths vote of the members.
27. Legislature has authority to amend, but it has never been used.
28. Committee can suspend rule after 15 days notice to agency.
29. There is also an executive branch committee which reviews rules consistency with legislative intent and the authority and policies of the governor.
30. Disapproval of a rule by committee prevents the agency from taking any "action to implement such disapproval rule or regulation," unless the committee action is reversed by the legislature. However, disapproval of a rule implementing a federally subsidized program must be sustained by the legislature before the end of the regular session, or the committee's action is reversed.
31. The Legislative Management Council submits its report to the governor. If the governor objects to the report, he must file his objections with the council within 15 days. The council reports to the legislature each session, at which time, the legislature can prohibit implementation of rule by "legislative order."
32. Council consists of eleven members, which includes presiding officers and the majority and minority floor leaders, or their designees, of the Senate and House; one member from each political party selected at large from the Senate and House; and one member selected at large from either the Senate or House by the ten above-named.

27. Legislature has authority to amend, but it has never been used.
28. Committee can suspend rule after 15 days notice to agency.
29. There is also an executive branch committee which reviews rules consistency with legislative intent and the authority and policies of the governor.
30. Disapproval of a rule by committee prevents the agency from taking any "action to implement such disapproved rule or regulation," unless the committee action is reversed by the legislature. However, disapproval of a rule implementing a federally subsidized program must be sustained by the legislature before the end of the regular session of the committee's action is reversed.
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11
LEGISLATIVE STAFF OFFICES

Legislative Staff Offices Providing Staff Assistance for Legislative Review of Administrative Regulations

ALASKA
Legislative Affairs Agency
Division of Legal Services
Pouch Y
Juneau, AK 99811
907/465-3867

ARIZONA
(not specified)

ARKANSAS
Arkansas Legislative Council
315 State Capitol
Little Rock, AR 72201
501/371-1937

COLORADO
Legislative Drafting Office
Rule-Review Section
Room 30, State Capitol
Denver, CO 80203
303/839-2045

CONNECTICUT
Legislative Commissioner's Office
Legislative Legal Services
Room 113, State Capitol
Hartford, CT 06115
203/566-5030

FLORIDA
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, FL 32304
904/488-9110

GEORGIA
(review by standing committees; no central staff assistance)

IDAHO
Idaho Legislative Council
State House
Boise, ID 83702
208/384-2475

ILLINOIS
Joint Committee on Administrative Rules
520 South 2nd Street, Suite 100
Springfield, IL 62706
217/785-2254

IOWA
Administrative Rules Review Committee
State House
Des Moines, IA 50319
515/281-3084

KANSAS
Legislative Research Department
Room 545 - North
State House
Topeka, KS 66612
913/296-3181

KENTUCKY
Legislative Research Commission
Capitol Building
Frankfort, KY 40601
502/564-3136

LOUISIANA
Louisiana Legislative Council
Committee Staff Division
State Capitol, P.O. Box 44012
Baton Rouge, LA 70804
504/389-6141

MAINE
Legislative Research Office
State House
Augusta, ME 04333
207/289-2101

MARYLAND
Department of Legislative Reference
90 State Circle
Annapolis, MD 21401
301/269-2361

MICHIGAN
Joint Committee on Administrative Rules
735 Washington Square Building
Lansing, MI 48901
517/373-6476

MINNESOTA
Legislative Commission to Review Administrative Rules
Room 3, State Capitol
St. Paul, MN 55155
612/296-1143

MISSOURI
Thomas Graham
Committee on Administrative Rules
301B East High Street
Jefferson City, MO 65101
314/635-9191

MONTANA
Office of the Legislative Auditor
Room 135, State Capitol
Helena, MT 59601
406/449-3122

NEBRASKA
Revisor of Regulations
State House, Room 1012
Lincoln, NE 68509
402/471-2567

NEVADA
Legislative Counsel Bureau
Legal Division
Legislative Building
Carson City, NV 89710
702/885-5627

NEW HAMPSHIRE
Office of Legislative Services
Division of Administrative Procedures
Room 107, State House
Concord, NH 03301
603/271-3680

NEW YORK
Administrative Regulations Review Commission
Senate Section
23rd Floor, Alfred E. Smith Office Building
Albany, NY 12247
518/455-2731

Assembly Section
13th Floor, Agency Building #4
Empire State Plaza
Albany, NY 12247
518/455-3416

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High Street
City, MO 65101
91

A
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. State Capitol
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Regulations
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Counsel Bureau
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Building
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MPSHIRE
Legislative Services
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NH 03301
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, Alfred E. Smith Office
Y 12247
31

Section
, Agency Building #4
ate Plaza
Y 12247
16

NORTH CAROLINA
Administrative Rules Review Committee
Legislative Research Commission
2129 State Legislative Building
Raleigh, NC 27611
919/733-7044

OHIO
Legislative Service Commission
State House, Fifth Floor
Columbus, OH 43215
614/466-7977

OKLAHOMA
Oklahoma Legislative Council
305 State Capitol
Oklahoma City, OK 73105
405/521-3201

OREGON
Office of Legislative Counsel
S101 State Capitol
Salem, OR 97310
503/378-8148

SOUTH CAROLINA
Legislative Council
P.O. Box 11417
Columbia, SC 29211
803/759-2334
(committee staff also assists standing committees)

SOUTH DAKOTA
Legislative Research Council
Code Counsel
State Capitol
Pierre, SD 57501
605/224-3251

TENNESSEE
Joint Legislative Services Committee
State Capitol
Nashville, TN 37219
615/741-3511
(provides staff to standing committees)

TEXAS
(standing committee staff)

VERMONT
Legislative Council
State House
Montpelier, VT 05602
802/828-2231

WEST VIRGINIA
Legislative Rulemaking Review Committee
State Capitol
Charleston, WV 25305
(no phone listed)

WISCONSIN
David Stute
Legislative Council
State Capitol
Madison, WI 53702
608/266-1304

WYOMING
Legislative Service Office
213 Capitol Building
Cheyenne, WY 82002
307/777-7881

STATEMENT IN FAVOR OF BALLOT PROPOSITION NO. 1

The legislature, when it writes a law, cannot foresee all of the possible details involved in carrying it out. The appropriate administrative agency is therefore allowed to write regulations which spell out who does what, when, where, and how. If the agency does no more than this no problem is created.

Unfortunately agency regulations are not always consistent with the intent the legislature had in passing the law. Sometimes an agency will get carried away and put out regulations that cause an unnecessary burden for the citizens. The First State Legislature realized this and provided a simple solution. The legislature could, by a concurrent resolution passed by a majority of each house, annul an administrative regulation. Such a resolution is not subject to the governor's veto.

The Alaska Supreme Court recently held, in a 3-2 decision, that the legislature must use a bill rather than a resolution to annul administrative regulations. But a bill is subject to the governor's veto. The governor can hardly be expected to approve a bill overruling his subordinates, who put out the regulation in the first place. The present governor has already vetoed one such bill.

The court ruling gives agency regulations equal standing with laws, *even though no single person elected by the voters has approved them.*

Our government is wisely based on dividing power among the three branches: legislative, executive and judicial. The current situation gives entirely too much power to the executive branch. Your approval of this constitutional amendment will restore the better balance under which the state operated from 1961 to 1980.

— Charles H. Parr
Chairman, House Judiciary Committee
Alaska State Legislature

STATEMENT AGAINST BALLOT PROPOSITION NO. 1

This is still another proposal by the legislature to free itself from the checks and balances of our constitution. Under the constitution, the legislature has all the power it needs to make laws and annul administrative regulations. This proposal does not aid the public in any way. What it does is allow the legislature to exercise its power to annul regulations in disregard of the constitutional requirements that each bill have a single subject, that each bill have three readings in each house, and that there be a recorded vote of the ayes and nays on final passage. It would also free the legislature from the executive veto and it would allow it to ignore the prohibition against special and local legislation.

The Alaska Supreme Court has recently ruled that the legislature must abide by the constitution's checks and balances on its power whenever it exercises that power, including when it acts to annul regulations. This amendment is intended to overrule the court's decision and erode the constitution's safeguards. It aids legislators, not the public, and it should be rejected.

— Katherine D. Nordale
Delegate to the Alaska
Constitutional Convention,
1955-1956

Arguments printed on this page are the opinions of the authors and have not bee checked for accuracy by any official agency.

BALLOT PROPOSITION NO. 1

LEGISLATIVE ANNULMENT OF REGULATIONS

Constitutional Amendment

(Committee Substitute for House Joint Resolution No. 82 Amended)

SUMMARY

(As it will appear on the November 4, 1980 General Election Ballot)

This proposal would permit the legislature to annul, by adopting a resolution, regulations adopted by state agencies. Annulment of regulations by resolution was authorized by the First State Legislature in 1959; however, in 1980 the Alaska Supreme Court held that the constitution permits the legislature to annul a regulation only by passing a bill, which requires three readings of the bill and a roll call vote which is recorded. The procedures for adopting resolutions are governed by legislative rules and require only the approval of the resolution by voice vote of a majority of both houses. A bill passed by the legislature annulling a regulation could be vetoed by the governor or repealed by referendum. A resolution annulling a regulation could not.

BALLOT FORM:

A vote "FOR" adopts the amendment.

A vote "AGAINST" rejects the amendment.

FOR ☐

AGAINST ☐

VOTE CAST BY MEMBERS OF 11TH STATE LEGISLATURE ON FINAL PASSAGE

Senate	(20 members):	Yeas 18	Nays 0	Absent or Not Voting 2
House	(40 members):	Yeas 36	Nays 0	Absent or Not Voting 4

LEGISLATIVE AFFAIRS AGENCY SUMMARY

(As required by law)

This proposal would add a new section, section 22, to Article II of the state constitution. If adopted, the proposal would authorize the legislature to annul or set aside a regulation which has been adopted by a state department or agency. In order to annul a regulation, the legislature could adopt a concurrent resolution by approval of the resolution by majority vote of the membership of each house of the legislature. The resolution specifies the date on which the annulment of a regulation would take effect.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

SECTION 22. ANNULMENT OF REGULATIONS. The legislature by a concurrent resolution approved by a majority vote of the membership of each house may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective on the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3500

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M December 29, 1982

SUBJECT: Constitutional amendments: regulations
(Work Order No. 13-0408)

TO: Representative-elect Mike Szymanski

FROM: Edward H. Hein EHH
Legislative Counsel

You have asked what legislation has passed the legislature proposing amendments to the Alaska constitution that would give the legislature power to change or modify administrative regulations.

The only measure proposing such an amendment that was passed by the legislature was CS HJR 82 am in 1980. The proposal appeared on the November 4, 1980 general election ballot as ballot proposition no. 1. It was rejected by the voters.

The identical proposal was again passed by the House in 1982 as HJR 77. The Senate, however, passed a different version of the resolution. The House would not concur in the amendment; the Senate would not recede from its amendment. The Conference Committee reported out the House version, but the Legislature adjourned without voting on the measure again.

I have been unable to locate any other proposed constitutional amendments on the subject that have passed the legislature.

EHH:lmb

Enclosure

FILE WITH HJR 5

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
307 BAWDEN STREET
KETCHIKAN, ALASKA 99901

While in Juneau
POUCH V
JUNEAU, ALASKA 99811

Senate

VICE CHAIRMAN
SENATE RESOURCES COMMITTEE

MEMBER
SENATE JUDICIARY COMMITTEE

WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE

WESTERN CONFERENCE COUNCIL
OF STATE GOVERNMENTS

May 5, 1983

Senator Bill Ray,
Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: HJR 5

Dear Bill:

This proposed constitutional amendment is well known to both of us. It provides that a concurrent resolution approved by a majority vote of each house may annul state departmental or agency regulations.

As you are well aware, the voters knocked this proposition down by at least a four-to-three margin in the general election in 1980. If we do pass it out, and if it does go on the ballot, we should make sure that the public is educated.

Art Peterson wrote a letter to Charlie Bussell on April 13th in which he took a fairly dim view of the legislation.

Regards,

Robert H. Ziegler, Sr.

RHZ:lk

FILE WITH HJR 5

STATE

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 11, 1983

The Honorable Bill Ray
Chairman
Senate Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HJR 5 (constitutional amendment on annullment of regulations)

Dear Senator Ray:

The Senate committee schedule shows that your committee will be taking up House Joint Resolution No. 5 on May 13. The Department of Law strongly opposes that resolution, and I am attaching to this letter a copy of my April 13, 1983 letter to Representative Bussell on the same subject.

Essentially, the Department of Law's position is that:

1. In 1980, the voters rejected a virtually identical resolution by a substantial margin -- 82,010 to 58,808. We should assume that the voters knew what they were doing.

2. The legislature does not need this short-cut method to perform its proper oversight function.

   (A) The Alaska Administrative Procedure Act includes provisions giving multiple notice to the legislature and enabling legislators to participate in the regulations-adoption process.

   (B) If an executive-branch agency, in adopting a regulation, goes in a direction that is not supported by the current legislature, the legislature may legislate further -- enact guidelines, limitations, prohibitions.

3. A concurrent resolution, the vehicle proposed by this resolution to annul administrative regulations, is not covered by the constitutional and other provisions applicable

to bills, which provisions tend to assure protection of and accountability to the public.

4. An annullment resolution's bare negative statement does not afford the executive-branch agency responsible for executing the law any guidance in performing its constitutionally mandated duties.

Thank you for this opportunity to comment on this measure.

Yours truly,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Art Peterson

Arthur H. Peterson
Assistant Attorney General

AHP:jb

Attachment

cc w/enc.: Hon. Mike Szymanski
Alaska House of Representatives

cc: Emil Notti
Legislative Assistant
Governor's Office

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 13, 1983

The Hon. Charlie Bussell
Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HJR 5 (constitutional amendment on annulment of regulations)

Dear Representative Bussell:

I understand that House Joint Resolution No. 5 is on your committee's agenda for today. This letter is to briefly express the Department of Law's opposition to that resolution.

The amendment proposed by HJR 5 is virtually identical to the Eleventh Legislature's CS HJR 82 am. (The only difference between the two amendments is that HJR 5 provides for the annulment to take effect 30 days after approval of the resolution, whereas the earlier version provided that it would take effect on the date the current resolution is approved.) That amendment was rejected by the voters on November 4, 1980 by a vote of 82,010 to 58,808. That is a substantial margin, and we should assume that the voters knew what they were doing. They should not be repeatedly subjected to the same ballot issue.

As you know, these proposals for constitutional amendments are intended to reverse the effect of the Alaska Supreme Court's decision in State of Alaska v. A.L.I.V.E Voluntary, 606 P.2d 769 (1980). The essence of that court decision, which held invalid the statute (AS 44.62.320(a)) that provided for legislative annulment of administrative regulations by concurrent resolution, is that (1) procedurally and substantively valid regulations have the force of law, (2) an "annulment" of a regulation has the effect of changing the law, and (3) when the legislature changes the law, it must do so by following the constitutional procedures for law-making. Since AS 44.62.320(a)'s concurrent resolutions do not follow the procedures for law-making, the court held that that statute was invalid.

As the court pointed out in Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979), the various constitutional provisions specifying the mechanics of legislation are "designed to engender

a responsible legislative process worthy of the public trust." Those provisions are "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." Id. Those procedures include, for example, the single subject rule of art. II, sec. 13; the requirement of separate readings on separate days, under art. II, sec. 14; the requirement that the ayes and nays on final passage be recorded in the legislative journal, under art. II, sec. 14; and, of course, the provisions on gubernatorial veto, under art. II, secs. 15 and 16.

Those provisions provide for public accountability, public notice, and an opportunity for the public to prepare for the application of new law. Regulations adopted under the Alaska Administrative Procedure Act require public notice, opportunity for public comment, legal review by the Department of Law, and a deferred effective date. The current version of this proposed constitutional amendment has improved upon some earlier versions by the provision for a thirty-day deferral of the effective date, but neither the other constitutional protections nor the corresponding Administrative Procedure Act protections would be applicable to the annulment of an administrative regulation.

The proposed constitutional amendment before you is not a "mere adjustment" or technical correction of the constitution. It proposes a substantial realignment of the constitutionally specified powers. Although the adoption of administrative regulations by an administrative agency is considered a "quasi-legislative function," it is an essential part of the executive branch's execution or implementation of a statute. The proposed amendment, by providing for legislative annulment, by means a concurrent resolution, provides for the legislature to make what could be considered executive-branch decisions -- executing a program created by statute. This concentration of power in the legislative branch -- both enacting the program statute and then participating in executing it -- does not reflect a sound policy in the face of the separation-of-powers doctrine as expressed in the Federalist Papers and other writings. That doctrine, of course, involves a blending or sharing of powers. The purpose is to avoid an inappropriate concentration of power.

In addition, when the legislature makes a simple negative statement by merely annulling a regulation, it interferes with the executive-branch's execution of the statute and offers nothing in its place. For example, the regulation involved in the A.L.I.V.E. Voluntary case was a Department of Revenue regulation dealing with permits for such things as lotteries. It contained several elements: a dollar limitation, a time limitation, and a provision for the cumulative effect of the value of individual prizes in reaching the dollar limitation. When the legislature annuls a provision such as that, is the agency to

interpret that annulment as meaning that the dollar limitation is not appropriate, or that the time period is not appropriate, or that the cumulative effect is not appropriate? If the agency concluded that the legislature must have been primarily concerned about the dollar limitation, and adopted a new regulation specifying a different dollar amount, would it be guessing right?

I do not believe that anyone questions the legislature's right to review the executive-branch's execution of the statute. Nor does anyone question the legislature's right to enact statutes setting guidelines and imposing limitations or prohibitions. We may disagree as to the merit of a particular guideline or prohibition, but not as to the right of the legislature to enact it (subject, in some circumstances, to the applicability of other constitutional provisions).

The Alaska Administrative Procedure Act (AS 44.62) provides a carefully structured system with many opportunities for legislator-involvement in the adoption of administrative regulations. If one of those opportunities was missed, or proved otherwise unavailing in some circumstance, further legislation might be appropriate. Such legislation would, of course, supersede the offending regulation.

Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), is currently on appeal to the United States Supreme Court. That case presents to the court the question of the validity of what has become known as the "legislative veto." A decision is expected by June of this year. Your committee might also find helpful the discussion in the official commentary to the 1981 Revised Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State Laws; see, especially, the art. III introductory comments which discuss the legislative/executive/public interrelationship regarding administrative regulations.

Thank you for this opportunity to comment. I would be happy to discuss the matter further with you at your convenience.

Yours truly,

Norman C. Gorsuch
Attorney General

By: Arthur H. Peterson
Arthur H. Peterson
Assistant Attorney General

AHP/jb

cc: Emil Notti
Legislative Assistant
Governor's Office

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: HJR 5 No. 2
Title: "...annulment of regulations..."
Sponsor: Repr. Szymanski
Requestor: House Judiciary Committee

II. FISCAL DETAIL

Agency Affected: Department of Law
Program Category Affected: General Go
BRU, Program of Subprogram(s) Affected
Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY.87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Division Date: April 13, 1983
Approved by Commissioner: Richard L. Planer / FOR Norman C. Gorsuch, Attorney General Date: April 13, 1983
Department: Department of Law

Fiscal Note
Analysis

While the Department of Law opposes this resolution, we will limit our comments here to fiscal matters. This proposed amendment to the state's constitution, if adopted in the 1984 general election, will probably not have a direct fiscal impact on the department's operations. The department is statutorily responsible for reviewing all regulations for legality and form to insure consistency with the appropriate enabling legislation. The department also drafts regulations on behalf of other departments and assists other departments in drafting regulations that deal with highly complex matters requiring the attention of an attorney. Obviously, some of the time spent in these efforts will have been lost whenever a regulation has been annulled. Larger departments, which have the responsibility for carrying out major state programs, and who routinely draft numerous program operating regulations inhouse, will probably experience an even greater loss of staff time. The absence of statutorily mandated regulations, which would occur after annulment, could result in litigation from an adversely impacted industry or public interest group. The impact of such litigation cannot, in this case, be estimated in advance and therefore no cost impact can be shown.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Joint Resolution No. 5 No. 1
Title Proposing an amendment to the Constitution of the State of Alaska relating to annulment of regulations by the legislature.
Requested by: House Judiciary Committee Date 4/13/83

II. FISCAL DETAIL
Agency Affected General Government
Program Category Affected Legislative Affairs Agency
BRU, Program, Or Subprogram(s) Affected Session
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES	-0-	-0-				
200 TRAVEL	-0-	-0-				
300 CONTRACTUAL	-0-	-0-				
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-	-0-				

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS None

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Assuming that no special session is called for the express purpose of annulling regulations, it is estimated that this resolution will have no additional fiscal impact.

There is no additional cost to the Division of Elections to place an issue before the voters as that is the division's function.

IV. DATE 04-13-83 PREPARED BY Wally Harrison, Dir. of Admin. S
AGENCY Legislative Affairs Agency
PHONE 465-3850

Original: Legislative Finance
cc: Budget and Management

FILE WITH HJR5

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
307 BAWDEN STREET
KETCHIKAN, ALASKA 99901

While in Juneau
POUCH V
JUNEAU, ALASKA 99811

Senate

VICE CHAIRMAN
SENATE RESOURCES COMMITTEE

MEMBER
SENATE JUDICIARY COMMITTEE

WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE

WESTERN CONFERENCE COUNCIL
OF STATE GOVERNMENTS

May 5, 1983

Senator Bill Ray,
Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: HJR 5

Dear Bill:

This proposed constitutional amendment is well known to both of us. It provides that a concurrent resolution approved by a majority vote of each house may annul state departmental or agency regulations.

As you are well aware, the voters knocked this proposition down by at least a four-to-three margin in the general election in 1980. If we do pass it out, and if it does go on the ballot, we should make sure that the public is educated.

Art Peterson wrote a letter to Charlie Bussell on April 13th in which he took a fairly dim view of the legislation.

Regards,

Robert H. Ziegler, Sr.

RHZ:lk

FILE WITH HJR 5

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 11, 1983

The Honorable Bill Ray
Chairman
Senate Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HJR 5 (constitutional amendment on annullment of regulations)

Dear Senator Ray:

The Senate committee schedule shows that your committee will be taking up House Joint Resolution No. 5 on May 13. The Department of Law strongly opposes that resolution, and I am attaching to this letter a copy of my April 13, 1983 letter to Representative Bussell on the same subject.

Essentially, the Department of Law's position is that:

1. In 1980, the voters rejected a virtually identical resolution by a substantial margin -- 82,010 to 58,803. We should assume that the voters knew what they were doing.

2. The legislature does not need this short-cut method to perform its proper oversight function.

   (A) The Alaska Administrative Procedure Act includes provisions giving multiple notice to the legislature and enabling legislators to participate in the regulations-adoption process.

   (B) If an executive-branch agency, in adopting a regulation, goes in a direction that is not supported by the current legislature, the legislature may legislate further -- enact guidelines, limitations, prohibitions.

3. A concurrent resolution, the vehicle proposed by this resolution to annul administrative regulations, is not covered by the constitutional and other provisions applicable

to bills, which provisions tend to assure protection of and accountability to the public.

4. An annullment resolution's bare negative statement does not afford the executive-branch agency responsible for executing the law any guidance in performing its constitutionally mandated duties.

Thank you for this opportunity to comment on this measure.

Yours truly,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Art Peterson

Arthur H. Peterson
Assistant Attorney General

AHP:jb

Attachment

cc w/enc.: Hon. Mike Szymanski
Alaska House of Representatives

cc: Emil Notti
Legislative Assistant
Governor's Office

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 13, 1983

The Hon. Charlie Bussell
Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HJR 5 (constitutional amendment on annulment of regulations)

Dear Representative Bussell:

I understand that House Joint Resolution No. 5 is on your committee's agenda for today. This letter is to briefly express the Department of Law's opposition to that resolution.

The amendment proposed by HJR 5 is virtually identical to the Eleventh Legislature's CS HJR 82 am. (The only difference between the two amendments is that HJR 5 provides for the annulment to take effect 30 days after approval of the resolution, whereas the earlier version provided that it would take effect on the date the current resolution is approved.) That amendment was rejected by the voters on November 4, 1980 by a vote of 82,010 to 58,808. That is a substantial margin, and we should assume that the voters knew what they were doing. They should not be repeatedly subjected to the same ballot issue.

As you know, these proposals for constitutional amendments are intended to reverse the effect of the Alaska Supreme Court's decision in State of Alaska v. A.L.I.V.E Voluntary, 606 P.2d 769 (1980). The essence of that court decision, which held invalid the statute (AS 44.62.320(a)) that provided for legislative annulment of administrative regulations by concurrent resolution, is that (1) procedurally and substantively valid regulations have the force of law, (2) an "annulment" of a regulation has the effect of changing the law, and (3) when the legislature changes the law, it must do so by following the constitutional procedures for law-making. Since AS 44.62.320(a)'s concurrent resolutions do not follow the procedures for law-making, the court held that that statute was invalid.

As the court pointed out in Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979), the various constitutional provisions specifying the mechanics of legislation are "designed to engender

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a responsible legislative process worthy of the public trust." Those provisions are "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." Id. Those procedures include, for example, the single subject rule of art. II, sec. 13; the requirement of separate readings on separate days, under art. II, sec. 14; the requirement that the ayes and nays on final passage be recorded in the legislative journal, under art. II, sec. 14; and, of course, the provisions on gubernatorial veto, under art. II, secs. 15 and 16.

Those provisions provide for public accountability, public notice, and an opportunity for the public to prepare for the application of new law. Regulations adopted under the Alaska Administrative Procedure Act require public notice, opportunity for public comment, legal review by the Department of Law, and a deferred effective date. The current version of this proposed constitutional amendment has improved upon some earlier versions by the provision for a thirty-day deferral of the effective date, but neither the other constitutional protections nor the corresponding Administrative Procedure Act protections would be applicable to the annulment of an administrative regulation.

The proposed constitutional amendment before you is not a "mere adjustment" or technical correction of the constitution. It proposes a substantial realignment of the constitutionally specified powers. Although the adoption of administrative regulations by an administrative agency is considered a "quasi-legislative function," it is an essential part of the executive branch's execution or implementation of a statute. The proposed amendment, by providing for legislative annulment, by means a concurrent resolution, provides for the legislature to make what could be considered executive-branch decisions -- executing a program created by statute. This concentration of power in the legislative branch -- both enacting the program statute and then participating in executing it -- does not reflect a sound policy in the face of the separation-of-powers doctrine as expressed in the Federalist Papers and other writings. That doctrine, of course, involves a blending or sharing of powers. The purpose is to avoid an inappropriate concentration of power.

In addition, when the legislature makes a simple negative statement by merely annulling a regulation, it interferes with the executive-branch's execution of the statute and offers nothing in its place. For example, the regulation involved in the A.L.I.V.E. Voluntary case was a Department of Revenue regulation dealing with permits for such things as lotteries. It contained several elements: a dollar limitation, a time limitation, and a provision for the cumulative effect of the value of individual prizes in reaching the dollar limitation. When the legislature annuls a provision such as that, is the agency to

interpret that annulment as meaning that the dollar limitation is not appropriate, or that the time period is not appropriate, or that the cumulative effect is not appropriate? If the agency concluded that the legislature must have been primarily concerned about the dollar limitation, and adopted a new regulation specifying a different dollar amount, would it be guessing right?

I do not believe that anyone questions the legislature's right to review the executive-branch's execution of the statute. Nor does anyone question the legislature's right to enact statutes setting guidelines and imposing limitations or prohibitions. We may disagree as to the merit of a particular guideline or prohibition, but not as to the right of the legislature to enact it (subject, in some circumstances, to the applicability of other constitutional provisions).

The Alaska Administrative Procedure Act (AS 44.62) provides a carefully structured system with many opportunities for legislator-involvement in the adoption of administrative regulations. If one of those opportunities was missed, or proved otherwise unavailing in some circumstance, further legislation might be appropriate. Such legislation would, of course, supersede the offending regulation.

Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), is currently on appeal to the United States Supreme Court. That case presents to the court the question of the validity of what has become known as the "legislative veto." A decision is expected by June of this year. Your committee might also find helpful the discussion in the official commentary to the 1981 Revised Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State Laws; see, especially, the art. III introductory comments which discuss the legislative/executive/public interrelationship regarding administrative regulations.

Thank you for this opportunity to comment. I would be happy to discuss the matter further with you at your convenience.

Yours truly,

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