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LEGISLATIVE OVERSIGHT AND THE SOUTH CAROLINA EXPERIENCE

I. INTRODUCTION

The number of state agencies has risen sharply in recent years, resulting in a corresponding increase in the number of agency rules and regulations.¹ California, for example, had 72 agencies which filed 456 regulations during fiscal year 1967-68.² During the 1978-79 fiscal year, 147 California agencies filed almost 1200 regulations.³ In 1980, South Carolina's agencies⁴ submitted 73 sets of regulations.⁵ This figure rose to 88 in 1981.⁶

On January 26, 1982, President Ronald Reagan proposed turning over responsibility for more than forty federal programs to the states.⁷ Should this proposal become effective, it will undoubtedly add to the proliferation of agency rules and regulations.

Legislatures have responded to the growth of agencies and rulemaking by adopting some form of "legislative oversight."⁸

1. For purposes of this paper, the words "rule" and "regulation" will be used interchangeably. According to the 1961 version of the Model State Administrative Procedure Act, "'rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. . . ." MODEL STATE ADMIN. PROCEDURE ACT § 1(7), 14 U.L.A. 357, 372 (1961)(amended 1980) [hereinafter cited as 1961 MODEL STATE APA]. The South Carolina Code contains a more detailed definition and uses the term "regulation" instead of "rule." S.C. CODE ANN. § 1-23-10(4)(Supp. 1981). The Federal Administrative Act [hereinafter cited as Federal APA] uses the term "rule." 5 U.S.C. § 551(4)(1970 & Supp. V 1975).

2. Starr, *California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review, Too*, 32 AD. L. REV. 713 (1980).

3. *Id.*

4. South Carolina has eighty-six state agencies. S.C. CODE ANN. R.1-1 to R.125-12 (1976 & Supp. 1981).

5. 4 S.C. State Reg. (1980).

6. 5 S.C. State Reg. (1981).

7. The Wall Street Journal, Jan. 27, 1982, at 3, col. 1.

8. Although "legislative oversight" seems to indicate the legislature overlooked regulations, the phrase actually refers to a process of overseeing the regulations. Under this process, the agency must submit rules promulgated by it to the state legislature for approval or disapproval. F. COOPER, STATE ADMINISTRATIVE LAW 221 (1965).

The most common types of legislative oversight are one or more of the following: simple review of the regulation with only advisory comment;⁹ repeal of a regulation by resolution;¹⁰ suspension of the regulation by a legislative committee until the full legislature acts;¹¹ or permanent suspension of the regulation by a legislative committee unless reversed by the full legislature.¹² The repeal by the legislature of a regulation is known as a “legislative veto.”¹³ In 1955 only six states provided for review of agency regulations.¹⁴ Today, thirty-eight states, including South Carolina, have some type of legislative review procedure.¹⁵

The purpose of this article is to present an overview of the development of legislative oversight, and to compare South Carolina’s oversight statute¹⁶ with other state oversight statutes and the Model State Administrative Procedure Act (1981 Model State APA).¹⁷ South Carolina’s oversight statute will then be considered in depth, focusing on its weaknesses and the constitutionality of the statute.

II. HISTORY AND DEVELOPMENT OF LEGISLATIVE OVERSIGHT

A. *Development in Great Britain*

Parliament began to control delegated or subordinate legislation (i.e., administrative rules and regulations) during the nineteenth century.¹⁸ Beginning in 1833, Parliament required

9. See *infra* notes 95-98 and accompanying text.

10. See *infra* notes 99-105 and accompanying text.

11. See *infra* notes 107-17 and accompanying text.

12. See *infra* notes 118-20 and accompanying text.

13. At the federal level, enabling statutes provide for the legislative veto. This allows Congress or a congressional subgroup to control implementation of agency action. The approval can be by either negative or positive action. The most common control is negative action, which provides that, in the absence of disapproval, the rule becomes effective after a specified period. Positive control requires congressional approval before the rule can go into effect. Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 426 n.14 (1978).

14. Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 362 (1978).

15. ALA. CODE § 42-22-22 commentary (Supp. 1981).

16. S.C. CODE ANN. §§ 1-23-120 to -140 (Supp. 1981).

17. MODEL STATE ADMIN. PROCEDURE ACT §§ 3-201 to -204, 14 U.L.A. 74 (Supp. 1982)[hereinafter cited as 1981 MODEL STATE APA]. The 1961 version does not provide for legislative oversight. See *supra* note 1.

18. Schwartz, *supra* note 14, at 359.

rules of court procedure to be "laid before" it for a specified period before the rules would take effect.¹⁹ What is substantially the modern version of oversight developed in 1875 when this procedure was extended to all types of subordinate legislation.²⁰

Parliamentary control over subordinate legislation is presently asserted through provisions in enabling statutes,²¹ rather than by a general statute requiring all instruments to be brought before Parliament.²² Great Britain has two types of oversight—"affirmative" and "negative."²³

Affirmative oversight procedure requires, through an enabling statute, that the statutory instrument be approved by resolution of both houses or of the House of Commons alone.²⁴ The enabling statute may allow the statutory instruments to take immediate effect, but requires an affirmative resolution for continued validity.²⁵ This affirmative procedure is considered the more powerful of the two and is usually used when "matters of principal are delegated."²⁶ This is typically when either taxes or a levy is imposed, or when the enabling statute defines legislative policy in broad terms, deriving its actual content from the statutory instrument.²⁷

An enabling statute negative oversight procedure requires statutory instruments to be laid before Parliament for forty days, during which any single member of the House of Commons

19. Carr, *Legislative Control of Administrative Rules and Regulations: II. Parliamentary Supervision in Britain*, 30 N.Y.U. L. Rev. 1045, 1045 (1955).

20. This was in the Judicature Act of 1875, 38 & 39 Vict. c. 77 § 25, which also fused common law and equity. Carr, *supra* note 19, at 1046. After 1948, subordinate legislation was referred to as "statutory instruments." Carr, *supra* note 19, at 1046.

21. Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. Rev. 1031, 1032 (1955).

22. Sir Carr suggests that more than half of the yearly statutory instruments do not have an oversight requirement. Carr, *supra* note 19, at 1048.

23. Schwartz, *supra* note 21, at 1032-33; Carr, *supra* note 19, at 1047; F. Cooper, *supra* note 8, at 223.

24. Schwartz, *supra* note 21, at 1032-33.

25. F. Cooper, *supra* note 8, at 223.

26. Carr, *supra* note 19, at 1047.

27. *Id.*; F. Cooper, *supra* note 8, at 223. In 1924, the House of Lords established a Special Orders Committee to examine and report upon all instruments requiring affirmative approval. In 1944, the House of Commons established a standing committee, the Scrutiny Committee. These committees report any unexpected use of statutory power to the respective houses. Carr, *supra* note 19, at 1049-50. Since its establishment, the Scrutiny Committee has increased substantially the efficiency in the House of Commons. Schwartz, *supra* note 14, at 361.

may enter a motion, referred to as a “prayer,” to annul the instrument. The motion must be approved by members of the House to effect the annulment. As a result, many instruments take effect without challenge.²⁸

B. Oversight in the United States at the Federal Level

1. Development

In 1941 the United States Attorney General’s Committee on Administrative Procedure rejected the use of the British procedure in this country. The Committee reported that “[l]egislative review of administrative regulations, . . . has not been effective where tried.”²⁹ In 1946 Congress adopted the Federal Administrative Procedures Act. The Act did not provide for direct congressional review of agency rulemaking,³⁰ and the current version does not contain such a provision. During 1976, the Administrative Rule Making Reform Act,³¹ which would have required a systematic review of rules,³² was introduced, but failed to receive the required two-thirds vote.³³

While Congress has thus far rejected a general oversight requirement, it has, in particular statutes, implemented legislative oversight similar to the British “negative” oversight procedure.³⁴ The first statute to provide for a legislative veto was the Legislative Appropriation Act of 1932,³⁵ passed when President Hoover sought to reorganize executive departments and agencies of the federal government. Hoover was required to submit his propos-

28. Carr, *supra* note 19, at 1047.

29. Schwartz, *supra* note at 14, at 359-60 (citing ATT’Y GENERAL’S COMM. ON ADMIN. PROCEDURE, REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. 8, 77th Cong., 1st Sess. 120 (1941)).

30. See Admin. Procedure Act, ch. 324, 60 Stat. 237 (1946)(current version at 5 U.S.C. § 553 (1970 & Supp. V. 1975)).

31. H.R. 12,048, 94th Cong., 2d Sess. § 4, 122 CONG. REC. H 10666-90, H 10718-19 (1976).

32. The agency submits the rule to the Secretary of the Senate and Clerk of the House. Unless it is disapproved within ninety days of submission by a concurrent resolution of both houses, or within sixty days by a resolution of one house, the rule becomes effective. If disapproved by a resolution of one only house, the remaining house has thirty days beyond the sixty day limit to reject the other house’s resolution. *Id.*

33. *Id.*

34. Schwartz, *supra* note 21, at 1036. See *supra* note 28 and accompanying text.

35. Pub. L. No. 72-212, 47 Stat. 414 (1932).

als to Congress as a check on the broad powers granted the President under the Act. The proposals were to be adopted if neither house passed a resolution of disapproval, known as a one-house veto.³⁶

Since 1932, more than 295 legislative vetoes have been inserted in over 196 acts of Congress.³⁷ In addition to the one-house veto required in the Legislative Appropriation Act, Congress has required in various statutes that before a rule can take effect it must not have been vetoed by both houses of Congress,³⁸ by a congressional committee,³⁹ or by a single committee chairman.⁴⁰

2. *Alternative Methods of Legislative Oversight Not Employing the Veto*

The discussion of legislative oversight at the federal level thus far has focused on oversight that included a legislative veto. Congress employs other methods of oversight as well. The most fundamental, direct, and effective method is for Congress to revoke an offending rule by enacting a statute that explicitly rescinds or preempts the rule.⁴¹ Another statutory method is to alter the jurisdiction of the agency⁴² or limit its authorizations and appropriations.⁴³ There is also a growing number of statutory techniques that have an indirect influence on oversight. These include prior review requirements and "notice to Congress" provisions.⁴⁴

36. Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 372 (1977). Presidents, from Hoover to Carter, have attacked the legislative veto on Constitutional grounds. See W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW CASES & COMMENTS* 119 n.3 (7th ed. 1979).

37. Miller & Knapp, *supra* note 36, at 371.

38. *E.g.*, Motor Vehicle and School Bus Safety Amendments of 1974, 15 U.S.C. § 14106(d)(1) (1976).

39. *E.g.*, Dep't of Interior and Related Agencies Appropriations for Fiscal Year 1976, Pub. L. No. 94165, tit. II, 89 Stat. 977, 993-94 (1975).

40. *E.g.*, Supplemental Appropriation Act for 1953, Pub. L. No. 82-547, § 1413, 66 Stat. 637, 661 (1952).

41. For examples see Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 AD. L. REV. 667, 670-73 (1980).

42. *Id.* at 673-87.

43. *Id.* at 687-96.

44. *Id.* at 696-704. A number of nonstatutory controls also exist. Although these controls are neither self-enforcing nor legally binding, they contribute substantially to

3. *Review of the Legislative Veto by the Federal Courts*

In *Sibbach v. Wilson*,⁴⁵ the authority of Congress to delegate the development of the Federal Rules of Civil Procedure to the United States Supreme Court was upheld. A provision of the enabling act⁴⁶ required submission of the rules to Congress prior to their effective date. This provision allowed Congress to disapprove a rule or rules if found contrary to the enabling legislation. The Supreme Court reasoned that: "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose."⁴⁷ Although *Sibbach* is the leading judicial expression on the legislative veto, it dealt only with the power of Congress to veto new rules of court procedure.⁴⁸

In *Buckley v. Valeo*,⁴⁹ the Supreme Court was asked to determine the constitutionality of a provision of the Federal Election Campaign Act⁵⁰ providing that the rules of the Federal Election Commission (FEC) could be disapproved by resolution of either house within thirty days after the rules were submitted to Congress.⁵¹ The Court did not reach the merits of this issue, but instead found the manner of appointment of FEC members unconstitutional, thus precluding the Commission from exercising its rulemaking powers.⁵² Justice White, concurring in part

rulemaking control. The nonstatutory oversight techniques include: legislative investigation and confirmation hearings, select agency rulemaking committees, directives in committee reports, congressional criticism of agency action, and liaison between a congressional office and an agency. These alternative methods are clearly within the power of Congress and do not impinge on the powers of other branches. *Id.* at 668.

45. 312 U.S. 1 (1941).

46. 28 U.S.C. §§ 723b, 723c (recodified at 28 U.S.C. § 2072 (1948)).

47. 312 U.S. at 15.

48. See *infra* notes 58-59 and accompanying text.

49. 424 U.S. 1 (1976).

50. 2 U.S.C. §§ 431-456 (Supp. V 1975).

51. *Id.* at § 438(c).

52. 424 U.S. at 140. The Court in reference to the legislative veto said:

Appellants make a separate attack on this qualification of the Commission's rulemaking authority, which is but the most recent episode in a long tug of war between the Executive and Legislative Branches of the Federal Government respecting the permissible extent of legislative involvement in rulemaking under statutes which have already been enacted. . . . Because of our holding . . . we have no occasion to address this separate challenge of appellants.

and dissenting in part, addressed the merits of the constitutional issue:

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. . . . [F]or 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.⁵³

After *Buckley*, Congress amended the Federal Election Campaign Act to provide for a constitutionally valid appointment procedure.⁵⁴ Congress did not, however, change the legislative oversight or veto provisions. The constitutionality of these provisions was challenged in a subsequent suit, *Clark v. Valeo*.⁵⁵ In *Clark*, the government, on behalf of the President and the executive branch, was granted permission by the district court to intervene, apparently for the purpose of also challenging the veto provision. The questions presented were certified by the district court to the United States Court of Appeals for the District of Columbia Circuit, which held that "the matter before us does not present a ripe 'case or controversy' within the meaning of Article III [of the Constitution]."⁵⁶ The court of appeals dismissed the case and the Supreme Court affirmed without an opinion.⁵⁷

Although the merits of *Clark* were never reached, Judge

Id. at 240.

53. *Id.* at 284-85 (White, J., concurring & dissenting).

54. 2 U.S.C.A. § 437c(a)(1)(West Cum. Supp. 1977).

55. 559 F.2d 642 (D.C. Cir. 1977), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

56. 559 F.2d at 647.

57. *Clark v. Kimmitt*, 431 U.S. 950 (1977).

MacKinnon's dissent in the court of appeals decision directly addressed the constitutionality of the veto provision.⁵⁸ Judge MacKinnon distinguished the "lay-over provision" of *Sibbach* from the "lay-over" and one-house veto provisions found in the Federal Election Campaign Act, concluding that: "[a lay-over provision] . . . can allow Congress to act in a constitutional manner through both houses and the President. . . . But the one-house veto . . . is a completely different method of accomplishing a legislative result by a congressional procedure *not* authorized by the Constitution"⁵⁹ Judge MacKinnon asserted that Justice White's approach in *Buckley* "ignore[s] the actual situation created in Congress"⁶⁰ by the Act's legislative veto provision.

A legislative veto provision in the Federal Salary Act of 1967⁶¹ has also been challenged. The Act authorized the President to adjust the compensation of federal employees. The recommended salaries, however, could be vetoed by either house of Congress.⁶² In *Atkins v. United States*,⁶³ 140 federal judges challenged the constitutionality of the Salary Act's veto provision. The Court of Claims, in a four to three decision, upheld the veto but limited its scope to government salaries. These salaries are within the purview of Congress because of the "appropriations power"⁶⁴ and the "necessary and proper"⁶⁵ clauses.⁶⁶ The case was dismissed, however, because the plaintiff judges failed to state claims entitling them to recovery.⁶⁷

The most recent federal case to consider the legislative veto is *Chadha v. Immigration and Naturalization Service*.⁶⁸ In

58. 559 F.2d at 678-95 (MacKinnon, J., dissenting).

59. *Id.* at 681 n.4 (MacKinnon, J., dissenting).

60. *Id.* at 685 (MacKinnon, J., dissenting).

61. 2 U.S.C. § 359 (1970)(amended 1977)(current version at 2 U.S.C.A. § 359 (Supp. 1982)). The current version of the statute requires an affirmative vote by both houses within 60 days for approval or disapproval.

62. *Id.*

63. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). The Federal Salary Act of 1967 also was challenged in *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), but the court did not reach the legislative veto issue on appeal. *Id.* at 1262-63.

64. U.S. CONST., art. I, § 9, cl. 7.

65. U.S. CONST., art. I, § 8, cl. 18.

66. 556 F.2d at 1057-71.

67. *Id.* at 1071.

68. 634 F.2d 408 (1980).

Chadha, a three-judge panel for the Ninth Circuit unanimously held unconstitutional a one-house veto by the House of Representatives of a determination by the Immigration and Naturalization Service (INS) that plaintiff Chadha should be allowed to remain in the United States. Chadha, a native of Kenya, entered the United States as a nonimmigrant student in 1966. In 1975 the executive branch of the government, acting by a special inquiry officer of the INS, determined that although Chadha was subject to deportation, his deportation should be suspended because of extreme hardship. On December 16, 1975, the House of Representatives passed a resolution to overrule the suspension of Chadha's deportation. As a result of the House's action, the deportation proceedings were reconvened, and a final order for deportation was entered. Chadha then filed suit, contending the enabling statute⁶⁹ authorizing congressional disapproval was unconstitutional. The court requested both houses to file briefs on this issue as *amici curiae*.⁷⁰

The Ninth Circuit rejected Congress' arguments that the court lacked jurisdiction; that the legislative veto was not part of the deportation proceedings, and therefore, should not be involved in judicial review; that there was no case or controversy; that Chadha lacked standing; and that the issue was political and therefore not justiciable.⁷¹ The court then explored general constitutional considerations and the veto as applied to Chadha. After a lengthy analysis of separation of powers principles, the court found that the veto was an impingement upon the judiciary,⁷² on executive powers, and a departure from constitutional lawmaking by bicameral action with presidential approval.⁷³ Al-

69. 8 U.S.C. § 1254(c)(2)(1976).

70. 634 F.2d at 411.

71. *Id.* at 411-20.

72. *Id.* at 430. The court said:

We think the supervening legislative action taken here implies a radical alteration of the role of federal courts in the field of administrative law. By reason of the congressional disapproval device, nearly all judicial interpretations of the criteria in section 244 are rendered, in effect, impermissible advisory opinions. . . . We think this is an interference with a central function of the Judiciary, and that it is an interference which is both disruptive and unnecessary.

Id.

73. *Id.* at 432-35. On May 1, 1981, this case was appealed to the United States Supreme Court as *Immigration and Naturalization Service v. Chadha*, 49 U.S.L.W. 3865 (U.S. May 19, 1981)(No. 80-1832). The Court heard oral arguments during the week of

though only a one-house veto was considered in *Chadha*, many of the court's positions are applicable to a congressional veto of rulemaking and can be extended to two-house legislative veto by concurrent resolution.

C. Oversight at the State Level

1. Development

Although the federal government has relied solely on enabling statutes containing veto provisions and has not enacted a general statutory requirement for legislative oversight, the states have experimented with various general oversight statutes. As Mr. Justice Brandeis said, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁷⁴ The states have proven this observation correct in their development of oversight statutes.

One of the first states to enact a statutory provision for legislative oversight of administrative rules was Kansas in 1939.⁷⁵ The statute allowed rules to become effective upon filing and publishing, subject to disapproval by a concurrent resolution of the legislature.⁷⁶ Because the statute lacked a provision for routine review by the legislature, it was seldom used.⁷⁷

February 22, 1982, and on July 2, 1982, the Court ordered the case restored to the calendar for reargument. 50 U.S.L.W. 3998 (U.S. July 2, 1982)(No. 80-1832). The appeal raises the issues of whether the veto violates separation of powers, whether the one-house veto provision is severable from section 244 of the Act, and whether the court of appeals had jurisdiction. 50 U.S.L.W. 3633 (U.S. Feb. 16, 1982)(No. 80-1832). Hopefully the Supreme Court will reach the merits of the legislative veto issue in this latest appeal.

74. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion). The differences in state constitutions also accounts for some of the variation in state oversight statutes.

75. KAN. LAWS 1939, ch. 308c.

76. KAN. STAT. ANN. § 77-410 (1964).

77. F. Cooper, *supra* note 8, at 225 (citing Howe, *Legislative Review of Administrative Rules*, CURRENT TRENDS IN STATE LEGISLATION, 199 (1955-56)). A more recent Kansas statute grants an agency rule the force and effect of law. KAN. STAT. ANN. § 77-425 (1977). The legislature may adopt a bill to modify, approve or reject rules and regulations submitted by the agency. KAN. STAT. ANN. § 77-426(e) (1977). Kansas is one of the states which has struck down the legislative veto. *Kansas ex rel., Schneider v. Bennett*, 219 Kan. 285, 301, 547 P.2d 786, 799 (1976) (authority of legislative members of state finance council to approve expenditure of special revenue funds held a violation of separation of powers).

In 1945 the Michigan legislature passed a bill containing an oversight provision employing an affirmative veto. The bill required that rules be referred to legislative committees in the same manner as bills, and any rule not affirmatively adopted by concurrent resolution was suspended.⁷⁸ The bill, however, was vetoed by the Governor.⁷⁹ The legislature responded in 1947 by enacting a statute authorizing negative oversight. Under this statute, new rules were submitted to various legislative committees. The rules were upheld unless disapproved by concurrent resolution. The 1947 statute also provided for a joint interim committee to review rules until the next regular session.⁸⁰ The statute was amended in 1951 to give the interim committee even greater power. Under the 1951 amendment, once a rule was suspended, it remained suspended unless reinstated by the committee or by concurrent resolution of the legislature.⁸¹

In 1953, the Michigan Attorney General declared the oversight statute unconstitutional.⁸² The interim committee continued to operate but refrained from suspending rules. In 1958, a statute was passed eliminating the committee's power to suspend rules. The legislature, however, could still disapprove a rule by concurrent resolution.⁸³ The committee problem was settled in 1963 when Michigan adopted a new constitution. Section 37 of article IV authorized the legislature to establish an interim committee with the power to suspend rules until the next regu-

78. F. Cooper, *supra* note 8, at 226.

79. Governor Kelly stated the following as his reasons for vetoing the bill:

1. Instead of an orderly method of legislative condemnation of improper rules and regulations, the act decrees automatic death for all rules which have not met with legislative approval at the time of the short adjournment.

2. The legislative burden of technical detail, already excessive, would be increased tremendously.

3. Legislative attention would be diverted from major issues of public policy.

4. A legislative review of administrative rules, as provided in this act, is doubtful from a constitutional viewpoint. The Attorney General of Michigan shares my opinion in this regard.

Schuberg, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. L. 135, 142 (1958).

80. MICH. COMP. LAWS § 24.71 (repealed 1970).

81. F. Cooper, *supra* note 8, at 226 (citing Public Acts 1951, Act No. 9).

82. Letter from Michigan Att'y Gen. Frank G. Millard to Hon. Adrian de Boom (Dec. 17, 1953), *quoted in part in* Schubert, *supra* note 79, at 158.

83. 1958 MICH. PUB. ACTS No. 177, § 8c.

lar session.⁸⁴ The present legislative veto technique was established with passage of the Administrative Procedures Act of 1969.⁸⁵ This Act allows the committee to temporarily suspend a rule and introduce a concurrent resolution in either house to disapprove the rule. If the resolution is adopted, the rule does not take effect.⁸⁶

Like Michigan, Wisconsin also experienced difficulty in developing its approach to legislative oversight. In 1953, Wisconsin adopted a statute allowing disapproval of all agency rules, including those in existence, by joint resolution.⁸⁷ A year later, the Wisconsin Attorney General issued an opinion finding the statute unconstitutional. The Attorney General concluded that the joint resolution procedure violated a provision of the Wisconsin Constitution requiring laws to be enacted by bill subject to the governor's veto.⁸⁸

In 1955, the Wisconsin legislature repealed the 1953 oversight statute and created a joint legislative advisory committee to review administrative rules.⁸⁹ The legislature completely abolished the committee eleven years later.⁹⁰ The present method of legislative oversight, adopted by statute in 1970, provides for joint committee review of administrative rules. The committee may suspend a rule after a public hearing, but a rule may not be revoked except by a bill introduced in the legislature.⁹¹

2. *Current Status of Oversight Legislation in the States*

Thirty-eight states presently use some form of legislative

84. This section states:

The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session.

MICH. CONST. art. IV, § 37.

85. MICH. COMP. LAWS ANN. §§ 24.201 to -315 (1981).

86. MICH. COMP. LAWS ANN. § 24.245 (1981).

87. 1953 Wis. Laws ch. 331, § 4.

88. 43 Op. Wis. Att'y Gen. 350, 352-55 (1954)(construing Wis. CONST. art. IV, § 17; art. V, § 10).

89. WIS. STAT. § 227.041 (1957).

90. 1965 Wis. Laws ch. 659, § 21.

91. WIS. STAT. ANN. § 13.56 (West 1972 & Supp. 1982).

oversight.⁹² There are four basic categories of oversight procedures: (1) review of regulations by the legislature with only advisory comments authorized; (2) repeal of regulations by joint or concurrent legislative resolution upon the recommendation of a reviewing committee; (3) suspension of regulations for a specified period of time; and (4) permanent suspension of regulations by a legislative committee, subject to reversal by the legislature.⁹³ It is difficult to place some states in only one category because the statutory requirements of the categories are similar. For example, a state may allow the suspension of a regulation by a committee and also allow the suspension to be upheld or rejected by a joint or concurrent resolution.⁹⁴

The first category of legislative oversight provides for review of regulations with only advisory comment by the legislature. The legislature cannot suspend or abrogate the rule. Arkansas,⁹⁵ Florida,⁹⁶ North Dakota,⁹⁷ and Texas⁹⁸ are among the states using this method.

The second form of legislative oversight allows for the repeal of a regulation by joint or concurrent legislative resolution, usually upon the recommendation of a reviewing committee. Georgia,⁹⁹ Idaho,¹⁰⁰ Montana,¹⁰¹ South Carolina,¹⁰² and Virginia¹⁰³ use this method. To understand this procedure, it is necessary to define what is meant by a joint or concurrent resolu-

92. See *supra* note 14 and accompanying text. See NATIONAL ASSOCIATION OF SECRETARIES OF STATE ADMINISTRATIVE CODES AND REGISTERS COMMITTEE, ADMINISTRATIVE CODES AND REGISTERS 1981 STATE/FEDERAL SURVEY [hereinafter cited as 1981 SURVEY].

93. ALA. CODE § 41-22-22 commentary (Supp. 1981). See Schwartz, *supra* note 14, at 362-63.

94. See *infra* notes 103 and 111 and accompanying text.

95. ARK. STAT. ANN. §§ 6-608 to -612 (Supp. 1981).

96. FLA. STAT. § 11.60(2)(1976 & Supp. 1981).

97. N.D. CENT. CODE §§ 54-35-02.5 to -02.6 (1981).

98. TEX. STAT. ANN., art. 6252-13a, § 5(g) (Vernon Supp. 1981).

99. GA. CODE ANN., § 50-13-4(f) to (g) (1982).

100. IDAHO CODE § 67-5218 (Supp. 1981).

101. MONT. CODE ANN. § 2-4-412 (1981).

102. S.C. CODE ANN. §§ 1-23-120 to -140 (Supp. 1980).

103. VA. CODE § 9-6.14:9 (1950 & Supp. 1981). Until recently, Alaska was also in this category. Alaska's statute provided that "[t]he legislature, by a concurrent resolution adopted by a vote of both houses 'could' annul a regulation of an agency or department." ALASKA STAT. § 44.62.320 (1980). In *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980), the Alaska Supreme Court held that the statute violated state constitutional provisions defining the mechanics of legislation. *Id.* at 772. See *infra* notes 149-55 and accompanying text.

tion. A resolution is generally considered an expression of opinion by the legislature.¹⁰⁴ A concurrent resolution results when one house of the legislature passes an action in the form of a resolution and the other house concurs to more fully express the purpose or importance of the resolution. A joint resolution, however, has the force and effect of law if adopted by both houses and approved by the executive.¹⁰⁵

The third type of legislative oversight allows a reviewing committee to suspend a rule for a period of time. The suspension must be ratified by the full legislature before the rule is permanently approved. Alabama,¹⁰⁶ Michigan,¹⁰⁷ Minnesota,¹⁰⁸ South Dakota,¹⁰⁹ Wisconsin,¹¹⁰ and Virginia¹¹¹ have adopted this approach. Both Michigan and South Dakota have constitutional provisions establishing review committees.¹¹² Illinois, a new member of this category, adopted a statute in 1980 allowing committee suspension of a regulation.¹¹³ The statute was adopted over the veto of the Governor, who stated the suspension or legislative veto "constitutes a serious and unwarranted intrusion by the General Assembly and one of its committees into areas properly reserved to the executive and judicial

104. The difference between a resolution and a law is:

[T]he former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing, while by law it is intended to permanently direct and control matters applying to persons or things in general.

BLACK'S LAW DICTIONARY 1178 (rev. 5th ed. 1979). *Accord*, Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, 307 F. Supp. 1113, 1115 (E.D. Va. 1969); Becker v. Detroit Sav. Bank, 269 Mich. 432, 257 N.W. 853 (1934); Cleveland Terminal & V.R. Co. v. State, 85 Ohio St. 251, 294, 97 N.E. 967, 973 (1912); Hawks v. Bland, 156 Okl. 48, 49, 9 P.2d 720, 721 (1932); Rowley v. City of Medford, 132 Or. 405, 414, 285 P. 1111, 1114 (1930); Scudder v. Smith, 331 Pa. 165, 170, 200 A. 601, 604 (1938); Todd v. Yelle, 7 Wash. 2d 443, 449, 110 P.2d 162, 165 (1941).

105. BLACK'S LAW DICTIONARY 1178 (rev. 5th ed. 1979).

106. ALA. CODE §§ 41-22-1 to -27 (Supp. 1981).

107. *See supra* notes 78-86 and accompanying text.

108. MINN. STAT. ANN. § 3.965 (Supp. 1982).

109. S.D. COMP. LAWS ANN. § 1-26-38 (1980).

110. *See supra* notes 87-91 and accompanying text.

111. VA. CODE § 9-6.14:9(D)(2)(Supp. 1980).

112. MICH. CONST. art. IV, § 37; The South Dakota Constitution provides for the establishment of an interim committee with the power, until the legislature reconvenes, or between sessions. S.D. CONST. art. III, § 30.

113. ILL. REV. STAT. ch. 127 § 5.01 (1979).

branches of government."¹¹⁴ Illinois previously used an advisory committee.¹¹⁵ The new statute allows the committee to suspend a rule upon a finding that the rule constitutes a serious threat to the public interest, safety, and welfare.¹¹⁶ Once the rule is suspended, the committee may then introduce, in either house of the General Assembly, a joint resolution to continue the prohibition. If the prohibition resolution is passed by both houses, the rule does not take effect.¹¹⁷

The fourth category of legislative oversight is used by only a few states. It authorizes permanent suspension of a rule by a legislative committee unless the legislature reverses the committee's action. States that use this method are Connecticut,¹¹⁸ Louisiana,¹¹⁹ and Tennessee.¹²⁰ This method, like the committee veto at the federal level, places an enormous amount of power in a committee.

States without some type of legislative oversight¹²¹ usually follow the 1961 Model State APA,¹²² which requires that the agency file a certified copy of each rule it adopts with the Secretary of State. The rule is adopted twenty days after filing unless a later date is required by statute. In the event of an emergency, the rule may be adopted at an earlier date.¹²³

California developed a unique system of executive oversight with the adoption of Assembly Bill 1111, which established the Office of Administrative Law (OAL) in July of 1980.¹²⁴ This agency was created in response to the tremendous growth in the number of regulations in California. The OAL insures that the agencies follow specified procedures and meet required stan-

114. LaMarca, *Illinois' New Legislative Veto: A Strict Scrutiny of Agency Rulemaking "With Bite,"* 70 ILL. B.J. 36 (1981)(citing Governor's statement accompanying H.B. 2351, Sept. 15, 1980).

115. ILL. REV. STAT. ch. 127 § 7.04 (1979).

116. ILL. REV. STAT. ch. 127 § 7.06(a)(1979).

117. ILL. REV. STAT. ch. 127 § 7.06(c)(1979).

118. CONN. GEN. STAT. ANN. §§ 4-170 to 4-171 (Supp. 1982).

119. LA. REV. STAT. ANN. § 49:968 (West Supp. 1981).

120. TENN. CODE ANN. § 4-5-129 (Supp. 1981).

121. Among those states with no legislative oversight are Delaware, Indiana, Massachusetts, New Mexico, New York, and Utah. 1981 Survey, *supra* note 92.

122. See *supra* note 2. The Model State APA was revised in 1981. See *supra* note 17.

123. 1961 Model State APA, *supra* note 2, § 4.

124. OFFICE OF ADMINISTRATIVE LAW, FIRST ANNUAL REPORT, 2 (1981-81)[hereinafter cited as OAL Report].

dards in developing regulations.¹²⁵ The regulations must meet standards of necessity, authority, clarity, consistency, reference, and, if applicable, must obtain approval of the State Building Standards Commission.¹²⁶ As a result of OAL scrutiny during its first year, agencies submitted thirty-two percent fewer sets of regulations and the OAL disapproved twenty-seven percent of those submitted.¹²⁷

If a regulation fails to meet OAL standards, the OAL may disapprove or repeal the regulation. Agencies are allowed to appeal OAL decisions to the Governor. However, during the first year of the OAL's existence only one of its decisions was overturned.¹²⁸

3. Review of State Legislative Oversight Procedures by the State Courts

Although there has been a significant increase in legislative oversight at the state level, there have been few challenges in the courts. One reason for so few challenges is that nonexecutive agency plaintiffs must establish standing in order to raise the issue.¹²⁹ These plaintiffs may be reluctant to bring an action when faced with the possibility that the action may hinder desired legislation and approval of a forthcoming budget.¹³⁰ Also, the courts may view this struggle between the legislature and executive as a political question.¹³¹

Legislative vetos have been upheld in decisions from three states. The leading case is *Watrous v. Golden Chamber of Commerce*,¹³² in which the Colorado Supreme Court upheld a provision in a turnpike construction statute requiring that a pledge of

125. CAL. GOV'T CODE §§ 11340 to 11445 (West. 1980).

126. CAL. GOV'T CODE § 11349.1 (West 1979). See Starr, *supra* note 3.

127. OAL Report, *supra* note 124, at 4.

128. *Id.* at 3.

129. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 609-10 (1953); Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1093-97 (1981); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV., 983, 989-90 (1975).

130. See Dixon, *supra* note 13, at 445-48; Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 SUFFOLK U.L. REV. 1, 3 (1979).

131. Watson, *supra* note 129, at 989-90.

132. 121 Colo. 521, 218 P.2d 498 (1950).

funds from the state highway fund be approved by joint resolution of the Senate and House of Representatives. The court held that the Governor's approval was not required because the pledge was a matter relating solely to the transaction of business of the two houses.¹³³ In *Porterie v. Grosjean*,¹³⁴ the Louisiana Supreme Court upheld the authority of the legislature to amend laws and regulations by concurrent resolution.¹³⁵ In *Brown v. Heymann*,¹³⁶ a New Jersey statute permitting the legislature to disapprove the Governor's reorganization plan by concurrent resolution was held constitutional by the New Jersey Supreme Court.¹³⁷

More cases have struck down the legislative veto than have upheld it. In 1978, the Massachusetts Supreme Judicial Court considered a bill requiring each appropriation to be fully expended unless the legislature passed a resolution releasing the executive from this requirement.¹³⁸ In Massachusetts, joint resolutions are not sent to the Governor. The court reasoned that:

this section [of the bill] eliminates the Governor's constitutional veto power as to the subsequent "legislation." What this part of the proposed bill attempts to do is to provide an open-ended means of regulating the conduct of members of the executive branch according to the consensus of the Houses of the Legislature as evidenced by resolutions enacted at unspecified times in the future. This would violate . . . the Massachusetts Constitution. . . .¹³⁹

133. *Id.* at 546, 218 P.2d at 510. Professor Schwartz, a proponent of the veto, considers the court's reasoning "so unsatisfactory as to destroy its value as a precedent." Schwartz, *supra* note 21, at 1043 n.56.

134. 182 La. 298, 161 So. 871 (1935).

135. *Id.* at 315, 161 So. at 877.

136. 62 N.J. 1, 297 A.2d 572 (1972).

137. *Id.* at 11, 297 A.2d at 578.

138. 375 Mass. 827, 376 N.E.2d 1217 (1978). During the 1970s, the Massachusetts legislature began to subject various executive acts to the legislative veto by requiring legislative committee approval. Taylor, *supra* note 130, at 10. In 1976, the Massachusetts Supreme Court held that legislative committees were not authorized to grant exceptions to the rule that no state employee vacancies could be filled except in cases of critical need. Opinion of the Justices to the Governor, 369 Mass. 990, 341 N.E.2d 254 (1976). The court held that the power to grant exceptions fell within the executive power to expend funds. *Id.* at 993, 341 N.E.2d at 257. In addition, the court found that even if the granting of exceptions was a constitutional legislative power, it would be a nondelegable power of appropriation, which would be subject to the Governor's veto. *Id.* at 994, 341 N.E.2d at 257.

139. 375 Mass. at 838, 376 N.E.2d at 1223. The Massachusetts Constitution requires

The constitutionality of the legislative veto applied to a reorganization statute was considered in New Hampshire in 1950.¹⁴⁰ The reorganization statute directed the Governor to submit agency changes to the legislature for approval or disapproval. This portion of the statute was upheld as constitutional.¹⁴¹ However, the portion stating that the reorganization would become law by inaction during twenty-five legislative days after receipt unless rejected by concurrent resolution or upon earlier adjournment, was held unconstitutional.¹⁴² The New Hampshire Supreme Court found that this portion of the statute violated the constitutional provision requiring separate action by each house,¹⁴³ reasoning that:

the act would dispense with the "passage" of any measure, as the 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 action taken.¹⁴⁴

In 1970, the New Hampshire Supreme Court considered the constitutionality of a statute requiring approval of requests for salary increases by the fiscal committee of the General Assembly prior to submission to the Governor and Council.¹⁴⁵ The court held that no unconstitutional delegation of power was involved. The statute "establish[ed] a permissible division of responsibility between the executive and legislative branches without domination of one by the other."¹⁴⁶

In 1981, the New Hampshire Supreme Court was again

separation of powers:

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

MASS. CONST. pt. 1, art. 30.

140. Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950).

141. *Id.* at 520, 83 A.2d at 740.

142. *Id.* at 521, 83 A.2d at 741.

143. *Id.* at 522, 83 A.2d at 741.

144. *Id.*

145. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970).

146. *Id.* at 365, 266 A.2d at 827.

faced with a legislative veto question.¹⁴⁷ A statute requiring that rules be approved by standing oversight committees of both houses before becoming effective was challenged as unconstitutional. The court held the statute unconstitutional, concluding that the legislature could “not delegate its lawmaking authority to a smaller legislative body and thereby waive the requirements for action by a majority of a quorum of both legislative bodies.”¹⁴⁸

In *State v. A.L.I.V.E. Voluntary*,¹⁴⁹ the Alaska Supreme Court held invalid a statute allowing the legislature, by concurrent resolution of both houses, to annul an agency or department regulation.¹⁵⁰ The opinion emphasized the safeguards found in the state constitution concerning passage and effectiveness of legislation, particularly presentation to the Governor for approval or veto.¹⁵¹ Under the Alaska Constitution, “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.”¹⁵² The court noted that, although the legislature “can delegate legislative power to others, . . . it [cannot] delegate the same power to itself and, in the process, escape from the constraints under which it must operate.”¹⁵³ To convey the power to its own members would violate the dual office-holding prohibition of the state constitution.¹⁵⁴ In an alternative holding, the court found that since the state constitution provided for two specific legislative veto procedures,¹⁵⁵ there was no implied power to veto agency regulations.

In 1981, the West Virginia Supreme Court of Appeals, in

147. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

148. *Id.* at 560, 431 A.2d at 788.

149. 606 P.2d 769 (Alaska 1980).

150. *Id.* at 770.

151. *Id.* at 772-73.

152. *Id.* at 773.

153. *Id.* at 777.

154. *Id.*

155. The two provisions of the constitution are (1) the governor may make changes in the law by executive order unless his proposed changes are disapproved by the legislature within sixty days by “resolution concurred in by a majority of the members in joint session,” ALASKA CONST. art. III, § 23; and (2) the state local boundary commission may make recommendations to the legislature which become effective in forty-five days unless vetoed by a “resolution concurred in by majority of the members of each house.” *Id.* at art X, § 12.

State ex rel. Barker v. Manchin,¹⁵⁶ considered that state's general oversight statute and found it unconstitutional. In *Manchin*, the Department of Mines developed rules governing safety of surface mine employees. A joint legislative committee disapproved these rules. The legislature's subsequent failure to act on the disapproval constituted approval of the committee's action.¹⁵⁷ Barker, who was employed as a surface miner, sought a writ of mandamus under the original jurisdiction of the court to compel the Secretary of State to file the rules in the permanent register.¹⁵⁸ The court found that the legislative oversight scheme reversed "the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor."¹⁵⁹ The court reasoned that when the matter is properly the subject of the enactment process, the legislature cannot give the matter the force of law by a resolution.¹⁶⁰ The legislature can amend a rule or regulation through the constitutional process, but "[i]t cannot invest itself with the power to act as an administrative agency in order to avoid these requirements."¹⁶¹ The court concluded by holding that the portion of the oversight statute allowing the veto violated the separation of powers doctrine embodied in the state constitution.¹⁶²

III. LEGISLATIVE OVERSIGHT IN SOUTH CAROLINA

A. Oversight Procedure

Prior to 1976, South Carolina required that official rules and regulations of state agencies adopted under general and permanent law be certified by the promulgating officer or agency for substance. The rules and regulations were then reviewed by the

156. 279 S.E.2d 622 (W. Va. 1981).

157. Under the West Virginia Code, to be effective a rule or regulation had to be presented to the joint legislative committee, which had six months to approve or disapprove the rule or regulation. If the committee took no action and the legislature did not, by concurrent resolution, reverse the committee, the rule went into effect. If the committee approved or disapproved the rule, the rule retained that status unless reversed by the legislature. W. VA. CODE §§ 29A-3-11 to -12 (1980).

158. 279 S.E.2d at 625.

159. 279 S.E.2d at 632 (citing *Boyers v. Crane*, 1 W. Va. 176 (1865)).

160. *Id.* at 633.

161. *Id.*

162. *Id.* at 636.

Code Commissioner for form and filed in the office of the Secretary of State.¹⁶³ There was no legislative review.

In 1976 the South Carolina General Assembly enacted the State Administrative Procedure Act (South Carolina APA).¹⁶⁴ This Act was completely revised and reenacted on June 13, 1977.¹⁶⁵ The resulting Act is similar to the Model State Administrative Procedure Act¹⁶⁶ and the Federal Administrative Procedure Act (Federal APA).¹⁶⁷ The major difference is South Carolina's method of legislative review,¹⁶⁸ which was revised in part in 1979¹⁶⁹ and again in 1980.¹⁷⁰

The Act's review procedure is complex and can best be illustrated by following a hypothetical regulation through the review process.¹⁷¹ It will be assumed that an agency has developed two regulations and has complied with section 1-23-110 of the South Carolina Code covering notice and comment procedures.¹⁷²

163. S.C. CODE ANN. § 1-1-210 (1976), *repealed* by No. 176, art. III, § 2, 1977 S.C. Acts 391.

164. No. 671, 1976 S.C. Acts 1758 (*repealed* 1977).

165. S.C. CODE ANN. §§ 1-23-10 to -400 (Supp. 1982). Article III, § 2 of the 1977 Act repealed No. 671 of 1976. For a discussion of the entire Act see Note, *South Carolina Administrative Procedure Act*, 30 S.C.L. Rev. 1 (1979).

166. See *supra* note 2.

167. 5 U.S.C. §§ 551 to 559 (1970 & Supp. V 1975).

168. S.C. CODE ANN. §§ 1-23-100 to -140 (Supp. 1982).

169. No. 188, 1979 S.C. Acts, S.C. CODE ANN. §§ 1-23-120 to -125 (Supp. 1982).

170. No. 442, 1980 S.C. Acts, S.C. CODE ANN. §§ 1-23-120 to -140 (Supp. 1980).

In 1980, South Carolina agencies proposed 138 regulations and the legislature considered 126 regulations. (The remaining twelve were carried over to 1981). Of the 126 regulations considered, 75 became effective by nonaction or expiration of the 120-day period; 30 were required by federal law and were not subject to legislative approval; and eleven were approved by joint resolution. Sixty-nine emergency regulations were promulgated. 4 S.C. State Reg. (1980). Approval by the General Assembly is not necessary for regulations required by federal law, or for regulations developed by the State Board of Financial Institutions. S.C. CODE ANN. § 1-23-120 (Cum. Supp. 1981).

171. Under the S.C. APA, "agency" includes "each state board, commission, department, executive department or officer, other than the legislature or the courts, authorized by the law to make regulations or to determine contested cases." S.C. CODE ANN. § 1-23-10 (Supp. 1981). Although an executive department or officer is considered an "agency," executive orders, proclamations, or documents issued by the Governor's office are exempt from the S.C. APA. S.C. CODE ANN. § 1-23-100 (Supp. 1981).

172. The notice and comment procedures require the agency to give at least thirty days notice of intended action (including promulgation of a new regulation, and amendment or repeal of regulations) in the *State Register*. The notice must include statutory authority, text or synopsis of the regulation, and the time and place where interested persons may present their views. The procedures require the agency to mail notice to persons who have made timely requests for advance notice of proposed regulations. All

Before the regulations can take effect, the agency must submit them to the General Assembly, which has 120 days to review them. The review period begins on the date the regulations are filed with the President of the Senate and Speaker of the House of Representatives. The agency must file the regulations with a request for review and a brief synopsis or analysis of the regulations. If the new regulations change existing regulations, the synopsis or analysis must show the changes.¹⁷³

After filing, the President and Speaker submit the regulations to the appropriate standing committees of the Senate and House. If neither House nor Senate committees introduce a resolution to approve or disapprove the regulations, they become effective upon expiration of the 120-day period and publication in the *State Register*. Should one of the reviewing committees submit a resolution disapproving either or both of the regulations when less than 60 days remain in the 120-day review period, the remaining period is increased to 60 days. The introduction of a resolution by a committee of either house does not prevent the introduction of a resolution by the other house to approve or disapprove the regulation.¹⁷⁴

If a *sine die* adjournment of the General Assembly occurs within thirty days after regulations are submitted, the 120-day period is tolled. When the General Assembly reconvenes, the re-

interested persons may submit data, views, or arguments. If twenty-five persons, a governmental subdivision or agency, or an association having not less than twenty-five members requests an oral hearing, the agency must grant one. The agency must consider all written and oral comments on the proposed regulation; however, the agency is not required to base the final regulation solely on the comments. S.C. CODE ANN. § 1-23-110 (Supp. 1981).

173. No. 414, 1982 S.C. Acts 2461-62. Prior to 1982, the review period was ninety days. S.C. CODE ANN. § 1-23-120 (Supp. 1981). Upon receipt, the Lieutenant Governor and Speaker of the House have the regulation delivered to the Legislative Council for initial processing. The Council places the regulations in Senate and House regulation covers and enters on the cover the following information:

[T]he name of the promulgating agency, the chapter number assigned to the agency for codification of its regulations, the statutory authority for promulgating such regulations, a brief title, the dates the regulations were received by the Speaker and the Lieutenant Governor, and based on the date of receipt the expiration of the [one-hundred-twenty-day] period which would allow the regulations to become effective without legislative action.

RULE 16, JOINT RULES OF SENATE AND HOUSE, reprinted in 1980 LEGISLATIVE MANUAL 161 (61st ed. 1980)[hereinafter cited as LEGISLATIVE MANUAL].

174. No. 414, 1982 S.C. Acts 2461.

maining period begins to run.¹⁷⁵ In our hypothetical, there would be a ninety-day period remaining. Special sessions called by the Governor are not included in the 120-day period. The regulations become effective 120 days after they are submitted, unless they are adopted earlier or disapproved.¹⁷⁶

A member of the legislature may introduce a joint resolution to approve regulations. However, he must wait until thirty days after the regulations have been submitted to the committees. He may then introduce the joint resolution only if the committees have not introduced a joint resolution for approval or disapproval. Action by a legislator does not toll the 120-day automatic approval period.¹⁷⁷

If the House or Senate committee members object to both hypothetical regulations, the committee is precluded from amending them and then introducing a joint resolution approving the amended regulations. The committee may, however, submit a joint resolution approving or disapproving one or more regulations submitted in a group of regulations, or a portion of a single regulation that is clearly separable.¹⁷⁸ In the hypothetical, the committee may decide only one of the regulations should be approved. To approve the acceptable regulation, the committee would either submit a joint resolution for approval or allow approval by permitting the 120-day period to expire. To disapprove the unacceptable regulation, the committee would submit a joint resolution for its rejection. If the committee decides it cannot approve either regulation as submitted, it may then notify the promulgating agency in writing and inform it what portions would be acceptable. If this action is taken, the agency has three alternatives. It may (1) withdraw the regulations from the committee and resubmit them in amended form to the Senate and House, (2) permanently withdraw the regulations, or (3) do nothing and abide by whatever action is taken by the General Assembly. These alternatives will now be considered in more detail.

175. *Id.*

176. *Id.*

177. *Id.* at 2461-62.

178. No. 414, 1982 S.C. Acts 2462.

1. *Agency Withdraws the Regulations and Resubmits with Recommended Changes*

If the agency decides it will temporarily withdraw the regulations and resubmit them with the recommended changes, the withdrawal automatically tolls the 120-day review period. When the revised versions of the regulations are resubmitted, the General Assembly will have the balance of the 120-day period to approve or disapprove them. Should the agency fail to withdraw the original regulations within ten calendar days, or if fewer than ten days remain in the 120-day period and the agency fails to withdraw them within one half of this period, the agency action is considered a refusal to withdraw.¹⁷⁹ If the regulations as passed are substantially different from the original regulations proposed and published in the *State Register*, the agency must reinitiate the entire process unless the substantive changes were raised, considered, or discussed by public comment, as required by section 1-23-110 of the South Carolina Code.¹⁸⁰

2. *Agency Permanently Withdraws the Regulations*

The agency may decide that if the regulations are left with the committee they will be disapproved by joint resolution. It may, therefore, choose to permanently withdraw the regulations. The ability to permanently withdraw regulations allows the agency to avoid an unwanted confrontation. Changed circumstances may also make permanent withdrawal necessary.

3. *Agency Decides To Do Nothing and Abide by the Action of the General Assembly*

If an agency is notified by the committee that its regulations are not acceptable in their present form, the agency may decide to do nothing and abide by whatever action is taken by the legislature. If this course is chosen, the 120-day period is automatically extended to 150 days while the General Assembly is in session. This time period must expire before the regulations are

179. *Id.* at 2463.

180. *Id.*

effective without General Assembly approval.¹⁸¹

The South Carolina oversight procedure is complicated and time consuming. However, the procedure allows an agency to adopt an emergency regulation without going through the above-described procedure. If the agency decides that it wants the emergency regulation to become permanent, it must comply with the normal method of promulgation.¹⁸²

B. Inefficiency of South Carolina's Legislative Oversight Procedure

1. Delay

The first and most obvious problem with the legislative oversight procedure discussed above is the time required to implement agency policy. An agency must initially comply with the notice and comment procedures, which require a thirty-day notice of intended action. It must then allow adequate time for replies and, if necessary, an oral hearing.¹⁸³ After this procedure, the agency must comply with the oversight requirements which add further delays. The minimum delay is 120 days unless the regulation is approved by a joint resolution.¹⁸⁴ The agency may adopt emergency regulations, but these are normally limited in duration to ninety days.¹⁸⁵

181. *Id.* In 1980, the legislature added a provision which allows an interested person to petition an agency in writing to promulgate, amend, or repeal a regulation. Within thirty days of submission of the petition, the agency must either deny the petition in writing stating the reasons for denial, or initiate the action requested in the petition. The agency must take the required action within thirty days; however, if it should fail to do either and simply ignore the petition, the statute provides no guidance for the petitioner as to what further action he could take, or what sanctions, if any, can be imposed on the agency. S.C. CODE ANN. § 1-23-126 (Supp. 1981).

182. S.C. CODE ANN. § 1-23-130 (Supp. 1980). Although the legislative oversight procedure provided in the South Carolina APA is the primary source of legislative oversight in the state, the legislature has employed the concept through specific enabling statutes, some of which have been held unconstitutional. *See McLeod v. McInnis*, No. 21787, slip op. (S.C. Aug. 31, 1982)(act permitting legislative committees to control distribution of funds held an unconstitutional infringement on the executive branch of government); *Reith v. S.C. State Hous. Auth.*, 267 S.C. 1, 225 S.E.2d 847 (1976)(act requiring approval of Housing Authority regulations by General Assembly held unconstitutional).

183. S.C. CODE ANN. § 1-23-110 (Supp. 1981).

184. *See supra* notes 171-82 and accompanying text.

185. An Attorney General's opinion issued February 19, 1982 states that an emergency regulation promulgated pursuant to section 1-23-130 shall remain in effect for a 90

Delay is a serious problem, and at the federal level Congress and the courts have imposed deadlines.¹⁸⁶ A critical situation arises when the legislature and the agency cannot agree upon an acceptable regulation. The agency can either concede to the legislative demands¹⁸⁷ or, if so empowered, use adjudication rather than rulemaking. This results in even further delays and is an inefficient method of establishing agency policy.¹⁸⁸

2. *Notice and Comment Thwarted*

Notice and comment procedures may be thwarted by the influence of special interest groups on the reviewing committees in the General Assembly. Notice and comment procedures are included in the regulation-making process to insure that all interested parties have an opportunity to present their views on proposed regulations. The importance of these procedures is decreased in South Carolina because regulations are submitted to a legislative committee for review after notice and comment. Allowing this additional step could destroy the openness of regulation-making and prevent equal access to the review process. Many parties are financially unable to both support participation in the notice and comment procedures and finance lobbying efforts in the reviewing committees of the General Assembly.

C. *Constitutional Analysis of the South Carolina Legislative Oversight Procedures*

1. *Constitutional Foundation*

The South Carolina Constitution provides that legislative power is vested in the Senate and House of Representatives of the General Assembly.¹⁸⁹ Supreme executive power is vested in

day period only, and may be renewed or repromulgated. Opinion of Ass't Att'y General C. Havird Jones, in letter to Thomas S. Linton (Feb. 19, 1982).

186. See, e.g., Energy Policy and Conservation Act § 551, 42 U.S.C. § 6421 (1976). See Bruff & Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1379-80 (1977).

187. At this point in the process, the agency would be dealing with a standing committee of the General Assembly. See *supra* notes 177-78 and accompanying text.

188. See Bruff & Gellhorn, *supra* note 186, at 1380.

189. S.C. CONST. art. III, § 1.

the Governor,¹⁹⁰ and judicial power "in a unified judicial system which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."¹⁹¹ The legislature, by constitutional mandate, creates agencies to function in areas of public concern and determines the activities, powers, and duties of the agencies.¹⁹² All state officers, agencies, and institutions within the Executive Branch¹⁹³ are required to report to the Governor and to provide him, at his request, with information relating to their respective duties.¹⁹⁴ The Governor is charged with responsibility for insuring that the laws are faithfully executed.¹⁹⁵

It is well settled in South Carolina that the legislature cannot delegate its power to make laws, but it may enact a law (*i.e.*, an enabling statute) authorizing an "agency or board 'to fill up the details' by prescribing rules and regulations for complete operation and enforcement of the law within its expressed general purpose."¹⁹⁶ This does not violate the separation of powers doctrine.¹⁹⁷ The enabling statute should declare a legislative policy and provide primary standards for carrying it out, or establish an intelligible principle to which the agency must conform.¹⁹⁸ The amount of authority that may be lawfully delegated depends on the circumstances. The legislative policy declared by the enabling statute and the nature of the agency's field of operation must be considered.¹⁹⁹ When the agency has adopted a regulation pursuant to its enabling statute, the regulation has the

190. *Id.* at art. IV, § 1.

191. *Id.* at art. V, § 1.

192. *Id.* at art. XII, § 1. The South Carolina Constitution lists health, welfare, safety of the lives and property of the people, and conservation of the state's natural resources as matters of public concern. *Id.*

193. The executive branch in South Carolina includes the Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, Solicitors, Adjutant General, Comptroller General, State Superintendent of Education, Commissioner of Agriculture, and the Chief Insurance Commissioner. S.C. CODE ANN. § 1-1-110 (1976).

194. S.C. CONST. art. IV, § 17.

195. *Id.* at § 15.

196. *State v. Brown*, 274 S.C. 592, 266 S.E.2d 415 (1980); *Terry v. Pratt*, 258 S.C. 177, 187 S.E.2d 884 (1972); *Cole v. Manning*, 240 S.C. 260, 125 S.E.2d 621 (1962); *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 355, 126 S.E.2d 15, 19-20 (1962).

197. *Cole v. Manning*, 240 S.C. 260, 264, 125 S.E.2d 621, 623 (1962).

198. *Id.*

199. *Id.* at 265, 125 S.E.2d at 623.

force of law and becomes an integral part of the statute.²⁰⁰

2. Separation of Powers

The General Assembly avoids violating this constitutional provision by submitting joint resolutions approving or disapproving regulations to the Governor for his approval or veto.²⁰¹ Although submission of the joint resolution to the Governor is not required by the oversight statute, it is required by article IV, section 21 of the South Carolina Constitution. Since a regulation has the force of law and becomes an integral part of the enabling statute, the General Assembly must approve or disapprove the regulation prior to the expiration of the 120-day review period through normal law-making procedures. The statute requires approval or disapproval by joint resolution.²⁰² In South Carolina, a joint resolution, once approved by the Governor, has the same force as an act, but is a temporary measure and dies when the subject matter is completed.²⁰³ If the joint resolution is not presented to the Governor, it does not have the effect of law. A joint resolution that has not been submitted to the Governor is only one step above a concurrent resolution and only reflects the agreement of the two houses. In *State ex rel. Lyon v. Columbia Water Power Co.*,²⁰⁴ the South Carolina Supreme Court held that a concurrent resolution cannot repeal a statutory provi-

200. *Faile v. S.C. Employment Sec. Comm.*, 267 S.C. 536, 537, 230 S.E.2d 219, 220 (1976). The court noted the difference between a legislative rule which has the force of law, and an interpretative rule which is entitled to great respect but is not binding on the courts. *Id.* at 539-40, 230 S.E.2d at 221. The courts take judicial notice of regulations. *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 254, 31 S.E.2d 447, 449 (1944).

201. See *infra* note 222 and accompanying text. The separation of powers clause of the constitution provides that “[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. CONST. art. I, § 8.

202. No. 414, 1982 S.C. Acts 2460.

203. The South Carolina Constitution states that a bill or joint resolution shall not have the force of law unless it has been read three times on “three several days” in each house, the Great Seal has been affixed to it, and it has been signed by the President of the Senate and Speaker of the House of Representatives. S.C. CONST. art. III, § 18. Before the bill can become law, it must be presented to the Governor for his approval or veto. If the Governor vetoes the bill or joint resolution, the General Assembly may override his veto by a two-thirds vote in both houses. *Id.* at art. IV, § 21. LEGISLATIVE MANUAL, *supra* note 173, at 154.

204. 90 S.C. 568, 74 S.E. 26 (1912).

sion.²⁰⁵ It follows that a joint resolution approving or disapproving a regulation must be submitted to the Governor for approval or disapproval in order to have the force of law.

If a committee submits a joint resolution disapproving a regulation, and that resolution is approved by the General Assembly, the regulation is rejected unless the Governor vetoes the joint resolution. Of course, the General Assembly has the final vote and may override the Governor's veto. Thus, by complying with constitutional mandates, a separation of powers violation is avoided.

3. Review Period

The portion of South Carolina's oversight statute requiring a 120-day review period before a regulation is passed appears constitutionally valid.²⁰⁶ This review period allows the General Assembly time to review the regulation and determine whether it complies with the scheme of the enabling statute. If nothing happens and the regulation is approved at the expiration of the 120-day period, the only harm is the delay in placing the regulation into effect. This portion of the procedure is similar to the procedure upheld at the federal level in *Sibbach*.²⁰⁷

4. Dual Office Holding Provision of the South Carolina Constitution

Article III, section 24 of the South Carolina Constitution provides that a member of the General Assembly cannot hold any other office of profit or trust under the state. A reviewing committee apparently has de facto power to veto regulations, because if the committee disapproves a regulation, it is difficult, if not impossible, to obtain approval of the regulation by the legis-

205. A concurrent resolution affects the actions of the General Assembly and is used to record the agreement of the two Houses. LEGISLATIVE MANUAL, *supra* note 173, at 155. Like the legislative oversight requirements for agencies, the supreme court is required to submit court rules that it has promulgated under section 14-3-950 of the South Carolina Code to the legislature. The rules or amendments become effective within 90 days unless disapproved by concurrent resolution. S.C. CODE ANN. § 14-3-950 (Supp. 1981).

206. No. 414, 1982 S.C. Acts 2460.

207. See *supra* notes 45-48 and accompanying text.

lature as a whole.²⁰⁸ Therefore, committee members may be acting in both administrative and legislative capacities in violation of the dual office holding provision of the constitution.²⁰⁹

In *Cole v. Manning*²¹⁰ the South Carolina Supreme Court concluded that “the power delegated . . . is . . . not legislative, but administrative [T]he courts may not substitute judicial discretion for administrative discretion, and therefore as a general rule will not attempt to interfere with the exercise of discretionary power by a governmental agency”²¹¹ It follows that although the legislature has the power to establish and abolish agencies, it cannot substitute its legislative discretion for administrative discretion.²¹² Of course, the agencies’ regulations must conform to their enabling statutes. Whether a regulation conforms to its enabling statute is a question for the courts to decide, not the legislature. The *Cole* court stated that “capricious or arbitrary exercise of administrative discretion is of course subject to judicial review.”²¹³ The court noted a difference between administrative and legislative capacities, but did not indicate where the legislative function stops and the administrative function begins.²¹⁴ If the reviewing committee has the de facto power to disapprove regulations, it is acting as an agency and its members are violating the dual office holding provision.

208. See *supra* notes 153-54 and accompanying text.

209. The dual office holding provision of the South Carolina Constitution provides that:

[n]o person shall be eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America or any of them, or under any other power, except officers in the militia and Notaries Public; and if any member shall accept or exercise any of the said disqualifying offices or positions he shall vacate his seat.

S.C. CONST. art. III, § 24.

210. 240 S.C. 260, 125 S.E.2d 621 (1962).

211. *Id.* at 267, 125 S.E.2d at 624-25.

212. The counter argument is that if the legislature can abolish the agency, why can't it abolish the regulations?

213. 240 S.C. at 268, 125 S.E.2d at 625.

214. *Id.* at 267, 125 S.E.2d at 623-25.

IV. RECOMMENDATIONS FOR CHANGE

A. *Adoption of the 1981 Model State APA to Improve Procedural Efficiency*

The legislature could replace the present oversight provisions of the South Carolina APA with section 3-201 of the 1981 Model State APA.²¹⁵ This provision requires agencies to review all of their regulations annually to determine if a new regulation should be submitted. The agencies submit an annual report, covering the effectiveness of the regulations and any criticisms, to an administrative rules review committee.

B. *Alternative Methods of Legislative Oversight That Would Avoid Constitutional Problems*1. *Create an Agency To Review All Regulations Promulgated by Other Agencies*

This approach is similar to California's,²¹⁶ which has thus far proved successful. The procedure would eliminate legislative oversight. The legislature would establish guidelines in the enabling statute creating the agency. An agency would then approve or disapprove regulations based on statutory requirements. Appeal of the agency's actions would be to the Governor.²¹⁷

2. *Provide for Review of Rules by the Governor*

This procedure is provided for in section 3-202 of the 1981 Model State APA. An administrative rules counsel is established in the Governor's office to "advise the governor in the execution of the authority vested under this Article."²¹⁸ The Governor, by executive order, has the authority to suspend or rescind a rule "to the extent the agency itself would have authority."²¹⁹

215. 1981 MODEL STATE APA, *supra* note 17, § 3-201.

216. See *supra* notes 124-28 and accompanying text.

217. *Id.*

218. 1981 MODEL STATE APA, *supra* note 17, § 3-202(c).

219. *Id.* at § 3-202(a). According to the comments following § 3-202:

An authority vested in the governor of a state to veto administrative rules avoids the separation of powers problems that legislative veto schemes raise; it

3. *Establish an Administrative Regulation Review Committee*

An administrative regulation review committee, as described by section 3-203 of the 1981 Model State APA and the procedures provided for it by section 3-204, eliminates most, if not all, of the practical and constitutional problems. The review committee is within the legislature and reviews proposed and adopted rules. The committee may recommend that the legislature supersede a particular rule by statute. Any other committee of the legislature may also review a rule or recommend that the rule be superseded.²²⁰ The committee may file an objection with a statement of its reasons with the Secretary of State if it finds that the rule exceeds "the procedural or substantive authority delegated to the adopting agency."²²¹ The agency receives a copy of the objection which is published in the state register adjacent to the regulation.²²² Within fourteen days after the objection is filed, the agency must respond in writing, after which the committee may withdraw or change its objection.²²³ If the regulation is not withdrawn, it remains in effect; however, in a judicial proceeding the burden is on the agency to establish that the regulation is "within the procedural and substantive authority delegated to the agency."²²⁴

Section 3-204 of the 1981 Model State APA allows objections based upon "lawfulness" of the rule, or, whether the agency has exceeded its statutory authority. Therefore, obligations based on policy would be insufficient.²²⁵ This section of the 1981 Model State APA provides a realistic legislative check on agency rules without impinging on the powers of the executive.

avoids the subversion of the governor's authority to veto legislative acts that is inherent in legislative veto schemes; and it keeps effective political and administrative control of all law enforcement in the official who is, by the state constitution, *the chief executive*, and who is directly politically accountable to the people for proper performance of that function.

1981 MODEL STATE APA § 3-202, comments.

220. *Id.* at § 3-204(c).

221. *Id.* at § 3-204(d)(1).

222. *Id.* at § 3-204(d)(2)-(3).

223. *Id.* at § 3-204(d)(4).

224. *Id.* at § 3-204(d)(5).

225. See IOWA CODE § 17A.4(4)(a)(Supp. 1981).

V. CONCLUSION

Agencies have been characterized as a headless "fourth branch" of the government, and there has been a growing concern that agencies are not sufficiently responsible to the executive or legislative branches of the government or to the electorate for their functions.²²⁶ Because of the increase in the number of agencies and the corresponding growth in the number of rules and regulations, legislatures have sought more effective means of supervising agency activities. The most controversial legislative oversight schemes are those giving legislative committees the power to veto a regulation,²²⁷ and those utilizing the legislature to disapprove the regulation by joint or concurrent resolution.²²⁸ Alaska and West Virginia have held these forms of legislative oversight unconstitutional under dual office holding and separation of powers provisions of their constitutions.²²⁹

Serious practical problems are created by the South Carolina legislative oversight procedure. The procedure causes considerable delay in the promulgation of regulations, and because of the de facto power held by the legislative reviewing committees to pressure agencies to promulgate regulations to conform to the committees' demands, the notice and comment procedures may become a hollow shell. The final decision on the adoption of a regulation will not rest with the agency, but with the committee.²³⁰

To avoid practical and constitutional problems, the General Assembly should consider amending the South Carolina APA or establishing a different procedure. If the legislature decides to continue legislative oversight of regulations, it should adopt sections 3-203 and 3-204 of the 1981 Model State APA. This approach is the most practical alternative and the least questionable on constitutional grounds.

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226. Schwartz, *supra* note 14, at 353.

227. *State ex rel. Baker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

228. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).

229. See *supra* notes 149-62 and accompanying text.

230. See *supra* notes 183-88 and accompanying text.

