

ADMINISTRATIVE LAW ADVISORY COMMITTEE

REPORT OF THE SUBCOMMITTEE TO STUDY STATE LEGISLATIVE AND CONGRESSIONAL INVOLVEMENT IN THE REGULATORY RULEMAKING PROCESS

Mission of the Subcommittee

The purpose of the subcommittee is to study the legislative involvement in the rulemaking process in other states, as well as Congressional involvement in the rulemaking process on the federal level. ALAC feels that a thorough understanding of the role legislators play in regulatory review will be a helpful adjunct to the Committee's study of redress from regulatory mandates.

Members of the Subcommittee and Actions Taken

The subcommittee consists of seven members: Susan Eckerly, Director of Federal Public Policy, NFIB, Chair; John R. Broadway, Jr., Governor's Liaison for Senate Relations; Carol G. Dawson, secretary and member of the Board of Directors, Consumer Alert, Inc.; Susan E. Dudley, Senior Research Fellow, Mercatus' Regulatory Studies Program; Charles H. Koch, Jr., Professor of Law, William and Mary Law School; and Stewart J. Lagarde, Jr., Senior Analyst, Department of Planning and Budget.

The subcommittee asked staff to study the legislative review process in all 50 states as well as the federal system. Staff surveyed the legislation of all states and the Congressional Review Act to determine the statutory authority of the legislators to review regulations. Staff then followed up on this research by contacting persons in each state who deal with regulatory review in order to get a better understanding of how the statutory authority is put into practice. A report of the findings of the state and federal survey is attached.

Issues Identified by the Report

Issues Identified by the State Report

The states survey raised several important issues concerning state legislative review of regulations. These issues are the following: 1) separation of powers, 2) diversity among the states, and 3) the overarching authority to grant and withdraw regulating powers.

1. *Separation of Powers*

The most important issue raised by the report is that of separation of powers. Idaho is the only state that has declared legislative veto of a regulation to be constitutional. The ten or so states that have addressed this issue in the courts have decided that legislative vetoes of regulations are unconstitutional because they violate the separation of powers provisions. The theory behind the decision typically is that once the power to regulate has been given to an agency, the legislature cannot veto the regulations because the agencies are performing an executive branch enforcement function, not a legislative function.

2. *Diversity among the States*

The report describes a diversity in how states handle legislative review of agency rulemaking. Most states (40 out of 49 responding) allow for some sort of review by the state legislature. However, the role that the legislature actually plays in the process can be anything from merely being informed of the regulation to actually having to approve the regulation prior to adoption. On balance, it was apparent that very few states have extensive legislative involvement in the regulation process, even if such a role is authorized by statute.

3. *The Authority to Grant and Withdraw Regulatory Powers*

Although all but two responding states have set up some form of regulatory review, most persons interviewed seemed to feel that the ultimate power of review rested in the power to grant and withdraw regulating powers through authorizing statutes. The comment most commonly heard was that if the legislature was extremely unhappy with what a particular agency was doing, the best way to control the agency action was to amend its authorizing statute.

Issues Identified in the Federal Report

The federal report raised several important issues concerning Congressional review of regulations. These issues are 1) the need for Presidential agreement to disapprove a rule and 2) the lack of use of the power conferred on Congress under the Congressional Review Act.

1. *The Need for Presidential Agreement*

In order for Congress to disapprove of a rule, it must pass a joint resolution. The joint resolution, like all other federal legislation, must be signed by the President in order to take effect. As a result, it is very difficult for Congress to permanently bar a regulation from taking effect because the President must also agree that the regulation is unnecessary or improper.

2. *Lack of Use of the Power Conferred on Congress*

As was mentioned in the report, Congress only disapproved one regulation since enactment of the Congressional Review Act (CRA). The only use of the CRA occurred

during the presidential transition, a situation where the president whose administration promulgated the rule was not in office to veto the joint resolution.

Recommendation and Conclusion

The Subcommittee respectfully submits this report and recommends its adoption and referral to the Code Commission for consideration.

Dated: November 8, 2001

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SUSAN ECKERLY, CHAIR
JOHN R. BROADWAY, JR.
CAROL G. DAWSON
SUSAN E. DUDLEY
CHARLES H. KOCH, JR.
STEWART J. LAGARDE, JR.