

## FEDERATION OF REGULATORY COUNSEL, INC.

### ADMINISTRATIVE RULES IN ILLINOIS: WHO HAS THE FINAL SAY?

#### *Is JCAR Unconstitutional?*

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As with "desk drawer rules," which seem to exist in every state, it is often judged more prudent to accept their existence and validity for a variety of reasons than to challenge them in a formal proceeding. Such it has been as well in Illinois with the constitutional issue of the authority of the Joint Committee on Administrative Rules (JCAR).

JCAR is a legislative body composed of twelve members, six from the House, six from the Senate, with three from each side of the aisle in their respective chambers. 25 ILCS 130/1-5(a)(3) (2006). It has the authority to reject administrative rules proposed by the executive branch with a vote of eight of the twelve members. 5 ILCS 100/5-120(a) (2006). When JCAR was originally enacted in 1981, it was vetoed by then Governor Thompson on the grounds that he believed it to be unconstitutional. His veto was subsequently overridden by the General Assembly, and JCAR came into being. Since then, Governors have grumbled on occasion but have complied with JCAR's decisions and have never raised the possible constitutional objections voiced by the Thompson veto in a court challenge. This has now changed.

#### **Background**

In March 2007, Governor Blagojevich delivered a combined Budget and State of the State address. One of the central themes was his call for a vast expansion of the state's health care program. The catch phrase for the multi-part initiative was "Illinois Covered."

To support this initiative and many others, the Governor proposed a Gross Receipt Tax. Neither proposal was ever passed nor even voted on by either chamber, a clear indication the proposals had little support in the legislature. The Governor, however, did not view this as an impediment to his proposals. On August 30, 2007, he was quoted in the *Chicago Tribune* saying:

"Because we couldn't get some legislators to support this, I'm acting unilaterally to expand health care."

Emergency and permanent rules were subsequently filed to implement portions of Illinois Covered. Both were rejected by JCAR with the necessary eight of twelve votes. The effect of JCAR's rejection of both the emergency and permanent rules under the Illinois Administrative Procedure Act should have been a prohibition on the implementation of the rules.

However, in November 2007, the Department of Healthcare and Family Services (DHFS) began enrolling people into one of the programs included in the Illinois Covered proposal called "Family Care." In so doing, it took the position that the actions of JCAR were of no legal and binding effect and in effect, advisory only.

A preliminary injunction was sought by a tax payer and a business group and was granted on April 15, 2008. The decision of the Court was based entirely upon some technical aspects of the structure of the program. The JCAR issues were not addressed. *Caro, et al. v. Blagojevich, et al.*, 07 CH 034353, Circuit Court, Cook County, Illinois.

DHFS appealed the Circuit Court Order and on September 26, 2008, an Illinois Appellate Court issued an order upholding the injunction issued by the Circuit Court, only mentioning the JCAR issue in passing. *Caro, et al. v. Blagojevich, et al.*, 1-08-1061, Appellate Court of Illinois, First Judicial District, Fifth Division, Slip Opinion.

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The question has been asked; the issue is now on the table. The Speaker of the House, a member of the same party but not an ally of the Governor, has reacted to the Governor's position of treating JCAR as merely advisory by requiring the addition of language similar to the example below on all bills brought before the General Assembly under which the Governor or an agency under him could propose rules.

Notwithstanding any other rulemaking authority that may exist, neither the Governor nor any agency or agency head under the jurisdiction of the Governor has any authority to make or promulgate rules to implement or enforce the provisions of this amendatory Act of the 95th General Assembly. If, however, the Governor believes that rules are necessary to implement or enforce the provisions of this amendatory Act of the 95th General Assembly, the Governor may suggest rules to the General Assembly by filing them with the Clerk of the House and the Secretary of the Senate and by requesting that the General Assembly authorize such rulemaking by law, enact those suggested rules into law, or take any other appropriate action in the General Assembly's discretion. Nothing contained in this amendatory Act of the 95th General Assembly shall be interpreted to grant rulemaking authority under any other Illinois statute where such authority is not otherwise explicitly given. For the purposes of this amendatory Act of the 95th General Assembly, "rules" is given the meaning contained in Section 1-70 of the Illinois Administrative Procedure Act, and "agency" and "agency head" are given the meanings contained in Sections 1-20 and 1-25 of the Illinois Administrative Procedure Act to the extent that such definitions apply to agencies or agency heads under the jurisdiction of the Governor.

This amendment encapsulates the unresolved question. The President of the Senate, an ally of the Governor, refuses to accept bills with this amendment. Thus, a stalemate has developed.

### **Governor's Position**

The Governor's position is basically that of a separation of power under the Illinois Constitution. He concedes that while the General Assembly has originally delegated the authority, it can only be withdrawn by a legislative action. He contends that the suspension of a rule by the General Assembly is a legislative action that must comply with Article IV of the Illinois Constitution of 1970. Article IV requires an action by the legislature to be passed by both houses; presented to the Governor for approval or veto; and if necessary, returned to the legislators for consideration of a veto.<sup>12</sup> JCAR actions involve none of these elements because they are only acted upon by a committee and the Governor cannot veto or approve their action. Brief of Defendants-Appellants at 39, *Caro, et al. v. Blagojevich, et al.*, Appellate Court of Illinois, First Judicial District, Fifth Division (No. 08-1061)

In the briefs, he also notes that nine states and the United States have adopted a similar position: Alabama, Kansas, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, Oregon and West Virginia. *Id.* at 37.

### **Attorney General's Position**

The Plaintiff and the Illinois Attorney General support the constitutionality of JCAR. They point out that the legal burden born by the Governor is quite high.

"All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Wilson*, 214 Ill.2d 394, 398-99, 827 N.E.2d 416, 419-20 (2005). "Moreover, courts will construe statutes, if possible, to be constitutional." *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill.App.3d 334, 345, 880 N.E.2d 1105, 1117 (1st Dist. 2007).

They further argue that this matter has been addressed by the Illinois Supreme Court in a similar situation when the constitutionality of the Compensation Review Board (25 ILCS 102/2) was upheld in *Quinn v. Donnewald*, 107 Ill.2d. 179, 483 N.E.2d 216 (1985). In that case, a board of twelve appointed individuals was given authority to recommend increases in salaries for legislators and some Executive Branch positions. If a

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recommendation was made, it was then up to both chambers of the General Assembly to reject the recommendations or they would go into effect. No action by the Governor is possible under this statute.

In *Quinn*, the court held Article IV was not violated because:

"Itself [the Compensation Review Board legislation] was, of course, passed by a majority of both houses of the General Assembly and was presented to the Governor for his possible veto." *Quinn*, 107 Ill. 2d at 190, 483 N.E.2d at 222. In addition, "the appropriation bill [which would fund the increases] was passed by a majority of both houses and presented to and approved by the Governor." *Id.* Thus, the Court held, "the requirements of article IV, section 8(c) [enactment clause], and Article IV, sections 9(a) and (b) [presentment clause], have been satisfied." *Id.* at 190-91, 483 N.E.2d at 222.

The Plaintiff and the Attorney General assert that if principles of the *Quinn* case are applied in this situation, any subsequent actions taken by JCAR must be held constitutional, since the authorization of the JCAR legislation was passed in accordance with Article IV. They further argue in support of JCAR that Illinois has a long history of legislative delegation to executive branch agencies.

"Highly complex and technical subjects . . . it simply is impractical for legislators to become and remain thoroughly apprised of the facts necessary to determine which aspects of that activity are harmful and how they might be modified." *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 370, 369 N.E.2d 875, 878 (1977).

This delegation does not transfer rule making into an executive function, but rather it remains a quasi-legislative power, and thus, constitutional.

As of this writing, the appeals court has upheld the preliminary injunction and the issue is back before the Circuit Court for a hearing on the merits.

It is, of course, unknown if the court will again decide the matter without reaching the issue of the constitutionality of JCAR, or if so, what it will decide.

Until there is a final resolution, the best prediction is that the legislative language being inserted by the House, which in essence will prohibit the executive branch from promulgating any administrative rules to implement newly enacted laws without the prior permission of the General Assembly, will become part of every bill so long as the parties or their successors hold to their positions.

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### Endnotes

1. SECTION 8. PASSAGE OF BILLS (c) No bill shall become a law without the concurrence of a majority of the members elected to each house. Final passage of a bill shall be by record vote.
2. SECTION 9. VETO PROCEDURE (a) Every bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage. The foregoing requirement shall be judicially enforceable. If the Governor approves the bill, he shall sign it and it shall become law. (b) If the Governor does not approve the bill, he shall veto it by returning it with his objections to the house in which it originated. Any bill not so returned by the Governor within 60 calendar days after it is presented to him shall become law.