# Council Comments:

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**NO. 961** **September 1986**


**STATE BALLOT PROPOSALS - I**

## PROPOSAL B: LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES

Three proposals to amend the Michigan Constitution have been placed on the November ballot by the Legislature. Proposal B, which would provide constitutional status for review and approval by the Legislature of administrative rules, is discussed below. Two other proposals placed on the ballot by the Legislature will be discussed in subsequent **Council Comments.**

### THE ISSUE IN A NUTSHELL

Proposal B would amend Section 37 of Article 4 of the Michigan Constitution to permit the Legislature or a joint committee thereof to approve or disapprove, in the manner provided by law, any rule proposed by an administrative agency. It is identical to a proposal the Legislature put on the 1984 ballot and the voters defeated by a 59% to 41% margin. It would give constitutional status tot he current procedure whereby a joint legislative committee approves administrative rules or rejects them subject to an override by concurrent resolution of the full Legislature. Attorneys General opinions have held such procedures unconstitutional.

The State Constitution grants lawmaking power to the Legislature and requires that the Legislature make and modify law only through bills passed by both the House and Senate and then presented to the Governor, who may approve or veto them and is responsible for carrying out the laws. Because laws seldom are specific enough to deal with every unforeseen event, many statutes require administrative rules to give them effect. Lack of specificity may in fact make legislative passage of a measure more likely: potential conflict can be avoided with the assurance that details can be worked out later in the form of rules by the administering agency. There is potentially more certainty in such an assurance if the Legislature has a role in rule-making and can keep administrators from distorting true legislative intent.

But if the Legislature asserts control over the rule-making process, it has effectively arrogated itself the power to carry out the laws as well as to write them. The problem with such a joining of powers is that it allows the Legislature to change or even undo administratively what it has done by law, thus deceiving the public. The separation of powers is intended to prevent this. The issue is whether this proposal, in trying to curb administrative discretion, destroys a fundamental check on legislative abuse of power.

## IN MEMORIAM

We report with sorrow the death on July 17, 1986, of Mr. Ray R. Eppert who had served as President of the Research Council, 1966-1970. His efforts on behalf of good government in Michigan exemplified outstanding citizenship.

**BACKGROUND.** Between 1943, when the first act governing administrative rules was adopted, and the 1961 Michigan Constitutional Convention, the Legislature several times asserted the power to reject, approve, suspend or amend administrative rules by resolution or by committee action. The Attorneys General ruled consistently that the Legislature could act on an administrative rule "only by constitutionally ordained process, namely by bill."

In placing Section 37 of Article 4 in the new Constitution, the Constitutional Convention authorized the Legislature to empower a joint committee on administrative rules to suspend any proposed agency rule promulgated between legislative sessions. Delegates to the Convention made clear that the purpose of the section was "to allow [the Legislature] to suspend [a rule] -- not kill it or anything of that nature." This power of suspension was intended solely to give the Legislature the opportunity when it reconvened to act by bill on those rules promulgated when it was not in session. At the time of the Constitutional Convention, the typical annual session lasted about 6 months with long intervals between sessions. Since the late 1960s legislative sessions have lasted nearly 12 months with virtually no intervals.

The Administrative Procedures Act of 1969 gave statutory effect to Section 37 of Article 4. A Joint Committee on Administrative Rules was empowered to do no more than suspend a proposed rule during the Legislature's absence. In addition, the Legislature could express its opinion that a promulgated rule was unauthorized, outside legislative intent, or inexpedient. However, the Legislature could modify or rescind an existing rule only by enacting a law.

Amendments made to the Administrative Procedures Act in 1971 and 1977 have returned the Legislature to a procedure which Attorneys General had in 1953, 1958, and 1967 declared to be unconstitutional. The 1977 amendments were passed over the Governor's veto. The Governor then requested an advisory opinion of the state Supreme Court as to the constitutionality of the act as amended, but the Court declined.

Under the law as amended, the Joint Committee has 60 days to act on a proposed rule; if it approves, the agency may file copies of the rule with the Secretary of State for promulgation. Should the rule be disapproved or an impasse reached, the Committee must report the same to the Legislature, which then has 60 days to pass a concurrent resolution approving the rule. Proposed rules approved by neither the Joint Committee nor the Legislature have no effect. Rules which are approved and promulgated have the force of law.

Although the current act requires approval of the Joint Committee or the Legislature for all administrative rules, Attorneys General opinions have consistently held that such approval is essentially superfluous, and that agency rules promulgated pursuant to law do not require legislative approval in any form to become effective. It is this conflict between the Attorneys General interpretation of Section 37, Article 4 of the Constitution and current statutory law that has led the Legislature to place this proposed amendment on the ballot for the second time in 2 years.

Annual reports of the Joint Committee on Administrative Rules indicate that about 60-70 percent of proposed rules are approved annually, and only a few (sometimes none) are disapproved. However, 20-30 percent are withdrawn by the submitting agency, and an unknown number of proposals are not submitted because of the threat of rejection or are modified before submission for the same reason. Thus the

data on committee actions are not a reliable indicator of the impact of the process.

**THE CASE FOR PROPOSAL B.** Proponents of Proposal B advance several points in its support.

First, the Legislature has a legitimate role to play in oversight of executive agencies. The purpose of legislative oversight of administrative rules is to ensure that agency action is faithful to the spirit of the law. The amendment would permit the Legislature to exercise this responsibility and would remove doubt as to the constitutionality of the current procedure.

Second, it may be argued that the present procedure does not encroach on the powers of the executive branch because rule-making is a legislative and not an executive function. This contention is based on the fact that the Legislature could eliminate the need for rules by drafting more specific laws.

Third, the current procedure permits an additional opportunity to defeat an objectionable rule, if opponents are unsuccessful at persuading an agency not to propose it in the first place. Members of the Joint Committee on Administrative Rules may be persuaded to withhold approval, thereby obviating the need for the Legislature to pass a law. The elected Legislature is more accountable to the voters than appointed officials or career employees and therefore more responsive to citizen problems with administrative rules, which have the force of law and may at times be more important than legislation.

Administrative abuse of rule-making does occur. In one instance, an agency of the Michigan Department of Labor interpreted state law and its existing rules authorizing elevator regulation broadly enough to give it control over lifting machinery that did not carry people. The agency persisted even after one business obtained a court decision denying its jurisdiction. Proposed rules to give the agency explicit control over such machinery ultimately were withdrawn and the agency's efforts abandoned.

**THE CASE AGAINST PROPOSAL B.** Opponents argue that the proposed amendment would adversely affect the principle of separation of powers. The present state constitution provides for protecting the people against abuses of power by dispersing that power among 3 branches of government and requiring that “no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Thus, the Legislature is granted power to enact the law but cannot enforce it; the executive is granted power to enforce the law but cannot enact it; and neither can interpret the law, for that power lies within the province of the courts.

The principle underlying this separation is to create a government of coequal and yet interdependent branches, each required to cooperate with the others in accomplishing the public’s business but also given the incentive and capacity to check abuses by the others. This principle is basic to Michigan constitutions since 1835, to the U.S. Constitution, and to the structure of other organizations as well. The essential aim is to preserve accountability and prevent abuses by keeping one person or group from gaining total control. Prudence demands that such a longstanding principle should be done away with, if at all, only after careful consideration of the reasons behind it.

It can be argued that the current rule- making procedure allows for abuses. The sentiments of lawmakers and their constituents may not always converge; nevertheless, the pressure to enact a particular type of law may be irresistible. The present rule-making

procedure permits the Legislature to enact keenly-sought legislation content in the knowledge that implementing rules may never be adopted -- because the Legislature itself will not allow them to be. It also permits a small committee of legislators to exert considerable influence over the administrative interpretation of a law, perhaps changing its focus from that adopted by the legislative body as a whole. In both cases, the enacted law remains visibly in the statute books, and the uninitiated public, unfamiliar with the rule-making process, may assume that it is effective as published.

For example, the lobbyist registration act of 1978 was adopted with a provision specifying that its key sections could not go into effect until 6 months after rules were adopted. Proposed rules were sent to the Joint Committee twice before being approved more than 2 years after the act was adopted. Should the Legislature desire to adopt an act but hamstring its administration, it could continue such a process in definitely. A member of the Joint Committee also can condition his vote for certain rules on receiving favorable consideration from the administrative agency on some unrelated matter -- a form of "horse-trading" that should not infect administration of the laws even if it occurs in the process of passing legislation.

Proposal B does not specify the precise procedure by which the Legislature would approve or disapprove a proposed agency rules stating only that the Legislature, or a joint committee empowered by it, could approve or disapprove "in the manner provided by law" any proposed rule. Opponents argue that the proposed amendment asks the people to endorse a blank constitutional check upon which the Legislature could fill in the amount as it pleased, potentially upsetting the constitutional balance between the executive and the legislative branches. If the people are being asked to expand the boundaries of legislative power, they should be told precisely where the new boundaries are to be drawn.

It is also argued that Proposal B is not needed, since the Constitution already has a method for the Legislature to act on rules -- by adopting a bill subject to veto by the Governor, thus preserving the separation of powers.