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# UNCONSTITUTIONALITY OF THE MISSOURI LEGISLATIVE VETO:

## AN ENVIRONMENTAL GROUP'S EFFECT ON THE CONSTITUTIONAL LANDSCAPE

*Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*<sup>1</sup>

by Stephen Davis

### I. INTRODUCTION

As expected, the Missouri Supreme Court has declared the Missouri General Assembly's legislative veto power of administrative agency rules unconstitutional.<sup>2</sup> The U.S. Supreme Court declared Congress' legislative veto power unconstitutional in 1983, and since then, many have speculated about whether the Missouri Supreme Court would follow suit. According to some, the question has been not if, but rather when the legislative veto would be struck down in Missouri.<sup>3</sup> However, the Missouri Court's treatment of the issues involved as well as the legislature's response to the ruling raise new questions in the minds of environ-

mental and other special interests as to how effective the decision will be and what now lies ahead.

### II. FACTS AND HOLDING

In 1992, the Missouri Department of Natural Resources (DNR) proposed a new administrative rule pursuant to its rulemaking authority under the Missouri Solid Waste Management Law (MSWML) and submitted it to the Secretary of State for publication. The rule would have required those applying for DNR permits for landfills and waste processing plants to document that they had complied with all applicable zoning and licensing requirements of the area in which they were to be located.<sup>4</sup> The Secretary of State,

however, refused to publish the rule because it had not been presented to the General Assembly's Joint Committee on Administrative Rules (JCAR) for review, as was required by state administrative procedure.<sup>5</sup> The absence of JCAR review and the refusal of the Secretary of State to publish the rule in the Missouri Register resulted in the failure of the rule's formal promulgation.<sup>6</sup> The rule's failure brought one environmental organization, the Missouri Coalition for the Environment, and some of its members to challenge state administrative procedure regarding JCAR's review of proposed rules.<sup>7</sup>

The Missouri Coalition for the Environment (MCE) brought suit in the Circuit Court of St. Louis County against various state officials ("the State") seeking a writ of mandamus to compel the Secretary of State to publish the rule, a declaratory judgment pronouncing the Missouri General Assembly's legislative veto unconstitutional, and an injunction to prevent JCAR from taking further action.<sup>8</sup> MCE

<sup>1</sup>948 S.W.2d 125 (Mo. 1997).

<sup>2</sup>See generally Kenneth Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 Mo. L. Rev. 1157 (1992); Scott Welman, *Joint Committee on Administrative Rules: The Missouri Legislature's Disregard for the Missouri Constitution*, 58 UMKC L. Rev. 113 (1989).

<sup>3</sup>See Dean, *supra* note 2. Professor Dean concludes his analysis stating: "At some point the right case will arise challenging the powers of the [Joint Committee on Administrative Rules]. It should come as no surprise to anyone when those powers are ruled unconstitutional." *Id.* at 1216. The Court in the instant case begins its analysis by quoting Professor Dean's comment, hinting that it was now fulfilling his prediction. See *Mo. Coalition for the Env't*, 948 S.W.2d at 125.

<sup>4</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 129.

<sup>5</sup>Mo. REV. STAT. § 260.225 (Supp. 1990). Section 260.225.4 provides: "[n]o rule or portion of a rule promulgated under the [Missouri Solid Waste Management Law] shall become effective until it has been approved by the joint committee on administrative rules."

Subsection 5 goes on to say: "[t]he [DNR] shall not file any final order of rulemaking with the secretary of state until twenty days after such final order of rulemaking has been received by the committee."

The state administrative procedure act is codified at Mo. REV. STAT. Chapter 536. In 1995, legislative veto provisions affecting many state agencies, including the DNR, were moved from their individual enabling acts to the state administrative procedure act in § 536.024. See *infra* note 92.

<sup>6</sup>*Id.*

<sup>7</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 130-31.

<sup>8</sup>The Missouri Coalition for the Environment is a non-profit corporation, comprised of approximately 15,000 members, with its principal office located in St. Louis, Missouri. The self-expressed purposes of the Coalition are "promoting, preserving and protecting the environment in the State of Missouri." Legal File at 83. The three individual relators include Karen Zurick, Beverly Toner, and Darby Tally—all members of MCE.

Respondents include the Joint Committee on Administrative Rules and all of its members: State Senators Jeff Schaeperkoetter, Franc Flotron, Emory Melton, Norman Merrell, John Schneider and Representatives Steve Carroll, Raymond Hand, David Klarich, Kaye Steinmetz, and Vernon Thompson. The Secretary of State, Roy Blunt, the Department of Natural Resources, and its Acting Director, Ron Kucera, were also named as respondents.

claimed that the Secretary of State's refusal to publish the final version of the regulation deprived it and state citizens of the rule's intended beneficial effects, including a decrease in both noise and stench near landfills.<sup>9</sup> It also complained that JCAR's broad power of review of administrative rules crossed the line of legislative authority--that the General Assembly had, in effect, granted itself executive authority--and that JCAR was unconstitutionally spending taxpayer money in the course of its duties.<sup>10</sup>

When MCE filed its action in 1992, the legislative veto provisions relating to DNR rules were surprisingly bold considering the U.S. Supreme Court's treatment of congressional vetoes almost ten years earlier.<sup>11</sup> Under the version of section 260.225 in effect at the time, the legislature empowered JCAR, without approval from the General Assembly, to either disapprove of a proposed DNR rule within twenty days after it was filed with the Committee, or suspend any rule

already promulgated.<sup>12</sup> After MCE filed suit, the legislature amended DNR's rulemaking authority under section 260.225 in 1993 and again in 1995.<sup>13</sup> On April 18, 1994, DNR officially withdrew its final order of rulemaking which the Secretary of State had refused to publish.<sup>14</sup>

The Circuit Court granted JCAR's motion for summary judgment, ruling the case moot since the final order of rulemaking had been withdrawn by DNR, the statute had been amended since the action was commenced, and the legislature had not actually exercised its veto authority.<sup>15</sup>

On direct appeal to the Supreme Court, the Court reversed, holding that both MCE and its three individual members had standing to sue, that amendment of the statute or withdrawal of the rule did not render the case moot, and that the case was ripe for adjudication.<sup>16</sup> It also held that the 1990 version of section 260.225 was unconstitutional, since it violated the separation of powers and presentment

requirements of the state constitution.<sup>17</sup> However, the Court stressed that the legislature is free to authorize committees to review regulatory actions of the executive department and take such action as is constitutionally allowed.<sup>18</sup> In so ruling, the Court specified that its holding was "limited only to the constitutional inability of the legislature to unilaterally suspend or veto such regulatory action."<sup>19</sup> In sum, the Supreme Court held that the legislature may not, without violating the constitution, "unilaterally suspend or veto" administrative rules promulgated by executive agencies.<sup>20</sup>

### III. LEGAL BACKGROUND

The authority of JCAR has constantly evolved since its inception. The Committee was established by the General Assembly in 1975 as a joint committee with five members from each house.<sup>21</sup> At first, JCAR's role was merely to review new regulations proposed by state executive agencies and then make recommendations to the

<sup>9</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 128.

<sup>10</sup>*Id.*

<sup>11</sup>See generally *INS v. Chadha*, *infra* note 44.

<sup>12</sup>MO. REV. STAT. § 260.225.4-.6 (Supp. 1990). Subsection 4 provides: "[u]pon filing any proposed rule with the secretary of state, the department shall concurrently submit such proposed rule to the committee which may hold hearings upon any proposed rule and may disapprove any proposed rule or portion thereof at any time."

Subsection 6 allows for suspension of any rule at any time: "[a]ny rule or portion of a rule promulgated under the authority of [the MSWML] may be suspended by the committee at any time after a hearing conducted thereon."

<sup>13</sup>While the 1993 amendment changed the JCAR's procedure of review, the 1995 amendment's only significant purpose was to reorganize many legislative veto provisions into one section. See MO. REV. STAT. §§ 260.225.7-.10 (Supp. 1993) and 260.225 (Supp. 1995). See also *Mo. Coalition for the Env't*, 948 S.W.2d at 129-31.

<sup>14</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 131.

<sup>15</sup>*Id.* at 131.

<sup>16</sup>*Id.* at 135-36.

<sup>17</sup>*Id.* The Court held the section unconstitutional "insofar as it purported 1) to suspend publication and promulgation of the DNR's final orders of rulemaking for up to twenty days while the JCAR reviewed such rules; 2) to prevent promulgation and enforcement of DNR rules the JCAR disapproved; and 3) to permit the JCAR to suspend and withdraw rules already promulgated by the DNR." *Id.*

<sup>18</sup>*Id.* at 136.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>MO. REV. STAT. § 536.037.1 (Supp. 1975). The statute provides: "[t]here is established a permanent joint committee of the general assembly to be known as the 'Committee on Administrative Rules', which shall be composed of five members of the senate and five members of the house of representatives. The senate members of the committee shall be appointed by the president pro tem of the senate and the house members by the speaker of the house. The appointment of each member shall continue during his term of office as a member of the general assembly unless sooner removed. No major party shall be represented by more than three appointed members from either house."

For a comprehensive history of the legislative veto in Missouri until 1992, see Dean, *supra* note 2 at 1161-66.

Assembly and other state officials based on its findings.<sup>22</sup> Thus, the Committee was initially used only as a "watchdog," possessing no veto power, and able to see its recommendations become reality only through legislation or by asserting pressure through hearings.<sup>23</sup> At this point, JCAR's authority was not constitutionally problematic.<sup>24</sup>

However, this measured authority did not remain static. The legislature believed that the executive branch had too much control over implementing law through administrative rulemaking and wanted to reign in such autonomy by increasing its own powers of agency oversight.<sup>25</sup> Starting in 1979, the legislature tried to invest JCAR with the power to lodge complaints with the Administrative Hearing Commission (AHC) to challenge the validity of agency rules.<sup>26</sup> Filing such a complaint would result in the suspension of the rule at issue until the AHC had determined whether the rule had

violated the agency's rulemaking authority.<sup>27</sup> This arrangement was not effective in producing its desired results, however; and although still on the books, these provisions were left unutilized.<sup>28</sup> In 1982, this grant of authority to JCAR was finally pronounced unconstitutional by the Supreme Court.<sup>29</sup> It went on to say that the legislature, by empowering AHC to invalidate administrative rules, was in effect, "elevat[ing]" the Commission to the "status of a court."<sup>30</sup> According to the Missouri Constitution, the legislature has no power to create courts and "cannot turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary."<sup>31</sup> The legislature was left to find another way to control the content of agency rules.<sup>32</sup>

In 1986, the legislature amended section 260.225 to allow JCAR to actually disapprove of DNR rules.<sup>33</sup> Two years later, the statute was again amended to

include a provision enabling JCAR to suspend, or essentially nullify, any rule previously published and promulgated under the MSWML after it had conducted a hearing on the rule.<sup>34</sup> Thus, any previously promulgated DNR regulation was at risk to the whims of just a few legislators on this key committee. The section also included a nonseverability clause stating that if JCAR's "review power" were ever held to be unconstitutional or otherwise held invalid, DNR's rulemaking authority as well as any rule promulgated by it would also be void.<sup>35</sup> In 1990, the section was amended again, but not in a way that affected the legislative veto power of JCAR.<sup>36</sup>

The Assembly maintained its fervent pace, and in 1993, revised the statute yet again, this time after the Secretary of State refused to publish the DNR rule at issue and JCAR's authority was under fire.<sup>37</sup> This time, however, the legislature effected a substantial

<sup>22</sup>MO. REV. STAT. § 536.037.3-4 (Supp. 1975). Subsection 3 provides: "[t]he committee shall review all rules promulgated by any agency.... In its review the committee may take such action as it deems necessary which may include holding hearings."

Subsection 4 provides: "[i]f the committee finds that any rule...should be amended or rescinded in whole or in part, it shall report such findings and recommendations to the general assembly, to the commissioner of administration, and to the elected state officer, if any, who promulgated the rule."

<sup>23</sup>Dean, *supra* note 2, at 1162.

<sup>24</sup>*Id.*

<sup>25</sup>See Welman, *supra* note 2, at 115 (citing MO. GENERAL ASSEMBLY JOINT COMMITTEE ON ADMINISTRATIVE RULES, REPORT ON THE CHANGING SCOPE AND INCREASING WORKLOAD OF THE JOINT COMMITTEE ON ADMINISTRATIVE RULES, 83rd Gen. Assembly at 3 (1986)).

<sup>26</sup>See Dean, *supra* note 2, at 1163, 1217-19 (examples cited by Professor Dean where the JCAR is granted authority to file complaints include: MO. REV. STAT. §§ 344.070 (enacted 1969; amended 1979), 198.009 (enacted 1979), and 630.050 (enacted 1980)).

<sup>27</sup>*Id.*

<sup>28</sup>Dean, *supra* note 2, at 1163.

<sup>29</sup>State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69 (Mo. 1982) (en banc). The AHC had been empowered in 1978 by the General Assembly "to render declaratory judgments regarding the validity of agency rules." *Id.* at 73. The Court held that the grant of authority from the legislature to the AHC was an "abuse that flowed from centralization of power" and hence contrary to the doctrine of separation of powers because the suspension of the rule was a purely judicial remedy.

<sup>30</sup>Admin. Hearing Comm'n, 641 S.W.2d at 73-75.

<sup>31</sup>*Id.* at 76.

<sup>32</sup>*Id.* at 73-76. See also MO. REV. STAT. §§ 161.333, 536.050 (1978).

<sup>33</sup>MO. REV. STAT. § 260.225 (Supp. 1986).

<sup>34</sup>MO. REV. STAT. § 260.225.4 (Supp. 1988). The statute provided that "any rule or portion of a rule promulgated under [the MSWML] may be suspended by the committee at any time after a hearing conducted thereon."

<sup>35</sup>MO. REV. STAT. § 260.225.5 (Supp. 1988). This provision states: "[i]f the review power is held unconstitutional or invalid, the grant of rulemaking authority and any rule promulgated under such rulemaking authority shall also be invalid or void." *Id.*

<sup>36</sup>MO. REV. STAT. § 260.225 (Supp. 1990). Most significantly, the 1990 amendment added two new sections dealing with a legislative directive for the DNR to prepare model solid waste management plans. See MO. REV. STAT. § 260.225.2-3.

<sup>37</sup>*Id.*

change, trying to legitimize and strengthen the veto against attack by relinquishing some of its power and clarifying that the delegated DNR rulemaking authority was conditional.<sup>38</sup> JCAR's authority was restricted in that no longer would the Committee be allowed to suspend any rule at any time.<sup>39</sup> It could only suspend rules within a thirty-day time period before the final order of rulemaking is filed with the Secretary of State and only upon specific, newly-specified grounds.<sup>40</sup> In addition, the Committee could no longer suspend DNR regulations unilaterally—the concurrence of the Senate and House of Representatives by resolution was now necessary for a permanent suspension.<sup>41</sup> The legislature strengthened its grip on the veto power by reestablishing and emphasizing the nonseverability clause of the pre-amended versions.<sup>42</sup>

The legislature acted again in 1995 to revise DNR, as well as many other agencies', rulemaking

authorization. However, instead of radically realtering JCAR's authority, the 1995 revision was geared toward centralization of various legislative veto provisions in many individual agency enabling statutes into the state administrative procedure law. The amendment repealed the 1993 version of the veto provisions in section 260.225 and incorporated them into a new section to Chapter 536, section 536.024.<sup>43</sup> The amendment left unchanged the specific requirements of rule suspension the 1993 amendment imposed on JCAR and the legislature as a whole.<sup>44</sup>

Traditionally, the major argument against the legislative veto has centered on separation of powers.<sup>45</sup> The doctrine is more carefully defined, however, in the Missouri structure of government than it is at the federal level.<sup>46</sup> Although the U.S. Constitution only implies separation of powers through its organization and delegation of duties to each branch, the Missouri

Constitution explicitly commands that each branch of state government is to be separate, distinct, and not encroach upon the authority of the others.<sup>47</sup> In addition, the bounds of the legislature are more explicitly defined in the state constitution.<sup>48</sup> The General Assembly twice attempted, by proposing constitutional amendments granting it a legislative veto, to push the constitutional envelope, but both referenda failed at the ballot box.<sup>49</sup>

The year after the Missouri Supreme Court handed down its decision in *Administrative Hearing Commission*, the U.S. Supreme Court declared congressional legislative vetoes unconstitutional.<sup>50</sup> In its landmark decision in *INS v. Chadha*, the Court primarily relied on the Presentment and Bicameral Clauses of the Constitution in ruling that legislative vetoes of one house of Congress violated separation of powers.<sup>51</sup> Speaking for the Court, Chief Justice Burger explained federal separation of powers:

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>MO REV. STAT. § 260.225.4-.7. Subsection 7 provides: "[t]he committee may, by majority vote of the members, suspend the order of rulemaking or portion thereof by action taken prior to the filing of the final order of rulemaking only for one or more of the following grounds:

- (1) An absence of statutory authority for the proposed rule;
- (2) An emergency relating to public health, safety or welfare;
- (3) The proposed rule is in conflict with state law;
- (4) A substantial change in circumstance since enactment of the law upon which the proposed rule is based" (emphasis supplied).

MO REV. STAT. § 260.225.7.

<sup>41</sup>MO. REV. STAT. § 260.225.4 (Supp. 1993).

<sup>42</sup>*Id.* The subsection states: "[t]he delegation of the legislative authority to enact law by the adoption of such rules is dependent upon the power of the joint committee on administrative rules to review and suspend rules pending ratification by the senate and the house of representatives as provided herein."

<sup>43</sup>MO. REV. STAT. §§ 260.225 and 536.024 (Supp. 1995).

<sup>44</sup>*Id.*

<sup>45</sup>Dean, *supra* note 2, at 1190.

<sup>46</sup>*Id.*

<sup>47</sup>Dean, *supra* note 2, at 1190. MO. CONST. art. II, § 1 provides: "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

<sup>48</sup>See MO. CONST. art. III, § 21: "[n]o law shall be passed except by bill." See also *Mo. Coalition for the Env't*, 948 S.W.2d at 134.

<sup>49</sup>*Missouri Coalition for the Env't*, 948 S.W.2d at 129. The legislature's two proposed amendments to the state constitution, Senate Joint Resolution No. 29 and House Resolution No. 36 were defeated in 1976 and 1982 respectively. *Id.* See also MO. REV. STAT. §§ 173.612, 197.445, and 277.160.

<sup>50</sup>*INS v. Chadha*, 462 U.S. 919 (1983).

<sup>51</sup>*Id.* at 947-952. Rex Lee, the U.S. Solicitor General who argued before the Supreme Court in *Chadha*, later remarked that the case was "one of the half-dozen most important cases ever decided by the Supreme Court." Rex Lee, Brigham Young University constitutional law lecture (March 1994).

the Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.<sup>52</sup>

Thus, the U.S. Supreme Court determined that a unicameral disapproval of administrative regulations violated the doctrine of separation of powers inherent in the federal Constitution.<sup>53</sup> With the express statement of the Missouri Constitution, Article II, section 1, a Missouri court would have an easier time ruling that such an action would violate state separation of powers.

The effects of *Chadha* were far-reaching. *Chadha* appears to require, on statutes containing legislative veto provisions, a case-by-case examination of whether the veto can be severed from the rest of the act.<sup>54</sup> Instead of Congress provoking a fight, it will probably refuse to veto administrative rules when a statute authorizes such.<sup>55</sup> In fact, since "the mere presence of an

unexercised legislative veto provision in a statute may invalidate" the whole statute, because of the severability issue, commentators suggest it would serve the legislature well, to not only keep quiet about its dormant legislative veto provisions, but also amend such laws to correct any problems waiting to happen.<sup>56</sup>

Three years later, the U.S. Supreme Court, in *Bowsher v. Synar*, again struck down a legislative encroachment upon executive authority.<sup>57</sup> Citing *Chadha*, the Court held that congressionally granted authority under Gramm-Rudman to the Comptroller General was executive in nature and unconstitutional since the Comptroller General could only be removed from office by Congress.<sup>58</sup> Again, Chief Justice Berger explained separation of legislative and executive authority:

To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control of the execution of the laws . . . . The structure of the Constitution does not permit Congress to execute its laws; it follows that Congress cannot grant to an officer under its control what it does not possess.<sup>59</sup>

The Court explained that allowing the Comptroller General to act in the way Congress had

intended would be, "in essence, to permit a congressional veto."<sup>60</sup> In fact, the Court added, "[t]his kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible."<sup>61</sup> According to the U.S. Supreme Court, therefore, a grant of authority by the legislature to itself, or an officer under its exclusive control, to execute the laws is an unconstitutional violation of separation of powers.<sup>62</sup>

Finally, in late September 1997, the Missouri Supreme Court issued its decision in *State Auditor v. Joint Committee on Legislative Research*, in which it favorably relied on its previous decisions in both *Administrative Hearing Commission* and the instant case.<sup>63</sup> In this case, the court determined that the Missouri doctrine of separation of powers as stated in Article II, section 1 of the state constitution, precludes action by the Joint Committee on Legislative Research to conduct an audit of the state auditor's office.<sup>64</sup> The court quoted *Chadha* for the proposition that separation of powers "may be violated when one branch assumes a [power]...that more properly is entrusted to another."<sup>65</sup> It also cited its interpretation of *Bowsher* by saying that "[o]nce the legislature makes its choice in enacting legislation, its participation ends."<sup>66</sup> By applying *Chadha* and *Bowsher*,

<sup>52</sup>*Id.* at 951.

<sup>53</sup>*Id.*

<sup>54</sup>Nowak and Rotunda, *Treatise on Constitutional Law*, 5th ed. § 7.15

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>58</sup>*Id.* at 726.

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 726-27.

<sup>62</sup>*Id.*

<sup>63</sup>*State Auditor v. Joint Committee on Legislative Research*, No. 79454, 1997 WL 731529 (Mo. Sept. 30, 1997).

<sup>64</sup>*Id.* at \*3.

<sup>65</sup>*Id.* (quoting *Chadha*, 462 U.S. at 963).

<sup>66</sup>*Id.*

Missouri has indisputably stated that the legislature is not justified in encroaching upon the executive function.

#### IV. INSTANT DECISION

The Missouri Supreme Court in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules* ruled that disapproval by the Missouri General Assembly of executive agency administrative rules was unconstitutional.<sup>67</sup> It reasoned that it was a violation of the state constitution for the legislature to grant additional power to itself in areas reserved for the executive branch.<sup>68</sup> Section 260.225 (Supp. 1990) of the Missouri Revised Statutes mandates prior approval of all DNR rules by JCAR before the Secretary of State may officially publish them.<sup>69</sup> The statute also authorized JCAR to disapprove of previously promulgated rules enacted under MSWML and suspend and withdraw them.<sup>70</sup> As noted above, the legislature then amended its legislative veto power in 1993 and again in 1995.

The Court first addressed the issue of standing.<sup>71</sup> It ruled that the individual residents had stand-

ing for both the Secretary of State's refusal to publish and the constitutional issues at stake.<sup>72</sup> The Court reiterated its position that public citizens, when seeking orders of mandamus against state officials, have a right to performance of those officials' "ministerial duties."<sup>73</sup> It explained by stating that where the duty to be performed is simple, mandated by statute, and routine, the standing threshold for a member of the public is "extremely low."<sup>74</sup> Since the ministerial duty at issue was a routine one mandated by statute, over which the Secretary had no discretion as to compliance, the standing requirement was satisfied.<sup>75</sup>

The Court also ruled in favor of standing for the individuals to sue on the constitutional issue of state funding of JCAR's expenses.<sup>76</sup> When the assembly established JCAR, it provided that "members of the committee ... may receive their necessary expenses while attending the meetings of the committee, to be paid out of the joint contingent fund."<sup>77</sup> As taxpayers, the individual relators would have standing to sue the Committee if they alleged an

illegal, "direct expenditure of funds generated through taxation."<sup>78</sup> Since the complainants alleged that JCAR expended funds in this manner between 1986 and 1992, they fulfilled the sufficiency requirements for standing on the constitutional claim.<sup>79</sup>

The Court found that MCE's lobbying effort and concern for enforcement of MSWML, especially since the group did not claim any "concrete injury beyond non-implementation of its preferred policy choices," was insufficient to afford standing.<sup>80</sup> Alternatively, the coalition argued associational standing, claiming that it brought the action on behalf of its members who resided near waste disposal areas.<sup>81</sup> This specific claim was dismissed as moot since the individual relators had already been granted personal standing.<sup>82</sup>

The Court began its discussion of the constitutional claim by establishing both its reverence for legislative action and its authority of judicial review.<sup>83</sup> Quoting *Asbury v. Lombardi*, it declared that "we presume a statute is valid unless it clearly contradicts a constitutional provision."<sup>84</sup> The court then cited

<sup>67</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 133-35.

<sup>68</sup>*Id.*

<sup>69</sup>MO. REV. STAT. § 260.225.4-.5 (Supp. 1990) provides: "[n]o rule or portion of a rule promulgated under the authority of [chapter 260] shall become effective until it has been approved by the joint committee on administrative rules.... If any proposed rule or portion thereof is disapproved by the committee, the secretary of state shall publish in the Missouri Register ... an order that such rule or portion thereof has been disapproved."

<sup>70</sup>MO. REV. STAT. § 260.225.6 (Supp. 1990).

<sup>71</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 131.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* (quoting *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. 1992)).

<sup>74</sup>*Id.* (quoting *State ex rel. Cabool v. Texas County Bd. of Equalization*, 850 S.W.2d 102, 105 (Mo. 1993)).

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* (quoting MO. REV. STAT. § 536.037.5 (1975)).

<sup>78</sup>*Id.* (quoting *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 60 (Mo. 1994)).

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 132.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* (quoting *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. 1993)).

the assertion of Chief Justice Marshall—that “it is emphatically the province and duty of the judicial department to say what the law is,” adding to that a clarifier, “to determine the constitutionality of statutes.”<sup>85</sup> This statement reaffirms the Court’s judicial power to overrule a law as unconstitutional.<sup>86</sup> With its authority thus defined, the Court progressed to the Missouri separation of powers doctrine.<sup>87</sup>

According to the doctrine of separation of powers in Missouri, each branch of government should be “kept as separate from and independent from, each other as the nature of free government will admit, or as is consistent with that chain of connection which binds the whole fabric of the Constitution in one indissoluble bond of union and amity.”<sup>88</sup> The Court also maintained, according to long established interpretation of the Missouri Constitution, that one branch was not to encroach upon the duties of another without express constitutional mandate.<sup>89</sup> The constitution, the court affirmed, “peremptorily forbids either of such departments

from passing the prohibitory precincts thus ordained by the exercise of powers properly belonging to either of the others.”<sup>90</sup> It then determined that legislature’s encroachment in authorizing JCAR was not merely an “overlap of powers” but a violation of constitutional separation of powers in two respects.<sup>91</sup> First, the statute allows the legislature to “unconstitutionally interfere with the functions of the executive branch.”<sup>92</sup> Second, it allows the “circumvent[ion of] the constitution’s bill passage and presentment requirements.”<sup>93</sup>

On the first violation, the court firmly pronounced that article II, section 1 of the Missouri Constitution limits the authority of the legislature to enacting laws, as opposed to enforcing those laws which it has enacted.<sup>94</sup> The court stated that JCAR’s statutory authority under section 260.225 to review, suspend publication of, and disapprove of DNR administrative rules, as well as its power to suspend rules already promulgated, is a power reserved by the constitution to the

executive branch.<sup>95</sup> Article IV, sections 16 and 47 of the constitution direct that the promulgation of rules and regulations is solely an executive function. Once the legislature has delegated rulemaking powers, its control is at an end, and is not at liberty to exercise direct control over what rules are promulgated.<sup>96</sup> The Court clarified that the legislature may, of course, exercise its oversight function.<sup>97</sup>

On alternate grounds, the Court invoked the passage and presentment requirement of the constitution to bar JCAR’s action.<sup>98</sup> Since administrative rules have the force and effect of law, it reasoned, it is necessarily inferred that they may only be defeated by the legislature through subsequent law.<sup>99</sup> The Court then explained that since the constitution stipulates that “no law shall be passed [by the legislature] except by bill,” and that every bill passed by both houses must be presented to the Governor, the type of legislative action in this case failed to comply with the constitution’s passage and presentment requirements.<sup>100</sup> Therefore,

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* (quoting *Marbury v. Madison*, 5 U.S. 137).

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 132-33 (quoting *Rhodes v. Bell*, 130 S.W. 465, 468 (Mo. 1910)).

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 133 (quoting *Albright v. Fisher*, 64 S.W. 106, 108-09 (Mo. 1901)). The Missouri Constitution states: “[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.” Mo. CONST. art. II, § 1.

<sup>91</sup>*Mo. Coalition for the Env’t*, 948 S.W.2d at 133.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 134.

<sup>97</sup>*Id.* at 136. When established, the JCAR was authorized to hold hearings on DNR proposed rules and submit recommendations based on its findings to the legislature and executive officials. Naturally, the General Assembly could act in accordance with the Committee’s recommendations through legislation. In this process, even though legislation might not be proposed, pressure could be effectively asserted on the DNR to withdraw or modify its proposed rule, especially pressure brought by an appropriations committee to curtail or qualify agency funding or another committee to hold hearings, delay appointments, etc. The Court maintained that these oversight procedures are completely appropriate and do not leave the legislature helpless once its veto power is stripped away. *Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*



the Court pronounced, "legislative actions...cannot amend, modify, rescind, or supplant any rule promulgated by an agency unless the legislature follows the bill passage requirements."<sup>101</sup> Since an action by the legislature to suspend an administrative rule is necessarily a legislative action, it is subject to the constitutional mandates for bill passage.<sup>102</sup>

The next issue the Court had to face was justiciability. JCAR asserted that the case was mooted by either the fact that the statute was amended or by the withdrawal of the final order of rulemaking by DNR.<sup>103</sup> The Court found this argument unpersuasive in spite of the trial court's ruling.<sup>104</sup> It elaborated that the statute, as amended in 1995, did not "eliminate that nature of the controversy alleged."<sup>105</sup> The court explained that the amended version still allowed for violation of the constitution's passage and presentment requirements, in that it provided for a thirty-day suspension and a complete veto upon action by the legislature without presentment of such action to the

governor.<sup>106</sup> In short, the Court maintained that "a case is not mooted when the controversy continues regardless of the amendment. Here, essentially the same constitutional infirmity infects both the earlier and later versions of the statute."<sup>107</sup> The case for mandamus was also not mooted, the court added, because once the Secretary of State improperly refused to publish the order, "the rule was, for purposes of this litigation, promulgated."<sup>108</sup> Since it was promulgated, section 536.021.5 mandated that it could only be withdrawn by a "subsequent order of rulemaking that is first published as a proposed rule, permitted to be commented on," and published.<sup>109</sup> Thus, a proposed rule cannot be withdrawn by an agency, alleging a mistake was made, without following the proper procedure of section 536.021.<sup>110</sup>

The Court then examined the issue of ripeness, summarily dismissing respondents' claim that since JCAR had taken no action against the proposed regulation, the case was not ripe for adjudication.<sup>111</sup> Like individual standing,

this issue also failed to obstruct a decision on the merits.<sup>112</sup> In short, the court asserted, JCAR's inaction was not at issue.<sup>113</sup> What did matter was not JCAR's action or inaction, but the Secretary of State's refusal to publish the rule based upon section 260.225.<sup>114</sup> Thus, the court found the case was indeed ripe with respect to the rule's promulgation.<sup>115</sup>

The Court did not elaborate on the question of severability. It acknowledged that subsection 7 of 260.225 seems to make the relationship between agency rulemaking authority and legislative review of agency rules interdependent.<sup>116</sup> In fact, the statute provides that section 260.225's grant of authority to JCAR is "nonseverable" with the legislature's delegation of authority to executive agencies to promulgate regulations.<sup>117</sup> However, the Court interpreted the "review power" of JCAR not necessarily as a legislative veto power, but as the general power inherent in the legislature to review the agencies it creates.<sup>118</sup> Thus, since the legislature continued to wield oversight authority over executive agencies even with-

<sup>101</sup>*Id.*<sup>102</sup>*Id.*<sup>103</sup>*Id.* at 135.<sup>104</sup>*Id.*<sup>105</sup>*Id.*<sup>106</sup>*Id.*<sup>107</sup>*Id.*<sup>108</sup>*Id.*<sup>109</sup>*Id.* at 136.<sup>110</sup>*Id.*<sup>111</sup>*Id.*<sup>112</sup>*Id.*<sup>113</sup>*Id.*<sup>114</sup>*Id.*<sup>115</sup>*Id.*<sup>116</sup>*Id.*

<sup>117</sup>See MO. REV. STAT. § 260.225.7 (Supp. 1990) which states: "[t]he provisions of this section are nonseverable and the grant of rulemaking authority is essentially dependent on the review power vested with the committee. If the review power is held unconstitutional or invalid, the grant of rulemaking authority and any rule promulgated under such rulemaking authority shall also be invalid or void."

<sup>118</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 136.

out a legislative veto power, the Court reasoned that severability was not an issue.<sup>119</sup>

V. COMMENT

In assessing the likely outcome of the instant decision on Missouri, *Chadha's* effect on the federal government may provide guidance. *Chadha* has had its critics, Justice White and then-Justice Rehnquist chief among them, and there is no doubt that the instant decision can be criticized in the same way.<sup>120</sup> Some argue that *Chadha* has had a negative effect on not only the federal administrative state, but also constitutional separation of powers as well.<sup>121</sup> The wisdom of the instant decision, like that of *Chadha*, largely depends upon its future effects on the constitutional doctrine of separation of powers in Missouri.

The likely effect of the instant decision on Missouri law has been, and will continue to be, immense. The state administrative state, not to mention the balance of

power within state government has and will still be significantly affected. Missouri has endowed JCAR with extensive authority—more, in fact, than any other state.<sup>122</sup> Thus, other states, who might have looked on Missouri as the last great bastion of legislative supremacy over the administrative state, are now likely to see the Missouri Supreme Court's decision as the comet that will cause the inevitable extinction of the legislature's behemoth dinosaur. A ripple effect throughout the states is almost certain to result.

The effect of the decision may reverberate loudly at home too. No doubt, JCAR's previously unchecked power has had a chilling effect on the rules agencies promulgate. In particular, the DNR may have thought twice before promulgating a rule that would have a negative fiscal impact on the University of Missouri's coal-burning power plant, for instance, when a former university curator, or

a likewise interested legislator, sat on JCAR. Now that the Supreme Court has removed this potential hurdle to administrative action, the DNR and other agencies should feel the relief of no longer having to worry about the General Assembly's "fooled you!" mentality regarding delegation of rulemaking authority.

Like *Chadha*, the Missouri Supreme Court's decision will almost certainly have its detractors. Perhaps the most volatile issue the Court explained away in its opinion was severability. The Court interpreted JCAR's "review power" as the general power within the legislature as a whole to review and exert oversight on executive agencies.<sup>123</sup> This is an intentional misreading of the statute in order to avoid the consequences of the legislature's condition. Even if the Court could honestly say it believed the legislature intended this general meaning of review power, it had only to look to the even clearer language of its 1993 amendment,

<sup>119</sup>While its interpretation of the severability provision may have been justified in past versions of the statute, more recent developments tend to demonstrate that the legislature did, in fact, intend to make its delegation of authority to agencies dependent upon an operable legislative veto power. In its legislative session since the Court's ruling in *Mo. Coalition for the Env't*, the General Assembly has amended its Administrative Procedure and Review statute. The amendment inserted thirteen new sections in lieu of seven sections which it repealed. Most relevant to the subject of this Note, § 536.024 (relating to filing requirements with the JCAR) was modified and § 536.028 (relating to severability, etc.) was created. While the filing requirements of agency rules with the JCAR remained unchanged, the guidelines the JCAR is to follow in disapproving rules was moved to § 536.028. The JCAR was also directed to file its recommendations specifically with the appropriations committees of both houses.

Most significant in the amendment are the waiting period and presentment requirements imposed by § 536.028.8-.9, directing the Secretary of State to withhold publication of the final order of rulemaking until 30 days after the JCAR has made its recommendations regarding the rule to the General Assembly. If the Assembly passes a resolution regarding the rule, the rule is held in limbo until the resolution is presented to and approved or rejected by the Governor.

The amendment also adds clarification and emphasis on severability and legislative intent. Section 536.028.1 declares: "[t]he delegation of authority to any state agency to propose to the general assembly rules as provided under this section is contingent upon the agency complying with the provisions of this chapter and this delegation of legislative power to the agency...is contingent and dependent upon the power of the general assembly to review such proposed order of rulemaking...and to disapprove and annul any rule or portion thereof contained in such order of rulemaking." Section 536.028.10 further explains: "[t]he provisions of this section [and agency rulemaking authority] are nonseverable and the delegation of legislative authority to an agency to propose orders of rulemaking is essentially dependent upon the powers vested with the general assembly as provided herein. If any of the powers vested with the general assembly or the joint committee on administrative rules to review...or to disapprove and annul a rule or portion of a rule contained in an order of rulemaking, are held unconstitutional or invalid, the purported grant of rulemaking authority and any rule so proposed...shall be revoked and shall be null, void and unenforceable."

See generally, H.B. No. 850, 1st Regular Sess. (Mo. 1997).

<sup>120</sup>See generally, *Chadha*, 462 U.S. 919.

<sup>121</sup>See generally, Robert F. Nagel, *The Legislative Veto, the Constitution, and the Courts*, 3 CONST. COMMENT 61 (1986).

<sup>122</sup>See Dean, *supra* note 2, at 1215.

<sup>123</sup>See *supra* note 37.

where the legislature replaced the words "review power" with "the power of the joint committee on administrative rules to review and suspend rules pending ratification by the [General Assembly]."<sup>124</sup> Clearly, the legislature intended its review power to specifically refer to the legislative veto.<sup>125</sup>

Aside from the opinion's internal reasoning problems, lack of legislative veto power itself may be detrimental. While the members of the Missouri Supreme Court all concurred in their judgment, those on the U.S. Supreme Court did not and voiced their concerns for canceling Congress' veto authority. In particular, Justice White's dissent in *Chadha* decried the overturning of the veto provision.<sup>126</sup> In his now-famous words, White declared that the Court had gone too far, for not only did it invalidate one provision of federal statute, it "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto."<sup>127</sup> This, he believed, was incomprehensible.

In Missouri, the legislature had reserved to itself a legislative veto in almost 180 statutes.<sup>128</sup> However, the fate of these statutes is

slightly different from their federal counterparts; for while legislative vetoes still lurk in congressional statutes, they have been economically stricken from the Missouri administrative environment. Even though the Missouri Supreme Court held that a presumption of validity in statutes remains, and a statute will not be stricken absent clear contradiction with the Missouri Constitution, Missouri legislators have received notice that this is such a case and they will lose if they try again.<sup>129</sup>

In the wake of the Court's ruling, the legislature must now decide how to proceed without its powerful check on executive agencies. As Congress did after *Chadha*, the Missouri legislature must now confront new decisions. It must decide whether to legislate "more clumsily," keeping its delegation of rulemaking authority to executive agencies inordinately narrow or rigid.<sup>130</sup> In addition, it must also decide whether to be deterred in its delegation of rulemaking authority in the future, or on the contrary, whether to grant broad authority and, in essence, "pass the buck" to the executive branch.<sup>131</sup> It must now decide how to shape its

future method of delegation and how vigorously to pursue its other oversight capabilities. In the face of the legislature's amendment of the statute since the Court's decision, the Court will likely be forced to revisit the issue fairly soon.<sup>132</sup>

## VI. CONCLUSION

Fourteen years after *Chadha*, the Missouri Supreme Court has finally declared the legislative veto in Missouri unconstitutional. It has pronounced that the unilateral declaration by the legislature, without presentment to the Governor and hence not by legislation, voiding an executive agency rule violates separation of powers. But the fact that the Court struck down the 1990 version of the legislative veto leaves doubts as to whether subsequent versions of the veto are also unconstitutional, particularly the 1997 amendment requiring a mandatory waiting period and presentment to the Governor if the General Assembly adopts JCAR's recommendation. If the judiciary is called upon to face this issue again, the new face and structure of the veto provisions and reinvigorated obstacles like severability may prove more problematic for it to overcome.

<sup>124</sup>See Mo. REV. STAT. § 260.225.4 (Supp. 1993) (emphasis supplied).

<sup>125</sup>See *supra* notes 90 and 92 for further clarification of the legislature's intent on severability.

<sup>126</sup>*Chadha*, 462 U.S. at 967 (White, J. dissenting).

<sup>127</sup>*Id.*

<sup>128</sup>Dean, *supra* note 2, at 1157.

<sup>129</sup>*Mo. Coalition for the Env't*, 948 S.W.2d at 132.

<sup>130</sup>Nagel, *supra* note 94, at 62-63.

<sup>131</sup>*Id.*

<sup>132</sup>In addition to strengthening nonseverability, the Assembly has ostensibly countered the Court's Presentment Clause argument by requiring all disapproval resolutions to be presented to the Governor. See *supra* note 92.