WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Evers v. Marklein II: Administrative Rulemaking

Prepared by: Scott Grosz, Principal Attorney

In *Evers v. Marklein*, 2025 WI 36 ("*Marklein II*"), the Wisconsin Supreme Court addressed the authority of the Joint Committee for Review of Administrative Rules (JCRAR) to "pause, object to, or suspend administrative rules for varying lengths of time, both before and after promulgation." [2025 WI 36, ¶ 1.] Citing the bicameralism and presentment requirements of the Wisconsin Constitution, the Court held each of the challenged statutes to be facially unconstitutional.

STATUTES AT ISSUE

In its petition, the Governor and other state agency petitioners asserted that five specific provisions of ch. 227, Stats., violate the Wisconsin Constitution. Each provision relates to the role of JCRAR during and after rule promulgation.[1] Those statutes are:

- Section 227.19 (5) (c), Stats., which specifies that an agency may not promulgate a proposed rule until JCRAR completes a review of the proposed rule. A review is completed either through expiration of a 30- to 60-day passive review period, waiver of its jurisdiction, or after any objection of the committee and subsequent legislative activity is concluded. The Court referred to this provision as a "pre-promulgation pause."
- Section 227.19 (5) (d), Stats., which permits JCRAR to temporarily object to a proposed rule, and prevents an agency from promulgating the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the objection.
- Section 227.19 (5) (dm), Stats., which permits JCRAR to indefinitely object to a proposed rule, and prevents an agency from promulgating the rule unless a bill is enacted to authorize the promulgation.
- Section 227.26 (2) (d), Stats., which permits JCRAR to temporarily suspend an existing rule, and prohibits an agency from enforcing the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the suspension.
- Section 227.26 (2) (im), Stats., which permits JCRAR to suspend a rule multiple times.

PRIOR LAW

Prior to *Marklein II*, judicial review of JCRAR powers was conducted under an analysis established by the Court in *Martinez v. Department of Industry, Labor and Human Relations*, 165 Wis. 2d 687 (1992). In that decision, the Court upheld JCRAR's authority to temporarily suspend administrative rules under s. 227.26 (2) (d), Stats., describing the process of rule promulgation as distinct from that of legislation, and concluding that legislative review, including JCRAR's suspension authority, was permissible as "a cooperative venture between the legislature and administrative agencies to make and implement rules that are consistent with their statutory authorization." [*Id.* at 692.] In 2020, the Court cited the *Martinez* analysis to uphold JCRAR's authority to suspend a rule multiple times, finding the statute was not facially unconstitutional. [*Service Employees International Union (SEIU) v. Vos*, 2020 WI 67.]

PARTIES' ARGUMENTS

In *Marklein II,* petitioners argued for the Court to abandon the *Martinez* analysis, to analyze JCRAR's authority under reasoning drawn from *Immigration and Naturalization Service (INS) v. Chadha*, 462 U.S. 919 (1983), and to find that JCRAR's authority under the five provisions cited above are unconstitutional "legislative vetoes." The petitioners argued that "once an agency has complied with all statutory rulemaking requirements, JCRAR may not pause, object to, or suspend a rule's implementation

without legislation." [*Marklein II*, 2025 WI 36, ¶ 2.] The Legislature argued that the *Martinez* framework should be maintained and that JCRAR's powers are "permissible in all cases because rulemaking is an appropriate extension of legislative power." [*Id.* (citing *SEIU*, 2020 WI 67, ¶ 98).]

Adoption and Application of the *Chadha* Standard

As requested by the petitioners, the Court overruled *Martinez* and *SEIU*, and adopted a standard drawn from *INS v. Chadha*. Describing the new standard, the Court stated, "legislative action that alters the legal rights and duties of persons outside of the legislative branch triggers the requirements of bicameralism and presentment."[2] [*Marklein II*, 2025 WI 36, ¶ 39.] Following adoption of the new standard, the Court reviewed the five JCRAR powers, and held that each power violates the bicameralism and presentment requirements of the Wisconsin Constitution.

Implications for Legislative Review

By changing the approach to evaluating the Legislature's power to review administrative rules in Wisconsin, the decision effectively permits promulgation and ongoing administration of rules by the executive branch without any direct oversight actions by JCRAR. Accordingly, it limits legislative oversight of agency rulemaking to enacting legislation to revise agency rulemaking authority, to challenging promulgated rules through litigation, and to its remaining roles in the rule promulgation process, discussed below, to the extent such activities do not violate the Wisconsin Constitution.

Although the decision's broad impact can be easily summarized, it prompts a number of practical questions regarding the viability of certain requirements within the rulemaking process. Several elements of the decision may be cited in support of an agency's ongoing obligation to promulgate rules in accordance with all statutory requirements of ch. 227, Stats., except those explicitly held unconstitutional. For example, the decision acknowledged that the rulemaking process "requires a series of steps, including checks from the Governor, the public, and the Legislature" and that these steps occur "prior to, and independent of, JCRAR's involvement." [*Id.* ¶ 5.] Further, the Court stated, "The Legislature created the current process. It alone maintains the ability to amend, expand, or limit the breadth of administrative rulemaking in the other branches—as long as it adheres to the constitution, including the provisions of bicameralism and presentment." [*Id.* ¶ 44.]

Nonetheless, the Court's analysis of the "pre-promulgation pause" under s. 227.19 (5) (c), Stats., may raise questions regarding other requirements in the rulemaking process.[3] In reaching its conclusion, the Court held that the pause itself was constitutionally unsound, noting that it "allows JCRAR to capture control of agency rulemaking authority from the executive branch during the 30-day pause period" and that, "[e]ven if such an interruption is relatively brief, the constitution does not contemplate temporary violations of its provisions." [*Id.* ¶ 41.] Thus, some legal uncertainty remains regarding whether other elements in the rulemaking process are legislative actions that also constitute impermissible "pauses" in the rulemaking process. Resolving those questions may require future litigation, should an agency choose not to follow a step in the rulemaking process.

Read in conjunction with statutory provisions that are not directly affected by the decision, an agency may, at present, avoid questions of improper promulgation by continuing to follow the rulemaking process specified by ch. 227, Stats., up to and including satisfaction of the expiration of the legislative standing committee review period as directed under s. 227.19, Stats.[4]

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[1] This challenge to JCRAR's powers involved JCRAR's authority over a promulgated Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board rule defining conversion therapy as unprofessional conduct, and its indefinite objection to a proposed Department of Safety and Professional Services rule relating to the commercial building code.

[2] Legislative power is vested in a "bicameral" Senate and Assembly, and when a bill passes both houses, must be "presented" to the Governor. [Wis. Const. arts. IV, s. 1, and V, s. 10 (1) (a).]

[3] Examples could include the authority of a JCRAR cochair to request a scope statement hearing under s. 227.136, Stats., legislative authority to request an independent economic impact analysis under s. 227.137 (4m), Stats., and requirements for notice to the Legislature and referral of a proposed rule for standing committee review under s. 227.19 (2) and (4), Stats.

[4] In particular, s. 227.40, Stats., provides a private right of action to challenge a rule for failure to promulgate the rule according to the rulemaking process, and directs a court to invalidate the rule in such circumstance.