JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 15, 1983

Honorable Paul E. Violette
Chairman, State Government Committee
Maine Senate
State House
Augusta, Maine 04333

Honorable Dan A. Gwadosky
Chairman, State Government Committee
Maine House of Representatives
State House
Augusta, Maine 04333

Dear Senator Violette and Representative Gwadosky:

You have asked whether the opinion of this office dated November 4, 1976 (#76-215) is applicable to Legislative Document No. 276, AN ACT to Amend the Administrative Procedure Act to Require Legislative Approval of Rules and Regulations,[1] and whether there have been developments in constitutional law since the issuance of that opinion which would alter or affect its conclusions. Attorney General Opinion 76-215 concluded that the Legislature has the constitutional authority to review, suspend or revise administrative rules and regulations, but only by those means set forth in the Maine Constitution, Art. IV, Part 3 governing the enactment of legislation.

It is the conclusion of this Department that opinion 76-215 remains applicable not only to L.D. 276, but to any other bill

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[1] L.D. 276 would provide that no rule adopted by any agency may take effect until approved by the appropriate legislative committee.

which may propose to give the Legislature, or any subdivision thereof, the authority to review and pass upon the substance of any administrative rule, unless by Act or Resolve. At the time of Opinion 76-215, there were no judicial decisions which directly addressed the constitutionality of the "legislative veto." Since that time however, the conclusions of that opinion have been substantially strengthened by the unanimity of the several courts in other jurisdictions that have decided the question.

Although the Maine courts and the United States Supreme Court have not yet spoken to the question, the Supreme Courts of Alaska[2/] and West Virginia[3/] have held that their respective constitutions prohibit the legislative review of administrative rules except by the majority vote of both Houses of the Legislature and approval by the Governor. In addition, the Justices of the New Hampshire Supreme Court have issued an Opinion of the Justices[4/] which reaches the same conclusion under the New Hampshire Constitution. In the federal system, two Circuit Courts of Appeals have decided three cases holding different forms of the "legislative veto" unconstitutional.[5/] Among them, these courts have confronted the "legislative veto" in various forms and various settings. But no matter what the formulation of the constitutional question,

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2/ State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alas. 1980).

3/ State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981).

4/ Opinion of the Justices, 431 A.2d 783 (N.H. 1981).

5/ Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980) (one-house veto of suspension of deportation order unconstitutional); Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982) (one-house veto of administrative rule unconstitutional); Consumers Union of the United States, Inc. v. Federal Trade Commission, 691 F.2d 575, (D.C. Cir., en banc, 1982) (two-house veto of administrative rule unconstitutional). The United States Supreme Court has granted certiorari in all of these cases. Oral argument has been held twice in the Chadha case, most recently in December of 1982. Neither of the other cases has reached oral argument. With these cases, compare Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (per curiam, en banc) (Congressional disapproval of federal salaries proposed by Executive held to be constitutional), cert. den. 434 U.S. 1009 (1978).

or the factual setting in which it is raised, the conclusion of these courts has been the same. That conclusion is aptly stated by the Supreme Court of Appeals of West Virginia:

> Such a mechanism for legislative review of executive action may properly be called an "extra-legislative control device" for it permits the Legislature to act as something other than a legislative body to control the actions of the other branches. This is in direct conflict with our constitutional requirement of separation of powers. The power of the Legislature in checking the other branches of government is to legislate. [Citation omitted.] While the Legislature has the power to void or amend administrative rules and regulations, when it exercises that power, it must act as a legislature through its collective wisdom and will, within the confines of the enactment procedures mandated by our Constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements.
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> State ex rel. Barker v. Manchin, supra, at 633.

The constitutional principles underlying this conclusion are most thoroughly discussed by the United States Court of Appeals for the District of Columbia Circuit, in Consumer Energy Council of America v. F.E.R.C., 673 F.2d 425, 461-470 (1982). In sum, the court concludes that a Congressional veto of an administrative rule violates the enactment clauses of the federal Constitution because the effect of the veto is to limit or destroy the initial statutory delegation of rulemaking power to the agency. 673 F.2d at 465. The delegation is originally made by an act having the concurrence of both houses and the President (or a supermajority of both houses).

> An effective delegation, therefore, must embody some basic Congressional policy decision. That policy decision, plus what the agency does in accordance with that decision, constitutes the law on the subject matter.
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> 673 F.2d at 467.

In an alternative statement of the same conclusion, the Court said:

> . . . the crucial fact [is] that the Congress had already made one judgment on this policy problem, and had agreed to allow FERC to formulate a rule that would go into effect without further Congressional action. In taking its "second look" at the problem, Congress undeniably engaged in a reconsideration of its previously enacted policy. This is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power. The President and both houses of Congress agreed on a policy when they took their "first look." Undoing this policy requires adherence to this same procedure.
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> 673 F.2d at 468.

In summary, the conclusion of Opinion 76-215 has been strenghtened in the six years since its issuance. Both federal and state courts have made it clear that standard constitutional provisions establishing our system of government permit no other conclusion.6/ The Maine Supreme Judicial Court would likely follow the same analysis and reach the same conclusion in applying the Maine Constitution to L.D. 276 or similar proposals for legislative review of agency rules.

6/ Care needs to be exercised in the shorthand description of the relevant constitutional provisions. This Opinion, like 76-215, considers only the "enactment clauses," Me. Const. Art. IV, Part 3. The West Virginia Court relies upon the same constitutional provisions describing the legislative process, but refers to the separation of powers doctrine. By contrast, the Ninth Circuit in Chadha based its decision on the doctrine of the separation of the three branches of government, a doctrine expressly stated in the Maine Constitution, Art. III, sections 1 and 2, distinct from the "enactment clauses." This Opinion expresses no view as to the applicability of Me. Const. Art. III to the "legislative veto."

Please let me know if my office can be of further assistance.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Hon. Joseph E. Brennan
Hon. Darryl N. Brown
Hon. Philip Jackson
Hon. Donald E. Sproul