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LEGISLATIVE CHANGES TO VIRGINIA ADMINISTRATIVE RULEMAKING

*John Paul Jones**

I. INTRODUCTION

The year 1983 was an active one for administrative law reform in Virginia. The Governor's Regulatory Reform Advisory Board¹ completed its first full year of studying the state administrative process in Virginia, developing proposals for its improvement and drafting enabling legislation.² The Board received a wide variety of suggestions from state employees, businesses, and the public at large in open hearings and through private correspondence.³ The result was the Board's first annual report,⁴ containing a series of

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1. The Governor's Regulatory Reform Advisory Board [hereinafter referred to as the Board] was created by Exec. Order No. 20 (1982), with the general mission of improving the regulatory climate in Virginia. Its specific responsibilities include:

- reviewing any Executive Department proposals which result from studies of existing or proposed regulations, and making recommendations on those proposals;
- advising the Governor on new proposals for reducing, eliminating or clarifying state regulations;
- holding public hearings to identify citizen and private sector concerns related to existing regulations as well as regulatory reform;
- advising the Governor on progress made in reducing, eliminating, simplifying, or clarifying state regulations.

Exec. Order No. 20 (1982), *reprinted in* 1983 GOVERNOR'S REGULATORY REFORM ADVISORY BOARD REP. 63 [hereinafter cited as 1983 REPORT]. The twenty-two members of the Board represent the General Assembly, business, organized labor, the bar, and various citizen groups. The chairman is Delegate Ralph Axselle, Jr. *See* 1983 REPORT, *supra* at unnumbered page following title page.

What the current administration began as a matter of executive discretion, future administrations will continue by statutory command. Under new article 8 of the Virginia Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1978 & Cum. Supp. 1984), each governor is directed to establish procedures for executive review of both the form and content of regulations. VA. CODE ANN. § 9-6.14:25 (Cum. Supp. 1984).

2. Exec. Order No. 20, *supra* note 1.

3. 1983 REPORT, *supra* note 1, at iii-vi.

4. In addition to the broad review of rulemaking from which the reforms discussed herein emerged, the Board also oversees the review by each agency of its existing body of regulations in accordance with Exec. Policy Mem. 1-82, effective October 4, 1982, as developed in Secretary of Administration and Finance Directive 4-1982 (Sept. 19) (revised); Secretary of Administration and Finance Temporary Directive 2-1982 (Nov. 5); and Secretary of Administration and Finance Temporary Directive 2-1982 (Nov. 18) (revised), *reprinted in* 1983

proposed legislative reforms.⁵ The common thread of these reforms was an increased public involvement in bureaucratic decision-making creating broadly applicable regulations with the force of law.⁶ These reforms were enacted in 1984 by the General Assembly in amendments to the Virginia Administrative Process Act (VAPA)⁷ and the Virginia Register Act (VRA).⁸

The three most salient of these reforms were the establishment of a Virginia Register of Regulations⁹ as a widely accessible source for the output of agencies engaged in rulemaking,¹⁰ the creation of an affirmative obligation on the part of rulemaking agencies to seek out and incorporate public input before drafting a new regulation,¹¹ and the creation of an apparatus for political branch in-

REPORT, *supra* note 1 at appendices A, F, G & H. Reviews of five state agencies were completed in 1983: the State Air Pollution Control Board, the Virginia Employment Commission, and the departments of Commerce, Health, and Social Services. The Board's report to the Governor on the results of these reviews is also part of the 1983 REPORT, *supra* note 1, at 34-50.

5. 1983 REPORT, *supra* note 1, at 4-25.

6. As developed in detail *infra*, the proposed reforms are associated with regulations under article 2 of the Virginia Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to :25 and not with case decisions under article 3. The relevant portions of the statute read as follows:

Definitions. — As used in this chapter:

D. "Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

...

F. "Regulation" means any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases thereafter by the agency or by any other agency, authority, or court. But such statements do not include traffic signs, markers, or control devices. So far as not shown in its other regulations or in the basic laws under which it operates, each agency shall include in its regulations statements of the general course and method by which its authority to decide cases or issue regulations is channeled and determined sufficient to inform persons affected or interested of their opportunities to participate.

VA. CODE ANN. § 9-6.14:4 (Cum. Supp. 1984).

7. VA. CODE ANN. §§ 9-6.14:1 to :24 (Repl. Vol. 1978 & Cum. Supp. 1984).

8. *Id.* §§ 9-6.15 to .22.

9. See *infra* text accompanying notes 14-36.

10. The term "rulemaking" does not appear in VAPA. In this paper it is used in its generic sense to denote the process by which agencies make regulations as described in chapter 2 of VAPA. Compare "rulemaking" in federal administrative law. See Federal Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1980). See also K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 6 (2d ed. 1978), B. SCHWARTZ, ADMINISTRATIVE LAW ch. 4 (2d ed. 1984).

11. See *infra* text accompanying notes 45-63 for further discussion of public input during the drafting stages of new regulations.

volvement in agency rulemaking decisions to replace the constitutionally defective legislative veto.¹² This article will examine the amendments¹³ to VAPA and VRA, extrapolate some limits to their scope and efficacy, and offer some conclusions concerning the significance of the new legislation for the Virginia administrative process. The first section addresses what appears to be the most far-reaching of the reforms—establishment of a Virginia Register of Regulations.

II. ESTABLISHMENT OF THE VIRGINIA REGISTER OF REGULATIONS

A. *The Scheme and Some Public Access Shortcomings*

The most far-reaching reform enacted in the 1984 amendments is the establishment of a state periodical reproducing all agency regulations, executive orders, and tax bulletins.¹⁴ Published bi-weekly, the Virginia Register of Regulations will be available for public subscription by mail¹⁵ and in the public libraries of the

12. See *infra* text accompanying notes 69-81 for a more complete discussion of the legislative veto.

13. While other sections of the Virginia Code were changed as a consequence of the administrative reform movement, see *infra* note 104 (discussing the repeal of VA. CODE ANN. §§ 30-74 to -77 (Cum. Supp. 1984)), this paper focuses on changes to VAPA and VRA brought about by the enactment of H.B. 8, 1984 Va. Acts — [hereinafter cited as 1984 amendments].

14. Publication of Virginia Register of Regulations. A. The Registrar shall publish every two weeks a Virginia Register of Regulations which shall include (i) proposed and final regulations; (ii) emergency regulations; (iii) executive orders; (iv) notices of all public meetings and public hearings of state agencies, legislative committees and study subcommittees; and (v) tax bulletins.

VA. CODE ANN. § 9-6.14:22 (Cum. Supp. 1984). The Virginia Register will also contain announcements of state agency meetings open to the public pursuant to the Virginia Freedom of Information Act, VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1978 & Cum. Supp. 1984). The statute reads, in pertinent part:

C. Notices for all meetings of state agencies required pursuant to the Virginia Freedom of Information Act (§ 2.1-340 et seq.), except for legislative meetings held during regular and special sessions, shall be published in the Register. Each notice shall include (i) the date, time and place of the meetings; (ii) a brief general description of the nature of the meeting and the business to be conducted; and (iii) the name, address and telephone number of an individual who may be contacted for additional information about the meeting. Failure to publish in the Register the notice for such a meeting or any inadequacies in the information contained in such notice shall not affect the legality of actions taken at that meeting.

VA. CODE ANN. § 9-6.14:22 (Cum. Supp. 1984). Announcements of meetings to solicit public comment on proposed regulations heretofore appeared in the Calendar of Events published by the Division of Legislative Services pursuant to VAPA. 1981 Va. Acts 492. Now all public meeting notices will appear in one periodical, the Register.

15. VA. CODE ANN. § 9-6.14:23 (Cum. Supp. 1984).

Commonwealth.¹⁶ Heretofore, state agencies had been required by the Virginia Register Act to make a complete file of all operative regulations and amendments¹⁷ available for public inspection and copying.¹⁸ State agencies were also obligated to furnish the Registrar with copies of all operative regulations and amendments.¹⁹ The Registrar would compile this information and each year would publish a directory of regulations and agency information sources as an adjunct to the Code of Virginia.²⁰ These duties continue after the 1984 amendments.²¹

Like the old system, the new Register reaches not only those state agencies subject to VAPA,²² but also agencies having rulemaking power subject to procedural limitations distinct from those in VAPA, such as the State Corporation Commission,²³ the Commission of Game and Inland Fisheries,²⁴ and the Virginia Housing Development Authority.²⁵

It remains to be seen whether the Virginia Register will make state regulations significantly more accessible to interested members of the public. The 1984 amendments do not address the question of whether public subscribers, such as libraries, must retain back issues of the Register. Absent both legislative direction and commitment to underwrite the space necessary for storage, back copies of the Virginia Register will compete with other library materials for a place on the shelves of reading rooms and stacks. Similar storage decisions face private subscribers. If back copies of the Virginia Register are not retained, then only during the two-week period between issues will the texts of regulations be any

16. *Id.* § 9-6.14:24. In counties without public libraries, the Register will be held by the local governing body. *Id.*

17. Until the 1984 amendments, "regulation" had different meanings in VRA and VAPA. Compare 1973 Va. Acts 207 with VA. CODE ANN. § 9-6.14:4 (Cum. Supp. 1984). The narrower VAPA definition has been adopted for VRA in the 1984 amendments. VA. CODE ANN. § 9-6.16 (Cum. Supp. 1984). For the new definition, see *infra* text accompanying note 36.

18. VA. CODE ANN. § 9-6.18 (Cum. Supp. 1984).

19. *Id.*

20. *Id.* § 9-6.19. See, e.g., 1983-84 Register of Regulations of the Agencies of the Commonwealth. No regulation's text is reproduced, only a title or the most cursory description. The duties of both the agencies and the Registrar in this regard remain the same, but the annual compendium, for obvious reasons, has had its name changed to the Administrative Law Appendix. See VA. CODE ANN. § 9-6.19 (Cum. Supp. 1984).

21. VA. CODE ANN. § 9-6.18 (Cum. Supp. 1984).

22. See *id.* § 9-6.14:4.

23. See VA. CONST. art. IX; VA. CODE ANN. §§ 12.1-12 to -13 (Repl. Vol. 1978).

24. See VA. CODE ANN. §§ 29-1.1(2), -7 (Repl. Vol. 1979).

25. See *id.* § 36-55.30(5) (Repl. Vol. 1984).

more accessible to interested members of the public than before.

Associated with the problem of storage is one of information retrieval. If the Virginia Register is meant only as a notice medium, difficulty in locating selected materials in past editions is not a handicap. However, if the General Assembly intended public access to rulemaking to include the ability to locate current regulations on a given subject in any public library, the new publication is deficient. The 1984 amendments impose no express duty on the Registrar to index the Virginia Register, although the Division of Legislative Services has undertaken development of an indexing system, as well as a style manual.²⁶ If the Register is to remain a useful research tool in administrative law, the index should identify superseded materials. Otherwise, as the number of indexed but superseded Register materials begins to dwarf the indexed and still effective rules and regulations, the Register will become an increasingly inefficient research tool.²⁷ In that case, the agency's public file, from which amended or appealed regulations have been withdrawn,²⁸ may prove more useful to the researcher.

B. *Publishing Unwritten Rules in the Virginia Register*

The new amendments to the Virginia Register Act go beyond the highly visible establishment of a bi-weekly periodical. In addition to whatever impact the Virginia Register may have as a vehicle for public access to written rules and formal rulemaking, the amendments will greatly enhance bureaucratic accountability by requiring promulgation of unwritten rules and illumination of the infor-

26. Department of Management Analysis and Systems Development, Management Consulting Division, *Register of Regulations Study and Implementation Plan 1* (Nov. 1983), appearing as appendix 1, 1983 REPORT, *supra* note 1, at 145-46. See VA. CODE ANN. § 9-6.20 (Cum. Supp. 1984).

27. These storage and retrieval difficulties could be ameliorated by complementing the bi-weekly Register with a regulatory code, as the Federal Register is complemented by the Code of Federal Regulations. Only current materials are collected in each CFR edition, and the collection is organized according to subject matter. Because the CFR contains only current materials, its publication permits the subscriber to conserve considerable shelf space by discarding editions of the Register published prior to the CFR volume and rendered redundant thereby. The two-publication complementary system of code and register is not unique to the bureaucratic world. Similar limitations with the chronological compilation of legislative acts presumably led the General Assembly to commission the Code of Virginia. The Governor's Board considered recommending both Register and Code for state regulations but concluded that "some years' experience" with the Register was necessary before introducing a regulatory code. 1983 REPORT, *supra* note 1, at 7.

28. See VA. CODE ANN. § 9-6.18. See also *supra* text accompanying note 18.

mal rulemaking process.

Prior to the 1984 amendments, the publicly accessible regulation files of each agency had to include all written directives used in imposing sanctions, withholding benefits, or refusing licenses.²⁹ This statutory requirement applied to both procedural and substantive rules and their interpretations.³⁰ There were three exceptions to the access requirement: internal management communications,³¹ traffic signs,³² and those directives judged excludable as a practical matter by a three member commission.³³

The 1984 amendments enlarge the agency's duty to make its regulations publicly accessible by including unwritten as well as written agency rules in the description of materials required for the public file and for Register publication.³⁴ In addition, only one of the three previous exceptions is retained, that governing traffic signs.³⁵ Even internal organizational rules must be published in the Virginia Register and added to the public file, if they constitute "any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases thereafter by the agency or by any other agency, authority, or court."³⁶ This expanded definition of regulation for purposes of the VRA promises to enhance public access to the more informal agency processes.

Notwithstanding its potential limitations as a research tool, the Virginia Register will, through its wide distribution, serve as the primary means by which the public is informed about the rulemaking actions of state agencies. It announces the agency's intent, the points of access for public interaction, and a prototype rule for public examination and critique.

29. 1973 Va. Acts 1207.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Compare the definition of "regulation" at 1973 Va. Acts 1207 with that in VA. CODE ANN. § 9-6.16 (Cum. Supp. 1984).

35. VA. CODE ANN. § 9-6.16 (Cum. Supp. 1984).

36. *Id.*

III. INCREASED PUBLIC PARTICIPATION IN ADMINISTRATIVE RULEMAKING

A. *Access to an Agency's House Rules*

The 1984 amendments go beyond increasing public access to the published results of rulemaking. With respect to certain types of informal rulemaking not procedurally limited by statute, the amendments enlarge the public's entry into the process itself. Section 9-6.16 of the Virginia Code requires each rulemaking agency to make public the process by which it decides cases or issues regulations if that process is not already publicly described to sufficiently inform potential participants.³⁷ Now that unwritten rules must be publicly accessible,³⁸ this mandate to illuminate the process by which they are created leaves little of the agency's workings behind closed doors.

Before the 1984 amendments, Virginia law required an agency planning to promulgate a substantive regulation,³⁹ or a procedural regulation for which the General Assembly had imposed a public hearing prerequisite, to issue a public invitation to comment either in writing or in a public hearing.⁴⁰ The invitation had to appear in at least one Richmond newspaper at least sixty days prior to the last day the agency would accept public input on its proposal.⁴¹ In addition to the particulars of the hearing, the newspaper invitation had to contain a brief description of the background and nature of the proposed regulation and the place where its draft text could be

37. *Id.* § 9-6.14:4(F) (Cum. Supp. 1984), which reads, in part:

So far as not shown in its other regulations or in the basic laws under which it operates, each agency shall include in its regulations statements of the general course and method by which its authority to decide cases or issue regulations is channeled and determined sufficient to inform persons affected or interested of their opportunities to participate.

In light of the background and spirit of these amendments, this directive should be viewed as requiring agencies to reveal (1) how they are currently exercising delegated legislative discretion, regardless of the opportunity for public input; and (2) how they propose to create such an opportunity where none presently exists. *Cf.* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2-104, 14 U.L.A. 86 (Cum. Supp. 1984). *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:4 (2d ed. 1978 & Cum. Supp. 1982).

38. *Cf.* 1973 Va. Acts 1207 (no requirement to file rulemaking procedures, either written or unwritten).

39. Substantive regulations are those which allow, require, or forbid conduct "in which persons are otherwise free or prohibited to engage or which state requirements, other than procedural, for obtaining or retaining a license or other right or benefit." VA. CODE ANN. § 9-6.14:4(H) (Cum. Supp. 1984).

40. *Id.* § 9-6.14:7.

41. *Id.*

examined.⁴² These requirements remain.

Now, in addition to the newspaper summary and invitation, the agency must publish the full text of its draft regulation, and repeat its invitation, in the Virginia Register.⁴³ Printing the full text reduces the risk that Register readers will underestimate the significance of the agency's newspaper-advertised synopsis. Printing the full text also removes from Register readers the burden of going elsewhere for access to the exact wording of what the agency wants the law to be. Register reproduction of the agency invitation theoretically enlarges the segment of the public audience contacted for rulemaking input.⁴⁴

B. *An Agency's Obligation to Solicit Input*

A second major goal for rulemaking reform set by the Governor's Advisory Board was that of increased public involvement in the prepromulgation process.⁴⁵ To this end, the 1984 amendments to VAPA introduced two changes in the way the bureaucracy is required to involve the public in formulating new rules: (1) the burden was shifted to the bureaucrat to seek out public input, and (2) the timing of public participation was advanced to the drafting stage.⁴⁶ Left unchanged by the 1984 amendments is the general scope of public rulemaking participation. Public participation is required only when either the statute enabling the agency to make regulations imposes a hearing prerequisite or when the agency contemplates a substantive regulation.⁴⁷ Otherwise, public participation is at the option of the bureaucratic rulemaker.⁴⁸

Before the 1984 amendments, two VAPA models for public participation were applicable to all non-emergency rulemaking except

42. *Id.*

43. *Id.* § 9-6.14:7.1. Normally, the Register will carry the full text of a regulation. When printing the full text would be impractical in the judgment of the Registrar, a summary can be substituted for Register publication. *Id.* § 9-6.14:22(A). The full text would be available to interested members of the public in a file locatable by reference to the Administrative Law Appendix. See *supra* text accompanying notes 17-20. On the face of the VAPA amendment, abridgment is not an option for executive orders, meeting notices or tax bulletins. See VA. CODE ANN. § 9-6.14:22(A) (Cum. Supp. 1984).

44. The question arises, however, as to just how many Register readers were not already agency advertisement readers.

45. 1983 REPORT, *supra* note 1, at 12-13.

46. VA. CODE ANN. § 9-6.14:7.1(A) (Cum. Supp. 1984).

47. *Id.* § 9-6.14:7.1(B).

48. *Id.*

ratemaking and pricefixing. The less formal approach involved the informational hearing.⁴⁹ The agency contemplating promulgation of a rule accepted written submissions and held one or more "town meetings" to receive oral comments from interested members of the public.⁵⁰ The more formal alternative involved the evidential hearing,⁵¹ in which a specially designated agency officer took sworn testimony from interested persons, applied evidentiary rules, and supervised compilation of a verbatim record.⁵²

Both VAPA models imposed detailed but basically passive obligations on the agency contemplating a regulation of general applicability—i.e., to make a forum available and to leave open communication channels to the public. Assuming the agency met minimum prior notice requirements,⁵³ it fulfilled its statutory duties whether anyone showed up to be heard or not.

The new model introduced by the 1984 amendments contains additional—not alternative—requirements for rulemaking agencies. Without waiting for the next urge to promulgate a new regulation, agencies must establish procedures for identifying parties who might be interested in future rulemaking and, when the time comes, for obtaining their opinions.⁵⁴ Agencies are directed by the

49. *Id.* § 9-6.14:7. This model is roughly akin to informal rulemaking as practiced by federal administrative agencies subject to the Federal Administrative Procedure Act, 5 U.S.C. § 553 (1982). See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING (1983) [hereinafter cited as ADMINISTRATIVE CONFERENCE]; K. DAVIS, *supra* note 10; B. SCHWARTZ, *supra* note 10. One significant difference between the practices is that the federal practice tolerates a "hearing" that is no more than the opportunity to send written comments for insertion in a file compiled by the rulemaker. See *Mobil Oil Corp. v. F.P.C.*, 469 F.2d 130, 139 (D. C. Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). A hearing in Virginia practice guarantees the opportunity to comment orally as well as in writing. VA. CODE ANN. § 9-6.14:7 (Cum. Supp. 1984).

50. VA. CODE ANN. § 9-6.14:7(B) (Cum. Supp. 1984).

51. *Id.* § 9-6.14:8 (Repl. Vol. 1978). This model is somewhat analogous to formal rulemaking as practiced by federal agencies subject to the Federal Administrative Procedure Act, 5 U.S.C. §§ 554, 557 (1982). See ADMINISTRATIVE CONFERENCE, *supra* note 49.

52. VA. CODE ANN. § 9-6.14:8 (Repl. Vol. 1978).

53. See *id.* § 9-6.14:7 (Cum. Supp. 1984).

54. VA. CODE ANN. § 9-6.14:7.1(A) (Cum. Supp. 1984) provides:

A. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency pursuant to the provisions of this chapter. Such guidelines shall not only be utilized prior to the formation and drafting of the proposed regulation, but shall also be utilized during the entire formation, promulgation and final adoption process of a regulation. The guidelines shall set out methods for the identification and notification of interested parties, specific means of seeking input from interested persons or groups and, whenever appropriate, may provide for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering inter-

amendments to actively solicit the opinions of identifiable interested parties when anticipating a substantive regulation, or one with a hearing prerequisite.⁵⁵ On other upcoming rulemaking matters, they are merely invited to go out and beat the bushes for public comment.⁵⁶

C. *Public Involvement Before the Regulation is Drafted*

The 1984 amendments change the public's role as well as the rulemaker's duty. Before the amendments, VAPA's public participation requirements were met when the agency produced a tentative draft of the substantive regulation and allowed sixty days for public criticism of the draft before promulgating a final version.⁵⁷ An exception lay for legitimate emergency rulemaking.⁵⁸ This system remains intact, but the 1984 amendments require agencies to consult the public even before a tentative draft is hammered out. The amendments reflect a legislative expectation that the public, or at least those elements of the public previously pinpointed by agency guidelines as potentially interested, be invited to take part "not only . . . prior to the formation and drafting of the proposed regulation, but also . . . during the entire formation, promulgation and final adoption process of a regulation."⁵⁹

The 1984 amendments push back public input to a time before the agency has drafted a prototype regulation. This change affects the makeup of the design team engaged in formulating the prototype, as well as the institutional costs influencing any subsequent agency decision. With regard to design team membership, the importance of the amendments is not simply that they compel an agency rulemaker to go outside the agency for advice on rule de-

est in working with the agency.

55. As is stated in VA. CODE ANN. § 9-6.14:7.1(B) (Cum. Supp. 1984):

B. In formulating any regulation, including but not limited to those in public assistance programs, the agency pursuant to its public participation guidelines may afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency or its specially designated subordinate. This procedure shall be mandatory when the regulation being formulated is of a substantive nature, or the enabling legislation under which the agency is acting specifically authorizes the making of regulations only upon or after a hearing.

56. *Id.*

57. 1981 Va. Acts 387.

58. VA. CODE ANN. § 9-6.14:6(iii) (Repl. Vol. 1978).

59. *Id.* § 9-6.14:7.1(A) (Cum. Supp. 1984). *Cf.* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-101, 14 U.L.A. 90 (Cum. Supp. 1984) (stops short of making pre-drafting public participation a requirement).

sign, even though they now compel what was but prudent practice before. Agencies have always had a sufficient institutional interest in being able to foresee serious objection to imminent regulatory activity, and this interest commonly led to consultation and cooperative efforts with interested parties.⁶⁰ The 1984 amendments make clear that agencies no longer have unbridled discretion about whom to consult and whom to leave in the dark in the design state of a substantive regulation. Formation-stage notice and invitation to participate will hereafter be subject to public scrutiny for conformity with publicly accessible agency guidelines.

Addressing the institutional costs of rulemaking, the amendments direct rulemaking agencies to establish a mechanism for drafting-stage consultation. Performance of this duty cannot be postponed until the agency's next rulemaking initiative.⁶¹ The cost of putting the mechanism in place becomes legislatively-mandated agency overhead. However, the operating cost of an agency thereafter employing such a mechanism for individual rulemaking initiatives is much lower when compared to an ad hoc approach of similar dimensions. Presumably, the low agency cost of employing a mechanism already in place will persuade its use even in those rulemaking endeavors where it is not mandated.

Finally, the pre-drafting public involvement mechanism reduces agency disincentive to withdraw or amend a rulemaking decision. In those instances where the agency's discretionary scouting would have failed to turn up substantial public resistance, the new mechanism enables the agency to make an early decision to cut its losses by withholding bureaucratic resources from a marginal initiative before the interest of any agency department or decisionmaker vests by way of authorship or endorsement.

Determining exactly when a bureaucrat's informed conclusion that "there ought to be a law" (or a change in existing law) triggers his obligation to communicate with an interested party should be a fertile area for judicial interpretation. The 1984 amendments make clear that the General Assembly anticipates public consultation by a would-be rulemaker well in advance of her settling on a certain

60. See, e.g., SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMMITTEE ON THE JUDICIARY, CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, S. REP. NO. 522-4, 94th Cong., 1st Sess. 104-13 (1975) (discussing rate-setting procedures used by the CAB which involved co-operative efforts with carriers to achieve the lowest fares and best services for consumers, while ensuring profits for carriers).

61. See VA. CODE ANN. § 9-6.14:7.1(A) (Cum. Supp. 1984).

response to a certain problem.⁶² If mere generalized dissatisfaction with the present state of affairs does not trigger the duty to consult, the agency's decision to do something, without yet knowing what, should.

While the new model imposes an active pre-promulgation duty on a rulemaking agency, it does so with much less specificity than the existing hearing models. How each rulemaking agency is to identify, approach, and communicate with the public at the pre-drafting stage is not legislatively specified. The General Assembly only proffered a nonbinding suggestion to establish and consult advisory groups.⁶³

The 1984 amendments are sure to provoke increased public involvement in agency rulemaking. Whether either the circle of public participants or the quality of public involvement will be substantially enhanced remains unclear. Aside from encouraging agencies to employ advisory panels, the amendments avoid the question of where the agency is to turn in eliciting public input to the decision to make or amend a regulation. The spokespersons with whom the agency would logically begin are those who have expressed an interest in past agency ventures on a given topic. Yet the very fact that these spokespersons have a track record of participation proves that they were adequately informed and involved without the agency's being required to seek them out. If the agency search and invitation reaches only public spokespersons who have previously commented on rulemaking proposals, the duty imposed on rulemaking agencies by the public participation requirements is not particularly heavy, but the feedback promises to be only more of the same. If the agency is able to reach beyond the cadre of public participants who had sufficient interest to come forward before, it will be interesting to see if these heretofore silent parties now have something useful to say.

62. *Id.*

63. *Id.* Reservations about excessive reliance on advising committees led the U.S. Congress to pass legislation limiting their creation and use by federal agencies. See Federal Advisory Committee Act, 5 U.S.C. app. § 2 (1982).

IV. OVERSEEING AGENCY ACTION TO INVOLVE THE PUBLIC IN RULEMAKING

A. *Judicial Oversight After the 1984 Amendments*

At the same time that the General Assembly put in place new procedures designed to improve public awareness and participation in agency rulemaking, it adopted additional safeguards to ensure agency compliance. The new safeguards employ all three of the traditional government branches in oversight of the fourth.⁶⁴

For the judiciary, already an integral part of the VAPA apparatus for controlling bureaucrats by virtue of its judicial review role,⁶⁵ the 1984 amendments produced one change: failure of an agency to comply with the notice and comment requirements before adopting a substantive rule cannot be deemed harmless error in an action brought by one objecting to the regulation.⁶⁶ This seems to shift the burden from challenger to rulemaker—which makes sense in the context of judicial review pursuant to VAPA. The agency has *prima facie* violated a statutorily imposed duty and should not be allowed to plead a presumption that unlawfulness is harmless and therefore excused. By the same token, a challenger must presumably evidence some injury to satisfy traditional judicial reservations about standing.⁶⁷ Thus, the agency's burden after the 1984 amendments is to show the lack of a sufficient causal link between the failure to meet its notice and comment obligation and the challenger's injury.

64. One Virginia administrative agency, the State Corporation Commission, enjoys constitutionally separate if not entirely coordinate status. *See* VA. CONST. art. IX. *See also* *City of Richmond v. Chesapeake & Potomac Tel. Co.*, 127 Va. 612, 619, 623, 105 S.E. 127, 129, 131 (1920) (describing SCC as constitutional creation, without inherent power, but with *paramount* delegated ratemaking power).

65. *See* VA. CODE ANN. §§ 9-6.14:15 to :19 (Repl. Vol. 1978).

66. *Id.* § 9-6.14:7.1(F) (Cum. Supp. 1984). Note that this limit on judicial review pertains only to the notice and comment requirements for proposed and final substantive regulations (and others for which a hearing is statutorily required). Failure of an agency to generate or abide by guidelines for public participation at the drafting stage, *see supra* text accompanying notes 57-63, may, by implication, yet be deemed harmless error without running afoul of VAPA.

67. The General Assembly has conferred standing to seek judicial review of agency action on "[a]ny person affected by and claiming the unlawfulness of any regulation, or . . . case decision . . ." VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1978). Whether this would allow a party uninjured and unrestricted by a VAPA regulation to obtain a judicial decision has not yet been decided in Virginia. *See* K. DAVIS, *supra* note 10, §§ 22:1 to 26. *Cf.* *Hammer v. Commonwealth*, 169 Va. 355, 362, 193 S.E. 496, 498-99 (1937) (interpreting who is an "interested person" permitted to petition for statutory writ of quo warranto); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 5-106, 14 U.L.A. 148 (Cum. Supp. 1984).

Where the notice and comment defect is raised defensively rather than affirmatively in an agency enforcement action, a different situation presents itself. By Virginia Supreme Court rule, challenges to a new regulation must occur within sixty days after its effective date.⁶⁸ Enforcement actions, however, can arise years later. When considerable time has passed, it is reasonable to assume that an agency's operations, pursuant to the defective regulation, including enforcement of the regulation against others of the defendant's class with whom she is doubtless in communication, has cured any failure of notice and opportunity to comment. Moreover, since the agency, not the defendant, has met standing prerequisites, the erstwhile rulemaker would be forced to prove a negative by facts particularly in the possession of its opponent. For these reasons the shift in burden created by the 1984 amendments is properly limited to challenges to rulemaking pursuant to VAPA's article 4.

B. *Repeal of the Legislative Veto*

If the change in judicial oversight of VAPA rulemaking made by the 1984 amendments is slight, the changes in legislative oversight are not. In keeping with a noticeable trend, Virginia disposed of its legislative veto, and replaced it with more limited legislative oversight procedures, as well as an executive scheme. This is the third major reform accomplished by the 1984 amendments.

In 1981, the General Assembly changed VAPA's rulemaking procedures by adding a legislative veto.⁶⁹ When an agency adopted a

68. VA. SUP. CT. R. 2.A:2, 2.A:4 reprinted in 11 VA. CODE ANN. 35, 36 (Added Vol. 1984). *But cf.* Commonwealth *ex rel.* State Water Control Bd. v. County Util. Corp., 223 Va. 534, 541, 290 S.E.2d 867, 871 (1982) (the detailed procedural scheme in the State Water Control Laws, not Rule 2.A:4, governs appeals from State Water Control Board case decisions).

69. The notion of a device by which a legislature with second thoughts can overrule an agency's decision to issue, pursuant to broadly delegated legislative powers, a specific regulation having force of law, has received much attention in the journals. *See, e.g.*, Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984); Hutchins, *Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis*, 15 TEX. TECH L. REV. 307 (1984); LaMarca, *Illinois' New Legislative Veto: A Strict Scrutiny of Agency Rulemaking "With Bite"*, 70 ILL. B.J. 36 (1981); Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982); Saks, *Holding the Independent Agencies Accountable: Legislative Veto of Agency Rules*, 36 AD. L. REV. 41 (1984); de Seife, *Legislative Delegation of Powers: A Hobson's Choice?*, 17 J. MAR. L. REV. 279 (1984); Note, *The Legislative Veto: Is It Legislation?*, 38 WASH. & LEE L. REV. 172 (1981); Comment, *The Legislative Veto: A Survey, Constitutional Analysis, and Empirical Study of Its Effect in Michigan*, 29 WAYNE L. REV. 91 (1982); Comment, *The Constitutionality of the Legislative Veto*, 23 WM. & MARY L. REV. 123 (1981).

substantive regulation⁷⁰ in its final form, the agency had to send copies to the Registrar⁷¹ who passed the regulation on to concerned committees of the General Assembly.⁷² A majority of a quorum of any of the recipient committees could vote to postpone the effective date of the new regulation until it had been considered by the legislature as a whole during its next normal session.⁷³ If the General Assembly then declined to nullify the regulation by joint resolution, the agency could formally file it with the Registrar.⁷⁴ The regulation would normally become effective thirty days after filing.⁷⁵

Called upon to consider the constitutionality of this legislative oversight device, Virginia's attorney general issued an opinion⁷⁶ that it violated state constitutional requirements for separation of governmental powers and lawmaking by bill.⁷⁷ While the Supreme Court of Virginia never ruled on the matter, the Governor's Board recommended repeal of the VAPA legislative veto.⁷⁸ The Board based its recommendation on three factors: the attorney general's opinion, legislative veto invalidations by several state supreme courts,⁷⁹ and a decision by the United States Supreme Court declaring a federal variant unconstitutional for failure to conform to the United States Constitution's requirements for bicameral lawmaking and presentment.⁸⁰ The General Assembly obliged the Board's request in the 1984 amendments.⁸¹

C. *Executive Oversight*

In the 1984 amendments, the General Assembly replaced the legislative veto with more limited oversight of administrative law-

70. See *supra* note 39 for definition of substantive regulation.

71. 1981 Va. Acts 493.

72. *Id.*

73. *Id.*

74. *Id.*

75. 1975 Va. Acts 1002.

76. Opinion of the Attorney General to Hon. J. Samuel Glasscock, February 15, 1982, reprinted in 1981-82 OP. VA. ATT'Y GEN. 93

77. VA. CONST. art. III, § I & art. IV, § 11.

78. See 1983 REPORT, *supra* note 1, at 20.

79. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783 (1981); *General Assembly of New Jersey v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

80. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 419 (1983).

81. VA. CODE ANN. § 9-6.14:9 (Cum. Supp. 1984).

making. The new legislation specifies that both the governor⁸² and the relevant standing committees of each house of the General Assembly⁸³ have review responsibilities with respect to all public comment VAPA rulemaking.⁸⁴

The 1984 amendments impose duties on the governor to examine all proposed⁸⁵ and final⁸⁶ regulations as they appear in the Virginia Register.⁸⁷ For proposed regulations, the governor is charged with obtaining the attorney general's opinion concerning the sufficiency of rulemaking authority on the part of the promulgating agency.⁸⁸

82. VA. CODE ANN. § 9-6.14:9.1 (Cum. Supp. 1984) reads:

A. The Governor shall adopt procedures by executive order for review of all proposed regulations governed by this chapter. The procedures shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations; (ii) examination by the Governor to determine if the proposed regulations are necessary to protect the public health, safety and welfare; and (iii) examination by the Governor to determine if the proposed regulations are clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

83. VA. CODE ANN. § 9-6.14:9.2 (Cum. Supp. 1984) reads:

After the legislative members have received copies of the Register pursuant to § 9-6.14:24, the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable may meet and, during the promulgation or final adoption process, file with the Registrar and the promulgating agency an objection to a proposed or final adopted regulation. The Registrar shall publish any such objection received by him as soon as practicable in the Register. Within twenty-one days after the receipt by the promulgating agency of a legislative objection, that agency shall file a response with the Registrar, the objecting legislative committee and the Governor. If a legislative objection is filed within the final adoption period, paragraph 1 of § 9-6.14:9.3 shall govern.

84. The Governor's rulemaking review duties extend inter alia to "all *proposed* regulations governed by this chapter [VAPA]." *Id.* § 9-6.14:9.1(A) (emphasis added). Proposed regulations are not defined in VAPA. While it is possible to interpret the Governor's duties as extending to *all* new regulations as defined in VAPA's new VA. CODE ANN. § 9-6.14:4(F) (Cum. Supp. 1984) in the sense that, before adoption, all new regulations must have been proposed, the more practical approach is to regard mandatory executive branch review as limited to VAPA public comment rulemaking (i.e., to those "proposed regulations" required by VA. CODE ANN. § 9-6.14:7.1(C) (Cum. Supp. 1984) to be published in the Virginia Register). Any other interpretation would leave ambiguous the point at which the executive review duty commences, set forth in § 9-6.14:9.1(A) as when the proposed regulation is published in the Virginia Register.

85. See *supra* note 84 and accompanying text.

86. See VA. CODE ANN. § 9-6.14:9(D) (Cum. Supp. 1984).

87. *Id.* § 9-6.14:9.1.

88. *Id.* Presumably, the attorney general is still free to give an official opinion on broader issues presented by the proposed regulation, as requested by the governor, the agency director, or a legislator, among others, in accordance with VA. CODE ANN. § 2.1-118 (Repl. Vol. 1979). The new legislation takes any decision on whether to ask the attorney general if rulemaking in progress is ultra vires out of the hands of the persons so empowered by § 2.1-118.

The governor himself must then determine whether the proposed regulations are "necessary to protect the public health, safety and welfare"⁸⁹ and whether they are "clearly written and easily understandable."⁹⁰ If the attorney general finds the rulemaking ultra vires, or if the governor finds a proposed regulation unnecessary, unclear, or both, the governor is required to transmit such objections to the rulemaking agency.⁹¹ On its face, VAPA imposes no corresponding duty on the agency to answer the governor's criticism; the rulemaker may ignore the executive input and proceed with adopting its new regulation. When the agency does choose to respond to the governor's objections by changing a proposed regulation, the agency is not expressly obligated by the amendments to reopen or prolong its public comment proceedings.⁹² This is apparently the case no matter how much the changes supplied by the chief executive may alter the proposed regulation as it previously appeared for public scrutiny and input.⁹³

Another interesting omission respecting the new executive review of proposed regulations concerns executive nonfeasance. The consequences of the governor's failure to transmit his comments in time⁹⁴ are not delineated in the 1984 amendments. Because failure to perform a statutory duty should not operate to enhance executive power, nontransmittal should not delay Register publication of

89. VA. CODE ANN. § 9-6.14:9.1(A) (Cum. Supp. 1984).

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* § 9-6.14:7.1(C). The 1984 amendments do no more than empower the agency to incorporate, at its discretion, changes proposed by the governor. *Id.* § 9-6.14:9.1(A). That the rulemaker had the power, but not the duty, to do so, by implication of former sections 9-6.14:7 and :8, does not appear to have been doubted before passage of the 1984 amendments. *See* 1975 Va. Acts 1001-02. The result is that the governor's power to control the outcome of rulemaking decisions remains, as before, informal—manifested either in his "jawboning" of the rulemaker directly, or in his enlistment of the legislative guardians of the agency's budget. This is not to suggest that such executive power is not considerable. *See* Levinson, *supra* note 69, at 105-11. *Cf.* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-202, 14 U.L.A. 108 (Cum. Supp. 1984). Various proposals to replace the constitutionally suspect legislative veto with an executive override respecting VAPA rulemaking enjoyed considerable if ultimately insufficient support before the Governor's Board. *See* 1983 REPORT, *supra* note 1, at 21-22, 120-21. The basically precatory nature of the governor's new role under the 1984 amendments more accurately reflects a political defeat than meets any need for the supervision of agency rulemaking. Thus, section 9-6.14:9.1(A) is more vestigial than remedial.

94. Such transmittal must occur before the period for public comment ends. VA. CODE ANN. § 9-6.14:9.1(A) (Cum. Supp. 1984). For more on public participation, see *id.* § 9-6.14:7.1; *see also supra* text accompanying note 57.

the final regulation and its formal adoption,⁹⁵ unless the agency, in its discretion, elects to wait for executive input.⁹⁶

The governor's rulemaking review responsibilities encompass regulations in their final as well as their proposed form. Once the rulemaking agency has manifested its satisfaction with a regulation by designating it "final" and adopting it,⁹⁷ the governor is empowered to "suspend the regulatory process" for thirty days.⁹⁸ However, the amendments limit the discretion of the governor in the exercise of this power. Before he can halt the process, the governor must find that the final version of the new regulation differs substantially from the proposed version, and that the difference does not result from public comment on the proposed version.⁹⁹ The governor's power to temporarily suspend an agency regulation, if and when he elects to exercise it, triggers a concurrent duty requiring the agency to take additional public comment.¹⁰⁰

95. Allowing agency receipt of the governor's comments to be a condition precedent to the closing of the public comment period would permit the governor to indefinitely forestall adoption. This would be, in effect, an implicit executive veto, rendering nugatory the explicit thirty day limit on his power to delay adoption in section 9-6.14:9.1(C).

96. VA. CODE ANN. § 9-6.14:9.3 permits the rulemaking agency to set any effective date for a newly adopted regulation which falls more than thirty days after agency adoption. Furthermore, section 9-6.14:9.4 permits the rulemaking agency to withdraw a regulation at any time before its effective date. The agency's power to withdraw is not on its face limited to final regulations, since the language in section 9-6.14:9.4 is broad enough to encompass an agency's decision to withdraw a regulation *instead* of adopting it. Given the express power to postpone effectuating adopted regulations in section 9-6.14:9.3 and the express power in section 9-6.14:9.4 to withdraw regulations before their effective dates, the better view is that an agency can at its discretion extend the public comment period, or having closed public comment, postpone further action.

97. Absent operation of the new delay mechanisms made available to the governor and the General Assembly by the 1984 amendments (or perhaps delay through judicial interference, see VA. CODE ANN. § 9.6-14:19 (Repl. Vol. 1978)), a new regulation becomes effective thirty days after the signing of a formal agency order adopting a final version. See VA. CODE ANN. §§ 9-6.14:9.1, :9.3 (Cum. Supp. 1984).

98. That is, he may postpone the effective date of the new regulation. VA. CODE ANN. §§ 9-6.14:9.1, :9.3 (Cum. Supp. 1984). As section 9-6.14:3 makes clear, when the governor suspends the normal thirty day clock by imposing his own thirty day delay, the agency decides when—after the governor's delay period runs out—the regulation will become effective, if at all. The alternative for the agency is withdrawal pursuant to its power under VA. CODE ANN. § 9-6.14:9.4.

99. VA. CODE ANN. § 9-6.14:9.1(C) (Cum. Supp. 1984). The governor's new power to suspend appears to be conditioned upon a finding that the agency has, in adopting a final version, made substantial changes in the version originally set out for public examination and comment. Even if the two versions are substantially different, the statute does not license executive interference when the difference stems from agency response to public suggestions. Failure of the agency to adopt suggested changes, even those transmitted by the governor himself, does not empower the governor to interfere with the agency rulemaking.

100. While the syntax is troublesome, the context in which section 9-6.14:9.1(C) appears

The 1984 amendments thus impose on the governor a duty of considerable dimension to participate in the pre-adoption debate of a proposed regulation. His opinion is required, not only as editor, but as interpreter of the agency's duty to advance the public health, safety and welfare. If the new executive duty to participate is broad, the new executive power to interfere is narrow. Only when the rulemaker enervates VAPA's public participation requirements by adopting something other than what was previously reviewed is the governor empowered to interfere, and then only to reinstate the public as a participant in the process.

For the standing committees of each house of the General Assembly,¹⁰¹ the authors of the 1984 amendments have fashioned a role in public comment rulemaking¹⁰² similar to that of the governor.¹⁰³ While they no longer possess the power to forestall regulation until the General Assembly's next meeting,¹⁰⁴ the standing committees have the power to compel an agency response to the

seems to suggest that if the governor, upon the above discussed findings, chooses to suspend the rulemaking process, he can do so only if he also orders the rulemaking agency to take additional public comment. The governor's power to suspend is limited not only in scope and duration, but also in purpose.

These limitations highlight the special role assigned to the chief executive in the rulemaking scheme of the 1984 amendments. Whatever his political mandate, the governor is not established by the amendments as a policymaking alternate to the agency rulemaker. The amendments do not create a scheme for checks and balances in decisions about regulatory content. They impose on the governor a duty to comment on regulatory policy; they do not afford him sanctions against a dissenting rulemaker. The agency continues to have the final say within the limits of its delegated legislative power. On the other hand, the amendments do provide the governor with clout in policing agency compliance with the legislative mandate to involve the public in its lawmaking decision. In short, his supervisory mandate is procedural, not substantive.

101. The standing committees of the 1983 Senate are listed at 2 SEN. J. 1809-28 (1983). The standing committees of the 1983 House of Delegates appear at II HOUSE J. 1492-93 (1983).

102. VA. CODE ANN. § 9-6.14:9.2 (Cum. Supp. 1984) (for text of statute, see *supra* note 83), like its counterpart addressing executive review (VA. CODE ANN. § 9-6.14:9.1, set forth *supra* note 82), does not explicitly limit its operation to public comment rulemaking pursuant to VA. CODE ANN. § 9-6.14:7.1. See *supra* note 84.

103. While the governor's duty to review is absolute, review by the standing committees is discretionary. Compare VA. CODE ANN. § 9-6.14:9.1(C) (showing the absolute nature of the governor's duty to review) with VA. CODE ANN. § 9-6.14:9.2 (giving the standing committees a discretionary duty to review). Otherwise, the executive and legislative powers to comment and delay are discretionary. See *supra* note 99. Compare VA. CODE ANN. § 9-6.14:9.2, quoted *supra* note 83.

104. This power was eliminated with repeal of the legislative veto. See 1981 Va. Acts 493. See also *supra* text accompanying notes 69-81 for a more complete discussion of the repealed legislative veto.

committee's objection to rulemaking in progress,¹⁰⁵ and the power to delay the legal effectiveness of a regulation for twenty-one days.¹⁰⁶

The legislative objection provision of the 1984 amendments seems largely redundant, in light of pre-existing formal and informal alternatives by which a standing committee can elicit an agency response to objections to its rulemaking.¹⁰⁷ The only apparent difference is that the exchange of objection and response must take place in a public forum. That is, both the committee's objection and the agency's response must be published in the Virginia Register.¹⁰⁸ However, because the decision to file an objection is one in the committee's discretion,¹⁰⁹ even the public exchange requirement should have little effect on relations between the relevant standing committees and the rulemaking agencies.

Nor is the standing committees' power to delay the regulatory process particularly intrusive on agency rulemaking power. Left in the wake of the repealed legislative veto triggered by standing committee resolution, the power to delay the legal effectiveness of a new regulation by twenty-one days is somewhat anti-climatic. Unlike the executive delay power,¹¹⁰ the legislative delay power is not tied to an agency public involvement breakdown.¹¹¹ The standing committees may delay the rulemaking process for perceived substantive as well as procedural defects. They just can't delay it very long.

In delegating to its standing committees and the governor the power to delay public comment administrative rulemaking, the

105. VA. CODE ANN. § 9-6.14:9.2 (Cum. Supp. 1984).

106. *Id.* § 9-6.14:9.3.

107. *See, e.g.*, VA. CODE ANN. § 2.1-2 (Cum. Supp. 1984) (statutorily required agency reports); *Id.* § 30-10 (Repl. Vol. 1979) (legislative subpoena power); *Id.* § 30-19.7 (agency information officers available to General Assembly members); *Id.* § 30-19.8 (agency investigations by standing committees). In 1984, the General Assembly repealed chapter 9 of the Code of Virginia which had established joint general laws subcommittees to investigate a variety of licensing agencies. *Id.* §§ 30-74 to -77 (Cum. Supp. 1984). In addition to the expressly set forth oversight powers mentioned above, considerable hegemony presumably follows the General Assembly's control of a rulemaking agency's budget. *See id.* § 2.1-400 (Repl. Vol. 1979). Additionally, the General Assembly has delegated considerable agency oversight powers to the Joint Legislative Audit and Review Commission. *See id.* § 30-56 to -61 (Repl. Vol. 1979). *See also* Levinson, *supra* note 93, at 96-105.

108. VA. CODE ANN. § 9-6.14:9.2 (Cum. Supp. 1984).

109. *See supra* note 103.

110. *See* VA. CODE ANN. § 9-6.14:9.1; *see also supra* text accompanying notes 85-99.

111. *See supra* note 99. Compare VA. CODE ANN. § 9-6.14:9.2 (Cum. Supp. 1984) (legislative delay power) with VA. CODE ANN. § 9-6.14:9.1(C) (executive delay power).

General Assembly set clear limits: short terms for both,¹¹² and required findings and coordinated duties for the governor. In this scheme, the fact that the statute does not expressly limit the governor and the committees to one delay each should not support an interpretation that more than one delay is allowed. The nature of the governor's power makes it difficult to imagine a reasonable basis for an executive assertion of the power to delay the process producing a new regulation more than once. The final version will either meet the statutory requirements for congruence with the proposed version, or it will not.¹¹³ Because the delay power of the standing committees is not as conditional, there is at least the possibility of seriatim objections for differing reasons, whether real or apparent. A committee using this tactic would be exercising a power delegated by negative inference alone and would, in effect, destroy the twenty-one day limit expressly imposed by the enabling legislation.¹¹⁴ "One to a customer" preserves the spirit of the 1984 amendments.

V. CONCLUSION

The 1984 amendments substantially alter the statutory framework for administrative rulemaking in Virginia. Bureaucratic autonomy has been enhanced by repeal of the legislative veto and substitution of a limited executive and legislative rulemaking delay.

A single medium, the Virginia Register, has been established for communicating to the general public virtually all bureaucratic exercises of delegated legislative power. New duties of public notice have been imposed on all state agency rulemakers. VAPA rulemakers have been given increased obligations to solicit public input, as well as to publish heretofore inaccessible informal procedures and unwritten rules. The way in which the General Assembly intends the rulemaking game to be played in Virginia has been greatly changed.

112. While the twenty-one day delay seems designed to maintain the *status quo* long enough for the rulemaking agency to file a response to the committee's objection, there is, curiously, no procedure for early resumption of the process by either objecting committee or responding agency in the event that the agency responds quickly. If the delay clock runs twenty-one days in all cases, there is no incentive to answer in less time.

113. See VA. CODE ANN. § 9-6.14:9.1(C) (Cum. Supp. 1984).

114. Compare *id.* (thirty days, post-adoption) with *id.* § 9-6.14:9.2 (twenty-one days, from publication of proposed regulation to effective date).

How the rulemaking game is in fact played from now on remains to be seen. Will Register publication actually result in communication to public segments seriously interested in, but until now isolated from, rulemaking activity? Will pre-drafting cooperation between a rulemaker and public commentators not otherwise voluntarily consulted produce better regulations? How enforceable is a duty to publish unwritten rules and informal procedures? The history of the legislative veto in Virginia underscores the broad gulf between the existence of formal safeguards against bureaucratic autocracy and their effectiveness.¹¹⁵ With the 1984 amendments, the General Assembly has led the public and the agencies to water; it remains to be seen whether it can make them drink.

115. According to the Governor's Board, the veto was used only once. 1983 REPORT, *supra* note 1, at 19.