The Impetuous Vortex:
The State of Separation of Powers after *Evers v. Marklein*

The status of separation of powers and whether rulemaking is a legislative or executive function is in flux in Wisconsin. Two cases (originally one) brought by Governor Tony Evers will have wide-ranging effects and, potentially, reimagine the nature of administrative agency power. It is possible, but not a certainty, that the Wisconsin Supreme Court will acknowledge that administrative rulemaking power is legislative in nature but requires execution of the law and is thus a hybrid power.

BY CHRISTIAN A. HANSON

In the middle of 2024, the Wisconsin Supreme Court issued a decision in *Evers v. Marklein* (*Evers I*),[1] which addressed financial approval powers of the Joint Committee on Finance (JFC). In the coming months, the court will also issue a decision in *Evers II*, which deals with promulgation of administrative rules and another, separate, committee's ability to object to proposed administrative rules and suspend promulgated rules. Both cases will have wide-ranging effects and, potentially, reimagine the nature of administrative agency power.

James Madison warned that "[t]he legislative department is everything extending the sphere of its activity and drawing all power into its impetuous vortex."[2] *Evers II* will determine whether administrative rulemaking will remain in the eye of the storm when the court addresses this singular question: is agency rulemaking a legislative or an executive power?

Evers I

Evers I revolved around the Warren Knowles-Gaylord Nelson program, which was created to allow the Department of Natural Resources (DNR) to use state funds to purchase land for outdoor recreation. State law required approval from the JFC before funds could be expended.[3] The DNR had to notify the JFC, in writing, of any proposed expenditures exceeding $250,000. Once it received a proposal, the JFC had 14 days to decide whether it was going to hold a hearing. If the JFC decided to schedule a hearing, the funds were withheld until the committee approved of the proposal. The statutes did not create a time limitation on how long the JFC could wait to hold a meeting on a proposal or a mechanism for review by the full legislature. It was possible for the JFC to withhold funds indefinitely if it wanted to – which it did.

Ultimately, the governor's office brought an original action requesting review of three separate constitutional issues:[4]

1) The JFC's role in administering the Warren Knowles-Gaylord Nelson program,

2) Wis. Stat. section 230.12(3)(e)1. and the Joint Committee on Employment Relations' ability to adjust pay increases for University of Wisconsin System employees, and

3) Various provisions of state law that allow the Joint Committee for Review of Administrative Rules' (JCRAR) 10-member body to veto administrative rules promulgated by executive agencies.

The supreme court granted review of the first issue and held the remaining two in abeyance until further order. It is currently considering issue number three, and it heard oral argument at the end of January.

Majority

Justice Rebecca Grassl Bradley authored the majority opinion ruling in favor of the governor's position in *Evers I*. Justice Ann Walsh Bradley, Justice Dallet, Justice Hagedorn, Justice Karofsky, and Justice Protaswiecz signed on to the decision.[5]

In its decision, the majority engaged in the usual background analysis. Facial constitutional challenges are particularly challenging because they require a showing that a statute cannot be enforced. Period. There are core and shared powers, and as the names might suggest, core powers cannot be shared with another branch of government. Article IV of the Wisconsin Constitution

confers upon the Wisconsin Legislature a vast power: any legislative powers not delegated to another branch or prohibited by the constitution are given to it, as long as the executive branch has veto power. Article VII sections 2 and 5 of the Wisconsin Constitution operate to give the legislature the ability to appropriate funds. Bicameralism and presentment operate to curb the powers of the legislature, and the take-care clause of article V section 1 grants the executive branch the power to interpret and implement the law.[6]

The principles of bicameralism and presentment were key to the arguments in both cases. Bicameralism splits the legislature into two houses: the assembly and the senate. Because of bicameralism, a bill originating in the assembly will go through a vetting process by the senate, resulting in spirited debate and consideration necessary to pass wise and effective legislation.

Presentment comes into play once the proposed law has gone through both houses. The legislation is then required to be presented to the executive branch for consideration, and the governor then chooses to veto legislation or sign it into law.

The governor argued that the JFC's infinite ability to hold up appropriated funds intruded on his ability to execute the law. The legislature argued that because the DNR is created by the legislature and is subject to its oversight, appropriation of funds falls within the powers shared by the executive and legislative branches. The legislature also argued that spending appropriated funds is a shared power because the Wisconsin Constitution gives the legislature the authority to appropriate funds. The majority decided that although the legislature has the power of the purse, the executive branch, when given permission, is to reach its hand into the purse and peel off a couple of hundreds (or millions), as constitutionally required. The court went on to hold that the legislature cannot decide how money is spent once it is appropriated, but it could still limit the governor's ability to make spending decisions.[7]

The majority concluded that both Wis. Stat. section 23.0917(6m) and Wis. Stat. section 23.0917(8)(g)3. "unconstitutionally authorize the legislative branch to arrogate and impede the executive's core power to execute the law, violating the separation of powers structurally enshrined in our constitution." The statutory scheme provides the long-prohibited legislative veto to the JFC, a committee insulated from politics. The majority then went a step further and overruled *J.F. Ahern Co. v. Wisconsin State Building Commission*[8] and its "functionalist analysis."[9]

The plaintiffs in *J.F. Ahern Co.* brought a suit challenging the building commission's statutory power to select where state structures are to be built as well as the commission's ability to carry out construction and leasing of state-owned buildings. The plaintiffs argued that these powers are reserved to the executive branch because they require the execution of the law.

The Wisconsin Court of Appeals acknowledged that the commission had the ability to "exclude the executive branch from exercise of its own powers…" but also allowed a check on the commission because the governor could make the final decision and choose whether to approve any building contracts over $15,000.[10] The court found importance in this ability, and it changed the analysis significantly: "A practical requirement of unanimity between the legislative members of the Building Commission, on the one hand, and the governor, on the other, therefore exists. That compulsory unanimity converts the shared power over building construction into a cooperative venture between the two governmental branches."[11]

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The legislature argued that the statutes at issue in *Evers I* were constitutional under *Ahern* and *Martinez.*[12] The dissent in *Evers I* acknowledged that *Ahern* was not binding precedent but gave it a level of precedential importance because it was cited in the *Martinez* decision, which, as a Wisconsin Supreme Court decision, is entitled to horizontal precedent. The dissent also leaned on *Martinez* for the proposition that the JFC operated as a "check on the activities of non-elected agency bureaucrats."[13]

One of these things is not like the other. *Ahern* dealt with the building commission, which has numerous powers over bidding and construction of state buildings under Wis. Stat. section 13.48. The commission is comprised of three senators and three representatives, a citizen member appointed by the governor, and the governor, who acts as the chairperson of the commission.[14] The distinctions between the cases go beyond the composition of the commissions, however. As the *Ahern* court detailed, the governor ultimately had final approval authority of the building commission's decision.[15] This is quite different than the statutory structure at issue in *Evers I*. The *Evers I* statutes did not provide an avenue for the governor to exercise control over the JFC. Therefore, overruling *Ahern* led to an immediate expansion of the holding because it also appears to apply to funding bills that confer final veto power to the governor. Post-*Evers I*, statutory designs that give a committee the ability to approve expenditures but reserve the final decision to the executive also appear unconstitutional.

It is unclear how the supreme court will rule on the two outstanding issues.

The second issue, which is currently in abeyance, questions the legislature's authority to approve pay adjustments for University of Wisconsin System employees. Under current state law, the administrator of the Division of Personnel Management must submit a proposal for pay and benefit adjustments to the Joint Committee on Employment Relations (JCOER).[16] The JCOER is then required to hold a public hearing and can modify the proposal as it wishes. The statute in question is silent as to whether the committee may modify based only on the public hearing, or whether it is permitted to make changes at will once it holds the hearing. If the JCOER modifies the proposal, the governor may disapprove the JCOER's modifications within 10 days. A vote of six of the eight members of the committee can set aside the governor's disapproval.[17]

This arrangement is plagued with the same issues accompanying the JFC's ability to approve DNR funds. It provides the JCOER the ability to approve

the spending of appropriated funds and gives it the final say in the matter. Like the commission in *Ahern*, the governor could veto the plan through disapproval, but unlike the building commission, the JCOER has the ability, with a three-quarters vote, to override the governor's veto and pass the modified plan.

The third issue raised by the governor is far removed from appropriation questions and deals exclusively with the promulgation of administrative rules and will be decided by *Evers I*'s progeny.

Evers II

So, we know that the JFC can't veto the executive's expenditure of appropriated funds once they have been appropriated. What about the JCRAR's ability to veto executive agency rulemaking? Enter *Evers II*. This case pertains to issue three discussed above and whether the JCRAR's ability to veto or potentially indefinitely hold up agency rulemaking is constitutional. The petitioner, Governor Evers, filed an opening brief on Nov. 8, 2024, arguing that the JCRAR's ability to temporarily or indefinitely object to a proposed rule and its ability to suspend rules as many times as it likes are both unconstitutional.[18]

Before an agency can promulgate a rule, it must go through a protracted and detailed process, which ends in approval by the governor.[19] After approval, the JCRAR's 10 members can choose to object to the rule. Wisconsin Statutes section 227.19(5)(c) prohibits an agency promulgating a rule while it is under review at the JCRAR. Under Wis. Stat. section 227.19(5)(d) and (dm), the JCRAR can object to a rule either temporarily or indefinitely. A temporary objection under subsection (5)(d) expires if a bill to prevent promulgation is not passed. An indefinite objection under subsection (5)(dm) prevents an agency from ever promulgating the rule *unless* a bill is passed. Additionally, under Wis. Stat. section 227.26(2)(d), the JCRAR can suspend rules already in effect. Suspensions last for 30 days, and in that time, the committee must introduce a bill to repeal or amend the proposed rule.

The exercise of these powers is limited by Wis. Stat. section 227.19(4)(d), which allows objections for limited, enumerated, reasons. These reasons include conflicts with state law, absence of statutory authority, failure to comply with legislative intent, and public health or safety emergency. It doesn't stretch the imagination to fit almost any administrative rule into one of the enumerated grounds for objection or suspension.

The issue at the core of *Evers II* is whether rulemaking is a legislative or executive function. The parties

argued over the nature of this power and the validity of the court's holdings in *Martinez* and *Service Employees International Union, Local 1 v. Vos.*[20]

Martinez and *Service Employees International Union* (*SEIU*) addressed only the JCRAR's ability to temporarily suspend an administrative rule. *Martinez* held that a suspension is permissible because it is limited in time. *SEIU* held that a second, additional suspension is also permissible based on *Martinez*. The nature of rulemaking power is crucial to answering the question, and the cases agree that the power is legislative in nature and "on loan" from the legislature.

In the opening brief in *Evers II*, the governor argued that the JCRAR's objection and suspension power always triggers bicameralism and presentment issues because these powers alter the rights and duties of those outside of the legislature. Suspensions alter the rights and duties of regulated parties. Objections, on the other hand, alter the rights and duties of rule makers within executive agencies because they remove powers previously delegated by the legislature.

The governor asserted that statutes enabling agencies to promulgate rules are amended because the JCRAR is withdrawing power through its action. Essentially, the agency can create rules, just not *this* rule. Whether the powers of each branch are shared or core powers, the statutory scheme is unconstitutional because it prevents the executive branch from executing the law. When an agency promulgates a rule, it is, in effect, interpreting the statute giving it the authority to do so — a purely executive function. Finally, the governor argued that Wisconsin should return to original principles of administrative rules as an executive function and cited cases as early as 1853 as well as the court's recent shift toward "a more formal treatment of the separation of powers" as justification for overruling *Martinez* and *SEIU.*[21]

The legislature responded that rulemaking is a legislative function shared with executive agencies, as held by *Martinez*. It asserted that although rulemaking is a legislative power, promulgated administrative rules are not legislation in the typical sense and do not need to satisfy bicameralism and presentment requirements. Additionally, the JCRAR's ability to object to proposed rules clearly does not violate the constitution because proposed rules do not have the force of law and are not legislation. The legislature's position was that the JCRAR's ability to object and suspend rules is facially constitutional under separation-of-powers principles because these powers have appropriate safeguards, and the process does not interfere with the executive branch. Finally, it claimed the governor failed to meet the standard required to overturn precedent and could not satisfy any of the required factors.[22]

Conclusion

The core question in *Evers II*: Is administrative rulemaking based on the legislature delegating lawmaking power to the agency, or is the agency engaging in an executive function when it interprets and executes the requirements of enabling legislation?

Agencies routinely blend and use powers conferred upon each branch. On one hand, agencies create rules that have the force and effect of law. On the other, they are required to interpret enabling statutes to determine how best to execute the law by creating rules under the restrictions of the statute. As oral argument in *Evers II* showed, it is nigh impossible to describe rulemaking as either a legislative or an executive power alone. Either description presents logical problems because the nature of the power comes from the legislature but requires agencies to use executive power when creating rules.

At oral argument in *Evers II,* Justice Hagedorn said the case is "as consequential to the operation of government" as any he has seen on his time on the bench. **WL**

ENDNOTES

[1]*Evers v. Marklein* (*Evers I*), 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395.
[2]James Madison, *The Federalist No. 48*.
[3]Wis. Stat. § 23.9017(6m).
[4]Wis. Sup. Ct. Order, *Evers v. Marklein*, No. 2023AP2020-OA (Feb. 2, 2024), https://www.wicourts.gov/sc/order/DisplayDocImage.pdf?docId=760431.
[5]*Evers I*, 2024 WI 31, 412 Wis. 2d. 525.
[6]*Id.*
[7]*Id.*
[8]*J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n,* 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).
[9]*Evers I*, 2024 WI 31, 412 Wis. 2d 525.
[10]Wis. Stat. § 16.855.
[11]*Id.*
[12]Wis. Stat. § 13.48(2)(a).
[13]*Evers I*, 2024 WI 31, ¶ 88, 412 Wis. 2d 525.
[14]*Martinez v. Department of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992).
[15]*J.F. Ahern Co.*, 114 Wis. 2d at 106.
[16]Wis. Stat. § 230.12(3)(e)1.
[17]Wis. Stat. § 230.12(3)(b).
[18]*Petitioners' Opening Brief, Evers v. Marklein I,* No. 2023AP2020-OA (Nov. 8, 2024), https//statecourtreport.org/sites/default/files/2024-12/marklein-opening_brief.pdf.
[19]Wis. Stat. § 227.185
[20]*Service Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.
[21]*Petitioners' Opening Brief*, *Evers v. Marklein I*, No. 2023AP2020-OA (Nov. 8, 2024), https://statecourtreport.org/sites/default/files/2024-12/marklein-opening_brief.pdf.
[22]*Brief of Respondents & Intervenor-Respondent Wisconsin State Legislature*, *Evers v. Marklein I*, No. 2023AP2020-OA (Dec. 6, 2022), https://statecourtreport.org/sites/default/files/2024-12/wisconsin_state_legislature-brief_2.pdf. **WL**