

**Memorandum 98-6****SB 209: Judicial Review of Agency Action**

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SB 209 was defeated in the Senate Judiciary Committee on January 13, with one vote in favor and five against. The bill was opposed by the same broad coalition of public employee, labor, consumer, and environmental groups that opposed it last April, despite our efforts to address their concerns by substantially amending the bill. Groups opposed included the Consumer Attorneys of California, Consumers Union, California State Pipe Trades Council, Public Advocates, Planning and Conservation League, California State Employees Association, California Employment Lawyers Association, California Federation of Teachers, California Nurses Association, International Association of Firefighters Local 1230, and the Western Center on Law and Poverty. The bill was supported by the California Judges Association and the Judicial Council.

Opposition centered around a few key issues:

- Opponents said that they liked their present traditional mandamus remedies under Code of Civil Procedure Section 1085, that existing law is not confusing or hard to use, that it protects citizens' rights, and that SB 209 could only cause problems for them.
- They expressed concern about the bill's scope, complexity, and length, the length of the Comments, the need to rely on Comments to understand the bill, and the likelihood of years of litigation to construe the new provisions.
- They said our attempt in Section 1123.810 to codify *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995) (closed record review of administrative adjudication or quasi-legislative action, open record review of ministerial or informal action), would have a drastic effect on employee groups who, they say, now get a full civil trial in cases involving employment rights and retirement benefits.
- They were concerned the bill would make it harder for citizens to get judicial review of state agency rulemaking

Among the options the Commission should consider are the following:

(1) Continue working with opponents to try to address their concerns, including considering revising the closed record provision to make it easier for persons seeking judicial review to get a full court trial on the merits, or deleting the closed record provision from the bill, leaving the bill silent on the matter.

(2) Exempt quasi-legislative action of state and local agencies from the bill, limiting it to judicial review of adjudication and ministerial and informal action.

(3) Limit the bill to judicial review of administrative adjudication. Possibly some provisions, such as standards of review, might be generalized to apply to all forms of review.

(4) Select provisions from the bill with a view toward a partial codification of useful principles — for example, the requirement for adjudication that the agency must give notice to the parties of the last day for review.

(5) Stop working on the judicial review project, and devote Commission and staff resources to projects with a better chance of enactment. The Commission could return to this subject at a later time, if chances of enactment appear more favorable.

Alternatives (1) to (4) would require developing a new bill for introduction, presumably at the 1999 session. The staff discussed with Senator Kopp's office the possibility of putting in a spot bill for this session to give us longer time deadlines than for a two-year bill such as SB 209. Legislative rules prohibit reintroducing at the same session a bill that is substantially the same as one that failed of passage, so a new bill would have to be substantially different. Moreover, a request for a bill draft would have to be submitted to Legislative Counsel by Friday, January 16. In view of the likely futility of seeking another hearing this session, the staff elected not to do that.

The staff believes alternatives (1) and (2) do not go far enough to neutralize the opposition. The consistent and emphatic position of groups such as the California Federation of Teachers has been that there is nothing we can do to SB 209 to make it acceptable. They are satisfied with traditional mandamus in its present form, and will view any proposal for change as threatening. **The practical choices appear to be limited to alternatives (3), (4), or (5).**

Respectfully submitted,

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