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Wyoming's Administrative Regulation Review Act

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COMMENTS

WYOMING'S ADMINISTRATIVE REGULATION REVIEW ACT

The increasing practice of legislative delegation of rulemaking authority to administrative agencies has, in turn, heightened interest in the concept of legislative oversight.¹ The Wyoming State Legislature joined this trend in 1977, with the passage of the Administrative Regulation Review Act (ARRA).² The ARRA provides for administrative agency³ accountability within a framework of legislative and executive review. Unfortunately, the Act was poorly drafted, leaving substantial questions as to its operative effect. Further, the constitutionality of some of the Act's basic features is uncertain. The purposes of this Comment are to analyze the review process established by the ARRA, and to address the constitutional issues involved.

THE REVIEW PROCESS

Under Wyoming's Administrative Procedure Act (APA), rulemaking has been a relatively unilateral agency function.⁴ Specified statutory requirements had to be met, of course, and judicial review was available,⁵ but the delegated authority was largely unsupervised. The ARRA now greatly limits this agency freedom to promulgate rules, and an amendment to the APA also prescribes new filing pro-

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1. Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285 (1976) [hereinafter Note, *Congressional Veto*]; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975) [hereinafter Watson]; Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962) [hereinafter Cooper & Cooper]; Schwartz, *Legislative Control of Administrative Rules and Regulations: I The American Experience*, 30 N.Y.U.L. REV. 1031 (1955) [hereinafter Schwartz]; Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953) [hereinafter Ginnane].
2. WYO. STAT. §§ 28-9-101 to 28-9-108 (1977).
3. Section 101(a)(i) defines "agency" as "any authority, bureau, board, commission, department, division, officer or employee of the state, excluding the state legislature and the judiciary." WYO. STAT. § 28-9-101(a)(i) (1977). This definition differs from the definition of "agency" found in the Administrative Procedure Act, which includes county or municipal governments. WYO. STAT. § 9-4-101(a)(i) (1977). The legislature obviously intended that only state level agencies be subject to the ARRA. This intention is further reflected in a special definition of "agency" found in another section of the Administrative Procedure Act, which limits certain other filing requirements to state level agencies. WYO. STAT. § 9-4-103(d)(iii) (1977). The ARRA does, though, apply to rules just as they are defined in the Administrative Procedure Act. WYO. STAT. § 28-9-101(a)(iii) (1977).
4. WYO. STAT. §§ 9-4-103 and 9-4-104 (1977).
5. WYO. STAT. § 9-4-114 (1977).

cedures for agency orders and decisions.⁶ Under the ARRA, the Legislative Service Office (LSO), the Management Council of the legislature (Council), and the legislature itself each has a role in reviewing rules.⁷ In addition, the governor's approval is necessary before any rule becomes effective.⁸

The ARRA has placed most of the initial review responsibility on LSO, the research arm of the legislature.⁹ Section 103(a) of the Act provides that a copy of all rules being implemented by agencies exercising rulemaking authority be submitted to LSO within sixty days of the effective date of the Act.¹⁰ Further, prior to the adoption, amendment, or repeal of a rule "authorized or required by law," each agency must submit a draft of the proposed rule to LSO for review.¹¹ An amendment to the APA also requires the agency to give LSO twenty days' notice of intended substantive rulemaking.¹² The key provision of the ARRA is Section 108, which says "no rule may be adopted, amended, repealed, implemented or enforced" unless it is subjected to the review process, beginning with filing with LSO.¹³ LSO then has sixty days in which to review the rule, and report its findings to the Council.¹⁴

The Council is not unlike a legislative board of directors, composed as it is of the leadership from both houses and both major political parties.¹⁵ The ARRA gives the Council authority not only to review rules upon report from LSO, but to examine the rules and regulations of any agency, demand

6. WYO. STAT. § 9-4-102(b) (1977).

7. These roles will be analyzed in particular in the course of this Comment.

8. The governor actually takes part in the review process at several stages, as will be explained *infra*.

9. LSO is created, and its duties are defined in WYO. STAT. §§ 28-8-101 to 28-8-112 (1977).

10. WYO. STAT. § 28-9-103(a) (1977).

11. WYO. STAT. § 28-9-103(b) (1977). Subsection (c) of the same section specifies that drafts of any rules "required by law" must be submitted for review within ninety days of the effective date of the Act requiring such rules. It appears from the context that "submitted" means "submitted to LSO," even though the Council, rather than LSO, is given authority to extend the date for submission. WYO. STAT. § 28-9-103(c) (1977). The specific wording of Subsection (c), and ordinary usage, suggests that "required by law" means required by statutory law. See, *Mutual Benefit Life Ins. Co. v. Comm. of Internal Revenue*, 488 F.2d 1101, 1105 (3d Cir. 1974); *City of Mountlake Terrace v. Stone*, 492 P.2d 226, 230 (Wash. App. 1971); *Gilliam v. California Employment Stabilization Comm.*, 278 P.2d 528, 536 (Cal. App. 1955). Regulations proposed under discretionary authority, or to meet common law requirements are not subject to this special provision.

12. WYO. STAT. § 9-4-103(a)(ii) (1977).

13. WYO. STAT. § 28-9-108 (1977).

14. WYO. STAT. § 28-9-104(a) (1977).

15. WYO. STAT. § 28-8-102 (1977).

agency cooperation, hold public hearings, and review rules upon a legislator's or legislative committee's demand.¹⁶ Standards for Council review are set out in two separate sections of the ARRA. Section 102(a)(1) states that the Council may examine agency rules "to determine if they properly implement legislative intent, are within the scope of delegated authority, and are lawfully adopted."¹⁷ Section 104(c) defines the specific determinations to be made by the Council:

(c) When reviewing a rule of an agency, the council shall determine whether the rule:

(i) Appears to be within the intent and scope of the legislative enactment delegating the authority to adopt the rule;

(ii) Has been adopted in accordance with all applicable and statutory requirements of law; and

(iii) Meets all constitutional and statutory requirements, restrictions and standards.¹⁸

The reasons for the inclusion in the ARRA of two separate sections containing review standards for the Council is not entirely clear. The language of Section 102(a)(1) is evidently meant as a general grant of authority to review, while Section 104(c) mandates the standards that all rules must meet.

Once it reaches its conclusions, the Council may prepare written findings, which may then be sent to any interested legislator or legislative committee, the agency concerned, or LSO.¹⁹ But more important to the central review process, the Council is obligated to submit its approval of the rule or its recommendations for change to the governor within thirty days of receiving an LSO report.²⁰ Finally, the Council must report all of its findings, recommendations and actions to the legislature at its next succeeding session.²¹

16. WYO. STAT. § 28-9-102 and 28-9-104 (1977).

17. WYO. STAT. § 28-9-102(a)(i) (1977).

18. WYO. STAT. § 28-9-104(c) (1977). It appears that a word has been omitted following "applicable" in Subsection (ii). The context suggests that "constitutional" might have been intended.

19. WYO. STAT. § 28-9-105 (1977).

20. WYO. STAT. § 28-9-106(a) (1977).

21. WYO. STAT. § 28-9-107(a) (1977).

The role of the governor in the review process is less than clear on the face of the ARRA. He has input in at least two, and probably three stages.²² Newly added Section 103(d) of the APA states that no rule may be filed with the secretary of state until it has been approved and signed by the governor.²³ At this stage, the governor must determine whether the rule is within the agency's scope of authority, whether it meets the legislative purpose of that statutory authority, and whether it has met procedural requirements for adoption.²⁴ Since this executive review power is in a new section of the APA, rather than in a section of the ARRA, it is evidently meant to be part of the initial rulemaking process. Consequently, when an agency adopts a final version of a new rule, the rule is sent to the governor for his signature; if he indicates his approval by signing the rule, it can then be filed with the secretary of state, at which time it becomes effective.²⁵

Quite clearly, no rule may be adopted unless the governor has approved it during this initial stage. This is an effective veto power in the hands of the governor. Unfortunately, the APA amendments failed to provide specific procedures to be followed by the agency in the event the governor disapproves a rule. Seemingly, the agency would be free to adopt any recommendations the governor might suggest, and redraft the rule. Such changes would then have to be reported to LSO, so that its review would be meaningful. Furthermore, problems could arise as to the notice and hearing requirements of the APA if these changes went outside the original scope of the proposed rule.

The second stage of the governor's review authority occurs after LSO and the Council have reviewed the rule, and the Council has submitted its recommendations. The governor then has fifteen days in which to either order amendment or rescission of the rule in accordance with Council recommendations, or to file his objections to the Council's recom-

22. The constitutional implications of the governor's role in the review process will be discussed later in this Comment.

23. WYO. STAT. § 9-4-103(d) (1977).

24. WYO. STAT. § 9-4-103(d) (1977).

25. WYO. STAT. § 9-4-104(b) (1977). Provided, of course, that it has been filed with LSO pursuant to WYO. STAT. § 28-9-103(b) (1977). Before Section 9-4-104(b) was amended, rules became effective twenty days after filing with the secretary of state.

mendations.²⁶ The governor's rulemaking authority at this stage is also direct and powerful—he may order the amendment or rescission of a rule that he has already declared to be *prima facie* valid.²⁷

Before looking at the governor's third review function, it is necessary to describe the role of the legislature, itself, in the process. Pursuant to Section 104(b) of the ARRA, any member of the legislature, or any legislative committee may request the Council to review any agency rule.²⁸ Under Section 105, the Council is authorized to report to various legislative committees, or to legislators.²⁹ The legislature, as a body, does not become involved in the review process until LSO, the Council, and the governor have performed their respective functions, as described above. Section 107 sets out the substantive provisions for legislative oversight:

(a) The council shall report all its findings, recommendations and actions to the legislature at its next succeeding session following the review. The report shall include:

(i) A copy of the rule reviewed;

(ii) The determinations of the legislative service office;

(iii) The recommendations of the council made to the governor and the agency;

(iv) Any objections filed by the governor with respect to council recommendations to amend or rescind administrative rules; and

(v) Any recommendations for legislative action.

(b) The legislature, each house voting separately, shall vote on the council's recommendations with respect to prohibiting the implementation or enforcement of any rule during the session in which the recommendations are made. Each house shall schedule council reports for action in accordance with its rules.

26. WYO. STAT. § 28-9-106(b) (1977).

27. Pursuant to WYO. STAT. § 9-4-103(d) (1977), the governor has previously determined that the rule meets statutory requirements and that it is within the purpose of the enabling legislation.

28. WYO. STAT. § 28-9-104(b) (1977).

29. WYO. STAT. § 28-9-105 (1977).

(c) If the legislature approves by legislative order a council recommendation to prohibit the implementation or enforcement of any rule, the rule shall not be implemented or enforced. If the legislature fails to approve a council recommendation with respect to prohibiting the implementation or enforcement of a rule, the rule may be implemented or enforced, as the case may be, after compliance with all other applicable provisions of law.³⁰

Section 107 is important for several reasons. First, Subsection (a) requires the Council to make its report at the legislature's next succeeding session. Additionally, Subsection (b) requires the legislature to vote on these recommendations during the session in which they are made. If the legislature fails to pass, or to vote upon the recommendations during that session, the rule stands. There is no indication in the Act that similar recommendations may be brought up at later legislative sessions.

The second major point in Section 107 is that the language of both Subsections (b) and (c), plus the fact that the rule involved is already effective, suggests that when the legislature votes, the form of the question is whether to prohibit the operation of a rule, not whether to allow it. In other words, if the opponents of the rule cannot muster a majority vote, the rule stands. This is not a case of needing a majority vote to make the rule effective; it takes a majority vote of both houses to suspend the effectiveness of the rule.³¹ Clearly, the legislature's direct power over administrative agency regulations is not as potent as that of the governor.

The final, and most controversial aspect of Section 107 of the ARRA, which involves the third stage of the governor's review, is the form of the legislative vote. Subsection (c) provides for a vote on the Council's recommendations to be in the form of a "legislative order."³² And Subsection

30. WYO. STAT. § 28-9-107 (1977). The language of Subsections (b) and (c) as to "prohibiting implementation" reflects one of the internal inconsistencies of the ARRA and related sections of the APA. As was pointed out, the rule is already effective by this stage in the review process. The vote of the legislature here would actually be more like a repeal than a prohibition against implementation.

31. Consequently, this does not involve the controversial "one-house veto." See, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977). See also, the sources cited *supra* note 1. The "each house voting separately" language of Section 107(b) does not negate the fact that it is the legislature that shall vote.

32. WYO. STAT. § 28-9-107(c) (1977).

(b) clearly provides that, although each house votes separately, it is the legislature that is voting on the order.³³ Since both houses must vote on the order, their concurrence is necessary for its passage, and the order must then be sent to the governor,³⁴ giving him a third review of the questioned regulation.³⁵

CONSTITUTIONALITY

There are three principal constitutional questions presented by the provisions of the ARRA:

1. Does the Act violate the principle of separation of powers by infringing on the executive?
2. Does the Act violate the principle of separation of powers by infringing on the judiciary?
3. Does the Act violate constitutional lawmaking procedures by providing for legislative action to be in the form of an "order", and by failing to provide for a final gubernatorial veto of that order?

Separation of Powers—The Executive

At least since the writing of the United States Constitution, this country has feared the spectre of unilateral governmental power. The separation of powers doctrine, though not expressly defined, is implied in the federal Constitution.³⁶ Wyoming, like many other states, specifically recognized the principle in its own constitution.³⁷ Further, the courts of Wyoming have continued to hold that the three branches of government should be kept separate and distinct.³⁸

The problem of separation of powers arises in the legislative oversight context in the attempt to define the administrative rulemaking process as either "executive" or

33. WYO. STAT. § 28-9-107(b) (1977).

34. WYO. CONST. art. III, § 41.

35. This simplified conclusion is based on part of the constitutional analysis appearing in this Comment.

36. *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928).

37. "The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." WYO. CONST. art. II, § 1.

38. *Carter v. Board of County Commissioners of the County of Laramie*, 518 P.2d 142, 144 (Wyo. 1974); *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 P. 125, 131 (1893).

"legislative" in nature. Rulemaking, when viewed as lawmaking, appears to be a traditional legislative function. But when viewed as the operational implementation of statutory provisions, it takes on the character of an executive duty. Holders of this latter view would see an unconstitutional infringement upon executive authority in any attempt by the legislature to dictate regulations.³⁹ The fundamental precept of the separation of powers doctrine is, after all, that the maker of the law should not also enforce it.⁴⁰

Proponents of legislative oversight offer four basic arguments to refute the charge of a separation of powers violation. First, while the doctrine is firmly imbedded in American Constitutional rhetoric, many courts and commentators today seriously question its practical utility.⁴¹ The emphasis in modern government is on the sharing of functions, aptly exemplified by the administrative agency. Second, no sharp and logical lines can be drawn between executive and legislative functions, and aside from a few specific delegations, no such distinctions have been constitutionally spelled out.⁴² Thus, there is no substance to the complaint of interference by the legislature with "naturally" executive functions. Third, the powers of the executive department are limited to those specifically granted in the constitution, while the powers of the legislative department are absolute, except as restricted and limited by the Constitution.⁴³ In other words, since administrative rulemaking is not constitutionally mandated as an executive function, the legislative branch should have all doubts in this area resolved in its favor. And fourth, legislative approval by failure to adopt a resolution of disapproval can be seen as a contingency upon which the agency's rulemaking authority can be made to depend.⁴⁴ Annulment by order or resolution is a mere safeguard, a check on a subordinate legislative power.⁴⁵

39. Watson, at 1087.

40. Buckley v. Valeo, *supra* note 31, at 138-139.

41. Atkins v. United States, *supra* note 31, at 1066; SCHWARTZ, ADMINISTRATIVE LAW § 64 (1976); Cooper & Cooper, at 479-487, 502-507. The argument is that the complexity of government has destroyed the feasibility of "pure" separation, resulting in a "blending of powers." 16 AM. JUR.2d *Constitutional Law* § 214 (1964).

42. Ginnane, at 571; Cooper & Cooper, at 480; Atkins v. United States, *supra* note 31, at 1066.

43. *People ex rel. Richardson v. Henderson*, 4 Wyo. 535, 35 P. 517, 520 (1894); 16 AM. JUR.2d *Constitutional Law* § 216 (1964).

44. Schwartz, at 1043.

45. *Id.* at 1043.

One commentator suggests that where an act contains such a condition, future use of the legislative veto is not even lawmaking, since it was contemplated in the act, and therefore evinces no change in policy.⁴⁶

The courts have understandably avoided a frontal assault on this systemic constitutional issue. Over the years, however, the question has often been addressed, at least in passing, in cases that conveniently could be decided on other grounds. In 1902, the United States Supreme Court in *Dreyer v. Illinois*, while concluding that the immediate question was one for state determination, suggested that the true meaning of the separation of powers doctrine is that the whole power of one department should not be exercised by the same hands which possess the whole power of another department.⁴⁷ The same Court came close to deciding the issue in *Sibbach v. Wilson & Co.*, where the legislative veto was praised.⁴⁸ But *Sibbach* was only superficially similar to the instant situation, because it dealt with the constitutionality of Congress delegating procedural rulemaking authority to federal courts.

The most recent Supreme Court case concerning the separation of powers between the executive and legislative branches was *Buckley v. Valeo*, a 1976 case.⁴⁹ In a very lengthy and complex opinion, the Court in *Buckley* declared several features of the Federal Election Campaign Act of 1971 unconstitutional. Because it was able to invalidate the Act based on its conclusion that the makeup of a Federal Election Commission violated the appointment clause of the United States Constitution, the Court was able to sidestep the issue of the legislative veto that was also involved.⁵⁰ At the same time, though, the Court made several comments indicating its belief that the separation of powers doctrine is a fundamental principle of American government.⁵¹ Indeed, one commentator has concluded that the "philosophical premises and principles of construction necessary to the

46. Cooper & Cooper, at 476.

47. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

48. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941); Note, *Congressional Veto*, at 290-291.

49. *Buckley v. Valeo*, 424 U.S. 1 (1976).

50. *Id.* at 140 n.176.

51. *Id.* at 120.

Buckley decision are strong evidence of a strict view of the doctrine of separation of powers.⁵²

Despite such views, the weight of authority today appears to reject the contention that legislative oversight violates the separation of powers doctrine.⁵³ The attorney general of Wyoming, in his initial appraisal of the ARRA, suggested that a separation of powers argument alone probably was not sufficient to invalidate the Act.⁵⁴ In view of the present state of the law, and the current low status of the separation of powers doctrine, it is probably safe to assume that the ARRA could survive a constitutional challenge based on that doctrine.

Separation of Powers—The Judiciary

Wyoming's constitutional recognition of the separation of powers doctrine applies to judicial as well as legislative functions.⁵⁵ Consequently, neither the legislature nor the governor may perform judicial tasks in derogation of the judicial power of the courts. What this means in practical application is difficult to determine. In the normal course of lawmaking, both non-judicial branches necessarily address questions of constitutionality and legislative intent, traditionally judicial functions.⁵⁶ The final say, of course, still rests with the courts.⁵⁷ But the fact remains that the blending of powers necessary in the administrative agency context applies with equal force to judicial functions.

As explained above, Sections 102(a)(i) and 104(c) of the ARRA provide specific guidelines for the Council's review of administrative regulations.⁵⁸ On their face, these guidelines appear to be a blatant infringement by the legislative branch upon the role of the courts. Indeed, both the attorney general and the governor of Wyoming have so interpreted them.⁵⁹

52. Note, *Congressional Veto*, at 300.

53. SCHWARTZ, *ADMINISTRATIVE LAW*, § 64 (1976).

54. Letter opinion from V. Frank Mendicino, Attorney General, to Ed Herschler, Governor of Wyoming, at 5 (March 7, 1977).

55. WYO. CONST. art. II, § 1, *supra* note 37.

56. 16 AM. JUR.2d *Constitutional Law* § 104 (1964).

57. *Id.*

58. WYO. STAT. §§ 28-9-102(a)(i) and 28-9-104(c) (1977).

59. Letter opinion, *supra* note 54, at 6; letter from Ed Herschler, Governor of Wyoming, to Honorable L. Donald Northrup, President of the Senate, at 2 (February 25, 1978). The letter was written by Governor Herschler upon his veto of a legislative order reviewing an agency regulation.

Further, it is universally accepted that the duty of determining the constitutionality of laws belongs to the courts, not to the legislature.⁶⁰

Similar arguments can be made in respect to the review authority granted the governor in Section 103(d) of the APA,⁶¹ and Section 106(b) of the ARRA.⁶² Under the APA section, the governor assesses statutory authority, legislative purpose, and procedural requirements. Under the ARRA, his action is taken on the basis of the Council recommendations made pursuant to the constitutionally questionable guidelines mentioned above. In either case, the governor appears to be exercising traditionally judicial functions. Having no judicial authority itself, the legislature certainly may not confer such authority on the executive.⁶³ And since every law is presumptively constitutional until declared otherwise by the courts, an officer of the executive department has no power to make that determination himself.⁶⁴

To automatically decide that these questioned provisions render the ARRA unconstitutional, however, would be to ignore the presumption that existing laws are constitutional,⁶⁵ and also to ignore the concept of blended powers and the demands of the separation doctrine in the context of modern government. The presumption in favor of the constitutionality of statutes requires that the law not be invalidated if any possible interpretation can sustain it.⁶⁶ In this respect, it is important to note that the courts have interpreted the separation of powers doctrine as requiring not that the legislative and executive branches refrain from commenting on constitutionality, but that they not prevent the judiciary from making the final determination.⁶⁷ Sections

60. 16 AM. JUR.2d *Constitutional Law* § 101 (1964).

61. WYO. STAT. § 9-4-103(d) (1977). At this stage, of course, the rule is not yet effective, and the governor is merely participating in the initial rulemaking process.

62. WYO. STAT. § 28-9-106(b) (1977).

63. *Tucker v. State*, 35 N.E.2d 270, 283-284 (Ind. 1941).

64. 16 AM. JUR.2d *Constitutional Law* § 104 (1964).

65. Wyoming accepts the general rule that every law must be presumed to be constitutional, with all reasonable doubts resolved in its favor. *State v. Stern*, 526 P.2d 344, 347 (Wyo. 1974).

66. *In re Owl Creek Irr. Dist.*, 71 Wyo. 30, 253 P.2d 867, 879, *reh. denied* 71 Wyo. 70, 258 P.2d 220 (1953). The Wyoming Supreme Court at one time set the standard for making this determination as "beyond a reasonable doubt." *Zancanelli v. Central Coal & Coke Co.*, 25 Wyo. 511, 173 P. 981, 983 (Wyo. 1918).

67. *State v. City of Troutdale*, 558 P.2d 1255, 1257 (Or. 1977); *City of Tacoma v. O'Brien*, 534 P.2d 114, 116-117 (Wash. 1975); *Polk v. Oklahoma Alcoholic Beverage*

102(a)(i) and 104(c) can be interpreted as merely allowing the Council to make the types of evaluations legislators would normally make during the proposal of any law. The Council's recommendations based on the guidelines found in these sections of the ARRA are sent to the legislature,⁶⁸ the governor,⁶⁹ the agency,⁷⁰ and any of various interested legislators or legislative committees.⁷¹ In the hands of any of these parties, the recommendations have no more force than mere suggestions. If the legislature chooses to act upon them pursuant to Section 107(b), that body, in effect, will merely be repealing or amending a legislative enactment. It is not the prerogative of the judiciary at that point to inquire into the legislature's reasons for that action, and the fact that the legislature has addressed itself to questions of constitutionality or legislative intent does not encroach upon the judicial branch. This legislative action, of course, is effective only prospectively, in that private rights or obligations that have arisen in the interim are to be ascertained by the courts.⁷²

Under this analysis, the legislative review established by the ARRA is logically little different from normal procedures in the case of re-evaluation of a statute, which the legislature certainly has the authority to do. A more serious problem, however, is engendered by the sweeping powers granted to the governor in Section 106(b):

(b) The governor, within fifteen (15) days after receiving any council recommendations, shall either order that the rule be amended or rescinded in accordance with the council's recommendations or file with the council in writing, his objections to the recommendations.⁷³

The fact that the regulation is already effective at this stage,⁷⁴ raises the issue of the possible constitutional infirmity of this gubernatorial function. If the governor can order

Control Bd., 420 P.2d 520, 522, 523 (Okla. 1966); *State v. Eaton*, 133 P.2d 588, 593 (Mont. 1943).

68. WYO. STAT. § 28-9-107(a) (1977).

69. WYO. STAT. § 28-9-106(a) (1977).

70. WYO. STAT. § 28-9-106(a) (1977).

71. WYO. STAT. § 28-9-105 (1977).

72. *Board of County Commissioners of Wyandotte County v. General Securities Corp.*, 138 P.2d 479, 487-488 (Kan. 1943).

73. WYO. STAT. § 28-9-106(b) (1977).

74. WYO. STAT. § 9-4-104(b) (1977).

rescission of the rule, based on his belief in its unconstitutionality, violation of legislative intent, or procedural error, there is little left for the courts to decide. Since regulations have the force and effect of law,⁷⁵ it is difficult to justify the governor's pronouncement of a regulation's demise, absent a vote by the legislature to that effect, or a judicial determination of the issue.

One constitutionally viable interpretation of this problem may be that in Section 106(b), the legislature has merely delegated directly to the governor part of the rulemaking authority once exercised by each individual agency. Administrative agencies may, without a doubt, repeal or amend regulations they have adopted.⁷⁶ Under this section of the ARRA, the agencies can be seen as sharing this function with the governor. An additional problem arises, however, in that not even the governor should be exempt from the procedural rulemaking requirements established by the APA. Section 103 of that Act, for example, provides specific notice and hearing procedures to be followed whenever an agency adopts, amends, or repeals a rule.⁷⁷ If the amendment or repeal is mandated by the governor's order, these notice and hearing safeguards are destroyed. Unfortunately, the ARRA does not incorporate these APA provisions, leaving major questions as to the proper process for amendment or rescission. Further, there is a limit to what courts will read into a statute, even to meet the constructionary rule of presumed constitutionality.⁷⁸

The Legislative Order and the Veto Power

Section 107(b) and (c) of the ARRA provide that the legislature, each house voting separately, exercises its oversight function in the form of a legislative order.⁷⁹ This provision raises two interrelated constitutional issues:

1. Is a legislative order the proper form for this particular legislative action?

75. *Bronson v. Moonen*, 528 P.2d 82, 85-86 (Or. 1974); 2 AM. JUR.2d *Administrative Law* § 295 (1962).

76. *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 806 (Alas. 1975).

77. WYO. STAT. § 9-4-103 (1977). This section applies to all rules except interpretive rules or statements of general policy.

78. *Barber v. State Highway Comm.*, 80 Wyo. 340, 342 P.2d 723, 725 (Wyo. 1959).

79. WYO. STAT. § 28-9-107(b) and (c) (1977).

2. Is such an order subject to presentment and veto by the governor?

1. Legislative Order

It is well settled that an order or resolution is not the same as a law.⁸⁰ Resolutions and orders deal with matters of special or temporary character; laws prescribe some permanent rule of conduct or government.⁸¹ It is necessary to look beyond the title of the enactment, as something is not an order or resolution just because that is what it was called.⁸² When acting by resolution or order, a legislature cannot go outside of matters incident to its session and legislate generally on matters involving property or other rights.⁸³ Where actual legislation by concurrent resolution is valid, it is generally based on a specific constitutional authorization.⁸⁴

Administrative regulations are generally regarded as legislative enactments, having the force and effect of law, just as if they were enacted by the legislature as part of the original statute.⁸⁵ Further, any act which amends or repeals an enactment which has the force and effect of law should be of equal dignity.⁸⁶ Yet, despite these apparently firm rules of law, legislative bodies often go beyond just "housekeeping", and legislate via orders and resolutions.⁸⁷

When an administrative agency makes or repeals a rule, it does so based on the judgment and technical expertise of its staff, which is the basis of the administrative process. If repeal is accomplished other than by the agency, this expertise element is lost. In such cases, at least the one safeguard of full legislative participation should be observed. Consequently, the practice of disapproving agency rules and regulations by mere legislative order, though perhaps not unconstitutional, seems questionable, at best.

80. *Julian v. Mayor, Councilmen and Citizens of the City of Liberty*, 391 S.W.2d 864, 867 (Mo. 1965); 43 OPS. ATTY. GEN. 350, 357-360 (Wisc. 1954); *Van Hovenberg v. Holeman*, 144 S.W.2d 718, 721 (Ark. 1940).

81. *Baker v. City of Milwaukee*, 533 P.2d 772, 777-778 (Or. 1975); *State v. Atterbury*, 300 S.W.2d 806, 817 (Mo. 1957).

82. *Baker*, *supra* note 81.

83. *Rowley v. City of Medford*, 285 P. 1111, 1114 (Or. 1930).

84. *Ward v. State*, 176 Okla. 368, 56 P.2d 136 (1936).

85. *Bronson*, *supra* note 75.

86. *Chicago & N.P.R. Co. v. City of Chicago*, 174 Ill. 439, 51 N.E. 596, 598 (1898).

87. Under the Federal Land Policy and Management Act of 1976, for instance, Congress can disapprove of proposed public land sales by passing a concurrent resolution to that effect. 43 U.S.C. § 1713(c) (1976).

The legislative order provisions of Section 107(c) were drafted to avoid Wyoming's constitutional mandate that during the budget session no bills except the budget bill may be introduced unless supported by a two-thirds majority of either house.⁸⁸ This rather artless justification for ignoring the constitutionally required bill format was one of the major reasons prompting Governor Herschler to object to the ARRA.⁸⁹ There is no doubt that a strict constructionist court could find this provision highly objectionable.

2. Governor's Veto

One of the most pressing difficulties with the ARRA is its failure to provide for a final gubernatorial veto of the legislative orders passed in review of administrative rules. Section 107 allows the legislature to disapprove, by legislative order, the implementation or enforcement of any rule.⁹⁰ Nothing is said in the Act about the presentment of such orders to the governor. This deficiency is constitutionally suspect under either of two analyses. First, if the repeal or amendment of an administrative regulation by the legislature is "lawmaking", then the Wyoming Constitution demands that such "law" be in bill format,⁹¹ and that it be presented to the governor for approval or veto.⁹² And second, even rejecting this approach, there is clear constitutional language demanding presentment to the governor:

Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him or, being disapproved, be repassed by two-thirds of both houses as prescribed in the case of a bill.⁹³

Section 107 of the ARRA provides for the legislative orders involved to be passed by the legislature, thus requir-

88. WYO. CONST. art. III, § 6. Gerald W. Fox, an LSO research assistant who helped draft the ARRA, reports that the budget session "problem" was the major reason for the legislative order format. Personal interview, February 9, 1978.

89. Letter from Herschler to Northrup, *supra* note 59, at 1.

90. WYO. STAT. § 28-9-107 (1977).

91. "No law shall be passed except by bill. . . ." WYO. CONST. art. III, § 20.

92. "Every bill which has passed the legislature shall, before it becomes a law, be presented to the governor." WYO. CONST. art. IV, § 8. *See also*, State *ex rel.* Henderson v. Burdick, *supra* note 38, at 126.

93. WYO. CONST. art. III, § 41.

ing the concurrence of both houses.⁹⁴ Because this is spelled out in the Act, this is not a question of whether the "nature" of the order necessitates a concurrent vote.⁹⁵ Further, the question is not adjournment or the business of the two houses, so the excepting phrases do not apply.

The courts and commentators generally agree that the legislative branch cannot avoid the executive veto power simply by restyling legislative acts.⁹⁶ In finding Wisconsin's legislative oversight statute invalid, that state's attorney general relied heavily on that theory.⁹⁷ Not everyone agrees, though, as proponents of the legislative veto contend for a less literal interpretation of these constitutional provisions.⁹⁸

One common argument against the necessity of a final gubernatorial veto opportunity in statutes similar to Wyoming's ARRA, is that the governor already had a chance to veto the ARRA itself, and by failing to do so, he forfeited his objections.⁹⁹ On the other hand, acceptance of such a view would bind not only that governor, but also his successors, to the detriment of the office.¹⁰⁰

There is presently little or no agreement among Wyoming's state officials as to the governor's authority to review legislative orders under the ARRA. In his initial opinion concerning the Act, the attorney general construed the relevant language of Section 107 as implying the veto.¹⁰¹ The legislature evidently assumes that the veto is not provided for by the Act itself, because the 1978 budget session felt it necessary to agree by a joint rule to send any legislative orders approving Council recommendations to prohibit rule enforcement to the governor.¹⁰² Despite his displeasure with the Act's provisions, the governor allowed it to become law

94. WYO. STAT. § 28-9-107 (1977).

95. In 1897, the United States Senate interpreted the similar federal constitutional provision as meaning that, in cases where the concurrent vote requirement was not certain, "necessary" refers to constitutional necessity, which turns upon whether the vote in question is legislative in nature. S. REP. NO. 1335, 54th CONG., 2d Sess., 8 (1897). See, Watson, at 1066.

96. *Atkins v. United States*, *supra* note 31 at 1065; Ginnane, at 593; Watson, at 1066-1067.

97. 43 OPS. ATTY. GEN. 350 (Wisc. 1954).

98. SCHWARTZ, ADMINISTRATIVE LAW, *supra* note 41; Cooper & Cooper, at 478-479.

99. *Buckley v. Valeo*, *supra* note 31, at 286. J. White, concurring; Cooper & Cooper, at 477-478.

100. Watson, at 1067.

101. Letter, *supra* note 54, at 5.

102. Senate Action Sheet, February 14, 1978, referring to HSR12-1S2/A (Rule 12-1).

without his signature,¹⁰³ then less than a year later, he changed his mind and notified the legislature that he had decided the ARRA was unconstitutional.¹⁰⁴

CONCLUSION

Wyoming's Administrative Regulation Review Act needs legislative re-evaluation. The ARRA provides for too much review by too many people. Further, poor drafting has left many of the Act's provisions unclear. These deficiencies, especially when coupled with the problems of questionable constitutionality, require remedial attention.

There are numerous examples of the procedural difficulties and internal inconsistencies of the ARRA. Section 103(b), for instance, provides that "drafts of proposed rules" be sent to LSO for review,¹⁰⁵ while Section 104(c)(ii) instructs LSO to determine whether the rule has been properly "adopted".¹⁰⁶ For LSO to meet this latter requirement, the agency obviously must file a copy of the rule with LSO subsequent to its adoption, yet this is not specifically required by the Act.

Another shortcoming of the ARRA is that it provides no consequences for a failure of LSO, the Council, or the governor to meet their respective time limitations. Similarly, the Act fails to spell out the responsibility of the agency when the Council recommends, or the governor orders, amendment or rescission of a rule. Also unclear is whether a rule is free from potential review under the Act once the Council has failed to recommend against it, or the legislature has failed to disapprove it.

Beyond these procedural questions, the ARRA also has broader conceptual problems. Though designed to give the legislature more direct control over the rulemaking process, the ARRA has actually given the most powerful review authority to the governor. While LSO and the Council may recommend against rules, and the legislature may disap-

103. Letter from Ed Herschler, Governor of Wyoming, to Thyra Thomson, Secretary of State. (March 15, 1977).

104. Letter, *supra* note 59.

105. WYO. STAT. § 28-9-103(b) (1977).

106. WYO. STAT. § 28-9-104(c)(ii) (1977).

prove rules subject to the governor's veto, the governor may kill proposed rules by refusing to sign them, he may order their amendment or rescission, and he may veto the legislature's disapproval of a rule.

Rather than creating a systematic legislative oversight scheme, the Wyoming State Legislature has given birth to a hydra-headed monster. The superstructure of the ARRA review process is far too cumbersome, destroying the essential purpose of the administrative process, which is the combination of efficiency and expertise. Individual legislators, legislative committees, LSO, the Management Council, the legislature, and the governor—all may meddle with administrative regulations to one degree or another. It is not difficult to conclude that, even if the ARRA can avoid the constitutional obstacles inherent in its design, the legislature might be well advised to restructure the Act so that it more nearly accomplishes realistic legislative review of the administrative agencies.

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