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The field of administrative law is an ever-expanding one, due in large part to the need for particularized regulation in a vast array of subject areas which cannot adequately be dealt with by the legislature. Because the legislature must delegate rule-making authority to various administrative agencies, it is only appropriate that some sort of administrative regulation review be carried out to see that such rule-making authority is kept within its proper bounds. In this article, the author engages in a defense of Wyoming's controversial Administrative Regulation Review Act, dealing with its legislative history, its underpinnings in administrative law, and its day-to-day function. The author goes on to suggest modifications which would strengthen administrative regulation review in Wyoming.

## ADMINISTRATIVE REGULATION REVIEW--ACT II

*T. Thomas Singer\**

The tension between and among the branches of Wyoming's government was preserved by the state's constitution,<sup>1</sup> but it had long national and territorial roots even then. About the time Wyoming became a state, Professor Woodrow Wilson was bitterly complaining about the dominance of the executive by the congress.<sup>2</sup> Today, the complaints usually concern the excessive power of the president<sup>3</sup> or the judiciary.<sup>4</sup> Since 1890, the balance of power has shifted among the three branches many times.

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\*Research Assistant, Wyoming Legislative Service Office; B.A., Eastern Montana College, 1975; J.D., Harvard University, 1978; member of the Wyoming Bar. The opinions expressed in this article are the author's and are not opinions of the Wyoming Legislative Service Office.

1. Wyo. CONST. art. II, § 1.
2. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1884).
3. See generally SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).
4. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 99-118 (1976); BICKEL, THE MORALITY OF CONSENT (1975).

Wyoming's experience with checks and balances may have been less volatile. A part-time legislature can never assume the powers of a full-time executive, but the commissions which play such a prominent part in Wyoming government may have restrained the governor. The level of tension is generally quite low because of the dominance by one party in both the executive and legislative branches.

In the past five years, Wyoming's governor has been a democrat while the legislature has been overwhelmingly republican. Whether for that reason or others, tensions between the branches have increased. The legislature has removed pre-existing gubernatorial powers<sup>5</sup> and imposed a number of restraints and checks on the governor. One of those is legislative review of administrative regulations.

It has been slightly more than two years since the Administrative Regulation Review Act (ARRA) became law.<sup>6</sup> In that time, it has engendered many enemies<sup>7</sup> and few friends. This article is written by a friend.<sup>8</sup> It defends the ARRA, with some qualifications. While not an effort to produce an exhaustive legal argument on the constitutional issues raised by the Act,<sup>9</sup> the article does state the basic constitutional and practical reasons for retaining the ARRA.

Section I explains the ARRA's legislative history, which is useful in understanding the language and purpose of the Act. Section II states the constitutional argument which supports the ARRA, and, more importantly, shows that even though opposition on constitutional grounds is nothing new to administrative regulation, it survives. The ARRA appears likely to survive in the same way. Section

5. 1975 WYO. SESS. LAWS Ch. 145, § 1, repealed the Energy Emergency Powers Act, 1974 WYO. SESS. LAWS Ch. 22. Governor Hathaway was in office when the 1974 law was enacted to deal with the energy crisis. Ed Herschler was governor when it was repealed in 1975.
6. 1977 WYO. SESS. LAWS Ch. 190, § 4 made the Act effective May 27, 1977.
7. The Governor and his former attorney general are certainly on this list, as is a recent commentator in this review. Comment, *Wyoming Administrative Regulation Review Act*, 14 LAND & WATER L. REV. 189 (1978) (hereinafter cited as Comment). Also, most agencies dislike the Act.
8. The article is based in part on the author's experiences as a research assistant for the LSO, where his duties include writing administrative rule review reports pursuant to the ARRA. WYO. STAT. § 28-9-104(a) (1977).
9. See Comment, *supra* note 7, at 195-205.

III examines the ARRA during its two year life span, and argues that it has functioned well and improved rule-making. Some changes in the Act are also proposed.

### I. LEGISLATIVE HISTORY

The Administrative Rule Review Act's public life began January 17, 1977, when it was introduced as House Bill 205. Before that, it had gone through more than a year of drafting, criticism, redrafting, consulting and re-drafting.

Representative Russ Donley (R-Natrona) drafted an "Administrative Rule Review Committee" bill for the 1976 budget session, but did not introduce it.<sup>10</sup> In September of that year, he made some changes in the bill and sent copies of it to several other legislators<sup>11</sup> and Governor Herschler.<sup>12</sup>

The Governor responded in November.<sup>13</sup> He objected to the bill because it included a provision permitting a legislative interim committee to block enforcement of an agency rule until the legislature met and approved the rule, and because the definition of "agency" included every political subdivision of the state, which would inundate the legislature with rules. The Governor also suggested an alternative to the bill—increasing the governor's power over promulgation of rules by state agencies.

Donley altered the bill to suit the Governor's wishes.<sup>14</sup> He willingly agreed to restrict the act to state agencies and to give the governor a veto over agency rules. Donley noted that the bill, as altered, would create the first joint executive-legislative rule review procedure. "Reluctantly,"

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10. The draft bill was coded 76LSO 015.L1. The information in this paragraph and the two which follow is taken from bill drafts and letters which are in LSO files on H.B. 205.
  11. Letters from Gerald W. Fox, Research Associate, Legislative Service Office, to Senator Robert Johnson and Representatives Jack Sidi, Warren Morton and Russell Zimmer (September 22, 1976).
  12. Letter from Representative Russ Donley to Governor Ed Herschler (September 22, 1976).
  13. Letter from Governor Ed Herschler to Representative Russ Donley (November 29, 1976).
  14. Letter from Representative Russ Donley to Gerald Fox, Research Associate, Legislative Service Office (December 7, 1976).

Donley agreed to remove the interim committee's authority to hold rules in abeyance. With those amendments, Donley approved the bill for pre-filing on January 10, 1977. Thus, before the bill ever entered the legislative mill, the most controversial and most constitutionally suspect provision, authority to hold rules in abeyance, was removed to placate the governor.

As introduced, H.B. 205 created a select standing administrative rules review committee of the legislature.<sup>15</sup> The committee was authorized to review the rules of any agency, to compel agencies to assist the committee and its staff, and to hold hearings. The Legislative Service Office (LSO) was the committee's staff. Rules were to be filed with the LSO, which was to review the rules, make determinations and submit recommendations to the committee and others, including the Management Council. In turn, the Management Council was to refer the LSO's report to the standing committee with jurisdiction over the rule-making agency. The rules review committee would approve rules or make recommendations to the governor, who had fifteen days to react, either by complying with the committee's recommendations, or by filing his objections. The committee could then recommend action to the legislature at its next session. The legislature could prohibit implementation and enforcement of a rule by adopting the committee's recommendation. Amendments to the Wyoming Administrative Procedure Act were proposed to conform it to the rule review procedure.

The bill was assigned to the Rules Committee, of which Representative Donley was a member. It took the Committee nearly a month to return the bill to the House. The Committee gave the bill a new number—205A—and reported it out with lengthy amendments which made three substantive changes. First, the "select administrative rules review committee," which had been proposed as a permanent legislative interim committee, was eliminated. Its functions were given to the Management Council, a pre-

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15. H.B. 205, 44th Legis., Gen. Sess. (1977).

existing legislative committee whose primary responsibility had been supervising the LSO. By giving the rule review function to the Management Council, some travel and per diem costs were saved, and the rule review function was delegated to the leadership of the legislature.<sup>16</sup>

Second, the Committee changed the requirement that rules be "filed in the Legislative Service Office" to a requirement that rules be "submitted to the Legislative Service Office." The apparent purpose was to make it clear that the LSO was not going to duplicate the secretary of state's duties as registrar of rules.

Third, and most significantly, the Committee added a new subsection (d) to Section 9-4-103 of the Wyoming Statutes, within the Wyoming Administrative Procedure Act.<sup>17</sup> The subsection gave the governor a veto over rules by requiring him to certify that the rules 1) were within the statutory scope and intent, 2) were adopted in accordance with law, and 3) met constitutional and statutory requirements, restrictions and standards. If he refused to sign the rules, they could not be filed or become effective.<sup>18</sup> The three criteria were the same the Management Council was to consider in reviewing rules.

The new subsection was the result of a compromise between the Committee and the Governor.<sup>19</sup> The legislative history of the bill records the compromise in three ways. First, in spite of relatively strong support among influential members of the legislature and on the Rules Committee, the bill languished for over half the session, even though the Committee had only eight other bills to consider,<sup>20</sup> because of

16. Since the Rules Committee and the Management Council are both dominated by legislative leaders, the Committee could be accused of favoring its own members. The Council consists of the president of the Senate, the speaker of the House, the majority and minority leaders of the two houses, two senators and two representatives selected by the party caucuses of the two houses meeting separately, and one member selected by the other ten. WYO. STAT. § 28-8-102 (1977).

17. WYO. STAT. § 9-4-103(d) (1977).

18. WYO. STAT. § 9-4-102(b) (1977).

19. Interview with Joe Meyer, Assistant Director, Legislative Service Office (August 30, 1979). Mr. Meyer was active in the negotiations between the Committee and the Governor's office.

20. The Rules Committee considered nine bills during the 1977 session, out of 655 which were considered in the House. Legislative Service Office, Forty-

negotiations which delayed the bill. Second, in the correspondence prior to the session, Herschler expressed his opinion that the governor should have primary control of the bureaucracy, and Representative Donley agreed.<sup>21</sup> The pre-session amendments had increased the governor's control, but not to the extent Herschler desired. The new subsection made the governor's power clear. Third, and most significantly, the Governor had the opportunity to veto the bill without threat of an override,<sup>22</sup> and he had motives for a veto.<sup>23</sup> Nevertheless, he allowed the ARRA to become effective without his signature in order to complete his part of the compromise.

The amendment significantly increased the governor's control over agency rule-making and did little or nothing to augment legislative control. It also complicated rule-making by including the governor at three stages of the process.<sup>24</sup>

In Committee of the Whole, the House accepted the Rules Committee amendments and adopted three more minor amendments.<sup>25</sup> The first permitted the Management

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Fourth Legislature House Bill Committee Referrals (1977) (on file at the LSO).

21. Letter from Governor Ed Herschler to Representative Russ Donley (November 29, 1976); letter from Representative Russ Donley to Gerald Fox, Research Associate, Legislative Service Office (December 7, 1976).
22. The Governor received the enrolled act Friday, February 25. The session adjourned Monday, February 28. DIGEST OF HOUSE JOURNAL, 44th Legis., Gen. Sess. 261, 528 (1977). As a result, the Governor had fifteen days after adjournment to act on the bill. WYO. CONST. art. IV, § 8.
23. The Governor has made his disdain for the Act known on several occasions. Letter from Governor Ed Herschler to Secretary of State Thyra Thomson (March 15, 1977); letter from Herschler to Senator Don Northrup (February 25, 1978).
24. The governor may amend or rescind rules after receiving the Council's recommendations, WYO. STAT. § 28-9-106(b) (1977), he may disapprove a rule before it is filed, WYO. STAT. § 9-4-103(d) (1977), and he may veto a legislative order which disapproves a rule, JOINT RULES OF THE WYOMING LEGISLATURE, 45th Legis., Gen. Sess. Rule 12-1 (1979).

That and other incongruities in the ARRA and between the ARRA and the APA which the Committee's amendment produced led one commentator to charge the ARRA with being "poorly drafted." Comment, *supra* note 7, at 189. For example, the original bill directed the LSO to make certain determinations in reviewing rules. The LSO would have reported its findings to the rules review committee, which would have been authorized to make the same determinations. The Committee amended both sections by replacing the LSO and the rules committee with the Management Council. The result is an apparent duplication—the Council is authorized to examine rules and make determinations, and also required to make the same determinations when reviewing rules. In the hurried business of legislating, such problems are to be expected.

25. DIGEST OF HOUSE JOURNAL, 44th Legis., Gen. Sess. 260-61 (1977).

Council to delegate rule review functions to subcommittees of the Council. The second was a minor verbal change. The third left it to the Management Council's discretion whether to send rule reviews to the standing committee with appropriate jurisdiction.

The final amendment to the bill occurred on second reading in the House.<sup>26</sup> Representative Donley added three words which make Wyoming's rule review process unique. The amendment is italicized in the following quotation from the Act: "If the legislature approves *by legislative order* a council recommendation to prohibit the implementation or enforcement of any rule, the rule may not be implemented or enforced."<sup>27</sup>

This amendment solved the problem created by Article III, Section 6 of the Wyoming Constitution, which prohibits the introduction of bills other than the budget bill during the Budget Session "unless placed on call by a two-thirds vote of either house."<sup>28</sup> If legislative action against rules could only be carried out by bill, and such a bill failed introduction, the rule could be in effect for as long as twenty-two months before legislative action. A "legislative order" is not subject to the constitutional constraints, so the maximum delay is less than a year.

The rule review bill sailed after that. On third reading in the House, it passed by a vote of 49 to 12.<sup>29</sup> In the Senate, the bill went to the Rules Committee and was returned in four days. On third reading, it received 29 aye votes, and one no vote.<sup>30</sup> The bill became law without the Governor's signature, and appears as chapter 190, the last chapter of the 1977 Wyoming Session Laws.<sup>31</sup>

26. *Id.* at 261.

27. WYO. STAT. § 28-9-107(c) (1977).

28. WYO. CONST. art. III, § 6.

29. DIGEST OF HOUSE JOURNAL, 44th Legis., Gen. Sess. 261 (1977). There was also one abstention.

30. *Id.* at 261.

31. Codified as WYO. STAT. §§ 28-9-101 to 28-9-108, and 9-4-102 to 9-4-105 (1977). Neither the legislature nor the Governor are completely comfortable with the rule review process. In 1979, the Joint Judiciary Interim Committee introduced a bill amending the ARRA. As it passed both houses, the bill added a definition of "legislative order," gave the governor more time and a better opportunity to respond to legislative recommendations, removed the Management Council's authority to consider constitutional



## II. THE LEGISLATURE'S POWER

The Governor has opposed the ARRA almost since it became law.<sup>32</sup> Among the arguments he raises is one on constitutionality under the separation of powers clause, an argument that has been raised concerning rule review procedures in other states and concerning the federal equivalent of rule review—the congressional veto.

The constitutionality of the congressional veto has been debated at length,<sup>33</sup> without a victor emerging. "At this time, the American government has no 'principle' that congressional veto of administrative rules is or is not compatible with the Constitution."<sup>34</sup> In spite of the more strict separation of powers clause in the Wyoming Constitution, the doubts about the constitutionality of the ARRA are unnecessary.<sup>35</sup>

For analytical purposes, the ARRA can be broken into two parts. The first encompasses all of the rule review process except the legislative order. This part only adds to the procedural burden of agencies, which the legislature may do constitutionally. The second part is the legislative

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questions, and allowed the Council to hold rules in abeyance. H.B. 117, 45th Legis., Gen. Sess. (1979). The Governor vetoed the bill. DIGEST OF HOUSE JOURNAL, 45th Legis., Gen. Sess. 115-17 (1979).

32. See note 23, *supra*.

33. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323 (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

34. 1 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 77 (2d. 1978) (hereinafter cited as DAVIS).

35. WYO. CONST. art. II, § 1. Whereas the congressional veto prevents any rule from becoming effective for a designated period during which either house of Congress may veto the rule by majority vote, the ARRA never delays the effective date of rules and vetoes rules only when both houses and the governor agree.

The U.S. Supreme Court has made it plain that the separation of powers doctrine is not a technical legal rule. The constitutional convention rejected a strict separation in favor of some overlapping duties which provide checks on all branches. *Powell v. McCormack*, 395 U.S. 486 (1969); see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-46 (1977). Wyoming's court has not indicated how strictly article II is to be interpreted.

order. Because the legislative order must survive the normal law-making process, including the governor's veto, there can be no violation of separation of powers.

### A. *The ARRA's Procedural Requirements*

Read from the perspective of an agency about to propose rules, the ARRA does three things. It requires submission of the proposed rules to the LSO; it gives the governor a firm hand in the content of the rules after the Management Council has made its recommendations; and it requires the governor's signature before filing the rules with the secretary of state. The last two of these are controls over the substantive content of rules, but both are controls held by the governor. Because the agency and the governor are in the same branch of government, those controls cannot violate the separation of powers.<sup>36</sup>

The agency's only dealing with other branches of government comes from the first requirement, which mandates submission of the rules to the LSO. This procedural burden of the ARRA is trivial when compared to the notice, hearing, statement of reasons, filing and other requirements of the Administrative Procedure Act (APA).<sup>37</sup>

The legislature's power to impose procedural requirements on rule-making is beyond question.<sup>38</sup> Rule-making is a legislative power.<sup>39</sup> An agency cannot write rules unless the legislature delegates such authority.

Since the legislature grants the power, it may also impose conditions upon its exercise, such as the procedural requirements of the APA and the ARRA. By doing so, the legislature does not infringe upon the executive's prerogatives or violate the separation of powers clause.

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36. WYO. CONST. art. II, § 1 establishes only three branches of government which are separate.

37. WYO. STAT. § 9-4-103 (1977).

38. In fact, the legislative power to impose the procedures of the APA has never been questioned in Wyoming, and apparently not much more frequently elsewhere.

39. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672 (1975) (hereinafter cited as Stewart).

Although the ARRA's only imposition on agencies is procedural, it does more than establish a procedural barrier. The ARRA directs the LSO to review rules and report to the Management Council.<sup>40</sup> In doing so, the LSO interprets the constitution and the statutes. The Council then makes determinations which are based on constitutional and statutory interpretations.<sup>41</sup> Moreover, the governor must make similar determinations before approving a rule.<sup>42</sup> The argument has been raised that these are judicial functions and their exercise under the ARRA violates the separation of powers doctrine.<sup>43</sup>

The argument proves too much. First, it implies that the LSO may not give legal opinions to legislators or legislative committees. Such a result is as absurd as telling attorneys in private practice that they may not give legal opinions to their clients. The courts do not have the time to address the legal problems of every legislator, let alone every person. Second, the argument denies the Management Council, or any legislative committee, authority to act on questions which raise legal or constitutional issues. Such a result would bring all legislative activity to a standstill. Third, the argument denies the governor the power to act on constitutional questions. Arguably, the governor would be acting outside his authority by vetoing legislation on constitutional grounds.<sup>44</sup> The constitution simply does not hinder governmental processes in this way.<sup>45</sup>

Those who operate the government, like persons in the private sector, must make judgments based upon informed legal opinion. Though the courts' constitutional and statutory interpretations are the most authoritative, their's is not a monopoly on the power to interpret. The ARRA does not reduce the courts' authority, or subject it to the control of another branch.

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40. WYO. STAT. § 28-9-104(a) (1977).

41. WYO. STAT. § 28-9-104(c) (1977).

42. WYO. STAT. § 9-4-103(d) (1977).

43. Comment, *supra* note 7, at 198-201.

44. Half of Governor Herschler's 1979 vetoes were on constitutional grounds.

45. *Cf. Alcala v. Board of Barber Examiners*, 365 F. Supp. 560, 564 (D. Wyo. 1973) (federal court abstained from deciding constitutional questions in part because Board had not considered them. "It is clear that administra-

### B. Legislative Orders

The one real power of the legislature under the ARRA is the legislative order. It is the one part of the ARRA which might justifiably encounter difficulties on separation of powers grounds. On its face, the statute allows the legislature, acting alone, to prohibit the implementation and enforcement of an administrative rule by adopting a legislative order.<sup>46</sup> Like most things, the ARRA is not as simple as it seems. Even though rule-making is a function delegated by the legislature, the legislature may not interfere in agency rule-making at will. Moreover, the Wyoming Constitution requires the governor's signature on every bill, order or resolution except those relating to the transaction of the legislature's business.<sup>47</sup> This requirement unquestionably applies to legislative orders.

The veto power may never have been discussed during consideration of the rule review bill.<sup>48</sup> Once the ARRA became law, however, the problem was recognized and addressed. The joint rules of the House and Senate were amended to require the order to be sent to the governor in accordance with the constitutional requirement.<sup>49</sup> As a result, the legislative order is now treated as a bill in all respects but one — it may be introduced in a budget session without a two-thirds vote of one house.<sup>50</sup> The governor's veto power is preserved.

The adoption of the joint rule also resolved any separation of powers questions about the legislative order since the legislative order uses the law-making process. Although that process blurs some of the distinctions between the executive and the legislature, it certainly does not violate the doctrine of separation of powers.<sup>51</sup> The legislative order

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tive agencies are competent to pass upon constitutional issues germane to proceedings before them.")

46. WYO. STAT. § 28-9-107(c) (1977).

47. WYO. CONST. art. III, § 41 & art. IV, § 8.

48. The legislative order concept was not introduced until second reading in the House, the last reading in which the bill was amended.

49. JOINT RULES OF THE WYOMING LEGISLATURE, 44th Legis., Budget Sess., Rule 12-1 (1978).

50. See text at notes 26-28, *supra*.

51. Article II excludes from the requirement areas where the separation is blurred by the Constitution, such as law-making.

is unique; but an unusual form of enactment need not be unconstitutional.

### C. *Changing Times Change Demands*

Administrative regulation is a vital part of the governmental system. To some extent, it has been since Washington became president.<sup>52</sup> But with the increasing demands upon government in this century, administrative regulation has proliferated.

The rise in importance of administrative regulation was accompanied by the development of administrative law. The development faced strong resistance from powerful interest groups, including the American Bar Association.<sup>53</sup> Those opposed to the movement toward administrative regulation found support in at least three legal theories: the theory of separation of powers, the theory of the rule of law and the nondelegation doctrine. Each was "a barrier to the development of administrative law and . . . contributed little or nothing that is affirmative."<sup>54</sup>

At the same time these theories were extant, there was difficulty in finding philosophical support for administrative regulation.<sup>55</sup> The traditional model viewed agencies as "transmission belts" implementing legislative directives, with court review to hold agency discretion within statutory bounds.<sup>56</sup> That model became unworkable as government intervention increased and more discretion was vested in administrative agencies. During the New Deal, the "expertise" of professional public administrators was offered as a solution to the problem of discretion, but it failed because the courts and others recognized that agencies did not practice an apolitical science.<sup>57</sup> The courts then developed an "interest representation" model which provides a "surrogate political process to ensure the fair representation of a wide range of affected interests. . . ."<sup>58</sup> The failure of this

52. See generally DAVIS, *supra* note 34, at 15-35.

53. *Id.* at 23-24.

54. *Id.* at 147.

55. See generally Stewart, *supra* note 39.

56. *Id.* at 1671-76.

57. *Id.* at 1676-79.

58. *Id.* at 1670.

model to provide a workable philosophical foundation for administrative law is now evident.<sup>59</sup>

Despite the lack of philosophical support, and despite strong philosophical opposition, government by administrative regulation has prospered. The barriers to administrative regulation have been overridden,<sup>60</sup> but administrative law goes on without a firm philosophical footing. It survives because government could not survive without administrative agencies.

Necessity now calls for different steps. A plethora of problems associated with administrative government have been identified: agencies act beyond their authority; they fail to achieve legislatively mandated goals; they are biased; and they exercise discretion unreasonably.<sup>61</sup> As society depends upon agencies more, their "misconduct" becomes more significant. The traditional answer to such complaints is the courts. With the growth of administrative government, that solution is no longer practical—if indeed it ever was. The costs of litigation prohibit all but the most severely injured or the very wealthy from pursuing their remedies.<sup>62</sup> Moreover, statutory and constitutional violations by agencies may not injure a potential litigant directly enough to make him aware of his injury.<sup>63</sup> To depend upon litigation as the remedy is, in most cases, to have no remedy at all.

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59. *Id.* at 1681-88.

60. DAVIS, *supra* note 34, at 147.

61. Stewart, *supra* note 39, at 1681-88.

62. A recent example arose when the Department of Health and Social Services issued regulations to implement the mandatory immunization of children act which was passed by the 1979 legislature. WYO. STAT. §§ 14-4-116 and 21-4-309 (Supp. 1979). The law limited the immunization requirement to children ten years old or less "entering initially or transferring into" schools. Obviously, the program would achieve total immunization only after several years. The Department chose to implement a different program which required all children ten years old or less to be immunized immediately. The costs to parents and schools of the legislature's long-term program were certainly less than the Department's immediate program, but the difference is not great enough to warrant litigation. See Legislative Service Office, Administrative Rule Review Report Number 157 (June 21, 1979). As to whether the legislature's or the Department's program is better policy, no opinion is expressed here.

63. The Wyoming Department of Agriculture's regulations under the Dairy Marketing Act, WYO. STAT. §§ 11-36-101 to 11-36-110 (1977), prohibit selling dairy products in this state which have been processed out-of-state at a price below that set by the Department for in-state dairy products. This violates the U.S. Constitution's prohibition of burdens on interstate commerce. See Legislative Service Office, Administrative Rule Review Report Number 118 (November 6, 1978). Wyoming consumers are injured

Legal commentators are discussing means of controlling agency discretion. Kenneth Culp Davis recommends "an affirmative reinterpretation" of the theories of separation of powers, rule of law, and nondelegation.<sup>64</sup> Richard Stewart sees either of two developments possible: the further application of the interest representation model, or the use of a classification scheme to conform control techniques to each agency's characteristics.<sup>65</sup> The federal government and many state governments are experimenting with methods to control administrative excess. Recently a federal agency's discretion was limited through deregulation,<sup>66</sup> and the same action has been proposed for some of Wyoming's regulatory agencies.<sup>67</sup> Some states, including Wyoming, have adopted sunset legislation to force agencies to justify their continued existence.<sup>68</sup> Wyoming's legislature has also made an effort to gain better control of the appointment process.<sup>69</sup> Administrative rule review is among the solutions being tested and discussed.<sup>70</sup>

Necessity now calls for developments to set reasonable restrictions on administrative processes. Those with an interest in unfettered administrative action will oppose the developments, just as the growth of administrative law was opposed by conservative forces at an earlier time. Necessity prevailed then, and it should prevail now. The ARRA is not the only way of controlling administrative agencies, nor is it the best. But in its short life in Wyoming, it has proved that it is worthy of continuation.

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by the regulations, but most are unaware of the higher price they pay or the reason they pay it.

64. DAVIS, *supra* note 34, at 147 (emphasis in source).

65. Stewart, *supra* note 39, at 1805-13.

66. Many of the Civil Aeronautics Board's powers were removed by Pub. L. No. 95-504, 92 Stat. 1705 (1978). Trucking regulation is now under fire. S. 710, 96th Cong., 1st Sess. (1979).

67. See, e.g., H.B. 53 (milk order funding) & S.F. 168 (prevailing wage act), 45th Legis., Gen. Sess. (1979).

68. WYO. STAT. §§ 28-10-101 to 28-10-103 (1977).

69. WYO. STAT. §§ 28-11-101 to 28-11-103 (1977).

70. Thirty four states have adopted formal legislative regulation review systems. LEGISLATIVE IMPROVEMENT AND MODERNIZATION COMMITTEE, NATIONAL CONFERENCE OF STATE LEGISLATURES, RESTORING THE BALANCE: LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS 8 (1979).

### III. REVIEWING RULE REVIEW

Whatever legal and constitutional arguments are made in its support, rule review must be judged ultimately on its effectiveness. Unless it does something worthwhile, it should not be retained.

The original goal of rule review was to impose some checks on the bureaucracy. The experience with Wyoming's ARRA to date suggests that it goes a long way toward fulfilling that goal, while providing other benefits. It could be even more effective if some minor changes were made in the Act.

#### A. *Controlling the Bureaucracy*

The ARRA gives the legislative branch mostly advisory powers. The one method it has for making rules conform with law, the legislative order, is proposed infrequently and is usually unsuccessful. Nevertheless, the rule review process is valuable. Through voluntary compliance by agencies with LSO and Management Council recommendations, and an occasional legislative order, rules are brought into conformance with law.

The rule review process in Wyoming consists of four official steps. First, the LSO prepares a report to the Management Council, which consists of recommendations to the Council concerning the rules.<sup>71</sup> Most rules are found to be in compliance with law.<sup>72</sup> Second, the Management Council acts upon the LSO report and notifies the governor.<sup>73</sup> That is usually the end of the matter. Third, in a few cases, where noncompliance is significant and the agency is unwilling to change its rules, the Council proposes a legislative order.<sup>74</sup> Fourth, the legislature may adopt and the governor may sign the legislative order.<sup>75</sup>

Behind and between the official steps, a great deal more goes on. The LSO's report is only a recommendation

71. WYO. STAT. § 28-9-104(a) (1977).

72. A review of the rule review reports numbered 101 to 150 reveals 31 findings that the rules were within statutory authority.

73. WYO. STAT. § 28-9-106(a) (1977).

74. WYO. STAT. § 28-9-107(a) (v) (1977).

75. WYO. STAT. § 28-9-107(b) & (c) (1977).



to the Management Council, but a copy is sent to the agency which submitted the rules. Before the Management Council meets to act upon the report, it is likely that representatives of the agency will meet with LSO staff to discuss the report. As a result of these conversations, the LSO may revise its recommendation to the Management Council or the agency may withdraw the rules or amend them to conform to the statutes.

Generally, the LSO and the agency are interested in resolving differences and conforming the rules with law. An agency may feel compelled to adopt a questionable regulation because of pressure from interest groups<sup>76</sup> or in order to establish an effective program.<sup>77</sup> Agencies seldom ignore or violate the law intentionally. Often they interpret the statute differently than the LSO. The LSO staff may agree not to press the issue when the agency's interpretation is reasonable, or the agency may decide the LSO is correct and change the rule.

An agency which rewrites rules in response to LSO objections is not acting because of a statutory mandate. Neither the LSO nor the Management Council can force an agency to amend its rules. Agencies respond to the LSO's suggestions for a variety of reasons. Among them are the avoidance of legislative orders,<sup>78</sup> the general need to remain on good terms with the legislature, the elimination of possible legal challenges to agency actions, and the simple desire to act within legal bounds.

Before the Management Council acts upon the LSO report, many problems in the rules have been resolved.<sup>79</sup>

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76. The Department of Fire Prevention and Electrical Safety has been under intense pressure from unions and some corporations to include corporations as "persons" when interpreting the statutory exclusion of "a person on his own property" from electrical licensing requirements.

77. The Department of Agriculture has unconstitutionally banned importation into Wyoming of dairy goods processed at prices below those set by Wyoming's dairy market orders. The Department argues, with justification, that to lift the ban would make the dairy market order program ineffective.

78. This threat appeared more real after the 1979 session, because two legislative orders passed. Agencies have cooperated with the LSO more willingly since the session.

79. Of eighteen rules with statutory or constitutional problems identified in rule review reports 113 to 150, four were amended or withdrawn prior to Management Council action. Three problems required statutory solutions, so the Council took no action on the rules.

If the agency disagrees with the LSO report, the agency may argue its case to the Management Council. Regardless of the Council's decision, the agency is under no compulsion to conform its rules to the Council's directives. The Council's only function at this point in the process is to make recommendations to the governor.<sup>80</sup>

### *B. Rule-making and the Governor*

Under the ARRA, the governor can control the destiny of rules at three stages:<sup>81</sup> by ordering the amendment or rescision of proposed rules after receiving a Management Council recommendation;<sup>82</sup> by refusing to approve rules when submitted for his signature prior to filing with the secretary of state;<sup>83</sup> or by approving or vetoing a legislative order which prohibits the implementation or enforcement of the rules.<sup>84</sup>

These powers granted in the ARRA, plus the enactment of two legislative orders in the 1979 session, prompted the Governor and the Attorney General to assume a greater role in agency rule-making. Agencies have been urged to consult with the attorney general's office at an early stage of rule drafting,<sup>85</sup> and the Governor has indicated that rules should not be submitted to him unless approved by an assistant attorney general.<sup>86</sup>

Because the governor has final authority over rules, the suggestions made by the attorney general or the governor will probably carry more weight with agencies than LSO recommendations. The result may well be rules which not only comply with law, but which are organized, comprehensible and unambiguous.<sup>87</sup> Rules should be at least as

80. WYO. STAT. § 28-9-106(a) (1977). The agency which adopted or proposed the rule which is reviewed also receives a copy of the Management Council's recommendations.

81. See Comment, *supra* note 7, at 192-95.

82. WYO. STAT. § 28-9-106(b) (1977).

83. WYO. STAT. § 9-4-103(d) (1977).

84. WYO. STAT. § 28-9-107 (1977).

85. Memorandum from Pete Mulvaney, Deputy Attorney General, to Staff Attorneys (May 16, 1979).

86. Memorandum from Governor Herschler to State Agencies (May 14, 1979).

87. See Memorandum of Bruce Salzburg, Assistant Attorney General, to John Troughton, Attorney General (April 19, 1979).

understandable as the laws they interpret and implement. The governor can make sure they are.

### *C. Rules and the Laws*

One function of the rule review process which is often over-looked is its potential for identifying statutes which are in need of amendment or repeal. As unintelligible as some rules are, there are statutes which are worse. Wyoming has had a brief time in which to compile statutes which are outdated, incomprehensible and conflicting. Nevertheless, the collection inside the ten green volumes is remarkable.<sup>88</sup>

Agencies develop ways of understanding ambiguities and resolving conflicts within the statutes they use. Seldom does anyone question the agency's interpretation. Once comfortable with an interpretation and the way it operates, the agency has little reason to go to the legislature with a request for changes in the law. By asking for statutory changes, the agency may invite unwanted legislative scrutiny or may find itself with duties it never sought.

The agency is obliged to do its best with unworkable statutes. However, when an agency resolves a conflict or ambiguity in the statutes, it assumes a policy-making function which belongs to the legislature. The fault lies not with the agency, but with the legislature, and the cure must come from the same place.

In reviewing rules, the LSO and, indirectly, the Management Council have two ways of discovering problems with the statutes. The first is in preparing the report. In comparing the rules to the statutes, the LSO necessarily uncovers conflicts and ambiguities. These problems are identified in the rule review reports. Second, after the agency receives the report, but before Management Council action, LSO staff may discuss the rules with staff from the agency, and further problems in the statutes may be identified. An effort is made to bring such statutory problems to the Management Council's attention.

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88. The transportation code, the criminal code and the fire prevention and electrical safety statutes are good examples. The ARRA itself is not a model of clarity.

The Management Council is authorized to introduce bills. In 1979, it introduced five, three of which were directed toward clarifying statutes which had been identified as problems through the rule review process.<sup>89</sup> The Management Council has also begun directing interim committees to study statutory problems which are uncovered through rule review.<sup>90</sup>

Individual legislators also introduced bills which addressed problems identified through rule review. In fact, the force of the two legislative orders adopted in 1979 was tempered significantly by the enactment of bills introduced by other members. Legislative Order Number 1 prohibited the enforcement of a Department of Revenue and Taxation rule exempting newspapers from the sales tax.<sup>91</sup> All sales tax exemptions are specifically enumerated in the statutes,<sup>92</sup> and the addition to that list by means other than statutory amendment is clearly beyond the agency's authority. However, the exemption dated back to the depression era. The Management Council decided not to introduce a bill providing the exemption, but two legislators did,<sup>93</sup> and one of the bills was adopted.<sup>94</sup> Thus, the legislature made the point that the Department could not exceed its statutory authority, while it authorized the Department to continue the policy.

Legislative Order Number 2 related to rules of the Department of Fire Prevention and Electrical Safety.<sup>95</sup> Eight sections of the Department's rules were declared void and unenforceable. However, the legislature also recognized that the Department's authorizing statutes were

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89. S.F. 94, 45th Legis., Gen. Sess. (1979), attempted to eliminate constitutional problems in the enforcement of the dairy marketing act which were identified in Legislative Service Office, Administrative Rule Review Report Number 118 (November 6, 1978). H.B. 462, 45th Legis., Gen. Sess. (1979), addressed the State Financial Institutions Board's practice of granting bank application fee refunds which were not authorized by statute. See Legislative Service Office, Administrative Rule Review Report Number 79 (April 24, 1978). H.B. 199, 45th Legis., Gen. Sess. (1979), which became 1979 WYO. SESS. LAWS Ch. 27, codified as WYO. STAT. § 39-6-405 (Supp. 1979), concerned the sales tax exemption for school annuals.

90. Minutes of the Management Council 3 (August 13, 1979).

91. 1979 WYO. SESS. LAWS L.O. 1.

92. WYO. STAT. § 39-6-405(a) (1977).

93. S.F. 152 (Arney) & H.B. 348 (Lummis), 45th Legis., Gen. Sess. (1979).

94. WYO. STAT. § 39-6-405 (Supp. 1979).

95. 1979 WYO. SESS. LAWS L.O. 2.

out-dated, conflicting and difficult to understand, and amended them substantially.<sup>96</sup>

The legislature may have spoken with a soft voice in these two instances, but the message was clear. Government agencies possess only the authority which is granted by law. They are obliged to remain within that authority and to seek greater authority from the legislature.

#### *D. Improving Rule Review*

The ARRA does not give the Management Council the power either to hold rules in abeyance or to take action against rules on grounds other than noncompliance with constitutional, procedural or statutory requirements. Other states have provided these powers to their rule review committees.<sup>97</sup> The results appear to be large staffs and big budgets<sup>98</sup> without more effective rule review. The ARRA works well enough that giving the Management Council additional powers seems unnecessary and unwise. Agencies cooperate now, so the Council does not need a larger club with which to induce cooperation. Rather, the ARRA needs amendments which will make it easier for agencies to cooperate. Two changes would be most helpful: first, the ARRA should be clarified to make rule review an orderly process, and second, the responsibility for rule review should be vested in a body other than the Management Council.

#### 1. Clarifying the Process

When introduced as H.B. 205, the ARRA set forth a relatively precise pattern of events and functions for rule

96. WYO. STAT. §§ 35-9-106, 35-9-116, 35-9-121, 35-9-132 to 35-9-136, 35-9-138, 35-9-140, 35-9-110, and 35-9-121 (Supp. 1979). It remains to be seen if any real improvement was made. WYO. STAT. § 35-9-135 requires the use of licensed electricians for electrical work in or on buildings except by a person on his own property and in certain other instances. The former statute had also excluded farms and ranches larger than forty acres, mines, and railroads. The Department is under pressure to retain those exclusions through a broad interpretation of "persons" and the legislative intent is anything but clear.

97. Eleven states authorize the rule review committee to hold rules in abeyance. RESTORING THE BALANCE, *supra* note 70, at 41-43. At least four states specifically authorize review of rules on non-statutory grounds such as impact on the economy, government operations and affected parties. *Id.* at 31-39.

98. *Id.* at 21-22.

review. By the time it passed, the ARRA granted authority to so many so often that understanding the law was an obstacle to implementing it. Based on the working arrangements which have been developed, the ARRA should now be amended to state clearly each step of the rule review process and the order in which the steps proceed. The four steps which follow seem most logical:

First, agencies should be required to send proposed rules to the LSO thirty days prior to final adoption. The rules should be in final form,<sup>99</sup> and all APA requirements should be complete.<sup>100</sup> Agencies should be required to utilize the attorney general's assistance in rule drafting.<sup>101</sup>

Second, the rule review committee's recommendations should be sent to the governor five days before final adoption of the rules.<sup>102</sup> If the committee makes no recommendation, it should lose its opportunity for input. This would force the committee to meet frequently, or to decide which rules demand committee action and which do not. The uncertainty which now occurs between a negative LSO rule review report and the Management Council meeting could be reduced. If the legislature asks efficiency of state agencies, it should not hinder their operations unnecessarily.

Third, the governor should have his formal opportunity for input in the last five days before adoption.<sup>103</sup> With the rule review committee's recommendations and the advice of the attorney general before him, the governor should have the

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99. If the LSO and the Management Council are not to act as rule drafters and advisors, then the rules should be final. Informal opinions can be obtained by agencies from the LSO staff without specific statutory authority, although some conflict of interest problems arise when LSO staff review rules which they assisted in drafting.

100. The ARRA's direction to review rules for procedural compliance makes no sense unless the rules have gone through most procedural steps.

101. The attorney general is required to be available to assist agencies in drafting, but is utilized too infrequently. WYO. STAT. § 9-4-104(d) (1977).

102. Present law authorizes 60 days for the LSO to conduct its review and report to the Council, and 30 days after the LSO submits its report for the Council to make its recommendations to the governor. Even these generous time limits are occasionally ignored.

103. One can assume that particularly significant rules will receive his attention at a much earlier date.

power to reject, alter or approve the proposed rules.<sup>104</sup>

Fourth, the legislative order should be retained and the occasions for its use should be specified. Two occasions are appropriate: 1) when the governor approves a rule in spite of a rule review committee objection on clear constitutional, procedural or statutory grounds; and 2) when the committee makes no recommendation, any member of the legislature should be allowed to introduce a legislative order for major constitutional, procedural or statutory problems.

These changes would be beneficial to all who are affected by rule review. Agencies would be certain of their obligations and the timetable under the act. The attorney general's staff would be involved at early stages of drafting, where their input can be most useful. The LSO staff's time would be used more economically. The legislature would have its opportunity for review, and the governor would have complete information when deciding whether to approve rules.

## 2. The Rule Review Committee

The rule review bill began with a select committee, but was amended to give the rule review function to the Management Council. There were good reasons for doing that — travel and salary expenses could be saved, and since the members of the Management Council are chosen by the rest of the legislators,<sup>105</sup> the Council should fairly represent the views of the legislature. Those points are still valid, but other considerations should now prevail. Rule review should be delegated to a permanent joint-standing committee.

Four characteristics of the Council make it less effective at rule review than another committee could be. First, the Council meets too seldom. Bi-monthly or even tri-monthly

104. These are powers which the governor now possesses under the ARRA. A question not specifically addressed in the ARRA is if the governor should be limited to acting on constitutional, procedural and statutory grounds, or if he should be able to amend or reject rules for any reason.

105. Six seats on the Council are filled by party leaders, who are selected by caucuses. Four members are selected by the party caucuses of their respective chambers. One member is selected by the other ten.

meetings are inadequate to watch over a full-time government.<sup>106</sup> A rule review committee should meet no less than every three to four weeks. Second, the Council is too large. A smaller committee could work more expeditiously and would spend less money for travel and salary. Third, the Council has too many other matters on its collective mind. The Council oversees the LSO and is the major channel of communication with the legislature between sessions. The members lack the time and the interest to devote to thorough rule review.<sup>107</sup> Fourth, the Council does not divorce itself from non-statutory considerations, which the ARRA demands. Rule review in Wyoming is limited. It has legitimacy, in part, because of the limitations. The rule review committee must act upon statutory language and perceptions of legislative intent, not upon personal political views.<sup>108</sup>

The ideal rule review committee might have six to eight members who have few other committee assignments. They should meet regularly and frequently. The committee should be empowered to request assistance from other standing committees in interpreting laws and to introduce bills when statutes are encountered which need clarification or modernization.

### CONCLUSION

The struggle for and against the ARRA is the same struggle which pervades administrative law — it is the need to find legitimacy in the use of power. Agencies exercise tremendous power. Yet, the elections which legitimize executive officers and legislatures in their acts, and the multitude of factors which legitimize courts, do not apply to administrative agencies. In previous years, agencies have found fleeting legitimacy in the “transmission belt”,

106. The Council met eleven times from January 1978 to September 1979, or approximately once every two months.

107. This is evidenced by the amount of time the Council gives to rule review. A set of rules may receive five to ten minutes. If all of the members were prepared, that might be sufficient, but often the rules and reports have gone unread.

108. The Management Council may be more likely to engage in partisan politics since all but one member hold a post in, or owe their Council seat to the party.



“expertise”, and “interest representation” models of administrative law. These models have failed, and the search continues.

Some help may be found in the nondelegation doctrine. Though the doctrine has lost much of its force, its basic premise retains acceptability. That premise is that ultimately, elected officials should be responsible for the conduct of government. The ARRA is based upon that same premise. It lays in the governor’s hands the power to control executive agency rule-making. It also provides a check upon the executive branch which the legislature exercises. The check is necessary and appropriate. Applying what Senator Jacob Javits once wrote about the congressional veto to Wyoming’s ARRA, “That history already records massive delegations of legislative power to the executive branch should not prevent . . . [the legislature] from recapturing some of that lawmaking power.”<sup>109</sup>

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109. Javits & Klein, *supra* note 33, at 496.