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Administrative Law in Wyoming - An Introduction and Preliminary Report

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ADMINISTRATIVE LAW IN WYOMING – AN INTRODUCTION AND PRELIMINARY REPORT

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Introduction

The purpose of this Article is twofold – (1) to serve as an introduction to this symposium issue on administrative law in Wyoming and (2) to make a preliminary evaluation of the need for reform in Wyoming and in this context to specifically consider the Model State Administrative Procedure Act (hereinafter the "Model State APA" of the "Model Act"). These purposes overlap as one of the objectives of this symposium has been to provide the empirical basis on which an informed evaluation can proceed. This empirical basis rests on the appropriate statutory (including regulations) materials, factual data developed by questionnaire, and a correlation of the case law.

The evaluation must of necessity be preliminary because (1) although the response to the questionnaire was good, the factual data assembled is incomplete, (2) the problems involved do not lend themselves to glib solutions but will require the exchange of ideas by informed persons directly concerned with the problems and affected by any proposed solution, (3) we have developed to date little empirical information relating to the administrative law or practice on the local and county level, and (4) any proposal for reform in Wyoming will have to be tailored to Wyoming's peculiar needs.

The entire area of administrative law, both on a federal and state level, is currently stiring considerable discussion, proposals and experimentation. The ferment of ideas in this area represents in part a feeling that administrative procedures should be more efficient and that they leave something to be desired from the standpoint of fairness. Experimentation can, of course, be helpful in demonstrating not only the possible advantages of alternative methods of handling a problem but also from the standpoint of making apparent alternative methods that do not work or do not work well. However, experimentation should not be an end in itself if the existing machinery is performing its functions reasonably well or if established methods used elsewhere appear to be adaptable as solutions to the Wyoming problem. However, because of the relatively light case loads of many of the administrative agencies in Wyoming and because of the resulting small staffs for such agencies, experimentation may be necessary in order to accomplish the desired objectives in the light of Wyoming's particular needs.

At the outset we should make clear what we mean by "administrative law." First, we have reference primarily to procedural aspects (as distinguished from substantive) of the administrative process relating to

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administrative adjudication and rule making. By administrative adjudication we mean administration agencies (agencies other than the legislature or a court and usually part of the Executive Department) conducting trial-type adversary proceedings similar to judicial trials (hence, often referred to as "quasi-judicial"). By rule making we have reference to agencies adopting regulations which have the effect of law and which are therefore similar to statutes (and hence often referred to as "quasi-legislative"). Second, administrative law is concerned with judicial oversight (more commonly referred to as "judicial review") of administrative action and in this area administrative law concerns itself not only with judicial review of administrative adjudication and rule making but other types of administrative action as well. Generally we are not concerned by and large with the structure, organization, personnel and fiscal policies of agencies or other matters generally falling under the classification of public administration or with the substantive law administered by the agencies. Yet we cannot ignore these matters completely as both the structure and organization of the agency on the one hand and the substantive law administered by the agency may determine in large part what is feasible from the standpoint of relevant procedures. Futher, personnel policies cannot be entirely overlooked as the most elaborate procedural safeguards may be of little significance if administered by incompetent personnel; on the other hand, competent personnel have a way of making even antiquated administrative machinery work reasonably well if not ideally.

The importance of administrative agencies in Wyoming is demonstrated by the fact that there are more than fifty agencies that have either powers of adjudication or rule making or both on the state level alone. There is already a reasonably well developed body of case law in Wyoming relating to these agencies and the administrative process in general. It is particularly significant that these agencies today give rise to an increasing number of problems that have resulted in court litigation. The frequency with which the Supreme Court of Wyoming deals with these problems is indicated by the fact that it has been necessary to make corrections to the student notes through the page proof stages in order to take into consideration the five most recent decision of the Supreme Court of Wyoming dealing with administrative law. It is only the most spectacular administrative law case that reaches the Supreme Court and a large number of such cases are undoubtedly being considered by the District Courts since many of the statutes dealing with administrative agencies provide for judicial review on District Court level. However, the area in which administrative adjudication has real impact on many citizens is in the day-to-day decisions of the agencies which frequently terminate without judicial review and hence do not become the subject of a court proceeding. It is clear that on the federal level that administrative agencies decide more adversary litigation than the entire federal court system and enact more legislation in the form of rules and regulations than does Congress.[1] While

reliable statistics are not available, it is a reasonable assumption that in Wyoming, administrative adjudication and rule making has considerable impact on the rights and obligations of individuals.

GOALS AND OBJECTIVES

We should also at the outset attempt to agree on our objectives and goals. In this emotionally charged area all to frequently personal prejudices pass for informed judgment largely because goals have not been clarified. The author believes that there would be substantial agreement on the following objectives:

1. Our goal should be to improve not to destroy, harass or hamper the administrative process. This requires recognition of the fact that administrative agencies are here to stay. This also requires that we deal with administrative law problems without regard to the substantive rights that are affected by administrative action. Administrative law problems are essentially the same whether they deal with problems relating to communism, internal security, civil rights, or economic regulation. All too often the alleged objections to administrative practices are a mere camouflage for substantive objections to the laws that are being administered. The substantive battles are to be fought in the Legislature and assuming that the Legislature has resolved the substantive problems in terms of a particular program, our concern must be only with the fairness and efficiency of the procedures used in order to implement the substantive program.

2. Recognition of the fact that the administrative process has its own character and values and is in itself a method (and the one preferred by the legislature) of handling a particular problem. Judicial methods should be adapted only to the extent they have worked well for the judiciary and work well in the context of the particular problem. Trial type adversary proceedings characteristics of most judicial proceedings are primarily useful for determining adjudicative facts[2] and should not be imposed on proceedings that essentially involve questions of policy determination.[3]

3. Our goal in the area of administrative adjudication should be to provide a minimum in the way of fair hearing procedures without judicializing the administrative process. Assuming we are dealing with an area in which a trial type hearing serves a purpose this requires (without undue formality) adequate notice of the issues, adequate opportunity to prepare, adequate opportunity to discover and present evidence, the right to cross-examine and confront opposing evidence. Persons affected by administrative action are entitled to their day in the administrative court.

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1. DAVIS, ADMINISTRATIVE LAW TREATISE § 102 (1958).
2. See *infra* p. 205 for distinction between adjudicative and legislative facts. See also DAVIS, *op. cit.* note 1 at § 15.03.
3. For excellent discussion of this general problem, see Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48A. B.A.J. 243 (1962).

4. The agency decision in administrative adjudication should be rendered by unbiased persons who have personally considered the record, have not been contaminated by participating in the prosecution of the case and who have rationalized their decision in a written opinion setting forth the basis for their conclusions.

5. Each agency should have rules of practice governing the agencies' procedures in administrative adjudication. The Rules of Pratcice should be readily available to all parties.

6. Procedures for the promulgation of rules and regulations by agencies should assure participation by persons affected by such rules and regulations and should assure publication of the rules and regulations on a basis that those affected can readily become aware of same.

7. Reform of administrative law should not result in destroying or reducing the peculiar advantages of the administrative process growing out of the special competence of the administrators in their area of jurisdiction and growing out of the institutional approach to such problems. One of the principal advantages of the administrative agency is the fact that the agency head does not have to depend on his own limited knowledge but has available to him a staff of trained personnel that can bring a more specialized and studied approach to the problems the agency must deal with. Of the goals listed, this perhaps will be the most controversial since it infringes on some person's ideal of separation of functions. Of this we have more to say below.

THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Before turning to the symposium discussion of administrative law problems reference should be made to the Model State Administrative Procedure Act (hereinafter the "Model State APA" or the "Model Act"). The Model Act was initially approved in 1946 by the National Conference of Commissioners on Uniform State Laws. A revision of this Model Act, largely the handiwork of Dean E. Blythe Stason, Dean Emeritus of the Michigan Law School, was approved by the National Conference in 1961. The Model Act is limited in its application to state agencies as distinguished from county and municipal agencies. The Act concerns itself with administrative adjudication (referred as as "contested cases" and defined so as to include rate making and licensing), rule making and judicial review of administrative adjudication and rule making. In the area of rule making the Act prescribes procedures for the adoption and publication of rules and for judicial review of rules to determine their validity. In the area of administrative adjudication the Act prescribes the right to a hearing, the "pleadings", the right to present evidence and to cross-examine, rules of evidence, form of the agency decision, manner of reaching and bases for the agency decision. The Act provides for judicial review of agency decisions in contested cases; prescribes the procedure, mechanics and record on review and the scope of judicial review. The Act also contains certain

provisions limited in application to licensing. The Model Act or a variation thereof has been adapted by seventeen states, the states of Massachusetts,[4] Wisconsin[5] and Colorado[6] having adopted significant and in some instances well considered modifications. Since 1947 there has been a Federal Administrative Procedure Act[7] (hereinafter the "APA") prescribing certain minimal procedural requirements for federal administrative agencies. Reference will be made also on occasion to an excellent study[8] (hereinafter the "Kentucky Study") relative to state administrative law prepared by the Kentucky Legislative Research Commission. The Kentucky Study includes a draft of a proposed state administrative procedures act (hereinafter the "Kentucky Proposed Act") which is consideraly more comprehensive in scope than the Model Act.

BACKGROUND AND FUNCTIONS OF ADMINISTRATIVE AGENCIES

The administrative agency exercising powers of adjudication though given increased emphasis by the New Deal and economic regulation traces its origin in Wyoming to territorial days and the State Constitution. *Development of the Administrative Process in Wyoming*,[9] a symposium note written by Professor Ralph Wade is a historical sketch of Wyoming administrative agencies. This note recognizes that administrative agencies have grown not because any person or party has been interested in advancing the administrative process as such, but as a pragmatic solution to practical problems faced by society. As society becomes more complex we can expect the organization of additional agencies to deal with these problems. Administrative law has considerable impact on many phases of human affairs today in Wyoming, it can be safely predicted that in the future this impact will be substantially greater.

Professor Wade's Note deals to some extent with the different substantive functions of administrative agencies. Despite differences in the content of such functions ordinarily agency functions can be classified into adjudication, rule making or what this author for lack of a better term refers to as executive action. Adjudication and rule making have been defined above (albeit descriptively rather than conceptually). Executive action refers to administrative action that is neither classified as adjudication nor rule-making. Problems of classification will continue to plague us and may if we are not careful even obscure the real issues; however, it is believed that these classifications are workable and helpful. Among the principal purposes served by these classifications are (1) to determine to what extent a trial type hearing is appropriate, (2) to determine what constitutes the record on review and (3) to determine the scope of judicial review. A trial type hearing is required ordinarily when a statute or the

4. MASS. ANN. LAWS, ch. 30A.
5. WIS. STAT., ch. 227 (1959).
6. COLO. R.S. 3-1-1 (1960 Perm. Supp.).
7. Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1001 (1959).
8. KENTUCKY LEGISLATIVE RESEARCH COMMISSION, ADMINISTRATIVE PROCEDURES LAW IN KENTUCKY (1962).
9. *Infra* p. 216.

Constitution requires that a determination be made by an administrative agency only after a hearing. Our faith in the efficacy of hearings has probably caused us to extend such hearing requirements to situations involving fundamentally policy questions which type question may be better developed by reports, discussions, conferences, and arguments rather than a trial type hearing.[10] The trial type hearing is adapted best to resolving disputed questions of adjudicative facts. This thesis is further developed in the Note,[11] *Some Constitutional Limitations on Administrative Agencies* by Fred Miller.

Procedures appropriate for the adoption of rules and regulations ordinarily differ from those appropriate to adjudication. If the problem under consideration is a regulation requiring certain safety devices on commercial trucks, e.g., opportunity for the interested parties to effectively present their viewpoint is what is required and this generally can be accomplished without the trappings of a judicial type trial. Presently except for informal and inadequate procedures provided by a few agencies interested parties have no right to participate in the rule making process in Wyoming and there is no system available for the publication and systematic indexing and codification of Rules in Wyoming. These problems and the Model Act approach to Rule-making are discussed in the Note,[12] *Administrative Rule Making in Wyoming* by Alex Abeyta, Jr. The Model Act[13] prescribes a procedure for the giving of notice prior to adoption of proposed rules, opportunity of interested persons to present their viewpoints relating to same and for publication and compilation of the rules. The Kentucky Study[14] recommends a system of notice and publication of rules, described in the footnote relating to this text, which seems superior to that required by the Model Act.

The author is reluctant to suggest another agency as a partial solution to administrative law problem. However, if the administrative process is to be improved there are certain functions that will have to be performed and others that could be performed with profit either by an existing agency or a new agency. The approach of the Model Act is to vest these functions in the office of the Secretary of State or other agency to be designated by the Legislature. The Kentucky Proposed Act places these functions in the Legislative Research Commission. The functions appear to be more appropriately vested in the Executive Branch of the government. The principal function involved under the Model Act is the publication and

10. See Gellhorn, *supra* note 3.
11. *Infra* p 226.
12. *Infra* p. 255.
13. §§ 3, 4, and 5. All Model Act citations are to the revised act adopted in 1961. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 206 (1961).
14. KENTUCKY LEGISLATION RESEARCH COMMISSION, *op. cit. supra* note 8 at pp. 63-66. The Kentucky Proposed Act provides for circulation of proposed rules in a monthly bulletin and provides for a loose-leaf publication of adopted rules which would be maintained on a current basis by periodical loose-leaf supplements. In Wyoming these functions could be performed by the Administrative Procedures Commission recommended below.

compilation of rules and proposed rules. The author would suggest that consideration be given to the creation of a separate agency (hereinafter the "Administrative Procedures Commission") as part of the Executive Department with the following additional functions:

1. To gather statistics and other data relating to administrative procedures and designed to lead to proposals or suggestions to improve the efficiency of the administrative process.

2. To make studies upon the request of a particular agency for structural reorganizations.

3. To advise upon the request of a particular agency with respect to the handling of problems relating to administrative procedures and law.

4. To control the selection, promotion, assignment and general supervision of Hearing Examiners.

INVESTIGATIONS AND DISCOVERY

The regulatory type of administrative agency has dramatized the need for and the results that can be accomplished with the subpoena power used as an implement for conducting invesigations. The scope of the administrative subpoena power under modern case law is discussed in the Note,[15] *Investigatory Powers of Administrative Agencies In Wyoming,* written by Duane Buchholtz. As Mr. Buchholtz observes, the subpoena power has been used and is necessary in order to obtain essential data related to the adoption of rules as well as in connection with the regultory-type adjudication. In addition, it is essential if an appropriate record is to be developed that the subpoena power be available to all the parties to an administrative adjudication and not merely to the agency and its staff. As shown by the Table following the Buchholtz Note[16] a large number of Wyoming administrative agencies have the subpoena power. However, there are a few conspicuous absences including the Board of Land Commissioners and the Wyoming Liquor Commission.

Since most agency statutes on the state level provide for the subpoena power, the more serious problems in Wyoming in the area of preparing and presenting a case before an administrative tribunal are (1) making the subpoena power available to the parties other than the agency and (2) providing for pre-trial discovery. The Model Act contains no provisions pertaining to the issuance of subpoena, making the subpoena power available to parties or directly providing for discovery. Discovery by parties other than the agencies, in fact, is a largely neglected area of administrative law on both the state and federal level. Since the administrative agencies have powerful discovery weapons available to them, a staff of trained investigators to effectively use such weapons, and generally the time and money to thoroughly investigate, the administrative adjudication involving the agency vs. the individual is decidedly one sided from the standpoint of discovery techniques.

15. *Infra* p. 241.
16. *Infra* p. 250.

Elsewhere in this symposium[17] it is recommended that a proposed administrative procedure act for Wyoming extend the subpoena power to all administrative adjudications, provide for issuance of the same upon request of any party[18] and provide for a uniform enforcement procedure. The author would join in this recommendation but with the qualification that the subpoena be issued by the agency or hearing officer rather than by a Court. Enforcement of the subpoena, of course, would require a Court proceeding. The provision included in the Kentucky Proposed Act designating the Court of a particular judicial district to hear all subpoena enforcement cases warrants consideration. The proposed statute should make clear, as does the Kentucky Proposed Act, that the enforcement proceeding may be initiated by any party.

A few Wyoming agencies provide for the taking of depositions but these provisions generally require the consent of the agency and appear to pertain only to the taking of testimony as distinguished from discovery.[19] The Model Act as noted contains no discovery provisions. However, the Kentucky Proposed Act[20] requires that the notice in a contested case include notice to and afford an opportunity of parties to examine all relevant staff memoranda and data which are not made confidential or privileged by statute. This provision undoubtedly will be criticized as making available the product of the agency's work to the other parties and by destroying the element of surprise making it more difficult for the agency to win its cases. Since agencies are manned by human beings to the extent they are participants in contested cases those responsible for preparing the agency's case usually like to win. The function of agencies, however, is not to win cases merely for the sake of winning and in the last analysis the administrative process will gain more respect and be stronger if it does make its work product available within the limitations relating to confidential and privileged information. An alternative approach broader and preferable in the sense that it permits discovery against the agency and other parties to the proceeding would be to provide that in connection with administrative adjudication the discovery rules (Rules 30 through 37) of the Rules of Civil Procedure are applicable. These Rules would require some minor adaptations in order to apply to administrative adjudication and such modification should make clear the fact that to the extent the agency is in fact an adversary party it shall be deemed a party for discovery purposes. The extent to which the agencies files and staff are

17. Andrew's NOTE, *infra* p. 264. See also Buchholtz NOTE, *infra* p. 241.

18. The Board of Equalization, Public Service Commission, Employment Security Commission and perhaps other Wyoming agencies presently make their subpoena power available to the parties. Replies to Questionnaire.

19. The Rules (or procedures) of the Board of Equalization, Public Service Commission and Department of Agriculture provide for the taking of depositions. In addition the Rules of the Board of Equalization and the Public Service Commission permit subpoenas to be issued upon application for the production of "books, papers, or other documents . . . that . . . will be of service in the determination of the proceeding." Rule 3 of Rules of Practice of the Public Service Commission and Rule 3 of Rules of Practice of the State Board of Equalization.

20. KENTUCKY LEGISLATIVE RESEARCH COMMISSION, *op. cit. supra* note 8 at 68.

protected as confidential or privileged could be left for determination by the courts on an *ad hoc* basis.

ADMINISTRATIVE ADJUDICATION—RULES OF PRACTICE

Administrative Adjudication in Wyoming[21] is the topic of a Note written by Frank Andrews. As Mr. Andrews points out, the first requirement for administrative adjudication is that the agency have established procedures for conducting such adjudication embodied in the forms of rules of practice that are available to all persons affected by such adjudication. Of the thirty agencies responding to the questionnaire only nine have detailed Rules of Practice. The Model Act in itself supplies a skeleton set of rules; the detail relating to implementation, however, is quite properly left to the individual agencies. The Model Act also affirmatively requires that each agency adopt Rules of Practice.[22] Some of the agencies with substantial case loads have the personnel and facilities necessary in order to adopt rules without outside assistance. However, many of the smaller agencies have no staff and it is recommended following the Oregon practice that the proposed legislation provide that the Attorney General be required, upon request, to submit to the agency a proposed set of rules of practice to be adopted by the agency.

ADMINISTRATIVE ADJUDICATION—PRESIDING OFFICERS

One of the troublesome problems with respect to administrative law, particularly as practiced in a smaller state, is the question of the presiding officer in contested cases. This may become a serious problem in Wyoming in view of the fact that many of the licensing agencies are headed by persons with no substantial experience in acting as presiding "judicial" officers who are called on only infrequently to preside at and conduct hearings; and, secondly, by virute of the fact that in many agencies with substantial case loads, the agency members themselves are only engaged in such capacity on a part-time basis or have other substantial duties. It seems to the author that it is more important in the case of the Board of Land Commissioners (which consists of the Governor, Secretary of State, State Treasurer, State Auditor and Superintendent of Public Instruction),[23] for example, that its members have an opportunity in an adjudication involving conflicting lease applications to carefully review a properly developed record than it is for them to personally preside at a hearing actually listen to testimony and resolve the issues based on their recollection of the testimony. The administrative process as practiced on the federal level has demonstrated that from an efficiency standpoint there is much to commend a system under which a trained person presides as a hearing examiner for the purpose of conducting the proceeding. The result is that the final decision frequently is rendered based on a review of the record by persons other than those who actually heard the testimony. It is sub-

21. *Infra* p. 267.
22. Model Act § 2(2).
23. WYO. STAT. § 36-14 (1957).

mitted, although others may disagree, that the federal experience amply demonstrates that cases ordinarily can be decided as well, if not better, by persons reviewing the record, including a transcript of testimony, than by persons who have actually heard the testimony but do not have available a transcript. This is particularly true when demeanor of witnesses of if no importance, as is frequently the case, but in the author's opinion credibility can be determined reasonably well by an evaluation of the written record.

On the other hand, the function of deciding contested cases should rest with those persons who constitute the agency and who should have the responsibility for agency decisions and policy. There has been a trend toward making hearing examiners independent and the author as is noted below is generally sympathetic with that trend. However, this trend on the federal level has reached the point where the analogizing of the role of the hearing examiner to that of a judge overlooks the fact that responsibility for the decisions of the agency should remain with the agency heads. There is, on the federal level, a persistent demand to give the decisions of the hearing examiners more finality and, in fact, many federal administrative agencies either by statute or by regulation have, in effect, been affording the decisions of hearing examiners a finality comparable to that which is afforded by appellate courts to district court decisions.[24] This approach is undesirable[25] because of the fact that it places the decision making power in large part with persons other than those with whom the responsibility belongs and because it substantially eliminates another level of review. As a general proposition, the existence of various levels of review is one of our most effective protections against arbitary and unreasonable action by administrative officials.

The Model Act is seriously deficient in not providing for hearing examiners, although it is assumed that such officers may exist. In Wyoming at the present time statutory authority exists in some instances for the conduct of hearings by persons other than the agency or the entire agency and this practice is employed by several agencies in contested cases[26] although only the Employment Security Commission appears to have well developed practices in this area and specially trained personnel for this

24. For example in 1961 Congress authorized the Federal Communcation Commission to delegate the decision-making function to employee boards consisting of three employees with only limited right to review by the Commission. 47 U.S.C.A. § 155 (d). The Atomic Energy Commission, by regulation, has limited the right of review to the Commission from decisions of the Hearing Officers. 10 C.F.R. § 350. The principal justification for these procedures is to permit the agency to concentrate its personal attention on the more important cases.

25. The Board of Agriculture in Wyoming apparently delegates authority in contested cases to the Commissioner of Agriculture or the Deputy Commissioner to make final decisions. Reply to Questionnaire. The Board's composition includes the Governor and others only devoting part time to the affairs of the Board. WYO. STAT. § 11-5 (1957). As in the case of the Board of Land Commissioners (See note 23 and related text) the *de facto* head of the agency is undoubtedly the Commissioner. These are instances in which structural problems of organization which are beyond the scope of this project, overlap with problems of administrative procedures. The author is not prepared to say that under these circumstances delegation of the decision-making power to the *de facto* head of the agency is inappropriate.

26. See *infra* p. 270.

purpose. The Colorado[27] and the Kentucky Proposed Act[28] authorizes the use of hearing examiners but do not specify their qualifications or the manner of their appointment. The merit of this approach is its flexibility in that it apparently permits any designated employee to preside. Other and more preferable alternatives would include (1) the federal approach which provides for a special class of hearing examiners who are employees of the individual agencies but somewhat insulated from agency influence[29] or (2) to create a separate class of Hearing Examiners who would be employed, supervised and assigned to cases by the Administrative Procedures Commission. This latter system would not only assure the independence of Hearing Examiners but would make them available to agencies without the personnel or case load to justify the employment of a Hearing Examiner. Still another alternative for the smaller agency might be authorization for such agencies to "borrow" a hearing examiner when needed from one of the agencies with a staff of hearing examiners. Proposed legislation should specify the powers of the Hearing Examiner or other presiding officers in conducting the proceeding.[30]

ADMINISTRATIVE ADJUDICATION—DECISION MAKING

The Model Act has some specific provisions dealing with the decision-making process by the agency in those instances in which the entire agency does not hear the testimony. These provisions are discussed in the Andrew's Note[31] and among other things distinguish between "considering" the whole record (which the agency must do) and "reading" the record (which the agency doesn't have to do but in the event less than a majority of the members have read the record, briefs and oral arguments directed to a proposed decision must be allowed).[32] The author believes the following approach to be preferable:

1. The agency must consider the entire record (or that portion cited by the parties) including the briefs of the parties.

2. The agency in its discretion may direct the Hearing Examiner or other presiding officer to write a Recommended Decision.

3. The parties as a matter of right should be permitted to file a brief and in the discretion of the agency should be allowed oral argument prior to the agency's decision.

In terms of the decision-making process within the agency and in particular the writing of decisions, the so-called institutional approach to

27. COLO. R.S. 3-16-4 (3) (1960 Perm. Supp.).
28. KENTUCKY LEGISLATIVE RESEARCH COMMITTEE, *op. cit. supra* note 8 at p. 68.
29. Under the federal APA only the agency, a member of the agency or a hearing examiner can preside at a hearing (Section 7). Hearing Examiners are employed by the individual agencies pursuant to civil service appointments but (1) can perform no other inconsistent duties, (2) are assigned to cases (but with possible differentiation as to type of cases) in rotation, (3) their compensation and promotion is determined by the Civil Service Commission rather than the agency, and (4) they can be discharged only for cause and after a hearing by the Civil Service Commission (Section 11). 5 U.S.C. §§ 1007, 1011.
30. See recommendations of Andrew's NOTE, *infra* p. 271.
31. *Infra* p. 271.
32. Model Act § 11.

this problem has given rise to much criticism. Further, the problem of institutional decision inevitably overlaps with the problem of separation of functions. In terms of the institutional decision itself, Dean Landis,[33] among others, objects to the fact that opinions in administrative adjudications are frequently written by persons other than the members of the agency. On the federal level, this is a well-developed art. Most such agencies have, under various names, an opinion writing division which performs the function of writing opinions for the agency. This practice is also engaged in to some extent by administrative agencies in Wyoming.[34]

Aside from the question of separation of functions, which is discussed below, the principal objection to this practice is the assumption that the process of writing the opinion in itself somehow contributes to a more informed judgment. It is argued in this area that it is commonplace that in many instances one's thinking is substantially changed or modified when an attempt is made to rationalize conclusions and formulate ideas in the written form. Undoubtedly, there is a great deal that can be said for this viewpoint (and the author's ideas on administrative law have been modified in the course of and as a result of the process of writing this Article), but, in the author's opinion, it is somewhat exaggerated. Assuming, for example, that the agency is composed of more than one person; at best, only one of the members is going to have the direct benefit of this intellectual exercise. But more important, if the members of the agency regard the party who assisted in writing the decision as being merely a tool to assist them, and if they accept and exercise their responsibility for the decision itself, all of the members of the agency by reviewing, supervising, and instructing the opinion writer or writers will experience much of the same intellectual process. In the last analysis, the extent to which this intellectual activity is experienced and beneficial will depend upon the personnel involved.

The Model Act appears to permit or recognize (if otherwise authorized by law) delegation of decision making but only limited delegation of decision writing. Section 13 refers to "members or employees of an agency assigned to render a decision . . ." and precludes such persons in a contested case from consulting "with any person" (which would include any other employee) in connection with any issue of fact except upon notice and opportunity for all parties to participate. This provision appears from a practical standpoint to preclude the use of an opinion writing division or its equivalent. However, the same section does permit agency members to consult with each other in contested cases and does permit consultation as

33. Landis, 86th Cong. 2d Sess., SENATE COM. ON THE JUDICIARY, *Report on Regulatory Agencies to the President-Elect,* 19-20, 39, 47 (Com. Print 1960).

34. The following information was developed by Questionnaire. Board of Equalization and Public Service Commission opinions are sometimes written by the Secretary to the Commission or Board or by other employees. Board of Land Commissioners' opinions are written by the Commissioner of Public Lands or an employee. Wyoming Oil and Gas Conservation Commission opinions are written by staff members and edited by the office of the Attorney-General.

to questions of law. Further, Section 13 also permits agency members to have and consult with personal assistants.

DECISION MAKING AND SEPARATION FUNCTIONS

The really objectionable feature of the institutional decision arises out of the possible failure to separate functions which is part of a larger problem. The problem essentially is to avoid contaminating the decision-making function by the prosecuting function. It is obvious that the prosecutor does not make a good judge in his own case. There are many choices in this area but the basic choices are among (1) complete separation, (2) internal separation, and (3) no separation. Although the third choice appears to be practiced by some of the more important administrative agencies in Wyoming,[35] it is doubtful whether anyone would attempt to make a case for this alternative except possibly on the basis that in view of limited staff and budget it is unavoidable for some agencies.[36] A good case can be made for complete separation and there are various proposals on the federal level to accomplish complete separation within certain agencies and in certain areas complete separation now exists in the National Labor Relations Board.[37] However, complete separation is a radical solution in the sense that it would require very basic structural changes in all administrative agencies and would involve the type of controversial question that would probably make any reform in this area unattainable because of lack of agreement. The foregoing statements should not be construed as an indication that the author believes in complete separation and would advocate same except for the lack of political feasibility. Rather, it is intended to make clear to the advocates of complete separation that such is not a practical solution and that all parties interested in reform of administrative law should close ranks so as to permit improvements in terms of internal separation of functions. In order to achieve internal separation, it is necessary to isolate those members of the agency who engage in or are responsible for the investigation and prosecution of agency cases from participation in any aspect of the decision-making function, including participation in opinion writing.

Internal separation should not, however, preclude an agency from the benefit of the institutional approach. This requires frank recognition of the fact that any decision maker, whether on the judicial or administrative level, brings to each decision the totality of his knowledge with respect to the problems and issues under consideration. It requires

35. Based on replies to Questionnaires the following agencies permit ex parte consultation by those responsible for rendering a decision in administrative adjudication with staff members who participate in the investigation or presentation of cases or otherwise fail to provide for internal separation: Board of Equalization, Public Service Commission, Board of Land Commissioners, Wyoming Oil and Gas Conservation Commission.

36. The Public Service Commission Questionnaire suggests that its staff members do not have an adversary position.

37. Complete separation is achieved in "unfair labor practice" cases (but not representation cases) by making the General Counsel of the Board solely responsible for investigation, initiation and prosecution of unfair labor practice cases. 61 Stat. 139 (1947), 29 U.S.C.A. § 141.

recognition of the fact that an administrator's knowledge is not only his personal knowledge but also the knowledge available from his staff and, subject to the rules pertaining to separation of functions, an administrator should be free to consult with the members of his staff in reaching his decision. He should not, however, be free to consult with members of his staff who have participated in the investigation or prosecution of the case or who have supervised such investigation or prosecution or have responsibility for same. The real question in this area is whether or not parties to the proceeding should be given notice of the fact of such consultation and the opportunity to rebut the position of the staff member consulted. The Model State APA as revised provides this protection to the parties as to question of fact. Yet, if the process of consultation is viewed as merely an enlargement of the experience, skill and knowledge that the deciding officer brings to his judgment-making task, it is clear that ordinarily the parties would have little if any opportunity to examine the decision-making process in this manner. As an ideal, it might be desirable for any decision maker to completely explain and rationalize his decision to the party before actually reaching a decision, giving the party an opportunity to rebut on each particular point. Yet, traditionally parties are limited in this regard by the somewhat inadequate opportunities available in connection with a petition for rehearing.

The Model Act,[38] as noted, affects the separation of function problem solely by prohibiting consultation with agency employees as to questions of fact except upon notice and opportunity of all parties to participate. The practical effect of this provision will be to deny the agency the experience of its staff in reaching decisions in contested cases.[39] On the other hand it does not preclude the decision from being made by agency members or employees who have participated in the investigation or prosecution of the case. The Kentucky Proposed Act[40] would serve as a better model since it precludes only consultation with persons engaged in the investigation or prosecution of the case although it should be broadened so as to preclude such consultation by all persons participating in the decision-making process and not merely by persons rendering the decision. In order to obtain internal separation of functions in some of the smaller agencies in Wyoming it may be necessary to make available to such agencies outside assistance from the Office of the Attorney-General or some other administrative office for the purpose of conducting investigations and presenting the agency's case.[41]

The Model Act with respect to contested cases almost makes a fetish of the requirement that with respect to questions of fact the decision must be based exclusively on the record. As to adjudicative facts no one would

38. § 13.
39. Section 13 of the Model Act does permit this agency to use its (as distinguished from the staff's) "experience, technical competence and specialized knowledge . . . in the evaluation of the evidence."
40. KENTUCKY LEGISLATIVE RESEARCH COMMISSION, *op. cit. supra* note 8 at 87.
41. See recommendation in this regard in Andrew's NOTE *infra* 273.

argue the proposition that the determination should be based on the record.[42] If, for example, the question is whether A was in New York City on a specified date, the Agency should confine itself to the record and should not consider a report of a member of the staff setting forth the result of his independent investigation which is not reflected by the record. But as to legislative facts, that is general policy considerations with a factual basis, the agency should not be so limited. If the question, for example, is whether a basing point pricing system tends to limit competition, the agency must reach this conclusion based on all of its knowledge and experience (which includes the knowledge and experience of its staff) and not merely the record testimony. Further, even as to adjudicative facts the agency should not be denied the assistance of its staff in sifting and analyzing the record and reducing its decision to a written opinion. All of the foregoing is subject to the qualifications previously noticed with respect to separation of functions.

The Model Act approach is to first require that the agency consider (but not necessarily actually read) the entire record or that portion cited by the parties. It also encourages a majority of the persons rendering the decision to read the record requiring a proposed decision routine in those instances in which a majority has not read the record.[43] Findings of fact, must be based exclusively on the evidence and matters officially noticed;[44] it is not entirely clear whether this has reference to only adjudicative facts or whether it also includes legislative facts. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.[45] Presumably, however, agency member can utilize only their personal assistants for this purpose as agency members in the absence of notice and opportunity to participate to the parties cannot consult with staff personnel (other than their personal assistants) as to a question of fact.[46] Agency members may, however, consult with staff members as to questions of law but all staff memoranda submitted in connection with the agencies consideration of the case becomes a part of the record.[46a] Presumably, such staff memoranda will be available for use primarily in connection with judicial review and petitions for rehearing as there are no provisions specifying at what point such memoranda become part of the record and accessible to the parties.[47]

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42. Apparently the Model Act intends to make this distinction since the official comment relating to Section 13 reads as follows: "This section is intended to preclude *litigious facts* [emphasis supplied] reaching the deciding minds without getting into the record. . . ." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISIONERS ON UNIFORM STATE LAWS 219 (1961). The author's contention is that this could be readily accomplished without imposing the unfortunate restrictions of Section 13 on consultations.

43. Model Act § 11.
44. Model Act § 9(g).
45. Model Act§ 10(4).
46. Model Act § 13.
46a. Model Act § 9(e) (7).
47. The official comments to the Model Act do state as follows: ". . . In some circumstances it may prove desirable to go even further and prescribe that such staff memoranda shall be submitted for the record in time to permit adverse parties

ADJUDICATION—EVIDENCE, OFFICIAL NOTICE, THE RECORD AND FINDINGS

The exclusionary rules of evidence have not generally been applied in administrative proceedings. There are some references in Wyoming decisions relating to administrative agencies to "competent evidence" which suggest that the exclusionary rules may be applicable although such construction probably is not warranted in the context of the reference and in the light of other Wyoming decisions. Wyoming appears to have followed the "residium rule" which does require that decisions be supported by a residium of competent evidence, although the cases involve Workmen's Compensation which in Wyoming is adjudicated in the Districts Courts rather than by an administrative agency. These matters are discussed in Note, *Evidence and Findings In Administrative Agencies* by James Castberg. The Model Act adopts for contested cases the rules of evidence as applied in non-jury civil cases with a proviso that when facts are not otherwise provable, evidence may be admitted in contravention of these rules provided it is the type of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs. The approach of the federal APA seems preferable to the author since it admits all relevant evidence which is not repetitious, merely requiring that the decision be based on reliable, probative and substantial evidence. The exclusionary rules of evidence were designed to protect litigants against juries which of necessity have limited experience in evaluating evidence.

Most authorities on the law of evidence regard many exclusionary rules as in need of drastic revision[48] and there is no general agreement as to what the non-jury rules are or that they even exist.[49] The Model Act provision seems tailored to produce interminable objections and argument as to what are the non-jury rules of evidence and over extraneous matters (e.g., is a fact otherwise provable) rather than concentrating on the relevancy, reliability and weight of the evidence. Any statutory enactment in this area should also put to rest the residium rule with respect to administrative adjudications. The Model Act[50] also restricts official notice to generally recognized technical or scientific facts within the agency's specialized knowledge; a preferable provision in the author's opinion would be to permit official notice of any fact within the agencies' files or records or specialized knowledge provided the parties are afforded an opportunity to contest the facts so noticed.

The record developed in administrative adjudication is extremely important for it ordinarily determines the basis for the decision and controls in part the nature and extent of judicial review. In the event

to offer evidence in reply. . . ." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 214 (1961). Since Section 12 precludes *ex parte* consultation as to questions of fact "unless required for the disposition of *ex parte* matters authorized by law . . ." presumbaly the memoranda referred to would have to be those relating to the preparation of the case, the initiation of the case, legislative facts as distinguished from adjudicative facts or questions of law.

48. DAVIS, *op. cit. supra* note 1 at § 14.10.
49. *Id.* at § 14.04.
50. § 10(4).

all the members of the agency have not heard the case, it is essential that the proceedings be reported both for purposes of judicial review and in order to permit the entire agency to participate in the decision. A substantial number of the better staffed Wyoming agencies report proceedings as a matter of course.[51] The Model Act,[52] although it provides that the record shall include "evidence received or considered," does not expressly provide as it should, in the author's opinion, that all contested cases be reported. The Model Act provision relating to transcription of the record should be enlarged so as to require such transcription be furnished upon request of any party upon payment of reasonable costs as established by the agency.

Objection may be made to the reporting requirement because of the costs involved. The suggested provision, it should be noted, would merely require that the proceeding be reported rather than stenographically reported as would be required under the Kentucky Proposed Act. The purpose is to permit magnetic tape or other machine recording[53] and hence the cost would not exceed the cost of purchasing or leasing such a machine and accessories. While stenographic reporting is undoubtedly preferable and will undoubtedly continue to be used by agencies with available personnel, the recommended provision will at least assure some semblance of a record in all contested cases. It should also be noted that the suggested provision is limited to administrative adjudication; other requirements are more appropriate to rule-making[54] and to executive action. Executive action is usually reflected by Minutes relating to the proceeding and it does not appear appropriate to legislate requirements in this area.

Section 12 of the Model Act requires that any final decision in a contested case shall set forth findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, must be accompained by a concise and explicit statement of the underlying facts supporting the findings. These provisions should not only help dispel impressions of arbitrary action but in some instances at least should limit arbitrary action and facilitate judicial review. The Model Act also provides that if proposed findings of fact are submitted by the parties in accordance with the agencies rules the decision must include a ruling upon each proposed finding. This provision in the author's opinion serves no useful function and probably serves primarily to clutter written opinions with extraneous material and meaningless boiler plate. Section 12 of the Model Act also requires that notice of the final decision in contested cases be given to the parties and that a copy be mailed to each party requesting

51. Among the agencies responding to the Questionnaire who have adequate procedures for reporting hearings and making a transcript available are the following: Board of Equalization, Public Service Commission, Board of Land Commissioners, Wyoming Oil and Gas Conservation Commission, Employment Security Commission and Board of Agriculture.
52. § 9(e) (2).
53. The Employment Security Commission presently employs machine recording. Reply to Questionnaire.
54. See Abeyta NOTE, *infra* p. 255.

same. Further provision should be made requiring that each agency maintain an appropriately indexed public file of all of its decisions in contested cases and as under the Kentucky Proposed Act[55] for publication of a summary of all such decisions in the monthly Bulletin distributed in connection with the publication of proposed rules.[56]

JUDICIAL REVIEW

A number of problems relating to judicial review of administrative action have given rise to considerable controversy on the federal level but have not been and are not likely to be serious problems in the State of Wyoming. These include problems relating to primary jurisdiction, exhaustion of administration remedies and standing to challenge administrative action. The first two topics are discussed in Note,[57] *Primary Jurisdiction and Exhaustion of Administrative Remedies* written by Gene Duncan and the latter problem is discussed in Note,[58] *Standing To Challenge Administrative Action* written by Jerry Yaap. As observed in Mr. Yaap's Note, the Wyoming Supreme Court has been liberal in permitting any person with a significant interest in fact to challenge administrative action. The principal objective in drafting legislation for Wyoming should be to avoid statutory language that might restrict this liberal attitude.

There are a number of problems relating to judicial review that undoubtedly will continue to reach and trouble the Wyoming Supreme Court. These problems would include the following:

1. What administrative action is reviewable?
2. What is the proper procedure for obtaining review?
3. What are the mechanics of review?
4. What is the review based upon?
5. What is the scope of review?
6. What are the remedies available upon review?

The first four problems are discussed in Note,[59] *Reviewability of Administrative Action in Wyoming* written by Richard Anderson and the other problems are discussed in the Note,[60] *Scope of Judicial Review* written by Bobbie Jean Baker. The author has attempted to synthesize these materials and his own viewpoint and recommendations below:

1. *What administrative action is reviewable?*

Many statutes relating to administrative agencies and action expressly provide that specified types of administrative decisions are subject to judicial review. Generally, these review provisions relate to administrative adjudication (contested cases) infrequently to rule making and occasionally

55. KENTUCKY LEGISLATIVE RESEARCH COMMISSION, *op. cit. supra* note 8 at 85.
56. See *supra* n. 14.
57. *Infra* p. 290.
58. *Infra* p. 396.
59. *Infra* p. 308.
60. *Infra* p. 326.

to executive action. However, as shown in Appendix A to Mr. Anderson's Note,[61] a number of statutes relating to agencies with powers of adjudication do not include review provisions. On the federal level there appears to be a well developed doctrine that unless a statute affirmatively precludes judicial review there is a common law right of judicial review of administrative action.[62] The decisions on the state level are inconclusive,[63] but the Wyoming Supreme Court by dictum recently suggested that there probably is an inherent right to limited judicial review at least as to certain types of administrative action.[64] The Model Act expressly provides that all contested cases are reviewable by the courts[65] and that the validity of all administrative rules and regulations may be determined in an action for a declaratory judgment.[66] The Wyoming Supreme Court has recently permitted a challenge to administrative regulations to be made in a declaratory judgment action.[67] The Model Act contains no provision for reviewing executive action, that is, administrative action that can neither be classified as adjudication or rule making. Yet, this is an area in which judicial review may be badly needed since there are typically no procedural safeguards within the agency to prevent arbitrary action. The difficult problem in this area is distinguishing between action in which the executive's discretion shall be absolute (e.g., pardon and parole and commutation of sentences) and in which the executive exercises discretion which can be reviewed for abuse. The author would recommend a provision to the effect that all administrative action is reviewable unless such review is precluded by "law."[68] The reference to "law" as distinguished from statute is to preclude review in those areas in which traditionally the executive has had absolute discretion including discretion to be arbitrary.

2. *What is the proper procedure for obtaining review?*

The appropriate procedure with respect to judicial review of administrative action is sometimes prescribed by statute particularly with respect to administrative adjudication. In the absence of statute there are a number of possibilities as discussed in Mr. Anderson's Note, *infra*. On the federal level, the injunction has frequently served as a utility remedy in those instances in which the statute prescribes no specific procedure.[69] However, the effective use of the injunction as a remedy is somewhat limited by the sovereign immunity doctrine which is discussed in Note, *Sovereign Immunity—A Still Potent Concept In Wyoming* by Myron Saltmarsh.[70]

61. *Infra* p. 319.
62. See Anderson NOTE, infra p. 308. For a dissenting view on this point see Frankfurter's dissentioning opinion in Stark v. Wickard, 321 U.S. 288 (1944).
63. See Anderson's NOTE, infra p. 308, notes 3 and 4.
64. Brinager v. Clark, 371 P.2d 62, 66 (Wyo. 1962). See also Colorado Interstate Gas Co. v. Uinta Development Co., 364 P.2d 655, 65 (Wyo. 1961) and Anderson NOTE, *supra* p. 308, at note 5a.
65. Model Act § 15 (a).
66. Model Act § 7.
67. Brinegar v. Clark, 371 P.2d 62 (Wyo. 1962).
68. *Cf.*, Chicago v. So. Airlines v. Waterman Steamship Corporation, 333 U.S. 103 (1948).
69. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04 (1958).
70. *Infra* p. 304.

The Wyoming Supreme Court has recently granted mandamus on the grounds that the administrative officer had a "clear legal duty"[71] in a situation in which to this author there appears to have been a disputed issue of fact and a relatively complex question of law. The liberal allowance of mandamus could effectively provide for both review of the area characterized as executive action and for affirmative relief where needed. However, there is a real danger in the multiple system of procedures for review of choosing the wrong procedure and having to begin over after litigating the case through the Supreme Court.[72] The Model Act, as previously noted, provides one procedure for contested cases and another procedure for reviewing rules. The author would recommend (following Professor Davis[73]) a single procedure (perhaps styled "Petition for Review") for the review of all reviewable administrative action. Consideration should also be given to providing that jurisdiction in all appeals from administration action be placed, as would be the case under the Kentucky Proposed Act, in a single designated District Court.

3. *What are the mechanics of review?*

Again many statutes in Wyoming specifically prescribe the time periods, papers, etc., governing appeals from administrative agencies to the courts.[74] In the absence of trial de novo or statutory provision, Rules 73 through 75 of the Rules of Civil Procedure appear to govern such mechanics although adaptation is required in order to apply these Rules to appeals from administrative agencies.[75] The Model Act prescribes the mechanics for review in contested cases[76] and these provisions should be extended with appropriate adaptation to all judicial review of administrative action. Since the Model Act is tailored to the precise situation of review of administrative action it is better adapted to this purpose than Rules 73 through 75 which are designed primarily to govern appellate procedure from the District Court to the Supreme Court.

4. *What is the review based upon?*

Some Wyoming statutes expressly provide that review is to be based exclusively upon the record developed by the administrative agency.[77] The Wyoming Supreme Court has held that under statutes providing for appeal from the agency to the district court as distinguished from trial de novo review is to be based on the record developed by the agency except if the record is incomplete it may be supplemented by competent evidence which would show actual occurrences before the agency.[78] The Supreme

71. Board of County Commissioners of Fremont County v. State, 369 P.2d 537 (Wyo. 1962).
72. See Anderson NOTE, *infra* p. 310.
73. DAVIS, ADMINISTRATIVE LAW TREATISE § 24.06 (1958).
74. See Anderson NOTE, *infra* p. 319.
75. The Supreme Court has said that these Rules "perhaps" govern certain types of judicial review of administrative action. Hoffmeister v. McIntosh, 361 P.2d 678 (Wyo. 1961).
76. Model Act § 15 (b) (c) (d).
77. See, e.g., the statutory provision relating to appeals from decisions of the Public Service Commissions, WYO. STAT. § 37-45 (1957).
78. Hoffmeister v. McIntosh, 364 P.2d 823 (Wyo. 1961).

Court has held that with respect to statutes providing for a trial de novo in the District Court, the District Court may take additional evidence but only for the purpose of determining whether the decision of the administrative agency is supported by substantial evidence.[79] Justice Harnsburger's concurring opinion[80] would apparently limit such evidence to showing occurrences before the agency (including testimony before the agency). Further, even in a trial de novo proceeding the implication of the Supreme Court decisions appears to be that such supplemental evidence can be taken by the Court only in the event the record developed by the administrative agency is incomplete.[81] The Model Act[82] provides in contested cases for review based upon the record developed before the agency although the Court may order the agency to take additional evidence if upon application of a party it is shown that additional evidence is material and that there were good reasons for failure to present it to the agency. The Model Act[83] also permits the Court to take evidence as to any alleged irregularity in proceedings before the agency not shown by the record.

The Model Act would not only clarify the law in this area but would represent an improvement in the existing situation. Since, as we note below, trial de novo in Wyoming does not involve substitution of judicial judgment as to questions of fact, it is anomalous for a Court to determine whether an administrative decision is based on "substantial evidence" when that evidence was not even before the agency. Further, the existing situation permits Counsel to rectify his inadequate handling of the case before the administrative agency by supplementary testimony before the Court.

79. Rayburne v. Queen, 326 P.2d 1108 (Wyo. 1958); J. Ray McDermott & Co. v. Hudson, 348 P.2d 73 (Wyo. 1960).
80. Rayburne v. Queen, 326 P.2d 1108, 1112 (Wyo. 1958).
81. The Court has referred to *either* the administrative record *or* the record developed by the District Court as appropriate and has referred to the administrative record as "one of the bases" for judgment, but all in the context of an inadequate administrative record and accompanied by critical remarks relating to the failure of the agency to develop an appropriate record. See Rayburne v. Queen, 326 P.2d 1108, 1109 (Wyo. 1958); J. Ray McDermott & Co. v. Hudson, 348 P.2d 73, 76 (Wyo. 1960). *Cf., Application of Hagood,* 356 P.2d 135, 139 (Wyo. 1960), in which it is suggested that the Court is not limited to the administrative record but may conduct an independent inquiry to determine whether the decision of the Board was illegal, fraudulent or an abuse of discretion. Since as is observed below the Wyoming Supreme Court sometimes uses the "substantial evidence" test in reference to policy questions, it may be that the Court has in mind only the taking of additional testimony for the purpose of determining legislative facts as distinguished from adjudicative facts. Thus, in the first McDermott case (discussed at note 79 *supra*) the Supreme Court held it was error for the District Court to exclude additional testimony and in the second McDermott case (J. Ray McDermott Co. v. Hudson, 370 P.2d 364, 366 (Wyo. 1952) arising out of the same factual situation the Court observed, "There is no dispute in the facts . . ." and concludes (*Id.* at 370) that there is "no substantial evidence to support . . ." the decision of the agency. What the Court appears to be saying is that in light of the facts (which are legislative rather than adjudicative in this instance), there is no reasonable basis for the manner in which the agency applied its statutory authority and that the District Court can take evidence to determine legislative facts. Compare the approach of the federal courts with respect to mixed questions of law and fact or questions of policy requiring that the administrative decision be sustained if it has "a rational basis and warrant in the record." See Baker NOTE, *infra* p. 326.
82. § 15 (e).
83. § 15 (f).

Since it is the judgment of the agency that is being exercised, that judgment should be evaluated on the basis of the record before the agency and the parties should be compelled to develop their record before the agency. The record on review should not, however, in the author's opinion, include staff memoranda as is presently provided in the Model Act.[84]

In view of the fact that some administrative agencies in the past have failed to develop an appropriate record in contested cases (and may not even have the subpoena power sometimes necessary for this purpose) the willingness of the Supreme Court to permit the administrative record to be supplemented is understandable. One of the advantages to a Model Act approach rather than an ad hoc approach to problems arising in the administrative law area, is the fact that it permits a comprehensive and correlated approach to related problems. If the recommendations made earlier in this Article are adopted, the parties will have the techniques available to both develop and preserve an appropriate record and the agency will have rendered a written decision setting forth findings of fact and conclusions of law. However, again it should be noted that this discussion relates to contested cases (adjudication) and not to other types of administrative action. It is inappropriate in a contested case to engage in the presumption of official regularity;[85] decisions required by statute to be made after a hearing should be supported by the administrative record. On the other hand, in the area characterized as executive action, there will be no record in the ordinary sense of that term and the record will have to be developed by the Court. It is also probably appropriate in this area to engage in the presumption of official regularity and to require the party challenging the administrative action to carry the burden of showing an abuse of discretion.[86]

5. *What is the scope of judicial review?*

The problem in this area has been to reconcile the viewpoints expressed in the quotations discussed below:

Justice Frankfurter in sustaining a grain rate structure established by the Interstate Commerce Commission: "We [the Court] certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commissioner."[87]

Justice Douglas dissenting has eloquently stated the case for judicial review strangely enough not in a civil liberties case but in a government contract case:[88] "Law has reached its finest moment when it has freed man

84. See discussion *supra* p. 204.
85. Justice Harnsberger in a concurring opinion has suggested that the presumption would apply to administrative adjudication. Rayburne v. Queen, 326 P.2d 1108, 1114 (Wyo. 1958). However, in other instances the Supreme Court has more appropriately found a lack of substantial evidence in administrative adjudication because of the absence of an appropriate record. Lake DeSmet Reservoir Co. v. Kaufman, 292 P.2d 483 (Wyo. 1956).
86. But *cf.*, School District No. 9 v. District Boundary Board, 351 P.2d 106 (Wyo. 1960). See also DAVIS, ADMINISTRATIVE LAW TREATISE § 11.06 (1958).
87. Board of Trade v. United States, 314 U.S. 534, 548 (1941).
88. United States v. Wunderlich, 342 U.S. 98, 101 (1951).

from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. . . ."

This problem was recently posed by Justice Parker of the Wyoming Supreme Court paraphrasing the holding in an earlier decision.[89] ". . . the courts in the absence of legislative provision to the contrary cannot substitute their judgment for that of the persons and boards specifically provided for that purpose by the legislative department of our government. However . . . such a board will not be permitted to act in an arbitrary, capricious or fraudulent manner and . . . courts should restrain such administrative agencies from becoming despotic."

By and large the Wyoming Supreme Court has paid considerable deference to administrative judgment. Even with respect to statutes that provide for de novo review by the process of judicial restraint the Court has limited the scope of review to the point where there is no significant difference between "de novo review" and "appeals" from an administrative decision except,[90] as noted above, as to what constitutes the record. In the event the foregoing recommendations as to "the record" are adopted the de novo provisions should be repealed as they add nothing to the scope of review in the light of the Court's prior decisions.

As a general proposition, it may be stated that under our Supreme Court decisions, the Court does not substitute judgment on questions of fact, mixed questions of fact and law, or on questions of policy but on questions of fact applies the so-called substantial evidence rule and on questions of mixed fact and law applies what is in effect the rational basis test. In the area of questions of law as such, the court does feel free to substitute judgment. In terms of mixed questions of fact and law, that is, situations involving the application of a broad statutory standard to a particular set of facts, and on questions of policy there has been some confusion of labels as the Court has sometimes talked as if it was applying the substantial evidence rule which in the usual connotation of that term is generally limited to questions of adjudicative facts and has sometimes talked about abuse of discretion, arbitrary and capricious action. It is believed that in this area these tests all add up to the rational basis test; that is, if there is any reasonable basis for the administrative decision on a mixed question of fact and law or question of policy the administrator will be sustained; whereas if the court can find no reasonable basis the administrator will not be sustained.[91] In terms of application of the substantial evidence rule, our Court, influenced somewhat by concepts pertaining to judicial review in appellate court actions, has talked about the necessity of viewing the case only as if the evidence most favorable to the

89. J. Ray McDermott & Co. v. Hudson, 348 P.2d 73, 75-76 (Wyo. 1960). The earlier case referred to is Bunten v. Rock Springs Grazing Association, 215 Pac. 244 (Wyo. 1923).
90. See Baker NOTE, *infra* p. 326.
91. See Baker NOTE, *infra* p. 326. See also discussion at note 81.

decision should be considered in isolation.[92] This approach on the federal level was the subject of considerable criticism that led to the adoption of the requirement that the administrative decision be based on substantial evidence as determined from the entire record and the reviewing court must take into consideration not only the favorable evidence but also any other evidence in the record that detracts therefrom.[93] It is recommended that any proposed statute incorporate this requirement as does the Model Act which provides for review of decisions in the light of "the whole record."[94] Futher, the Model Act[95] now provides for a "clearly erroneous" test as distinguished from a substantial evidence test with respect to questions of fact; although the difference in formula can only amount to a difference in degree, it is apparent that under the clearly erroneous test the court in evaluating the evidence has somewhat more authority (without the right to substitute judgment) to reverse a decision of an administrative agency on a factual question. The author views this provision with favor for it tends to offset the inevitable shortcomings of any system of internal separation.

6. *What are the remedies available upon review?*

Courts and the Model Act[96] have assumed that the court should not substitute judgment for that of the agency as to the weight of the evidence or on questions of policy. Accordingly, courts should ordinarily either affirm or remand the administrative decision in a contested case. Obviously in the area of rule making the most a court can do is to affirm or deny the validity of a Rule; the Court cannot adopt rules for the agency. However, with respect to contested cases and executive action it may be appropriate in certain instances for the Court to reverse or modify the administrative agency and to finally dispose of the case provided such disposition does not require the Court to exercise a discretion vested in the agency. The Model Act[97] specifically permits Courts to grant such relief upon review in contested cases, but fails to expressly provide for affirmative relief against an agency in those situations in which such relief may be appropriate.

MISCELLANY

The study to date has been largely concerned with agencies on a state level. There are some local and county agencies that rather clearly should be subject to comparable procedural requirements including the Boards of Zoning Adjustment, Police and Fire Departments Civil Service Commissions. Additional study may suggest subjecting other local and county agencies to the requirements of the proposed Act. In this regard, consideration should be given as to the possible application of the proposed act to certain functions of the County Commissioners and other local and county executive officials. However, more study and factual

92. See Baker NOTE, *infra* p. 326.
93. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
94. Model Act § 15 (9) (5).
95. Model Act § 15 (g) (5).
96. Model Act § 15 (g).
97. *Ibid.*

data is necessary in this area although the author would, based on present information, recommend that the judicial review provisions of the proposed Act apply to local and county administrative action.

Some of the problems pertaining to judicial review could be handled by the adoption of Rules by the Supreme Court. The Court has superintending powers under the Wyoming Constitution over "inferior tribunals."[98] It is not clear whether "inferior tribunals" would include administrative agencies acting in a quasi-judicial capacity although it is doubtful to this author whether such a broad construction would be warranted and no one has suggested that the Court attempt to prescribe procedures before the agencies. The Wyoming statutes do, however, expressly authorize the Supreme Court to adopt Rules to govern review from the decision of any ". . . board, officer, or commission when such review is authorized by law."[99] Under this provision, the Supreme Court probably could by Rule prescribe (1) a procedure for review, (2) the mechanics for review and (3) the record upon review. Indeed, Rules 72 through 75 of the Rules of Civil Procedure may do this in part already although somewhat inadequately.

The author is Reporter to a subcommittee of the Advisory Committee to the Supreme Court on Rules which Committee is investigating the possible adoption of Rules relating to appeals from Administrative Agencies. The author is also Chairman of a Committee of the Wyoming Bar Association with the same Committee membership which is considering the Model Act and state administrative procedures generally. However, the viewpoints expressed herein are solely those of the author and have not been presented to or considered as yet by the Committees referred to. One purpose of this article is to furnish the Committees a basis on which these Committees might consider appropriate recommendations and it is entirely possible that the committees will have substantially revised recommendations to make after they have considered these matters and that this author will join in such revisions. The author hopes to prepare and widely distribute for discussion in the immediate future a proposed statute embracing the recommendations and viewpoints expressed in this Article. The author wishes to acknowledge the assistance of Professors John O. Rames and Roy Stoddard of the University of Wyoming College of Law in the editing and preparation of this symposium issue. The author also wishes to thank the many persons in various administrative agencies who responded to the questionnaire, all of which responses have been and will continue to be of considerable assistance. The student notes do not take into consideration the Public Service Commission, Board of Land Commissioners or Board of Equalization Questionnaries as replies to these Questionnaries were received after the Notes had been sent to the printer.

98. WYO. CONST. Art. 5, § 2.
99. WYO. STAT. § 5-19 (1957).