ADMINISTRATIVE EFFICIENCY AND RESPONSIBILITY UNDER JURIDICAL DEMOCRACY: THE REGULATION FILING PROCESS IN KA AS*

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I. Introduction

Since its first publication in 1969, Theodore J. Lowi's The End of Liberalism has had significant impact on the study of American government.[1] One of the more intriguing (yet underexamined) contributions of the work was Lowi's "analytic" advocacy[2] of a five-part program for reform.

Characterizing his program as "Modest Proposals for Radical Reform" (1979, p. 208),[3] Lowi prescribes a "new public philosophy" which he terms juridical democracy. In delineating this alternative to (the now dominant) "interest group liberalism," he asserts that its adoption would entail the "rule of law operating in institutions." Juridical democracy would stress form and formality in government activities while simultaneously persuing "democratic notions of citizenship and equal treatment" (1979, pp. 298-299). Thus, by combining legal integrity with democratic norms, Lowi hoped juridical democracy would overcome the systemic pathologies he associated with the "second republic" that was built on interest group liberalism.

According to Lowi, there are five proposals (constituting "a few planks in the platform of an incipient movement") which, if adopted, would be "enormously effective" in bringing about the needed changes. These proposals were, in Lowi's terms, "deceptively simple"; yet, to the extent they would mean significant changes, "each would be politically difficult to accomplish" (1979, p. 299). In order of their presentation in the second edition, these proposals include:

(1) judicial revival of the Schechter decision rule regarding the delegation of legislative authority;

(2) establishment of a presidential decision rule obligating the chief executive "to veto a congressional enactment whenever

Congress has not been clear enough about what should be executed, and how";

(3) the reliance on administrative formality and rule-making in those instances when authority and discretion is lodged in the bureaucracy;

(4) the codification of law so that government policies dealing with a particular subject are systematized, digested and simplified; and

(5) the institutionalization of "sunset laws" in what Lowi originally called "tenure-of-statutes" acts (1979, pp. 300-310).[4]

There are a number of problems with Lowi's reform program, not the least of which is its relevance to the symptoms rather than the causes of interest group liberalism as he describes it. In fact, those five "reforms" may be better utilized as indicators of juridicaldemocracy (see below). To his credit, Lowi does (by implication) link these proposals to the adoption of juridical democracy as the new public philosophy. Nevertheless, the prescriptions never explicitly suggest that the shift in public philosophy must preceed the reforms if they are to succeed. Thus (by implication), one might assume that Lowi believes the five reform proposals can bring about the movement toward a "third republic." Again, relying on Lowi's own analysis, this does not seem reasonable. Any reform program based on legal formalism (1) is likely to fail since opposition is going to be too strong in a system where interest group liberalism prevails; or (2) is likely to involve merely symbolic or empty gestures since formalism without a radical change in public philosophy is no change at all.[5] In short, it is difficult to come away from reading Lowi's work with a strong positive attitude about the possibilities for any substantial changes in the current political system.

There are, however, some optimistic signs. For example, a survey of the events of the last decade indicates that each of the proposals advocated by Lowi has made it to national policy agenda in one form or another, and that some have been taken quite seriously. The Schechter rule was recently cited in a majority decision of the U.S. Supreme Court, and while that particular decision did not result in a serious revival of that precedent, its use may be regarded by some as a sign of things to come.[6] We have yet to elect a President who uses the veto power of the office to counteract congressional ambiguity and hyper-delegation of authority, but we have had a serious candidate for the office who advocated such a stand (Eugene McCarthy) and some would say that Reagan is (at least philosophically) prone to take such actions.[7] And if one listens to discussions among legal scholars and practitioners, one hears increasing mention of the need for more administrative rule-making (see Freedman, 1978) and codification of the law (especially criminal law, e.g., the controversial "S.1" bill introduced before the 96th Congress). Finally, sunset laws (although formulated and implemented primarily at the state level) have been formally proposed (and, at one time, passed[8]) in Congress and sunset-like provisions have been attached to a variety of major laws. Taking all this activity into account, the prospects for reforms similar to Lowi's proposals are not as dismal as either Lowi or his more cynical followers might believe.

What if the optimists are right? What if juridical democarcy became the dominant public philosophy tomorrow and Lowi's proposals were adopted? What would be the political, policy and administrative implications? Would "justice" become more salient in policymaking, or would the incrementalist particularism of interest group liberalism continue to dominate? Would law begin to prevail over mere policy? Would (as Lowi predicts, 1979, p. 304) administrators become more "responsible" and "efficient"? These are the questions that must be addressed if we are to continue to take Lowi's prescriptions seriously. In this paper we intend to examine the administrative implications of reforms in the administrative regulation writing process in Kansas, a state where standards similar to rule-of-law norms advocated by Lowi seem to exist at the moment.

II. Kansas As a Juridical Democarcy

Fundamental to this study is the contention that Kansas' political system qualifies as an empirical manifestation of juridical democracy. Lowi's "reform proposals" imply at least five indicators for determining whether a government reflects a rule-of-law system. Our measure of the rule-of-law system in Kansas is based on the degree to which that state's government lives up to those indicators. Underlying each measure is the standard that there exists a predictable system of laws and regulations with little room for discretionary administrative activity in the interpretation or enforcement of the law.

Lowi recognizes that state governments are generally closer to the rule-of-law than the federal government (1979:306). However, we have found that Kansas is not only one of the more traditional rule-of-law states, but also it has recently instituted several legal and administrative reforms (e.g., sunset reviews) that brings it even closer to the Lowi ideal of juridical democracy. Just how close becomes more evident as we examine each of his criteria.

The first criterion of juridical democarcy is rooted in the judicial review of legislative grants of authority. Lowi believes that many of the agencies created by legislatures have been provided with too much discretion for implementing their mandates, and that the courts should be more restrictive in allowing such excessive grants of power. Excessive grants of power may derive from either an unconstitutional delegation of authority or statutory ambiguity. Lowi argues that federal legislation should be invalidated by the courts on either of these grounds. In his arguments he relies primarily on the Supreme Court decision in Schechter.

There is case evidence that Kansas courts have historically followed rules similar to that of Schechter. In Kansas v. Crawford (1919) the Kansas Supreme Court invalidated a statute which provided that electrical wiring codes should be in accordance with a national electric code set semiannually by the National Board of Underwriters, a private association. The Court held that the legislature must outline the code in the statute and not simply provide for the adoption of a privately set code. Nearly half a century later, in Quality Oil Co. v. du Pont and Co. (1958), the Court invalidated a statute allowing producers of trade-marked products to set minimum prices for their goods through contractual agreements with distributors in the state. The Court held this unconstitutional because it gave "legislative sanction to the trade-mark owner to fix minimum resale prices"; the power to fix rates for such transactions, the Court held, is a legislative function which cannot be delegated under provisions of Kansas' Constitution.

In State ex rel v. Mermis (1961), the Court invalidated a statute allowing the head of Kansas' Alcoholic Beverage Control agency to decide whether a minimum price should be set on intoxicating beverages. Such a decision, according to the Court, was the responsibility of the legislature and should not be delegated to anyone else--not even a government agency. It likened setting a minimum price to price-fixing and as such a function restricted to the legislature itself.

Finally, in a more recent case (Gumbhir v. Kansas Board of Pharmacy, 1980) the Court invalidated a statutory provision that required an applicant for a pharmacist's license to be a graduate of an institution accredited by the American Council on Pharmaceutical Education (ACOPE). The Court held that deference to a non-governmental agency such as ACOPE to make decisions regarding standards for licensure was arbitrary and in violation of the state constitution. In short, the Kansas judiciary has been and remains rather restrictive in its views of delegation of legislative authority.

A second criterion for juridical democracy is the chief executive's willingness to exercise its right to veto legislation for constitutional as well as political reasons. In Lowi's Second Republic, presidential action is primarily political and questions of constitutionality are deferred to the courts. Under juridical democracy "presidents have every right to base their decisions on their own interpretation of constitutional obligations" (Lowi 1979, p. 301). Using this indicator, Kansas meausres well on such a criterion. This is evident by examining some of the vetos issued by the present governor (a Democrat) and his Republican predecessor.

In 1978, Kansas' Governor Bennett issued one statement which seems to contradict this criterion. When faced with an extremely controversial bill (SB952) which excluded restaurants from the state's long-standing "open saloon" prohibition, Bennett declared that "an issue of constitutionality does in fact exist but the proper arena for its determination is the court and not the governor's office...." However, he added a comment which reflects the more common standard for gubernatorial vetos in Kansas: a veto is appropriate when the "legal defect" in the legislation is clear. Thus, Bennett had no problems in using constitutional grounds (the "checks and balances" system) for justifying a 1978 veto of a one house "legislative veto" system (SB912). In a similar vein, he felt a bill (SP982) which gave the legislature's Joint Committee on Administrative Rules and Regulations (JCARR) the power to suspend temporary rules and regulations during the interim between sessions of the legislature was also a violation of constitutional roles.

Kansas' current governor, John Carlin, has been even more active along these lines. Among the 11 vetoes he issued in 1979 Carlin used constitutional grounds on several. He had to reassert the arguments of his predecessor when new attempts were made to provide for a legislative veto and temporary regulation suspension power for the JCARR (SB13). He also vetoed SB496 which authorized the legislature's Post-Audit Division to review district court budgets. In that decision, Carlin relied on a clause of the Kansas Constitution which gave the state's Supreme Court "general administrative authority over all courts in the state."

In 1980 Carlin once again used the governor's veot power to stop the legislature from giving the JCARR power to suspend the force and effect of temporary regulations while the legislature was not in session (HB2803). Besides accusing the legislature of making an attempt to establish clear superiority over the executive, Carlin also based his reasoning on what he saw as a violation of separation of powers as well as an unconstitutional delegation of legislative power (i.e., the bill provided no "fixed standards" and policies for the JCARR).

Also in 1980 Carlin vetoed HB3122 which provided special tax treatment for farm machinery on a district by district basis. This bill, he said, violated the constitutional mandate that the legislature "provide for a uniform and equal rate of assessment and taxation." When faced with a bill authorizing garnishment of the State Treasury for unpaid torts claims (HB3205), Carlin issued a veto citing the constitutional provision that no funds "shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

The third criterion for indicating juridical democracy is what Lowi terms "administrative formality." By this he means "a requirement for early and frequent administrative rule-making" (Lowi 1979, p. 303). Administrative activities should be based on rules rather than individual case decisions. Where cases are considered, they should be handled under a general rule rather than merely on their situational merits. "The rule combination with the cases to which it applies can become a known factor in the everyday life of each client" (p. 303).

Since the statutory rule-making process in Kansas is the focus of this paper, we will not go into detial at this point on administrative formality except to note the stress placed on rule-making in the system. As in all states, there is some regulatory power which is traditionally built on a case-by-case foundation. This has been especially true in public utility regulation (e.g., Kansas Corporation Commission) where general rules have often been the exception. For most Kansas state agencies, however, rule-making is the norm and this is reflected in both the importance given to setting up a formal administrative rules and regulation filing process and the lack of a generic administrative procedures act which establishes special rules for adjudicatory procedures. Even the KCC has been under increasing state and federal pressure to move toward rule-making. More state laws giving authority to the KCC require that agency to establish and file general rules, while the federal National Energy Policy Acts of 1978 mandated that state utility commissions develop generic rate-making rules for dealing with requests from state energy producers.

The fourth criterion for juridical democarcy implied in Lowi's analysis is codification of law. "Codification," Lowi states, "is nothing more than the effort to systematize, digest, and simplify all of the provisions of law relating to a particular subject" (1979, p. 305). While noting the limited federal experience with codification, Lowi acknowledges the "much richer experience" of states in this area. He offers New York as an example of a government which "has had an active commission on law revision and codification at least since 1934" (1979, p. 306). Even more notable, for our purposes, is the fact that Kansas was a pioneer in using such an organization when it established the country's first Legislative Council in 1933. The Council was terminated in 1970 when a legislative coordinating council and the Legislative Research Department were created and the Kansas legislature began to rely on more joint interim study committees to analyze areas of legislative concern and to submit recommendations to the House and Senate. In addition, that 1970 act also gave the Revisor of Statutes responsibility for drafting laws, doing legal research, and giving legal advise to legislators and committees.

Kansas was also one of the first states to break with the general common law tradition that held that "statutes in derogation of the common law are to be strictly [i.e., narrowly] construed." In 1923 the legislature explicitly invalidated that rule (KSA 77-109) and mandated that such "derogating" statutes be "liberally construed to promote their objects...." This progressive stand has continued and is manifested in Kansas' leading role in the enactment of uniform state laws. By 1980 Kansas had enacted 34 uniform laws in conjunction with other states, including the Uniform Commercial Code, the Uniform Consumer Credit Code, etc. (Wilbert, 1980). These adoptions and the historical record indicate quite clearly the primacy of codification as a legal norm for Kansas' public officials.

The fifth and final criterion for a juridical democarcy is some mechanism to deal with the "immortality of administrative agencies.... The only direct antidote to immortality would appear to be an attack upon the Frankenstein legislation creating each monster, and in that spirit the final reform proposal is for a general statute setting a Jeffersonian limit of from five to ten years on the life of every enabling act." These "sunset" acts are rather specific indicators, but even here Kansas fits the juridical democracy mold.

Kansas' sunset legislation (KSA 74-7201 through 74-7244) were pased in 1978 and the six-year cycle of sunseting began July 1, 1979 with six regulatory licensing boards. After a review by the Legislative Division of Post Audit, the legislature allowed the State Athletic Commission and Mobile Home and Recreational Vehicle Commission to terminate while continuing two boards (Hearing Aid Fitters and Dispensers and Abstracter's) and suggesting major changes in the Baord of Examiners of Psychologists and Board of Social Work Examiners which were eventually made. In addition, a sunset audit was begun on financial regulatory agencies and various programs within the Stae's Department of Health and Environment. This level of activity has continued. In short, Kansas law makers have thus far taken sunset review quite seriously when compared to their peers in Alabama and other states where sunset review is a joke and agency "renewal" is a symbolic gesture.

Thus, on all five indicators derived from Lowi's discussion of juridical democracy, Kansas scores relatively high. While it can be argued that Kansas may not represent an ideal form of Lowi's model, this state does provide us with a reasonable empirical surrogate. Given this case, we can now turn to the question of what difference a juridical democracy might make for public administrators who operate under it.

III. The Regulation Filing Process in Kansas

The clearest manifestation of administrative formality in Kansas is a statutory process for issuing administrative rules and regulations which went into effect during the 1977 legislative session. The process was the product of the same reform movement that generated sunset laws and many similar proposals throughout the states during the mid-1970s. Underlying this particular reform was the anti-bureaucracy rhetoric and formalistic bias that characterizes Lowi's juridical democracy. By simultaneously standardizing the process and providing for formal functions to be performed by central executive officials and the legislature, these new regulation writing procedures attempt to create a situation where administrative efficiency and responsiveness would be enhanced. In intent as well as form this process fits well into Lowi's concept of juridical democracy.

Under the statutory requirements all rules and regulations which "implement or interpet legislation enforced or administred by...[a] state agency" or which "govern the organization or procedure of such state agency..." must follow the filing process set forth in K.S.A. 77-415 through 77-437. The statute states a number of interesting exclusions. For example, the filing requirements do not apply to many of the policies of the state's fish and game agency, public libraries, board of regents and highway department. Emergency procedures for state correctional institutions are excluded, as are "statistical plans" used by the state insurance commissioner to set rates, the curriculum of public educational institutions, and standards related to the exploration, production and sale of crude oil or natural gas. Even the rate-setting work of the state's public utility commission (Kansas Corporation Commission -- KCC) is excluded "except when a statute specifically requires the same to be fixed by a rule or regulation." In fact, all case decisions based on "disposition of a particular matter as applied to a specific set of facts" are excluded along with matters that relate to "the internal management or organization" of an agency "and does not affect private rights or interest...."

The statute distinguishes between <u>permanent</u> and <u>temporary</u> rules and regulations in setting up the filing process. Our attention in this paper will be focused on the process for "permanent" regulations. These must be filed by the end of the calendar year if they are to become effective on the succeeding May 1. No permanent regulations can be filed between December 31 and the following May 1. If it is necessary for a regulation to be implemented before May 1 or if "preservation of the public peace, health, safety or welfare necessitates putting a rule or regulation into effect prior to the time it could be put into effect" under normal procedures, then a "temporary" regulation can be sought from a state Rules and Regulations Board. That board is composed of the Attorney General, Secretary of State, Secretary of Administration, and the chairperson of the legislature's Joint Committee on Administrative Rules and Regulations or their designated representatives. A representative of the Revisor of Statutes Office serves as secretary for the board which meets monthly to consider requests. Any temporary regulation they approve can have affect only until the next April 30, and no action of that board affects the permanent regulation filing process.

Under the procedures for filing permanent regulations, every proposal must be submitted to the Secretary of Administration by November 1 "for approval of its organization, style, orthography and grammar" as set forth both in the statute and by the secretary. The approval of the Secretary of Administration's office is necessary before the regulation is passed on to the Attorney General's office for opinions regarding both the regulation's legality and "that the making of such [a] rule and regulation is within the authority conferred by law on the state agency...."

Until January 1982, the documents submitted to the Attorney General had to include information about the adopting agency's plans for public notice and hearing, including a list of who is to be explicitly contacted about the pending action. It was the Attorney General's task to review and approve that list. With the recent creation of an official state publication, the Kansas Register, that requirement has been changed. The state agency must provide "at least 15 days notice of its intended action" to both the Secretary of State (who publishes the Register) and the Revisor of Statutes. That notice must contain "a statement of the terms, on the substance of the proposed rules and regulations or a description of the subjects and issues involved" along with information about the time and place of public hearings. (These public hearings can be held no later than December 10th.) In addition, a "fiscal or financial impact statement" for the proposed rules and regulations must also be filed.

Any changes resulting from these hearings should, of course, be reviewed by the relevant officials. But having been approved by the Secretary of Administration and the Attorney General, and having met the requirements for public notice and hearing, the agency's "executive officer" or governing board completes the process by submitting a formal statement of adoption to the Revisor of Statutes' office along with the adopted regulation and relevant documentation. At this point the proposed rule or regulation is technically adopted.

The process, however, does not end there. The statute requires that the Revisor of Statutes submit all newly adopted permanent rules and regulations to the Joint Committee on Administrative Rules and Regulations for their review. The JCARR actually does two types of reviews--one for the permanent regulations filed by December 31 of the previous year and a 5-year review in which it asks individual agencies to submit their extant rules and regulations for examination by committee members.

Aided by staff supplied by the Legislative Research Department, the JCARR can take a range of actions (see next section), the most serious being proposals to the legislature recommending modifications or rejections of regulations or statutory changes it believes are necessary to correct problems discovered during its review process. When dealing with statutory changes a formal bill is in order. When focusing on a regulation, the JCARR may offer a concurrent resolution to amend, suspend or revoke the rule.

IV. The Process in Operation:

The existence of a formal rule and regulation filing process would mean little if the system was merely symbolic. Such a process can lead to desirable changes in the behavior of bureaucracies only if the threats it poses are perceived as "real" by relevant administrators. An active statutory filing process can be effective in generating administrative formality in two ways: in its direct effects on the work of individual rule and regulation writers and in its indirect effects on the operating norms and standards of future rule and regulation writers who are made aware of the credibility of the process.

Not only are those future writers likely to become more scrupulous in their adherence to the relevant procedural requirements, but they will also pay closer attention to the substantive signals generated by the process. Rules and regulations can be evaluated on a number of grounds. Their legitimacy can be questioned by examining the congruence between the statutory authority under which they are promulgated and the implications of their enforcement. Another focal point may be the technical or administrative aspects of the regulation--that is, parts of the proposed rule which may be administratively inappropriate or inefficient. Or the review process may focus attention on some specific substantive issue which emerges from an assessment of the proposed regulation. Any of these factors may receive special attention from those involved in the filing process and it is likely that aware administrators will adapt to those signals.

For example, the reviews by the Secretary of Administration's office and the Attorney General are supposed to stress different things. The Secretary's office should focus on style, grammar, orthography, etc., while the Attorney General is to consider legality. Nevertheless, the matter of style and similar writing criteria has been stressed in recent months by both offices since most legal problems with regulations have been linked to stylistic ambiguities. Such an active emphasis is a relatively recent development and has clearly made a difference in how regulation writers have carried out their functions. Indications are that they have been much more concerned about such matters than was previously the case.

Another salient part of the filing process that will draw the attention of regulation writers is the activity of the JCARR. In both their annual and five-year reviews they could demonstrate either a strong commitment to administrative formality or a complacent attitude that could effectively defuse the process. Their record thus far is an active one and we can examine the impact they have had by exploring the dimensions of their activity.

As noted in the prevsiou section, the JCARR receives permanent regulations for review from the Revisor of Statutes office each year. In addition, it selects specific agencies each year for its five-year review efforts. The Committee has established eight general criteria it uses in its review and it informs all state agencies of these as well as other relevant information each year (see Exhibit 1). In addition, the JCARR often calls on agency representatives to testify when their regulations are under review. Guidelines for such appearances are also issued to all agencies by the committee (see Exhibit 2).

[Exhibits 1-3 Here]

If a review session results in specific committee questions or suggestions, these are formally communicated to the relevant agency (see Exhibit 3). The nature of these communications and agency responses are recorded by the JCARR staff and issued in an annual report. Data gathered from these reports for the 1979-80 and 1980-81 legislative sessions were analyzed by categorizing committee concerns (as communicated to each agency) along two dimensions: first, whether the committee was seeking <u>clarification</u> or <u>actions</u> by the agency in regard to the regulation under review; and second, whether the concern focused on questions dealing with (a) <u>statutory authorization</u>, (b) <u>technical or administrative matters</u>, (c) <u>substantive issues</u>, or (d) some <u>other</u> concern that could not be determined (given the information available from the committee). In addition, agency responses were classified according to whether they represented (1) a declaration of intent to take <u>positive action</u> on the JCARR recommendation, (2) a statement essentially responding <u>negatively</u> to the committeess suggestions, (3) a

EXHIBIT 1

July 1, 1980

TO: All State Agencies

FROM: Joint Committee on Administrative Rules and Regulations

RE: Criteria and Policies For the Review of Administrative Rules and Regulations

1. The Joint Committee shall use the following criteria in the review of regulations:

   a. Statutory Authorization. The Joint Committee shall utilize the standard rules of statutory construction outlined in K.S.A. 77-201 to evaluate whether a rule and regulation is within the statutory authority upon which it is based. The Joint Committee shall resort to the concept of legislative intent and the use of extrinsic aids only when the statutory language is unclear, internally contradictory, or contravenes the evident purpose of the enactment.

   b. Basic Reasonableness. To establish basic reasonableness, the Joint Committee shall consider whether a rule and regulation generally is within the scope of the agency's purposes, powers, and mission; whether it imposes clearly unreasonable or contradictory requirements; whether it conforms to legal requirements; whether it contains adequate procedural safeguards and standards for the exercise of discretion; and whether the public policy embodied in the rule is consistent with public policy enacted by the Legislature.

   c. Proper Form. The Joint Committee shall examine whether the organization, style, orthography and grammar of rules and regulations conform to the requirements adopted by the Secretary of Administration and published in the Policy and Procedure Manual For the Filing of Kansas Administrative Regulations (K.A.R.)

   d. Technical Errors. The Joint Committee shall review all rules and regulations to identify technical errors, but shall limit its remedial actions to situations in which such errors seriously affect the public's ability to understand the actual meaning of the regulation or impairs the ability of the agency to enforce its provisions.

   e. Conflicts or Overlaps. The Joint Committee shall review rules and regulations to identify conflicts or overlaps between and among agencies. The Committee itself may make recommendations for changes in specific regulations and changes in jurisdiction among agencies, or call such areas of overlap and conflict to the attention of the appropriate standing committees of the Legislature for study and resolution.

   f. Relationships. The Joint Committee, as a part of its review process, shall examine the relationship between the rules and regulations which an agency adopts and the operations of the agency sought to be carried out by those regulations. Such an examination may include questioning whether areas of agency discretion are adequately guided by rules and

over

regulations, whether the agency actually operates in accordance with its rules and regulations, and whether the rules and regulations provide the public with a meaningful knowledge of how the agency will act with regards to those matters which impose a legal obligation or privilege upon persons subject to the regulations.

g. Economic Impact. The Joint Committee, as a part of its review process, shall scrutinize the fiscal and financial impact statements filed by the agencies for compliance with K.S.A. 77-416. The Joint Committee shall focus its concern on the economic impact on an agency budget, upon persons directly regulated and upon persons indirectly affected by the regulation. The Joint Committee may object to a rule and regulation when the economic effects are clearly unreasonable or beyond legislative intent. Unreasonable economic effects shall be determined by the Joint Committee employing a cost/benefit formula. That formula is a comparison of the costs associated with a regulation compared to the benefit derived from that regulation.

h. Streamlining. In an effort to reduce the bulk and scope of administrative rules and regulations, the Joint Committee shall consider both the necessity and public need for a rule and regulation and the complexity of the language drafted to meet those needs.

2. Identical or Substantially Identical Regulations. The Joint Committee, as a part of its review process, shall scrutinize rules and regulations to identify those which are identical or substantially identical to regulations which the Legislature has rejected or revoked or which contain policy decisions previously rejected by the Legislature.

3. Temporary Regulation Review. The Joint Committee, as a part of its review process, shall review all temporary regulations as early as possible following their adoption and presentation to the State Rules and Regulations Board. Temporary regulations which are later filed as permanent regulations will not be reviewed again if they are identical or substantially identical to the temporary regulations, except to check the regulations for changes which may have been made as a result of Joint Committee review.

4. Review Procedure. The Joint Committee, as a part of its review process, shall adhere to the following review procedure: a) staff to present briefing memorandum on regulations under review; (b) agency to respond to staff memorandum, review regulations and respond to questions; (c) public to comment on the regulations under review; (d) Joint Committee to express its concerns in the minutes; (e) Joint Committee to send approved minutes to the agency thereby giving notice of its concerns to the agency; (f) agency to respond in writing to the Joint Committee concerns; and (g) Joint Committee reviews the agency response and makes its decision whether to recommend that the Legislature amend, revoke or reject the agency regulations reviewed. Any step of the review procedure may be waived at the discretion of the Joint Committee.

EXHIBIT 2

July 1, 1980

TO: All State Agencies

FROM: Joint Committee on Administrative Rules and Regulations

RE: The Review Process for State Agencies

A. When the Joint Committee Calls You, What to Do?

Since 1977, the Joint Committee has scheduled meetings approximately every two weeks during the interim and as required during the legislative session. It is the intention of the Joint Committee to continue that biweekly schedule into the new five-year review scheme mandated by 1980 H.B. 2811. As a result, agencies will be given as much advance notice, in writing, as is possible.

Upon receipt of a letter notifying an agency of an impending review session with the Joint Committee, those persons in the agency most closely associated with the development and implementation of the specific regulations under review should be informed of the upcoming review and should be prepared to assist the Joint Committee in that review. Since the Joint Committee has adopted criteria for its oversight of rules and regulations, agency personnel should be prepared to discuss their regulations in the context of those criteria. Agency executives who receive the communications from the Joint Committee should relay those communications, where appropriate, to their personnel. Clearly, the Joint Committee and the agency are best served when the agency prepares and submits its testimony in writing, and is prepared to orally summarize that testimony for the Joint Committee.

If questions arise as to how to prepare for the Joint Committee, please feel free to contact the staff: Bill Wolff or Mark Burghart with the Legislative Research Department at 296-3181 or Michael Germann with the Office of the Revisor of Statutes at 296-2321.

B. When You Arrive Before the Joint Committee, What to Do?

At the time of the meeting, staff will present in writing and orally, a memorandum prepared on the specific regulations under review. That memorandum will: highlight the authority of the agency to adopt rules and regulations in the area; provide some indication of legislative intent in the original delegation of rulemaking authority to the agency; and identify, under the heading of "Legislative Concerns," those areas of regulation which might be of concern to the Joint Committee. The memorandum will be given to the agency representatives on the day of the review.

Following the staff memorandum, agency representatives will be asked to respond to issues raised in the staff memorandum, "walk" the Joint Committee through the regulations under review - making sure to follow the criteria established by the Joint Committee - and respond to questions raised by members and staff of the Joint Committee.

EXHIBIT 3

August 13, 1981

Dear :

The Joint Committee on Administrative Rules and Regulations (JCARR) reviewed certain regulations and forms of the ____. At that time the Committee expressed various concerns regarding the format and content of these regulations and forms.

The Joint Committee concerns should be seen as constructive criticism which the agency may agree with and offer to change itself immediately, agree with and offer to change at a later time, agree with and request the Joint Committee to act upon, or disagree with and maintain the regulation as filed. Regardless of the agency decision, the agency head should respond in writing to the Chairman of the Joint Committee stating that decision. If the agency decides to make changes, some time frame should be given in which the Joint Committee may expect those changes to be made. If the decision is to make no changes, some explanation should be offered for maintaining the status quo.

The agency response will be evaluated by the Joint Committee after which it may decide to do nothing or, as provided in K.S.A. 77-436(c), it may "introduce such legislation as it deems necessary in performing its functions of reviewing administrative rules and regulations." Bills and concurrent resolutions introduced by the Joint Committee will not be referred to the Joint Committee for hearings, but will be assigned to the appropriate standing committees of the Legislature for their consideration and recommendation.

If questions arise as to the proper manner in which to respond to the Committee concerns enumerated in the enclosed minutes, please feel free to contact the staff of the Joint Committee: Bill Wolff or Mark Burghart with the Legislative Research Department (296-3181) or Norman Furse with the Revisor of Statutes Office (296-2321).

Sincerely,

William G. Wolff
Principal Analyst

WGW/db

Mark Burghart
Research Assistant

Enclosure

clarification or explanation relevant to the JCARR's concerns, or (4) a formal acknowledgement or "no response."

Exhibit 4 provides a summary of the findings for JCARR-agency communications on new permanent regulations for the periods in question. The JCARR zeroed in on 185 regulations in 1979-80 and 238 the following year. In both years they generally requested agency action (.949 and .795) more often than clarification (.048 and .201). While the JCARR made a proportionately greater number of action-oritented requests during 1979-80, its concerns were more evenly distributed than in 1980-81 when technical and administrative matters were dominant. This may account, in part, for the change in agency response patterns, for while a majority of agency responses in 1979-80 were formal or "no response" (.524), a greater proportion (.625) were declarations of intent to take positive actions in 1980-81. One can explain this by noting that it is easier to understand and deal with technical matters than with statutory or substantive concerns or some of the requests that fall into the "other" category.

EXHIBITS 4 AND 5 HERE

The five-year review data (see Exhibit 5) indicates a similar pattern but with the years juxtaposed. Among the 32 concerns expressed in 1979-80, 21 (.656) focused on technical and administrative matters. To these the agencies responded with 22 (.733) statements of intent to take positive action. In 1980-81, however, the JCARR's concerns were more evenly distributed. While a majority of the 79 agency responses were of the "positive action" type, this represented only .544 of the total responses. There were many more formal or no responses than in the previous year. Again, this is probably attributable to the greater ability

EXHIBIT 4: Summary of JCARR/Agency Communications
On Annual Review of Rules and Regulations

Nature of JCARR Communication

Request for:

		Clarification		Action	
		1979-80	1980-81	1979-80	1980-81
Subject of Concern	Statutory Authority	0	5 (.021)	16 (.086)	9 (.037)
	Technical or Administrative Matters	4 (.021)	21 (.088)	66 (.356)	109 (.457)
	Substantive Issues	5 (.027)	21 (.088)	48 (.259)	49 (.205)
	Other	0	1 (.004)	46 (.248)	23 (.096)

Nature of Agency Responses:

	1979-80	1980-81
Positive Action	113 (.400)	145 (.625)
Negative	0	32 (.137)
Clarification/ Explanation	21 (.074)	23 (.099)
Formal or No Response	148 (.524)	32 (.137)

EXHIBIT 5: Summary of JCARR/Agency Communications On 5-Year Reviews of Rules and Regulations

Nature of JCARR Communications:

		Request for: Clarification		Action	
		1979-80	1980-81	1979-80	1980-81
Subject of Concern	Statutory Authority	1 (.031)	0	1 (.031)	17 (.232)
	Technical or Administrative Matters	0	0	21 (.656)	27 (.369)
	Substantive Issues	0	0	4 (.125)	20 (.273)
	Other	0	0	5 (.156)	9 (.123)

Nature of Agency Responses:

	1979-80	1980-81
Positive Action	22 (.733)	43 (.544)
Negative	0	12 (.151)
Clarification/ Explanation	1 (.033)	1 (.012)
Formal or no Response	7 (.233)	23 (.291)

that agencies have in responding to technical and administrative concerns. Another interesting characteristic of the five-year review is that it is very "action" oriented. This may indicate a greater assertiveness on the part of JCARR members when faced with aan entire body of regulations rather than individual ones, or it might indicate a more superficial review that is attentive only to the most obvious flaws.

What little this data tells us about the activities and effectiveness of the JCARR can be summarized in two basic points First, the JCARR is more than a symbolic gesture. It is an active committee as measured not only by the number of regulations it reviews, but also the number it chooses to correspond about and the proportionately high number of action-oriented requests it makes. Second, the JCARR is probably most effective in dealing with technical and administrative matters, not because agencies will not respond to other concerns but rather they probably can not.

A final possible indicator of the JCARR's role is the track record of the resolutions and bills it submits to the legislature. In 1977-78, 85% of the 20 concurrent resolutions it introduced and 4 of the 7 bills it offered were passed. The following year 18 bills and 11 resolutions were submitted and 22 of these (.76) passes, while in 1979-80 on 10 of 23 measures (.44) were acted upon favorably. That legislative record is too mixed to allow us to derive any patterns; nevertheless, the small number of submitted bills and resolutions in light of the large number of concerns expressed to agencies seems to indicate that the JCARR's most effective operations are off the legislative floor.

V. Conditions For An Effective System:

Among the consequences Lowi predicts will emerge from a juridical democarcy is a more responsible and efficient public bureaucracy (1979, p. 304). In our limited and unsystematic discussions with regulation writers in several Kansas agencies[9] there was evidence of considerable variation in attitudes toward the formal filing process and how reviewers in that system had been treating agency proposals. The level of anxiety was quite high for many of these individuals and low for others. A good deal of that variation can be attributed to (a) the extent to which reviewers are actively scrutinizing and critiquing regulations and (b) the regulation writer's relative access to legal resources during the filing process.

The degree of scruitiny given a particular set of rules and regulations seemed to vary from reviewer to reviewer and from time period to time period. The Department of Administration's review process has been the assigned responsibility of one individual in the secretary's office since the process began. The three people who have had that assignment since 1977 were often given other tasks, especially at the beginning of the calendar year when no new proposals are being submitted. In fact, the current reviewer has been termporarily assigned full-time duties in another department during this lull. Even during more active times, however, the regulation review process is not given the resources it needs from the Secretary of Administration's office. The overburdened reviewer must therefore choose between the uneveness of selecting certain proposals for in-depth examination or giving all submissions a superficial review.

In the Attorney General's office, the division of labor among relevant staff attorneys establishes still another variable factor among agencies vis-a-vis the review process. Each staff attorney in the civil division has an assigned list of agencies to work with in regard to all state legal matters. Several of the staff attorneys invest considerable time and resources in the regulation review process and have a reputation for examining submitted rules and regulations in detial. Others are either less burdened by the reviewing functions (given their particular agency assignments) or concentrate on the other tasks they must accomplish. While the current norms of the Attorney General's office stress the need for stringent reviews,[10] the structure of office as well as differences among staff attorneys is conducive to variations in the stringency and detail of regulation reviews.

The JCARR's activities are another possible source of variation in the pressures felt by agencies. While there is some consistency in the committee's membership, turnover is bound to have some effect as will the changing political environment. In our limited survey of the committee's work we saw some variation in the overall nature of the JCARR's concerns. In addition, there is a great reliance on the analysis provided by the committee's two-person staff who, due to time and other constraints, necessarily posit a limited agenda. In fact, the JCARR staff (supplied by the Legislature's Research Department) is itself often dependent upon information and analyses by other members of the Research Department's staff. Part of the information and transaction costs of such a system are paid in biased or narrowly focused analyses. The more active and consistent the JCARR and other reviewers are the more effective the entire process is likely to be.

The second major factor in determining how effective the regulation filing system will be is the relative access of agencies to legal resources during the regulation writing process. Regulation writers vary in the amount of such resources they are provided. In some departments the resources are considerable and mandated. For example, the Department of Social and Rehabilitation Services (SRS) has centralized the entire intradepartmental regulation writing and filing process in the hands of high-level agency attorneys. As an agency with primary regulatory functions, the KCC also has a considerable amount of legal resources invested in the development of rules and regulations. At the other extreme are the smaller state boards and commissions which normally depend on the Attorney General's office for their legal needs and thus have little or no legal resources to use when writing regulations.

In the middle are agencies (like the Department of Health and Environment) which, despite having attorneys on staff, lack a system for clearing proposed rules and regulations through departmental counsel. Thus, regulation writers handle the writing and filing procedures by themselves and tend to make limited use of available legal help until they run into a problem. At the time a crisis ensues the previous lack of concern for legal requirements disappears and legal resources available to the agency are activated. The formal regulation filing process is likely to be less effective under such circumstances.

VI. Conclusions and a Comment

To summarize what we have found in our study, three conditions seem essential if the regulation filing process in Kansas (or some similar reform) is to be an effective form of administrative formality. First, the review process should focus on those factors which regulation writing bureaucracies can deal with (i.e., technical and administrative concerns). Second, the activity of the filing process reviewers must be stringently constant and consistent in order to build the correct expectations among regulation writers. Third, the regulation writers must have access to sufficient legal resources so that the demands and standards of the reviewers can be both understood and achieved.

Relative to Lowi's objectives, our tentative conclusions will seem optimistic. A comment is in order, however, on what is being achieved. What we conclude here is that (given the conditions just noted) administrative formality under conditions of juridical democracy can enhance the efficiency and responsibility of public administrators. A question arising from this is whether it is desirable to have the type of efficiency and responsibility which juridical democracy generates.

In a recent work, Marshall E. Dimock took note of two different perspectives on public administration: one legal and the other managerial. The legal perspective assumes "that law is rules -- and that where there are not rules there is license.... The more rules there are...the more justice there will be because discretion will be obviated, and discretion is the antithesis of rule. From these assumptions, it follows that management is ministerial, that is, performing more or less by rote the duties laid down in the rules" (Dimock 1980, pp. 10-11).

On the other side is the managerial view which sees management as "law in action. The law is a source but not the vehicle. The vehicle is the integrative and entrepreneurial mind of the manager that establishes and defines goals and then martials all the elements needed...to produce individual benefits that outweigh the total costs of production" (Dimcock 1980, p. 11). In this distinction between perspectives lies a major question about the meanings of "efficiency" and "responsibility."

While Dimock sees the two perspectives as potentially complementary, each provides a distinctive set of evaluative measures for public administration. For both, responsiiblity would be synonomous with accountability; but to whom? From the legal perspective, the responsible bureaucrat is accountable to the law and ultimately to the lawmakers. From the managerial view, what matters is accountability to those who are being served -- the public clientele. Similarly, the legal view of efficiency demands that government policies be implemented as effectively as possible within the limits of the law, while managerialists would see efficiency in terms of working within the resource constraints imposed by financial, technical, organizational and personnel limits.

To put the point briefly, Lowi's juridical democracy is a reflection of the legal perspective described by Dimock. It probably will lead to administrative efficiency and responsibility, but of the kind which legalists advocate. Thus, a fundamental question for those who are considering the path Lowi is offering for the third republic must be: do we wish to achieve the particular forms of administrative efficiency and responsibility which Lowi advocates? If so, then our findings indicate that, under certain conditions, Lowi's prescriptions might work.

ENDNOTES

*The author's would like to thank Bill Odle for his help in the research for this paper.

[1]Besides elevating Lowi's professional status among his colleagues (Roetger, 1978), the work has helped set a somewhat cynical tone for the analysis of the U.S. political system over the past decade.

[2]The term "analytic" is used here to reflect Lowi's conviction that there is "no hope of adoption" for the proposals. In offering them he claims to be merely "rounding out the analysis for those who are continuing to wonder where it is leading" (1979, p. 299).

[3]The "modesty" of these proposals was not emphasized in the work's first edition (1969, Chapter 10). In fact, there are several interesting differences between the proposals offered in the two editions. Most of the 1979 reform program is new to the book, but what is even more interesting was what Lowi discarded -- namely, proposals for an ombudsman and a senior civil service. In addition, the 1969 edition discusses reforms such as restoration of regional governments and expanding fiscal policy powers. His attitudes on fiscal policy matters are now central to a critical analysis of what took place over the preceeding decade (see 1979, Chapter 10). In that discussion Lowi advocates (1) abolishing discretionary fiscal policy, (2) strengthening the role of "automatic stabilizers" and related nondiscretionary fiscal tools, and (3) increasing public sector reliance on regulations based on a precise delineation of "bad conduct" (1979, pp. 292-293).

[4]In a footnote in the 1979 edition (p. 309) Lowi claims that his original suggestion of "tenure-of-statutes" acts was "the first proposal of this nature anywhere...." Lowi's attempt to claim responsibility for the sunset idea was obviously a response to both Common Cause's claim of credit for the idea in the early 1970s and William O. Douglas' autobiographical reference to discussions about the concept he had with FDR during the 1930s (Douglas 1975, p. 294). Both Common Cause and Douglas have been receiving a great deal of credit for the sunset reform idea, and in the chronology of events Lowi is quite correct in his claim. Douglas' proposal was, after all, never a public one until 1975. As for Common Cause, chronologically its claim will not stand up. However, in discussions with those involved in the formulation and passage of Colorado's Sunset Laws in 1975 (the first of their kind), it became clear to one of the authors of this paper that none of the principal actors knew about Lowi or his "tenure-of-statutes" proposal. More relevant seemed to be the reformist climate of the Clorado statehouse at the time, the recent success of a statewide referendum on "sunshine" laws, and a very special local Common Cause lobby effort (the

"Colorado Project"). Thus, the nation's first Sunset proposals emerged out of this peculiar set of circumstances rather than from the efforts of some advocates of Lowi's analysis.

[5]For example, consider Colorado's experience with sunset laws; see March 1982.

[6]The case was Industrial Union Department, AFL-CIO v. American Petroluem Institute (1980), better known as the "benzene case." For an analysis of the case, see Scalia 1980. For follow ups, see Cotton Dust 1981A, 1981B.

[7]One might cite one recent decision as evidence of Reagan's intentions on this matter. On January 8, 1982 the IRS announced it was no longer going to challenge the tax-exempt status of educational institutions on grounds of racial discrimination. After receiving quick and harsh reaction to that decision, the Reagan administraiton defended its action by arguing the issue was the excessive power of bureaucracies, not civil rights. If Congress wanted the IRS to challenge the tax status of schools, Reagan's officials stated, then it should give that agency explicit instructions to do so. Many saw this as a mere rationalization for a move intended to meet the demands of the "Moral Majority" and fundamentalist schools (e.g., Bob Jones University) associated with that interest group. If that was the case, then the IRS policy was just another example of interest group liberalism at work rather than an indication of an emergent form of juridical democarcy.

[8]See Kaufman 1976, p. 74, footnote 7.

[9]Most of these discussions were held in conjunction with two workshops on rules and regulation writing the authors ran for state agencies in late 1981.

[10]Assistant Attorney General Robert Alderson is in charge of these staff attorneys and his previous positions in the state bureaucracy has led him to emphasize the attorney general's role in the regulation review process. In addition to this role, Alderson also sits as Chair of the State's Rules and Regulations Board since he is the Attorney General's designate representative to that body.

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