

Rep. Scott Bedke, Speaker of the Idaho House of Representatives
Testimony Regarding Legislative Review of Administrative Rules
Before the Senate Subcommittee on Regulatory Affairs and Federal Management
Thursday, October 26, 2017

Good Morning, I'm Scott Bedke, state representative from the state of Idaho and Speaker of the Idaho House of Representatives. Thank you for the opportunity to testify today.

Legislative review of executive branch rules is a topic of great (and recent) interest in Idaho. Over the past 25 years or so the Idaho legislature's role and authority to review executive branch rules have been the subject of state Supreme Court cases and no less than two proposed constitutional amendments placed before the voters of our state. The role of the Legislature in this matter certainly implicates the constitutional separation of powers issues as well as very practical day-to-day matters of public policy. Within the past year, at the 2016 November general election, the voters of Idaho approved a constitutional amendment providing that the Legislature has the constitutional authority to review and to approve or reject executive branch rules. As a result, the Idaho Legislature now has the constitutional authority to ensure executive branch rules are written in a manner consistent with the Legislature's intent of the statute the rule is designed to implement.

Background and Idaho Supreme Court Decisions

In Idaho, the Legislature's authority to review and approve or reject executive branch administrative rules has been in place in one form or another since 1969, when the Legislature amended the state's Administrative Procedure Act. In 1978, the Legislature passed a statute authorizing legislative rules review subcommittees to meet in an advisory fashion to either object or not object to administrative rules under review. This "advisory" process evolved over time through statute to provide for a more formal and enhanced legislative role.

This statutory evolution provided the Legislature with authority to review administrative rules and, upon finding a rule inconsistent with legislative intent, reject that administrative rule through the adoption of a Concurrent Resolution. (Concurrent Resolutions require approval only of both houses of the Legislature—they are not subject to approval of the Governor.)

In 1990, the Legislature's authority to review and reject administrative rules was upheld by the Idaho Supreme Court in a closely decided case with a 3-2 decision. (*Meade v. Arnell*, 1990). The Court has reasoned that the executive branch's authority to write administrative rules is a power delegated to the executive branch by the Legislature. That executive power, however, is subordinate to the Legislature's constitutional power to make law. As our Supreme Court has held repeatedly, only the Legislature can make law. Because our Court has found the executive branch's authority to write rules is an authority delegated to that branch by the Legislature, the Court has traditionally upheld the Legislature's right to review rules.

Idaho's Current Process of Rules Review

The Idaho Legislature takes its responsibility in this area very seriously. Each legislative session starts with an in-depth review of the rules proposed in the preceding year by executive branch agencies. Each legislative committee reviews the rules germane to its area of expertise and makes recommendations to the House and the Senate as to whether those rules should be approved or rejected. The Legislature has used its authority to reject rules judiciously. Over the past four decades, the Legislature has reviewed more than 5,000 administrative rules and has rejected approximately 300, or about six percent. Often, a rejected rule is proposed again by the same executive branch agency the next year but with the changes necessary to make the rule consistent with legislative intent of the statute. In Idaho's approach to this matter, the Legislature's review of rules does not hamper executive branch authority—it only assures that state agencies are following the law in their rulemaking.

The Legislature acknowledges that, at times, executive branch agencies may not understand or appreciate the real-life impact of their proposed rules. In the Legislature's review of

administrative rules, committees listen to input from everyday citizens as to how a new rule may affect them. To reiterate, the time we take during this process to listen to our citizens has not resulted in sweeping rejection of administrative rules. It has, however, resulted in selective rejection of rules, constructive dialogue with the executive branch, and ultimately, we believe, administrative rules that are more closely aligned with the intent of statute.

Why a State Constitutional Amendment?

In order to safeguard the Legislature's authority to review administrative rules, and in light of the close decision in *Meade v. Arnell*, the Legislature chose to put a constitutional amendment before Idaho voters. The amendment placed the Legislature's authority to review rules in the state's Constitution. As I noted earlier, the Legislature's authority to review rules had been provided for in statute, but that statute was challenged in *Meade v. Arnell (1990)*.

The 2016 Joint Resolution authorizing a vote on the constitutional amendment won nearly unanimous approval from the Legislature (it received 96 yes votes; 4 no votes; 5 absent) and was passed by a majority of citizens casting a ballot on the amendment during the November 2016 election (it passed by approximately 56% to 44%--a margin of 69,000 votes statewide). The adopted constitutional amendment reads:

“The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.” (emphasis added)

I should note that we took two swings at this matter via constitutional amendment. The first attempt at the ballot box came up short in the 2014 general election. That election involved an amendment similar but not identical to the 2016 amendment; the 2014 amendment lost by approximately 51% to 49%--4,700 votes statewide. The second effort—the 2016 election

effort—benefited from a more vigorous and focused campaign in which the amendment passed by approximately 69,000 votes statewide.

Conclusion

In summation, the passage of the constitutional amendment strengthened and more clearly defined the Legislature’s authority to review and reject executive branch rules. Further, the amendment strengthened the Legislature’s constitutional lawmaking authority while improving our citizens’ ability to participate in their government via review of administrative rules. We believe that allowing executive branch agencies the unreviewed authority to promulgate and implement administrative rules compromises the Legislature’s authority to make law and, consequently, strengthens the executive branch at the expense of the legislative branch.