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Rulemaking Developments

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RULEMAKING DEVELOPMENTS

by Robert C. Power

I. INTRODUCTION

The program calls this "Rulemaking Developments." That is a nice, meaningless title. The title, "Random Notes on Rulemaking," which would certainly have been more accurate, would have been preferred. But, my topic *is* in keeping with the title of this Symposium. Here are several areas that my quick review of Pennsylvania's administrative law statutes suggests may need reform. The best way to start is to look at the history of Pennsylvania rulemaking statutes, particularly in the context of federal and model state acts. Chart I outlines the chronology of the federal, of the model, and of the Pennsylvania statutes. Certain things stand out.

Chart I. Time Line of Administrative Procedure Law

1945 - Pennsylvania Administrative Agency Law

1946 - Federal Administrative Procedure Act

1961 - Model State Administrative Procedure Act

1968 - Commonwealth Documents Law

1980 - Commonwealth Attorneys Act

1981 - Revised Model State Administrative Procedure Act

1982 - Regulatory Review Act

1982 - Executive Order 1982-2, "Improving Government Regulations"

1989 - Major Revisions to Regulatory Review Act

1996 - Executive Order 1996-1, "Regulatory Review and Promulgation"

1997 - Major Revisions to Regulatory Review Act

First, the Federal Administrative Procedure Act (APA or Federal Act)[1] was a giant achievement and a superb piece of legislation that remains a great concept. Like any other statute, code or case over fifty years old, however, it needs some revision. Moreover, Pennsylvania's basic administrative law statute is even older.[2]

Second, some of the original provisions do not work as well as intended, and others have become less effective due to developments over time. In my administrative law course, which is necessarily a basic course, the focus is on the federal structure. I spend some time on state materials that are included by the casebook authors, but not a great deal. Students sometimes ask which is better, the federal approach or the state approach. My usual answer is to follow the state approach. Where a state act and the Federal Act diverge, the difference usually reflects something that did not work well under the federal statute. The flaws in the Federal Act have never been corrected by Congress, but the states were well advised to do so. Examples include questions such as: Why do state acts tend to omit procedures for formal rulemaking? Primarily, state acts and procedural rules have omitted formal rulemaking provisions because the federal experience revealed them to be inefficient in practice.

Third, this is true of the Pennsylvania laws as well. Some portions are antiquated and do not fully respond to new problems. Other parts do not work well with subsequent legal developments, such as regulatory review. Although the General Assembly has amended and redrafted parts of the administrative procedure laws, and the courts have corrected other parts through good, and sometimes very creative, case law, problems persist. I identify some of the areas that need reform—or if not needing reform, at least, need to be reconsidered.

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[1] 5 U.S.C. §§ 501-596 (1994).

[2] Administrative Agency Law of 1945, 1945 Laws of Pennsylvania, No. 422, at 1388; Pennsylvania Register Act, 1945 Laws of Pennsylvania, No. 443, at 1392. These initial efforts required only that regulations be published. The public participation aspects of Pennsylvania rulemaking date from the Commonwealth Documents Law in 1968 and have been modified over the years. *See* Chart I.

The following seven areas provide the basis for my discussion: (1) the basic definition of a rule, (2) the basic notice and comments section, (3) modifications to proposed rules, (4) exceptions to the notice requirement, (5) legal review, (6) regulatory review, and (7) judicial review. After a brief overview of the regulatory review process, this Article takes up those topics one-by-one.

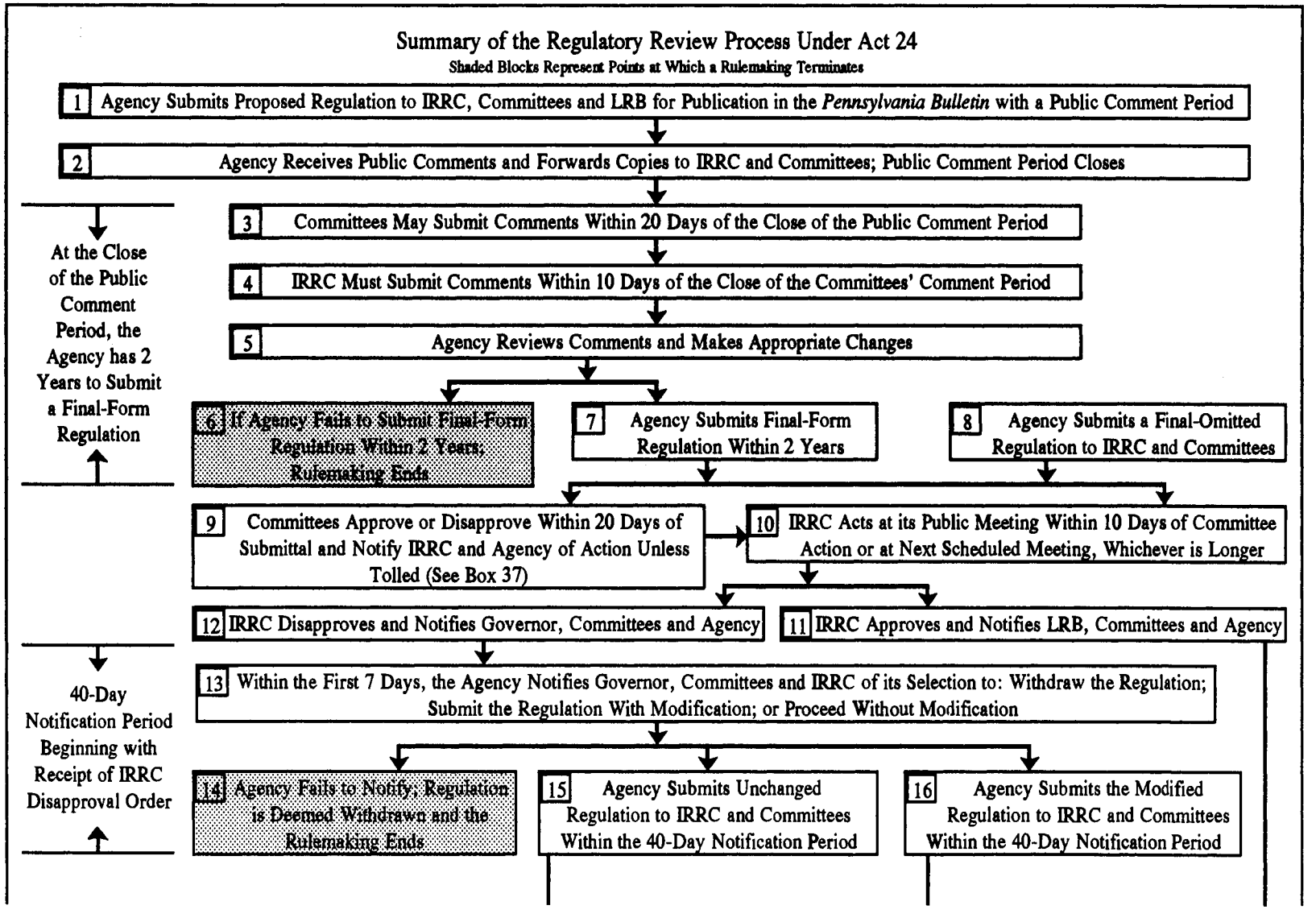
Chart II outlines Pennsylvania's regulatory review process.[3] The chart was prepared by the Independent Regulatory Review Commission (IRRC) and has been graciously provided by its Chief Counsel, Mary S. Wyatte. When I first showed this chart to my colleague, John Dernbach,[4] to see if I was overlooking something, he said, "Actually it's worse than that." He was right. Numerous problems are immediately evident. None of the legal review is included, either by the Office of Attorney General or the Office of General Counsel. Furthermore, all the agency and public-affected industry debates over the substantive content of rules are reduced to the first two boxes. Note the process contains thirty-six boxes. We will not take any more time with this chart, although I will revisit the question of regulatory review. Regulatory review has been sold as protection against overreaching and unduly complex government regulation. Here under this system we have one two-day review period, one seven-day review period, four ten-day review periods, two twenty-day review periods, two thirty-day review periods, and one forty-day review period. It reminds me of when the tax lawyers were happy to see tax simplification back in the 1980s.[5]

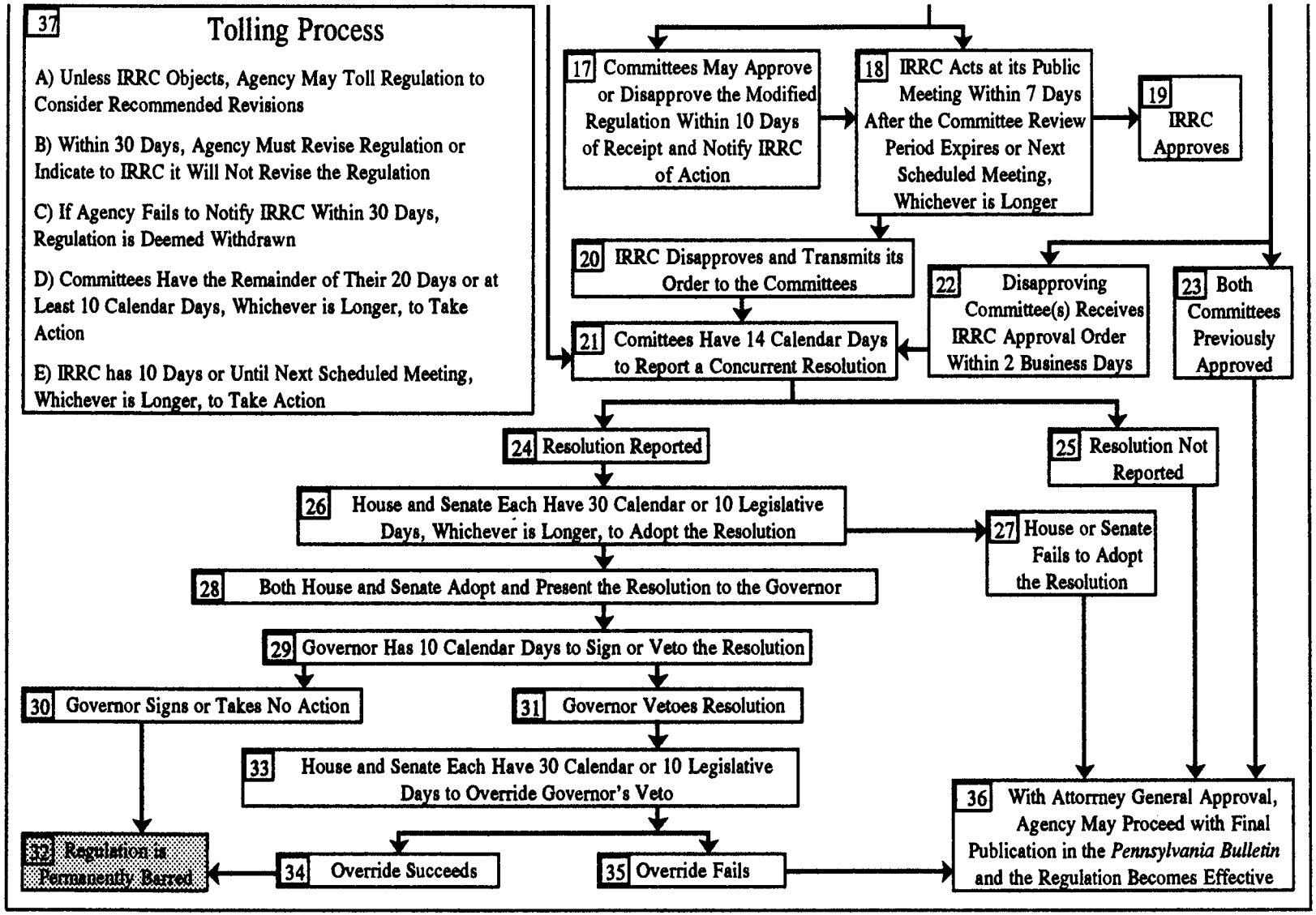
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[3] *See infra* Chart II.

[4] John Dernbach is an associate professor at the Harrisburg campus of the Widener University School of Law.

[5] Noted law professor Grant Gilmore once wrote: "In Heaven there will be no law. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).


Summary of the Regulatory Review Process Under Act 24
Shaded Blocks Represent Points at Which a Rulemaking Terminates
1 Agency Submits Proposed Regulation to IRRC, Committees and LRB for Publication in the Pennsylvania Bulletin with a Public Comment Period
2 Agency Receives Public Comments and Forwards Copies to IRRC and Committees; Public Comment Period Closes
At the Close of the Public Comment Period, the Agency has 2 Years to Submit a Final-Form Regulation
3 Committees May Submit Comments Within 20 Days of the Close of the Public Comment Period
4 IRRC Must Submit Comments Within 10 Days of the Close of the Committees' Comment Period
5 Agency Reviews Comments and Makes Appropriate Changes
6 If Agency Fails to Submit Final-Form Regulation Within 2 Years, Rulemaking Ends
7 Agency Submits Final-Form Regulation Within 2 Years
8 Agency Submits a Final-Omitted Regulation to IRRC and Committees
9 Committees Approve or Disapprove Within 20 Days of Submittal and Notify IRRC and Agency of Action Unless Tolled (See Box 37)
10 IRRC Acts at its Public Meeting Within 10 Days of Committee Action or at Next Scheduled Meeting, Whichever is Longer
12 IRRC Disapproves and Notifies Governor, Committees and Agency
11 IRRC Approves and Notifies LRB, Committees and Agency
40-Day Notification Period Beginning with Receipt of IRRC Disapproval Order
13 Within the First 7 Days, the Agency Notifies Governor, Committees and IRRC of its Selection to: Withdraw the Regulation; Submit the Regulation With Modification; or Proceed Without Modification
14 Agency Fails to Notify, Regulation is Deemed Withdrawn and the Rulemaking Ends
15 Agency Submits Unchanged Regulation to IRRC and Committees Within the 40-Day Notification Period
16 Agency Submits the Modified Regulation to IRRC and Committees Within the 40-Day Notification Period


37 Tolling Process
A) Unless IRRC Objects, Agency May Toll Regulation to Consider Recommended Revisions
B) Within 30 Days, Agency Must Revise Regulation or Indicate to IRRC it Will Not Revise the Regulation
C) If Agency Fails to Notify IRRC Within 30 Days, Regulation is Deemed Withdrawn
D) Committees Have the Remainder of Their 20 Days or at Least 10 Calendar Days, Whichever is Longer, to Take Action
E) IRRC has 10 Days or Until Next Scheduled Meeting, Whichever is Longer, to Take Action
17 Committees May Approve or Disapprove the Modified Regulation Within 10 Days of Receipt and Notify IRRC of Action
18 IRRC Acts at its Public Meeting Within 7 Days After the Committee Review Period Expires or Next Scheduled Meeting, Whichever is Longer
19 IRRC Approves
20 IRRC Disapproves and Transmits its Order to the Committees
21 Comittees Have 14 Calendar Days to Report a Concurrent Resolution
22 Disapproving Committee(s) Receives IRRC Approval Order Within 2 Business Days
23 Both Committees Previously Approved
24 Resolution Reported
25 Resolution Not Reported
26 House and Senate Each Have 30 Calendar or 10 Legislative Days, Whichever is Longer, to Adopt the Resolution
27 House or Senate Fails to Adopt the Resolution
28 Both House and Senate Adopt and Present the Resolution to the Governor
29 Governor Has 10 Calendar Days to Sign or Veto the Resolution
30 Governor Signs or Takes No Action
31 Governor Vetoes Resolution
33 House and Senate Each Have 30 Calendar or 10 Legislative Days to Override Governor's Veto
32 Regulation is Permanently Barred
34 Override Succeeds
35 Override Fails
36 With Attorney General Approval, Agency May Proceed with Final Publication in the Pennsylvania Bulletin and the Regulation Becomes Effective

II. DEFINITIONS

The Commonwealth Documents Law provides that a "regulation" is "any rule or regulation . . . promulgated by an agency under statutory authority . . . or prescribing the practice or procedure before such agency."[6] This is a good time to point out one problem with Pennsylvania's administrative procedure statutes: they say everything twice.[7] The definition from section 1102(12) of the Commonwealth Documents Law is nearly identical to the definition set forth in Pennsylvania's Regulatory Review Act.[8] With the exception of the portion of the Commonwealth Documents Law that provides "prescribing the practice or procedure before such agency,"[9] there is no description of what a regulation does or how it differs from other documents, such as press releases, guidelines, standards, or opinions in administrative cases. In fact, there is even

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[6] PA. STAT. ANN. tit. 45, § 1102(12) (West 1990). Section 1102(12) provides, in full: "'Regulation' means any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency." *Id.*

[7] The allusion is to CATCH 22, an apt reference for an article about lawmaking by governmental bureaucracies. JOSEPH HELLER, CATCH 22 (Dell Publishing Co. 1976) (1955). Heller's protagonist, Yossarian, suddenly decides to see everything twice in an attempt to be sent home from the war. As shown below, Pennsylvania's administrative law statutes sometime exceed Yossarian in "seeing things" more than once.

[8] PA. STAT. ANN. tit. 71, § 745.3 (West 1990). Section 745.3 provides, in pertinent part:

> "Regulation." Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by our relating to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency. The term shall also include actions of the Liquor Control Board which have an effect on the discount rate for retail licensees. The term shall not include a proclamation, executive order, directive or similar document issued by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor.

Id.

[9] PA. STAT. ANN. tit. 45, § 1102(12) (West 1990).

language suggesting that the definition might well include a case opinion–"regulation *or order* in the nature of a regulation."[10] Maybe that means substantive law made by adjudication.

Pennsylvania courts have concluded that the definition of a regulation is set against the definition of a "statement of policy."[11] Note several things about that definition: A statement of policy "sets forth substantive or procedural personal or property rights," using Hohfeldian terms,[12] and "includes without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency."[13] The definition also includes a "document interpreting or implementing" a statute.[14] The courts tell us that regulations and policy statements are two very different documents. That is perplexing because if you ask most people who adopt regulations what it is that they do, they usually say they implement statutes, which seems to be part of the policy statement definition. Moreover, a statement of policy is

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[10] PA. STAT. ANN. tit. 71, § 745.3 (West 1990) (emphasis added) ("the term [regulation] shall not include a proclamation, executive order, directive or similar document").

[11] Chimenti v. Pennsylvania Dep't of Corrections, 720 A.2d 205, 212 (Pa. Commw. Ct. 1998) (holding that a Department of Corrections statement regarding an automated inmate telephone system, issued in response to the General Assembly's directive to promulgate guidelines to implement the Wiretapping Act, was not a regulation but a policy statement); Central Dauphin Sch. Dist. v. Department of Educ., 608 A.2d 576, 582-85 (Pa. Commw. Ct. 1992) (holding that the Secretary of Education's budget reopening instructions were not regulations and thus did not have to be promulgated in conformance with notice and hearing requirements). Compare PA. STAT. ANN. tit. 45, § 1102(13) (West 1990) which provides:

> "Statement of policy" means any document, except an adjudication or regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency.

Id.

[12] PA. STAT. ANN. tit. 45, § 1102(13) (West 1990). *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

[13] PA. STAT. ANN. tit. 45, § 1102(13) (West 1990).

[14] *Id.*

neither a regulation nor an adjudication, but there is no such limitation in the definition of regulation; so perhaps we are back again to a regulation *is* an adjudication. Of course, that would be absurd and it is not what the General Assembly ever intended by this definition.

Fortunately, the courts have ignored the language of these definitions where necessary. More accurately, they have used just enough of the language to make the definitions useful. For example, in *Department of Environmental Resources v. Rushton Mining Co.*,[15] the Pennsylvania Commonwealth Court considered whether standard conditions in coal mining permits were "invalid because they constitute[d] regulations and were not promulgated in accordance with the Commonwealth Documents Law."[16] Numerous companies challenged the conditions before the Environmental Hearing Board, claiming that the conditions were regulations; consequently, the companies contended that they had not been promulgated through required rulemaking procedures and were therefore invalid.[17] The court agreed, in an opinion with an unusually lengthy treatment of the reasons for rulemaking procedure.[18] It correctly criticized the Federal APA[19] on this issue and then confronted the Pennsylvania approach.[20] The court cogently observed almost any agency activity could fit into the definition of a policy statement; however, it concluded "regulation" was only defined "procedurally–by how one is issued."[21]

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[15] 591 A.2d 1168 (Pa. Commw. Ct. 1991).

[16] *Id.* at 1171.

[17] *Id.* at 1170-71.

[18] *Id.* at 1171-74.

[19] *Id.* at 1172. The court opined that the Federal APA fails to resolve the problem, citing federal appellate cases describing the distinction as "'enshrouded in considerable smog'" and "'akin to wandering lost in the Serbonian Bog.'" *Id.* (quoting Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975)); *see also* Jean v. Nelson, 711 F.2d 1455, 1488 (11th Cir. 1983).

[20] *Rushton Mining*, 591 A.2d at 1172 (noting that "Pennsylvania, at first glance, appeared to have avoided the 'smog,' 'bog,' and 'despair' encountered by the federal courts").

[21] *Id.* at 1172 (citing PA. STAT. ANN. tit. 45, § 1102(12) (West 1990)).

So the court drew the line between regulations and statements of policy in a coherent, functional fashion.[22] Drawing on *Pennsylvania Human Relations Commission v. Norristown Area School District*,[23] the court applied the "binding norm test," which is similar to one approach used under federal law.[24] A binding norm is rulemaking if adopted legislatively, or adjudication, if adopted on a "case-by-case" basis.[25] By contrast, a statement of policy is not binding; rather, it is "'merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.'"[26] The test is a practical one: "force of law" versus "tentative intentions."[27]

We could say fine and let it be, but I recommend against it. It is one thing to say that a definition is difficult. That is tolerable. But the definitions of regulation and statement of policy are not just difficult. They purport to divide the relevant universe into two categories but do so with language that both overlaps and leaves gaps. This left the court resorting to the federal method, which is based on wholly different statutory language, to rein in the meaning. Moreover, the specific meaning of these terms is still a major question in Pennsylvania administrative law cases. Most of the cases cited in the Purdon's annotations on rulemaking procedure turn on the distinction between the terms "regulation and policy." For instance, in the 1991 main volume and the 1998 pocket part, nine out of ten annotations to section 1102 address the regulation–policy statement distinction; moreover, five out of eight annotations to section 1201 and six out of ten annotations to Section 1202 address this distinction.[28] Why does this issue come up in case after case under various statutory headings?

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[22] *Id.* at 1173-76.

[23] 374 A.2d 671 (Pa. Commw. Ct. 1977).

[24] *Rushton Mining*, 591 A.2d at 1173 (relying on Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974)).

[25] *Norristown Area Sch. Dist.*, 374 A.2d at 676 (quoting Pennsylvania Human Relations Comm'n v. Chester Sch. Dist., 233 A.2d 290, 301 (Pa. Commw. Ct. 1967)).

[26] *Id.* at 679 (quoting *Pacific Gas & Electric Co.*, 506 F.2d at 41).

[27] *Id.* (quoting *Pacific Gas & Electric Co.*, 506 F.2d at 41).

[28] PA. STAT. ANN. tit. 45, §§ 1102, 1201, 1202 (West 1991 & Supp. 1998).

As best as I can tell, the issues in all these cases focus upon providing definitions; however, the case is annotated under the statutory section at issue in the particular case. Thus, if a court decides there is no problem with a lack of notice because it is a statement of policy, the case is annotated under the notice requirement. If a court finds no problem with the failure to have regulatory review because it is a statement of policy, it is annotated under the regulatory review provisions. The issue, however, remains the same, and the litigation produced by this query dwarfs anything else involving the rulemaking statutes.

The federal statutory approach does not provide a very good remedy. The definition in the APA definition of a "rule" combines substantive, procedural and other types of rules into a long-involved definition.[29] Case law again serves to explain the statutory terms. The federal law, unlike Pennsylvania case law, distinguishes a statement of policy from an interpretive rule. Although this distinction appears useful, there is not much evidence of it making much difference because the same procedures apply to each type of rule. By comparison, the 1961 and 1981 Model State Administrative Procedure Acts are not much more informative.[30]

Here, however, is a starting point for discussion. Take what the courts have given as a meaning of "regulation," which includes concepts such as "binding norm," "implementing law," "general

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[29] 5 U.S.C. § 551(4) (1994). Section 551(4) states: "'Rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.*

[30] The 1961 Act defines "rule" as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not effecting private rights or procedures available to the public, or (B) declaratory rulings issues pursuant to Section 8, or (C) intra-agency memoranda.

MODEL STATE ADMIN. PROCEDURE ACT, § 1(7), 15 U.L.A. 137 (1990). The 1981 Act simplified the definition, in substance eliminating the language after "repeal of a prior rule." MODEL STATE ADMIN. PROCEDURE ACT, § 1-102(10), 15 U.L.A. 12 (1990).

applicability and future effect," "prescribing conduct or establishing a standard," and "under an express or implied delegation of rulemaking authority." The words and phrases accurately describe what lawyers think of as a regulation. They exclude statements of policy and interpretations, and thereby emphasize a key fact left out of the statutory definitions but one that is central to the functional analysis in the case law. This is the simple fact that in rulemaking the agency is using delegated *legislative* power; it adopts rules when it is acting like a legislature. That is why rulemaking procedures are generally in the nature of legislative, rather than judicial procedures. Policy statements are in the nature of executive proclamations. Using these phrases to craft workable definitions of a regulation policy statement should not be difficult, but note that I will leave it to those responsible for such tasks. Logic suggests that procedure should follow function and public hearings should proceed with legislative-type regulations rather than executive-type policy statements.[31]

III. RULEMAKING PROCEDURE– NOTICE, MODIFICATIONS AND EXCEPTIONS

Pennsylvania's notice requirements are set forth in section 1201 of Title 45.[32] There is then clever protective colorization of the statute, as public notice is required "[e]xcept as provided in section 204."[33] The provision further states that, "an agency shall give, in

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[31] The Commonwealth's Joint Committee on Documents has improved the matter by regulation. *See* Joint Committee on Documents, Statements of Policy, Pa. Bull. 214152 (1996). This report addresses statutory and case law understandings of "regulation" and "statement of policy." It establishes standards for internal government usage largely consistent with prevailing judicial understandings of these terms and their cousins, such as "guideline" and "interpretation." Statutory codification would seem to be the obvious next step. Unfortunately, this helpful report is essentially hidden away in the index volume of the book copies of the *Pennsylvania Code* and is unlikely to be discovered by many practicing lawyers in or out of Pennsylvania.

[32] PA. STAT. ANN. tit. 45, § 1201 (West 1991).

[33] *Id.* (citations omitted). This reference is not too confusing, as most readers will soon figure out that section 204 is codified at PA. STAT. ANN. tit. 45, § 1204 (West 1991).

provides, in pertinent part, that "[a]n agency may not adopt a rule that is substantially different from the proposed rule."[46] Subsection (b) provides specific factors for determining whether the final rule is "substantially different": (1) the extent people would foresee that the proposal could affect their interests, (2) the extent that the subject matter or issues differ from those of the proposal, and (3) the extent to which the *effects* differ from the proposal.[47]

The approach of the Model Act is effective and useful. Pennsylvania would be well-advised to adopt something similar. Pennsylvania's existing ban on enlarging the purpose is not an effective guideline. Considered in the abstract, it is hard to understand what it means. *Every* regulation has a purpose—to implement a particular statutory provision. Because each proposed regulation must identify its statutory authority when published,[48] enlarging or otherwise changing the statutory authority would presumably run afoul of this requirement, thereby rendering the "enlarge the original purpose" provision of section 1202 redundant.[49]

Brocal Corp. v. Department of Transportation[50] reveals this dynamic in application. There the court reviewed the Pennsylvania Department of Transportation's (PennDOT's) proposed regulations concerning public reimbursement of transit companies for transporting senior citizens.[51] The agency proposed regulations to limit total reimbursement for this program by creating a tariff system with adjustment factors.[52] Based on public and private comments, PennDOT revised the proposal by simplifying the tariff and creating a uniform trip and mileage system.[53] A number of private common carriers sued, claiming that the final regulations were different from the agency's original proposal and that they had

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[46] MODEL STATE ADMIN. PROCEDURE ACT § 3-107(a), 15 U.L.A. 42 (1990).

[47] *Id.* § 3-107(b).

[48] PA. STAT. ANN. tit. 45, § 1201(2) (West 1991).

[49] *Id.* § 1202.

[50] 528 A.2d 114 (Pa. 1987).

[51] *Id.* at 116-17.

[52] *Id.* at 117. The agency's purpose "was to remedy economic abuses" of the program "by carriers." *Id.*

[53] *Id.* at 117 nn.7-8.

not been afforded proper notice and opportunity to comment.[54] The Pennsylvania Supreme Court disagreed, concluding that PennDOT had not "'enlarged its original purpose.'"[55] The justices saw the general purpose as unchanged–"to improve the efficiency, effectiveness and accountability of the" program.[56] The method of achieving that purpose was revised to simplify administration. Because the change altered only the method, rather than the purpose, the court held that there was no need for additional notice and opportunity for comment.[57]

Although *Brocal* was probably decided correctly under the statute, the statute should be modified. It would have been very easy for PennDOT to stay within the original purpose of the regulations and still have been very unfair to interested parties. For example, as proposed there was no reason for passengers other than senior citizens to comment on the regulations, because the original notice addressed only transactions between the carriers and the elderly passengers. What if, at the end of the consideration period, PennDOT kept its "efficiency, effectiveness, accountability" purpose but decided to have nonelderly passengers bear all the costs of the program participants? Notice is required so that people who are likely to be adversely affected will be aware of the proposal and be afforded an opportunity to express their views, including proposing alternatives. For precisely these reasons, the Model State Act, mentioned above, requires that the promulgated rule be substantially similar to that which was proposed and published.[58] Basically, the requirement is: "same people, same issues, same general approach." If all are consistent, the agency may modify and publish final rules. If any major discrepancies exist between the proposal and the final regulation, those individuals with an interest in the outcome must be afforded a second opportunity to participate.

The federal law is not particularly effective here. There are few cases, and they offer seemingly inconsistent theories and

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[54] *Id.* at 118.

[55] *Id.* (quoting PA. STAT. ANN. tit. 45, § 1202 (West 1991)) (alterations added).

[56] *Id.*

[57] *Id.* at 120.

[58] *See supra* note 46 and accompanying text.

approaches.[59] An example involving another local industry is the so-called *Chocolate Manufacturers* case,[60] in which the United States Court of Appeals for the Fourth Circuit held that a notice proposing changes to a Department of Agriculture food nutrition program, in which the only specific cutback proposed was to sugary breakfast cereal, could not support final regulations cutting back on chocolate milk.[61] The modifications would have been allowed under *Brocal*'s "enlarge the purpose" test.

Section 1204, "Omission of Prior Notice," identifies those regulations exempt from prior notice requirements. It closely follows the federal model, although it differs somewhat in style.[62] The federal law begins with a description of notice and then sets out several clauses that exempt notice in several settings.[63] Similarly, section 1204 says that an agency may omit publishing notice if (1) the regulation is one of several excepted categories, (2) the regulated parties are named and served with notice, and (3) for "good cause."[64]

With respect to the provisions allowing omission of certain items from publication, an obvious anomaly exists. Recall that the structure of Pennsylvania rulemaking is based on the concept that

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[59] As the *Brocal* court recognized, many of the federal cases addressing this issue are at least partially explainable on other grounds. *See, e.g.*, Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972) (finding initial notice inadequate); Abington Memorial Hosp. v. Heckler, 576 F. Supp. 1081 (E.D. Pa. 1983), *aff'd*, 750 F.2d 242 (3d Cir. 1984) (finding agency failed to respond to comments). Providing complete notice, responding to comments, and making only those modifications arising out of the original notice are three aspects to one overall problem: the opportunity for the public to comment on regulations before they are adopted.

[60] Chocolate Manufacturers Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985).

[61] *Id.* at 1106-07.

[62] *Compare* PA. STAT. ANN. tit. 45, § 1204 (West 1991), *with* Administrative Procedure Act § 4, 5 U.S.C. § 553 (1994).

[63] Section 553(b) provides that, unless required by statute, the notice requirement does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b) (1994).

[64] PA. STAT. ANN. tit. 45, § 1204 (West 1991).

"interpretations" are not "regulations." Under section 1201 and the case law referred to above,[65] interpretations are statements of policy by definition and are therefore not covered by "rulemaking" procedure by simple application of sections 1201 and 1202. Curiously, however, they appear as subcategories of "regulation" in section 1204.[66] Their appearance here is confusing and could cause problems, especially because the language in section 1204 also refers to a self-executing act. It is conceivable that an agency document of some sort interpreting a *non*-self-executing act could be deemed not excluded from the prior notice requirement by this clause. That would be logical under section 1204, but plainly at odds with the governing notion that an interpretation is not even a regulation.

One provision requiring reform is the exemption from prior notice for procedural regulations. The justification under federal law for excluding procedural regulations from notice is that the public does not need to comment where the government is not meddling in private or business activities. Procedural regulations, however, tell the public what to do and how to interact with the government. Nowadays, that often has the effect of telling the public how to go about its business or even private activities. Regulating the public's interaction with government is of interest to the public as much as it is to the agency, and agencies should not be allowed to avoid public input. Lawyers in particular are interested in procedural matters. Such regulations tell us how to conduct our business with the government. We should be heard on them.

Professor Bernard Schwartz suggested that reform is unnecessary because this provision has not been abused, as evidenced by the sparse federal and state case law on this issue.[67] It is, however, one that is worth the time of people reconsidering administrative procedure statutes. I would not particularly recommend the 1981 Model State Act generally with regard to notice. It includes so many sections with one exception or another

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[65] *See supra* notes 6-28 and accompanying text.

[66] *See* PA. STAT. ANN. tit. 45, § 1204(1)(v) (West 1991) (providing that interpretations are a species of regulation exempt from the prior notice requirement).

[67] BERNARD SCHWARTZ, ADMINISTRATIVE LAW 197-98 (3d ed. 1991).

that its flow chart must rival the Pennsylvania regulatory reform chart for complexity.[68] In this area, however, it has much to recommend it. Under that Act, procedural regulations are subject to notice and comment procedures unless the rule concerns solely "the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public."[69] The effect of all that is to place a rigorous burden on the agency to justify an exception, which is a worthy goal in this area.

One may also consider the role of review in prior notice exemption settings. Before regulatory review, regulations exempt from prior notice requirements could be published promptly upon the agency's decision. Regulatory reform has changed the dynamic. While agencies may exclude the public from participation in rulemaking if the proposed rule fits one of the several categories exempted from prior notice, the same is not true for the IRRC and legislative review. The adoption of regulations without prior notice is an anomaly in a system of regulatory review. The regulatory review structure depends on consultation and revision during the period between proposal and final adoption. That period does not exist for regulations adopted without prior notice.

The Regulatory Reform Act was amended to clarify the operation of regulatory review on such exempt regulations. As the Act now operates, the key term is "final-omitted regulation," which is defined to mean "[a] regulation which an agency submits to the commission and the committees for which the agency has omitted notice of proposed rulemaking pursuant to . . . the Commonwealth Documents Law."[70] Such regulations go to the IRRC and General Assembly at the same time they are submitted to the Attorney General for legal approval. The requirements of defending their content and documenting their basis still apply. At this point, the procedures for adoption mirror the procedures for regulatory review

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[68] *See supra* Chart II.

[69] MODEL STATE ADMIN. PROCEDURE ACT § 3-116 (1981), 15 U.L.A. 55 (1990).

[70] PA. STAT. ANN. tit. 71, § 745.3 (West Supp. 1998).

of "final form" regulations.[71] In short, everything other than public participation remains the same. Not much time is saved in the notice omission process, but consideration of public comments is permanently lost.

The Pennsylvania Act also contains a special provision dealing with emergency situations. Section 745.6(d), under the 1997 amendments to the Regulatory Reform Act,[72] provides that if the Attorney General certifies that a regulation is required by court order, federal government mandate, or "if the Governor certifies that the final-form or final-omitted regulation is required to meet an emergency," which can relate to fiscal issues as well as "conditions which may threaten the public health," the rule may be published without prior review and take effect on the date of publication.[73] This provision is most applicable to weather calamities, such as the floods of the Susquehanna River several years ago, or a drought condition, or perhaps the potentially looming Y2K problem.

At first glance, the statute permits an agency to avoid regulatory review as well as public commentary in cases of real emergency. There is an important limitation, however, which allows the agency only to delay the inevitable. Review still takes place, and if the regulation is disapproved, it is "rescinded after 120 days or upon final disapproval, whichever occurs later."[74] Why not do this in all cases of notice exempt regulations? Agencies could publish a request for public input with the publication of the rule itself. It is instructive that while the General Assembly acknowledged the need for emergency regulations, it created a much narrower exception for evading commission and General Assembly review than for evading public review. The General Assembly insisted on keeping its role by allowing emergency regulations, in practical terms, only on an interim basis. The

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[71] The Pennsylvania Regulatory Review Act provides that "final form" regulations are "regulation[s] previously published as . . . proposed regulation[s] pursuant to . . . the Commonwealth Documents Law." PA. STAT. ANN. tit. 71, § 745.3 (West Supp. 1998).

[72] *Id.* § 745.6(d).

[73] *Id.*

[74] *Id.*

concept was not new. The 1961 Model State Administrative Procedure Act provided that: "[i]f an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule, . . . it may proceed without prior notice."[75] The rule, however, is "effective for a period of not longer than 120 days[,] . . . but the adoption of an identical rule [after public comment] is not precluded."[76] This is a workable provision. Connecticut has used it for over twenty years with little difficulty.[77] The proof is that it is used not so often as to suggest it is used as a cover for other reasons, yet not so rarely as to be a nonexistent justification.

Public input can be valuable in agency rulemaking, even where excused by law. In 1976 most crude oil and petroleum products were subject to price and allocation regulations. Decontrol was just beginning, and the Federal Energy Administration (FEA) had to come up with a formula for allocating costs among regulated products. It did so by final regulation, omitting prior notice. This was proper for several reasons, not the least of which was that advance notice about price controls can trigger supply and demand dislocations that are harmful to the economy.[78] The FEA chose a method of allocating costs based on the volume of the resulting product. Several years later, the courts struck down that method because the agency, in its rulemaking, had overlooked the industry's rejection of volume-based cost accounting because it reflected value poorly. Because the agency overlooked that aspect of the problem, the court declared the regulation arbitrary and

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[75] MODEL STATE ADMIN. PROCEDURE ACT § 3(b) (1981), 15 U.L.A. 168 (1990).

[76] *Id.*

[77] CONN. GEN. STAT. ANN. § 4-168(f)(1), (2) (West 1998).

[78] *See, e.g.*, E.I. Du Pont De Nemours & Co. v. Federal Trade Comm'n, 729 F.2d 128, 130 (2d Cir. 1984); Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1491 (Temp. Emer. Ct. App. 1983); Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005, 1014 (Temp. Emer. Ct. App. 1975) (responding to partial end of controls); Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (addressing concerns about withholding products from market); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332-33 (Temp. Emer. Ct. App. 1974) (addressing concern about "massive rush" to change prices); Cibro Petroleum Prod., Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520, 1527 n.4 (N.D.N.Y. 1985).

capricious, not in the sense that it was necessarily a bad rule, but because the agency had not considered all of the relevant factors.[79] By this time the entire price control system was based on the method, and the upshot may have been additional costs passed through to consumers in the range of hundreds of billions of dollars. Even in Washington, that is real money. If the agency had used the interim rule approach of publishing a final rule based on its assumptions, but still inviting comment, it would have quickly learned about what it had overlooked and would have been able to correct the problem in weeks rather than years.

To agencies, public comment is often seen as, at best, a diversion and too often as an obstacle to doing the public good. This assumes that public input will not help the agency, but in fact public comment often will help. Furthermore, even on those occasions where the commentary is not helpful in terms of providing information, at least the agency policymakers can be confident that they have considered all of the relevant data and policy arguments for and against their regulation in drafting the final language of the rule and supporting documents.

IV. LEGAL REVIEW, REGULATORY REVIEW, AND JUDICIAL REVIEW

A. Legal Review

Consistent with Yossarian's observation,[80] Pennsylvania has legal review of regulations twice. The Commonwealth Attorneys Act[81] provides that proposed regulations be submitted to the Attorney General and establishes a rigorous system of review.[82] A

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[79] Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 798-802 (Temp. Emer. Ct. App. 1979).

[80] *See supra* note 7 and accompanying text.

[81] PA. STAT. ANN. tit. 71, § 732 (West 1990).

[82] *Id.* § 732-204(b). Section 732-204(b) states:

> [t]he Attorney General shall review for form and legality, all proposed rules and regulations of Commonwealth agencies before they are deposited with the Legislative Reference Bureau as required by section 207 of . . . the "Commonwealth Documents Law." If the Attorney General determines that a rule or regulation is in improper form, not

separate portion of the Act provides the Office of General Counsel with much simpler review authority.[83]

There was statutory review of regulations for legality by the Office of the Attorney General prior to the Commonwealth Attorney's Act,[84] but the present rigid statutory structure dates from the changeover to an elected Attorney General in 1980. The main responsibility of the Attorney General under the Act is to review regulations by state agencies "for form and legality."[85] Form questions largely involve compliance with the regulations of the Joint Committee on Documents.[86] Legal questions for the most part concern constitutional and statutory authorization issues: is the regulation within the agency's general authority, is the regulation within the agency's specific rulemaking delegations, and is the

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statutorily authorized or unconstitutional, he shall notify in writing within 30 days after submission the agency affected, the Office of General Counsel, and the General Assembly . . . of the reasons for the determination. The Commonwealth agency may revise a rule or regulation to meet the objections of the Attorney General and submit the revised version for his review. Should the agency disagree with the objection, it may promulgate the rule or regulation with or without revisions and shall publish with it a copy of the Attorney General's objections. The Attorney General may appeal the decision of the agency by filing a petition for review with the Commonwealth Court . . . and may include in the petition a request for a stay or supersedeas of the implementation of the rule or regulation which upon a proper showing shall be granted. If a rule or regulation has been submitted to the Attorney General and he has not approved it or objected to it within 30 days after submission, the rule or regulation shall be deemed to have been approved.

Id. (citations omitted).

[83] *Id.* § 732-301. Section 732-301 provides:

[t]here is hereby established the Office of General Counsel . . . who shall be the legal advisor to the Governor and who shall: . . . (10) Review and approve for form and legality all proposed rules and regulations of executive agencies before they are deposited with the Legislative Reference Bureau as required by section 207 of . . . the "Commonwealth Documents Law."

Id. (citations omitted).

[84] *Id.* §§ 732-101 to 732-301.

[85] *Id.* § 732-301(10).

[86] 1 PA. CODE §§ 7.1-.10 (1975).

regulation constitutional? The Office of General Counsel considers identical issues.[87]

Do we need two legal and form reviews? The short answer, of course, is "no, we do not." I suspect, however, that the long answer is "yes, we do." At the time of the changeover in the Attorney General's status, the Governor was disinclined to relinquish sole authority over regulations to an independently elected official. Similarly, the Attorney General was disinclined to abdicate a major legal services responsibility to the Governor's office.

Politics and history can explain much of governmental structure. Most states have elected attorney generals, but I have found none that bifurcate regulatory supervision in precisely this fashion. If we followed the federal model, the matter would be handled in individual agencies, with the Department of Justice becoming involved only as litigation counsel after the adoption of regulations. Of course, the Department of Justice can destroy regulations fairly effectively through the litigation process, which ensures that its views will be heard in some forum. In some states, all government attorneys are subject to the supervision of the attorney general. In others that office primarily handles civil litigation. Because regulatory authority was an important part of government at the time when the legislation implementing the 1980 changeover went into effect, some dual role was probably inevitable.

As the statute provides, an agency is not bound by the Attorney General's decision that a regulation is invalid.[88] If the agency promulgates the final rule, the Attorney General can, in effect, appeal the decision to the commonwealth court.[89] There is one major case on that process, *Zimmerman v. O'Bannon*.[90] In *O'Bannon*, the Department of Public Welfare (DPW) prepared proposed regulations on licensed personal care boarding home plans, which the Office of Attorney General claimed were inconsistent with the public welfare code and, therefore, were

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[87] *See supra* note 83.

[88] PA. STAT. ANN. tit. 71, § 732-204(b) (West 1990).

[89] *Id.*

[90] 442 A.2d 674 (Pa. 1982).

outside of the Department's statutory authority.[91] When the DPW decided to go ahead with the regulations notwithstanding the Attorney General's views, Attorney General Zimmerman filed an action in the commonwealth court.[92] For our purposes, the key issue was the status of his request for a stay pending decision.[93] The DPW argued for the traditional requirements of interim relief, which involve irreparable injury and a strong likelihood of success on the merits.[94] The Attorney General argued that his office had a right to the stay if it chose to bring such an action, and the court agreed.[95] The court's description of the statute and its role is significant: "This section obviously attempts to accommodate the independence of the agency and the role of the Attorney General as the attorney for the Commonwealth."[96] In describing the role of the Attorney General in addressing form and legality issues, the court noted that the requirement "is designed to assure that other concerned units of government are alerted of the potential problem."[97]

The downside for effective government is that either the agency or the Office of Attorney General can play "chicken," and end up with the commonwealth court deciding the matter in a posture that cannot be favorable for administrative policy. Of course, in the real world of give and take, we do not really get government officials playing "chicken" on such matters very often. The reality is a system of joint consultation. The formality of notification of disapproval and intragovernmental litigation in section 204(b)[98] has largely been replaced by discussions among the Office of Attorney General and interested agencies, through a system that tolls the thirty day review period when questions arise.[99] Even though official disapproval has become uncommon, the review by the

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[91] *Id.* at 675.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 676.
[97] *Id.*
[98] PA. STAT. ANN. tit. 71, § 732-204(b) (West 1990).
[99] *Id.*

Office of Attorney General is far from a rubber stamp. As a result, there may not be much to gain from changing the law. It is worthwhile, however, to think about improving the system. At present it looks like the poster child for governmental red tape, especially in the context of a complex system of regulatory review because the law provides for two offices of attorneys that are responsible for approving the form and legality of regulations.

B. Regulatory Review

The primary question concerning regulatory review is whether the benefits are worth the complexity, as the payoff is normally just an anticlimactic legislative power to change the rule. My answer, which may surprise you, is that regulatory review is probably worthwhile. The key sections of the Regulatory Review Act begin with section 745.2,[100] which is unusually candid for legislation both in recognizing the problems of bureaucratic government and in stating the conscious political decision by the General Assembly "to curtail excessive regulation."[101] Section 745.4,[102] sets the composition of the IRRC.[103] The IRRC is the typical politically balkanized commission of this sort, with the governor and the leaders of the two political parties in each house appointing a member.[104] Next is section 745.5,[105] which governs "procedures and criteria for review."[106] This section calls for various types of data and analysis to help the IRRC and the assigned General Assembly committees evaluate and comment on proposed and final regulations.[107] This section, and the ones that follow, are exceptionally dense. They are fatigueing to read and hard to

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[100] PA. STAT. ANN. tit. 71, § 745.2 (West 1990).
[101] *Id.*
[102] PA. STAT. ANN. tit. 71, § 745.4 (West 1990).
[103] *Id.*
[104] *Id.* § 745.4(a).
[105] PA. STAT. ANN. tit. 71, § 745.5 (West 1990).
[106] *Id.*
[107] *Id.* § 745.5(a).

understand without careful note-taking, the legal equivalent of leaving a trail of bread crumbs.[108]

The real heart of the statute appears to be section 745.7,[109] containing procedures for dealing with disapproved regulations.[110] Although somewhat oversimplified, this is basically what happens when the IRRC disapproves of a final regulation: the agency who created the regulation has three choices. It can, of course, withdraw the regulation.[111] Failing that, it can proceed by trying to revise the regulation under subsection (b)[112] or by standing its ground under subsection (c).[113] These options are provided in boxes 14, 15 and 16 of Chart II.[114] In the two latter approaches, the agency reports back to the IRRC and committees within forty days.[115] The IRRC and

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[108] My analogy at the Symposium was to reading law school exams, a point readily acknowledged by the other panelists. This is a side point, but not an insignificant one. Are we better off with short, readable statutes that necessarily leave big gaps for judicial or administrative resolution, or with statutory texts such as the Regulatory Reform Act, which are complete but which read like caricatures of contracts floating in legalese–"party of the second part" and the like? There is no easy answer to this question.

[109] PA. STAT. ANN. tit. 71, § 745.7 (West 1990).

[110] *Id.*

[111] *Id.* § 745.7(a). Section 745.7(a) provides that

> [w]ithin seven days after the agency has received an order from the commission disapproving and barring promulgation of a . . . regulation issued pursuant to section 6(a), the agency shall notify the Governor, the committees and the commission of its selection of one of the following options:
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> . . . .
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> (3) To withdraw the . . . regulation.

Id. (citation omitted).

[112] *Id.* § 745.7(b).

[113] *Id.* § 745.7(c).

[114] *See supra* Chart II.

[115] PA. STAT. ANN. tit. 71, § 745.7(b) (West 1990). Section 745.7(b) provides:

> [i]f the agency decides to adopt the . . . regulation without revisions or further modifications, the agency shall submit a report to the committees and the commission within 40 days of the agency's receipt of the commission's disapproval order. The agency's report shall contain the . . . regulation, the commission's disapproval order and the agency's response and recommendations regarding the . . . regulation. [Certain specific instructions are provided that modify the 40-day deadline when the Legislature is not in session.] If the agency fails to deliver the report

committees then institute legislative proceedings to disapprove the regulations.[116] If a committee reports a concurrent resolution disapproving the regulation, each house has thirty days to adopt the

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to the committees and the commission in the time prescribed in this subsection, the agency shall be deemed to have withdrawn the final-form or final-omitted regulation. Upon receipt of the agency's report, the committees may proceed pursuant to subsection (d).

Id.

[116] *Id.* § 745.7(c). Section 745.7(c) provides that

[i]f the agency decides to revise or modify the . . . regulation in order to respond to objections raised by the commission and adopt that regulation with revisions or modifications, the agency shall submit a report to the committees and the commission within 40 days of the agency's receipt of the commission's disapproval order. The agency's report shall contain the revised . . . regulation, the findings of the commission, and the agency's response and recommendations regarding the revised . . . regulation. [Certain specific instructions are provided that modify the 40-day deadline when the Legislature is not in session.] If the agency fails to deliver its report to the commission and the committees in the time prescribed in this subsection, the agency shall be deemed to have withdrawn the . . . regulation. Upon receipt of the agency's report, a committee shall have ten days to approve or disapprove the report and to notify the commission and the agency of its approval or disapproval. If a committee fails to notify the commission and the agency of its disapproval within ten days, the committee shall be deemed to have approved the agency's report. The commission shall have seven days from the expiration of the committee's ten-day review period or until its next regularly scheduled meeting, whichever is later, to approve or disapprove the agency's report. If the commission and the committee approve the agency's report, the agency may promulgate the . . . regulation. If the commission disapproves the agency report, the agency shall be barred from promulgating that regulation until the review provided for in this subsection and in subsection (d) is completed. If a committee disapproves an agency's report and the commission approves it or if the commission disapproves an agency report, the commission shall deliver its order to the committees for consideration by the General Assembly pursuant to subsection (d). [Certain specific instructions are provided that modify the deadline when the Legislature is not in session.] If the commission fails to deliver its order disapproving the agency's report and revised final-form or final-omitted regulation in the time prescribed by this subsection, the commission shall be deemed to have approved the agency's report and the revised final-form or final-omitted regulation.

Id.

concurrent resolution.[117] The resolution is then presented to the Governor in the ordinary method, with the Governor retaining his veto power over general legislation and the General Assembly retaining the power to override the veto.[118]

Those familiar with civics will recognize that all of this procedural give and take simply leads to a power that the General

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[117] *Id.* § 745.7(d). Section 745.7(d) provides that

> [u]pon receipt of the report of an agency pursuant to subsection (b), of the agency's report and the commission's order pursuant to subsection (c) or of the commission's order pursuant to section 6(c), one or both of the committees may, within 14 calendar days, report to the House of Representatives or Senate a concurrent resolution and notify the agency. During the 14-calendar-day period, the agency may not promulgate the . . . regulation. If, by the expiration of the 14-calendar-day period, neither committee reports a concurrent resolution, the committees shall be deemed to have approved the . . . regulation, and the agency may promulgate that regulation. If either committee reports a concurrent resolution before the expiration of the 14-day period, the Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, from the date on which the concurrent resolution has been reported, to adopt the concurrent resolution. If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House of Representatives, the concurrent resolution shall be presented to the Governor in accordance with section 9 of Article III of the Constitution of Pennsylvania. If the Governor does not return the concurrent resolution to the General Assembly within ten calendar days after it is presented, the Governor shall be deemed to have approved the concurrent resolution. If the Governor vetoes the concurrent resolution, the General Assembly may override that veto by a two-thirds vote in each house. The Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, to override the veto. If the General Assembly fails to adopt the concurrent resolution or override the veto in the time prescribed in this subsection, it shall be deemed to have approved the . . . regulation. . . . The bar on promulgation of the final-form or final-omitted regulation shall continue until that regulation has been approved or deemed approved in accordance with this subsection. . . . If the General Assembly fails to adopt the concurrent resolution or if the Governor vetoes the concurrent resolution and the General Assembly fails to override the Governor's veto, the agency may promulgate the . . . regulation.

Id.

[118] *Id.*

Assembly had from the beginning; that is, the power to overrule an executive agency regulation by passing inconsistent legislation.[119] As a matter of formal law, the Regulatory Review Act gives the General Assembly very little that it did not already have, and could exercise anyway, even without the time limits. Furthermore, given that the Governor would logically support executive agency regulations because he presumably could have had them changed by executive direction alone, it seems that this very elaborate scheme is unnecessary at best and a sham at worst. In reality, it is nothing of the kind. That is why when all is said and done, I expect that most lawmakers would fight hard to keep both the IRRC, or its equivalent, and the legislative review process.

Part of the reason that the regulatory review process works this well ironically may be the somewhat tenuous legal status of its existence. The most important case with regard to this matter is *Commonwealth v. Jubelirer*,[120] a 1989 decision by the commonwealth court. The Department of Environmental Resources (DER) filed a petition with the commonwealth court, essentially asking that the court strike down the Regulatory Review Act as unconstitutional.[121] The conflict was described to me by a local lawyer as the war between the Casey administration and the Republican General Assembly. That is the setting, obviously enough, where the most serious conflicts over structures such as regulatory review are most likely to occur. Technically the DER sought an order directing the Legislative Reference Bureau to publish regulations adopted by the Environmental Quality Board but disapproved by the IRRC and the Senate.[122] The facts are very complicated, and changes in the Act make some of them unimportant for present purposes. In short, at the end of the regulatory review process, the regulations were disapproved by the reviewers, and publication was permanently banned pursuant to the

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[119] *See* PA. CONST. art. III. Article III is the source from which the Legislature derives its power.

[120] 567 A.2d 741 (Pa. Commw. Ct. 1989). The Department sued in the name of the Commonwealth. Senator Jubelirer was the first named defendant. *Id.*

[121] *Id.* at 743.

[122] *Id.*

Act.[123] In a fairly short opinion, the commonwealth court held that two sections of the Act were unconstitutional on separation of powers grounds.[124]

Following the United States Supreme Court in *Immigration and Naturalization Service v. Chadha*,[125] the court held that the power then granted to the IRRC and either house to prevent regulations from becoming law was in substance lawmaking.[126] The *Jubelirer* court stated: "Nothing less than legislation may suffice to override the rule-making power of the [Environmental Quality Board] or any other executive agency."[127] The *Jubelirer* court also followed a Pennsylvania Supreme Court precedent, *Commonwealth v. Sessoms*.[128] That case upheld the Pennsylvania Commission on Sentencing despite the fact that, similar to the IRRC, four of the Sentencing Commission commissioners were appointed by the General Assembly rather than the Governor.[129] The supreme court held that this was permitted only because the Sentencing Commission was not an administrative agency and exercised no lawmaking power, but only "investigation, classification, and evaluation" powers.[130] The court's decision was complex and, in some respects, ambiguous: A legislative agency may exist, and the Sentencing Commission was one, however, it may not act with the force of law.[131] That meant that the Commission's guidelines did not have the force of law, although they could be considered by the sentencing courts exercising discretionary sentencing authority.[132] Moreover, the Legislature could not override even those nonbinding policy statements without presentment to the Governor, because that would be legislative action without presentment to the Governor.[133]

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[123] *Id.* at 745.
[124] *Id.* at 750.
[125] 462 U.S. 919 (1983).
[126] *Jubelirer*, 567 A.2d at 749-50.
[127] *Id.* at 749.
[128] 532 A.2d 775 (Pa. 1987).
[129] *Id.* at 780.
[130] *Id.*
[131] *Id.* at 780-81.
[132] *Id.*
[133] *Id.* at 781-82. This shows how complex the regulations versus policy

How does *Sessoms* affect *Jubelirer*? The courts had to acknowledge that the IRRC, with the Senate but not the full General Assembly or the Governor, acted with the force of law when it prevented publication of a final order adopting a rule promulgated by the executive.[134] Only legislation can do that, the commonwealth court held, and by necessary inference, that means bicameralism and presentment are required as well.[135]

The Pennsylvania Supreme Court, in its review of *Jubelirer*, vacated the decision as moot[136] in light of the 1989 amendments that added bicameralism and presentment. As discussed above, this renders the formal powers of the IRRC and the General Assembly no greater with the Regulatory Review Act than without it.

Even though vacated, *Jubelirer* stands as an ominous check on the regulatory review process. *Jubelirer* is a well-reasoned opinion, and seems clearly based on supreme court precedent, therefore the existing law may be unconstitutional as well. There are essentially two arguments. First, the amended law provides that there is no permanent ban on a regulation without bicameralism and presentment, which is why in this form it adds little or nothing to legislative power in a larger sense. It does, however, allow the Commission or one committee, and later one house, to delay publication for fairly large blocks of time. This would seem to be legislative action, lawmaking under *Sessoms*, even if it is not permanent legislative action.

Second is a technical argument based on *Blackwell v. State Ethics Commission*[137] and *West Shore School District v. Pennsylvania Labor Relations Board*.[138] Under these decisions even the "legislative" actions of resolutions disapproving regulations and presenting the resolutions to the government may not constitute

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statement issue can become. A legislative agency may not enact binding rules, but it may adopt statements of policy. For such bodies, therefore, statements of policy are stronger than regulations, for they deserve deference (or at least some consideration), while regulations are ultra vires and, therefore, null and void.

[134] *Id.* at 782.

[135] *Id.*

[136] Commonwealth v. Jubelirer, 614 A.2d 204, 211 (Pa. 1992).

[137] 567 A.2d 630 (Pa. 1989).

[138] 626 A.2d 1131 (Pa. 1993).

constitutionally permissible lawmaking under the Pennsylvania Constitution.[139] Does either side really want to test the constitutionality of the existing system? Probably not, because failure would give the other side too much power. Perhaps, much like the old mutual Soviet Union-United States nuclear deterrent, uncertainty keeps both sides honest. Is the standoff in this regard appropriate? Perhaps so. I spoke with people in and out of government in preparation for the Symposium, and they had different perceptions of the role of the IRRC and committees in the regulatory process. But they did on balance agree and convince me that regulatory review largely serves its purposes, although not precisely in the way that the statutory form or legislative intention would suggest.

In reality this is what happens. The regulatory review process presents a structure for adversarial testing of administrative policies. The IRRC always asks hard questions and demands documented support for regulatory initiatives. The IRRC and committees have the clout to demand real answers. With regulatory review, executive agencies cannot adopt regulations without having solid justification, without being prepared on the most difficult policy and fact issues, and without being flexible enough to make changes where appropriate.

In that sense regulatory review is the government regulator's best friend. As long as it is not too entangled in partisan politics, it can work. The result may in the long run be that professors of political science and legal theorists may look at the form of regulatory review, and see this enormous structure and complex

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[139] In *Blackwell*, the supreme court held unconstitutional a portion of the Sunset Act that allowed a legislative committee to postpone an agency's termination under that Act. *Blackwell*, 567 A.2d at 634. In *West Shore School District*, the court invalidated the entire Sunset Act, thereby voiding its limitations on agency powers. *West Shore School District*, 620 A.2d at 1136. It recognized that "a concurrent resolution signed by the Governor has the effect of law, although, the resolution in and of itself is not a law" under the Pennsylvania Constitution. *Id.* at 1135. The status of a bar on publication of an agency regulation under the Regulatory Review Act bears some similarities to this problem, as it does to the surviving smile of the Cheshire Cat in Alice in Wonderland. *See* CARROLL LEWIS, ALICE IN WONDERLAND (Scholastic Book Services 1972) (1866).

statutory morass to do something the legislature could always do. They then ask, "Is that all there is?"[140] But that is not the song that agency regulators hear. They hear the commissioners and staff at the IRRC and the committees and their staffs singing a song by the Police, "Every breath you take, every step you make, I'll be watching you."[141] As long as that is the song the agency regulators hear, regulatory review will be alive and well.

C. Judicial Review

The last topic is judicial review of regulations. Pennsylvania's Administrative Law statutes generally provide for judicial review of adjudications[142] but do not specifically provide for judicial review of regulations. Instead, judicial review of regulations largely occurs in cases reviewing adjudications in which regulations have been applied. If that were true across the board, it would at least have the virtue of consistency. In reality there is substantial uncertainty in many settings as to whether direct judicial review of a regulation is appropriate or permissible. "Pre-enforcement review" in the federal system has been the norm not the exception since *Abbott Laboratories v. Gardner*[143] in 1967.[144] The system has worked well. The theory of the court in *Abbott Laboratories* was built into a four factor test, but the key is that substantive regulations forced the regulated party to choose between expensive compliance and risky violation before any enforcement by the agency.[145] Although *Abbott*

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[140] PEGGY LEE, *Is That All There Is?*, on IS THAT ALL THERE IS? (Capitol Records 1969).

[141] THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A & M Records 1983).

[142] *See* PA. STAT. ANN. tit. 2, § 702 (West 1990). Section 702 states that, "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." *Id.*

[143] 387 U.S. 136 (1967).

[144] *Id.* at 141.

[145] *Id.*

Laboratories could have been limited to its own strong facts, that has not occurred, with no real harm to regulatory systems.

Nonetheless, Pennsylvania appears to reject pre-enforcement review by virtue of statutes that provide for review of agency adjudications. But Pennsylvania does not always bar review. A leading case is *Arsenal Coal v. Department of Environmental Resources*.[146] Numerous anthracite companies brought an original action in commonwealth court challenging the Environmental Quality Board's recodification of regulations in response to a then-recent federal statute.[147] They claimed that the regulations violated limitations imposed by the General Assembly and were therefore outside of the agency's statutory authority.[148] The Department of Environmental Resources argued that the companies had to await enforcement cases before obtaining judicial review.[149] The court disagreed with the Department of Environmental Resources. The court held that an appeal from an enforcement case would not be an adequate remedy at law, which was the primary statutory obstacle to pre-enforcement review.[150] Applying the same reasoning as in *Abbott Laboratories*, the court concluded that the effect of the regulations was "direct and immediate"–a real hardship.[151] Delay would cause uncertainty, meaning that the companies could either comply with the regulations, which was costly and would prevent them from ever obtaining judicial review, or violate the regulations, which was "beset with penalties and impediments."[152]

Since *Arsenal Coal*, cases have gone both ways. Two illustrative commonwealth court decisions are worth discussion. First is *Concerned Citizens of Chestnuthill Township v. Department of Environmental Resources*,[153] in which the court refused to allow pre-enforcement review of the Department of Environmental

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[146] 477 A.2d 1333 (Pa. 1984).
[147] *Id.* at 1335.
[148] *Id.*
[149] *Id.* at 1340.
[150] *Id.* at 1339.
[151] *Id.* at 1340.
[152] *Id.*
[153] 632 A.2d 1 (Pa. Commw. Ct. 1993).

Resource's upgrade of water quality standards.[154] How does it differ from *Arsenal Coal*? The challengers were not forced to a choice on compliance.[155] The water in question either was or was not in compliance, and final resolution could await agency action on a case-by-case basis.[156] In contrast, in *Success Against All Odds v. Department of Public Welfare*,[157] the court considered a statutory authority and procedural challenge to a Department of Public Welfare rule change.[158] The court acknowledged that the Department of Public Welfare would not consider the challenger's claim on the merits in administrative proceedings.[159] Furthermore, with individual benefits cutoff pending judicial review, the court understood that there would be the sort of direct and immediate impact that prevents the standard administrative appeal from being an adequate remedy at law.[160] Pre-enforcement judicial review was therefore deemed appropriate.[161]

These cases, of course, can be reconciled by traditional methods of legal analysis. My question, though, is whether the game is worth the candle. Should the availability of judicial review before enforcement turn on such a subjective notion as "adequate statutory remedy?" Equitable doctrines are wonderful conceptions for lawyers and judges seeking to do justice in individual cases. They are not particularly helpful in administering rules of general application. Should the availability of pre-enforcement review turn on the peculiar circumstances of individual plaintiffs, as is sometimes the case under the federal approach that Pennsylvania seems to have adopted? Rather, why not have a general approach that allows review of substantive regulations, subject to a discretionary power in the court to stay judicial review upon a strong showing by the agency that further agency fact-finding or

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[154] *Id.* at 4.
[155] *Id.* at 7.
[156] *Id.* at 9.
[157] 700 A.2d 1340 (Pa. Commw. Ct. 1997).
[158] *Id.* at 1342.
[159] *Id.* at 1348.
[160] *Id.* at 1349.
[161] *Id.*

policymaking is necessary for a proper administrative decision and, therefore, for competent judicial review.[162] Such an approach would seem more suited to the problem and more likely to result in consistent decisionmaking from case to case.

One final issue with respect to judicial review concerns the clarification of standards of review. The judicial review statutes themselves are not clear about the standards the courts are to apply.[163] Case law indicates that Pennsylvania uses typical standards, such as abuse of discretion and arbitrary and capricious.[164] The cases are not particularly helpful in providing more specific content to these terms, and there is a potential problem that the courts are applying the standards either inconsistently or (or perhaps "and") haphazardly. Federal law has tightened the unduly amorphous nature of these standards through section 706(2) of the Administrative Procedure Act[165] and through cases that provide more guidance on the underlying meaning of the somewhat shopworn phrases used to describe the standards.[166] Pennsylvania may want to consider adopting statutes that codify

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[162] This would seem to be more analogous to judicial review of statutory validity.

[163] The general judicial review provisions direct that courts "affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that [statutory procedures were not followed] or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." PA. STAT. ANN. tit. 2, § 704 (West 1990).

[164] *See, e.g.*, Pennsylvania State Bldg. & Construction Trades Council v. Commonwealth, 722 A.2d 1139, 1142 (Pa. Commw. Ct. 1999) (applying and equating abuse of discretion and arbitrary and capricious standards); Pennsylvania Med. Soc'y v. Commonwealth, 546 A.2d 720, 722 (Pa. Commw. Ct. 1988) (applying reasonableness test); Bandy v. Commonwealth, 530 A.2d 507, 511-12 (Pa. Commw. Ct. 1987) (describing discretionary issues).

[165] 5 U.S.C. § 706(2) (1994).

[166] *See, e.g.*, Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (creating structure for judicial review of agency interpretations); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 53 (1983) (breaking arbitrary and capricious down into four part inquiry); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (explaining arbitrary and capricious).

some of these principles. Instead of limiting judicial power,[167] such statutes more accurately advise litigants and agencies of the likely thrust of judicial oversight.

V. CONCLUSION

The last comment largely summarizes the overriding principle here. Pennsylvania has a complex structure of administrative procedure statutes that have been adopted at different times for various purposes. This is a good time to re-evaluate those statutes in context, and to give them a full check up if not a full tune-up, even if the final result is largely to declare them fit, at least for their age. There are certainly strengths in our system that other states would be well-advised to adopt, such as the existence, jurisdiction and structure of the commonwealth court. Our satisfaction with the most obvious successes of our system, however, should not prevent us from tinkering with some aspects that are more problematic. We may not solve great problems, but we may solve small ones. Certainly we can make laws whose operations are clearer and more user-friendly to the courts, government agencies, lawyers, and members of the public who are the intended beneficiaries of the statutory scheme.

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[167] It is probably beyond the General Assembly's powers to limit judicial power, as Pennsylvania courts vigorously defend their authority and would not in all likelihood allow legislative poaching. For a strong critical view of the controversy, see Bruce Ledewitz, *What's Really Wrong with the Supreme Court of Pennsylvania*, 32 DUQ. L. REV. 409 (1994). There should be some room, however, for the Legislature to codify and clarify the largely judge-made law concerning procedural and substantive aspects of judicial review of administrative action.