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An "Irrc-some" Issue: Does Pennsylvania's Regulatory Review Act Violate the Separation of Powers?

> The legislative department derives a superiority in our government from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.[1]
>
> —*James Madison*

I. Introduction

In 1982, the Commonwealth of Pennsylvania adopted the Regulatory Review Act[2] ("Act") in an apparent attempt to curb what many believed to be the proliferation of unwise bureaucratic regulations.[3] Pennsylvania, following the national trend, was one of many states to adopt such a law.[4] The Act essentially allowed one House of the General Assembly, upon recommendation of the

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1. THE FEDERALIST NO. 48, at 251 (James Madison)(Gary Will ed., 1982) (discussing the separation of powers between the legislative, executive, and judicial branches of government).

2. Regulatory Review Act, Act 19 §§ 1 to 15 (1989), Senate Bill 1093 (June 21, 1989), unofficially codified as amended at PA. STAT. ANN. tit. 71, § 745.1 *et seq.* (1989). The original version of the Act was passed on June 25, 1982 (P.L. 633, No. 181) with subsequent reenactment and amendment on Feb. 21, 1986 (P.L. 47, No. 16), Dec. 16, 1986 (P.L. 1625, No. 185), and June 30, 1989 (P.L. 73, No. 19). For ease of reference, all subsequent citations to the Act in this Comment will be to the unofficial codification.

3. *See, e.g.*, Thom Cole, *Casey Vetoes Regulatory-Review Bill*, UPI, Dec. 23, 1988, *available in* LEXIS, Nexis Library, UPI File (explaining that the Regulatory Review Act was passed in response to alleged over-regulation).

4. In 1982, forty-two states had some provision for legislative review of state regulations. *See, e.g.*, Iver Peterson, *Courts Outlawing of Congress's Veto Casts Shadows on State Legislatures*, N.Y. TIMES, July 22, 1983, at A8 (discussing the influence the Supreme Court's decision to outlaw the Congressional veto would have on similar state legislative vetoes).

Independent Regulatory Review Commission ("IRRC"), to prevent the implementation of a proposed regulation.[5]

From the Act's inception, it was criticized as a violation of the separation of legislative and executive powers, allowing the General Assembly to infringe upon the Governor's constitutional duty to "take care that the laws be faithfully executed."[6] Critics argued that the Act enabled the General Assembly to interfere unconstitutionally with the Governor's rule-making authority.[7]

As of the early 1980s, both state and federal courts had provided little guidance on the subject. However, in 1983, the United States Supreme Court rendered the landmark decision of *INS v. Chadha*.[8] The *Chadha* Court held that a one-House "legislative veto" of an executive action violated the separation of powers doctrine.[9]

Subsequently, state regulatory review acts were bombarded with court challenges to their constitutionality.[10] In response, the Pennsylvania Legislature amended the Act in 1989 to address its potential constitutional deficiencies.[11] As the Act exists today, the General Assembly may disapprove, upon the recommendation of the IRRC, a proposed regulation by a concurrent resolution which is subject to the Governor's veto.[12] The Pennsylvania courts have yet to address whether this new procedure violates the separation of powers between the legislative and executive branches.

This Comment will examine the separation of powers doctrine as it applies to the Pennsylvania Regulatory Review Act.[13] In

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5. *See* PA. STAT. ANN. tit. 71, § 745.5 (as originally enacted in 1982).

6. "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed . . . ." PA. CONST. art. IV, § 2.

7. *See, e.g.*, Cole, *supra* note 3 ("Since its establishment, the commission [i.e. IRRC] has been criticized from almost every corner—administration officials, lawmakers and public interest groups.").

8. 462 U.S. 919 (1983). In *Chadha*, one House of Congress invalidated an immigration judge's suspension of an alien's deportation. The Supreme Court found that the House was without constitutional authority to order a deportation. The separation of powers doctrine prohibited Congress from interfering with the executive branch's authority over immigration matters.

9. *Id.* at 959.

10. Peterson, *supra* note 4, at A8 (discussing the impact of *Chadha* on state regulatory review measures).

11. *See* PA. STAT. ANN. tit. 71, §§ 745.6(b), 745.7(b) (1989).

12. *Id.*

13. A discussion of the effectiveness of the Regulatory Review Act in eliminating needless or unwise regulations is beyond the scope of this Comment. The analysis is limited to the relationship between the Regulatory Review Act and the separation of powers

particular, this Comment will address the 1989 amendments to the Act and whether the amendments cured the constitutional deficiencies found in the original Act.

Part II explores the philosophy of the separation of powers doctrine and how the courts have applied it. Part III explains the regulatory review procedure presently set forth in the Act, including the composition of the IRRC. Part IV addresses the implications of *Department of Environmental Resources v. Jubelier*,[14] the case in which the Pennsylvania Supreme Court came the closest to addressing the constitutionality of the Act. Part V asserts that the Act in its current form violates the separation of powers doctrine and is therefore unconstitutional under the Pennsylvania Constitution. Part VI examines why the constitutionality of the Act has not been challenged since *Jubelier*.[15] Finally, Part VII discusses the possible consequences of finding the Act to be unconstitutional.

II. The Philosophy And Court Treatment Of The Separation Of Powers Doctrine

The doctrine of separation of powers is an integral part of our state and federal governments.[16] The division of power between the legislative, executive and judicial branches serves a more grandiose purpose than simply the efficient administration of government. A cursory glance at the philosophy of the separation of powers reveals that the purpose is nothing less than the protection of liberty, whether from an imminent threat or a potential future threat.[17]

A discussion on the modern notion of separation of powers necessarily begins with the writings of French philosopher Montesquieu.[18] In *The Spirit of Laws*, Montesquieu observed that where

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doctrine.

14. 567 A.2d 741 (Pa. Commw. Ct. 1989), *vacated*, 614 A.2d 204 (Pa. 1992).

15. *Id.*

16. *See, e.g., infra* notes 19-29. Both Montesquieu and the writers of the *Federalist Papers* place tremendous importance upon the separation of powers doctrine. *Id.*

17. *Id.*

18. Charles-Louis de Secondat, Baron de la Brede et de Montesquieu was born in France and lived from 1689-1755. He is best known for his theory of the separation of powers. The theory was largely developed from his observations of the government of England. The preservation of liberty, thought Montesquieu, was dependent upon the separation of the executive, legislative and judicial branches. All other types of government necessarily led to despotism. *See* WILLIAM EBENSTEIN & ALAN O. EBENSTEIN, GREAT

the legislative and executive powers are united in the same person or body, "there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[19] He believed that if the executive was unable to restrain legislative encroachments on executive authority, the legislature would become "despotic," "arrogate to itself what authority it pleased," and eventually destroy all other powers.[20] In fact, Montesquieu went so far as to refer to the executive as a "sacred" position that must be protected from the legislature.[21]

Montesquieu's fears were shared by the Framers of the Constitution of the United States.[22] Accordingly, the Framers delineated, in a specific fashion, the powers granted to each of the three branches of government.[23] Observing that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex," James Madison, in *The Federalist No. 48*, warned against legislative usurpations "which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."[24] Similar sentiments concerning legislative power were shared by Thomas Jefferson: "It will be no alleviation [from despotic government] that these [government] powers will be exercised by a plurality of hands, and not by a single one, 173 despots would surely be as oppressive as one."[25] Even though the Framers recognized that in a republican government the legislative authority predomi-

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POLITICAL THINKERS: PLATO TO THE PRESENT 456-59 (5th ed. 1990).

19. MONTESQUIEU, THE SPIRIT OF LAWS 70 (Robert M. Hutchins ed. & Thomas Nugent et al. trans., 1971) (1st ed. 1748).

20. *Id.* at 72.

21. "His [the executive's] person should be sacred, because as it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary . . . ." *Id.* at 73.

22. *See, e.g.*, EBENSTEIN & EBENSTEIN, *supra* note 18, at 459; *see also* THE FEDERALIST NO. 47 (James Madison) (quoting Montesquieu).

23. *See* U.S. CONST. arts. I, II, III (providing respectively for the legislative, executive, and judicial branches of the United States government).

24. THE FEDERALIST NO. 48, at 250-51 (James Madison).

25. *Id.* at 252 (quoting Thomas Jefferson).

nates,[26] they adamantly asserted that legislative authority must be carefully contained in order to secure the blessings of liberty.[27]

Both state and federal courts have heavily relied upon the philosophies of Montesquieu and the Framers in drafting their separation of powers opinions.[28] The United States Supreme Court and the Pennsylvania Supreme Court have both found the separation of powers to be a fundamental principle of their respective governments.[29] Additionally, the *Chadha* Court explained that even if a law or procedure is "efficient, convenient, and useful in facilitating functions of government," it may not violate the constitutional guarantee of the separation of powers.[30]

Federal courts have strictly adhered to the provisions of the Constitution when analyzing separation of powers questions.[31] This formalistic approach is founded upon the belief that the Framers structured the Constitution with certain institutional safeguards. If adhered to strictly, the safeguards would secure the separation of powers which in turn would protect the liberties of the citizenry. For instance, the United States Constitution requires two basic components for legislative action: (1) passage through both Houses of Congress, and (2) presentment to the President.[32] In *Chadha*, Congress failed to satisfy the bicameral and presentment requirements of the Constitution—and thus violated the

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26. *See* THE FEDERALIST NO. 51, at 263 (James Madison) ("But it is not possible to give to each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates.").

27. *See id.* at 263-64 ("In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments.").

28. *See, e.g.*, Bowser v. Synar, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

29. *See* Buckley v. Valeo, 424 U.S. 1, 120 (1976) ("Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another."). *See also* Commonwealth v. Sessoms, 532 A.2d 775, 778 (Pa. 1987).

30. INS v. Chadha, 462 U.S. 919, 944 (1983).

31. *See generally* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984) (discussing the Supreme Court's "formalistic" approach to separation of powers questions).

32. "Every Bill which shall have passed the House of Representatives and Senate, shall, before it become a Law, be presented to the President of the United States . . . ." U.S. CONST. art. 1, § 7.

separation of powers doctrine —by allowing one House to veto the actions of the Attorney General (an executive agent).[33]

The Pennsylvania Supreme Court has adopted the *Chadha* formalistic approach.[34] However, the Pennsylvania constitutional requirements for legislative action are stricter than the requirements found in the United States Constitution.[35]

III. The Pennsylvania Regulatory Review Procedure

Three fundamental sections of the current Pennsylvania Regulatory Review Act are relevant to this Comment.[36] First, section 745.4 provides for the creation of the Independent Regulatory Review Commission ("IRRC"), the entity responsible for the oversight of proposed regulations.[37] The IRRC consists of five "commissioners."[38] Each of the following persons appoints one commissioner to the IRRC: the Governor, the President pro tempore of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, and the Minority Leader of the House of Representatives.[39] The Governor may, with the approval of two-thirds of the Senate, remove a commissioner for misfeasance, malfeasance or neglect of duty.[40]

Second, section 745.6 sets forth the procedures for IRRC consideration of proposed regulations.[41] If a proposed regulation is determined to be contrary to public interest, as adjudged by specified criteria,[42] the IRRC may, under subsection 745.6(b),

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33. *Chadha*, 462 U.S. at 959.

34. *Sessoms*, 532 A.2d at 778 (stating that bicameral approval and presentment to the Governor are integral parts of the constitutional design for the separation of powers).

35. *See* PA. CONST. art. III, §§ 1-4; *Sessoms*, 532 A.2d at 778 (explaining that the Pennsylvania Constitution contains explicit strictures concerning legislative procedure that are not contained in the United States Constitution). *See also infra* Part V.

36. Section 745.2 of the Regulatory Review Act states that regulatory oversight is the legislative intent. However, section 745.2 is not relevant for purposes of this Comment because the separation of powers analysis hinges solely on whether the Act adheres to the legislative procedure set forth in the Pennsylvania Constitution, regardless of legislative intent. *See* PA. STAT. ANN. tit. 71, § 745.2.

37. *Id.* § 745.4.

38. *Id.* § 745.4(a).

39. *Id.*

40. *Id.* § 745.4(e).

41. PA. STAT. ANN. tit. 71, § 745.6.

42. Factors to be considered by the IRRC when adjudging a proposed regulation include the following: (1) the statutory authority of the agency; (2) the legislative intent in the enactment of the statute upon which the final-form regulation is based; (3) the economic or fiscal impacts of the regulation or rule; (4) the protection of the public health, safety and

issue an order barring the publication of a final order adopting the regulation.[43] The promulgating agency however has an opportunity under section 745.7 to challenge the IRRC rejection.[44]

Third, section 745.7 provides for the subsequent review of a rejected regulation.[45] The following is a summary of the procedure for subsequent review of a proposed regulation. If the agency desires to implement a rejected regulation without revisions or modifications, the agency must notify the Governor, the designated standing committees of the House and Senate, and the IRRC of its intention to proceed.[46] Along with its notification, the agency must submit a report containing the proposed regulation, the findings of the IRRC, and the agency's response to the IRRC's objections.[47]

The designated standing committees of the House and Senate have the option of approving or disapproving the proposed regulation.[48] If one or both of the designated standing committees disapprove of the proposed regulation, the committee may report a concurrent resolution to the House and Senate concerning the rejection of the proposed regulation.[49] Nonetheless, if the designated standing committees approve of the proposed regulation, the IRRC has the opportunity to either approve the regulation or continue its bar. If the bar is continued, the committees must report a concurrent resolution to the House and Senate concerning the rejection of the proposed resolution.[50]

If a concurrent resolution rejecting the proposed regulation fails to obtain a majority in either the House or Senate, the agency may proceed with implementation of the regulation.[51] If a concurrent resolution rejecting the proposed regulation is agreed to by a majority in both the House and Senate, the resolution is

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welfare, and the effect on the Commonwealth's natural resources; (5) the clarity, feasibility and reasonableness of the regulation; (6) whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; and (7) the approval or disapproval by the designated standing committee of the House of Representatives or the Senate. *Id.* § 745.5(e).

43. *Id.* § 745.6(b).
44. *Id.* § 745.7.
45. *Id.*
46. PA. STAT. ANN. tit. 71, § 745.7(a).
47. *Id.* § 745.7(b).
48. *Id.* §§ 745.7(b), 745.7(c).
49. *Id.* § 745.7(b).
50. *Id.* § 745.7(c).
51. PA. STAT. ANN. tit. 71, § 745.7(d).

presented to the Governor pursuant to Article III, Section 9 of the Pennsylvania Constitution.[52] If the Governor fails to veto the resolution, implementation of the proposed regulation is permanently barred.[53] If the Governor vetoes the resolution, the agency could implement the regulation, provided that the veto is not overridden by a two-thirds vote in each House, in which case the agency would be permanently barred from implementing the regulation.[54]

IV. *Department of Environmental Resources v. Jubelier*

The closest Pennsylvania courts have come to addressing the question of whether the Regulatory Review Act violates the separation of legislative and executive powers is *Department of Environment Resources v. Jubelier*.[55] The Pennsylvania Department of Environmental Resources (DER) sought to have the Act, as it stood before the 1989 amendments, declared unconstitutional. The DER brought the action after the IRRC and the Senate Environmental Resources and Energy Committee barred the implementation of a regulation providing for volatility limitations on gasoline sold or exchanged in the Commonwealth.[56]

In 1989, after the 1989 amendments had been adopted,[57] the Commonwealth Court of Pennsylvania held that the DER had standing to bring suit;[58] that the action was not rendered moot by the 1989 amendments;[59] and that the Act—as it stood prior to the 1989 amendments—was unconstitutional as a violation of the separation of powers.[60]

Relying on *Commonwealth v. Sessoms*,[61] in which the Pennsylvania Supreme Court found the composition of the Pennsylvania Commission on Sentencing to be the most significant factor in determining its status as a legislative agent, the Commonwealth

52. *Id.* § 745.7(d).
53. *Id.*
54. *Id.*
55. 567 A.2d 741 (Pa. Commw. Ct. 1989), *vacated*, 614 A.2d 204 (Pa. 1992).
56. *Id.*
57. The 1989 amendments to the Regulatory Review Act were adopted on June 30 of that year. *Jubelier* was not decided until Dec. 7, 1989.
58. *Jubelier*, 567 A.2d at 746-47.
59. *Id.* at 746-47.
60. *Id.* at 748-49.
61. 532 A.2d 775 (Pa. 1987).

Court found the IRRC to be a legislative agent.[62] The General Assembly appointed four of the five IRRC commissioners.[63] Even though the Governor had the power to remove commissioners, the power was limited to circumstances of misfeasance and malfeasance and could only be exercised with the consent of two-thirds of the Senate.[64] The Commonwealth Court of Pennsylvania went on to explain, as had the earlier *Sessoms* court,[65] that the powers of investigation, classification and evaluation were functions traditionally undertaken by committees of the House and Senate.[66] This provided further indication of the IRRC's legislative nature. The Commonwealth Court also found that the stated legislative intent of the Act[67]—to provide oversight of the regulatory process—demonstrated that the IRRC was a legislative agent.[68]

Having assessed the IRRC to be a legislative agent, the Commonwealth Court then considered whether the original Act unconstitutionally interfered with the executive branch's rule-making authority. Applying a formalistic approach to the separation of powers question, the court opined that nothing less than legislation could be used to override or interfere with the executive branch's rule-making authority.[69] Accordingly, the court held that the provisions enabling the IRRC to block publication of a regulation (subsections 745.6(b) and 745.7(b))[70] were an unconstitutional "impediment to the executive's rule-making authority inherent in his duty to administer the laws."[71]

Moreover, the Commonwealth Court found that allowing one standing committee to permanently disapprove a proposed regulation violated the bicameral action and gubernatorial presentment requirements of Article III, Section 9 of the Pennsyl-

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62. *Jubelier*, 567 A.2d at 748.

63. *Id.*; *see also* PA. STAT. ANN. tit. 71, § 745.4.

64. *Jubelier*, 567 A.2d at 748 (Pa. Commw. Ct. 1989); *see also* PA. STAT. ANN. tit. 71, § 745.4.

65. *Sessoms*, 532 A.2d at 780.

66. *Jubelier*, 567 A.2d at 748 ("Oversight and review—much like the investigatory and evaluation functions of the sentencing commission in *Sessoms*—are legislative functions.").

67. *See* PA. STAT. ANN. tit. 71, § 745.2.

68. *Jubelier*, 567 A.2d at 749 ("IRRC, a body created to assist the General Assembly and empowered to perform preliminary oversight functions, is an agent of the legislature.").

69. *Id.* (quoting Bowser v. Synar, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.")).

70. PA. STAT. ANN. tit. 71, §§ 745.6(b), 745.7(b) (prior to 1989 amendments).

71. *Jubelier*, 567 A.2d at 749.

vania Constitution.[72] Accordingly, the court held subsection 745.7(b) of the old Act to be unconstitutional.[73]

On appeal in 1992, the Pennsylvania Supreme Court vacated the Commonwealth Court's decision in *Jubelier*.[74] The court found that the 1989 amendments to the Act rendered the controversy moot when the Commonwealth Court heard argument.[75] If DER wanted to pursue the implementation of the regulation, the court reasoned, it should have resubmitted it under the amended Act.[76] Because no action was taken under the new procedure, the Supreme Court refused outright to consider the topic that this Comment addresses: Whether the amended Act violates the separation of powers doctrine.[77]

V. Legislative Tyranny?: A Critical Analysis Of The 1989 Amendments To The Regulatory Review Act

The 1989 amendments were an obvious attempt to cure the constitutional deficiencies of the Act. The amendments came in the wake of *Chadha*[78] and a plethora of similar decisions in various state courts.[79] In response to these cases, the amendments simply replaced the provisions allowing a one-House committee rejection of a proposed regulation.[80] Under the 1989 amendments, a concurrent resolution, passed in both Houses and subject

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72. *Id.*; *see also* PA. CONST. art III, § 9 ("Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.").

73. PA. STAT. ANN. tit. 71, § 745.7(b).

74. Deptartment of Envtl. Resources v. Jubelier, 614 A.2d 204 (Pa. 1992) (vacating *Jubelier*, 567 A.2d 741).

75. *Id.* at 210-11.

76. *Id.* at 211 n.3, 212 ("We will not review the New Act because none of the parties have undertaken any of its procedures.").

77. *Id.*

78. INS v. Chadha, 462 U.S. 919 (1983).

79. For a thorough coverage of legislative regulatory review procedures in other states, see Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415 (1993); *see also* State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); Opinion of the Justices, 431 A.2d 783 (N.H. 1981); General Assembly of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982); Enourato v. N.J. Bldg. Auth., 448 A.2d 449 (N.J. 1982); Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984); State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622 (Kan. 1984); Mead v. Arnell, 791 P.2d 410 (Idaho 1990).

80. PA. STAT. ANN. tit. 71, §§ 745.6(b), 745.7(b) (as originally enacted in 1982).

to the Governor's veto, became necessary for the rejection of a proposed regulation.[81] All other provisions of the Act relevant to the issue of the separation of legislative and executive power remained largely unchanged.[82]

A. IRRC Remains a Legislative Agent with the Ability to Interfere with the Executive Branch's Rule-Making Authority

The 1989 amendments did not change the fundamental composition and purpose of the IRRC. Under subsection 745.4(a) of the amended Act, four of the five IRRC commissioners are still appointed by the legislature.[83] Under subsection 745.4(e), gubernatorial removal of a commissioner for misfeasance, malfeasance or neglect of duty can still be done only with the approval of two-thirds of the Senate.[84] The stated legislative intent of the Act is still the oversight of the regulatory process.[85] In addition, the functions performed by the IRRC (*e.g.* investigation, classification and evaluation) are still traditionally functions performed by legislative committees.[86] These are the same factors that the Commonwealth Court took into consideration in *Jubelier* when it held that the IRRC was a legislative agent.[87] Although the Supreme Court vacated the judgment on other grounds,[88] the Commonwealth Court advanced a very strong argument that the IRRC was in fact a legislative agent acting in the interests of the General Assembly.[89] Along the same lines, the United States Supreme Court in *Buckley v. Valeo*[90] held that the Federal Elections Commission was a legislative agent because four of the

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81. *Id.* §§ 745.6(b), 745.7(b) (after 1989 amendments).

82. *See, e.g., id.* § 745.4(a) (providing for appointments to IRRC), § 745.5 (setting forth procedure for submission of proposed regulation to IRRC and the designated standing committees).

83. *Id.* § 745.4(a).

84. *Id.* § 745.4(e).

85. PA. STAT. ANN. tit. 71, § 745.2.

86. Commwealth v. Sessoms, 532 A.2d 775, 780 (Pa. 1987) (referring to investigation, classification, and evaluation as traditional functions of legislative committees).

87. *See* Department of Envtl. Resources v. Jubelier, 567 A.2d 741, 749 (Pa. Commw. Ct. 1989), *vacated*, 614 A.2d 204 (Pa. 1992).

88. *See Jubelier*, 614 A.2d at 210-11.

89. *See Jubelier*, 567 A.2d at 748-49.

90. 424 U.S. 1 (1976). *Buckley* involved a challenge to the constitutionality of the Federal Election Campaign Act by various individuals and groups. Besides the separation of powers challenge, the Act was primarily attacked as a violation of the First Amendment's speech and association rights as well as the Fifth Amendment's equal protection principles.

six members were appointed by Congressional leaders and the Commission exercised functions traditionally associated with a legislative committee.[91]

Once it is established that the IRRC is a legislative agent, the next inquiry is whether the IRRC unconstitutionally interferes with the executive branch's rule-making authority. As Montesquieu and the Framer's suggested,[92] even the slightest encroachments by the legislature upon the power of the executive branch should be viewed with a skeptical eye. Nonetheless, as the United States Supreme Court pointed out in *Buckley*, "it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government."[93] The *Buckley* Court, however, went on to state: "It is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'"[94] For the reasons that follow, the IRRC's interference in the rule-making process exceeds acceptable levels of intermingling between the branches and, thus, offends the constitutional guarantee of the separation of powers.

1. IRRC's Ability to Delay Implementation of Regulations. —In *Legislative Research Commission v. Brown*[95] the Kentucky Supreme Court found that the Kentucky Legislative Research Commission's ability to delay the implementation of regulations was in essence the same as a legislative veto and therefore unconstitutional.[96] The Pennsylvania IRRC suffers the same constitutional deficiency. Although the IRRC lacks the ability to permanently bar the implementation of a regulation, the IRRC does have the power to independently delay the implementation of a proposed regulation for an extensive period of time.[97] As the

91. *Id.* at 113.

92. *See* THE FEDERALIST NO. 47 (James Madison) (quoting Montesquieu).

93. *Buckley*, 424 U.S. at 104.

94. *Id.* at 138.

95. 664 S.W.2d 907 (Ky. 1984).

96. *Id.* at 918.

97. Under the Regulatory Review Act, the IRRC could cause a delay in the implementation of a regulation that could potentially last up to 180 days: thirty days for the initial rejection of the regulation by the IRRC, PA. STAT. ANN. tit. 71, § 745.5; up to forty days for the agency to resubmit the regulation along with a report, *id.* § 745.7; thirty days for the consideration of a concurrent resolution by the Legislature, *id.*; ten days for the Governor to veto the concurrent resolution, *id.*; thirty days for the Legislature to override

Brown court explained, such an ability has "the effect of creating a legislative veto of the administrative policy of the executive branch of government."[98] Although the Pennsylvania Act provides an exception allowing immediate implementation of a regulation in cases of emergencies and compliance with a federal statute, the exception is limited to 120 days; after which time, the IRRC may disapprove of the regulation.[99]

The power to delay implementation of a regulation acts as a *de facto* veto of the regulation. For instance, if the implementing agency believes that a regulation is necessary to meet a pending problem within the Commonwealth, the agency would likely abandon the old proposed regulation and settle for another regulation that will be able to pass the IRRC standards without delay. The power of the IRRC in such a situation undeniably places executive agencies in a vulnerable position.

Similarly, the very existence of the IRRC necessarily shapes the way in which agencies design their regulations. The drafting of regulations is likely affected not only by what the agency believes to be the best policy for the Commonwealth, but also by what the agency believes will not be barred from implementation by the IRRC (i.e., the legislative branch). Accordingly, the executive branch's ability to draft a coherent regulatory scheme is severely limited by the very existence of the IRRC.

2. The Influence of Individuals and Special Interests on IRRC. —One of the primary reasons the Framers separated powers between three branches of government was to limit the ability of individuals and factions, whether internal or external, to have undue influence over the affairs of government. As Madison, referring to the necessity of an executive veto, aptly noted in *The Federalist No. 73*: "The propriety of the thing does not turn upon the supposition of the superior wisdom or virtue in the executive: But upon the supposition that the legislative will not be infallible . . . that a spirit of faction may sometimes pervert its deliberations."[100] When the laws are made and executed by one branch, special interests need only convince that single branch of the merits

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the Governor's veto, *id.*

98. *Brown*, 664 S.W.2d at 918.

99. PA. STAT. ANN. tit. 71, § 745.6(b).

100. THE FEDERALIST NO. 73, at 373 (Garry Wills ed., 1982).

of their contentions in order to achieve their desires. Such is the case with the IRRC.

Traditionally, the President pro tempore of the Senate, the Speaker of the House, the Senate Minority Leader and the House Minority Leader are lobbied very heavily by special interest groups. Ironically, these same four individuals appoint four of the five IRRC commissioners.[101] In other words, lobbyists in reality need to lobby only four individuals and their appointed agents in order to have a substantial impact upon both the making of a law as well as its execution. Despite its name, the IRRC is by no means "independent." It is well known that special interests lobby IRRC in order to influence decisions concerning which regulations are challenged.[102]

3. The Ability of Subsequent General Assemblies to Frustrate Original Legislative Intent Without Legislating Anew. —The procedure allowed for under the Act empowers the current General Assembly to disregard the intent of the General Assembly that originally enacted the enabling law from which a proposed regulation has arisen. Even if an agency's proposed regulation is in full compliance with the original intent of the law, the current General Assembly could by concurrent resolution strike down the proposed regulation. Such an ability constitutes an unlawful interference with power lawfully delegated to the executive branch. In essence, the Act vests the General Assembly with the ability to amend and interpret the law by way of a concurrent resolution. As will be discussed, the procedure for passing a concurrent resolution is relaxed in comparison to the constitutionally mandated procedure for lawmaking.

This scenario demonstrates precisely the type of situation against which the Framers and Montesquieu had warned.[103] The checks and balances upon the powers of the General Assembly have been weakened by the Act and the existence of IRRC. The derogation of the separation of powers has led to a situation in which one branch has the *potential* to effectively exercise tyranny, however mildly, over the citizenry of the Commonwealth.

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101. PA. STAT. ANN. tit. 71, § 745.4(a).

102. *See, e.g.*, Cole, *supra* note 3. Governor Casey asserted that "[t]he reality is (that) too often the interests being served by excessive delays are special interests which lobby IRRC so effectively rather than the interests of the public at large." *Id.*

103. *See generally*, *supra* notes 19-29.

B. Regulatory Oversight Must Be Accomplished by Adhering to Constitutionally Mandated Legislative Procedure

The fundamental change brought about by the 1989 amendments to the Act was the replacement of the one-House committee veto requirement with the Article III, Section 9 concurrent resolution requirement.[104] It is a well-established principle that a legislative body may either legislate in detail or legislate in general and delegate power to the executive branch to fill in the details.[105] In *Bowser v. Synar*,[106] the United States Supreme Court stated that "[o]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[107] A few years earlier in *Chadha*, the Court explained that two fundamental concepts are "integral parts of the constitutional design for the separation of powers."[108]

> [T]he bicameral requirement and the Presentment Clause . . . serve essential constitutional functions. The [Executive's] participation in the legislative process was to protect the Executive Branch from [the legislature] and to protect the whole people from improvident laws. The division of [the legislature] into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The [Executive's] unilateral veto power, in turn, was limited by the power of two-thirds of both Houses . . . to overrule a veto thereby precluding final arbitrary action of one person . . . . It emerges clearly that the prescription for legislative action . . . represents the Framer's decision that the legislative power . . . be exercised in accord with a single, finely wrought and exhaustively considered, procedure.[109]

The Pennsylvania Supreme Court adopted the *Chadha* reasoning in *Sessoms*.[110] Interestingly, the *Sessoms* court did not explicate

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104. *See* PA. CONST. art III, § 9; PA. STAT. ANN. tit. 71, § 745.7(b).
105. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
106. 478 U.S. 714 (1986).
107. *Id.* at 733-34.
108. INS v. Chadha, 462 U.S. 919, 946 (1983).
109. *Id.* at 951.
110. Commonwealth. v. Sessoms, 532 A.2d 775, 778-79 (Pa. 1987).

whether the full legislative procedure[111] is required for legislative action affecting rule-making or whether a concurrent resolution subject to the Governor's veto[112] is sufficient for such a purpose. It is this distinction that places the Act in controversy.

As it presently stands, the Act requires the passage of a concurrent resolution by a majority of both Houses—subject to the Governor's veto—for the barring of a proposed regulation.[113] Although this procedure satisfies the *Sessoms* bicameral and presentment requirements,[114] it falls far short of meeting the requirements for the passage of legislation.

The Pennsylvania Supreme Court in *Scudder v. Smith*[115] held that a joint resolution, which always begins with the words "Be it resolved . . . ," was not a law despite its adoption by both Houses and its presentment to the Governor.[116] The *Scudder* court defined a resolution as merely a formal expression of the opinion or will of an official body or a public assembly.[117] A resolution differs significantly from a law, which can only be passed by a bill.[118] As the Supreme Court explained:

> The fact that a joint resolution went through the *mode of passage* prescribed by the Constitution for Bills, does not supply the constitutional deficiencies of its conception. The purpose of the constitutional requirements relating to the enactment of *laws* was to put the members of the Assembly and *others interested, on notice,* by the title of the measure submitted, so that they might vote on it with circumspection. What was attempted to be done by the sponsors of this challenged measure was something utterly alien to the proper subject matter of a "joint resolution." Its deceptive nomenclature is fatal to its validity as a *law*.[119]

For similar reasons, the concurrent resolution provided for in the Act cannot properly be considered legislation.[120] The concur-

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111. *See* PA. CONST. art. IV, § 15.
112. *See* PA. CONST. art. III, § 9.
113. *See* PA. STAT. ANN. tit. 71, § 745.7(b).
114. *See Sessoms*, 532 A.2d at 778-79.
115. 200 A. 601 (Pa. 1938) (challenge to a resolution that gave a commission inquisitorial power to investigate the oil industry in the state).
116. *Id.*
117. *Id.* at 604.
118. *Id.*
119. *Id.*
120. *Id.*

rent resolution does not put legislators and the public on notice that the measure will have the effect of law. As a general principle, legislators typically do not take resolutions as seriously as actual bills. Accordingly, it can be deduced that most legislators will not research the contents of a concurrent resolution barring a proposed regulation as thoroughly as they would a regular bill.

The Pennsylvania Supreme Court in *West Shore School District v. Pennsylvania Labor Relations Board*[121] clarified the status of an Article III, Section 9 concurrent resolution: "[A] concurrent resolution signed by the Governor has the effect of law, although, the resolution in and of itself is not a law as contemplated under Article 3, Section 1. Resolutions do not attempt to promulgate rules or create rights but merely enhance those which already exist."[122] Although the General Assembly is not in the literal sense promulgating rules, it is in fact controlling which rules can be promulgated. Such a power is in essence the equivalent of promulgating rules, and therefore cannot be constitutionally accomplished by way of a concurrent resolution.

The Act allows the Pennsylvania General Assembly to circumvent the procedural safeguards built into the Pennsylvania Constitution to protect the separation of powers. The passage of a concurrent resolution is much easier than the passage of a bill. Thus, it is easier to interfere with the executive branch's rule-making authority.

The constitutionally mandated procedure for the passage of a law in Pennsylvania is wrought with safeguards designed to keep the General Assembly's power in check. For example, the purpose of bills may not be substantively changed on their passage through the Houses.[123] All bills must be considered in committee.[124] All bills are limited to only one subject clearly identified in the bill's title.[125] All bills must be considered on three different days

121. 626 A.2d 1131 (Pa. 1993) (holding that the state Sunset Act which enabled the Legislature to reestablish an agency by resolution violated the state constitution).

122. *Id.* at 1135.

123. PA. CONST. art. III, § 1 ("No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.").

124. *Id.* art. III, § 2 ("No bill shall be considered unless referred to a committee, printed for the use of the members and returned therefrom.").

125. *Id.* art. III, § 3 ("No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.").

in each House.[126] Finally, all bills are subject to the Governor's veto.[127] With the exception of committee consideration and the Governor's veto, the General Assembly could avoid these procedural safeguards under the current Act. These safeguards are essential to protecting the executive branch from spontaneous, imprudent action by the General Assembly. Subsection 745.7(b) of the Act should accordingly be modified to require the General Assembly to follow the constitutionally mandated lawmaking procedure when denying the implementation of a proposed regulation.

VI. Probable Reasons Why The Regulatory Review Act Has Not Been Challenged

The constitutionality of the Act has likely not been challenged for three primary reasons. First, the *Jubelier* case was decided in 1992.[128] It will probably take a few years before an appropriate case or controversy arises.

Second, in January of 1995, Governor Robert Casey, an adamant opponent of the Act,[129] was succeeded by Governor Thomas Ridge. The new Governor has yet to make known his sentiments towards the Act.

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126. *Id.* art. IV, § 4.

> Every bill shall be considered on three different days in each House. All amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill and before the final vote is taken, upon written request addressed to the presiding officer of either House by at least 25% of the members elected to that House, any bill shall be read at length in that House. No bill shall become a law, unless on its final passage the vote is taken by yeas and nays, the names of the persons voting for and against it are entered on the journal, and a majority of the members elected to each House is recorded thereon as voting in its favor.

Id.

127. *Id.* art. IV, § 15 ("Every bill which shall have passed both Houses shall be presented to the Governor . . . .").

128. *See* Department of Envtl. Resources v. Jubelier, 614 A.2d 204 (Pa. 1992), *vacating*, 567 A.2d 741 (Pa. Commw. Ct. 1989). The exact date of the decision was September 16, 1992.

129. *See* Cole, *supra* note 3. Casey believed that the court system was the proper avenue for special interest groups to challenge the way the executive branch implemented laws. *Id.* Casey stated that the regulatory review process "becomes intolerable when it comes so intrusive into executive decision-making that discretion is effectively removed from department heads or their priorities are effective [sic] frustrated by excessive delays and bureaucratic hurdles built into the review process." *Id.* Casey also expressed frustration with the influence of lobbyists over IRRC. *Id.*

The third, and probably most prominent, reason why the Act has not been challenged is that few parties have standing to challenge the Act. In *Jubelier*, the Commonwealth Court of Pennsylvania found that the Department of Environmental Resources, as a executive agent, had standing to bring suit against the General Assembly.[130] In a suit brought simultaneously, the Pennsylvania Supreme Court denied standing to a private environmental organization.[131] The court held that "in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interest must be substantial, direct and immediate."[132] Accordingly, few parties, outside agents of the executive branch, have standing to challenge the Act.

VII. Possible Consequences If The Act Is Found To Be Unconstitutional

Three obvious consequences are likely if the Act is found to be unconstitutional. First, the promulgation of the regulations by the executive branch will once again go unchecked by the General Assembly. Freed from these constraints, agencies may implement the regulations that they were previously unable to implement. Nonetheless, the General Assembly could reestablish the regulatory review procedure by reinstituting the Act in an amended form which mitigates the constitutional deficiencies.

Second, the constitutionality of other "independent" agencies, such as the Pennsylvania Higher Education Assistance Association (PHEAA) and the State Ethics Commission, would be thrown into question. Both PHEAA and the Ethics Commission are run by Boards that consist of large numbers of General Assembly appointments.[133] If PHEAA and the Ethics Commission are

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130. *See Jubelier*, 567 A.2d at 746; *see also* Leonard v. Thornburgh, 467 A.2d 104 (Pa. Commw. Ct. 1983); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

131. *See* Sierra Club v. Hartman, 605 A.2d 309 (Pa. 1992), *aff'g* 567 A.2d 339 (Pa. Commw. Ct. 1989) (holding that private environmental organization lacked standing to challenge the constitutionality of the Regulatory Review Act).

132. *Id.* at 310 (citing Sprague v. Casey, 550 A.2d 184 (1988)).

133. The State Ethics Commission consists of seven members. Three are appointed by the Governor. Each of the following appoints one member: the President pro tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority Leader of the House. *See* 65 PA. CONS. STAT. § 406 (1995).

The PHEAA Board of Directors consists of nineteen appointees. Three are appointed by the Governor. Eight are appointed by the President pro tempore of the Senate. Eight

found to be legislative agents, then their ability to undertake executive functions would be questionable.

Finally, the General Assembly would be forced to take greater care in drafting its legislation. Laws would have to be detailed in order to limit the discretion excercised by executive agencies. In turn, the General Assembly would be held more accountable for the policies it promulgates. It would be much more difficult for the General Assembly to pass on controversial issues to executive agencies. The General Assembly would be forced to explain in greater detail how policies should be implemented by the agencies.

VIII. Conclusion

The separation of powers doctrine is a fundamental principle in Pennsylvania's governmental structure. Any possible encroachment by the General Assembly upon the Executive Branch should be viewed with great skepticism. Pennsylvania's Regulatory Review Act allows the General Assembly to have an undue influence over the Governor's duty to faithfully execute the law. Although the Act may serve the legitimate purpose of reducing the number of unwise regulations, it also creates the potential for the "tyranny" of the legislative branch. The Pennsylvania Constitution has procedural safeguards built into it to preserve the integrity of the separation of powers doctrine. However, the current Act does not require the General Assembly to follow the extensive procedure set forth for the passage of a law. The Act should either be abolished or amended to cure these constitutional deficiencies.

David Pascal Zambito

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are appointed by the Speaker of the House. *See* 24 PA. CONS. STAT. § 5103 (1996).