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SPEED BUMPS ON THE ROAD TO ADMINISTRATIVE LAW REFORM IN CALIFORNIA AND PENNSYLVANIA

By Michael Asimow*

Since 1989, I have been toiling in the vineyard of California administrative law reform as a consultant for the California Law Revision Commission. This project has produced both a solid success and two ignominious failures. The solid success occurred on October 15, 1995, when Governor Pete Wilson signed into law S.B. 523, the Commission's new and improved Administrative Procedure Act (APA) relating to state agency adjudication.¹ The first of the ignominious failures occurred on January 13, 1998, when the Senate Judiciary Committee killed S.B. 209, the Commission's proposed judicial review bill. The second ignominious failure occurred on October 8, 1999, when the Governor vetoed an apparently non-controversial rulemaking

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¹ Cal. Gov't Code §§11400-11529 (West Supp. 1998) (hereinafter Gov't Code). For a detailed account of the new adjudicatory APA provisions, see California Law Revision Commission, *Administrative Adjudication by State Agencies*, 25 Cal.L.Rev.Comm'n Rep. 55 (January, 1995); Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 Tulsa L. J. 297 (1996) (hereinafter Asimow, Tulsa).

bill. Thus I advise all administrative law reformers to hope for the best but expect the worst.

This article is intended to share my experiences as a state administrative law reformer with those hardy souls who plan to carry the torch in Pennsylvania and other states. I will discuss some of the key issues, looking both at California law and, rather fearfully and from an outsider's perspective, Pennsylvania law. I'll tell the tale of California's reform odyssey, identify the likely sources of support for and opposition to reform, and point out some of the political speedbumps on the highway to reform. Administrative law reform is a tedious process, requiring copious amounts of negotiation; it will be controversial and hard fought. Ultimate success depends on the reformers having articulated a compelling case for reform. It is necessary to overcome that most overworked and yet most valid of cliches, "if it ain't broke, don't fix it."

Getting past the speedbumps on the road to reform without breaking an axle requires a generous measure of good luck. In addition, as in most legislative struggles, it depends on finding a powerful political patron, doing determined grassroots lobbying, forging successful coalitions and placating opponents. Remember--it is far

easier for opponents to kill proposed legislation than for proponents to enact it. It is also essential to know when to hold 'em and when to fold 'em. As we shall see, when it came to reform of judicial review, the Commission failed to observe that it held a losing hand and it paid the price.

I. THE CALIFORNIA LAW REVISION COMMISSION

The California Law Revision Commission is an independent state agency charged with recommending reforms of state law.² The Commission employs a very small but quite expert paid staff. Its members are volunteer lawyers appointed by the Governor as well as legislators and legislative staff members.³ Commission members convene for one- or two-day meetings several times a year to review studies and recommend legislation on a wide variety of subjects.⁴

At the suggestion of the legislature,⁵ the Commission placed administrative law reform on its agenda. While this area of "lawyer's law" is the kind of thing the Commission does best (it successfully revamped the evidence and probate codes, for example), administrative law turned out

² Gov't Code §§8280-98.

³ Gov't Code §8281.

⁴ I would like to take this opportunity to pay tribute to the dedicated members of the Commission and the staff who made such a massive effort to draft and enact the new APA. Readers who wish to obtain documents or studies cited herein can write the Commission at 4000 Middlefield Rd. Ste. D-2, Palo Alto, CA 94303-4739. The Commission's phone number is (650) 494-1335 and its website is <http://www.clrc.ca.gov>. Many of the documents are available on the website.

⁵ Res. ch. 47(24), 1987 Cal. Stat. 5897, 5899.

to be quite a handful. It was more complex and more politically sensitive than most of the areas the Commission had historically addressed. In all likelihood, the Commission never anticipated what it was in for--bruising legislative struggles and expenditure of large amounts of its very limited resources over a ten-year period. And it's not over yet.

The Commission split the administrative law project into three parts--adjudication, judicial review, and rulemaking. This was shrewd political strategy because each of the three parts was likely to attract a different set of opponents. Taking each part separately at least minimized the chances that a strong coalition would emerge to kill the entire bill in the legislature or persuade the governor to veto it. In addition, each of the three areas of potential reform are quite complex and each presents many points of controversy as well as difficult drafting problems, even for the nonpareil draftspersons on the Commission's staff. Thus the trifurcation of the subject made the drafting task more manageable.

The Commission has considerable credibility with the legislature which was of great assistance in getting the new adjudicatory APA passed, but insufficient to get the judicial review bill out of committee. While the

Commission is highly respected, the reality is that it has no political muscle whatsoever. Moreover, the swift turnover in members resulting from California's draconian term limits has produced a legislature having no institutional memory; most members probably have never heard of the Commission. A bizarre statute even forbids Commission members and staff from lobbying legislators on behalf of Commission bills.⁶ Thus there is no possibility of enacting Commission bills without a strong patron, bipartisan legislative support (or at least indifference), and an absence of determined, organized opposition.

The process of drafting administrative procedure reform legislation, like most Commission projects, began with study and research. Often the Commission employs outside consultants for this task; in the case of administrative procedure reform, I was the consultant that supplied most of the research.⁷ The staff broke down this

⁶ Gov't Code §8288. Fortunately this provision allows consultants like myself to lobby for proposed legislation or nobody would have stood up for the Commission's bills in legislative committee hearings.

⁷ Some very useful research and input was supplied by law professors Greg Ogden of Pepperdine Law School and J. Clark Kelso of McGeorge Law School, as well as by the late Preble Stolz of Boalt Hall.

I prepared four studies on administrative adjudication, three studies on judicial review, and one study on rulemaking. The studies are as follows:

1. "Administrative Adjudication: Structural Issues" (1989)
2. "Appeals Within the Agency" (1990)
3. "Administrative Impartiality" (1991)
4. "The Adjudication Process" (1991)
5. "Judicial Review: Standing and Timing" (1992)
6. "The Scope of Judicial Review" (1993)
7. "A Modern Judicial Review Statute to Replace Administrative Mandamus" (1993)

research into bite size policy issues, each of which was discussed by the Commission members in painstaking detail. After the Commission members made the basic policy decisions, the staff prepared a draft statute which the Commission picked apart on a line-by-line basis.

At all stages, Commission meetings were open to the public and drafts were circulated as widely as possible. All public comment was warmly and gratefully accepted. The draft statute was in a constant state of revision, with every possible effort being made to improve the drafting and to placate opponents.

The Commission wisely appointed additional consultants to represent the interests of the private sector in Commission deliberations. State agencies paid careful attention to the reform efforts and lobbied the Commission successfully, but the private sector often ignored the process. Understandably, private lawyers could not justify the time necessary to participate in Commission meetings or analyze and comment on the lengthy draft reports and statutes.

8. "Rulemaking Under the California Administrative Procedure Act: Proposals for Reform" (1996).

See Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992) (incorporating studies 1, 2, and 3) (hereinafter Asimow, *Adjudication Fundamentals*); Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995) (hereinafter Asimow, *Scope of Review*) (incorporating study 6). Study 4 was reprinted in 25 Cal. L. Rev. Comm'n Rep.

Indeed, despite every effort to keep the public informed (for example by sending material to everyone who asked to be placed on a mailing list and posting all reports and drafts on the Commission's website), inevitably many of the attorneys or entities most affected by the proposed reforms never found out about the project until the last minute.⁸ Thus they often entered the process at the last minute, requesting revisions that would have been more easily accommodated if they had been sought earlier. The presence of late-arising and highly suspicious opposition was one of the reasons that the judicial review bill was torpedoed in committee.

The Commission's final work product was in the form of draft legislation. A member had to be found who was willing to carry the bill, meaning that the member was willing to invest the time and attention necessary to shepherd the legislation through the legislative process. This is not a trivial hurdle, since, as a practical matter, legislators can carry only a limited number of bills. Administrative procedure reform lacks legislative sex appeal, to put it mildly. As a result, a member gets

447 (1995). Studies 5 and 7 were reprinted in 27 Cal. Law Rev. Comm'n Rep. 229, 403 (1997).

⁸ For whatever reason, private sector attorneys took part extensively in the judicial review phase of the project. They were quite successful in lobbying the Commission. On the adjudication and rulemaking phases, however, it was more difficult to secure private sector involvement.

little political credit for carrying such good-government oriented bills. It is unlikely that anyone has ever been elected to office on a platform of reforming the APA. On the contrary, a legislator can offer opposition to such bills as a reward to significant campaign contributors. The Commission was fortunate in that one of its members, former State Senator Quintin Kopp, not only carried the adjudication and judicial review bills but ardently supported them at every legislative stage.

II. ADJUDICATION

A. Background of California's adjudication reform effort

California's original APA was a pioneering effort. It was proposed in 1944 by the California Judicial Council⁹ whose report relied heavily on the report of the federal Attorney General's Committee on Administrative Procedure.¹⁰ Enacted in 1945,¹¹ a year before the federal APA, California's APA was the first state administrative procedure statute of any consequence.¹² The Act flew in the

⁹Judicial Council of Cal., Tenth Biennial Report to the Governor and the Legislature of 1944 8-30 (1944). See John G. Clarkson, *The History of the California Administrative Procedure Act*, 15 *Hast. L. J.* 237 (1964).

¹⁰*Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong. 1st Sess. (1941). The majority of the Attorney General's Committee recommended adjudication provisions of quite limited scope. *Id.* at 195-202. California's 1945 APA was vastly more ambitious than that recommended by the Attorney General's Committee's majority.

¹¹Ch. 867, 1945 Cal. Stat. 1626. The provisions on rulemaking were added in 1947, Ch. 1425, 1947 Cal. Stat. 2984, and were heavily amended in 1979. Ch. 567, 1979 Cal. Stat. 1978.

¹²California's former APA provisions were contained in Gov't Code §§11340-11529 (West 1992). The portions of the former APA concerned with adjudication were §§11500-11529.

face of the recommendation of New York's Benjamin Commission that a state APA was inadvisable.¹³

In many respects California's 1945 legislation was far ahead of its time. It contained detailed provisions designed to assure fair and relatively judicialized administrative procedure. Most important, it created a central panel of independent hearing officers¹⁴--an idea that has been accepted by about half of the states, not including Pennsylvania¹⁵ or the federal government.

As the decades passed, the defects in California's 1945 statute became apparent. The most significant shortcoming was that the 1945 APA applied only to occupational licensing agencies and a very few others.¹⁶

¹³1 R. Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 35-36 (1942).

¹⁴Gov't Code §11502. Originally, the Act allowed agencies to choose between their in-house hearing officers and those from the central panel. See Judicial Council Report, note 9 at 14-15; Norman Abrams, *Administrative Law Judge Systems: The California View*, 29 Admin. L. Rev. 487 (1977). Beginning in 1961, agencies were required to use central panel hearing officers to the exclusion of in-house officers. Id. at 495-98. Hearing officers were renamed administrative law judges (ALJs) in 1985. Stats. 1985, c.324, §§16-17.

¹⁵ See Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 5 Wid.J.Pub.L. 297 (1996); Jeffrey G. Cokin & Jonathan Mallamud, *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office*, 15 Duq.L.Rev. 605 (1977).

¹⁶The Judicial Council's recommendations for a new APA, see note 9, covered only licensing agencies because resource limitations prevented the Council from studying other agencies. Nevertheless, the Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. Tenth Biennial Report, 9-10, 28-29. See Ralph Kleps, *California's Approach to the Improvement of Administrative Procedure*, 32 Calif. L. Rev. 416, 419 (1944). The Council's proposed judicial review provisions covered all state and local agencies. See Cal. Code Civ. Proc. §1094.5.

Over the years, the APA adjudication sections were expanded to cover a few non-licensing agencies engaged in prosecutorial activity such as the Fair Employment and Housing Commission and the Fair Political Practices Commission. It also covers certain personnel decisions of local school boards and community colleges. For a handy list of California agencies that explains which ones

Perhaps 95% of the adjudicatory proceedings conducted by state agencies were not covered by the APA at all, only by their own idiosyncratic statutes or regulations.

B. Political constraints on reform of the adjudicatory APA

The Commission's objective was to produce a good bill updating the adjudicatory provisions of the APA that would command as close to consensus as possible. But the political process was complex. There were numerous players before the Commission, in the legislature, and in the governor's office. Many agencies tenaciously represented their perceived interests during the Commission's deliberations. The Attorney General, the Office of Administrative Law¹⁷, private practitioners, Bar associations, administrative law judges,¹⁸ and regulated parties all had their own axes to grind--and grind them, they did.

Some of these players vigorously opposed portions of the Commission's original proposals. The members of the Commission themselves approached the issues with sharply differing points of view toward the efficacy of government regulation and about the differences between adjudication

were and which ones were not subject to the former Act, see Calif. Continuing Education of the Bar, CALIFORNIA ADMINISTRATIVE HEARING PRACTICE 479-539 (2d ed. 1998).

¹⁷ See text at notes 163-65.

¹⁸The term "administrative law judges" (and the abbreviation ALJs) is used herein to refer to the whole panoply of California administrative trial judges and hearing officers. It includes but is not limited to central panel ALJs.

in court and before agencies. That nearly all the players could ultimately join together in support of a single bill is a fairly miraculous event. Possibly, the seven-year deliberative process exhausted everyone.

Because of the need to attract consensus, truly radical changes in administrative adjudication were never on the table. For example, early in the process, there were calls from Bar groups and ALJs for an external separation of prosecutorial from adjudicatory functions, especially in licensing cases.¹⁹ These proposals would have stripped agency heads of their adjudicatory powers, either by empowering ALJs to make final agency decisions or by creating appellate tribunals to make the final agency decisions. This sort of change was never in the cards. Even if it is a good idea, and I have deep reservations about applying external separation across the board,²⁰ it would have been politically beyond the pale.

Similarly, the Commission turned aside calls to expand California's system of central panel ALJs to new domains. Central panel ALJs decided only about 5% of the total

¹⁹Large portions of California administrative adjudication were already subject to external separation of functions. Workers' compensation, unemployment compensation, state personnel, attorney discipline, alcoholic beverage licensing, worker safety, and welfare cases were and still are adjudicated by tribunals separated from the agencies responsible for law enforcement, prosecution, and advocacy. However, numerous important agencies, including those responsible for professional licensing, exercise combined functions.

²⁰See Asimow, Adjudication Fundamentals, note 7 at 1152-64.

number of adjudicated cases (those relating to occupational licensing and a few other areas). Many of the in-house ALJs at other agencies ardently wanted to join the central panel. However, the merits of separating in-house ALJs from the large adjudicating agencies seemed problematic since, in most cases, those agencies were already externally separated from the state adversaries.²¹ Many in-house ALJs did not want to be separated from their agencies and, needless to say, agency opposition was intense. Nor was any attempt made to prescribe administrative procedure for the vast and diverse array of local government agencies.²²

The dire fiscal condition of California government was an ever-present backdrop for Commission and legislative consideration of S.B. 523. The recession of the early 1990's hit California hard and triggered a series of harrowing budget crises. The budgets of state agencies were cut to the bone. Staffs were sharply pared. Yet these cuts were seldom accompanied by any diminution in regulatory responsibility. As a result of all this, it was an accepted constraint that APA reform couldn't cost very much, if anything.

²¹See note 19. For a detailed discussion of the pros and cons of expanding the central panel, see Asimow, Adjudication Fundamentals, note 7 at 1181-91.

Therefore, the Commission decided early on not to disturb the basic and familiar pattern of California administrative adjudication. Most cases would continue to be heard by ALJs who would prepare proposed decisions; the final agency decision would remain the responsibility of the agency heads. ALJs who were in-house would remain in-house. The challenge was to craft a set of modest procedural protections for private sector litigants consistent with these political and economic constraints while also seeking ways to make agency adjudication less costly, formal and adversarial.

C. Structural problems of the adjudicatory APA

The attempt to revamp the adjudication provisions of California's APA was bedeviled from the first by a difficult structural problem, one which Pennsylvania will fortunately not have to contend with. California administrative adjudication has two tiers. Tier 1, the agencies to which the adjudication provisions of the former APA applied, includes some 63 agencies,²³ most of which handle occupational licensing (I refer to these as the licensing agencies, although that is not completely

²²See Gov't Code §§11410.30, .40, which allow local agencies voluntarily to adopt the Act or any of its provisions.

²³Gov't Code §11501(b).

accurate).²⁴ Hearings in licensing cases are conducted by a panel of about 40 central panel ALJs employed by the Office of Administrative Hearings (OAH) and assigned to the various agencies as needed.²⁵ The former law governing Tier 1 worked reasonably well; although some tinkering was desirable, the existing Act did not require wholesale revision.

However, the adjudication provisions of the former APA covered less than 5% of the total number of state-level adjudications. As a result, there is a huge Tier 2: major state adjudicating agencies, such as those deciding workers' compensation, unemployment compensation, welfare, personnel, labor relations, and environmental cases, as well as many other adjudicating agencies with small caseloads, were not covered by the former Act. Each Tier 2 agency has its own procedural statute and regulations, its own stable of in-house ALJs, and its own uncoded hearing practices and customs.

Maintaining and improving the two-tier system, within the political and economic constraints already described, presented a difficult drafting problem. The drafters wanted to maintain the high level of procedural protection already provided in Tier 1 licensing cases. They also

²⁴See note 16.

wanted to achieve some base-line procedural protections in Tier 2 cases, but without significantly increasing the cost and formality of the process. It was infeasible to transplant the minutely detailed procedures called for under Tier 1 into all Tier 2 cases, because of cost concerns and because Tier 2 cases vary enormously.

Tier 2 cases run the gamut from twenty minute hearings provided in unemployment cases to complex and time consuming labor and environmental decisionmaking. Obviously, the same procedures cannot be appropriate for all Tier 2 agencies. For example, the carefully wrought discovery provisions applicable under Tier 1 could not possibly be extended without major modification to the vast array of Tier 2 adjudications. Finally, to compound the drafting problem, the Commission wanted to enact a set of procedural reforms applicable to both Tier 1 and Tier 2 adjudication that would encourage alternate dispute resolution (ADR) and would make adjudication less formal and costly.

Therefore, the legislation somehow had to embody three APAs within one: 1) one APA would insure a fundamental level of procedural protection in both Tier 1 and 2 adjudications; 2) a second APA would provide modest reforms

²⁵Gov't Code §§11370.1 to 11370.5.

in Tier 1 cases covered by the former APA; 3) a third APA would provide for ADR and authorize other flexibility and informality-promoting practices in both tiers. This structural problem of having three APAs within one made the resulting legislative product complex to draft and makes the final legislation difficult to explain.

My original solution was to enact some modifications to the former Tier 1 APA, then apply that former APA (as modified) to all Tier 2 agencies, with most provisions functioning as defaults. Then the Tier 2 agencies would be invited to adopt rules to change or delete the default provisions. For example, the Tier 2 agencies would be required to provide the same scheme of discovery as Tier 1 agencies *unless* they chose to adopt rules modifying or totally deleting the discovery provisions.²⁶ The provisions applying ADR and informality would apply across-the-board. This came to be known as the "big bang" approach to adjudication reform.²⁷

²⁶Michael Asimow, *The Adjudication Process*, note 7 at 2-3. Provisions representing due process fundamentals, such as the ban on ex parte contacts, could not be altered or dispensed with by rule.

²⁷Pennsylvania managed a successful big bang in 1971 with the adoption of its General Rules of Administrative Practice and Procedure which serve as default provisions that can be modified by agencies through rulemaking. 1 Pa. Admin. Code §31.1 et. seq; William E. Zeiter, *Pennsylvania General Rules of Practice and Procedure--A Surprising By-Product of a State Register System*, 24 Admin. L. Rev. 275 (1972). These rules deal primarily with relatively trivial issues and do not address the difficult problems of private interest protection or flexibility enhancement that a modern APA would address.

In my opinion, the rulemaking process called for by big bang would have been a healthy one. It would have provided the impetus for agencies to examine all of their procedures, often for the first time in many years, and would have resulted in an updated and comprehensive procedural code. Members of the public and regulated industries would be involved in this reconsideration and the viewpoints of commentators would have to be taken into account in making final rules.

The big bang approach provoked a firestorm of criticism. The Attorney General was the leading critic.²⁸ While the Attorney General conceded that some provisions of the big bang proposal were desirable, he argued that no case had been made for root and branch reform. In particular, the Attorney General noted that big bang required all Tier 2 agencies to engage in rulemaking to adapt the default provisions of the Act to their own special situations. Yet the fiscal austerity confronting virtually all agencies powerfully militated against any new chores or new costs. The California rulemaking provisions are exacting and costly to comply with; the rulemaking

²⁸Letter from Attorney General Daniel E. Lungren to California Law Revision Commission, May 11, 1994.

path bristles with time-consuming obstacles.²⁹ As a consequence, agencies complained that they would have to endure a complex and costly rulemaking proceeding--for which they lacked the personnel and budget--to get back to where they were in the first place.³⁰

The Attorney General's criticism led to a creative compromise that avoided the rulemaking imbroglio and satisfied all sides--the little bang approach. Under little bang, the three-in-one structure of S.B. 523 emerged: 1) an administrative adjudication bill of rights, setting forth basic fundamentals of administrative justice and applicable to both Tier 1 and 2 agencies;³¹ 2) a modest set of improvements applicable only to Tier 1 agencies;³² and 3) a set of flexibility enhancing provisions applicable to both Tier 1 and Tier 2 agencies.³³

D. Sources of guidance for administrative law reformers

Reformers of a state's administrative procedure law naturally turn first to existing models at the state and

²⁹See text at notes 165-71; Gregory L. Ogden, *CALIFORNIA PUBLIC AGENCY PRACTICE* ch. 20-22 (1995); Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 48-51 (1992) (hereinafter Asimow, *Underground Regulations*);

³⁰Although the Commission planned to study and revise rulemaking procedures as well as adjudication, that effort lay in the future and there could be no guarantee that the burdens of rulemaking would be lightened.

³¹Articles 6, 7, and 8 of §21 of S. B. 523, Gov't Code §§ 11425.10 to 11435.65.

³²Articles 23-51 of S. B. 523, involving amendments to Gov't Code §§11500-11530.

³³Articles 5, and 9-15 of § 21 of S. B. 523, Gov't Code §§ 11420.10 to 11420.30; 11440.10 to 11470.50. [check cites]

federal levels. The federal APA³⁴ has been in place since 1946 and has been amended only in relatively minor ways. Most of its provisions have stood the test of time and have been frequently litigated. The federal model fits California and Pennsylvania well, since the bureaucratic apparatus of these two populous, industrialized states rivals that of many nations. Their agencies have large, well-trained staffs and heavy caseloads. They administer an enormous range of regulatory statutes and adjudicate cases ranging from simple mostly pro per hearings to lengthy and complex cases with specialized counsel. Thus federal models may be more appropriate in California or Pennsylvania than in smaller states.³⁵ The new California act follows the lead of the federal APA in a number of important respects.

The 1981 Model State APA is also an important guidance document.³⁶ The 1981 Act represents a recent, carefully considered, state-of-the-art approach to state administrative law that is just now beginning to be adopted by the states. The 1981 Act is much more sophisticated and ambitious than its predecessors (the 1961 and 1946 Model

³⁴ 5 USC §§551 et.seq. (1994) (the federal APA will be cited without the prefatory 5 USC herein).

³⁵ Arthur Earl Bonfield, STATE ADMINISTRATIVE RULE MAKING 31-36 (1986).

³⁶ 15 U.L.A. 1 (1990 and 1998 Supp.). See Adjudication Fundamentals, note 7 at 1079-80.

Acts).³⁷ It is obviously desirable for reformers to free ride on the enormous investment made by the scholars, draftsmen, and members of the National Commissioners on Uniform State Laws. Indeed, the Model Act was frequently the starting point for the California Law Revision Commission. However, as the Commission was compelled to make compromises and face the inevitable tradeoffs, many of the more ambitious innovations in the Model Act fell by the wayside. I would predict that the same will happen in Pennsylvania or other states that attempt root and branch administrative law reform.

E. Which agencies and which forms of adjudication should be covered by a new APA.

Ideally, every adjudicatory decision of every state adjudicating agency should be covered by a single APA. The ideal APA would provide baseline procedural protections with sufficient flexibility to cover all sorts of cases, from the most simple to the most complex. The ideal, however, will never be attained in practice.

First, many agencies will try to exclude themselves from the Act; some will succeed, either through persuasive argument or political muscle. Second, it is not feasible to include within the Act's purview every single instance

³⁷ The 1961 Act can be found at 15 U.L.A. 137 et. seq. (1990 and 1998

of adjudication between a unit of the state and a private individual or entity. The process of defining which adjudications are covered is perhaps the single most difficult drafting challenge that reformers face.

1. What agencies should be covered?

In California, the objective of universal agency coverage came close to being met.³⁸ Numerous agencies tried to persuade the Commission to exclude all or part of their functions from the new APA. For the most part, the Commission stoutly resisted these blandishments. Instead, it designed statutory exceptions to deal with particular problems presented by particular regulatory schemes rather than entirely excluding agencies or regulatory schemes. I commend this approach to reformers in other states.

Universal coverage is the objective of the 1981 MSAPA which includes all adjudication of every agency.³⁹ The federal APA also purports to cover the adjudications of almost every federal agency,⁴⁰ provided that the adjudication in question is "required by statute to be

Supp). The 1946 Act has passed into obscurity.

³⁸Gov't Code §11405.30 defines "agency" comprehensively, and §11410.20(a) provides: "Except as otherwise provided by statute: (a) This chapter applies to all agencies of the state. (b) This chapter does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

³⁹§1-102(1). The reality, of course, is different. In states adopting part or all of the 1981 MSAPA, the legislatures exempted numerous agencies from its coverage. See, e.g., Kan. Stat. Ann. §§77-503, discussed in Steve A. Leben, *Survey of Kansas Law: Administrative Law*, 37 U. Kan. L. Rev. 679, 683 (1989); Utah Code §63-46b-1(2); Wash. Rev. Code Ann. §34.05.030.

⁴⁰APA §551(1). See the exceptions in §554(a)(1) to (6).

determined on the record after opportunity for an agency hearing."⁴¹ In reality, the federal act covers relatively little of the universe of federal agency adjudication. A great many cases of adjudication are not subject to statutes calling for "on the record" determination. More important, Congress repeatedly has excluded new adjudicating schemes from the federal APA, largely to escape the rigidity of the provisions of that Act relating to ALJ hiring and performance evaluation. As a result, there is a vast amount of non-APA federal adjudication.⁴² As a practical matter, the adjudication provisions of the federal APA now apply to Social Security and other benefit disputes plus cases in a few traditional regulatory agencies such as the NLRB. The rest is a motley system guided by no overarching procedural limitations other than due process.⁴³

California's new APA outperforms the federal government in terms of universality of coverage of its bill of rights and flexibility enhancers. Nevertheless, the Commission and the legislature fell short of imposing

⁴¹APA §554(a). See discussion in text at notes 52-53.

⁴²At the federal level, there are more than twice as many "administrative judges," adjudicating cases outside the APA, as there are ALJs who adjudicate cases under the APA. Administrative Conference of the U. S., THE FEDERAL ADMINISTRATIVE JUDICIARY 7-8 (1992) (hereinafter "ACUS Report").

⁴³Id. at 32.

universal coverage.⁴⁴ Pennsylvania reformers should brace themselves for a similar outcome, for they are doomed to lose most contests based on raw political power.

a. The California Public Utilities Commission (CPUC). The CPUC persuaded the Commission to exclude it entirely from S.B. 523.⁴⁵ CPUC engages in considerable adjudication, including individualized public utility ratemaking and a wide variety of licensing and penalty cases.⁴⁶ Nevertheless, CPUC's campaign to be excluded from the Act was a classic example of bulldog tenacity. Its representative showed up at every Commission meeting, urging that ratemaking should be treated as rulemaking rather than adjudication. He could be counted on to argue that whatever specific provision was under discussion, it wouldn't work at the CPUC and would have to be extensively modified to take account of the PUC's eccentric practices.

For a while, the Commission tried to accommodate the CPUC, but the result was a series of narrowly focussed

⁴⁴ In addition to the agencies mentioned, the Commission in an early vote excluded the Regents of the University of California from the Act on account of its constitutional immunity from regulation. Calif. Constitution Art. 9. See S.B. 523 §6, adding Education Code §92001. Although legally inevitable, this is a bad result since the personnel and student disciplinary decisions of the state college system fall under the new APA while those of the University of California do not.

⁴⁵ S.B. 523, §85, amending Public Utilities C. §1701. Back in 1947, the CPUC was similarly successful in gaining an exemption from the rulemaking provisions of the APA. Gov't Code §11351(a).

⁴⁶ Adjudication is defined as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." Gov't Code §11405.50(a). The comment to this section

provisions that complicated and distended the Act.

Finally, the Commission threw in the sponge and completely excluded the PUC from the Act. Its lobbying campaign was a stellar success. In my view, this was unfortunate; the CPUC's claims that its adjudication is idiosyncratic were exaggerated. If the PUC had chosen to negotiate in good faith instead of engaging in a war of attrition, its particular problems could have been easily accommodated under the Bill of Rights.

b. State Board of Equalization (SBE). The SBE is California's tax adjudication agency. It administers the business taxes (such as the sales tax) and also adjudicates disputes under those taxes. In addition it adjudicates income tax disputes but does not administer the income tax statute (the Franchise Tax Board handles that chore). The members of the SBE are popularly elected. They tend to view themselves more as politicians with responsibility to their constituents than as adjudicators or rulemakers.

SBE's system of adjudication is primitive.⁴⁷ For example, the 5-member Board hears every income tax case en banc. It has a rudimentary system of hearing officers who hear business tax cases; however, it has staunchly rejected

makes clear that adjudication covers individualized ratemaking and licensing decisions.

classification of these hearing officers as ALJs (apparently because reclassification would give them a pay increase). Ex parte contact between taxpayers and Board members is said to be commonplace, because Board members view such contacts as legitimate constituent service. Board members decide cases of persons who have contributed to their campaigns.⁴⁸ And separation of functions is largely ignored. SBE believes in a true institutional method: its advocates engage in off-record discussion with both hearing officers and Board members about specific cases.

Thus the Bill of Rights provisions relating to separation of functions, pecuniary bias, and ex parte contact would have transformed SBE decisionmaking. After a few initial submissions, SBE remained silent during Commission deliberations. But once S. B. 523 reached the legislature, SBE conducted an all-out lobbying campaign to win exclusion from the Act.

⁴⁷See Adjudication Fundamentals, note 7 at 1165 n. 334 describing California's tax adjudication system as a patchwork based on historic accidents or, less charitably, as a mess.

⁴⁸Under Gov't Code §15626(c), a Board member is disqualified from deciding or influencing a case in which the member knows or has reason to know that he or she received a contribution of \$250 or more from a taxpayer within the preceding 12 months. This provision obviously places a premium on making the contribution more than 12 months before the matter comes on for decision. A huge loophole to this provision permits a member who has received a contribution requiring disqualification to return the contribution and then participate in the decision. Gov't Code §15626(d). Anecdotal evidence available to the author suggests this loophole is frequently employed; the returned contribution can then be recontributed when the member stands for reelection.

Several SBE members are former legislators; they contacted the present legislators with their concerns. California Taxpayers Association (CTA), which represents the largest corporate taxpayers, lobbied vigorously to exclude SBE, even though the reforms in the Bill were on balance pro-taxpayer. But CTA persuaded the Republican caucus that the bill was "unfriendly to taxpayers."⁴⁹ These largest taxpayers, evidently, wanted to maintain their backdoor access to decisionmakers and their ability to influence decisions through making strategic campaign contributions.

In a dramatic confrontation before the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee, SBE won exclusion from the bill on a 7-6 party line vote. All Republicans voted for exclusion, following the recommendation of their caucus; all Democrats voted to keep SBE in the bill. To the author of this article, this Committee decision was the biggest single disappointment of the entire process of considering and ultimately enacting the APA adjudication provisions.⁵⁰

⁴⁹Memorandum from Assembly Republican Caucus to members of the Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committee, June 20, 1995. The memorandum disingenuously argued that the bill of rights would lead to costly formalization of SBE procedures, ignoring the provisions in the bill for informal hearings.

⁵⁰S. B. 523, §54, enacts Gov't Code §15609.5, excluding SBE from the provisions of the APA; §87 amends Rev. & Tax Code §19044 to exclude Franchise Tax Board hearings. Senator Kopp tried to refight this battle. His subsequent attempt to impose ex parte contact limitations on the SBE died a

2. What proceedings should be covered

The decision as to precisely which adjudications should be covered by the new California APA presented thorny policy problems. The original California APA applied only to hearings that are specifically required by statute to be covered by the APA.⁵¹ As already noted, the result was that the APA applied largely to licensing cases (and some of them were excluded as well). The scope of the federal APA is slightly broader; it applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing..."⁵² This formulation therefore depends on the presence of an *external* statutory requirement of an on-the-record hearing. It may, but probably does not, include hearings required by procedural due process rather than by a statute.⁵³

quiet death on March 31, 1998 in the Senate Committee on Governmental Organization after being discreetly but effectively lobbied by SBE members. S.B. 1520 (1998).

⁵¹Former Gov't Code §11501(a). Only California and Connecticut used this approach. Arthur Bonfield, *The Definition of Formal Agency Adjudication under the Iowa Administrative Procedure Act*, 63 Iowa L. Rev. 285, 339 n.200 (1977).

⁵²APA §554(a).

⁵³*Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), held that the APA applied to deportation cases. In the Court's view, Congress would have desired at least the same level of protection in cases where a hearing was mandated by the due process clause of the constitution as in cases where the hearing was mandated by a mere statute. However, this decision is unlikely to be followed today and is widely ignored. Since due process requires hearings in mass justice situations, it is inappropriate to require full-fledged formal APA adjudication procedure in every such case. See, e.g., *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1483-85 (D.C. Cir. 1989) (APA not applicable even though due process applies); *Clardi v. Levy*, 545 F.2d 1241 (9th Cir. 1976) (APA inapplicable to prison hearings required by due process); Robert E. Zahler, Note, *The Requirement of Formal Adjudication under Section 5 of the Administrative Procedure Act*, 12 Harv. J. Legis. 194, 218-41 (1975).

The 1981 Model Act, like several modern state statutes⁵⁴ and like Pennsylvania's AAL,⁵⁵ takes a different tack. The Model Act covers all adjudications, regardless of whether any external source (statutory or constitutional) requires an on-the-record hearing.⁵⁶ S.B. 523 struck a compromise between the federal and Model Act approaches. The Model Act approach proved to be too broad, but the federal approach was judged to be too narrow. This critical provision in the California statute, therefore, reflects a judgment that both the federal APA and the 1981 Act are seriously flawed.

I have previously discussed the resulting compromise in some detail⁵⁷ and I will not repeat the discussion here. In short, the federal APA is too narrow because it covers only cases in which Congress required a "hearing on the record;" this places far too much weight on what might be an accidental choice of language in the procedural sections of agency generic statutes. Also, the federal formulation probably does not cover hearings required by due process. Although I began the process with a bias in favor of the

⁵⁴See Adjudication Fundamentals, note 7 at 1090 n.70, referring to statutes in Delaware, Florida, Indiana, Oklahoma, and Wisconsin.

⁵⁵2 P.S.A. App. §101 (comprehensively defining adjudication as every final agency order having legal effect on any party). See John L. Gedid, [article prepared for Widener conference]-- (discussing the history of the Pennsylvania definition of adjudication).

⁵⁶1981 Model Act §§1-102(5) (order means action of particular applicability); 4-101(a) (agency shall conduct adjudicative proceeding as process for formulating an order).

1981 Act's formulation, I became convinced that it is too broad, because it sweeps in a vast array of trivial encounters between government and the private sector.

Under the California compromise, the bill of rights and flexibility enhancers in the statute apply whenever, under a federal or state statute or the state or federal constitution, "an evidentiary hearing for determination of facts is required for formulation and issuance of the decision."⁵⁸ Whether this formulation will sweep in too many cases or exclude too many cases, only time will tell. But reformers should be keenly aware of the sensitivity of this issue and the drafting problems that accompany whatever policy choices are made.

F. The Administrative Law Bill of Rights

The most important achievement of the new California statute was the enactment of an across-the-board bill of rights for all covered adjudications of all covered agencies. I have described the bill of rights elsewhere⁵⁹ and will not repeat that detailed discussion here.

The bill of rights prohibits ex parte contact⁶⁰ and requires internal separation of functions.⁶¹ Under the latter provision, agency adversaries (such as prosecutors

⁵⁷ Asimow, Tulsa, note 1 at 307-12.

⁵⁸ Gov't Code §11410.10.

⁵⁹ Asimow, Tulsa, note 1 at 312-18.

and investigators) can neither serve as adjudicators nor give off-the-record advice to adjudicators. Both the ex parte and separation of functions provisions contain exceptions designed to deal with the complexity of the problems. In addition, the independence of in-house ALJs is protected against interference or supervision by adversaries.⁶² A provision relating to challenges for bias tries to capture the uniqueness of the administrative adjudication process.⁶³ Agencies are authorized to provide for peremptory challenges of hearing officers.⁶⁴ Another provision, of fundamental importance, requires that deference be given to the credibility determinations of ALJs.⁶⁵ Additional provisions guarantee open hearings,⁶⁶ fair notice,⁶⁷ and an opportunity to present and rebut evidence.⁶⁸ Precedent decisions are authorized and agencies are encouraged to adopt them.⁶⁹

The adoption of the bill of rights, applicable across the board, was a signal achievement, marking the first time

⁶⁰ Gov't Code §11430.10 to 11430.80.

⁶¹ Gov't Code §§11425.30., 11430.30(a)

⁶² Gov't Code §11425.30(a)(2).

⁶³ Gov't Code §11425.40.

⁶⁴ Gov't Code §11425.40(d). OAH, which operates the ALJ central panel, has implemented this provision by providing for one peremptory challenge. 1 C.C.R. §1034

⁶⁵ Gov't Code §11425.50(b), essentially adopting the federal *Universal Camera* rule. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See discussion at notes 98-102.

⁶⁶ Gov't Code §11425.20.

⁶⁷ Gov't Code §§11425.10(a)(1), 11440.20.

⁶⁸ Ibid.

⁶⁹ Gov't Code §11425.60.

that most of these requirements applied to most California agencies (except insofar as they are constitutionally required).

G. Flexibility-enhancing provisions

California's new adjudicatory APA contains a range of flexibility enhancing provisions applicable both to Tier 1 and Tier 2 agencies.⁷⁰ I recommend that Pennsylvania reformers consider carefully whether to include comparable provisions in a new AAL. These provisions may, in the long run, be more important than the bill of rights because ultimately they might launch a new, less adversarial agency culture.

First, the statute should provide for the entire gamut of alternative dispute resolution techniques. Unless agencies are clearly authorized to make use of mediation, or binding or nonbinding arbitration, they may be reluctant to do so. Administrative adjudication is no less amenable to the use of ADR methodology than is adjudication in court, but ADR has been sadly underutilized in the administrative arena. California's APA authorizes mediation as well as both binding and non-binding arbitration, in

⁷⁰ See text at notes 23-25 for explanation of the two tiers.

each case with the consent of both parties.⁷¹ It also broadens and clarifies the authority of agencies to settle their cases.⁷²

Second, the statute should provide for a range of procedural formats. If an APA provides only for a single type of hearing, the hearing model will undoubtedly be extremely formal in nature since it must provide adequate protection for hard-fought, high-stakes prosecutorial cases in which both sides are represented by counsel and credibility issues are in sharp dispute. In this kind of formal adjudication, each party has a right to introduce testimony of percipient and expert witnesses and to cross-examine all opposing witnesses. While this form of procedure is often necessary and appropriate, it is quite inappropriate and wasteful in other situations.

Thus a modern APA should provide for informal hearings. As in the case of ADR, the provision for informal hearings could lay the foundation for a new, less adversarial culture of administrative adjudication. In an informal, conference-type hearing, the statute should

⁷¹ Gov't Code §11420.10. The statute authorized the Office of Administrative Hearings to adopt model regulations for ADR and provides for confidentiality of ADR communications. Gov't Code §§11420.20, 11420.30.

⁷² Gov't Code §11415.60. The provision allows agency heads to delegate their power to approve a settlement. Under past practice, settlements agreed to by agency counsel could not be approved for months because the agency heads met infrequently. It also allows a settlement to include sanctions that the agency would otherwise lack power to impose. §11415.60(c).

protect the right of all parties to present their case and assure an impartial decisionmaker and an exclusive record. However, it is frequently appropriate to dispense with live witness testimony and cross-examination. Instead, testimony (particularly expert testimony) can be submitted in writing and all parties can be accorded an opportunity to submit written rebuttals, file briefs, and (if appropriate) to make oral arguments. Informal proceedings are especially valuable in cases that present no disputed issues of adjudicative fact but instead involve only issues of legislative fact, law or discretion. They are also an important cost and time saver in cases in which the stakes are low.

The California statute provides for informal hearings in a variety of different types of cases. Thus informal hearings are appropriate if there is no disputed issue of material fact, or the stakes are low,⁷³ or the agency by regulation has authorized informal proceedings,⁷⁴ or a hearing is required by the state or federal constitution

⁷³ The statute itemizes the low-stakes cases as follows: a monetary amount of not more than \$1000, a disciplinary sanction against a student that does not involve expulsion or suspension for more than 10 days; a disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days; and a disciplinary sanction against a licensee that does not involve revocation or suspension for more than 5 days. Gov't Code §11445.20(b).

⁷⁴ Thus the agency could, by regulation, provide for the use of informal hearings in which the only issue was an issue of legislative rather than adjudicative fact.

but not by statute.⁷⁵ In an informal hearing, most of the normal rules for adjudication apply (including the bill of rights provisions and the detailed provisions for Tier 1 agencies). The presiding officer shall allow the parties (and may permit others⁷⁶) to offer written or oral comment on the issues. The presiding officer may limit the use of witnesses, testimony, evidence and argument and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.⁷⁷

Third, the statute should provide for declaratory orders. Often, parties are legitimately uncertain about the consequences of a proposed transaction. The stakes are too high to rely on informal agency guidance; the parties cannot proceed without assurance that the transaction is legal or will qualify for some special benefit. In this situation, the parties should be able to seek a declaratory

⁷⁵ Gov't Code §11445.10 to 11445.60. This provision authorizes informal hearings in more situations than does the 1981 Model Act which always requires prior authorization by agency regulations. See §4-401. The drafters of the California statute saw no need to adopt prior regulations before an informal proceeding was used where there is no disputed issue of material fact or in low-stakes cases. They were also impressed by the utility of using informal hearings where a hearing is required by the constitution but, under the balancing test conventionally used in due process cases, a formal hearing with cross-examination is not needed. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁷⁶ Thus informal proceedings can be employed in cases in which there is broad public interest such as environmental disputes. Members of the public can take part through introducing written statements. In this respect, the California statute departs from the 1981 MSAPA. §4-402(3)(ii).

⁷⁷ Gov't Code §11445.40. The presiding officer can dispense with cross examination but is also authorized to permit limited cross examination if it appears necessary for determination of the issues. *Id.* §11445.50. The presiding officer can convert an informal hearing to a formal hearing if appropriate. *Id.* §11470.10.

order from the agency. A declaratory order is a statement of legal consequences based on stipulated facts. Thus it closely resembles judicial declaratory judgment. No trial procedures are needed; informal procedures are appropriate and perhaps all procedure could be dispensed with other than a written request for the order and notice to all persons who might be affected by the issuance of the order.

Although the declaratory order procedure has long been provided for under the federal APA,⁷⁸ and is recognized in the 1981 Model Act,⁷⁹ our proposal to adopt it in California aroused skepticism from administrative agencies. Partly, I believe this was simply fear of the unknown. But there were valid reasons for the agencies to be concerned. They feared that outsiders might seize control of the agency's priority-setting function by forcing them consider and provide declaratory rulings when their financial or manpower resources were otherwise completely allocated to higher priority projects. The Model Act is subject to this criticism, since it provides that an agency "shall" issue a declaratory order unless doing so is contrary to an agency rule.⁸⁰ The California statute therefore gives the agency discretion to decline to issue a declaratory order and

⁷⁸ APA §554(e).

⁷⁹ §2-103.

⁸⁰ Id. §2-103(a).

makes the exercise of this discretion not subject to judicial review.⁸¹ I think the Model Act is too rigid on this point; an agency should have discretion to refuse to provide a declaratory order for any valid reason including uncertainty about the law or a shortage of resources.

Fourth, the statute should provide that agencies can render precedent decisions without complying with the requirements for rulemaking. Precedent decisions are adjudicatory opinions that are labelled as precedential and are indexed and made easily available to outsiders. They can be cited in future cases as authority. If Pennsylvania is anything like California, agency adjudicatory decisions are difficult to access and difficult to cite. It is hard to determine the precise holding, especially in a case with complex facts, and difficult to know whether the holding is limited to particular facts. Experienced attorneys and agency staff know about adjudicatory precedents; newcomer attorneys or even newcomer staff members, as well as members of the general public litigating pro se, don't have a clue. The availability of precedent decisions helps create a real system of administrative common law in which

⁸¹ Gov't Code §§11465.20(b), 11465.50(a)(4). The Office of Administrative Hearings is instructed to provide model rules for declaratory orders which serve as default rules in the event the agency has not adopted rules of its own. Clearly, however, an agency can adopt regulations precluding the issuance of declaratory orders in some or even in all situations. Id. §§11465.20(b)(1), 11465.70.

the law can be developed in a logical case-by-case manner and everyone will have equal access to agency law. It also encourages agencies to carefully articulate the bases for their adjudicatory decisions.

The California statute does not compel agencies to utilize precedent decisions but it prohibits them from citing any prior adjudicatory decision as precedent unless it has been designated as a precedential decision and indexed and made available to the public.⁸² The statute encourages adoption of precedent decisions by exempting them from California's onerous rulemaking requirements.⁸³ It also leaves the decision to designate a decision as precedential, or refusing to do so, to the agency's unreviewable discretion.⁸⁴

Fifth, the statute should go as far as possible to authorize and to encourage the use of less expensive formalities and new technologies. Thus the statute should authorize the conduct of hearings by telephone or other electronic means such as videoconferencing.⁸⁵ Agencies should be empowered to dispense with stenographically

⁸² Gov't Code §11425.60.

⁸³ See text at notes 165-71.

⁸⁴ Gov't Code §11425.60(b).

⁸⁵ See Gov't Code §11425.20(b), providing that such hearings do not violate the bill of rights provision for open hearings so long as members of the public have the opportunity to hear or inspect the agency's record and inspect any transcript and to be physically present at the place where the presiding officer is conducting the hearing.

reported transcripts in favor of audio or video taping the proceedings.⁸⁶

Sixth, the statute should take seriously the problem of misconduct in agency proceedings by providing for a set of sanctions. This is something that agencies need and therefore such provisions might help get state agencies on board in favor of administrative procedure reform. The California statute defines the situations in which a person would be in contempt⁸⁷ and provides for punishment for contempt by the superior court.⁸⁸ It also allows a presiding officer to order a party to pay reasonable expenses, including attorney's fees, incurred by another

⁸⁶ Unfortunately, a provision allowing a Tier 1 agency to dispense with stenographic recording perished in California. The previous APA required stenographic reporting unless both parties agreed to dispense with it. The Commission's bill, S.B. 523, would have allowed a central panel ALJ to dispense with stenographic transcription in favor of taping without consent of both parties. This would have been a time and cost saver since only a tiny percentage of the stenographic notes are ever converted into a hard copy transcript. In the vast majority of licensing cases, the agency heads adopt the ALJ's proposed decision and the decision is not judicially reviewed. Stenographic reporting in such cases is a colossal waste of the taxpayer's money. Many Tier 2 agencies use audiotaped hearings and report no problems. Unfortunately, the stenographic reporters are well organized and they had the Senate Government Operations committee wired. The Committee gave the proponents the option of deleting the taping provision or deferring consideration of the bill. That was the end of taped licensing hearings. This was a classic example of special interest politics at its worst. See Cal. Gov't Code §11512(d) which is the same as prior law. Pennsylvania's provision requiring stenographic reporting in all AAL cases is equally outdated. 2 P.S.A. §504.

⁸⁷ Gov't Code §11455.10. These circumstances include disobedience of or resistance to a lawful order, refusal to take the oath or refusal to be examined, obstruction or interruption of the proceeding, violation of the ban on ex parte contacts, or refusal to cooperate in discovery. *Id.*

⁸⁸ Gov't Code §11455.20.

party as a result of bad faith actions or tactics that are frivolous or intended to cause unnecessary delay.⁸⁹

G. Political calculations in enacting an adjudicatory APA

1. Making a positive case for procedural reform. Our experience in enacting adjudicatory reform in California was that the biggest political problems was to convince the agencies and the Attorney General that it was worthwhile to amend the APA. There was no crisis that called out for reform; everyone was accustomed to the existing law which seems to be working reasonably well. So what if most agencies had idiosyncratic procedures and there was no bill of rights? So what if newcomers to agency practice are mystified by an agency's uncodified procedures? After all, the agency staff and counsel who are oldtimers to the agency know all the ropes. Why go through a painful transition unless there is a strong reason to do so? Based on the response from commentators at the Widener Law School conference on administrative law reform in Pennsylvania, I would anticipate that reaction in Pennsylvania as well.

Reformers must sustain their burden of showing that change is necessary and it should come in the form of a comprehensive APA as opposed to incremental, agency-by-

⁸⁹ Gov't Code §11455.30. See the detailed regulations adopted by Office of Administrative Hearings (California's central panel). 1 C.C.R. §1040.

agency reforms.⁹⁰ It is necessary to show that the existing law truly is defective in failing to provide baseline procedural protections to regulated parties or in imposing difficulties on the courts or in failing to provide guidance to members of the public or new agency practitioners.

Probably, procedural reformers have always encountered this problem. There was no crisis that required abolition of the common law writ system, the adoption of Code pleading or of the Federal Rules of Civil Procedure, the adoption of the federal APA, or the merger of law and equity. These were law reform, law improvement ideas to make the system work better, quicker, more fairly, with more certainty and less mystery. Procedural reforms of this kind are worth considering and adopting even if there is no great public outcry against the former system and everything seems to be basically all right.

California was like Pennsylvania in an important respect: its APA was far out of date. California had no APA for 95% of its administrative adjudications. Pennsylvania's APA is amazingly primitive. The various Model acts have entirely passed Pennsylvania by. The

⁹⁰ For a detailed argument in favor of a comprehensive APA for adjudication rather than for piecemeal reform, see Asimow, *Adjudication Fundamentals*, note 7 at 1073-79.

obsolescence of Pennsylvania law provides an argument that isn't available, say, to reformers urging adoption of the 1981 Model Act in a state that previously adopted the 1961 Model Act.⁹¹

How, then, should reformers overcome the inertial resistance of state agencies and the Attorney General to changes in the status quo?

First, build in some sweeteners for the agencies in the form of the flexibility enhancing provisions I referred to earlier, such as ADR, informal hearings, precedent decisions, telephone hearings, or sanctions.⁹² These could provide some serious cost-saving, efficiency-enhancing, delay-reducing, quality of life-improving innovations in administrative law and practice.

Second, minimize transitional and operating costs. As discussed above, it was an accepted constraint that California's new adjudicatory APA provisions (or the transition to those provisions) could not impose any costs, because California was undergoing a fiscal crisis at the time. Even had there been no crisis, California agencies are strikingly underfunded to carry out their regulatory responsibilities and appropriately resist any measures that might divert scarce funds and manpower from their

⁹¹ See text at notes 36-37.

regulatory agenda. Thus the agencies and the AG successfully resisted the initial Commission effort to impose a regime requiring them to adopt rules to avoid default provisions. The cost and bother of complying with California's onerous rulemaking provisions sunk that idea. In general, therefore, reformers should be wary of mandating the sort of change that will seriously increase an agency's cost of discharging its necessary functions.

Moreover, there are serious costs of making a transition from an old to a new APA. The new provisions have to be interpreted. There are new procedures, new constraints. Some procedural rules must be adopted or amended. The legislature may have to revisit provisions that don't work out. Agency staff must be retrained. Mistakes will be made. Confusion is inevitable. Cases will get reversed because of procedural errors, causing waste of resources and perhaps harm to consumers and thwarting of regulatory goals.

At a minimum, the effective date of new procedural legislation should be set far enough in the future that agencies have plenty of time to accommodate to the new regime. Possibly, shortcuts could also be put in place to

⁹² See text at notes 70-89.

make the process of procedural rulemaking to accommodate the new act less onerous for the agencies.⁹³

2. The central panel problem. In addition to the fundamental political problem of overcoming agency inertia, there is a second political problem. Agencies don't want to lose control over their procedures or suffer reductions in their turf.

That's why a proposal to institute a central panel of ALJs in Pennsylvania will meet ferocious resistance from the agencies, as it did in California when the Commission announced it was studying the idea of expanding the existing central panel to new agencies. There was a solid wall of agency opposition to this idea; I believe not a single agency found anything good about the proposal. The Commission quickly backed off.

Agency resistance to central panels is quite understandable because there are clear and obvious advantages to agencies in keeping their ALJs in house. Having ALJs inside the agency's tent facilitates the scheduling of hearings; if the judge must be drawn from a central panel, an agency must queue up with other agencies and wait until a judge becomes available in the right

⁹³ See Gov't Code §§11400.20 and .21.

location.⁹⁴ Using outside ALJs is probably more costly to the agency than using in-house ALJs. At least this is so if the California model is followed: the agency is charged by the hour for the time of the central panelists.⁹⁵ If it costs more to hold each hearing, the agency can schedule fewer hearings, meaning it has to settle more cases on disadvantageous terms. In-house ALJs are specialized and build up considerable expertise in the regulatory structure administered by the agency; central panelists often have to be educated. Using in-house ALJs allows the agency to select judges with particular areas of expertise and to make judgments about which judge is best qualified to hear a particular case. Thus novice judges can be assigned to easy cases, more experienced ones to more difficult cases. Keeping judges in house allows an agency to hire and promote judges seen as particularly skillful or well-qualified to deal with the agency's caseload. An agency can more easily monitor, mentor and ultimately discipline judges who perform unacceptably if the judges are in house. And, of course, in-house judges may well have an institutional bias, meaning that they are pre-disposed in

⁹⁴ Having judges in house means that files can be easily controlled and kept in the same building, not shuttled across town to the central panel's hearing rooms.

⁹⁵ Gov't Code §11370.4.

favor of the agency's policy, politics, and regulatory philosophy.

Of course, lawyers in the private sector and their clients often, but not always, prefer a central panel over in-house ALJs for that very reason: they are sensitive to the possibility, or at least the appearance, of institutional bias. They are skeptical of whether provisions for internal separation of functions work in practice. Some private sector practitioners, however, are happy with in-house judges because those judges tend to be very experienced and knowledgeable in handling the particular cases that come before them.

Pennsylvania reformers will have to decide whether they want to fight the central panel battle. In my view, state central panels work well and enhance the legitimacy of the adjudicatory function.⁹⁶ They work best in certain situations: cases of relatively non-technical bipolar adjudication that typically present credibility conflicts and which do not call for a high degree of specialized expertise. However, experience in several states having central panels with broad jurisdiction at least suggests that they can work well in more complex cases. Central panels are particularly needed where the agency heads

⁹⁶ Asimow, *Adjudication Fundamentals*, note 7 at 1181-91.

discharge both the prosecutory and adjudicatory function in the same case. This is the situation with most professional licensing agencies and with many other agencies that impose penalties for statutory violations.

If Pennsylvania reformers decide that a central panel is part of their irreducible agenda, they can count on furious resistance from agencies that could easily sink the entire ship. I have been informed that previous proposals to inaugurate a central panel met with powerful opposition from both agencies and private sector lawyers accustomed to dealing with a familiar system. Reformers should not attempt to fight the central panel battle without strong political support from legislative leaders or the governor. Probably, they should carefully limit the jurisdiction of a proposed central panel to those agencies where the strongest case for it can be made and where the proposal is supported by solid empirical research.⁹⁷ It should not apply across the board to all agency adjudication. Why not start small, then build later?

3. Deference to ALJ credibility findings. The issue of loss of agency control over case decision was presented

⁹⁷ It is possible to query practitioners before the agency and the agency's judges about their views of the existing in-house situation and their attitudes toward a change. In California, this sort of research failed to provide any mandate for change. Workers' compensation, unemployment compensation, and public utility judges wanted to stay where they were rather than be transferred

in California by a provision I regard as one of the most important in the bill. In a great many cases, ALJs⁹⁸ administrative judge must resolve a credibility dispute: who is telling the truth, A or B? Suppose the judge believes A and dismisses the complaint. The agency heads have the final call; they choose to believe B and reinstate the complaint. Is there or should there be any constraint on the ability of agency heads to substitute their judgment on credibility questions?

Under the federal *Universal Camera* rule,⁹⁹ there is indeed such a constraint. A reviewing court must take into account the fact that the agency heads and the ALJ have differed on an issue of credibility or demeanor. An agency head reversal of an ALJ's credibility finding is a minus factor in considering whether the agency's findings of fact are supported by substantial evidence. *Universal Camera* does not affect the agency head's ability to reverse their ALJs on such questions as the qualifications or persuasiveness of expert witness testimony or even the heads from overturning ALJ findings on credibility. However, a reversal on a credibility issue places a thumb

to a central panel; practitioners also were satisfied with the status quo. Asimow, *Adjudication Fundamentals*, note 7 at 1189-90.

⁹⁸In this article, the term ALJ is intended to refer to all administrative trial judges, regardless of whether they are part of a central panel or whatever their nomenclature happens to be.

⁹⁹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

on the scales in support of a petitioner's argument that the decision lacks substantial evidence support. In California, however, *Universal Camera* was not generally followed. An ALJ's decision counted for nothing. A reviewing court looked only at the agency head's decision when it applied the substantial evidence test.¹⁰⁰

The Law Revision Commission's proposal to adopt the *Universal Camera* standard in California triggered an outburst of criticism from the Attorney General and from several agencies.¹⁰¹ The issue was simple: agency heads didn't want to lose control over credibility findings. The reality is that reversing an ALJ's decision on a credibility issue is a convenient and low-visibility way to impose the agency heads' policy judgment in a case without really saying so.

On this issue, the Commission held fast and the final bill contains a carefully limited provision adopting the *Universal Camera* standard.¹⁰² This was a real gamble; the

¹⁰⁰ Asimow, *Adjudication Fundamentals*, note 7 at 1113-24. Under California's idiosyncratic independent judgment test, reviewing courts considered neither the ALJ's nor the agency head's decision. Instead, the courts decided credibility questions for themselves, mostly on the written record, as if the prior decisions did not exist. See TAN

¹⁰¹ Two labor agencies, the Public Employees Relations Board and the Agricultural Labor Relations Board, expressed the most intense opposition to adopting the *Universal Camera* standard.

¹⁰² Gov't Code §11425.50(b) provides: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination

Universal Camera provision could have caused the agencies and the Attorney General to mount a sustained campaign urging Governor Wilson to veto the bill. Fortunately, that didn't happen and the *Universal Camera* rule made it into the bill of rights.

4. Building private sector support for administrative procedure reform. Politically, it is necessary to mobilize the private sector in favor of APA adjudication amendments, since the private sector mostly gains and agencies mostly lose by such legislation. Bill of rights provisions run mostly in favor of the private sector and impose constraints on agency decisionmaking. Additional judicialization means extra costs and bother for the agency. Only the flexibility enhancing provisions offer much for the agencies.

But the private sector is unlikely to be very interested in the process for the reasons mentioned above-- there really is no crisis. Busy lawyers can't be bothered taking the time to engage in the struggle for a ban on ex parte contacts (especially if they sometimes make such contacts themselves) or for internal separation of functions. If anything, experienced practitioners are at an advantage in dealing with agencies; their knowledge of

to the extent the determination identifies the observed demeanor, manner, or

the ropes is a valuable business asset. So while lawyers may be mildly supportive of change, most of them would prefer to free ride on the efforts of others--the result being little private enthusiasm and involvement in the campaign for reform.

Thus it is essential for reformers to build support for adjudicatory reform among good government groups (like Common Cause or the League of Women Voters), administrative law interest groups such as state or local bar committees, or professional organizations (such as the state Medical Society or lawyers who represent physicians in administrative proceedings). Administrative law judges tend to be well organized and these groups can be counted on to support administrative procedure reforms (although typically they are disappointed that reforms do not go further). These groups must be heard from to offset the wholly predictable opposition from agencies and the Attorney General.

5. The political bottom line. In retrospect, the Commission clearly did some things right in getting S.B. 523 enacted. First, it stepped back from the Big Bang¹⁰³ when opposition to it mobilized. There is probably a critical moment in the life of every piece of legislation

attitude of the witness that supports it."

when it is necessary to compromise; after that moment, opposition solidifies and it may be too late to compromise. The Commission dropped Big Bang when the Attorney General and many agencies opposed it but the political situation still remained fluid. The Attorney General got on board, although his staff had reservations about the *Universal Camera* provision.

Agencies who opposed the bill were remarkably ineffective in lobbying the legislature, with the exception of the State Board of Equalization.¹⁰⁴ This occurred in part because the Governor prohibited executive branch agencies from appearing before legislative committees without permission from the governor's staff. This lobbying limitation proved to be providential from the Law Revision Commission's point of view. But agencies (except for the Board of Equalization and the Public Utilities Commission) proved remarkably ineffective in behind-the-scenes lobbying in comparison to the private sector lobbying efforts described in the next part of the paper. With all that, the Commission members and staff, as well as this author, held their collective breaths until both houses of the legislature passed S.B. 523 and the Governor signed it.

¹⁰³ See text at notes 26-30.

H. Pennsylvania's adjudicatory APA provisions--an outsiders view

With some trepidation, I venture an outsider's observations on Pennsylvania's AAL.¹⁰⁵ The original version of the Act was adopted in 1945, the same year as California's APA.¹⁰⁶ In my view, the existing AAL is skeletal and sadly lacking in fundamental procedural protections. However, I should observe immediately that some aspects of Pennsylvania administrative law seem quite progressive. The state's Commonwealth Court is an appellate court that specializes in administrative law; this helps to assure high quality and uniform judicial review. Another positive feature was the adoption in 1971 of the General Rules of Administrative Practice and Procedure (GRAPP), a uniform code of default procedural regulations which agencies can alter by adopting a different set of rules.¹⁰⁷ It is fair to say, however, that these rules deal with very few of the important issues of

¹⁰⁴ See text at notes 47-50.

¹⁰⁵ The portions relating to adjudication are 2 P.C.S. App. §§101-106, 501-08, 551-55.

¹⁰⁶ The original version of the AAL did not apply to any adjudication from which an appeal to a court was provided by another statute. As a result, the coverage of the original AAL was extremely limited. Historical material is derived from Clark Byse, *Administrative Procedure Reform in Pennsylvania*, 97 U.Pa.L.Rev. 22, 24-25 (1948).

¹⁰⁷ See note 27. I have examined the rules of the Public Utilities Commission which provide a commendably complete manual of PUC procedure but little in the way of procedural protections. 52 Pa. Code ch. 1, 3, 5.

fair adjudication procedure that a modern administrative procedure law would address.

Because the AAL and GRAPP furnish little assurance of fair administrative procedure, the Pennsylvania courts have been called on to specify administrative procedures through a case-by-case application of state and federal due process. I believe that this is a crude and unsatisfactory approach. Due process does not go nearly far enough in assuring a fair system of adjudication. At the same time, case-by-case prescription of procedures is highly unpredictable, sometimes poorly considered, and likely to produce confusing guidance for the future.¹⁰⁸

Administrative procedure reform is a complex effort and requires serious consideration of input from all of the concerned players--exactly what the Pennsylvania courts are unable to do when they prescribe procedures by applying due process. The cases tend to be very fact-specific and give little guidance for resolution of future disputes or for agencies that want to change their practices so as to avoid the problem. Moreover, the existence of a body of

¹⁰⁸ Pennsylvania courts have utilized a dubious right/privilege distinction to avoid the apparently excessive coverage of constitutional decisions such as *Lyness*. E.g. *Penn. Game Comm'n v. Marich*, 666 A.2d 253 (Pa. 1995) (hunting license is mere privilege). Professor Gedid's article considers this highly unsatisfactory and indeterminate line of case law. Gedid [article prepared for Widener conference]

I disagree with Professor Nahmod on this point. See Sheldon H. Nahmod, *Thoughts on Pennsylvania Administrative Law*, 15 Duq.L.Rev. 573, 577 (1977)

constitutional precedents sharply limits the ability of the legislature to design a procedural code that may be inconsistent in some respects with the court decisions.¹⁰⁹

The shortcomings of the Pennsylvania approach are well illustrated, in my view, by the leading Pennsylvania Supreme Court decision in *Lyness v. State Bd. of Medicine*.¹¹⁰ In *Lyness*, eight of the eleven members of the Medical Board met by emergency conference call, heard a presentation by the Board's prosecutor, and voted to allow the prosecutor to cite Lyness for sexually molesting patients. Later a hearing examiner heard the case and recommended suspension of Lyness' license. Three years later, the full Board affirmed the examiner's fact findings but changed the penalty to license revocation. Of the seven members voting for revocation, three (including an abstainer who presided) had participated in the conference call.

(allowing courts to flesh out the AAL with constitutional decisions is better than scrapping the AAL and adopting comprehensive legislation).

¹⁰⁹ For these reasons, Pennsylvania courts might be better advised to adopt their administrative law reforms as administrative common law rather than as constitutional law. Presumably, they could claim authority to do so as part of their judicial review authority. I am advised that there is no decision precluding Pennsylvania courts from common law innovation. Under federal law, courts are not permitted to supplement the provisions of the APA by requiring additional procedures. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

¹¹⁰ 605 A.2d 1204 (Pa. 1992). The twists and turns of the Pennsylvania courts on this issue prior to *Lyness* are discussed in Gerald Gornish, *Due Process in Administrative Hearings in Pennsylvania: The Commingling of Functions under Feeser and Dussia*, 15 Duq. L. Rev. 581 (1977); Cokin & Mallamud, note 15 at 610-14. Post-*Lyness* cases are discussed in John L. Gegid, *Major Constitutional and Administrative Decisions of 1996: Progress of the*

The Court held that Pennsylvania's due process clause granted greater procedural protection than the federal due process clause.¹¹¹ Under the Pennsylvania constitution, agency heads cannot exercise the functions of prosecution and decision. In the future a wall of division must be erected within the agency so that persons who make the ultimate adjudicatory decisions are not involved in the decision to prosecute. In the Court's view, even the appearance of bias violates due process, a view which guarantees endless litigation about appearances.¹¹²

A dissenter argued in *Lyness* that agency heads should be allowed to make the initial decision to prosecute the case; this is a valuable protection against prosecutorial zeal. "The majority obviously finds the Board short of professional ability and personal integrity, a shortage they think best supplied by prosecutors."¹¹³

Federal APA decisions¹¹⁴ and provisions in the 1981 Model Act¹¹⁵ and the new California statute¹¹⁶ are squarely

Supreme Court of Pennsylvania, 6 Wid.J.Pub.L. 595, 610-13 (1997); Ruth, note 15 at 308-10.

¹¹¹ Under *Withrow v. Larkin*, 421 U.S. 35 (1975), the U. S. Supreme Court held that a combination of adjudicatory and prosecutory functions in the heads of a medical licensing agency did not violate due process.

¹¹² See Asimow, *Adjudication Fundamentals*, note 7 at 1145-49, citing a series of confusing and inconsistent cases from the state of Washington where the appearance of bias standard is used. See also *Wells v. Del Norte School Dist.*, 753 P.2d 770 (Colo.App. 1987) (ALJ sat next to agency lawyer at lunch without discussing the case--held, this created an appearance of bias).

¹¹³ 605 A.2d at 1212.

¹¹⁴ Several federal APA cases have squarely upheld participation by adjudicators in preliminary prosecutorial decisions in the case. See Michael

contrary to *Lyness*. I agree with the *Lyness* dissent, the federal APA decisions, and the California and Model Act provisions. It seems to me that the judicial decision in *Lyness* was unduly influenced by models drawn from the criminal law (where of course prosecutors and judges are strictly separated) and was inadequately attuned to the realities of the administrative process and the actual interests of litigants before administrative agencies. The dissent seems dead on in arguing that the decision will be a bad one for licensees who are the victims of overly zealous agency prosecution.¹¹⁷

Whether I am right or wrong on this position, I am certain that internal separation of functions is a complex and difficult problem with many subtle nuances. The provisions in the federal Act, the 1981 Model Act, and the California APA differ in important respects. Separation of functions is more amenable to solution through carefully studied and drafted legislation than through fortuitous judicial intervention. Trying to solve the problem through a series of precedential decisions applying state due process is a suboptimal approach. The court may be unduly

Asimow, *When the curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum.L.Rev. 759, 766-68 (1981).

¹¹⁵ §4-214(c).

¹¹⁶ Gov't Code §11425.30(b)(2).

influenced by the facts of a particular case or by application of criminal law models. The judges may labor under parochial and ill-informed views of the realities of the administrative process. Moreover, *Lyness* severely circumscribes the ability of the Pennsylvania legislature to adopt a modern separation of functions provision.¹¹⁸ As much as possible, administrative law should *not* be a branch of constitutional law.¹¹⁹

In my view, reformers should strive to adopt a modern APA in Pennsylvania containing appropriate administrative bill-of-rights type protections and flexibility enhancing provisions.¹²⁰ Very careful attention should be given to

¹¹⁷ Some defenders of *Lyness* generalize the case: prosecutors shouldn't be adjudicators. I agree, of course, but the issue is whether giving the green light for prosecution of the case automatically makes one a prosecutor.

¹¹⁸ A striking example of the problems of excessive constitutionalization of administrative law is *Conestoga National Bank of Lancaster v Patterson*, 275 A.2d 6 (1971). *Conestoga* holds that existing banks have a due process right to hearing when an agency grants an application allowing a new bank to compete with them. The agency's approval standard was discretionary and the statute left it to the agency's discretion whether to grant a hearing. Federal due process would not require a hearing because the standard is discretionary. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). Nevertheless, the Pennsylvania court reasons that because the decision is reviewable it must involve a property right, hence due process is triggered and the existing banks have a right to hearing. Most would find this reasoning a non sequitur. In an equally improvident constitutional decision, the Commonwealth Court ruled that customers of a utility have a due process right to notice and hearing before the PUC approves a contract between the utility and an energy supplier. *Barasch v. PUC*, 546 A.2d 1296, 1302-06 (Cmwlth.Crt. 1988). These decisions excessively constrain the legislature in properly tailoring appropriate hearing procedures in the vast realm of informal state adjudication.

¹¹⁹ Thus I disagree with Professor Gegid that administrative law should be viewed as a branch of constitutional law. John L. Gegid, *Administrative Law Progress In 1995: Important Pennsylvania Supreme Court Decisions*, 5 Wid.J.P.L. 625, 626 (1996). Obviously, principles of due process and separation of powers provide foundational protection in many administrative contexts, but it is far better if the principles are prescribed through carefully drawn statutes, whether comprehensive to all agencies or specifically drawn to deal with the problems of a specific agency.

¹²⁰ At the Widener conference, note *, a number of commentators argued that no APA reform was needed. Their argument were reminiscent of those in New

the definition of adjudication, since the existing provision¹²¹ is far too broad to be the basis for a modern statute. Flexibility enhancing provisions are essential since the existing law appears to call for only a single form of adjudication.

I will not take space in this article to discuss the details of a bill of rights.¹²² I believe that enactment of such provisions should be a minimum expectation for Pennsylvania reformers. Bill of rights provisions are very popular with the private sector and, if carefully drafted, should not be seriously opposed by the agencies.

York's 1942 Benjamin Report, note 13, to the effect that agencies differ too drastically to make a single APA feasible. They asserted that the various provisions that would be found in a bill of rights were already the general practice in Pennsylvania. They observed that there was no apparent demand for reform within the private sector--at least none of them had heard of any. They reiterated the ancient and valid maxim "if it ain't broke, don't fix it." My position is that a bill of rights would work no radical change; of course, most government officials observe decent standards of administrative justice. But there is great value in providing bedrock procedural protections so that everyone on both the private and public side knows the rules (without having to research the constitutional law) and does not have to rely on the fact that custom and practice is generally pretty decent. In California, where there was no administrative law bill of rights until 1995, there was plenty of anecdotal evidence that ex parte contact sometimes occurred and separation of functions was not always meticulous.

¹²¹ Under §101, "adjudication" covers any final order or ruling by any state or local agency that determines any legal rights, privileges, etc. A vast number of trivial encounters between private interests and government agencies might arguably be swept under the AAL by this definition. As a result, the courts have been compelled to arbitrarily limit the definition or to rely on procedural due process conceptions of protectible property rights. See, e.g., *Pipkin v. Pennsylvania State Police*, 693 A.2d 190 (Pa. 1997) (probationary employee has neither right nor privilege in his job so AAL not triggered by his dismissal); *Terzuolo v. Upper Merion*, 586 A.2d 480 (Cmwlth. Ct. 1991) (minor disciplinary sanctions against police officer do not trigger AAL). See John L. Gedid, *Administrative Law Progress in 1997: Selected Pennsylvania Supreme Court Decisions Involving Constitutional and Statutory Decisions*, 7 *Wid.J.P.L.* 403, 420-25 (1998); John L. Gedid, -- *Wid.J. P. L.* (paper from Widener conference).

¹²² The California provisions are discussed in Asimow, *Tulsa*, note 1 at 312-18.

In particular, a new APA should contain strong provisions prohibiting ex parte contacts between interested outsiders and agency decisionmakers. It should insure internal separation of functions, so that agency adversaries (meaning prosecutors, investigators, and adversaries) cannot also serve as agency adjudicators or off-the-record advisers to adjudicators. It should guarantee that adjudicatory decisions must be based exclusively upon the record made at the hearing plus matters officially noticed. It should contain provisions relating to disqualification of biased adjudicators. If ALJs are to remain in-house (instead of adopting a central panel), the Act should provide, insofar as possible, for full-time judges who are protected from influence or control by prosecutors and other adversaries.¹²³

The California bill of rights provides for all of these fundamental protections, as does the federal APA and the 1981 Model Act. An acceptable Pennsylvania statute can do no less.

III JUDICIAL REVIEW

¹²³ See Coker & Mallamud, note 15 at 615-22, pointing out the great variations between agencies with respect to hearing officers and the ways in which they are selected and supervised. As of 1973, many agencies used part-time employees to hear cases; others used attorneys that performed numerous other staff functions.

As mentioned earlier, the California Law Revision Commission's judicial review Bill, S.B. 209,¹²⁴ died in the Senate Judiciary Committee in January, 1998. As the reader may have surmised, this was a source of intense frustration to the author, as well as the Commission members and staff. Collectively, we had spent years on the judicial review reform effort and we believed it was good legislation which nobody had any substantial reason to oppose. Thus an analysis of the political calculus relating to judicial review reform may prove useful to aspiring reformers in other states such as Pennsylvania. How could we have gone so wrong?

A. California's existing system of judicial review

It is safe to assert that no other state has a judicial review system like California's and no state ever will.

Judicial review of adjudicatory action resulting from a hearing occurs by means of a baroque system sometimes referred to as "certiorarified mandamus."¹²⁵ Code of Civil Procedure (CCP) §1094.5 calls for mandamus review¹²⁶ but in fact is much more like certiorari. For historic reasons

¹²⁴ S.B. 209 is reprinted in 27 Calif. L. Rev. Comm'n Rep. 45 et. seq. (1997).

¹²⁵ This acid nickname for the procedure was coined by Kleps. Ralph N. Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 Stan. L. Rev. 285 (1950).

which are interesting to students of legal oddities but not worth chronicling here,¹²⁷ §1094.5 delegates to the courts the decision whether to review factual issues by exercising independent judgment or by applying the test of substantial evidence on the whole record.¹²⁸

Agency action other than formal adjudication and rulemaking is reviewed through traditional mandamus under CCP §1085. Newly adopted regulations are reviewed through declaratory judgment.¹²⁹ Public interest standing is well accepted.¹³⁰ The courts have developed elaborate case law requiring exhaustion of remedies but almost none of this is spelled out in the statute.¹³¹ This incredible hodgepodge cries out for reform and modernization, but reaching this goal turned out to be beyond the Commission's ability.

The issue of whether courts should engage in independent judgment of the factual findings of agencies is an issue of surpassing importance in California

¹²⁶ CCP §1094.5 is within the chapter of the Code of Civil Procedure dealing with dealing with writs of mandate.

¹²⁷ See Asimow, *Scope of Review*, note 7 at 1164-67. Note 20 of the Asimow article cites a large number of studies of the bizarre evolution of this statute.

¹²⁸ Section §1094.5(c) provides: "Where it is claimed that the findings are not supported by the evidence, *in cases in which the court is authorized by law to exercise its independent judgment on the evidence*, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Emphasis added).

¹²⁹ Gov't Code §11350(a).

¹³⁰ Michael Asimow, *Judicial Review of Administrative Decisions: Standing and Timing*, 27 Cal.L.Rev.Comm'n Rep. 229, 243-50 (1997).

¹³¹ *Id.* at 254-71.

administrative law. I have written extensively on this issue¹³² and briefly summarize the problem here. If the decision of a local agency or a non-constitutional statewide agency deprives a private litigant of a *vested, fundamental right*, the litigant is entitled to have a trial court exercise its *independent judgment* on questions of fact and (in most cases) application of law to fact. The category of "vested, fundamental rights" includes an incredible array of claims but among the most important are professional or occupational licenses, local civil service jobs, and government benefits.¹³³

Under independent judgment, the court generally is limited to considering the written record made before the agency,¹³⁴ but *gives no deference whatsoever to the fact findings of the ALJ or the agency heads.*¹³⁵ The court employs the conventional test of substantial evidence on the whole record when it reviews other adjudicatory decisions of state or local agencies, such as those not involving vested, fundamental rights, or which involve decisions of constitutional statewide agencies (such as the

¹³² Asimow, Scope of Review, note 7 at 1164-92.

¹³³ Id. at 1171-76.

¹³⁴ In certain narrow circumstances, the court is permitted to take additional evidence. CCP §1094.5(e).

¹³⁵ See Asimow, Scope of Review, supra note 7 at 1168 n. 35 (citing some contrary authority).

Workers Compensation Appeals Board or the State Personnel Board).

The independent judgment rule, unique to California, was once required by the California constitution but today is maintained by the Supreme Court solely as a matter of policy.¹³⁶ As articulated by the Supreme Court in the leading case of *Bixby v. Pierno*,¹³⁷ independent judgment is a vital protection of civil liberties.

Although we recognize that the California rule yields no fixed formula and guarantees no predictably exact ruling in each case, it performs a precious function in the protection of the rights of the individual. Too often the independent thinker or crusader is subjected to the retaliation of the professional or trade group; the centripital pressure toward conformity will often destroy the advocate of reform. The unpopular protestant may well provoke an aroused zeal of scrutiny by the licensing body that finds trivial grounds for license revocation. Restricted to the narrow ground of review of the evidence and denied the power of an independent analysis, the court might well be unable to save the unpopular professional or practitioner. Before his license is revoked, such an

¹³⁶ Asimow Scope of Review supra 7 at 1169-70.

individual who walks in the shadow of the governmental monoliths, deserves the protection of a full and independent judicial hearing.

I do not agree with the policy articulated in the *Bixby* case and have attacked it at great length.¹³⁸ To summarize the critique, the doctrine arose out of the distant past when courts were hostile to agencies and neither due process nor an APA provided any protection for private litigants. None of this is true today. Independent judgment substitutes the views of judges who haven't seen or heard the witnesses for judgments of ALJs who have seen and heard them. Both the agency head and, frequently, the ALJ are specialists in the area regulated and thus are more likely to arrive at correct findings of fact than a generalist judge whose only contact with the case is a lengthy written record. Independent judgment review is much more time consuming for busy courts than substantial evidence. It insures a pattern of disparate results in similar cases. The doctrine gives private litigants a second bite at the apple; it encourages litigation and excessively subordinates the interests of law enforcement,

¹³⁷ 481 P.2d 242, 254 (Cal. 1971).

¹³⁸ Asimow Scope of Review 1164-92. I have also written an amicus brief in a case now pending before the Supreme Court urging the Court to abolish independent judgment. *Fukuda v. City of Angels Camp*, Sup.Ct. No. 19480. Oral argument had not yet been scheduled in *Fukuda* at the time this article was written.

consumers and local government to private interests. The vested, fundamental right standard is so incoherent that it can only be described as a travesty of a legal standard;¹³⁹ each year dozens of trial and appellate court decisions struggle with the issue of whether a particular claim falls into that category. There are numerous anomalies in application of the test, such as the fact that independent judgment applies to local but not state personnel decisions, to some decisions concerning disability but not others, to money judgments even of a trivial amount, and to applications for welfare but not applications for licenses.¹⁴⁰

I believe that the independent judgment test is ineffective in protecting the civil liberties of private individuals against unjust agency action because there are so many ways other than biased fact findings whereby this could occur.¹⁴¹ At the same time, private individuals can be effectively protected from unjust agency fact findings under the familiar test of substantial evidence on the whole record, particularly if it is made clear that that test is intended to have some bite.¹⁴² Courts have numerous other techniques to overturn agency action perceived to be

¹³⁹ Asimow, *Scope of Judicial Review*, note 7 at 1172-76.

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* at 1184.

unjust such as exercising their power of independent judgment over questions of law or procedure or by describing discretionary action such as an excessive penalty as an abuse of discretion. All the other states and the federal government furnish adequate protection to private litigants by using these conventional judicial review tools. Thus independent judgment is that rare bird in administrative law that *both* increases regulatory and judicial costs *and* decreases accuracy of results. Whether or not to keep independent judgment is an issue that surpasses all other administrative law issues in California.

B. The sad fate of S.B. 209

After extensive study and endless negotiation, S.B. 209, the Commission's judicial review bill was submitted to the legislature. It was given a hearing before the Senate Judiciary Committee in April, 1997. The auguries were not favorable. After further amendments, S.B. 209 was heard again by the Judiciary Committee in January, 1998. And there it died. All the Democrats and all but one Republican opposed the bill or abstained.

The bill contained some useful and relatively non-controversial features, such as codification of legal

¹⁴² Id. at 1177-80.

doctrines that could only be understood by extensive research in hundreds of cases. Thus the statute codified the law relating to the final order rule, exhaustion of remedies, judicial stays, and primary jurisdiction. It codified and simplified the law of private and public interest standing. It contained important clarifying provisions on the statute of limitations for seeking review (such as a requirement that the agency decision notify private litigant of the last date for seeking review). These provisions did not change existing law in any fundamental way, just made it more accessible.

The proposed statute abolished judicial review of agency action by writs of traditional or certiorarified mandamus, with its many baroque features and baffling distinctions.¹⁴³ It introduced a new streamlined judicial review procedure. Under S.B. 209, someone who wants judicial review of any agency action simply files a petition for review in the trial court. Ordinary rules of civil procedure would apply to petitions for review.¹⁴⁴

¹⁴³ I will not torture the reader with an account of these esoteric legal doctrines which are summarized in Michael Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus*, 27 Cal.L.Rev. Comm'n Rep. 403, 406-12 (1997). Just invoking the words "peremptory writ," "alternative writ," "return," and "replication" should give the reader a sense of the subject. Trust me: it gets really complex and the distinctions between certiorarified and traditional mandamus boggle the mind.

¹⁴⁴ S.B. 209, calling for adoption of CCP §1123.610(a).

S.B. 209 codified existing law relating to the record for review and to the scope of review of questions of law, questions of discretion, and questions of procedure. But what about the critical question of whether or not to preserve independent judgment of questions of fact in cases depriving someone of a vested, fundamental right? The version of S.B. 209 presented to the interim hearing of the Judiciary Committee in April, 1997, struck a compromise. The bill preserved independent judgment of decisions of local government, on the theory that there was no guarantee of fair procedure at the local level. It preserved independent judgment at the state level but *only* in cases where the agency heads changed the fact findings of a central panel ALJ.¹⁴⁵

As the reader can imagine, this provision relating to independent judgment was a painstakingly negotiated compromise, which the Commission hoped would remove the opposition of the lawyers who represent both local government employees and professional licensees. Independent judgment would continue to apply to review of state government decisions in the situations where it was most needed--where agency heads substituted their judgment about fact findings for those of the ALJ. The compromise

¹⁴⁵ Id. §1123.430(c).

failed. The private bar graciously accepted all concessions and continued opposing the bill.

The opposition of the lawyers who represent professional licensees (especially health care professionals) to this compromise was understandable. The number of cases in which agency heads reverse ALJ fact findings in licensing cases are very few. These are cases heard by central panel ALJs and the agency heads almost always adopt their decisions (except for occasionally changing the penalty). As a result, under the compromise, independent judgment would apply in very few cases of state agency adjudication. And for the lawyers who represent doctors and other health care professionals, that was a big loss. Independent judgment is very, very good for physicians in trouble with the Medical Board and for the lawyers who represent them. Those lawyers saw no advantage to a reform that watered it down without delivering some other benefit.¹⁴⁶

By the time of the final Judiciary Committee hearing in January, 1998, S.B. 209 was further amended to delete

¹⁴⁶ I argued to those lawyers that independent judgment was maintained solely as a policy decision by the Supreme Court. It is required neither by statute nor the state constitution. It could be abolished tomorrow by the Supreme Court. Wouldn't the lawyers be better off with a watered down independent judgment test in the statute, one that would apply to the real cases of abuse? These arguments fell on deaf ears. The lawyers who represent health care professionals figured that keeping the status quo was a better gamble than the Law Revision Commission's bill which sharply decreased the

all references to independent judgment. The Commission caved completely on the issue. But it was too late. Opposition to the bill had solidified and it was overwhelming.

C. The politics of judicial review reform

1. Opponents of the reform bill. S.B. 209 was sunk by the determined opposition of two factions of the private bar, both marching under the banner of the Consumer Attorneys of California (formerly known as the Trial Lawyers). The most determined faction was a number of lawyers who litigate against local government, particularly lawyers representing local government employees such as police or school bus drivers. Lawyers active in environmental and land use planning were also unalterably opposed. The second faction were the lawyers who represent licensees, particularly physicians and other health care professionals. The Consumer Attorneys are an extraordinarily generous campaign contributor. They are very experienced at getting their way in the legislative arena. Their lobbying efforts against the Bill, particularly among Democratic members, were totally successful.

number of state agency cases in which independent judgment would apply. Only time will tell if they are right.

Strangely, the lawyers who litigated against local government (either in employment, land use or environmental cases) were the more vehement opponents, even though the semifinal and final versions of S.B. 209 preserved independent judgment in cases arising out of local government (such as discharge of civil service employees). Their stated concern was the abolition of traditional mandamus under CCP §1085 for the review of informal agency action. The bill gave these attorneys everything they wanted, including an open record for review of many informal agency decisions.¹⁴⁷

In the end, I believe the opposition of the local government lawyers was founded in general suspicion of the Commission's motives (and of my motives as well) and a conservative resistance to change, but it was no less determined for that. In the view of the attorneys who litigated against local government, the present system was working fine. They, at least, understood all the ins and outs of mandamus practice and they got quick and adequate judicial relief under traditional mandamus. Who knew what

¹⁴⁷ S.B. 209, §1123.810 would have provided that the administrative record was the exclusive basis for review (i.e. a closed record) in cases in which the agency gave interested persons notice and an opportunity to submit oral or written comment and the agency maintained a record or file of its proceedings. In all other cases, parties could introduce evidence in court or the court could remand the case to the agency to receive additional evidence. This provision codified *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (1995), so it did not change existing California law.

might be tucked into the many provisions of the bill that could be bad for them or their clients? Why bother to learn a whole new procedure, even if it would be simpler for some people? This was reason enough to oppose the bill and oppose it they did.

Meanwhile the lawyers who represented health care professionals continued to oppose the bill, although less vehemently than the local government lawyers. The most important issue for these lawyers, abolition of independent judgment, had been jettisoned by the Commission in a frantic effort to diminish opposition to the Bill. But that action came too late, because these attorneys by then had already dug in their heels in opposition to any change.

For reasons unclear to the author, California's Office of Administrative Law (OAL) also was opposed to the judicial review bill. It continued to write long letters raising what to me were trivial objections to the Bill, usually having to do with judicial review of underground regulations.¹⁴⁸ The Commission did everything possible to placate OAL, but nothing seemed to be enough. Although OAL staff did not testify at Committee hearings, OAL mobilized effective private opposition to S.B. 209.

¹⁴⁸ See Letter to Bob Murphy (a staff member of the Commission) from Herb Bolz, January 9, 1998 [in JR 96-97 file]. I asked a staff member of OAL to

Meanwhile, there was relatively little support for the Commission's bill. The Attorney General was unhappy that the Commission had folded its cards on the independent judgment issue. From the Attorney General's point of view, abolition of independent judgment was the only good reason to support the bill. Meanwhile, the California State Bar suffered a complete meltdown when the Governor vetoed its appropriation.¹⁴⁹ It was in no position to help. Other than myself,¹⁵⁰ only a spokesman for the California Judges Association and the Judicial Council and a couple of lonely practitioners rose in support of the bill when it faced its moment of truth before the Judiciary Committee. The opposition was very determined and very well connected politically. It is no surprise that the bill died a sudden death.

2. Lessons from the demise of the judicial review bill

I believe the Commission's efforts to pass the judicial review bill foundered because of a failure to compromise early enough with the private bar. Probably the independent judgment issue should never have been touched.

comment on this paragraph but he declined to do so, stating that he was acting under instructions from the Director.

¹⁴⁹ Barbara Mahan, *Who Killed the State Bar?* 18 Calif. Lawyer 33 (Oct. 1998).

¹⁵⁰ As mentioned above, Commission members and staff are legislatively prohibited from lobbying in support of Commission bills. See note 6.

Since the issue is violently controversial, no effective compromise was ever possible.

As earlier noted,¹⁵¹ the Commission has no chance to pass legislation opposed by determined and well funded antagonists. It must have bipartisan support (or at least indifference) and an absence of organized opposition. That could never happen on a bill that undermined independent judgment. And because the issue is one that could ultimately be resolved by the Supreme Court as a matter of policy,¹⁵² it probably should have been left alone in the Commission's bill. The same is probably true of the other scope of review issues, such as defining the scope of review of questions of law and discretion. These are subtle problems, difficult to define in a statute. They probably should have been left to judicial decision.

In any event, there is a moment in the life of any bill when proponents must compromise. Failure to do so means the opposition will dig in its heels. As mentioned earlier,¹⁵³ the Commission compromised on big bang and this removed the speed bumps on the road to enactment of the adjudication statute. But on judicial review, the Commission waited too long to fold on the critical issue.

¹⁵¹ See text preceding note 6.

¹⁵² See 136.

¹⁵³ See text at notes 27-30.

It voted to stick with its independent judgment compromise¹⁵⁴ at the time of the interim hearing before the Judiciary Committee, despite plenty of black storm clouds. When it jettisoned the provision before the final hearing, it was too late because opposition had already mobilized and was immovable.

It should have been possible to enact a judicial review bill that codified the existing standing and timing rules and got rid of the baroque provisions for review by certiorarified and traditional mandamus. How could anybody be opposed to a simple system of review by petition? I remain mystified why the lawyers who litigate against local government were so bitterly opposed to the abolition of review by traditional mandamus of informal agency action. We did everything they asked to clarify the bill and remove objectionable language, but their opposition only seemed to intensify.

I believe we failed to involve these lawyers early enough in the process so they could have bought in to the reform effort. Some lawyers who litigate against local government worked closely with the Commission from the beginning; we had the support of those lawyers once we dropped independent judgment in review of local agency

¹⁵⁴ See text at notes 145-46.

decisions. Unfortunately, those lawyers did not speak for some of their colleagues. A whole new group of opponents emerged at the last minute, terribly alarmed at the prospect that lengthy legislation they didn't thoroughly understand might pass the legislature. They claimed they had never heard about the project and were extremely distrustful of the Commission's motives. They decided to fight and nothing could dissuade them. There was a complete absence of trust.

All I can advise reformers in other states is to avoid the truly controversial issues on which no compromise is possible. As to the others, compromise freely and as early as possible. Remember that the best is often the enemy of the good. Involve all segments of both the public sector and the private bar as early as possible and try to get all of them on the bandwagon. Line up strong political patrons such as the governor or attorney general, the state bar, and the judges' association. And pray that no last minute opposition arises that cannot be placated.

D. Pennsylvania's judicial review provisions--an outsider's view

Pennsylvania's provisions for judicial review of state and local agency action strike me as skeletal.¹⁵⁵ The statute authorizes review of an adjudication by a state or local agency by any person "who has a direct interest" in such adjudication.¹⁵⁶ Parties must raise issues at the agency level before raising them on review.¹⁵⁷ The remedy provided does not impair existing equitable rights to review.¹⁵⁸ The substantial evidence rule applies.¹⁵⁹ That's about it for statutory explication.

It strikes me that Pennsylvania could do with an updating and modernization of its judicial review statute. Essentially the goal would be to codify the case law and to identify and correct outdated or confusing case law. A codification would place into an accessible statute the answers to many of the questions that now can only be found in case law or which remain obscure. For example, a statute should clarify questions of private and public interest standing. It should explain the timing doctrines

¹⁵⁵ 2 Pa. P.C.S. App. §§701-754. See John L. Gedid, *Administrative Law Progress in 1997: Selected Pennsylvania Supreme Court Decisions Involving Constitutional and Administrative Law*, 7 Wid.J.P.L. 403, 410 (describing provision as antiquated).

¹⁵⁶ Id. §§702, 752

¹⁵⁷ Except that a party shall not be precluded from questioning the validity of the statute. Id. §§703(a), 753(a).

¹⁵⁸ Id. §§703(b), 753(b).

¹⁵⁹ Id. §§704, 754. The law seems unclear whether the test is substantial evidence on the whole record. See Gedid, note 155 at 414-15 (discussing confusion in Pennsylvania law on this issue). It also seems unclear on the question of whether it makes any difference if the agency heads have overturned an ALJ decision.

such as final order rule, exhaustion of remedies¹⁶⁰ and its many exceptions, primary jurisdiction, and judicial stays. It is unclear what the statute means in preserving "equitable relief" alongside its statutory right of appeal. A statute should explain the scope of review of questions of law¹⁶¹ as well as questions of application of law to fact, discretion and procedure. It should clarify the question of closed or open record--when, if ever, can the record made before the agency be supplemented in court? No doubt, experienced Pennsylvania administrative lawyers and judges know the answers to all these questions. As a newcomer to the arena, however, I don't know and couldn't conveniently find these answers and I suggest that many lawyers confronted with the need to seek judicial review of agency action for their clients don't know them either.

[insert here material on whether such a statute would be an invalid infringement on the Supreme Court's power to prescribe the rules of judicial review; Ron Darlington to supply some material]

IV. RULEMAKING

¹⁶⁰ See, e.g., *Success Against All Odds v. Dep't of Public Welfare*, 700 A.2d 1340, 1348-49 (Cmwlth. Ct. 1997) (various common law exceptions to exhaustion requirement).

¹⁶¹ For example, should the state follow *Chevron* or the earlier weak deference standard or some other variation? See Asimow, *Scope of Review*, note 7 at 1192-1209. In the controversial federal case of *Chevron, U.S.A., Inc. v. Natural Resources Def. Coun.*, 467 U.S. 837 (1984), the Supreme Court held that courts must accept an agency's reasonable interpretation of an ambiguous statute.

A. California's rulemaking APA¹⁶²

California adopted a simple notice and comment system of rulemaking in 1947.¹⁶³ This scheme was similar to the barebones federal system of notice and comment¹⁶⁴ although it lacked most of the exceptions found in federal law. In 1979, the legislature overhauled the rulemaking provisions, creating a statute of awesome complexity.¹⁶⁵ The statute contains very few exceptions; in particular, there is no exception for guidance documents such as interpretive rules or policy statements, no exception for procedural rules, and no exception for situations in which public participation would be unnecessary or contrary to the public interest.

Most significantly, the 1979 legislation created a new executive branch agency, the Office of Administrative Law (OAL), which is required to screen every newly adopted rule before it can go into effect.¹⁶⁶ OAL is empowered to disapprove rules on various grounds including failure to observe all of the required steps (including responding to every public comment) or lack of "clarity." Most important, OAL disapproves rules if they are *unauthorized*

¹⁶² See generally Asimow, *Underground Regulations*, note 30; Ogden, note xx.

¹⁶³ Id. at 46-47.

¹⁶⁴ APA §553.

¹⁶⁵ Asimow, *Underground Regulations*, note 29 at 48-51; Ogden, note 29 at chapters 20-21.

¹⁶⁶ Gov't Code §§11340-11340.3, 11349-11349.11.

by the governing statute (i.e. ultra vires) or *unnecessary* in the sense that they are not supported by substantial evidence in the rulemaking record.

Thus OAL is empowered to second guess the agency's judgment both as to legal questions ("authority") and as matters of fact, policy, and discretion ("necessity"). OAL's reviewing function is essentially non-political and is not intended to intrude into the agency's policymaking function; thus it is quite unlike Pennsylvania's approach to rulemaking accountability.¹⁶⁷ OAL's function approximates that of reviewing courts and can best be understood as a system of pre-judicial review. In the past OAL's relationship with the agencies was confrontational.¹⁶⁸ Things have changed in recent years. OAL has new leadership and a leaner budget; the relationship now seems quite constructive. OAL tries to negotiate out its objections to pending rules and agencies generally feel that OAL is not obstructive.¹⁶⁹

Since 1979, California's rulemaking structure has remained in place but has been constantly amended to add even more steps, required impact statements, and the

¹⁶⁷ See text at notes 198-203.

¹⁶⁸ Asimow, *Underground Regulations* note 29 at 50 n.49, 56-57.

¹⁶⁹ Michael Asimow, *Rulemaking Under the California Administrative Procedure Act: Proposals for Reform* (1996) (consultant's report to CA Law Rev. Comm'n) 4-5. This report also contrasts the California rulemaking procedures with

like.¹⁷⁰ In my opinion the present APA rulemaking provisions have severely ossified the process of rulemaking in California agencies.¹⁷¹ I would favor a radical pruning of the statute to get back to simple notice and comment rulemaking, although I would favor retaining OAL's checking function.

B. The Commission's decision to attempt incremental reform

The Commission quickly decided not to attempt a root and branch revision of the rulemaking provisions. Instead, it decided to study and recommend a series of discrete and hopefully non-controversial amendments and improvements to the system. I concurred with this decision.

The reasons for this more modest approach were three-fold.

Σ First, the rulemaking provisions had been adopted in 1979. They are quite comprehensive and seem to command solid legislative support (indeed the legislature strengthens them at every opportunity). Thus rulemaking is quite unlike the adjudication and judicial review

federal law, pointing how the California scheme is far more onerous in many respects. Id. 5-12.

¹⁷⁰ A look at the most recent supplement to the West Annotated California Government Code, §§11340 et. seq., will give the reader a sense of how volatile and complex this area has become.

¹⁷¹ The term "ossification" as applied to rulemaking was popularized in a famous article about the federal rulemaking process. Tom McGarrity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 Duke L.J. 1385.

provisions which dated back to 1945, the dawn of the modern era of administrative law.

Σ Second, it was abundantly clear that there would be massive opposition to any attempt to reduce the burdens of rulemaking; a large number of private sector players are very devoted to the labyrinthine rulemaking process and apparently to each and every one of its provisions. OAL could be counted on to oppose any significant changes that reduced its control over the process and OAL had already proved itself to be a tenacious opponent in the judicial review study (a matter which concerned it much less). OAL is very capable of producing a well-orchestrated outcry from its constituency.

Σ Third, the Commission members and staff were exhausted by the massive though successful struggle to enact the adjudicatory APA and its equally massive effort and heartbreakingly unsuccessful attempt to enact judicial review reform. These battles had consumed a large amount of staff and Commission time for nearly a decade. The members were burned out on administrative law (which many of them never cared much for in the first place) and the members and staff had other areas of law they preferred to work on. And, to be honest, I was pretty burned out myself.

Thus the Commission made no attempt to propose a serious overhaul of the rulemaking process by trimming down the requirements for rulemaking or reducing OAL's powers, although in an ideal world I believe that it would have been desirable to do so. The process of incremental reform, however, proved a dismal failure when the Governor unexpectedly vetoed one of the Commission's rulemaking bills.

C. Advisory interpretations

In my view, an agency has a fundamental obligation to advise the public about what the law requires of them. Guidance documents stating the agency's interpretation of the statute or regulations are very different from other agency rules because guidance documents are not the law. Ordinary agency rules are adopted pursuant to a legislative delegation of authority and such rules are equivalent in legal force to statutes. But guidance documents simply articulate what the agency thinks the law means.

Guidance documents are exceptionally valuable to the public and the agency alike. The guidance is valuable to members of the public who want to minimize transaction costs and to plan their affairs to avoid legal problems. It is equally valuable to the agency because it improves compliance with the law and assures that the staff will

interpret and enforce the law in a uniform manner. For reasons I have stated at length elsewhere,¹⁷² I believe that an agency should be able to furnish guidance documents without first adopting them as rules. Imposing rulemaking requirements on the process of producing guidance documents radically decreases the number of such documents, a result which is bad for the public and the agency alike.

California's rulemaking law contains no exception for guidance documents.¹⁷³ Guidance documents adopted by agencies without compliance with the APA's rulemaking requirements are referred to as "underground regulations"¹⁷⁴ and there are undoubtedly hundreds of thousands of them out there, especially in places like personnel manuals.¹⁷⁵ Any person can seek judicial invalidation of an underground regulation and numerous cases have struck them down, often

¹⁷² Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich.L.Rev. 521 (1977); Asimow, *Underground Regulations*, note 29.

¹⁷³ See Asimow, *Underground Regulations*, note 29. In *Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296 (1996), the California Supreme Court held that the Act contains no exception for underground regulations and that an advisory ruling was therefore invalid. However, the Court also determined that the invalidity of the advisory ruling would not automatically invalidate the agency's underlying enforcement action. The invalidity of the ruling meant that the Court would give it no deference. Nevertheless the Court held that the ruling was a correct interpretation and upheld the agency's enforcement action. *Id.* at 308.

¹⁷⁴ Gov't Code §11340.5(a) provides: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." §11340.5(b) empowers OAL to issue a determination whether any guidance document was invalidly adopted under this section.

resulting in considerable disruption of an agency's regulatory program.

As I have sought to document,¹⁷⁶ the result is horrendous: very few guidance documents are adopted in compliance with the APA because it is far too slow and costly to do so. Agencies simply have more pressing tasks to occupy their limited staff. There is a large amount of evasion of the ban on underground regulations, because agencies simply must furnish guidance to the public and to their staff. For example, the agency can send out individual advice letters so long as it does not generalize the advice and can issue restatements of its individual advice letters.¹⁷⁷ Or it can just cheat and hope for the best. Some agencies have found it simpler to get legislation enacted implementing their interpretation than to adopt a regulation with the same interpretation. And, of course, some agencies provide no guidance at all, even though they would be prepared to issue rulings if it could be done without going through the rulemaking process.

My proposal to create an exception for interpretive rulings was met by intense skepticism from the private sector. Private sector players cherish their existing

¹⁷⁵ Asimow, *Underground Regulations*, note 29 at 61.

¹⁷⁶ *Id.* 55-65.

¹⁷⁷ *Tidemarine Marine*, note 173 at 304-05, 307.

opportunity to shoot down in court underground regulations with which they disagree. I argued that the private sector can only benefit from guidance documents because it does not have to follow any it disagrees with. Why would regulated parties not always want to know the agency's interpretation as quickly as possible? Would they really rather be left in the dark?

The private sector was legitimately concerned by the practical and legal effect of interpretive rulings. Agency staff would certainly follow the rulings, since one of the purposes for issuing them is to assure uniformity of staff decisionmaking. In most situations, the private party will just give up and follow agency law, since very few of them would have the appetite or resources for a costly judicial battle. Moreover, the private sector was very concerned by the problem of judicial deference; courts are likely to give some deference to many agency interpretive rulings.¹⁷⁸ This means that the rulings have some legal effect which in turn might warrant public involvement in their promulgation.

In addition, OAL was very dubious about any change in its power to review guidance documents. I believe this

¹⁷⁸ *Yamaha Corp. of America v. State Bd. of Equalization*, 960 P.2d 1031 (1998), indicates that courts often accord deference to agency advisory opinions. *Yamaha* involved an advisory opinion about business tax issued by the

opposition was grounded in an understandable concern about loss of turf. The reality, however, is that OAL does not have the resources to do much about underground regulations anyway, so it seems to me that the loss of turf should not be very significant.¹⁷⁹

A long process of negotiation and compromise ensued. The resulting product went to the legislature in the form of A.B. 486. All factions appeared to be satisfied with it, and A. B. 486 passed both houses. Unexpectedly, on October 8, 1999, Governor Gray Davis vetoed the Bill.

A. B. 486 would have allowed an agency to adopt an advisory interpretation, meaning an expression of its opinion as to the meaning of a statute, regulation or other provision of law the agency administers. All advisory interpretations would have to be clearly labelled as such, an important provision which avoids the confusion that has arisen under federal law about distinguishing interpretive from legislative rules. The interpretation could not compel any action and it could not be given *any* judicial deference.

A. B. 486 called for a simplified notice and comment procedure which would have achieved Review of

State Board of Equalization. The Board enjoys one of the very few exceptions to California's strict ban on underground regulations.

¹⁷⁹ Asimow, *Underground Regulations*, note 29 at 57-58.

interpretations by OAL would not be mandatory but any interested person could have requested that OAL review the interpretation to determine whether it is consistent with the law it interprets. Furthermore, in an important sweetener for the private sector, the law provided for a "safe harbor:" those who comply with an interpretation would have been protected from any retroactive change by the agency.

Thus the Commission attempted to win over all of the potential public and private opponents (at least all of those who emerged during its study of the problem), by proposing a something-for-everybody provision. At the same time, the provision would deliver a significant piece of law reform. It isn't perfect but even with its flaws, it is far superior to the present chaotic situation.

The Governor's veto was unexpected and a sobering reminder of the hazards of the political process. His veto message¹⁸⁰ seemed to reflect no understanding of the problem that AB 486 was designed to solve. It took no account of the massive effort by the Law Revision Commission to study the problem and to draft compromise legislation apparently satisfactory to all.

¹⁸⁰ Letter from Gray Davis, Governor of California, to Members of the California Assembly (October 8, 1999) (on file with the Widener Journal of Public Law). After hearing about the possibility of a

Unconvincingly, the Governor's veto message stated that the public will confuse a non-binding advisory interpretation with a binding regulation. Yet the labeling provision of the law was expressly designed to prevent any such confusion. The message suggested that advisory interpretations could ultimately become underground regulations--presumably meaning regulations binding on the public. Yet the statute explicitly prevented advisory interpretations from having any binding effect on anyone and prohibited courts from giving them judicial deference. The message stated that the provision was unnecessary since existing law provides for a declaratory order procedure.¹⁸¹ However, the declaratory order procedure is a time-consuming adjudicative proceeding which can only be triggered by an application by a private party and would be at least as resource-consuming as full-fledged notice and comment rulemaking. I do not think that any serious student of the administrative process would imagine that a declaratory order procedure is a substitute for the issuance of interpretive rulings.

At the time this is written, the real reasons for the Governor's veto are unknown. Rumor has it that several

veto, I peppered the Governor's office with faxes; Assemblyman Howard Wayne, who ably carried the bill in the Legislature, also lobbied the Governor's office. It was to no avail.

¹⁸¹ Calif. Gov't Code §11465.10.

agencies objected to the provision, although why they would do so is mysterious. Any agency that objected to the advisory interpretation procedure would not be required to use it. Supposedly, the agencies were afraid they would be deluged with requests for advisory opinions which they lacked the staff to produce. Therefore, they felt it would be better that they not have the power to furnish interpretations at all. Other agencies thought that the provision might imply that some other methods of furnishing advice were illegal. These arguments seem so weak that it is hard to believe anyone would take them seriously, but apparently the Governor's staff swallowed them and ignored all input to the contrary.

D. Consent regulations

Federal law allows an agency to dispense with prepromulgation procedure if such procedure would be "unnecessary."¹⁸² This has generally been held to include situations in which the public would have little or no interest in commenting because the rule is trivial or at least completely uncontroversial.¹⁸³ The unnecessary exception is useful to agencies because it allows them to

¹⁸² APA §553(b)(B). In full, the APA provides that a rule can be adopted without any pre-promulgation process "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."

¹⁸³ Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995).

adopt many minor rules quickly and at little cost, thus getting the necessary work done and preserving their resources for more important rulemaking. California has no statutory exemption for "unnecessary" rulemaking.

Under federal practice, many agencies now issue "direct final rules," meaning that they publish notice that they expect to adopt a rule under the unnecessary exception; however, if any adverse comments are received, the agency then initiates a standard notice and comment rulemaking.¹⁸⁴ Thus direct final rules are a useful way to make sure that public participation was really "unnecessary;" if the agency was wrong, and the rule is controversial after all, it then switches to the regular track. In the vast majority of cases, of course, the agency is right about public sentiment and the direct final regulation is routinely adopted.

The Commission recommends a provision for consent regulations which is analogous to the federal direct final rule.¹⁸⁵ Under this approach, an agency can distribute public notice of its decision to adopt a consent regulation. It must accept written comment for at least 45

¹⁸⁴ Id. The Administrative Conference of the United States took a strong position in favor of direct final rulemaking. Rec. 95-4, 60 Fed.Reg. 43,110 (1995). See also Lars Noah, *Doubts About Direct Final Rulemaking*, forthcoming 51 Admin. L. Rev -- (1999); and Ronald M. Levin's response to Noah's article in the same issue.

days. If no adverse comments are received, the rule can be adopted. If adverse comments are received, the agency must initiate normal rulemaking procedures. Thus any person can easily block adoption of a consent regulation merely by submitting a statement of opposition. OAL will not routinely screen consent regulations, but any interested person can request OAL review. This provides a second line of defense against a faulty regulation in case an protesting party missed the initial announcement.

We hope that the consent regulation provision will, like consent regulations themselves, prove sufficiently non-controversial that it won't attract opposition. Given the level of suspicion in the trenches, however, even that is questionable.

D. Internal Management Exception

The definition of "regulation" in California's existing rulemaking statute makes an exception for rules that "relate only to the internal management of the state agency."¹⁸⁵ This exception might have proved of great value in excluding from rulemaking procedure the vast array of agency manuals and guidelines relating to its own employees. However, the result has been just the opposite;

¹⁸⁵ *Consent Regulations and Other Noncontroversial Regulations*, 28 Calif. Law Rev. Comm'n Rep. 625 (Sept. 1998).

¹⁸⁶ Gov't Code §11342(g).

the courts have rendered a series of astoundingly narrow interpretations of the internal management exception.¹⁸⁷ If an agency rule relating to its own employees either has some practical effect on someone outside the agency,¹⁸⁸ or concerns a subject of interest to the general public,¹⁸⁹ the rule is not considered "internal management." Thus the cases have narrowed the exception to the point of near invisibility.

Commission staff has proposed to broaden the internal management exception so that rulemaking procedures do not apply to an agency rule relating to an agency's internal management and that does not affect the legal rights or obligations of a person other than an officer or employee of the agency adopting the rule.¹⁹⁰ Initial returns are not favorable, however. Various players think agencies will distort this provision into a new backdoor way to adopt underground regulations. It is questionable whether the

¹⁸⁷ Asimow, *Underground Regulations*, note 29 at 48, 73-74.

¹⁸⁸ *Armistead v. State Personnel Bd.*, 583 P.2d 744 (1978) (State Personnel Board regulation concerning procedures for resignation from agencies are not internal management); *City of San Marcos v. Highway Comm'n*, 131 Cal.Rptr. 804 (Ct.App. 1976) (rule imposing deadline on applications for funds is not internal management).

¹⁸⁹ *State Employees' Ass'n v. State*, 271 Cal.Rptr. 734 (Ct./App. 1990) (agency's policy relating to discipline of own employees convicted of drunk driving is not internal management because driving safety is of concern to the public); *Poschman v. Dumke*, 107 Cal.Rptr. 596 (Ct.App. 1973) (state college rules relating to tenure of its own employees are not internal management because the public is concerned with tenure).

¹⁹⁰ Proposed Gov't Code §11340.9, Calif. L. Rev. Comm'n Memorandum 99-8 (Jan. 22, 1999).

provision can be narrowed sufficiently to neutralize this skepticism.

E. Pennsylvania rulemaking procedure

Prior to 1982, Pennsylvania's rulemaking statute resembled California's pre-1979 system and the original federal system. The Commonwealth Documents Law provided for barebones notice and comment¹⁹¹ and contained exceptions roughly parallel to those in federal law.¹⁹² The statute also provided for review of regulations on the grounds of legality by the Attorney General and the governor's Office of the General Counsel.¹⁹³

All that changed in 1982 with enactment of the Regulatory Review Act (RRA), which has been frequently revised since its enactment.¹⁹⁴ RRA imposes a long list of

¹⁹¹ 45 P.S. §§1102, 1201-1208. The notice provision in the Documents Law provides inadequate protection to the private sector from abrupt changes in the proposed regulation. *Brocal Corp. v. Commonwealth Dep't of Transportation*, 528 A.2d 114, 118-20 (Pa. 1987) (despite major changes, final regulations did not enlarge the "original purpose" of the proposed regulations).

¹⁹² The law provides a good cause exception and a procedure exception that are similar to federal law. It provides for an exception for "the interpretation of a self-executing act of Assembly or administrative regulation." *Id.* §1204(1)(v); *Success Against All Odds v. Dep't of Public Welfare*, 700 A.2d 1340, 1351 (Cmwlth Ct. 1997); *Jay R. Reynolds, Inc. v. Dep't of Labor & Industry*, 661 A.2d 494 (Cmwlth Ct. 1995) (formula is interpretive rule). See Robert Power, -- *Wid J P L* [criticizing existing interpretive rule provision]

It also contains a poorly defined provision for policy statements. *Id.* §1102(13). See *Penn. Human Rel. Comm'n v. Norristown Area School Dist.*, 374 A.2d 671 (1977) (following the "binding norm" test used under federal law for distinguishing policy statements from regulations). Professor Power points out that the definition of policy statements is circular. Power, *supra* [art. to be published in *Widener J P L*]

¹⁹³ 45 P.S. §1205; Commonwealth Attorneys Act, 71 P.S. §§732-204(b), 732-301.

¹⁹⁴ 71 P.S. §745.1 et seq. See Nicholas J. Johnson, *There May be Cracks in the Foundation: An Analysis of Pennsylvania's Current Approach to Legislative Review of Agency Rulemaking*, 94 *Dick. L. Rev.* 637, 661-63 (1990) (criticizing

rulemaking requirements on agencies;¹⁹⁵ it compares favorably in complexity and cost to the California statute. All proposed regulations must contain elaborate analyses of the costs to the Commonwealth and the private sector; explanation of measures designed to minimize bureaucratic costs; an evaluation of the financial, economic, and social impact of the regulation and of the benefits expected; an explanation of the provisions designed to meet the particular needs of affected groups including minorities the elderly, small business and farmers; a description of alternatives which were rejected and a statement that the least burdensome alternative was selected; and a description of the evaluation plan for the rule.¹⁹⁶

The Act also provides for review of proposed regulations by the Independent Regulatory Review Commission (consisting of four legislative and one gubernatorial appointees) and by legislative committees. The Commission and the legislative committees have power to disapprove regulations (including those for which notice and comment

rule review process because of dangers of ex parte influence and lack of legislative accountability).

¹⁹⁵ Professor Power indicates that there are no exceptions to RRA review so that even interpretive rules and policy statements are subject to scrutiny. Power, *supra* at ; but see *Physicians Ins. Co. v. Callahan*, 648 A.2d 608, 614 (Cmwlth Ct. 1994) (memorandum sufficiently definitive to be treated as regulation, not policy statement, and so invalid under both Commonwealth Documents Law and RRA).

¹⁹⁶ *Id.* §745.5(a).

was not required).¹⁹⁷ After a suspension period resulting from such disapproval, the agency can adopt the questioned regulations;¹⁹⁸ but if it does so the legislature can veto the regulations through adoption of a two-house concurrent resolution that is subject to veto by the governor.¹⁹⁹

I've seen nothing written about the operation of the regulatory review provisions but it strikes me that the analytical requirements it imposes upon the process of proposing regulations are excessive.²⁰⁰ Nevertheless, I've been informed that these procedures are popular with both the legislature and the governor's office. It's hard to believe that agencies can really provide the required level of analysis for every single regulation they adopt. Therefore, it is likely that agencies will produce a lot of useless boilerplate for most regulations. Unlike the federal law, which imposes cost benefit analysis and

¹⁹⁷ Id. §745.5a(d), (e). The legislative committee can disapprove regulations for any reason including, but not limited to lack of statutory authority or deviation of the regulation from the General Assembly's intention. The Commission "shall consider, first and foremost" but apparently not exclusively, these same factors. It then considers a variety of factors to determine whether the regulation is in the public interest, including a cost benefit calculation. Id. §745.5a(i).

¹⁹⁸ Id. §§745.6(b), 7(b). The Commission and committees also have power to rescind an emergency regulation after it has been in effect for 120 days. Id. §745.6(d).

¹⁹⁹ Id. §745.7(d). See *Commonwealth Dep't of Envir. Res. v. Jubelirer*, 614 A.2d 204 (1992), holding that a challenge to the legislative veto provisions, before they were amended, was moot.

²⁰⁰ See generally Richard Whisnant & Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31 Wake Forest L. Rev. 693 (1996) for a skeptical view of the utility of state regulatory analyses regimes.

regulatory review only for major rules,²⁰¹ the Pennsylvania legislation seems to apply even to the most trivial ones. Moreover, it appears that the various provisions of the Regulatory Review Act are not enforceable by outsiders;²⁰² as a result, they may well be circumvented in practice or complied with in a perfunctory manner. Perhaps experience under the legislation will suggest reforms whereby the requirements of the Regulatory Review Act can be tailored more precisely to the problems they are intended to solve.²⁰³ Certainly, the various code sections relating to rulemaking could be brought together in one place and the exposition could be simplified (the statutes are virtually unreadable at present).

V. CONCLUSION

California administrative procedure reform has proved far more difficult than anyone would have predicted at the outset. Pennsylvania reform is likely to be just as tough. Almost every decision is deeply political, tending to attract new groups of vehement opponents (but few if any enthusiastic supporters). In California both private and

²⁰¹ Exec. Order 12866, §3, 58 Fed. Reg. 51735 (1993) ("significant regulatory actions" are those having an annual effect on the economy of \$100 million or more or a material adverse affect on a sector of the economy).

²⁰² 71 P.S. §745.2(b). In *Dep't of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989), the Court indicated that agencies had no standing to question the constitutionality of the law.

²⁰³ Professor Power's flow chart graphically illustrates the horrendous complexity of the existing regulatory review process. Power, *supra* at -- .

public players are deeply suspicious of the other side and almost everybody seems suspicious of the Law Revision Commission (and often of this author).

Yet the cause of administrative law reform is a good one. Administrative law and procedure is *the* justice system, as far as most of our citizens go. It should not be stuck in the dark ages of the mid-1940's but should be modernized for the benefit of the general public and regulated parties. The public deserves a system of administrative adjudication and rulemaking, and a system of judicial review, that delivers accurate results at reasonable cost and in a way that the parties involved find to be fair. The public deserves to have its administrative law codified in an understandable manner so that it is accessible to average people and novice lawyers and transparent in its meaning. I hope that reformers everywhere will take up this banner and engage the issues. Generations to come will be the beneficiaries of this law reform effort. There will be many disappointments and many difficult compromises along the way, many speedbumps and a few flat tires broken axles, but with enough commitment, administrative law reform is achievable.