Veto No. 1988-7

SB 202 December 21, 1988

To the Honorable, the Senate
of the Commonwealth of Pennsylvania:

I hereby publicly proclaim, and file with the Secretary of the Commonwealth, my disapproval of Senate Bill 202, Printer's No.2522, entitled "An act amending the act of June 25, 1982 (P.L.633, No.181), entitled, as reenacted and amended, 'An act providing for independent oversight and review of regulations, creating an Independent Regulatory Review Commission, providing for its powers and duties and making repeals,' further providing for the membership of the Independent Regulatory Review Commission and for the procedure for regulatory review; changing the termination date for the commission; and making repeals."

Senate Bill 202 would re-authorize the Independent Regulatory Review Commission (IRRC) for another three years pursuant to the Sunset Act of 1981. In addition, the bill expands the scope of IRRC's authority over the regulatory process in several areas and imposes new conflict of interest standards on the IRRC commissioners.

The commission was originally established for several express purposes identified by the General Assembly. IRRC was designed to "curtail excessive regulation" by the executive branch and to assist in the "ultimate review by the General Assembly of those regulations which may be contrary to the public interest." In order to carry out those functions, IRRC was given broad authority to review agency regulations using a number of specific review criteria. These include, among others, the "reasonableness" of the proposal, the "need" for it and even the question of whether it represents a "substantial" policy decision that ought to be reviewed by the Legislature. These criteria, and others in the act, call for judgments which in the first instance are entrusted to the executive branch of government. Article 4, section 2 of our State Constitution imposes a duty on the Governor and the executive agencies to make certain the laws are "faithfully executed." This particular provision is one of the cornerstones of the constitutional separation of powers between and among the three branches of government. To say that the regulatory function is entrusted to the executive branch, however, does not mean the various executive agencies could not tolerate any review by other branches of government. Clearly, both the agency and the public can benefit when suggestions are made for reducing the cost of a regulatory program or avoiding duplication or excessive "red tape."

Review by agencies outside the executive branch becomes intolerable when it becomes so intrusive into executive decisionmaking that discretion is effectively removed from department heads or their priorities are effectively frustrated by excessive delays and bureaucratic hurdles built into the review process.

Senate Bill 202 allows IRRC to substitute its judgment in place of the department which proposed the regulation under review. If the department decides, after studying all comments received from the public, that a regulation should be finally adopted, Senate Bill 202 allows IRRC to block that action. After the department has published its proposed regulations, received comments and incorporated those changes it deemed appropriate, IRRC may delay implementation for months based upon its own judgment of what the public interest requires. The reality is that too often the interests being served by excessive delay are the special interests which lobby IRRC so effectively rather than the interests of the public at large.

The IRRC review process sets up an elaborate series of roadblocks which must be navigated before any department can actually implement laws enacted by the Legislature. The changes contained in Senate Bill 202 could be expected to add months to that process which already averages nine months from proposal to final adoption. Clearly, the public is not well served when long delays prevent government from acting quickly in areas such as environmental protection, economic development and the delivery of vital services to our elderly or infirm citizens.

Fortunately, there are other means available to State agencies to communicate their interpretations of laws and regulations to those citizens affected by them. Agencies publish policy statements, guidelines, manuals and handbooks so that applicants for government benefits and others will know how the agency will apply statutory or regulatory language in making its decisions. These guidance documents are not regulations and have never been subject to review by IRRC. That would change dramatically under Senate Bill 202. If this bill became law, literally every document that describes how an agency program operates would be subject to "review" by IRRC and the special interests. The inclusion of policy statements and other similar documents under IRRC review would allow IRRC to substitute its policy for executive policy, to operate as a "shadow government" able to frustrate executive action at the whim of five unelected commissioners.

Obviously, IRRC is not equipped with a staff and budget large enough to examine all agency policy statements. The size of the commission is not the issue, however; rather, it is the degree of authority that body would be given over functions entrusted solely to the executive branch by our Constitution. This unprecedented grant of authority even extends to reviewing the Governor's decision that a regulation must be allowed to go forward in order to respond to an emergency. The fact that the power to second-guess the Governor's emergency declaration would be shared under this bill with a small number of legislators does nothing to make this usurpation of power any more palatable or constitutional.

Like the inclusion of manuals and handbooks under IRRC's review authority, this special commission power over emergency regulations is simply very bad public policy. Our system of government already provides numerous opportunities for special interest groups to challenge executive actions. If they feel an agency has abused its discretion, the courts are available to have the action invalidated. If the General Assembly agrees that

a regulation does not respond adequately to legislative intent, the law can be clarified by new statutes. Interest groups and individual legislators have ample opportunity to comment before regulations are finally adopted by executive agencies. But, in the final analysis, the executive branch must be free to execute the laws under our system of coequal, distinct branches.

Senate Bill 202 attempts to usurp the authority of one of those branches under the guise of curtailing excessive regulation. I believe this bill violates the separation of powers required by our State Constitution. Therefore, I am compelled to return Senate Bill 202 without my signature.

ROBERT P. CASEY