

Federal Regulatory Agencies: Fourth Branch of Government

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Spotlighting of the Regulatory Agencies

Recent Sharp Criticism of Trade Commission

Recent criticism of the Federal Trade Commission has directed attention to the part played by federal regulatory agencies in the American economy. A 185-page report by seven law students, made public Jan. 5, 1969, attacked members and staff of the F.T.C. for “spectacular lassitude and office absenteeism, incompetence by the most modest standards, and lack of commitment to their regulatory missions.” Of Chairman Paul Rand Dixon, the report asserted that his “chief and perhaps only contribution to the commission's improvement would be to resign from the agency that he has so degraded and ossified.”

Dixon, in an angry rebuttal four days later, called the authors of the report “young zealots” who had produced “a hysterical, anti-business diatribe and a scurrilous, untruthful attack on the career personnel of the commission.” As evidence of the students' “anti-business bias,” Dixon cited a passage in the report calling for application of “criminal sanctions to dishonest corporate behavior, for it [the report said] is far more damaging in contemporary America than all the depredations of street crime.”

The brief flurry of charges and counter-charges lifted the F.T.C. momentarily out of the obscurity in which it and other federal regulatory agencies usually operate. Although little known outside of the industries they regulate, the agencies have been called “a headless ‘fourth branch’ of government.”¹ It has been said that the agencies “probably account in sheer volume for the bulk of ‘legislating’ and ‘judging’ done by the federal government.”² Associate Justice William O. Douglas declared a decade ago that “The administrative agency is supreme.”

President Nixon, who favors reduction of government control over private enterprise, may undertake to reorganize some or all of the agencies, or to reshape their policies. The Republican party's 1968 platform said that “Decentralization of power, as well as strict congressional oversight of administrative and regulatory agency compliance with the letter and spirit of the law, are urgently needed to preserve personal liberty, improve efficiency, and provide a swifter response to human problems.”

Nixon on Oversight of the Securities Business

In a letter circulated privately among leaders of the securities industry and related businesses on Sept. 27, 1968, the Republican nominee for President evinced a highly skeptical attitude toward existing federal regulation of the country's financial institutions.³ The “fantastic growth” of the securities industry, Nixon wrote, had raised “sophisticated, complex questions” which the Democratic party had met with “the same tired old ‘cure-alls’...; that is, more heavy-handed bureaucratic regulatory schemes.” He promised that a Republican administration would undertake an exhaustive study of the country's financial institutions and

would appoint an independent commission to determine “the proper role which those agencies now regulating economic institutions are to play in insuring our nation's economic stability and growth.”

Our securities laws [Nixon added] were designed to protect the investor by insisting on full and complete disclosure. This has been the order of the day since the securities acts of the 1930s were written. I believe in the full enforcement of the securities laws to assure absolute protection for the investor; abuses of law should be vigorously prosecuted. I believe, furthermore, that the federal government should be continually sensitive to the needs for improvement in these laws to insure investor protection. The philosophy of this administration, however, has been that disclosure is not enough and that the government can make decisions for the investor better than he can make them himself. This philosophy I reject.

The Nixon letter clearly was aimed at the Securities and Exchange Commission, which has proposed, among other things, reform of the mutual-fund industry and of brokerage commission rates. Two major rule-making proceedings currently are under way at the S.E.C. The proposed rule that has evoked most criticism from industry would require corporate financial statements to show separately the financial record of each product line. The purpose of such a requirement would be to enable investors to determine whether a conglomerate corporation was hiding the poor record of a subsidiary behind a favorable overall financial showing.

The sharp tone of Nixon's letter gave rise to speculation that S.E.C. Chairman Manuel F. Cohen would not only step down from the chairmanship but would also resign from the commission. If that happened, Nixon would be able to replace Cohen with a Republican commissioner, giving the G.O.P. a 3–2 majority, and to appoint a Republican as chairman. But these changes might not necessarily result in a less active S.E.C. The two Republicans now on the commission have voted with the Democratic majority to regulate management fees, limit sales commissions charged by dealers who handle mutual funds, and crack down on persons who leak or use “inside” information about publicly owned companies.⁴

Functions of ‘Big seven’ Regulatory Agencies

The latest edition of the *United States Government Organization Manual* lists 47 independent federal agencies, many of which perform regulatory functions. However, discussion of federal regulation usually centers on activities of the so-called “Big Seven”—the Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, Civil Aeronautics Board, and National Labor Relations Board. Members of all seven agencies are appointed by the President for fixed terms. Agency chairmen serve, except in the case of I.C.C., at the President's pleasure.⁵ And no political party may have more than a one-member majority on any of the Big Seven.

Each regulatory agency has quasi-legislative and quasi-judicial functions. When the Civil Aeronautics Board promulgates a rule asserting its primary jurisdiction over airspace for both civil and military purposes, it is exercising its quasi-legislative (or rule-making) power. When it decides which of several commercial airlines shall be awarded a specific airline route, it is exercising quasi-judicial (or ad-judicatory) power. Similarly, the F.C.C. is making rules when it sets up criteria for evaluating competing claims for a television license, adjudicating when it awards a license. The Administrative Procedure Act requires the agencies to follow strict regulations at the adjudicative stage as to notice, hearings, procedures, evidence, oral argument, and formal judicial decision. However, most of the regulations apply to proceedings before a hearing examiner, not the commissioners themselves; hence there is some separation of the “trial” from the judgment.

The powers and influence of the Big Seven regulatory agencies reach into virtually every corner of the American economy. The principal functions of the Big Seven are as follows:

Interstate Commerce Commission —Jurisdiction covers railroads and related carriers, common and contract motor carriers, certain domestic water carriers, pipelines and freight forwarders. I.C.C. fixes rates; sets standards for reasonable service; issues permits or certificates required to engage in interstate transportation; controls consolidations and mergers of carriers, issuance of securities, and the accounting systems and records kept by carriers; regulates safety devices and standards.

Federal Trade Commission —F.T.C. may act to prevent practices leading to monopoly or restraint of trade, such as unfair methods of competition (e.g., false and misleading advertising), stock acquisitions of competing enterprises, and price discrimination. It has power also to investigate and to issue cease-and-desist orders, and it shares anti-monopoly responsibility with the Justice Department.

Federal Power Commission —F.P.C. grants licenses to private power projects on navigable waters subject to federal jurisdiction; fixes rates on interstate sale of electric energy; prescribes uniform accounting methods; and regulates (1) mergers and security issues of electric utilities, (2) most federal power projects, (3) interstate sales of natural gas.

Federal Communications Commission —F.C.C. regulates telephone and telegraph common carriers, including their rates; allocates radio frequencies; licenses radio and television stations; licenses radio operators; monitors broadcasts; administers international communications treaties.

Securities and Exchange Commission —S.E.C. regulates security issues; supervises the stock exchanges; regulates holding companies and investment companies—all for the purpose of protecting the investing public.

National Labor Relations Board —N.L.R.B. adjudicates charges of unfair labor practices on the part of employers or unions; enforces requirements for collective bargaining; supervises election of bargaining representatives; decides jurisdictional disputes.

Civil Aeronautics Board—C.A.B. licenses domestic air carriers; issues permits to foreign air carriers landing in the United States; fixes passenger, freight, and mail rates; controls mergers, pooling, and other arrangements between carriers.

From time to time, Congress has enlarged or reduced the powers of various agencies. For example, the Transportation Act of 1958 conferred on the I.C.C. certain powers to approve or disapprove the discontinuance of train or ferry service conducted between points in different states or within a single state by railroads subject to the Interstate Commerce Act. And the Department of Transportation Act of 1966 transferred from C.A.B. to the National Transportation Safety Board of the new department powers relating to the investigation and determination of probable cause of civil aircraft accidents and the hearing of safety enforcement appeals.

Opportunities to Appoint New Commissioners

President Nixon probably will have to wait until the final year of his term before achieving Republican majorities on all of the Big Seven agencies. If Cohen should stay on at S.E.C., the President would not be able to replace a Democratic commissioner with a Republican until Hugh F. Owens' term expires in June 1970. Assuming all incumbent commissioners serve out their terms, the Democrats will retain a majority on the F.C.C. and F.P.C. until June 1970; on the F.T.C. until September 1970; on the I.C.C. until December 1970; and on the C.A.B. until December 1972.

Of all the regulatory agencies, the National Labor Relations Board is the one the Republicans would most like to see adopt new policies. Businessmen contend that the board is pro-labor and that it has put the employer at a disadvantage in bargaining with unions. The trouble is that the two Republican members, Howard Jenkins Jr. and Sam Zagoria, generally side with the Democratic majority. Nixon will be able to replace Zagoria, if he wishes to do so, in December 1969 and Democrat Frank W. McCulloch in August 1970. The board would then have a Republican majority. But Jenkins, who often votes with the Democrats, was appointed to a second five-year term by President Johnson last summer and will serve until August 1973 unless he should resign.

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Evolution of Regulation by Commission

Government regulation of the American economy was slow to develop. Prior to the Civil War, the United States was a predominantly rural country with no great nationwide business enterprises. The federal government was more interested in encouraging exploitation of the nation's resources than in controlling their use. Federal influence on the economy was exerted mainly through such actions as making of internal improvements, patenting of inventions, granting of public lands to encourage homestead-ing and railroad construction, and imposition of protective tariffs to nurture "infant industries."

I.C.C.: Prototype for Regulation by Commission

Both before and after the Civil War, the states attempted in various ways to curb increasing abuses by the railroads. These efforts generally were ineffective. Then, in 1886, the Supreme Court ruled⁶ that any enterprise engaged in interstate commerce could not be regulated by the states through which it passed. Such regulation, the Court held, was barred by the commerce clause of the Constitution, which gave Congress the exclusive right to regulate interstate commerce. The scope of the decision not only nullified state regulation of railroads but also precluded state action in such fields as the curbing of monopolies.

Inability of the states to regulate the railroads led directly to passage in 1887 of the Interstate Commerce Act, which established the Interstate Commerce Commission. Supporters of the proposed I.C.C. argued in the hearings and debates which preceded its creation that:

A commission would be able to regulate the railroad industry with flexibility and firmness. Complex railroad problems could be handled more effectively by this means than through rigid legislative and judicial processes.

An expert and continuing body would be of great assistance to Congress in forming regulatory policy.

A commission would defend the interests of public and shippers and "protect the rights of those whose resources left them otherwise defenseless."

A commission would serve as a tribunal to adjust the conflicting interests of different railroads and save them from the effects of cutthroat competition.⁷

Although created amid high hopes for its success, the I.C.C. was unable at first to provide effective regulation because it lacked final legislative and adjudicative power. The enforcement power still resided in the judiciary. The courts insisted on reviewing commission orders to such an extent that they in effect substituted their judgment for that of the commission. The railroads soon saw that they could obstruct the I.C.C. by appealing continuously to the courts. "They even withheld evidence from the commission on the

accurate assumption that when they brought new evidence to the attention of the judiciary, on review the courts would insist on a *de novo* trial.”⁸

Passage of the Hepburn Act in 1906 freed the I.C.C. from the judicial straitjacket. The commission was given final rate-making powers subject to judicial review on complaint of the carriers; hence rates established by the I.C.C. were to become effective immediately without the need for prior judicial approval. This had the effect of shifting the burden of proof onto the carriers if they wished to challenge a commission ruling.⁹

Taken over by the federal government in World War I to avert a breakdown of rail transportation, the railroad industry suffered again during the Great Depression. As a result, “The functions of the I.C.C. began to shift from those which related to control in the public interest, that is, punitive actions, to those designed to foster a healthy industry, namely, promotional functions.”

This meant essentially that regulation in the public interest, as redefined, became equated to regulation in the interests of the railroads. The shift also reflected changing patterns of political support, which led to commission reliance upon the very interests it was supposed to control for the necessary political support to maintain itself as an independent agency in the bureaucratic structure.¹⁰

It is sometimes said that “The I.C.C. is the best friend the railroads have.”

Piecemeal Expansion of Government Regulation

The second of the Big Seven regulatory agencies—the Federal Trade Commission—was not established until after passage of the Federal Trade Commission Act of 1914. One of the earliest demands for such a commission came from Sen. Francis G. Newlands (D Nev.). Addressing the Senate on Jan. 11, 1911, Newlands said: “Had we submitted the administration of the [Sherman] antitrust act to an impartial quasi-judicial tribunal similar to the Interstate Commerce Commission, instead of the Attorney General's office, ...we would by this time have made gratifying progress in the regulation and control of trusts, through the quasi-judicial investigations of a competent commission and through legislation based on its recommendations.” Since the idea of a federal trade commission was endorsed by the Democratic, Progressive and Republican parties in the election campaign of 1912, no serious obstacle stood in the way of its creation.

Except for the Federal Power Commission, established in 1920, the remaining large regulatory agencies came into being in the 1930s during the F. D. Roosevelt administration. Even under the New Deal, however, the growth of regulation was “initiated by particular groups to deal with specific evils as they arose, rather than inspired by any general philosophy of government control.”¹¹ Not all groups in the proposed areas of regulation were initially opposed to government controls; some actually welcomed regulation as a way of eliminating destructive competitive practices.

Although each regulatory commission was created in response to different pressures and needs, all were founded on faith in experts and in rational solution of controversial problems. A 1949 *Task Force Report on Regulatory Commissions*, included in the Hoover Commission report, summed up the arguments that have traditionally been advanced in support of the commission system. “The purpose of regulation,” the task force stated, “should be to correct or prevent abuses without impeding the effective operation of the industry or imposing unnecessary expense or waste.”

This can be done only if regulation is framed with knowledge of the conditions of the industry. Otherwise, the rules will either fail to achieve their purposes or needlessly interfere with private management....The regulated industry is frequently complex or highly technical. Its problems can be understood only on the

basis of constant study and analysis of the developments in the industry. Thus the regulating agency must be able to give continuous attention to the area of regulation in order to achieve this essential familiarity or expertness.

The commission form is designed to assure expertness or at least familiarity with the problems of the regulated field both through the members of the commission and through the staff. Devoting their full time to the particular industry or activity, the staff and members become fully familiar with the technical aspects of the industry and its basic problems through their day-to-day contacts.

While complaints have often been voiced about individual commissions or commission rulings or procedures, Congress never has seen fit to alter the basic character of the regulatory commission. The argument that commissions insulate the process of government regulation of business from partisan political forces has usually proved controlling. However, commissions are in fact subjected to political pressures.

Legislative and Executive Pressure on Agencies

As noted, all of the commissions exercise, to greater or less degree, some executive, legislative, and judicial power. By the same token, control over the commissions is shared by the President, Congress, and the courts, in a system of checks and balances. The President's power to control the regulatory agencies rests largely in his appointive power, while that of Congress rests in its responsibility for appropriations. The courts may review commission orders.

Members of the Legislative Branch nevertheless have insisted periodically that the power of Congress has been delegated, not abdicated, and that in the last analysis the commissions are "creatures of Congress." The classic view of the commissions held by federal legislators was expressed in 1931 by the late Speaker of the House, Sam Rayburn (D Texas):

Far from undermining the constitutional authority of Congress, delegation of authority to administrative agencies is one of the surest safeguards to effective legislative action. It is a procedure which conserves the vital power of Congress for vital matters....[A commission] does not perform any act that Congress has not the authority to perform itself....Congress ...delegated responsibility to a commission of ...trained experts to work out the details for them.¹²

This view has not gone unchallenged. C. Herman Pritchett, a member of the Hoover Commission, wrote in the *American Political Science Review* in October 1949 that "The spurious nature of this 'arm of Congress' claim has long been evident." Pritchett added: "The fact is that Congress has not a single control over any of the regulatory commissions that it does not possess over executive agencies generally....[The Hoover Commission] wanted to have non-political regulation and at the same time provide for presidential control."

It has been asserted that every President of the United States from Woodrow Wilson on has tried in one way or another to influence commission activity and has succeeded in doing so. For example, "President Hoover made public statements indicating how he thought the Interstate Commerce Commission ought to exercise certain of its powers, and the commission somewhat reluctantly yielded."¹³ President Roosevelt obtained the resignation of Hoover's chairman of the Federal Power Commission and added two appointees of his own. Four days after his inauguration, President Nixon recalled from the Civil Aeronautics Board "for further review and decision" the awards of new Pacific routes which President Johnson had made to five airlines on Dec. 18, 1968.¹⁴

Devices used by the Executive Branch to exert influence over the commissions have included, in addition to the power of appointment, conferences on broad regulatory policy with commission chairmen, Budget Bureau action on appropriation requests or apportionment of available funds, and Justice Department action or inaction against violators of commission regulations.

Difficulties of the Communications Commission

Regulatory commissions have found it difficult to please simultaneously the Executive Branch, the Legislative Branch, and the regulated industry. Commission actions often are criticized as restrictive or permissive. In recent years, the Federal Communications Commission has attracted more adverse criticism than any other agency.

The function of the F.C.C., as spelled out in the Communications Act of 1934, is to regulate wire and radio communication in accordance with the “public interest, convenience and necessity.” The trouble is that the commission never has been able to agree on what is convenient or necessary or what it is that the “public interest” might require. A case in point was the Dec. 21, 1966, F.C.C. decision, by a 4-to-3 vote, to approve the largest merger in the history of the communications industry—the acquisition of the American Broadcasting Co. by the International Telephone & Telegraph Corp. The three-man minority in the I.T.T.-A.B.C. decision issued a vehement 138-page dissent, and the Justice Department filed suit to block the merger.¹⁵

Commenting on the I.T.T.-A.B.C. case last summer, Nicholas Johnson, one of the dissenting commissioners, wrote that “Only the F.C.C. is directly empowered to keep media ownership patterns compatible with a democracy’s need for diversified sources of opinion and information.” In its early years, Johnson said, the F.C.C. had taken this responsibility seriously. He added: “But since the New Deal generation left the command posts of the F.C.C., this agency has lost much of its zeal for combating concentration. Atrophy has reached so advanced a state that the public has of late witnessed the bizarre spectacle of the Justice Department, with its relatively narrow mandate, intervening in F.C.C. proceedings, such as I.T.T.-A.B.C., to create court cases with names like *The United States vs. the F.C.C.*”¹⁶

In a decision designed to foster the media diversification favored by Johnson, the F.C.C. on Jan. 23, 1969, refused to renew the license of a Boston television station and assigned the channel to a new licensee. Renewal was denied to WHDH-TV, licensed to the Boston Herald-Traveler Corp., which publishes one daily and one Sunday newspaper and has controlling interest in a community antenna television company. Boston Broadcasters Inc., the new licensee, was found to be “virtually free of media alliances.” Johnson, who voted with the 2 to 1 majority in the case, said “The door is thus opened for local citizens to challenge media grants in their local community ...with some hope of success before the licensing agency, where previously the only response had been a blind affirmation of the present license holder.”

The Federal Power Commission has lately come under attack for its efforts to regulate the price of natural gas. F.P.C. first won authority to regulate such prices in a 1954 Supreme Court decision involving Phillips Petroleum Co. Over the next six years, the commission failed in its attempt to set natural gas prices on a case-by-case basis. One reason for the failure was that some natural gas is mined along with oil, and the F.P.C. found it too complicated to calculate the separate production costs. By 1960, the commission's failure was described in a government study of regulatory agencies as the “outstanding example in the federal government of the breakdown of the administrative process.”

F.P.C.'s Struggle With the Price of Natural Gas

Stung by this criticism, F.P.C. undertook to approach the price issue on an area-wide basis, beginning with the vast Permian natural-gas field in western Texas and eastern New Mexico. A 1963 Supreme Court

decision sustained the area approach, and the commission two years later ordered price reductions and refunds to consumers of gas from the Permian field. The decision was immediately challenged in federal court by 335 Permian producers. Finally, in a pair of opinions handed down last spring, the Supreme Court upheld the commission. The Court decided in the first case that F.P.C. had authority to set one price for all gas extracted from a large gas-producing field. In a related case, the Court approved F.P.C.'s imposition of temporary gas prices "in line" with other prices in an area while the producer was involved in litigation with the commission. The Court also sustained the commission's authority to order refunds if the final litigated price ceiling turned out to be lower than the temporary price.

The F.P.C. and Supreme Court decisions promise to be costly to the natural-gas industry. The commission-fixed price ceiling will result in an over-all price cut of about \$16 million a year for gas produced in the Permian basin. In addition, natural gas consumers will be eligible for refunds covering the period from 1961, when the case began to unfold at F.P.C., to the time of the Supreme Court's decisions. The refunds may aggregate more than \$60 million, of which more than \$40 million is expected to go to California buyers.

The Federal Trade Commission has attracted less criticism than most members of the Big Seven because a great deal of its work concerns detection of unfair trade practices which industry in general is happy to see eliminated. However, a full-scale F.T.C. investigation of conglomerate mergers, ¹⁷ launched last summer, may well affect the vital interests of some of the country's largest corporations. F.T.C. intends to investigate the possible anti-competitive effects of conglomerate mergers, the effect of such mergers on business efficiency, the performance of merged companies in the markets they serve, the way such mergers affect divisions of the parent corporation, the potential anti-competitive effect a merged company might have over a period of several years, and the possible need for new antitrust legislation.

F.T.C. has been more vigorous to date in attacking conglomerate mergers than has the Antitrust Division of the Justice Department. The commission opened and won the battle to keep the Procter & Gamble Co. from acquiring the Clorox Co., a bleach maker, on the ground that P. & G.'s economic power would have discouraged other companies from entering the bleach market. F.T.C.'s general guidelines for mergers in the dairy industry are believed to have stopped some large dairies from becoming parts of existing conglomerates. For the past six years, F.T.C. has had a standing offer to review proposed mergers privately in advance and tell the companies involved whether they would pass. However, fewer than 30 requests for pre-merger clearance have been brought before the commission.

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Plans for Improving Agency Performance

Numerous plans for improving the performance of federal regulatory agencies have been put forward since World War II, yet few have been adopted. Most reform proposals have foundered because of opposition in Congress. The Legislative Branch tends to be suspicious of any reorganization that might weaken its influence on regulatory agencies. Moreover, the regulated industries evidently prefer a sometimes uncomfortable status quo to a new regulatory environment that might be less to their liking.

The complaint most often made about regulatory agencies is that they take far too long to decide some cases. The I.C.C. has long been criticized by railroads for protracted delay in dealing with petitions for increases in freight rates. A Federal Trade Commission merger case passed on by the Supreme Court early in 1966 had been in the works for more than 13 years. F.C.C. has taken as long as five years to decide between competing applicants for a television channel. And the Pennsylvania Railroad Co. and the New York Central Railroad Co. had to wait almost six years after filing joint merger applications with the I.C.C. before getting final approval from the Supreme Court. The Federal Power Commission estimated eight

years ago “that it would take 13 years with its present staff to clear up its pending 2,313 producer rate cases pending as of July 1, 1960, and that with the contemplated 6,500 cases that would be filed during that 13-year period it could not become current until 2043 A.D. even if its staff were tripled.”¹⁸

Examples of Extraordinary Delay on Decisions

Inadequate budgets are the cause of at least some of the foregoing delays. The backlog of regulatory agency business began to mount rapidly during the Eisenhower administration, when regulatory staffs were reduced despite a steady increase in casework. In fiscal 1950, for example, when 496 registration statements were filed with the Securities and Exchange Commission, the Bureau of the Budget approved 1,130 employees for the commission and 1,060 were authorized by Congress. But in fiscal 1960, when 1,628 registration statements were filed with the commission, only 978 employees were approved by the Budget Bureau and only 954 were authorized by Congress. “Obviously either extravagance characterized the situation in 1950 or parsimony in 1960. In any event, the statutory waiting period during that decade was in substance tripled. Similar situations prevailed in many other agencies.”¹⁹

Long delays can be costly to companies which have business before the agencies. An applicant for a television license from F.C.C. is faced with the likelihood that it will take the commission at least three years to hand down its decision. In the meantime, each applicant must hire numerous lawyers and engineering consultants. The minimum legal fee in TV license proceedings has been estimated at between \$75,000 and \$100,000, with engineering fees running almost as high. As a result, licenses in the most desirable television markets tend to be awarded to wealthy corporations that can afford the expense of protracted proceedings before the commission.

Character of Appointments to the Commissions

The late James M. Landis, who was successively a member of the Federal Trade Commission, a member and then chairman of the Securities and Exchange Commission, and finally chairman of the Civil Aeronautics Board, attributed many of the agencies' shortcomings to “a deterioration in the quality of our administrative personnel” since World War II, “both at the top level and throughout the staff.” One reason for the decline, Landis believed, was that “the fires that ...fed a passion for public service have burned low” since the New Deal, “making recruitment an increasingly difficult task.” Moreover, staff morale suffered when outsiders were placed in choice positions, often on partisan political grounds.

It has been charged also that the expertness which is supposed to be the main virtue of commissions can instead be a serious drawback. Meyer H. Bernstein, an associate professor of politics at Princeton, told a congressional subcommittee more than a decade ago that “Commissions tend to know more and more about less and less as their regulatory jurisdictions become narrower and narrower in relation to the general political and economic development of the country.” He added: “They lack perspective, and their experts have a remarkable capacity for developing a type of professionalism that narrows the vision of the public interest. Economists, lawyers, accountants, and engineers become preoccupied with problems of their professional status and specialized points of view.”²⁰

The pressure exerted on commission members from all sides occasionally has resulted in unethical conduct. Regulated industries have attempted, from time to time, to influence regulatory agencies by social favors, promises of later employment in the industry itself, and similar means. The most glaring example of unethical conduct was uncovered during a 1958 investigation of regulatory agencies conducted by the House Subcommittee on Legislative Oversight. The initial phase of the public inquiry culminated, March 3, 1958, in the resignation of F.C.C. Commissioner Richard A. Mack. Mack had admitted to the subcommittee that, since appointment to the commission in 1955, he had accepted loans totaling

\$2,650 as well as other favors from Thurman A. Whiteside, Miami lawyer and close personal friend, who had contacted him in behalf of an application by a subsidiary of National Airlines for a Miami television channel. Subcommittee members agreed that Mack's acceptance of loans and favors from Whiteside, whether or not illegal under the circumstances, was certainly improper.

Reform Proposals of Landis and Kennedy in 1961

Efforts since World War II to correct flaws in the regulatory agencies have met with only mixed success. The Administrative Procedure Act of 1946 was designed to formalize the varied administrative procedures of government agencies and to set up uniform standards for judicial review. The main provision of the law entitled any person suffering legal wrong because of agency action to seek judicial relief, provided he first exhausted administrative remedies. In reviewing such a case, the court was to set aside agency actions "unsupported by substantial evidence" and to review the whole record, taking "due account" of the rule of prejudicial error.

A bill to substantially revise the Administrative Procedure Act was passed by the Senate in 1966, but it never was reported out of committee in the House. The bill would have shifted responsibility for application of rules from agency commissioners to hearing examiners. Under existing procedures, hearing examiners make initial judgments which are then either affirmed, reversed or amended by the commissioners. Under the 1966 bill, hearing examiners would have made final decisions which could be appealed to the agency; however, most appeals would have been heard by a special appeal board and only a limited number by the commissioners.

The most ambitious attempt to reshape the regulatory agencies took place shortly after John F. Kennedy became President in 1961. Kennedy had asked James M. Landis to study the agencies and submit proposals for improving them. Landis's report, which noted the familiar problems of delay ethical conduct, and quality of personnel, made 16 broad recommendations. Among other things, he called for (1) extensive reorganization of most of the agencies; (2) establishment of special offices in the White House to develop national transportation policy, telecommunications policy, and energy resources policy; (3) establishment by executive order of a federal employee code of ethics and limitation of off-the-record presentation in regulatory agency cases; and (4) creation of a special Office for the Oversight of Regulatory Agencies.

In a special message to Congress on regulatory agencies, April 13, 1961, Kennedy proposed to give agency chairmen "broad managerial powers" to correct the existing, diffused authority of the commissions; provide that all agency chairmen serve in that capacity at the President's pleasure; and authorize delegation of a large proportion of agency responsibilities to inter-agency boards and hearing examiners to eliminate needless work on "unimportant details" at the top level. Congress responded by reviving the Reorganization Act of 1949, which had expired two years earlier, so that the President could submit reorganization plans for the agencies.

Seven such plans were submitted, all of which had the basic aim of speeding up and streamlining agency procedures. The first four plans—those for S.E.C., F.C.C., C.A.B. and F.T.C.—contained three basically identical steps. They authorized the agency to delegate some of its functions to certain employees; they empowered the chairman to assign the delegated functions; and they made review of certain lower-level decisions discretionary.

The plan for the National Labor Relations Board was the same as the first four but omitted the chairman's power of assignment; the plan for the Federal Home Loan Bank Board only restored some hiring and firing powers formerly held by the chairman; and in the seventh plan, the Federal Maritime Board was abolished and its functions assigned to other agencies.

Jealous as ever of its authority over the agencies, Congress charged that the administration planned to create a White House “czar” and establish a “direct chain of political command” over the regulatory agencies. When the smoke of battle cleared, the final score stood: three plans killed, with one replaced by a more limited version four plans approved. Congress vetoed the reorganization plans for F.C.C., S.E.C. and N.L.R.B. It upheld those for C.A.B., F.T.C., F.M.B. and H.L.B.B.

A scaled-down reorganization bill for F.C.C. allowed the commission to delegate minor functions to employees, but it did not provide the authority requested by the administration to enable the chairman to make specific work assignments to employees and commissioners. The bill also expedited action by putting oral argument on exceptions to agency decisions on a discretionary instead of required basis, and by giving the commission authority to either accept or deny appeals for over-all review without giving a reason.

The Reorganization Act under which Kennedy submitted his plans in 1961 again expired by limitation on Dec. 31, 1968. President Nixon, who has pledged a “searching, fundamental reappraisal” of the federal government structure, is expected to ask Congress to renew the lapsed authority. Otherwise, any reorganization proposals he might want to submit would have to go through the legislative labyrinth of committee hearings and floor action in both House and Senate.

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Footnotes

[1] *Report of the President's Committee on Administrative Management* (1937), p. 39.

[2] Anthony Lewis, “To Regulate the Regulators,” *New York Times Magazine*, Feb. 22, 1959, p. 13.

[3] The *New York Times* published the text of the letter on Oct. 2. Alan Greenspan, a Nixon economic adviser, said it had not been made public because it covered “a narrow policy area.”

[4] The S. E. C. on Nov. 26 sharply penalized Merrill Lynch, Pierce, Fenner & Smith Inc. and a group of its employees for allegedly giving inside information to 14 favored investment-company clients. The information enabled the clients to avoid losses or make profits totaling \$4.5 million on stock of the Douglas Aircraft Co. Paine, Webber, Jackson & Curtis was penalized, Jan. 24, for actions of several employees resulting in payment of allegedly excessive sales commissions by customers.

[5] The 11 I.C.C. commissioners annually elect a chairman and vice chairman from their own ranks.

[6] *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886).

[7] Robert E. Cushman, *The Independent Regulatory Commissions* (1941), pp. 45–61.

[8] Peter Woll, *American Bureaucracy* (1963), p. 39.

[9] Rate-making powers granted by the Hepburn Act applied only to maximum rates. I.C.C. authority to fix minimum rates, and thus avert rate wars, was not granted until 1920.

[10] Peter Woll, *op. cit.*, p. 40.

[11] Meyer H. Bernstein, *Regulating Business by Independent Commission* (1955), pp. 16–19.

[12] Quoted by Meyer H. Bernstein, *op. icit.*, p. 67.

[13] Robert E. Cushman, *op. cit.*, pp. 681–682.

[14] Although C.A.B. makes final decisions in domestic route cases, the President has statutory authority to approve or reject C.A.B. recommendations on foreign routes.

[15] I.T.T. canceled its plans for the merger on Jan. 1, 1968.

[16] Nicholas Johnson, "The Media Barons and the Public Interest," June 1968, p.50.

[17] Conglomerate mergers bring together (1) companies engaged in unrelated activities, or (2) concerns making similar products which do not compete in the same area of the country. In contrast, horizontal mergers unite enterprises that turn out the same product and that compete in the same markets, while vertical mergers combine concerns that make different components of a product, or manufacturers and their raw-material suppliers. See "Business Concentration and Antitrust Laws," E. R., 1966 Vol. I, p. 382.

[18] James M. Landis, *Report on Regulatory Agencies to the President-Elect* (1960), p. 6.

[19] *Ibid.*, p. 6.

[20] Testimony before antitrust subcommittee of House Judiciary Committee, Feb.29, 1956.

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Special Focus

The "Big Seven" Regulatory Agencies

Name	Year founded	Number of commissioners	Present chairman
Interstate Commerce Commission	1887	11	Virginia Mae Brown
Federal Trade Commission	1915	5	Paul Rand Dixon
Federal Power Commission	1920	5	Lee C. White
Federal Communications Commission	1934	7	Rosel H. Hyde
Securities and Exchange Commission	1934	5	Manuel F. Cohen
National Labor Relations Board	1935	5	Frank W. McCulloch
Civil Aeronautics Board	1938	5	John H. Crooker Jr.

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