Recent Trends in the Appointment of Commissioners

By Lincoln Smith *

I

The results of the 1952 elections focus attention on the perennial question of how to get outstanding commissioners on state and national independent regulatory agencies. The question goes to the very core of legislative-executive relationships, and challenges both the separation of powers and checks and balances. One Senator thinks the solution is to abolish human nature; but one Administrator is more hopeful: "everything will be wonderful when the millennium comes, but, of course, we will all be dead then." Although no panacea is immediately forthcoming, analysis, diagnosis, and discussion will encourage the public to apply proper sanctions through the ballot box.

Laws governing the place of the independent regulatory commissions at both levels in legislative-executive relationships and in the administrative hierarchy have received much attention, but relatively little has been written about the men who govern within these segments of the economy and the circumstances under which they were selected. The recent judicial self-restraint in refraining from substituting judicial for commission conclusions and of giving greater weight to the independence of regulatory agencies[1] emphasizes the importance of high calibre commission personnel. Because the men who govern are fully as important as the laws they execute, Wigmore pleaded that we put our trust in men and minds rather than rules.[2] Commissioner Eastman put it this way: "The statute which the tribunal administers should be well, simply, and carefully framed, but the personnel which does the administering is more important than the wording of the

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1 Federal Power Commission v. Natural Gas Pipeline Co. of America, 315 U. S. 575 (1942); Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 (1944). "When Congress . . . fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation." Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 589 (1945).

2 Wigmore, Evidence § 4 b (3rd ed. 1940).

statute. Good men can produce better results with a poor law than poor men can produce with a good law."[3]

The new administration will have to nominate several commissioners as terms of incumbents expire; a Republican controlled Senate must confirm nominations. Each branch will register its imprint on regulatory commissions. Organic statutes provide some continuity and thus a time lag before wholesale change is possible; unless Congress should, by law, create new commissions or enlarge the number of commissioners. What qualities should an executive seek in nominating commissioners? When should the Senate hold a hearing before confirmation? What type of questions should be asked? How well is the Senate equipped to ascertain if a nominee warrants confirmation? What do recent case studies show? The problem is more than legal; the training and fitness of potential commissioners must be considered, in contrast with their political antecedents and support. This involves ethical and moral standards to which political leaders should adhere in nominating and confirming top administrators.

In some states political activity and/or a nod from powerful corporations unfortunately is the controlling factor in determining agency personnel. Thus, the quasi-judicial function of those regulatory commissions has degenerated into a simulation based on political expediency and pressure group activity. Sometimes state constitutional provisions and other reasons beyond the control of the appointing authorities are in part responsible. This study excludes those jurisdictions; its relevance there is intended to be didactic rather than descriptive.

When the chief executive's political party controls the Senate, particularly in the early or honeymoon period of a session, confirmation hearings may not be rigid. Executives have tried to reduce senatorial confirmation to a mere routine by appealing to party responsibility, patronage, and executive responsibility. When each branch is controlled by a different party, the Senate can embarrass the administration by rejecting its nominees, and the executive may try to impose his cohorts on the Senate. Even when the same party controls both branches, however, conflict arises, particularly after an emergency when the legislature has yielded to temporary executive domination and is struggling to regain its old prerogatives.

Executive attempts to override the independence of commissions was climaxed by President Coolidge's request for the undated resignation of a member of the Tariff Commission as a condition to his reappointment, by his further attempt to hold one of his appointees to the Shipping Board to a prenomination agreement, and Franklin D.

[3] All quotations of Mr. Eastman are from his speech at a testimonial dinner on February 17, 1944, in recognition of his 25 years of service on the Interstate Commerce Commission.

Roosevelt's unsuccessful attempt to remove William E. Humphrey from the Federal Trade Commission.[4] But Roosevelt was more successful later, when a series of strategic appointments tended to subordinate several commissions to the executive.

On the other hand, the Senate tried to oust Dr. George Otis Smith and two colleagues from the Federal Power Commission.[5] Dr. Smith, a supporter of private operation of power sites, carried two colleagues in the dismissal of two FPC aides known as foes of the power trust. Democrats and progressive Republicans spearheaded the attempt to remove the Commissioners even though they had been confirmed and taken the oaths of office. The Supreme Court rejected the attempted recalls. A few years later Congress passed the Federal Power Act of 1935. Some Senators would solve the problem by unconstitutionally eliminating the President from the appointment process,[6] thereby removing the agencies from any degree of executive responsibility.

The assumption is made here that the structure of the independent regulatory commissions, a distinctly American and one of the few political inventions of the last century, will remain basically unaltered —that the agencies are arms of Congress and that the appointment of commissioners is a joint legislative-executive function.[7] But once an appointment is made, do the commissioners in the United States, where legislation and administration are theoretically separated, feel that they

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4 Humphrey's Executor v. United States, 295 U. S. 602 (1935).

5 United States v. George Otis Smith, 286 U. S. 6 (1932).

6 Prof. Pritchett has written that one Senator would like to take the appointive power away from the President and vest it in the Speaker of the House, subject to senatorial confirmation, even though this would require constitutional amendment. *The American Political Science Review,* Oct. 1949. Some members of the Hoover Commission were unable to agree whether the commissions are responsive to Congress, or part of the executive establishment. See also, Report of the President's Committee on Administrative Management.

7 The position of the independent regulatory commissions was stated in Humphrey's Executor v. United States, 295 U. S. 602, 625-626, 628 (1935); Congress established the FTC as "a body which shall be independent of executive authority, *except in its selection,* and free to exercise its judgment without leave or hindrance of any other official or any department of the government. . . . The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eve of the executive. Its duties are performed without executive leave and in the contemplation of the statute, must be free from executive control." In Ohio, by contrast, the Commission's duties are not legislative or judicial, but executive. Baltimore & Ohio Railroad Company v. Railroad Commission of Ohio, 10 Ohio N. P. (N. S.) 665, 669 (1910); 21 Ohio Dec. 468, 472. In California the Governor is the sole appointing authority, and the commission's annual report is submitted to him.

8 "Domestic Control of Atomic Energy, An Experiment in Government." Brunswick, Main, July 22, 1949.

have two masters, the legislators who made the law and the chief executive who is politically elected and who is also their boss? Or is a dyarchy discernible where political and administrative functions require complementary bosses?

As this legislative-executive duel continues, the independent commissions are vulnerable to capture and control by their clientele. After the regulatory statute is passed, public enthusiasm often wanes until hardly anybody but those regulated pay much attention to the commission. As acting chairman of the Atomic Energy Commission, Sumner T. Pike keenly summarized the frequent cycles of a commission's vitality:

> 1. A burst of interest and enthusiasm prior to and at the time of the passage of the basic act.
> 2. In the atmosphere of that enthusiasm the selection of a competent Commission plus staffing of personnel of a high grade which could only be attracted by a new and stimulating enterprise.
> 3. Considerable accomplishment under high head steam for the first few years.
> 4. Gradual incurrence of opposition and loss of enthusiasm with a tendency to routinize operations.
> 5. A certain amount of wing clipping by the Appropriations and other committees.
> 6. Appearance of political patronage in both appointments to the Commission and in filling positions on the staff.
> 7. Finally, we have "just another government agency."
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> It has frequently been said that ten years is as long as one can expect such an agency to be efficient. Sometimes this period has been extended and in other cases it has been very much shortened. This process is perhaps almost inevitable; and it may not be entirely bad in many cases since the main battle should be won and sound precedents should be established within the first few years.

II

Presidents and governors nominate to give administrative direction to the agencies; it is no accident when a McReynolds or Frankfurter is selected. To the extent that the chief executive is a political leader, he will nominate men whose backgrounds are sympathetic to the particular law, and whose discretionary authority under it will likely lean toward the executive's policies. Professor Cushman pointed to the undesirability of manning these agencies with decayed politicians who have political claims on the President, but observed that political appointees are not *ipso facto* and inevitably bad; many officers chosen for bad or irrelevant reasons have proved

competent and high-minded.[9] The Hoover Commission said the President does not recognize the importance of regulatory positions. Organization reforms in 1950 gave the President greater control over several commissions; he designates the chairmen, who serve at his will for indefinite periods and whose powers were enlarged. President Truman took advantage of this power to promote Thomas C. Buchanan and former New York Senator James M. Mead to the chairmanship of the FPC and FTC, respectively. Buchanan's elevation was construed as a maneuver to further the administration's public power and natural gas programs.

At the outset, a distinction must be made between regulatory and promotional agencies. The former is an *administrative* function; the latter an *executive* function. Political values, together with a willingness to accept executive domination and to follow lines of political policy, are relevant for Cabinet and operating-agency appointments. Economic values, together with an independence from political pressures, should be the main consideration in selecting personnel for an independent agency.[10]

No iron-clad formula is available on the requirements an executive should seek in nominating "good" commissioners, though statutes establish some limitations. In Ohio, where the Governor has wide latitude legally in nominating commissioners, eligibility requires state residence; and precludes holding any other public office of trust or profit, and any occupation or business inconsistent with a commissioner's duties. The commission is bipartisan. Confirmation is by the Senate, but the Governor designates the chairman.

Although the Hoover Commission recommended its extension, the bipartisan requirement of most regulatory agencies is a pious wish to insure divergence of political views. Because Americans have insisted upon geographical representation since prerevolutionary days and men are products of their ecology and environment, men of affairs are often Republicans or Democrats because they were born in a particular state. Thus, appointing authorities can find men from either party whose views are acceptable. A conservative Democrat and liberal Republican probably have more in common than a right and

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9 Robert E. Cushman, *The Independent Regulatory Commissions* (New York, 1941), p. 752.

10 Although the Hoover Commission classified the AEC as an independent but operating agency it is also included here in the regulatory periphery because of recent trends. Much regulation is in the framework of the statute even though the industry the Commission is regulating has not yet gone far. Whereas most commissions regulate abuses already existing and buck vested interests, the AEC is establishing the rules as this industry develops. In June of 1950 the Commission signed regulatory contracts with four private groups for experimental investigations in the use of atomic energy for power. Lincoln Smith, "Regionalism in Regulatory Administration" in *Public Utilities Fortnightly*, March 26, 1953.

left winger within either major party; a liberal Republican may be more like a liberal Democrat than a conservative Democrat or Republican.

Another limitation placed on executives, sometimes by statute and sometimes by political expediency, is spatial distribution of appointments. Geographical representation in elections affects the administrative process. This is partly because our political parties are amalgamations of local party hierarchies, and the choice of commissioners is part of the political process. Though defensible for Cabinet and some other posts, ambassadors from their own sections should not serve in quasi-judicial capacities.

Some statutes set minimum qualifications in training and experience, but seldom stipulate whether the administrator shall be a "generalist" or specialist. This issue is not clear-cut, because some specialists began as "generalists." For states supplying meager budgets, much can be said for specialists. But Professor Fesler concluded that character becomes more important as commissions have built up able staffs of experts to advise them on technical questions.[11] On this point Eastman said:

> It is not necessary for the members of the tribunal to be technical experts on the subject matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the Interstate Commerce Commission finds it necessary to pass. The important qualifications are ability to grasp and comprehend facts quickly, and to consider them in their relation to the law logically and with an open mind.

Yet the specialist with broad perspective can be an efficient top administrator. Commissioners frequently specialize; they divide their work and each writes opinions on particular segments, subject to the concurrence of the commission. The Interstate Commerce Commission is a pat example, with its divisional organization and with individual commissioners supervising the work of particular bureaus. Two grave dangers of this compartmental specialization appear. Concerted action is difficult; one man policy may be substituted for board decisions. Also, personal attachments and loyalties are likely to develop in both directions between commissioners and staff.

Statutes often provide that no commissioner may engage in any other business, vocation, or employment. The question then arises how to get specialists, particularly in economic matters, in the public service who do not have business entanglements.[12] Or, how can a

11 James W. Fesler, *The Independence of State Regulatory Agencies* (Chicago, 1942), p. 9n.

12 *Ethical Standards in Government.* Report of a subcommittee of the Committee on Labor and Public Welfare, U. S. Senate (Washington, 1951), pp. 20-21.

successful expert, once he is inducted into the public service probably at a salary sacrifice, cast aside past experience and prejudice, and resolve conflicting interests impartially? Would the umpire favor his old teammates? Much depends upon the character, temperament, and sense of justice of the man. Like many judges who refuse to participate in a particular decision because of past personal or professional connection with it, the reason is not so much that they would favor their former associates as that in leaning backward to be fair to the other side, injustice may be done to their former colleagues.

Although professional and academic backgrounds may cause commissioners to be hypercautious, such experience has distinct advantages. Furthermore, an apprenticeship and successful administrative experience in state government are valuable assets in recruiting appointees on the national level. The records of Commissioners Richard B. McEntire and Nelson Lee Smith are examples of these postulates. This suggests a career service in regulatory administration. But then the few states with outstanding personnel would obtain a large proportion of commissioners' posts.

Personal and professional sympathy for the job is a prerequisite. This includes faithful adherence to the law and also to its administration in the spirit with which it was enacted. By dragging his feet, losing his papers, or merely inertia, a commissioner may emasculate the objectives of the statute.

Capacity for hard[13] and sometimes thankless work, conscientious effort to make a good record, patience, courtesy, moral courage, lack of prejudice, and a desire to be helpful to the extent the law permits are personal characteristics which are helpful if not essential. The stereotype that Englishmen are men of action, Frenchmen, men of thought, and Spaniards, men of passion,[14] suggest other valuable qualities; a highly desirable combination would be an administrator who, in the words of a French philosopher, thinks like a man of action and acts like a man of thought. Furthermore, a commissioner should be familiar with Jeffersonian democracy and prefer to work not so much *for* as *with* the public; to *help* rather than *make* the public obey the law.

Equally important, commissioners must not only be personally acceptable, they must possess winning personalities and be specialists in human relationships to get along well with brass hats and prima donnas who happen to have power or influence. Administrators in the top brackets are still human beings with their personal likes and prejudices; likewise they are independent of, and yet responsible to,

13 A story is told that in one state two prominent politicians manipulated themselves into commissioners' posts. There they really did experience hard work, and shortly they pulled strings and got judgeships where they relaxed and enjoyed life.

14 Salvador de Madariaga, *Englishmen, Frenchmen, Spaniards* (London, 1937).

other human beings who are products of particular environments and who have their own idiosyncrasies.

Ability to work with others as a team is a basic requirement—the facility and experience of working in groups or as cogs in an organization. Highly developed individualists who tend to be intolerant of any intellectual differences, who are prone to personalize, and therefore not well suited to the development of a smoothly functioning organization seldom fit into an agency which needs to operate on an even keel regardless of the particular individuals composing it or its staff at a given time.

Needs also vary with the particular agency. A desirable man for the quasi-judicial Interstate Commerce Commission or the Public Service Commission of New York might well be ideologically or temperamentally unsuited for membership on a primarily operating agency such as the Civil Aeronautics Board. Some administrators in operations and those regulating trade with enemies and working under public health and quarantine laws must sometimes act first and explain afterward.

An open and analytical mind, and judicious temperament as distinguished from a "legal mind," are fundamental prerequisites in regulatory administration. Though commissioners have their own philosophies and prejudices, their decisions should not conform to personal whims and preconceived notions. Regulation in the public interest implies that investors, consumers, management, and the public-at-large have both rights and obligations toward each other. Governor Hugh Gregg of New Hampshire plans to select qualified men capable of "honest, intelligent, and just decisions." He declared: "The general public, the investor and the utility all have a right to expect that appointments to the Public Utilities Commission will be free from political prejudice." The governing statutes assume an identity of interests up to a certain point; beyond that, conflicts must be resolved within the discretionary authority of the regulatory agencies. The ideal commissioner will be sensitive to the conflicting forces within the public interest, and strive for a common denominator which

15 Federal Power Commission v. Natural Gas Pipeline Co. of America, 315 U. S. 575, 606-608 (1942); Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 596 (1896); Dayton-Goose Creek Railway Co. v. United States, 263 U. S. 456 (1924). Eastman said: "One of the great dangers in public regulation by administrative tribunals of business concerns is the resulting division of responsibility, as between the managements and the regulators, for the successful functioning of these concerns. For example, there was a tendency . . . on the part of those financially interested in the railroads to think of the financial success of those properties solely in terms of rates and wages and the treatment of rates and wages by public authorities. Sight was lost of the essentiality of constant, unremitting enterprise and initiative in management. The importance of sound public regulation cannot be minimized, but it must not be magnified to the exclusion of those factors in financial success upon which ordinary private business must rely."

sees each in relation to the others.[15] The regulatory process needs commissioners who can function as a court of arbitration within the area of discretion delegated to them as a court of law.

Thus a commissioner's philosophy and temperament give a sense of direction to the agency's work. The same law would take on quite a different complexion, for example, if administered by five young, vigorous, and conservative commissioners than if administered by a commission of sedate and progressive, or even scrupulous but unimaginative and unpredictable men.[16] On the negative side, there is no place on regulatory commissions for martyrs for lost causes; otherwise we would have an irresponsible bureaucracy. Commissioner Eastman succinctly remarked: "Zealots, evangelists, and crusaders have their value before an administrative tribunal but not on it."

III

Professor Herring concluded in 1936 that the Senate did not usually question presidential appointments to regulatory commissions.[17] Subsequently, however, in the capacity of checking bureaucracy and the "headless fourth branch" of government, the trend was altered. In "isolated instances that gathered with cumulative force," the Senate pushed and sometimes succeeded in its demands for more general scrutiny of administrative appointments.[18] But it failed in 1943 to extend senatorial confirmation to all appointments in excess of $4,500 a year when the House rejected the McKellar Bill.

The degree to which the Senate is equipped to supervise administrative work of the commissions indicates the degree to which it is justified in passing judgment on confirmations. Standing committees exercise some control, although Professor Cushman observed that committees usually provided little more than casual hit-or-miss supervision.[19] Under the Legislative Reorganization Act of 1946 standing committees are responsible for legislative oversight of administrative agencies. Thus the legislative branch moves toward quasi-judicial functions. However, legislators with their dual responsibilities of getting elected and making laws, usually lack the time and ability to

16 "Policy decisions are made by men, and men inevitably, if not consciously, filter program objectives through their own values, their own aggressions, their own struggles for status and prestige. Personal desires, interpersonal animosities, the self-conception of one's role and its importance, the expectations of others—all these factors affect an organization's objectives and the process of decision. This is as true for government as it is for other institutions." Morton Grodzins, *Americans Betrayed* (Chicago, 1949), p. VIII.

17 E. Pendleton Herring. *Federal Commissioners* (Cambridge, 1936), p. 73.

18 Arthur W. Macmahon, "Senatorial Confirmation" in *Public Administration Review*, Autumn, 1943, p. 285.

19 Cushman, *op. cit.*, p. 672.

thoroughly investigate an agency. Confirmation is generally delegated to Senate committees; otherwise the approval of commissioners who are not acceptable to a majority of the supervising legislative committee would result in an untenable position for either or both. Committee probing is not always incisive enough to get at fundamentals. Hearings often are political, substituting willful for reasonable consideration.[20]

When Congressman Charles A. Wolverton was chairman of the Committee on Interstate and Foreign Commerce in the 80th Congress, he inaugurated a technique which, though subsequently abandoned, provides an opportunity for more intelligent hearings if adopted by the Senate in the future. The heads of each agency under the supervision of the committee were invited to appear before it informally early in the session for brief statements and questions and answers. This plan served several very useful purposes. It permitted committee members, particularly new ones, and the commissioners to get acquainted; it enabled the agencies to explain the nature of their duties, their understanding of congressional intent, and to emphasize problems which seemed to require congressional attention; and it enabled committee members to ask questions about administering the basic statutes and to discuss troubling matters.[21]

Congress tightened controls over several experimental and highly controversial areas by establishing joint or watchdog committees. If successful, their extension may be expected. These committees are generally subcommittees of the regular committees, often with a resolution giving direction for investigations and providing additional funds for staff work. The Senate section of the committee, which is responsible for recommending the confirmation of commissioners, has a unique opportunity to appraise the record of incumbents.

The trend is to strengthen legislative rather than executive control of commissions through watchdog committees. Carroll L. Wilson, general manager of the Atomic Energy Commission, charged that the Commission was drifting toward policy of management by the watchdog committee, and that Commission chairman Gordon Dean was too subservient to his old law partner, chairman Brien McMahon of the committee. But commissioners complained that Wilson actually ran the show, pushing the Commission into an advisory role. The general manager, then a semi-independent official appointed by the President, was placed in the administrative hierarchy under the five commissioners by subsequent legislation.

20 See, for example, Lindsay Rogers, "Congressional Investigations: The Problem and Its Solution" in *The University of Chicago Law Review*, Spring, 1951, pp. 464-477.

21 These hearings were held in executive session, and records were not printed. Congressman Wolverton's opinion is that the agencies welcomed the opportunity to appear before the committee and thought a better understanding of their work resulted.

Under the Legislative Reorganization Act, Senator Edwin C. Johnson claimed committees have the duty "to interrogate nominees for commissioners of the agencies coming under our jurisdiction with respect to the policies they espouse; and I believe it particularly important in the case of reappointments that such commissioners render, in effect, an accounting of their stewardships to the people of the United States through us."[22] The committee was interested in the record of the commissioner, and "what we may expect of you in the future with respect to policies of and questions pending before your Commission." The committee justified its pointed questions in the public interest.

Senator Taft of Ohio maintains that the Senate should pass on character, ability, education, training, and competence of nominees; and that a man need not be a criminal or guilty of some sensational default to warrant rejection. "There is perhaps a slight presumption in favor of the President's nominations, but nothing that relieves us from making a complete examination ourselves."[23] In the case of Cabinet officers, he said, the presumption in favor of the nominee is stronger, but that is all. According to Senator Harry F. Byrd, the duty of confirmation is not merely perfunctory. The President should have wide latitude in his appointees, and Byrd frequently has voted to confirm officials whom he would not have appointed had the responsibility been his. "The confirmation authority of the Senate is one of the checks and balances of our democracy, and should be exercised by members of the Senate temperately and courageously."[24] Senator Johnson (Texas) maintains that the matter of "advice and consent" should not become a mere formality of "accept and agree."[25]

Appointment is primarily an executive function and responsibility; the Senate's function is that of a safety valve. Even though character may fluctuate, our history is not without examples of appointees who have hoodwinked both President and Senate. If the Senate takes greater control over appointments, it should assume greater responsibility through committees. After the minimum qualifications, the crux of the problem is the extent to which the Senate is entitled to reassure itself on the nominee's economic views and background.

Because confirmation is an administrative process, considerable

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22 Nomination of George E. Sterling to the FCC. Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 81st Congress, 2d session, June 15, 16, 1950. p. 1.

23 *Congressional Record,* 79th Congress, 2d session, Vol. 92, Part 1, Feb. 18, 1946, p. 1395.

24 *Ibid.,* 81st Congress, Vol. 95, Part 5, pp. 6406-6407.

25 *Ibid.,* Vol. 95, Part 11, Oct. 12, 1949, p. 14379. Professor Lindsay Rogers concluded that the Senate should interfere if it believes that a nominee is unfit; "a reasonable presidential discretion should not be presidential license." *The American Senate* (New York, 1926), pp. 30-31.

latitude in procedure is required. Even if a rigid rule could be established, reasonable men might well differ in its application. Instead of trying to set specific limits on the kind of questions asked, an adherence to a sense of decency, fair play, and equity are far more desirable.

In a penetrating treatise on congressional oversight of admintrative agencies, a committee of the Association of the Bar of the City of New York concluded that "while the legislature has a continuous obligation to study and assess the operations of an agency, the legislature's essential duty is to establish an act and the agency's essential duty is to administer the act.[26] . . . The problem is a delicate one and is not susceptible of rigid control or rule-making. In the last analysis, only a disciplined attitude of discernment and self-restraint can yield assurance that the legislator and administrator will each execute his own proper function and scrupuously respect the other's." With limited exceptions "legislative oversight of an agency should be essentially directed to the need for altering standards, structure and procedure, or budget through legislation." Congress or the committee should not interfere with pending or decided cases, but the committee should have greater latitude in matters pertaining to the agency's procedure and substantive rules. But even in these respects, "Congress having delegated to the agency the power to regulate, the agency must, in the last analysis, have a free hand to exercise its own informed judgment." Congress, then, if dissatisfied, should amend the statute, not coerce the agency to change its view.

In the confirmation of any appointment, however, the New York committee thinks the Senate may legitimately feel that the nominee's record indicates a disposition to depart from the legislative policy in ways for which amending legislation provides no satisfactory redress. Experience may show the nominee to be so confirmed in his habits of thought that amendments do not prevent him from consistently whittling away at or expanding upon the legislative policy whenever a plausible occasion arises. Such circumstances warrant senatorial inquiry.

Commissioners must distinguish between matters of general policy and matters of administrative discretion. The legislative body adopts basic policies such as "fair value", "just compensation for services rendered" and other fundamental tenets of policy for its territorial jurisdiction. As an agent of Congress or the state legislature, commissioners can determine policy only within the frame of reference assigned to them by the basic statutes; they cannot supplant or modify the statute by administrative interpretation. In 1910 the Supreme Court remarked that the powers of the Interstate Commerce Commission

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[26] *The Record of the Association of the Bar of the City of New York.* Vol. 5, No. 1, Jan., 1950, pp. 13-14, 19. See also, Beryl Harold Levy, *American Bar Association Journal,* Vol. 36, May, 1950, pp. 236ff.

were "expected to be exercised in the coldest neutrality."[27] The Court of Appeals has emphasized that the regulatory agencies have the duty of administering the law as they find it, and of recommending to Congress amendments which their experience demonstrates may be necessary or desirable, rather than recasting it through strained or tortured interpretation.[28] In this way the commission, as a planning agency, can make intrinsic and extrinsic contributions to general policy, but Congress is free to accept, reject or alter the recommendations.

Before confirming an economist in, for example, the Federal Power Commission, this writer suggests these questions: Is an economist needed for this post? Is he a reputable economist? Does he have a judicious mind? Is he aware that administration of the power and natural gas acts will require him to help resolve many complex national-state conflicts? Is he open minded on questions of public and private power? On control of independent gas producers?[29] For reappointment: Does his record on the Commission warrant reappointment? By his record, has he helped to accomplish the purposes of the statute? Actually, though, if a Senator does not like the commissioner or does not like some of his decisions, emotion and prejudice may be the conditioning factors. But the rationalization for rejection would

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27 Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry., 218 U. S. 88, 102 (1910).

28 Border Pipe Line Company v. Federal Power Commission, 171 F. 2d 149, 152-153 (1948). In a similar vein the Court has compelled the Commission to adhere to the restrictive language in the organic act. Idaho Power Company v. Federal Power Commission 189 F. 2d 665 (1951). And more recently: While the court must not be deprived of the "informed judgment of the Commission", it must scrutinize commission orders to determine whether the commission has "patently traveled outside the orbit of its authority." Federal Power Commission v. Arizona Edison Co., Inc., 194 F. 2d 679, 685 (1952). And on the state level: "Commissioners are not a law unto themselves, and they have no right to take short cuts across the rights of others—even of those engaged in a public service—to reach popular results." New England Telephone & Telegraph Co. v. Public Utilities Commission, Supreme Judicial Court of Maine, Jan. 27, 1953.

29 Professor Herring observed that the ability and integrity of men have been questioned chiefly when administrative policies and economic theories of particular appointees have strongly diverged from those of their critics. Herring, *op. cit.*, p. 6. He concluded: "Senators place more emphasis upon certain attitudes and loyalties than they do upon the capacity or training of the appointee", and stated the nature of the questions as follows: "Will the appointee carry out the policy of Congress or will he attempt to develop a line of commission policy? Will he incline toward Presidential or toward Congressional leadership? Is he a friend of the little man or is he a supporter of big business? Is he more sympathetic toward the rich man or the poor man? Is he tied in with the Washington bureaucracy or is he taken fresh from private life. With what economic interests can he be identified? What is there in his background that suggests a connection with the 'power trust' or the 'sugar interests' or Wall Street? Senators are interested in two general points of reference: the appointee's financial connections and his political relations. Out of this they apparently hope to get his economic and social philosophy." *Ibid.*, p. 7.

be on a professional basis—the nominee is incompetent, disloyal, or defeated the legislative intent of the law.

It would be unethical to pry into the attitude of the prospective appointee toward details of regulatory policy. The candidate probably does not have in mind the information essential to formulate an adequate and candid answer on specific situations he may have to meet, and upon which he should not decide until he has all the facts and an opportunity for study and reflection. Furthermore, such questions would almost certainly call for commitments, implied if not explicit, which would restrict the commissioner's freedom of action and independence of judgment.

Hearings would be superfluous when the nominees are well known by large sectors of the Senate. This includes a man of national stature, one with an outstanding public record on the state or national level, and one held in high esteem through former membership in the Senate.

The Senate is entitled to delve more deeply into the views of the nominee if the electorate has repudiated the President's political party in offyear elections. This is because regulation is a politically sensitive process; appointments should reflect the political party in power.

IV

Several confirmation cases point up the legislative-executive conflict. Some show how the Senate has tried to fortify the commissions as arms of Congress and to control commissioners; some have been on genuine matters of policy; some on politics; some on personalities; others defy classification. Many show unprofessional and irrational factors which sometimes controlled.

Senators have shown disapproval of the Federal Communications Commission several times. The Senate of the 80th Congress approved the McFarland Bill which would have curtailed the influence of FCC staff. A majority of the Commission favored a substitute bill introduced in the House. The Senate committee subjected the next FCC nomination, that of Commissioner George E. Sterling to an extended grilling, though the members did not object to him personally. At the end of the hearing they unanimously confirmed him.[30] Terming its career varied and in some respects checkered, Senators dug deeply into Commission policy and personal views of Commissioners. Nominees were asked their views on amending the communications act, superpower (when oral argument was pending before the Commission), indefinite licenses, permanent or rotating chairmen, and other policies. On the

30 Note 21, *supra*. Also, Nomination of Wayne Coy and George E. Sterling to the FFC, 80th Congress, 2d session, Jan. 20, 1948, p. 22.

reconfirmation of Commissioners Coy and Sterling, the committee's central theme was that the FCC is an arm of Congress. Both Commissioners showed great administrative courtesy, and also contributed suggestions for closer cooperation between the committee and the Commission. However, explicit statements of committee views on details, and requests for opinions on changes in the law when commissioner's reappointments were at stake were untenable.

On the renomination of Leland Olds to the FPC for a third term in 1949, *The New York Times* picked the crucial question: Do Mr. Olds' present views and his record as a Commissioner for the last decade warrant his reappointment?[31] More concretely, another writer cited the real issue as "the Kerr bill and federal regulation of the price of gas."[32] Although a few Senators considered the issue, most of the debates went wide of their mark, dwelling on more emotional aspects of personal ideology at the time and years before.

For his second term in 1944 Olds was recommended, 3 to 2, by a subcommittee. In 1949 the subcommittee heard 34 witnesses, took over 300 pages of testimony in three days, and heard Mr. Olds for six hours (two in reply to testimony against him). In the words of Senator Johnson, "a more searching . . . hearing was never held by any committee in Congress."[33] A unanimous decision against him may indicate decisiveness, or a prejudiced committee and steamroller methods. On the other hand, the appearance of a man in "mental undress" under cross examination is vital. Four of the seven committee members were Democrats. Three of the seven had supported him as members of the 1944 subcommittee, but in 1949 they voted against him. The full committee voted 10 to 2 against confirmation; the adverse vote included those of the majority of the Democratic members of the committee.

The charges against Mr. Olds were: that he had the zeal and fire of a crusader, that he lacked judicious temperament, and that his background and record showed him more sympathetic to public than to private power. More specifically, it was alleged he had administered the agency's legal mandates at the expense of state regulatory commissions and had interpreted the Natural Gas Act contrary to congressional intent. But is "congressional intent" determined from what was said when the bill was under discussion in committee hearing, from debate on the floor of the House or Senate when the law was enacted, or by the committee currently supervising the administrative agency? Is it presumptuous for the Senate to interpret congressional intent without consulting the House?

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31 October 8, 1949.

32 J. P. Harris, "The Senatorial Rejection of Leland Olds: A Case Study" in *The American Political Science Review,* Sept. 1951, p. 684.

33 *Congressional Record,* Vol. 95, Part 11, Oct. 12, 1949, p. 14357.

Commissioner Olds obviously had alieniated support of many Republicans, utility interests, and powerful gas-oil contingents in the Southwest.[34] But the record does not show whether Mr. Olds perverted the laws he was required to administer. Senators quoted, for example, excerpts from Supreme Court decisions for and against his interpretation of the laws. Some were decisions; some apparently dicta. Actually, the relation of a commissioner's interpretation of the laws and the court's is no criteria for evaluating the work of the man. Even if courts reject his analysis of the law, members of a commission can advise and even be energetic and vigorous in advocating changes in the law. In many instances Congress could amend the law in support of a commissioner's view rather than adhere to court interpretation.

In this case, however, the committee questioned the willingness of the nominee to carry out the purposes of Congress, as compared with his own analysis of regulatory problems, public policies, and ideologies. His conception of public welfare and consumer interests seemed almost identical. Although extraneous matters undoubtedly were factors too, the Senate concluded that his temperament and background were not desirable in administering the act. Confirmation was refused, 53 to 15.

The next year Congress passed the Kerr Bill which amended the Natural Gas Act contrary to the Olds' view. But President Truman exercised his legislative function of vetoing the measure. That raised the dilemma whether a commission should interpret a law which needed clarification in accordance with legislative amendment or executive veto.[35] Subsequently the majority of the Commission interpreted the act along the broad principles of the Kerr Bill, while the minority adhered to the general analysis of the veto.[36]

The nomination of Thomas C. Buchanan to the Federal Power Commission was held up for more than a year before confirmed, although he held an interim appointment for nearly one year.[37] Testimony indicated unimpeachable character and adequate training and experience, but conflicted on his open-mindedness and judicious temperament. During his nine years on the Pennsylvania commision, Buchanan concurred in every rejection of rate increases, but dissented from every approval; in every case where the state commission ordered

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34 For Mr. Olds' view of the proceedings, see his articles in the *New York Post*, Oct. 26, 27, 28, 30, 1949.

35 Lincoln Smith, "Can Southwestern States Limit Gas Exportation?" in *Public Utilities Fortnightly*, Aug. 17, 1950.

36 In the Matter of Phillips Petroleum Company, FPC Opinion No. 217, Aug. 22, 1951.

37 *Congressional Record*, Vol. 95, Part 6, June 6, 1949, pp. 7250-7254. Nomination of Thomas C. Buchanan to the FPC. Hearings before subcommittee of the Committee on Interstate and Foreign Commerce, U. S. Senate, 82d Congress, 2d session, June 18, 1952.

utilities to reduce their rates, he either voted with the majority or dissented because the reductions were inadequate. His opponents attributed to him pressure tactics and political activity as a minority member of the Pennsylvania commission.

Senator Herbert R. O'Conor claimed the vital questions on the confirmation of John Carson to the Federal Trade Commission were: 1. whether he is a loyal American citizen interested in maintaining these American institutions which have been so effective in bringing America to its present high estate, and 2. whether his economic stability and experience in the field of trade and commerce were adequate.[38] But other issues overshadowed these. Should the Commission be bipartisan, or recognize splinter parties? (Carson is an independent.) Another question was whether this former "public relations" man for the Cooperative League of the United States would, as Commissioner, promote the cooperative movement. Others contended business had four representatives on the Commission, and cooperatives were entitled to one. One witness likened the Commission to a carp pond. "If carp are put in a pond and fed they become sluggish. In order to stimulate them to swim around and get into good condition for eating, a big tough wall-eyed pike is thrown in to bite them. Mr. Carson would be like a pike in a carp pond. I think we need more pike in some of the carp ponds in Washington." Recommended in committee 8 to 4 on a partisan vote, Carson was approved, 45 to 25.

Mon C. Wallgren, former associate of Truman in the Senate and ex-Governor of the State of Washington, was rejected by the Senate as chairman of the National Security Resources Board, but five months later was confirmed to the FPC.[39] Maybe the Senate was capricious, or considered Wallgren incompetent for one but desirable for the other post, or perhaps it was unwilling to squelch the President as well as a former colleague twice in a row.

After many years of service in the New York legislature, the House of Representatives, and Senate, James M. Mead's nomination to the Federal Trade Commission met with overwhelming support.[40] Routine speeches stressed that the Senators knew him, thought well of him, and that he would bring to the FTC not only an intelligent understanding of its work, "but of its real purpose in being an arm of the legislative body."

Subordinates are encouraged to offer suggestions, but when one opposes or criticises the boss who is responsible for authority delegated to an administrator, the alternatives are generally that the subordinate must convince or dissociate himself from the organization.[41] If com-

38 *Congressional Record*, Vol. 95, Part 10, Sept. 16, 1946, pp. 12973-13011.

39 *Ibid.*, Vol. 95, No. 196, Oct. 19, 1949, pp. 15319-15322.

40 *Ibid.*, Vol. 95, Part 11, p. 14987.

41 Alvin Brown, *Organization of Industry* (New York, 1947), pp. 55-57.

missioners openly criticise, even academically, the chief executive and /or legislative branch, they do so at their own peril.[42] This introduces the case of Sumner T. Pike, the pioneer of a watchdog committee in action.

A year before the expiration of his first term on the Atomic Energy Commission, acting chairman Pike impaired his relations with the Senate as guest speaker at Bowdoin College. After explaining that the congressional committee had decided that it should not know the production rates and stock-pile of atomic weapons, he continued:

> One can easily put himself in the position of any individual committeeman and can share his reluctance to be charged with this knowledge. As one congressman not on the Committee recently said in a hearing, "Don't tell me any secrets. Talk is a congressman's stock in trade and he is liable to use anything he knows when he talks, which is most of the time." This, of course, is an exaggeration but it highlights the problem of the congressman or anyone else who has to run for office.
> Whatever the wisdom of the move, it may well be that lack of this knowledge has interfered with a really good sense of proportion on the part of some members of the Committee and has led to some feeling of frustration on its part in attempting to appraise the results of the enterprise. The recent charges against the Commission's Chairman, and the hearings which have followed, based as they have been on comparatively peripheral and insignificant items in the program seem to me to have had their source in a basic inability to make a sound appraisal of the relative importance of the various elements which constitute the Commission's work.

Commissioner Pike also indicated that the process of attrition (outlined in Part I) might have begun in the field of atomic energy. He cited legislation then under consideration to limit the Commission in meeting unexpected and unforeseen situations. He also stated that political considerations had been injected into congressional consideration of some AEC problems.

Pike was renominated. After a short hearing which was concerned with a vague charge of inefficiency and platitudes, the Senate section of the committee voted 5 to 4 against confirmation. Four of the five opposing Senators were Republicans, two were from Colorado. Mr. Truman's request that the committee reconsider went unheeded. With the majority and minority factions of the committee acting as prosecutor and defender, the nomination was finally confirmed, 56 to 24.

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42 Two of the commissioners whose views were requested for this study felt obliged to refrain from discussing the proper course of action to be taken by the President of the United States and the Congress.

Pike's record as a liberal Republican (Senator Taft once referred to him as "just another New Dealer" and subsequently voted against confirmation) alieniated many of his own party cohorts. Then again he was referred to not only as a Republican and too much of a Republican but also as a Maine Republican. Senator Hickenlooper did not call him a Red, but he claimed there was "a reticence on the part of Mr. Pike to clean out of the AEC those whose views are a little pink."[43]

The opposition emphasized the need for bold and sensible administrative judgment on a powerful commission with unique responsibilities. Testimony also indicated that no advice from the joint congressional committee was solicited or given by the President, and occasional slaps were taken at the failure of the President and his staff to consult the committee.

According to Senator Johnson of Colorado, Pike had once questioned his own ability to sit on the Commission. At the time of his original confirmation (several months after he began to serve) the chairman of the Senate section of the committee asked Pike if he had formed a substantial or basic conclusion as to the general field of activity, present responsibilities, and future plans of the Commission. In reply, Pike frankly and modestly made this proviso: "I want to say, Mr. Chairman, in taking hold of the job, after two or three months, you begin to get some feel of it, some feel of the size of it, and what you may be able to do with it. This is the only one I ever tackled which seemed further out of reach now than it did the day I looked at it."[44] He continued that in the first few weeks the new commissioners took a trip around the country, to get some idea of the magnitude of the job ahead. They talked with 35 or 40 scientific specialists. "If there is one thing that was left with me afterward it was that each one of them seemed to feel more possibilities, probabilities, and almost certainties, that required investigation; so many that all they needed was more men, more money, and more time. So it raised this whole series of question marks, promising things that ought to be looked at."

Senator Tom Connally called the above a compliment to Pike, claiming that if Pike had said: "Why, yes; I know all about atomic energy," he would have suited his opponents admirably.[45] Senator Lucas doubted if any man in America could truthfully say he had all the qualifications needed for the complicated problems of atomic energy.[46] But Yankee skepticism and frank approach provided opponents a wide avenue of excuse for attack. They failed to perceive

43 *Congressional Record*, Vol. 96, No. 134, July 7, 1950, p. 9906.

44 Hearing before the Senate section of the Joint Committee on Atomic Energy, Jan. 28, 1947, p. 47.

45 *Congressional Record*, Vol. 96, No. 134, July 7, 1950, p. 9906.

46 *Ibid.*, p. 9915.

that at first not many Senators knew much about their new jobs, or that an able man, especially in a new and highly specialized activity, will learn and grow on the job.

Senator Owen Brewster said that his investigation indicated a seeming case of incompatability between Pike and some members of the Senate committee. He stated his conviction that "at the bottom of this whole controversy was that Mr. Pike is what we call up in Maine a rather 'ornery cuss,' a fellow who speaks his mind rather plainly, as perhaps many people in Maine and New England do, and sometimes somewhat more generously than is entirely called for."[47] Brewster asked the Senators to make as large allowance as they could for this. Both extremes—one who talks too bluntly and one who always weighs every word—are unfortunate.

Pike first came to the attention of official Washington as a Republican member of the Temporary National Economics Committee. President Roosevelt, according to Senator Paul H. Douglas, put Pike on the Securities and Exchange Commission in 1940 because he knew at first hand the intricacies of Wall Street—having participated in some of them himself—and, while he was absolutely fair to the corporations and the issuing houses, he stood like a rock in protecting the public interest.[48] In 1946 Pike resigned from the SEC; he said he was getting stale on the job and wanted to go home to do some fishing. But that summer President Truman called him back as an original member of the AEC. He served more than five years. Late in 1951, however, about 16 months after his reappointment, Pike resigned and returned home to fish. His only political ambition is to represent his native Lubec in the legislature of Maine like his father did, 50 years ago.[49] He is financially self-sufficient, and his voluntary departures from Washington show that he is not tied to any job that does not suit him.

Personality clashes and prejudices are present in confirmation proceedings. David Lilienthal's refusal to make political appointments at the TVA had repercussions in the Senate when he was on the AEC. Senator Harry F. Byrd led the fight against confirmation of Martin A. Hutchinson of Virginia to the FTC. Hutchinson, a Truman ally, had opposed Byrd for the Democratic senatorial nomination in 1946. Colorado's Senators were unhappy because Sumner Pike favored a program of importing ores rather than developing low-grade Colorado ores. One said he was willing to leave Pike's name on the peak in Colorado, but not on the Commission.[50] A cynic might trace part of

47 *Ibid.*, p. 9914.

48 *Ibid.*, Part 7, pp. 9763-9764. Senator Douglas, classmate and fraternity brother of Pike said: "In college, we all regarded Sumner Pike as the ablest man of our college generation, having an amazing grasp of physics, chemistry, and mathematics and a perceptive and sure common sense."

49 May Craig, in *Portland Press Herald,* Nov. 26, 1949.

50 *Congressional Record,* Vol. 96, No. 134, p. 9919.

Senator Hickenlooper's opposition to Pike to the Iowa Senator's unsuccessful opposition to Lilienthal, whom Pike had supported strongly. Some Senators did not like Mr. Olds.[51] But the reverse was true in the confirmation of George E. Allen to the Reconstruction Finance Corporation. Although lacking in outstanding qualifications and despite protests in the press, the "public relations" man and "White House jester" made such a good appearance at the hearing[52] that he was recommended and confirmed.[53]

V

If the executive controls the agencies, a drift toward unrestrained bureaucracy would be precipitated. If the legislative branch dominates, regimentation and rigidity would result. If either branch wins out, the rôle of the courts will be increased and the concept of regulation as an administrative function eliminated. As the pendulum swings between legislature and executive, an equilibrium is created which, though aggrevating at times, gives the commissions a varied degree of independence and injects vitality into them.

Top staffing is a joint, not a divided, responsibility; it is a complementary but not coextensive process in which the initiative and major responsibility rests with the chief executive. It is a unique way to diffuse economic and political values; a difference between the administrative and executive functions; and the only ethical way in which the executive can interfere with regulation. The chief executive produces the candidates, under the statutes, at his own discretion. He may use this power in the public interest or to build up his own strength. His selections indicate a sense of direction, as differentiated from the general purposes determined by Congress.

A strong leader has many devices to imprint his influence on com-

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51 Said Senator Johnson: "Personally, I regard Leland Olds as a warped, tyranical, mischievous, egotistical chameleon, whose predominant color is pink" (Debate on Olds confirmation, p. 14359).

52 Senator Taft grilled Allen about his support for a Negro housing project in Washington at the behest of the evangelist Elder Solomon Lightfoot Michaux, especially what he got out of it. In the words of Allen: "I replied truthfully and with dignity that I had been made an honorary deacon in Elder Michaux's tabernacle. . . . I was reluctantly beginning to have a pretty good time, and members of the committee seemed to be enjoying my cross examination, too. I testified that I didn't purpose to resign my business connections because I wasn't sure Truman would be re-elected and I wanted some place to go if the Republicans came to power and fired me, as of course they would. It is odd that the simple, unadorned, and bluntly stated truth can be so amusing. By now the committee was in stitches." George E. Allen, *Presidents Who Have Known Me* (New York, 1950), pp. 205-206.

53 *Congressional Record,* Vol. 92, Part 1, 79th Congress, 2d session, Feb. 18, 1949, p. 1413.

missions. Interim appointments have been used effectively. The entering wedge may become a *fait accompli.* The appointee has made his contacts and created his own following. By the time of confirmation, a rebuttable presumption and possessory obligation may have arisen from having been on the job. Senatorial rejection then might disrupt the commission as a "going concern."

The Senate's function in confirming is a negative one, like sifting the nominees through either a net or sieve. The veto is absolute, but in general can be used sparingly among honorable men. In this screening process, some Senators have pried deeply into details of commission policy, often implying their own preferences. One wonders how independent some commissions can be. Commissioners should give careful consideration to views of Senators wherever made, but Senators should not expound or argue on details. The rule that commissioners should administer the law as they find it, regardless of their ideological objectives, applies with equal force to individual members of a legislative body or committee.

The Senate has attempted to inject higher standards in administrative personnel by establishing a code of ethics in professional conduct over and above bare compliance with the law; but how much individual character can be regulated by law is questionable.[54] Character should be evaluated before nomination and at confirmation hearings.

Institutional changes in the technique for the appointment of commissioners can gain little. In some New England states appointment by the governor and executive council recognize to some degree the parliamentary form of government. Although a hangover from colonial time, the governor is checked not by the legislature or any portion of it, but by a special council or committee of elder statesmen, a legislative cabinet, which has roughly the confidence of the legislature. This generally places the commissions within the executive hierarchy. Actually, however, the system has sometimes carried incumbents over in office for a long period, notwithstanding the unwillingness of the governor to reappoint them, because a majority of the council favored them and no other nominee therefore could secure confirmation.

Although quite a number of states elect regulatory commissioners, the system lacks a logical basis. The electorates are already overburdened. They are incompetent to determine and judge the highly skilled and technical qualifications for the various jobs. Commissioners have no specific responsibility to legislature or executive. Furthermore, administration needs to draw in talent which lacks personal qualifica-

54 It is based on the principle of an attorney asking a judge for an audience-in-chambers which may be done before or while a case is in progress, but he cannot request advice while decision is pending. See note 12, *supra.* Here is Senator Aiken's comment: "Laws alone will never improve the ethical and moral standards in the Government; only a clear sense of honor and duty imposed on those who hold the trust of public service can accomplish that end." p. 66.

tions and money for success at the polls. If commissioners were put under the classified system, that would fail to recognize the political process, and tend to stagnate personnel. The method of appointing commissioners was an issue in the Republican gubernatorial primaries in New Hampshire in 1952. One unsuccessful contestant suggested appointment by the state supreme court.

A discussion of trouble cases cannot present a full picture. The fact that many able commissioners are chosen annually is a high tribute to the regulatory process. An eminent authority on the Interstate Commerce Commission, for example, concluded that this body was composed predominantly of commissioners who measured up in highly creditable fashion to standards of fitness grounded in character, training, and experience.[55] That trouble can and does arise shows that the democratic process is in a vigorous state of good health. Commissioner Eastman documented this:

> Sitting in dignity and looking down on suppliants from the elevation of a judicial bench has its dangers. A reversal of the position now and then is good for the soul. It has for many years been my good fortune to appear rather frequently before legislative or congressional committees. They are a better safeguard against inflation than the O. P. A.

When an administrator emerges victorious from a clash, he may have profited by the ordeal and be a better person and administrator. If a man becomes a candidate for any public office, he must voluntarily forsake considerable privacy. On the other hand, the petulance and flippancy in some cases have harrangued able men shamelessly and needlessly.[56] A candidate must show proper respect for the Senate, yet he is helpless if Senators do not reciprocate.

Recent confirmation hearings have not always grappled with relevant matters. But the Senate must be applauded in instances where it did not become involved emotionally and take sides until its committee colleagues produced evidence. One may note with approval the great weight the Senate has given to local sentiment. In several cases the standing of the candidate in his own bailiwick won nods of approval from Senators. This factor in appraising the capacities of public servants at the grassroots is vital. The opinions of colleagues are valuable, if not beset with professional rivalries and ideological differences.

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55 I. L. Sharfman, *The Interstate Commerce Commission* (New York, 1937). Vol. 4, pp. 22-43.

56 In support of Mr. Olds, Senator Aiken remarked: "I think probably his usefulness as a public servant is about done. He should be much happier in other work. When an attack on the character of a man such as has been directed at him has been indulged in, it just about destroys the usefulness of a public servant. It is things like this that make it so hard to get good men and women into public life." p. 14372.

Two constructive suggestions can be made in the process of appointing commissioners. Prenomination consultation between the President or his staff and Senate leaders and committee chairmen may alleviate some cause of friction and also be more equitable to the prospective appointee. Cooperation in a complementary process might be more effectively achieved at the outset, before the coordinate nature of the two branches becomes emphasized. At the hearings committee chairmen could frequently keep questions more in bounds than they sometimes have, because hearings offer too much temptation for political tangents. That a surprisingly large number of Senators do subordinate opportunities for personal publicity to the qualifications of the nominee offers hope for an influx of able commissioners.

The situation in some states is catastrophic. On the national scene one can be neither dogmatic nor complacent about a more respectable record. If the commissions are to continue independent of, and yet responsible to two, and in a sense three, branches of government, the fluctuating conflicts must be resolved judiciously, with vigor and yet self-restraint. Elect statesmen wise enough to make any system work; exhort them to use discretion in their value judgments for nominations and confirmations; and then caution the commissioners to adhere to legislative policy, executive principles, and judicial standards. If a prescription of exhorting public officials seems insufficient, one alternative is to establish direct responsibility for the commissions in the legislative or executive branch. But that would invite new and untried evils. The cure might be worse than the malady.