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Government and Education: The University as a Regulated Industry*

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Barry B. Boyer***

Government regulation is an expanding influence in modern education, particularly in university administration. This essay takes a broad look at the influence of government in education, explores the basis for most government regulation, and suggests some steps which might be taken to assure that the concerns of higher education are heard in the regulatory process so that intervention will serve the goals of government as well as the interest of the university.

I. INTRODUCTION

Three years have passed since the presidents of two of the nation's most prestigious universities scathingly criticized the federal government's role in higher education. Addressing a distinguished group of lawyers, then-President Kingman Brewster of Yale complained: "High on the agenda of the [legal] profession, especially its scholarly branch, should be to see that in terms of both limits on authority and redress against its abuse, the coercive power of the federal purse [over higher education] is made subject to a rule of law."¹ Harvard President Bok's attack included no less strident a warning. He alerted Harvard's powerful alumni that for them "the critical issue for the next generation is Harvard's independence and freedom from governmental re-

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1. *YALE ALUMNI MAGAZINE*, April 1975, at 34-35.

straint."² These attacks are symptomatic of general dissatisfaction with increasing government regulation of university action.

This essay considers the "stifling bureaucratic requirements" which President Bok argued impose increasing costs on universities without providing corresponding benefits to either students or the public. Our concern is not directly with the questions of whether government regulation is effective in achieving its stated goals, or whether particular regulatory programs affecting higher education embody sound public policies.³ Rather, we will identify the procedural constraints that are associated with greater federal regulation of higher education and make a preliminary determination of whether these restraints are as unreasonably burdensome as critics have suggested.⁴

Although procedures are only one device for implementing the broad social policies embodied in regulatory statutes, to a large degree the quality of the administrative process will determine the practical effectiveness of a regulatory program. Criticism of the regulation of higher education has not, of course, been limited to the details of the regulatory process such as the draftsmanship of rules or the quality of administration. Rather, the challenge goes deeper; it is aimed directly at the legitimacy of government intervention in higher education and must ultimately be assessed on that basis.⁵

An important distinction between these two types of criticism needs to be noted. Mistakes have clearly been made in implementing the recent regulatory programs, and others will undoubtedly occur in the future. Indeed, it may well be that there exists a disturbingly high degree of inadequate, inefficient, and ineffective regulation in the programs affecting higher education. But unlike

2. Harvard U. Gazette, June 13, 1975, at 1, col. 2.

3. One evaluation has already been made of the constitutional basis of Brewster's challenge. In 1975, Robert O'Neil, now Vice President responsible for the Bloomington campus of Indiana University, examined four areas where the constitutionality of encroachment by federal regulation might be tested. The focus of these areas was on conditions imposed upon receipt of federal funds. They included challenges to the federal government's imposition of conditions unrelated to the funded programs, attempts to accomplish indirectly that which the federal government could not do directly, pressure on educational institutions to violate individual constitutional rights, and invasions of the autonomy of educational institutions. After examining the arguments and the evidence, however, O'Neil concluded that Brewster's constitutional challenge was unfounded. O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975).

4. Criticism and dissatisfaction with the performance of government as a regulator clearly have not been limited to the field of higher education. See, e.g., *Colloquium: The Deregulation of Industry*, 51 IND. L.J. 682 (1976); Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J. LAW & ECON. 371 (1976); *Why Regulate Utilities?*, 11 J. LAW & ECON. 55 (1968); Posner, Book Review, 86 YALE L.J. 567 (1977); Schmults, *Evaluation of Overall Benefits and Shortcomings of Federal Regulation*, 32 BUS. LAW. 869 (Special Issue, March 1977); Werther, *Government Control v. Corporate Ingenuity*, 26 LABOR L.J. 360 (1975).

5. See, e.g., Oaks, *A Private University Looks at Government Regulation*, 4 J.C. & U.L. 1 (1976). But see Jenkins, *Regulation of Colleges and Universities Under the Guaranteed Student Loan Program*, 4 J.C. & U.L. 13 (1976).

the criticism aimed generally at the role of government in education, the attack on inefficiency alone would not necessarily make the case against such regulations; the costs of new procedures must ultimately be weighed against the benefits that can be realized from the regulatory programs and the probability that the regulatory system will improve.⁶

Today's colleges and universities are no longer (if they ever were) isolated institutions standing apart from the main currents of society. Indeed, the universities have become a major force for social change, often supplying both the intellectual blueprint for government action and the personnel to implement it. Government recognition of the importance of education has supported the massive infusion of federal aid in the post-Sputnik era. The "Brain Trusts" of the Roosevelt Administration, the "Best and the Brightest" of the Kennedy era, the civil rights and anti-poverty programs, and the movement to end the war in Vietnam drew heavily on academic support.

Beyond its direct involvement in the formation and implementation of public policies, the contemporary university wields several other kinds of social power. A large university can dominate the economic life of the surrounding community in its double role as a major consumer of goods and services and as an employer. In the aggregate, institutions of higher learning comprise a significant sector of the national economy. Moreover, they increasingly control individual access to economic goods. In a specialized technological society, the universities assume the role of gate-keepers, controlling access to employment opportunities, and thus to wealth, power, and influence. Thus it is hardly surprising that society would think it desirable, if not essential, to assure that higher education is accountable and responsive to public needs.⁷

We concur with this view and believe that the theoretical and practical justifications for government regulation of higher education are firmly estab-

6. It should also be borne in mind that the "benefits" of government regulation cannot be evaluated strictly in terms of a *quid pro quo*: the receipt of government funds in exchange for expenditures in compliance with government regulations. The successes of regulatory programs in achieving societal goals, such as the elimination of discrimination and the securing of personal privacy, are also "benefits" which are largely consistent with the goals of a university.

7. Some commentators see a measure of poetic justice in the application to higher education of regulatory programs and techniques that were originally designed or advocated by academicians. Former Solicitor General Robert Bork has espoused this view:

"The academic world has been actively hostile to the claims of other non-governmental institutions to autonomy in the name of greater efficiency that benefits society," he said.

"The result is not only that many today take pleasure in the plight of academics forced to swallow their own medicine, but also the public philosophy of dispersed authority has been undermined and ridiculed by intellectuals who now invoke it for their own benefit.

"It should not come as a surprise if that invocation is met with a smile."

Quoted in Winkler, *Government Rulemaking: Any Hope for Simplification?*, Chronicle of Higher Education, Dec. 20, 1976, at 5, col. 5.

lished and likely to endure. Universities are too important a force in society to escape the contemporary demands for fairness, openness, equality of opportunity, and accountability that are being pressed upon all large and powerful institutions. And the processes and techniques of administrative regulation, imperfect as they are, may well be the most practicable means of meeting these demands.

If the goals of regulation seem worthy, why then have educators so frequently reacted with hostility and alarm to the imposition of new regulatory requirements? Three factors may account for the negative responses. First, a large part of the opposition seems to arise from the inevitable frictions that are created when substantial, rapid changes are imposed on large organizations. Change is especially disquieting when it is implemented by an unfamiliar bureaucracy which is not always cognizant of the special needs, values, and problems of higher education. Moreover, the kinds of procedural changes with which we are here concerned—open decisionmaking, widespread participatory rights, more reasoned and explained decisions, and the development of ongoing relationships with external regulators—alter distributions of power within the university. They also modify perceptions and expectations of change. It should not be surprising, therefore, that members of the university community may feel a real threat to the security of their position.

Another major factor in academia's resistance to government regulation is the "cost squeeze." Complying with regulatory requirements can impose major expenses on the universities, and the current wave of federal regulation has come at a time when most institutions of higher learning are facing the painful dilemma posed by austere budgets, declining enrollments, and sharply rising costs. At the same time, the social benefits to be realized through some regulatory programs may seem trivial or nonexistent by the time program goals have been translated from the broad generalities of statutory policy to the operational realities of administrative regulations.⁸

Finally, some part of the resistance to government regulation may be directed at the less tangible, more symbolic aspects of the regulatory process. That the political institutions of society have felt it necessary to impose a system of regulation on the universities implies a judgment that higher education cannot be trusted to serve the public interest on its own initiative. Given the extraordinary record of abuses of public trust by powerful institutions inside and outside government during the past decade, it is understandable that

8. Few educators, for example, would oppose the principle that sex discrimination in higher education should be eliminated. Yet many have questioned the wisdom of pressing this general principle to the particular conclusion that expenditures on intercollegiate athletics should be equalized between the sexes.

the public's view of institutional power is heavily colored with skepticism and suspicion. The large amounts of public money flowing into higher education probably would have brought a demand for greater controls on the use of those funds in any event. Still, the academic community reacts with surprise and resentment to this questioning of its integrity.⁹

In some respects, the concerns are well-founded; but despite these kinds of problems, the overall picture of the emerging regulatory environment is by no means as bleak as the critics have painted it. Higher education is still in the early stages of adjustment to broad federal regulation, and first attempts seldom produce perfect accommodations. The administrative process provides a variety of tools that can be used to affect the necessary adjustments to regulation.¹⁰ If the leadership of higher education continues to develop the understanding and the skill to use these tools effectively, many of the rough edges of the regulatory process can be smoothed.

By increasing the accountability of the universities, administrative procedures can help higher education to maintain the confidence of its constituencies and of the general public. More importantly, the procedures and techniques of the administrative process can improve the way major decisions are made and implemented within the universities. The underlying process values of administrative procedures—openness, rationality, fairness, efficiency, and accountability—are not inconsistent with the goals of the university.

Positive benefits can also flow from higher education's involvement in the regulatory process, beyond the crucial financial support government is providing. Regulatory programs are designed to implement policies of broad importance to the society, policies such as equality of opportunity, fairness to workers and students, or occupational safety, which ought to guide the actions of the universities. When regulatory procedures are well-designed and properly used, they can make it possible to achieve these policy goals.

9. Many academicians are also quite sensitive, perhaps more so than the general public, to the "red tape" image of bureaucracy, with its interminable delays, rigid rules, and stultifying uniformity. In part, this response may reflect a general temperamental characteristic of those who have chosen the academic life; in part, it may arise from the belief that bureaucracy tends to respond only to gross, quantifiable, demonstrably utilitarian "inputs" and "outputs" and therefore may be indifferent or hostile to important academic values.

10. There is, of course, no single "administrative process" but rather a variegated set of principles and decisionmaking systems which characterize that part of government that is neither purely legislative nor purely judicial. See generally G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 18-25 (1974); Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975). We believe that there are a sufficient number of shared policies and patterns of interaction—both wholly within the university and within the context of dealings between the university and outside agencies—to warrant generalizations about how administrative law is changing the institutions of higher education. For a thoughtful discussion of the shifting perspectives toward the administrative process, see Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977).

II. CONTROLLING DISCRETION WITHIN THE UNIVERSITY

Only in recent years have questions been raised about limiting the discretion of university administrators. In the relatively recent past, university administrations were seldom questioned in the governance of their institutions.¹¹ Trustees and regents quietly affirmed policy choices; their offices were positions of honor and prestige, not power bases for policymaking. University presidents and provosts declared policy, and consultations with those affected were usually held only after basic decisions had been made and sometimes even implemented. The appointment, promotion, and tenure of faculties were determined by department chairmen and college deans with little guidance, much less interference, from other faculty members or the affected individuals. Curricular decisions were made by faculties, it is true, but without serious student input and with little change over time. Admissions decisions were highly discretionary. Student conduct was subject to rules drafted by universities in their roles as surrogate parents,¹² and while their subjects did not always applaud the rules, they did not seriously challenge either their propriety or their application. To paraphrase Justice Holmes, no one had a right to a university education or to be a teacher, and therefore university students and teachers had no rights.¹³ If dissatisfied with the rules or their application, one could choose another institution or field; no forum was available to raise questions or to obtain redress.

Today, by contrast, courts have set substantial limits on the authority and discretion of university administrators. One of the most basic and perhaps far-reaching changes which has occurred within higher education is the set of limitations now placed on educator choice. That is, decisional standards must frequently be spelled out and fair procedures for applying these standards must be developed and stated.¹⁴ These requirements are important to students,

11. See, e.g., *De Haan v. Brandeis Univ.*, 150 F. Supp. 626, 627 (D. Mass. 1957) (no hearing required in dismissal of a student, the court observing that it "is in a poor position indeed to substitute its judgment for that of the university"). See generally D. HORNBY, *HIGHER EDUCATION ADMISSION LAW SERVICE* (1973); Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969).
12. See, e.g., *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924) ("courts have no more authority to interfere than they have to control the domestic discipline of a father in his family"); *Gott v. Berea College*, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913) ("College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. . . . [T]he courts are not disposed to interfere.").
13. See, e.g., *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 262 (1934) (no right to be a student in a state university free from military training required by state; "California has not drafted or called them to attend the university.").
14. Little attention has yet been paid to the process relied upon by universities in drawing such standards and procedures. If the federal experience in agency rulemaking is instructive, that too will become a focus of interest and searching scrutiny. See generally Clagett, *Informal*

teachers, and educational institutions, as well as the public generally. The rationales for these new controls on discretion in higher education are often not considered or fully appreciated by the people they affect. In most instances they have been initiated by courts rather than the executive or legislative branches of government.¹⁵

A. Judicial Controls¹⁶

The earliest and most basic changes in the discretion allowed university administrators came not because of federal funding or executive interference through regulations and procedures. They occurred because courts found that educational institutions had overstepped reasonable bounds in regulating student conduct both substantively (*i.e.*, what was actually decided) and procedurally (*i.e.*, how the decision was made).¹⁷ The Supreme Court's decision in *Healy v. James*¹⁸ is illustrative and instructive of judicially imposed limitations on university administrators' authority. The controversy involved a state college's denial of recognition (and use of its facilities) to a local chapter of the Students for a Democratic Society (SDS). The Supreme Court held that the students' first amendment right of association prevented the college from refusing recognition to the SDS chapter because of the organization's unconventional views. The students' success was not total, however. In recognizing student rights and limiting educator discretion, the Court did not entirely displace the state college's discretion, but carefully confined it within specific boundaries,¹⁹ thereby protecting academic and political freedom from encroachment by the college.

Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law, 1971 DUKE L.J. 51; Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974).

15. Many of the new controls reflect changing attitudes toward authority. See, e.g., Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968) ("The facts of life have long since undermined the concepts, such as *in loco parentis*, which have been invoked historically for conferring upon university authorities virtually limitless disciplinary discretion."), *aff'd*, 418 F.2d 163 (7th Cir. 1969).
16. See generally Gellhorn & Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 979-98 (1974).
17. See generally Habecker, *Students, Christian Colleges, and the Law: And the Walls Come Tumbling Down*, 2 J.C. & U.L. 369, 379 (1975): "[Given the *in loco parentis* doctrine], private colleges, as well as state universities proceeded to travel a road paved with unbridled arrogance, and students began and continued, as the case may have been, to be treated with increased indifference. Formal proceedings were almost unheard of"
18. 408 U.S. 169 (1972).
19. The traditional first amendment standard requiring a clear and present danger before speech could be inhibited was qualified as applied to a university. Reasonable time, place, and manner regulations could be imposed upon students by the college administration. It therefore followed that the college could deny recognition to an organization only if it refused to obey reasonable rules for maintaining order. 408 U.S. at 191-94. See also Papish v. Curators of the

Discretion with regard to student discipline, on the other hand, has been restricted not by substantive constitutional rights such as freedom of speech, but by procedural rights of due process. Though reluctant at first, courts have become increasingly willing to oversee the process by which students are disciplined. In the landmark case of *Dixon v. Alabama State Board of Education*,²⁰ the Court of Appeals for the Fifth Circuit held that notice and a hearing were prerequisites to the expulsion of college students for misconduct. Students, the court ruled, must be given a statement of the specific charges and the grounds which justify expulsion, as well as the names of opposing witnesses, a report on the facts to which they testified, a full opportunity to present their defense, and access to the findings and conclusions of the governing board.²¹ Despite these requirements, a complete trial-type hearing with lawyers present, subpoena powers, and the like has generally not been required.²² In approving a less stringent process for the suspension of high school students, the Supreme Court in *Goss v. Lopez*²³ has made clear its basic agreement with the *Dixon* result. In recognizing basic notions of fairness and fair process, the courts are also aware that trial-type procedures are not the only alternative. Negotiating processes which reflect concerns for accuracy and integrity in the decisionmaking process, for example, may be acceptable alternatives.²⁴

Colleges and universities make a variety of judgments, some procedural and others substantive, some disciplinary and others academic. Still others involve employment and resource allocations. The extent to which courts will impose

Univ. of Mo., 410 U.S. 667 (1973) ("[D]issemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

For a discussion of substantive constitutional limitations on decisionmaking by university officials, see Hollister, *A View of Some First Amendment Rights of College Students*, 2 J.L. & EDUC. 637 (1973).

20. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).
21. *Id.* at 158-59. *Accord* Perlman v. Shasta Joint Junior College Dist. Bd. of Trustees, 9 Cal. App. 3d 873, 879, 88 Cal. Rptr. 563, 567 (1970). *See also* General Order and Memorandum on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968); Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969) (procedural due process for suspension determination requires adequate notice, definite charge, and a hearing with an opportunity to present one's own side), *cert. denied*, 398 U.S. 965 (1970).
22. *See* General Order and Memorandum on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, *supra* note 21, at 147-48; Esteban v. Central Mo. State College, 290 F. Supp. 622, 629 (W.D. Mo. 1968) (The court will not "impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of law [which] would frustrate the teaching process and render the institutional control impotent."), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).
23. 419 U.S. 565 (1975).
24. *See generally* Antionore v. State, 49 App. Div. 2d 6, 371 N.Y.S.2d 213 (1975) (negotiated grievance procedure instead of state civil procedure system which accorded employee more procedural protection did not violate constitutional due process); Baird & McArthur, *Constitutional Due Process and the Negotiation of Grievance Procedures in Public Employment*, 5 J.L. & EDUC. 209 (1976).

their judgment to protect interests adversely affected by school decisions depends largely on the type of judgment involved and the type of interest affected. Cases like *Healy* and *Dixon* suggest that if decisions involve the resolution of factual controversies or conflicting rights recognized at law—decisions which courts typically make and on which educators have no special competence—judicial examination of university processes can be close and exacting. However, judicial concern for educator control of the academic environment has affected the court's choice of required safeguards. Moreover, only where basic constitutional rights are implicated have courts gone beyond a review of educational procedures and substituted their judgment for the educators' about the propriety of the standard being applied.

The active judicial scrutiny to which free speech issues and disciplinary procedures have been subjected has not been applied to review of either academic judgments or a university's allocation of resources.²⁵ In the case of academic judgments, the courts have demonstrated significant reluctance even to enter this arena.²⁶ The reasons are obvious. Given the volume of academic judgments made by every institution of higher education, university work could be halted if procedural guarantees such as notice and hearing were imposed every time a student was unhappy with a grade. Individual academic judgments are admittedly subjective and have long been considered part of the faculty's academic freedom. There is no available referent by which an outside

-
25. See *ACLU v. Radford College*, 315 F. Supp. 893, 896 (W.D. Va. 1970): "College officials properly have wide discretion in operating the school and in determining what actions are most compatible with its educational objectives. . . . This court has no desire to interfere with the operations of any school or to give encouragement to the trend of increasing challenges to the considered decisions of university administrators."
26. Thus, in *Board of Curators v. Horowitz*, 98 S. Ct. 948 (1978), the Supreme Court recently refused to upset a medical school's decision to dismiss a student for academic reasons, even though serious questions had been raised concerning the school's consideration of the student's grooming habits in reaching its decision. See also, *Cussler v. University of Md.*, 430 F. Supp. 602, 605-06 (D. Md. 1977) (promotion decisions in academia involve matters of professional judgment with courts thus reluctant to substitute their judgment for that of academics who are experts in their particular fields); *Keys v. Sawyer*, 353 F. Supp. 936, 939-40 (S.D. Tex. 1973) ("The assignment of grades to a particular examination must be left to the instructor. He should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by that professor for a satisfactory grade. The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades. Such an inquiry would necessarily entail the complete substitution of a court evaluation of a complainant's level of achievement in the subject under review, and the standard by which such achievement should be measured for that of the professor. It would be difficult to prove by reason, logic or common sense that the federal judiciary is either competent, or more competent, to make such an assessment."); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969) ("The judiciary is not the appropriate forum for decisions involved in academic rank."); *Horne v. Cox*, 551 S.W.2d 690, 691 (Tenn. 1977) (law student not entitled to "contested case" hearing on grade he received on a research paper as "[t]here are no constitutional or statutory provisions granting any legal rights or privileges to students in the educational institutions of this state with respect to grades for academic performance.").

court or agency could review academic determinations. Indeed, it may be almost impossible to construct procedural reforms that would not occasion second-guessing and gross invasion of the teacher's prerogatives. The resulting deference given academic questions, even on procedural grounds, is almost unlimited.²⁷ When it comes to reviewing resource allocation decisions, even greater administrative discretion has been preserved. Applying the traditional administrative law doctrine that administrative judgments on resource allocations are generally beyond judicial review, the Supreme Court has declared such questions essentially beyond its control.²⁸

B. Administrative Controls

The announcement and occasional enforcement of judicial controls is only a first step. As the aftermath of *Brown v. Board of Education*²⁹ illustrates, when important social policies are at stake, other social forces (here, the civil rights movement) may have to develop before court orders have widespread impact upon institutional behavior. In higher education, the due process "revolution" has not been solely a product of judicial decisions. More frequently, procedural changes have come about through the establishment of internal controls on discretion by governing boards and administrators. The adoption of procedures designed to assure a fair process has forced numerous changes, but most have been concentrated in two areas. First, universities generally now have established procedures governing student expulsions for misconduct (as well as other areas) which assure that the affected student receives a "fair hearing" before an adverse decision is made. Second, these institutions have also written codes or adopted standards which are applied in these hearings. Without such standards, the results could be arbitrary and unreasonable. Under these guidelines, if applied in a fair process, the results should be uniform and rational.

Following sound legal advice and intelligent policy, most institutions have not stopped at the edge of minimal legality. Their rules intentionally provide additional safeguards. They have sought to err on the side of additional procedures and standards, even where unconfined administrative discretion might be upheld. Moreover, and perhaps as a result of these efforts, there has been a change in attitudes and mores. The broad administrative authority which was once considered absolutely necessary to assure educational autonomy and

27. And even the erosion of that deference now occurring at the elementary school level, where occasional opportunities are available to question classification decisions, is seemingly limited to two minimal procedural requirements—namely, uniformity of application and fair administration of the regulations.

28. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

29. 347 U.S. 483 (1954).

administrative efficiency is now acknowledged to have been overstated. The advantages of shared authority, with the possibility of greater responsiveness and responsibility by students and faculty, have resulted in substantial extensions of once radical ideas. The universities have rediscovered an age-old truth of law—namely, that the development of fair procedures need not impair efficiency and that it may in fact contribute to the integrity of institutional decisionmaking.

The elements of a fair procedure in a disciplinary proceeding, as they have been worked out in the courts and through experience in the universities³⁰ and colleges, are now well-established. Four basic features are commonly included:³¹ (1) *Notice* of the charges must be given to the person being charged. Knowing the charges is the first step in preparing to meet them; energy and resources will not be spent (by either side) on irrelevant matters. A notice requirement also establishes what charges the university must sustain. (2) A *hearing* must be held where the charged person can hear and challenge the evidence presented against him, as well as present affirmative evidence in his own behalf. Evidence not presented in the hearing cannot be relied upon since that would defeat the essence of a fair hearing, the opportunity to challenge and rebut opposing evidence. Hearing procedures must be designed to assure that the tribunal will have all the evidence before it which it needs to decide the matter. (3) A *neutral tribunal* which decides the matter based upon the evidence presented is also essential to a fair hearing. The absence of bias and the independence of the tribunal are prerequisites if the hearing officer's decision is to be acceptable to the person charged. (4) A *reasoned decision* is a recent addition in many circumstances. This element usually includes the making of findings and the giving of reasons in support of the conclusion reached. It assures that the institution's articulated standards have been applied uniformly, and it provides visible evidence of the integrity of the decisionmaking process. Though not required to do so, educational institutions have added a fifth feature, and that is the *opportunity for review* of an adverse decision by a superior official.³² This is a further safety check. No process can assure complete accuracy or avoid all mistakes. It also recognizes the common fact that those on a lower rung of authority often impose relatively harsh remedies. And while superior officers seldom reverse unfavorable decisions, they frequently adjust the penalties downward.

30. See, e.g., Arizona State Univ. College of Law, Statement of Policies (1977-78), 12-14, on file at *Arizona State Law Journal*.

31. See, e.g., Office of the Dean of Students, Arizona State Univ., Policies and Procedures § III(B), at 12-16 (1977), on file at *Arizona State Law Journal*.

32. See, e.g., *id.*, § III(D), at 18-19.

These or similar procedures, then, are now followed in student (and employee) disciplinary proceedings where fact issues predominate. Similar but less formalized procedures also often govern questions of residence which determine whether in-state/out-of-state quotas and tuition apply. But other important decisions in which such procedures might seem applicable—such as student admissions, faculty hiring, and promotion—also involve matters of subjective judgment. It is generally impossible to reduce such decisions to the precise criteria that would make trial-type procedures workable, and the need to permit candid statements of opinion or to protect ongoing relationships may argue in favor of a broader measure of administrative discretion and flexibility. Thus, while some procedural formality and participatory rights have evolved, compromises have been required. Still, the change from the very recent past is startling.³³ Current procedures generally seem much fairer to the individual and also provide greater assurance to the university that an accurate yet rigorous judgment has been made. Obviously much more faculty and administrative time and effort are consumed by a systematic review of, for instance, a faculty promotion decision. This is not necessarily at greater “cost” to the university, however, if the overall quality of such decisions is improved thereby.

A review of admissions decisions, especially of the professional schools facing enrollment pressures, would reveal a less formalized procedure but a similar and significant change in process. On the other hand, other areas of discretion—student placement and references, grades and academic honors,

33. Consider, for example, the matter of faculty promotion and tenure. Not long ago, in institutional terms, the process was extremely rudimentary in many universities. The matter was not mentioned in advance, no resume or list of writings was sought, and no interview occurred. Indeed, the candidate was often wholly unaware that the faculty was even considering the matter. And the faculty apparently considered the matter without a committee report, close consideration of teaching performance, or even a reading of the candidate's scholarship.

Now compare the process as it is developing at both Arizona State University and the State University of New York at Buffalo today. Each year every probationary candidate's activities are evaluated by a college committee and summarized for the dean; individual discussions are held with the candidate to review his progress. Specific standards on the measure of performance must be met. At the time the primary decision is to be made, the candidate usually prepares a memorandum outlining his teaching responsibilities, writing and other scholarly activities, university and community service, and so forth. The committee then reviews his writings, attends classes, often interviews students, sometimes communicates with scholars in his field, reads student evaluations, and considers other evidence. The candidate may submit any evidence he wishes and even seek an interview. An open hearing is not held, however, because it is believed that the need for candor and the necessity for maintaining an ongoing relationship with the candidate are overriding requirements. Participation by close colleagues in the process is apparently viewed as an adequate substitute. The committee then submits its recommendations to the faculty. If an adverse recommendation is made, the candidate may be given an opportunity to respond; usually, however, a supporting colleague makes the case for him. The faculty is also provided with a copy of the candidate's resume and urged to read his writings. The matter is then considered *de novo*. This process continues with separate review by the dean and a university-wide committee with, in some instances, an opportunity to respond to an adverse recommendation along the way. See generally Arizona State Univ., Faculty Handbook § 3.5.6, at 42-43 (rev. ed. 1977), on file at *Arizona State Law Journal*.

teaching loads and salaries, to name a few—usually have not been affected, beyond the relatively minor changes that faculty unions have gained in bargaining. Although it may seem heresy for two deans to make this statement, it does seem to us that further changes, similar to those which occurred in faculty promotion and tenure, will occur here and in other areas. That is to say, deans and department chairmen now check with faculty on teaching assignments and loads before decisions are made, and decisions on leaves and sabbaticals are no longer solely matters of administrative grace. Nevertheless, additional concerns may limit future changes in faculty participation. Self-interest, for example, may skew faculty judgments on such matters as salaries and layoffs. If excellence is to be a university's standard, then faculty input will continue to be limited in this area. Similar reasons will, we think, preclude student participation in the determination of grades and academic honors.

In summary, a range of procedures and standards is used by institutions of higher education in limiting the discretion of administrators. If decisions are heavily dependent upon facts, it is likely that trial-type requirements will be relied upon. If non-quantifiable judgments are involved, less formalized processes will be used. University administrators do have to follow certain procedures, imposed by courts and by universities themselves, that may include requirements of notice, hearings, reasoned decisions, and the like, with varying degrees of formality. Yet the benefits of increased fairness and accuracy in decisionmaking generally outweigh the inconvenience and are in accord with the goals of an institution characterized as enlightened and a leader in reform.

III. OPENNESS, CONFIDENTIALITY, AND CONTROLS OVER INFORMATION

Paralleling the rapid evolution of "administrative due process" has been the even more rapid emergence of laws designed to govern the use and control of sensitive information. At the federal level alone, legislation has forced numerous major changes in information-management practices over the past dozen years. Broad disclosure of government files became the rule through the enactment and amendment of the Freedom of Information Act;³⁴ regulatory agency meetings have been opened to the public under the Government in the Sunshine Act³⁵ and Federal Advisory Committee Act;³⁶ protections against governmental abuse of sensitive personal information were provided by the Privacy Act of 1974;³⁷ and minimum standards for use of consumer credit

34. Pub. L. No. 90-23, § 1, 81 Stat. 54 (1967), *as amended by* Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-64 (1974) (codified at 5 U.S.C. § 552 (1976)).

35. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)).

36. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. (1976)).

37. Pub. L. No. 93-579, § 3, 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552a (1976)).

information were established by the Fair Credit Reporting Act,³⁸ the Fair Credit Billing Act,³⁹ and the Equal Credit Opportunity Act.⁴⁰ The state legislatures have also been active, and most states have either enacted or amended "open government" statutes during this period. The sweeping legislative agenda that was recently recommended by the federal Privacy Protection Study Commission⁴¹ suggests that more inclusive and more detailed information-control laws may be forthcoming.

This outpouring of legislation reflects a broad-based social demand to hold accountable large bureaucracies in both the public and private sectors. Recent history has often illustrated that the power which flows from the creation, collection, analysis, transfer, and disclosure of information can easily be abused. While the requirements of "administrative due process" described above provide some protections against arbitrariness when this power is exercised in relatively formal decisions, the information-control statutes generally seek to extend and adapt the procedural safeguards to a wide array of less formal, less visible, but no less important forms of bureaucratic decision-making.

A. *Individual Decisions and "Privacy" of Information*

These underlying concerns are evident in the federal information law that is of most direct concern to higher education: the Family Educational Rights and Privacy Act,⁴² officially known by the acronym "FERPA" but more colloquially referred to as the "Buckley Amendment." This statute grew out of several studies in the early 1970's which found that the recordkeeping practices of many elementary and secondary schools failed to protect the privacy interests of students and parents and gave them little or no voice in crucial decisions affecting their welfare.⁴³ It reflects a growing awareness that the individual's right to control personal information should extend beyond the traditional privacy concern with preventing public disclosure of sensitive personal data, to include the power to assure that the information is accurate, timely, complete, and used for a proper purpose. Although institutions of higher education were

38. Pub. L. No. 91-508, Title VI, § 601, 84 Stat. 1127 (1970) (codified at 15 U.S.C. § 1681-1681t (1970)).

39. Pub. L. No. 93-495, Title III, 88 Stat. 1511 (1974) (codified at 15 U.S.C. § 1666-1666j (Supp. IV 1974)).

40. Pub. L. No. 93-495, Title V, 88 Stat. 1521 (1974) (codified at 15 U.S.C. § 1691-1691e (Supp. IV 1974)).

41. See THE PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977).

42. 20 U.S.C. § 1232g (Supp. V 1975).

43. See generally THE PRIVACY PROTECTION STUDY COMMISSION, *supra* note 41, at 411-13; Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH. U.L. REV. 588, 594 n.38 (1975).

included in FERPA almost as an afterthought, it seems clear that the colleges and universities have at least as much power as the lower schools, and often more, to shape the individual student's future by the records they keep. In a competitive, credential-conscious society, "keeping a clean record," "building a resume," and collecting faculty recommendations are the common prerequisites for obtaining admission to desired programs, receiving scholarship assistance, and finding employment. Most institutions of higher education have been careful in exercising the powers that their recordkeeping functions confer, but they are not immune to mistake, bad judgment, sloppiness, or even malice in processing student records.

In retrospect some abuses of these recordkeeping powers now seem extraordinary, as in the case of the 1966 decision by administrators at the University of Michigan to release the membership records of several student political organizations to the House Un-American Activities Committee without notifying the students or giving them an opportunity to argue against disclosure.⁴⁴ Although the political climate has become less volatile in recent years, problems of government access to student records still arise.⁴⁵

To limit this potential for harm, FERPA and other contemporary "privacy" laws regard the collection, use, and dissemination of student records as a series of decisions—informal adjudications—that in practice will shape the individual's future. From this perspective it follows that the student should be provided the fundamentals of a fair procedure: notice, an opportunity to find out whether there is potentially damaging or inaccurate information in the file, and a chance to dispute or explain harmful items of information. In addition, since university records typically contain sensitive private information about a student's personal finances, academic performance, and physical, emotional or disciplinary problems, the individual student is given a voice in determining whether the information will be used or disclosed for purposes other than those for which it was originally collected.

Although these requirements are relatively mild, and the regulations implementing the statute permit the universities considerable flexibility in meeting FERPA's objectives, the Act has met strong resistance from the academic community. In essence, the principal objections are twofold: It is claimed that the required procedures are unduly costly to financially hard-pressed institutions, and that student access rights will impair the quality and accuracy of

44. See N.Y. Times, Dec. 13, 1966, at 20, col. 4.

45. The Veterans Administration, for example, recently obtained access to some universities' files in order to compare the performance of students who were receiving VA assistance with the performance of students who were not. Again, student consent was not requested. THE PRIVACY PROTECTION STUDY COMMISSION, *supra* note 41, at 409.

decisions, primarily by reducing the candor of recommendation letters and other judgmental evaluations. At present, there has not been enough experience under FERPA to permit a conclusive testing of these arguments. The evidence that is available, however, suggests that neither the cost objection nor the candor complaint has much substance.

First, in considering administrative burdens and costs, one should keep in mind that the early transition period—when regulated institutions are changing their practices to comply with a new statute—is likely to be the time of greatest expense and disruption. Yet, when the Privacy Protection Study Commission sought data regarding these early costs of compliance, it found no substantial evidence that the burdens imposed by FERPA were as severe as the critics claimed.⁴⁶ In retrospect, it is perhaps not surprising that the burden feared by FERPA's critics failed to materialize. Even before FERPA, state statutes and judicial decisions had created some student access rights in approximately half of the states,⁴⁷ and as a result some institutions may have already developed the required procedures. In any event, FERPA does little more than prescribe good recordkeeping practices and minimum standards of fairness in dealing with student files. Any college or university that did experience severe disruption in adjusting to FERPA's requirements probably had inadequate or slipshod record management systems and should benefit from rationalizing its practices to comply with the statute.

The second standard objection, that recommendation letters will become bland and uninformative if they can be seen by the students who requested them, is more difficult to evaluate. At the outset, there is a real question whether, as a practical matter, student access to recommendations has been significantly expanded by FERPA. The right to inspect recommendation letters may be waived, and few students are likely to risk the displeasure of the letter-writer by refusing to waive access rights.⁴⁸ But even if it could be shown that student access would "chill the candor" of recommendation letters, it is

46. In response to the Commission's direct request for data on the cost of implementing FERPA, only one institution produced evidence of extra expenditures. Its estimate, after careful analysis, was that FERPA cost about one extra dollar per year per student and, in doing the analysis, it discovered several places in which the flexibility FERPA allows would enable it to cut even that cost without detriment to the individual student. Had the cost of implementing FERPA been as great as the rhetoric would suggest, the Commission's request for data would surely have produced budgeting and planning documents reflecting the costs from institutions that had found them to be burdensome. While there are obviously some costs incurred in implementing the law—an extra page or two of printing, an extra form for those who wish directory information withheld, and the cost of discussions with faculty, staff, and administrators—it seems safe to infer that they are insignificant.

Id. at 418 (footnote omitted).

47. See Cudlipp, *The Family Educational Rights and Privacy Act Two Years Later*, 11 U. RICH. L. REV. 33, 34-35 (1976).

48. See THE PRIVACY PROTECTION STUDY COMMISSION, *supra* note 41, at 424.

doubtful that this would be a great loss. As anyone knows who has written or read a substantial number of student recommendation letters, they are a notoriously "soft" and unreliable source of information. If FERPA forces admissions officers and employers to use more objective data in making their decisions, the fairness and quality of these decisions should be improved rather than harmed.

The early implementation of FERPA has been neither vigorous nor uniform; nevertheless, there are indications that it is having some beneficial effects. The Act reportedly has caused some institutions to clean out stale or unnecessary files and has provided administrators with a basis⁴⁹ for refusing to hand over student files routinely to law enforcement agencies.⁴⁹ Beyond its practical impact, FERPA also suggests a positive symbolic or psychological change in the role of the individual confronting the educational bureaucracy. Instead of being viewed as a "data subject" whose file can be processed, manipulated, and disclosed at will, the student is restored to the status of a unique person who has enforceable rights to control the uses of particular information that relates to him.

B. Policy Decisions and Openness

While "privacy" statutes like FERPA are designed to assure fairness in the institution's treatment of the individual, the open records and open meetings laws speak primarily to the collective rights of affected groups to monitor and participate in the formulation of institutional policy. In this area, the compulsion of laws or regulations may be less significant to the universities than the general climate of opinion that the laws reflect. Although some public universities may be covered by general state freedom of information or "sunshine" laws,⁵⁰ the movement toward open decisionmaking in the academic world came largely in response to the demands of students and other internal constituencies in the late 1960's and early 1970's. The rationale for greater disclosure and participatory rights is familiar by now: Openness deters or exposes abuses, brings relevant facts and points of view to the surface before decisions become final, and makes decisions more acceptable to persons and groups who have been given an opportunity to participate in the formulation of policy.

In this area, as in the privacy debates, the argument has been made that full disclosure "chills candor" and inhibits frank discussion. Whatever force this

49. Cudlipp, *supra* note 47, at 39.

50. See generally Shurtz, *The University in the Sunshine: Application of the Open Meeting Laws to*

argument may have in other contexts, it is unpersuasive when applied to most faculty deliberations. Indeed, some positive benefits may be realized if the prospect of an open meeting forces participants to "do their homework," rather than rambling on extemporaneously, and dampens rhetorical excesses in favor of more realistic problem-solving efforts.

The question of how openness affects governance of universities and other large institutions is, of course, a good deal more complicated than this. Observers of the many conflicts over access to the meetings and records of the federal bureaucracies have begun to examine more closely the manner in which openness can alter the dynamics of group decisionmaking. Some of these commentators have concluded that full disclosure damages the processes by which conflict is mediated and compromise generated,⁵¹ while others have asserted that widespread participation tends to perpetuate the status quo by giving more interest groups an effective veto over proposed actions.⁵² The federal experience also suggests that the aggregate costs of a full disclosure policy can be overwhelming, at least when the institution in question is not trusted by large numbers of the concerned public.⁵³ Implementation of the new information laws is also bringing to the surface the implicit tension between the collective accountability objectives of the openness laws and the individual accountability goals of the privacy statutes. Information that may be useful in monitoring the organization's performance could also be harmful to particular individuals if disclosed to the public, and finding an acceptable balance between the conflicting interests of openness and confidentiality is often a difficult task.

In short, the process of implementing, understanding, and refining the recent information-control statutes is still at a relatively early stage. As is often true of major new legislative programs, both the benefits and the costs of change have sometimes been oversold. But underlying the exaggerated claims and criticisms is an important, unfinished social effort to find better means of controlling and humanizing large bureaucratic organizations, including the bureaucracies of higher education.

the University Setting, 5 J.L. & EDUC. 453 (1976).

51. See Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 739-42 (1975).

52. See Cleveland, *How Do You Get Everybody In on the Act and Still Get Some Action*, reprinted in 120 CONG. REC. § 19, at 455-57 (daily ed. Nov. 18, 1974).

53. The United States Department of Justice, parent agency of the FBI, spent more than half a million man-hours responding to requests for information in 1976, and at one point the agency's backlog in processing requests extended for several years. ACCESS REPORTS, April 5, 1977, at 6-7. See also *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

IV. RULES, REPORTS, AND SANCTIONS

While due process and open government are important aspects of the university's changing relationship with its internal constituencies, the issue of how universities relate to external governmental influences—particularly those bureaucracies which fund and regulate higher education—is a more pressing concern in the minds of most administrators.

To an increasing extent, the regulatory programs that seek to change university practices are enforced through administrative rules, reporting requirements, and sanctions. Requirements for affirmative action in hiring, prohibitions on sex and age discrimination, occupational safety standards, and the recent regulations on fair treatment of the handicapped all exemplify regulatory programs which operate through a broad delegation of authority to an administrative agency, which then has the responsibility for formulating detailed implementing rules.

In considering the effects of these regulatory programs on the universities, one must be aware of the differences between the formal paradigm of administratively imposed rules, reporting requirements, and sanctions, and the informal processes of bargaining, mediation, and mutual adjustment that give life to the formal model. Much of the hostile reaction among academicians to the process of administrative regulation seems to be directed toward the formal model, which is perceived as a system of inflexible rules imposed by rigid, unresponsive bureaucracies, and backed by devastating sanctions. Such a limited view of the regulatory process may be not only distorted, but also self-defeating. Most regulatory bureaucracies can be moved, but only by those who push hard and in the right places. Knowing where and how to "push" requires an appreciation of both the formal and the informal procedural tools that are available to the university as a regulated industry.

A. *Rulemaking*

The issuance of an administrative rule typically follows an extended period of development, during which interested persons have had opportunities to affect the content of the formal rule. Even in its simplest, most discretionary form, administrative rulemaking usually provides affected interests with the rudiments of fair procedure. At a minimum, they will be given notice and an opportunity to submit written comments on the proposed rules. In many instances, the agency is required by statute to recognize considerably more elaborate procedural rights, including formal hearings with the opportunity to cross-examine, and to provide a detailed justification for the rule on the basis

of the record it has compiled.⁵⁴ Judicial review is commonly available before the rule is enforced, and reviewing courts have been increasingly willing in recent years to probe in depth the factual, legal, and policy bases of administrative rules.⁵⁵

Beneath this formal superstructure, there is often an informal process of information-exchange and negotiation between the agency and interested parties.⁵⁶ Pre-publication negotiations are a common feature of the rulemaking process because they can be beneficial to both the regulators and the regulated. The agency typically knows less about the operations of the regulated industry and the possible consequences of the rule than industry members do; and most bureaucrats have an aversion to surprises, especially those which may bring public or political criticism. For the regulated parties, informal give-and-take with agency representatives provides an opportunity to shape the agency's thinking before positions have solidified.

The effectiveness of the regulated university at the informal levels of decisionmaking may depend in large measure on its willingness and ability to use the more formal procedural rights that are available to it. In most fields of economic regulation, government agencies have learned the hard way that a failure to respond to legitimate objections from the regulated industry can lead to bitter, protracted hearings at the agency level and judicial reversals of the rules that are finally issued. The academic community has seemed reluctant to resort to formal procedures and lawsuits, and as a result may have less leverage in the informal stages of rulemaking than it could have. However, this condi-

54. For a discussion of the various forms of administrative rulemaking procedures in the federal system, see Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1277 (1972).

55. See generally B. SCHWARTZ, ADMINISTRATIVE LAW § 204 (1976).

56. An example of informal contacts affecting agency rulemaking is provided by the following description of the drafting of affirmative action rules in 1972:

[A]t the end of July 1972 a 100-page draft of guidelines for the application of the Executive orders . . . to institutions of higher education was prepared [by the U.S. Department of Health, Education and Welfare] and sent to some two dozen university officials for their personal review and their comment by mid-August, as it was hoped that a guidelines document could be published by the opening of the academic year in September.

Some of the university officials who received the document presented to the appropriate officials in the Department of Labor their strong objections to parts of the HEW draft. The Director of Federal Contract Compliance in the Department of Labor has to approve any regulations [of this nature]

The Department of Labor officials, recognizing that the 100-page draft was unnecessarily detailed, ambiguous, and intrusive, instructed HEW to develop a new draft cut down perhaps to one-third the size, tightly organized and objectively written.

HEW issued its guidelines in October 1972. For the most part, these guidelines follow the specifications stated by the Department of Labor.

Lester, *Antibias Regulation of Universities*, reprinted in *Hearings on Federal Higher Education Programs Institutional Eligibility*, 93d Cong., 2d Sess., pt. 2B, 1006, 1072-73 (1974).

tion may be changing as the regulatory process becomes more familiar and pervasive in higher education.

B. Reporting Requirements

When the regulatory process shifts from rulemaking to the enforcement phase, another set of dynamics comes into play. Many contemporary regulatory systems, including the major federal programs affecting higher education, rely heavily on reporting requirements which empower the agency to specify the nature and format of information that must be filed by the regulated industry. The "utilization analyses," "goals and timetables," and other paperwork required under the affirmative action program are familiar examples of this approach. From the government's perspective, reporting requirements have obvious advantages over alternative enforcement strategies, such as waiting for complainants to report violations or sending out investigators to examine the activities of particular institutions. Regular reports can provide a detailed, systematic view, extended over time, of the compliance activities of the regulated industry and identify targets for more intensive enforcement activities. Self-reporting can also provide more accurate information, at less total cost, than having government investigators who are unfamiliar with the institution collect the data. And, perhaps most important of all, reporting requirements can shift a large part of the costs of compliance from government to the regulated industry. Of course, the cost-shifting feature is the reason why reporting requirements often are distasteful and burdensome to the regulated industry, and as a result these provisions are a frequent point of conflict in administrative regulation.⁵⁷

The formal legal system generally confers broad information-gathering power on the administrative agency. The statutes permit considerable discretion in prescribing the content and timing of reports and in obtaining access to records. The person or organization that is ordered to report may be able to get some form of court review, but the scope of this review tends to be quite limited.⁵⁸

57. The issue whether the universities or the regulators should bear these costs is a complex one, involving questions of the magnitude of the cost burden, where it will finally come to rest, and what the consequences of the burden will be upon those who must bear it. It is easy to imagine extreme situations in which allocation of all compliance costs to either the regulators or the regulated would have unfortunate effects. For example, if the regulatory requirements impose major costs on the universities and these costs are passed on to students in the form of substantial tuition increases, the net result could be reduced educational opportunities for low and moderate income students. On the other hand, forcing the regulatory agency to bear all expenses out of its appropriation could totally frustrate implementation of a desirable program. Without better data concerning the nature and distribution of compliance costs, there is little basis for choosing among these and other plausible arguments relating to cost-shifting.

58. Compare B. SCHWARTZ, ADMINISTRATIVE LAW § 48 (1976) (administrative agencies have broad powers to require reports and issue subpoenas to assure compliance with statutes and regulations) with note 55 *supra* and accompanying text.

At the informal level, however, the realities are somewhat different. Even if a court battle over reporting requirements is won by the agency, the delays and other costs associated with litigation can slow or cripple an enforcement program. Moreover, the agencies are accountable not only to the courts, but also to legislatures and executive officials, and these political overseers are often very responsive to the regulated industry's claims that they are being subjected to an unnecessary paperwork burden. On the other hand, the regulated cannot be too intransigent, since resistance creates costs and risks, including the loss of goodwill and support that can result from seeming to be an opponent of the underlying goals that the regulatory program fosters. Few university administrators, for example, want to appear hostile to the ideal of equal opportunity for minorities, women, or the handicapped—a reputation that might well follow from vociferous opposition to reporting requirements.

When these conflicting pressures exist, neither the regulators nor the regulated can escalate the conflict without risk to themselves. Often, both sides give a little, and a compromise set of reporting requirements is worked out. This is probably already happening in the administration of reporting requirements applicable to the universities. While educators have been complaining about the stifling paperwork burden associated with federal programs such as affirmative action, civil rights advocates have sharply criticized the Higher Education Division of HEW's Office for Civil Rights on the ground that it has failed to impose on the universities reporting requirements which are comparable to those demanded of other federal contractors.⁵⁹

Even when the agencies are willing to compromise on reporting requirements, there remains a considerable (if poorly documented) cost burden for the universities to absorb.⁶⁰ Part of this burden may result from overlapping, piecemeal regulatory programs which are administered by different agencies, or different subunits of the same agency, sometimes inconsistently.⁶¹ At the same time, many academic observers suspect that the mandatory reports ask for information that is irrelevant or misleading, and that the quantities of data demanded cannot even be digested by the regulators.⁶²

59. See, e.g., UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, Vol. III, at 275-281, 269 (1975).

60. Whether the universities *should* continue to absorb these costs, even if unnecessary expenses can be minimized, is, of course, a separate issue. See note 57 *supra*.

61. See, e.g., Vetter, *Affirmative Action in Faculty Employment Under Executive Order 11246*, printed in *Hearings on Federal Higher Education Programs Institutional Eligibility*, 93d Cong., 2d Sess., pt. 2A, 357, 368-75 (1974).

62. See generally Lester, *supra* note 56. See also the assertion of President Robben Fleming of the University of Michigan:

[T]he cost and effort [of compiling information] might be justified if it could be demonstrated that it is productive. On the contrary, it is evident that enforcement agencies are not staffed to examine and analyze the mountains of material which they

While these problems are real, they are not incurable. In large measure they can be traced to conditions such as understaffing in the regulatory agency and the unfamiliarity of enforcement officials with the operations and mores of the university. In the affirmative action program, another aggravating factor has been the use of a set of reporting requirements which had been developed to deal with hiring practices in industrial enterprises, and which therefore often did not fit the rather different recruitment and employment practices found in higher education. Given the inherent flexibility of the administrative process, it should be possible to work out satisfactory solutions for many of these problems in the reporting requirements, if the regulated seize their opportunities to influence the regulators.

C. Enforcement Actions

The final stage in this paradigm of the regulatory process is enforcement against those who have violated the rules. When formal accusations are made against a member of the regulated industry and sanctions are threatened, the full spectrum of due process rights to notice and a fair hearing generally comes into play, and judicial review is usually available if the accused is found "guilty" at the administrative level. Perhaps the most significant feature of the formal sanctioning process, however, is the fact that it is rarely used in many regulatory programs. This seems especially true when sanctions involve the termination of large-scale federal funding arrangements, a situation which encompasses many of the regulatory programs affecting higher education. Even the affirmative action program, which has been highly controversial since the 1972 amendments to the regulations,⁶³ has not generated a substantial amount of formal enforcement activity. Indeed, not until 1977 were reports published describing the first formal enforcement proceeding against a university for violation of the Executive Order, and even then the administrative decision was not final.⁶⁴ Minority and women's rights advocates have complained bitterly about HEW's tendency to negotiate with the universities over compliance rather than bringing formal enforcement actions,⁶⁵ and at times

are accumulating. Unless the whole procedure is a form of punishment . . . it is hard to see what really useful purpose it is serving.

Hearings on Federal Higher Education Programs Institutional Eligibility, *supra* note 61, at 93-94.

63. 36 Fed.Reg. 23,152 (1971) (codified at 41 C.F.R. Chapter 60, part 60-2 (1977), and commonly known as Revised Order No. 4).

64. *See U. of Texas Faces Loss of Federal Contracts*, CHRONICLE OF HIGHER EDUCATION, Feb. 22, 1977, at 11, col. 1.

65. *See, e.g., Hearings on Federal Higher Education Programs Institutional Eligibility*, *supra* note 61, at 326 (prepared statement of Mordeca Jane Pollock, Employment Compliance Task Force, National Organization for Women) ("HEW has repeatedly neglected to initiate enforcement proceedings when it has found violations by colleges and universities Instead, it has routinely elected to pursue protracted negotiations, which sometimes last

they have resorted to lawsuits against the agency in an effort to compel more vigorous enforcement of equal opportunity rules.⁶⁶

The reasons behind the agencies' reluctance to employ the formal sanctioning apparatus can be found in the sanctions themselves. When the principal or only sanction is a total termination of federal funding, or a flat ban on future grants and contracts, the sanctions may actually be too devastating to use. A funding cutoff could threaten the survival of even a major university, could harm innocent students and faculty who were not responsible for the violation, and could prevent the government from procuring needed products or services from the offending institution. These sweeping sanctions are, as one knowledgeable observer put it, "clumsy and overpotent,"⁶⁷ and it is small wonder that the regulators will not lightly invoke them. By the same token, many university administrators may regard any possibility of a federal fund cutoff, however slight, as a risk they cannot accept.

These incentives to avoid formal proceedings doubtless tend to compel bargaining and a search for compromise solutions, but they may also generate some needless friction and cynicism in all parties involved. Enforcement officials may feel that there is no credible response they can make to violations that do not merit the severest sanctions; educators may feel that they are powerless to resist the demands of enforcement officials even when the university can make a relatively strong case for its position; and the intended beneficiaries of the regulatory program may feel that enforcement is a sham because the statutory sanctions are never imposed. A more realistic range of flexible sanctions could improve relationships among the agencies and the universities, and provide a more structured context for the processes of negotiation and compromise.

The general outline of the regulatory process that emerges is a system in which change often takes place incrementally through bargaining and compromise, beneath a formal structure of legal and administrative procedures. Living in this sort of environment may be uncomfortable for many educators. By training and temperament, academicians tend to prefer clarity to ambiguity, and prefer principled, reasoned decisions to bargained or compromised outcomes.⁶⁸ But adapting to a system of regulation does not inevitably result in a

several years, and which ultimately lead to no relief for victims of discrimination.''). See also *id.* at 73 (statement of Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education & Welfare).

66. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), discussed in THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, *supra* note 59, at 256-64.

67. Vetter, *supra* note 61, at 359.

68. A classic articulation of this perspective is found in the chapter entitled *Liberal Jurisprudence* in T. LOWI, THE END OF LIBERALISM 125-56 (1969).

surrender to raw pragmatism, unrelieved by any aspiration or fidelity to higher values. Regulation of higher education, like most other fields of public administration, involves efforts to reconcile in particular settings the conflicts among important, widely-shared values, such as academic freedom and equality of opportunity, fairness to the individual and educational quality. If these goals are kept in sight, a process which leaves room for negotiation and accommodation among contending interests may be the surest method of producing social change.

V. CONCLUSION

As the influence of regulatory procedures, programs, and techniques spreads throughout higher education, there will be fundamental changes not only in the way the university interacts with the outside world, but also in the way it governs itself internally. University administrators will increasingly come into direct contact with the various regulatory bureaucracies. Dealing effectively with this new set of external constituencies will require further development of capacities and skills that most administrators already possess in some degree. Perhaps most important is sensitivity to changing social needs and demands.

Regulatory intervention is likely to be most intrusive and disruptive when the institution being regulated has failed to adapt to the evolving concerns of the society. Administrators also should develop a more sophisticated understanding of the workings of the regulatory process, including the various procedural tools and techniques that can be used to affect agency decisions. And they must be willing to use these tools in appropriate circumstances—to bargain hard when there is room for reasonable accommodation and to resort to the courts when litigation is necessary.

The regulatory presence is likely to be felt not only in more frequent contacts between university administrators and government regulators, but also in the evolving relationship between the universities and intermediary organizations like the American Council on Education (ACE). In many areas of economic regulation, the enactment of regulatory programs has resulted in increased powers and responsibilities among the trade or professional associations which represent the collective interests of the regulated industry.⁶⁹ This often happens because a single, central association can develop influence and resources that

69. This is not to suggest that there is a simple, universal pattern in which trade associations arise and gain power in response to the stimulus of government regulation. As Gabriel Kolko has pointed out, existing industry groups may actively seek government regulation as a means of achieving their own purposes, and government may try to use or co-opt voluntary associations as a means of implementing state policy. See generally G. KOLKO, *MAIN CURRENTS IN MODERN AMERICAN HISTORY* 107-43 (1976). Significant for present purposes are the advantages of the voluntary association in responding to the regulatory environment.

its dispersed members will rarely be able to match. With a full-time, specialized staff, the association can master the intricacies of regulatory programs more completely than the administrator or manager who devotes only part of his attention to the task. It can also bring together reliable information about general trends and conditions within the sector of the economy it represents, and its position as a general spokesman of the industry gives the association's views more weight and authority. Through continuous monitoring of the regulatory bureaucracies, a central association often gains the important advantages of access and timing: It can reach the key decisionmakers with data and argument at a time when regulatory policy is still in flux and amenable to change. In short, the greater economy and effectiveness of central representation often lead the regulated parties to delegate the principal responsibility for protecting their interests in the regulatory process to the association.⁷⁰

If intermediary organizations, such as ACE, do assume an enhanced role as spokesmen for the concerns of university administrations, there may be significant changes in the individual universities' relationships to these associations. One possible consequence is increasing pressure for member institutions to support the position advocated by the association: A dissident university may find itself in the doubly disadvantageous position of not only having to represent itself without the resources and expertise of the association, but also having to argue against the weight and authority of an establishment viewpoint. The associations, by virtue of their specialized knowledge and their strategic position between government and academe, may also take a more active role in shaping collective policy positions, rather than simply reflecting the desires of their constituents.⁷¹ If the power and influence of the associations do grow in

70. There are already some signs that higher education is following the patterns set by the regulated industries in their dealings with government agencies. ACE and the more specialized professional and academic associations are becoming more effective participants in the regulatory process, and the *Chronicle of Higher Education* now covers government regulatory stories as intensively as many industry trade journals do. Moreover, the "capture" of administrative agencies by the regulated industry seems to be well advanced in the field of higher education. Two university chancellors were appointed recently to the ranking positions dealing with higher education in the federal bureaucracy, Assistant Secretary for Education of the Department of HEW and U.S. Commissioner of Education. See Roark, *Washington's Week: New Faces In*, *Chronicle of Higher Education*, Jan. 24, 1977, at 1, col. 3. At about the same time, a congressional report criticized the Federal Advisory Committee for Higher Educational Equal Employment Opportunity Programs on the grounds that it was dominated by university administrators, and tended to make recommendations that weakened the enforcement of equal opportunity laws. See Fields, *House Unit Urges Single Anti-Bias Authority*, *Chronicle of Higher Education*, Feb. 22, 1977, at 11, col. 1. Finally, higher education spokesmen have recorded notable lobbying victories, such as the congressional amendment of FERPA only one month after the original "Buckley Amendment" went into effect. See Comment, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH. U.L. REV. 588, 588-89 (1975).

71. Cf. L. DEXTER, *HOW ORGANIZATIONS ARE REPRESENTED IN WASHINGTON* 103 (1969) (emphasis omitted):

this fashion, the universities may find themselves much more deeply involved in questions of who will lead these organizations, and what policies and priorities they should adopt.

Increasing contact with the regulatory process may also bring changes in the internal governance of the universities. The twin pressures for increased procedural fairness to internal constituencies and greater accountability to outside regulators should continue to expand the administrative workload, requiring more administrators and inflating the costs of administration. Internal administrative stresses may be magnified as universities juggle personnel and organizational structures to meet these increased demands. Efforts to shift some of these costs back to the regulatory bodies that are imposing procedural requirements also seem likely to increase. The recent disputes over the adequacy of government reimbursement of indirect costs to universities receiving research grants may well be just the preliminary round in an extended struggle over who will ultimately bear the burdens of regulation.

As the administrative work of the universities grows in size and complexity, there may also be changes in the kinds of people who are involved in academic administration. In this emerging regulatory environment, faculty members who have specialized in the humanities or the hard sciences may find it increasingly difficult to move into administration; by contrast, teachers who have trained in fields related to administration—management, law, policy studies, and the like—may have a relative advantage. Ultimately, as a result of the continuing pressures of specialization and workload, much of the work of academic administration may be delegated to individuals who are making a career in the field and who have only minimal direct involvement in the teaching and research missions of the university.

If this trend does materialize, it can have a high potential for conflict within the universities. In any large bureaucracy, tension often arises between “line” and “staff” personnel; in the university these tensions may be enhanced by the unremitting hostility that many faculty members feel toward anything that even faintly resembles regimentation or bureaucratic red tape. The university administrators, who speak the same language as the external regulators and accept at least some of their demands as legitimate, may become a lightning rod for faculty members’ distrust and contempt for the modern bureaucratic state.

Many clients and employers do not like, naturally enough, the idea that people whom they have hired are guiding and educating them. Nevertheless, a good many clients are educated or guided

. . . . The most important service of Washington representatives to clients and employers is teaching the latter to live with the government and in the society. That is, Washington representatives instruct a good many clients how to adapt, accommodate, and adjust.

In its extreme form, this distrust can breed conspiracy theories which hold that swarms of petty officials inside and outside the universities are plotting to subvert academic values.⁷² A more moderate variant of this perspective sees the university administrators as well-intentioned but misguided, incorrigible "bureaucratic outsiders" whose overzealous efforts to save the university may end up destroying it. In this view, adopting the bureaucratic style—devotion to rational planning, procedural regularity and fairness, reasoned decisions and explicit rules, efficiency, and accountability—"does not serve to insulate the University from outside pressures to control it; rather, it cuts channels to transmit those pressures inward."⁷³

Explicit in these critiques, and implicit in others, are questions not only about who will control higher education, or how control will be exercised, but also about the ends that will be sought by those using the various regulatory techniques and processes. Bureaucracy and its procedures are tools which can be used wisely or poorly, in the service of many purposes. If used sensitively, administrative procedures can harness the collective energies of large organizations to achieve desired goals effectively, responsibly, and humanely. But procedures can become ends in themselves, a repressive or stultifying force, if they are not kept subordinate to primary values. Experience suggests that the organization or institution which lacks a clearly defined, widely shared sense of mission or identity is most vulnerable to strangulation by red tape; and it may be that much of the anguished reaction to government regulation springs from deep-seated doubts that the universities really have this shared sense of mission.

In recent decades, the traditional ideal of the university as a collegium of

72. A Carnegie Commission study of federal anti-bias regulation at times comes close to this extreme:

... HEW enforcement officers in some regions seek to make numerical goals and timetables by department or "hiring unit" a key element in affirmative action programs, including for faculty The authority structure they tend to favor conflicts with the collegial or faculty system of shared responsibility in decision making by mature teacher-scholars. The HEW enforcement officers, interested in certain results more than in procedures to assure the best professional judgments, seem desirous of enhancing the authority of a university's newly appointed equal employment opportunity officers and coordinators, who, for the most part, have not been drawn from the faculty

[T]hrough their power to approve or disapprove affirmative action plans, HEW enforcement officials are, either consciously or unconsciously, attempting to alter the structure of authority and governance in universities in line with the industrial model In doing so, they are tending to undermine faculty self-government

Lester, *supra* note 56, at 1118-19.

73. The language is taken, admittedly somewhat out of context, from a dialogue concerning a draft academic plan for the State University of New York at Buffalo. SUNYAB Reporter, Jan. 13, 1977, at 8, cols. 1-2. However, the statement from which the quotations come seems to reflect a broad, underlying suspicion of bureaucratic approaches to the governance of universities. In this respect it probably exemplifies the attitude of many who are involved in higher education.

interacting scholars and students dedicated to a common core of academic values, and sharing a common language of discourse, has seemed increasingly remote and unattainable. To some observers, centripetal pressures—narrow disciplinary specialization, the demands and inducements of outside funding sources, the pull of instrumental and vocational interests—have tended to transform the university into a “multiversity,” a place which in Clark Kerr’s description⁷⁴ often appears to be no more than “a mechanism held together by administrative rules and powered by money.”

These critiques can be faulted for romanticizing the past and overstating the present crisis, but they nevertheless raise serious questions that go to the heart of the evolving relationship between government and higher education. If, as we believe, the colleges and universities can succeed in articulating to themselves and their constituencies the goals, values, and functions that are fundamentally important to their role in contemporary society, then the increasing interactions with the regulatory process may be as much an opportunity as a threat. But it is essential to approach this task in the right spirit—to avoid what Gerald Grant and David Reisman have called “fantasies of omnipotence” and “fantasies of total powerlessness” while trying to discover “what kinds of human quality can be nurtured in a college setting which can support the rationality necessary for a technological order along with, rather than in antagonism to, the more contemplative and expressive values.”⁷⁵

74. C. KERR, *THE USES OF THE UNIVERSITY* 20 (paper ed. 1972).

75. Grant & Reisman, *An Ecology of Academic Reform*, 104 *DAEDALUS* 166, 185-86 (1975).

