

# THE REGULATORY PROCESS

MARK S. MASSEL\*

We need to take a fresh look at the regulatory process. In recent years, we have been offered many criticisms of the administrative agencies, some suggested changes, and a few defenses. However, much of the discussion is so repetitive that it seems like an exercise in pouring old beer into new steins—producing a stale, flat potion. In the main, these deliberations do not encourage affirmative analysis of the more pressing problems of government regulation. Nor do they offer a firm basis for imaginative inquiry into the substance of public policy, rather than the form.

The discussions have reflected a familiar preoccupation with limited procedural technicalities, rather than an active interest in the practical problems of administrative regulation and its results. Semantic tags have been employed widely, if not wisely. The dichotomy of “rule-making” and “adjudication” has been employed to describe the total regulatory process. Meanwhile, the important processes of policy formulation, negotiation, and administration have been overlooked. Attention has been riveted on the independent commissions. Accordingly, the equally important regulatory functions of the executive departments have escaped notice.

In the almost ritualistic procession of critical moves and defensive countermoves, consideration has been confined largely to peripheral issues of procedure and organization. Substantial policy issues have been swept under the rug. The objectives of the regulations, together with their achievements, or failures, have been virtually disregarded in the search for changes in administrative form.

Most importantly, government regulation has been treated as an insulated, technical activity of government. Much of the discussion has been founded on the implication—stronger because unstated—that regulation is a legal function that can be protected from the contamination of other government activities. This academic assumption has been so imbedded that most of the debating gambits have overlooked three significant features of the regulatory process: first, it is inherently a political activity that is a substantial element in modern economies; second, the regulatory functions are too intertwined with a host of other government activities to be set as a class apart; and third, while procedural problems are important, they are subsidiary to the objectives and accomplishments of the regulatory functions.

Adequate consideration of the policy issues that are inherent in the regulatory process will depend upon a continuing awareness of our traditional anxiety about

\* B.S. 1930, M.A. 1933, J.D. 1933, New York University. Member of the New York and Illinois bars. Member of Senior Staff, The Brookings Institution, Washington, D.C. Author, *BUSINESS RESERVES FOR POST-WAR SURVIVAL* (1943). Contributor to professional periodicals.

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government regulation, an anxiety that stems from our inability to make clear-cut decisions about what functions we want government to undertake. Our ultimate public policy goals are an interesting compound of social, economic, political, and international aims. Many of these aims conflict with each other. At least, they give such an appearance. For social and political reasons, we want many independent private enterprises because we believe that they will insure the effective working of the democratic process and equality of opportunity; at the same time, we look to large corporate aggregations to satisfy certain economic and military objectives. Many look to government for the solutions to broad economic and social problems; but others are restive about government interference. We want to assure everyone of his day in court; yet, we are unhappy with the lengthy administrative hearings that this objective entails.

Unfortunately, these ambivalent feelings about regulation have produced an analytical quirk. We habitually compare the actual results of one alternative with the theoretical workings of another. For example, when we discuss the regulatory process, we tend to compare its present operations with the theoretical advantages of competition. Conversely, when we consider competition, we are apt to contrast the current conditions of the market place with the theoretical perfection of regulation.

This quirk extends into our considerations of the regulatory processes. Critics who emphasize the commissions' failure to formulate policy frequently paint an idealized picture of congressional capacity to make sharp policy decisions. Others compare Congress' hesitation to set down understandable rules with an optimistic portrayal of effective political leadership in the executive branch.

The dynamic pressures affecting our national life require a basic reorientation in our approaches to the regulatory process. We can no longer meet the requirements of current policy problems with technical changes in procedure. These issues require substantial attention to questions of substance. They call for broad-gauge consideration of the regulatory process in the context of the full range of government activities, rather than the narrow field of legal procedures.

To this end, this paper briefly reviews the criticisms of the agencies. It then sketches in an analysis of the assumptions that underlie this criticism. Finally, it suggests some impressions of what types of analyses are needed for evaluation of the regulatory process—evaluation that is an essential ingredient of improvement.

## I

### CRITICISMS AND PROPOSALS

The current century has produced a proliferation of governmental regulatory activities. Each development has quickly produced successive waves of critiques, defenses, and suggested improvements. While there has been a stimulating variety in the expository details, the underlying patterns of criticism and cure have remained

unchanged. For example, proposals for the abolition of the administrative agencies appear at irregular intervals; some made about twenty-five years ago were repeated recently. Complaints about the inefficiency and ineffectiveness of the commissions made by Henderson in 1924<sup>1</sup> have their counterparts in more recent reports by American Bar Association committees,<sup>2</sup> Hoover Commission Task Forces,<sup>3</sup> and such writers as Hector<sup>4</sup> and Landis.<sup>5</sup>

The criticisms and suggestions need no elaboration here. A quick review of their major elements should suffice for our present purposes.

Criticism has taken several tacks covering a wide range: inefficiency; undue delay and expense in regulatory procedures; prejudgments of controversies; lack of rules; enunciated rules are too detailed, too complex, and too tight; too many *ex parte* influences; too much contact with the regulated industry; too little understanding of the problems of the industry; too much power in the hands of the staff; commissioners' failure to write their own opinions; inadequate personnel on commissions and their staffs; corruption; "sandbagging" of companies and private citizens; and lack of coordination.

Similarly, suggested cures have a familiar ring: set up administrative courts; assign legislative functions to the Congress, adjudication to the courts, and administrative work to the executive branch; reshape the agencies in the image of the courts; extend terms of commissioners to ten years; require that commissioners write their own opinions; prohibit or regulate *ex parte* communications; establish policy leadership through a presidential overseer; and improve personnel.

It is noteworthy that the major legislation that has been passed to effectuate a "cure" was concerned with procedural problems exclusively. The Administrative Procedure Act,<sup>6</sup> as its name implies, dealt with procedures for enunciating rules, instituting and processing cases, holding hearings, and issuing decisions. It set up barriers between prosecuting and judicial functions by blocking off communications within the agency. For example, the Federal Trade Commission, itself, may not consult its own staff of economists or accountants when it reviews the decision of a hearing examiner. This rule emerges because the Commission's economists are employed in divisions that are called upon to aid the counsel supporting the complaint.

<sup>1</sup> GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924).

<sup>2</sup> ABA Special Comm. on Legal Services and Procedure, *Report*, 81 A.B.A. REP. 491 (1956); ABA Special Comm. on Administrative Law, *Report*, 61 A.B.A. REP. 720 (1936).

<sup>3</sup> COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE* (1955), *TASK FORCE REPORT ON REGULATORY COMMISSIONS* (1949).

<sup>4</sup> Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960)], *The New Critique of the Regulatory Agency*, 12 AD. L. BULL. 12 (1959).

<sup>5</sup> Landis, *The Administrative Process: The Third Decade*, 47 A.B.A.J. 135 (1961); JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)].

<sup>6</sup> 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

## II

## UNDERLYING ASSUMPTIONS

While much of the criticism is merited, there has been no systematic evaluation of either the critiques or the suggested cures. Each attack is based on assumptions about the nature of the regulatory process, its operative characteristics, and its goals. Yet, there is a virtual dearth of analysis regarding these assumptions as well as the criteria that are employed in the offensive and defensive countermoves.

In order to attain a practicable program of improvement, we must define and analyze these assumptions. We must determine how well they fit the actual situation. We must check them for consistency. We must reconsider the premises on which they are founded, and determine whether their compass has been sufficiently broad or whether it has been so narrow that vital deficiencies in the regulatory process-in-being have been overlooked.

This section outlines the assumptions that appear to be implicit in the major criticisms. It indicates the confined outlook reflected in these assumptions. It suggests that the charges have been so concentrated on procedure and form that significant progress requires a reorientation in our analysis.

## A. Efficiency

A principal target set up by the critics has been the inefficiency of the administrative agencies. Proceedings take too long to complete. There are irksome delays before any decisions are made. The procedures are too cumbersome and too expensive both for the government and for the parties who are involved. The backlogs of cases are too large and are growing.

While this criticism may well be merited, it has not been founded on sufficient analysis to suggest what has caused the condition, exactly how serious it is, or what influence it has on the effects of the regulations. Available statistics indicate that a problem exists. Backlogs have increased, and the time it takes to process many types of cases has been lengthened. However, we have no practical gauges for determining what is a reasonable time, nor have we evaluated what features of the process would be lost if proceedings were accelerated. Further, we have not checked the possibility that acceleration of some procedures might not be in the public interest.

Available statistics about backlogs and lengths of proceedings lie in the shallow grave of averages. The data treat all proceedings as if each had equal importance. No allowances are made for the differences in the complexity of proceedings, the novelty of issues presented, or the practical significance of timing for various types of procedures. Obviously, each agency has to contend with a wide range of complexity in its work. Some proceedings require more extended proofs and more detailed considerations than others. Dealing with the misrepresentation of the quality of fur coats is not as intricate as prosecuting a sophisticated price-fixing plan that must be established through circumstantial evidence. Nor does it warrant the same priority on the docket.

The issues of efficiency are tied up with procedural requisites. A requirement that everyone who is remotely interested in a case must have his "day in court" will inevitably extend proceedings. The provisions of the Administrative Procedure Act, combined with the agencies' defensive posture against further attack, seem to have pushed them into an unfortunate position. In response to this criticism, hearing examiners and commissioners are willing to turn over every stone that might bear on the issues of the case. Further, they are prone to allow a defense counsel wide leeway in playing a delaying action whenever it suits his purpose.

The piling up of backlogs has been discussed widely. However, neither the agencies, the Congress, nor the critics have attempted to set up guides for gauging the time taken for various types of procedure. Nor has any effort gone into developing bench marks to measure the substantive importance of a proceeding and to give it a position in some order of priorities. As a result, each proceeding seems to warrant the same painstaking attention as every other. Unimportant questions are taken up as readily as issues of consequence. Misrepresentations regarding a cure for baldness are treated as seriously as a corporate merger that may have a profound influence on competition in an important market.

Because of the absence of yardsticks, agencies may take on too many cases and may devote too much time to the insubstantial ones. Similarly, commissions may entertain appeals on insignificant issues.

On the other hand, it is possible that delays and backlogs can reflect budgetary deficiencies rather than weak administration. The absence of criteria for analyzing budgetary needs seems to require profound attention. Professor Parkinson has given us not only a law, but a theology as well. However, there do seem to be occasions when objective analysis might indicate the need for additional staff to handle greater work loads. On such occasions, Parkinsonian theology seems to be less than enough.

The emphasis on efficiency illustrates again the shortcomings of a preoccupation with procedure. We are all against inefficiency as a form of sin. However, a blind pursuit of proficiency may produce better ways to do the wrong thing. An extreme illustration of the need for relating the substance of policy to the search for efficiency may be found in rate-making. It is conceivable, possibly probable, that a speed-up in rate-making would harm the public interest.

Verbiage of the regulatory theories aside, the current rules for setting utility rates boil down to the limitation of profits. By and large, costs are accepted and the agencies' supervisory functions are limited to considering the reasonableness of the profit component in the rates that are charged. Unfortunately, the established patterns of regulation offer few incentives for reducing costs.

Now, if rate procedures were accelerated so that rate increases were granted in, say, two weeks, the utility would lose all incentive to control costs—unless rates were pushed to such heights that they reduced volume substantially, an unusual situation. However, since the company knows that a rate proceeding will take several years, it feels a pressure to keep its cost in hand. It must make some effort to maintain

efficiency and to watch both wage rates and the prices it pays for supplies and equipment.

Similarly, a speedy procedure would probably eliminate company incentives to reduce costs. If any cost reduction were followed immediately by a drop in rates, the utility would have no stimulus to push for cost savings. Hence, it would appear to be in the public interest to continue the present procedural "inefficiency" until affirmative policies can be developed to provide substantial spurs to operating industrial efficiency.

In general, these drives for proficient procedures seem to disregard several crucial points: substantive policy issues, budgetary needs, and the influence of procedural requirements. However, the need for efficiency cannot be disregarded. The important issue is: Will we improve the regulatory process with dismally familiar slogans, or will we push for empirical analysis to determine causes, to construct bases for improvement, and to strike a reasonable balance among the factors that affect efficiency—in both the agencies and industry?

### B. The Legal Dichotomy

Some of our preoccupation with agency procedures seems to stem from a proverbial dichotomy that unduly narrows the concept of the regulatory process. Many of the critics and defenders—possibly the majority—read the regulatory process as composed of two sharply differentiated elements: rule-making and adjudication. Hence, many evaluations of the process are based exclusively on the effectiveness of these two functions. Other germane activities of regulatory agencies are screened out, and a conceptual framework emerges that is far too narrow.

Conceptually, this dichotomy fits into a legalistic pattern of analysis. Rule-making is clearly a legislative function, while adjudication is a judicial one. The appeal of this framework is its close relationship with the basic construct of the tripartite system of government: legislative, executive, and judicial.

By way of contrast, these distinctions have not acquired prominence in countries that employ a parliamentary system. In those countries, the action of a regulatory agency is subjected to review in a parliamentary discussion in which the pertinent minister participates. The courts are concerned only with the question of whether the agency exceeded its authority. Nevertheless, in those other countries—in England, for example—there seems to be no disregard of the rights of the individual or of fair play.

While the general conception of the two functions seems to implement our checks-and-balance theory of our governmental structure, the distinctions between the functions have not been clear. For example, a decision to add a third carrier to the air route between Chicago and Cleveland has been tagged as "rule-making," while the choice of the company that will serve as the additional carrier has been described as "adjudication." Needless to say, the classification has supported the argument that the two decisions should be independent. Indeed, the application of some sug-

gested cures would place the two activities in separate agencies. However, no logical principle has been suggested to support this definition. Further, it seems highly unlikely that a regulatory agency would decide to add a third carrier unless it has some assurance that an adequate airline can be induced to serve the route, or unless the agency has the power to order a company to undertake the service—an authority that the Civil Aeronautics Board does not possess. Hence, this distinction seems neither clear nor useful.

The use of the classification of rule-making and adjudication underlies much of the criticism of the regulatory process. This preoccupation has blocked objective examination of many regulatory activities. On the whole, those processes that do not fit the classification have been ignored.

The rule-and-adjudication categories overlook a great bulk of regulatory activities. Many, if not most, agencies must exercise their functions mainly through negotiation and administrative decisions. Those that are charged with promoting and expanding the industries that they regulate must consider possible industry reactions even when they make decisions that have judicial overtones.

There are reasonably persuasive indications that the work of many agencies would bog down if informal negotiations were discontinued. Further, a requirement that all actions must fit into the groove of rigid, formal procedures would cause unnecessary harm to many individuals and companies. If the Federal Trade Commission were compelled to discontinue its stipulation and consent order procedures, it would have to forego a major part of its activity. At the same time, the publicity and expense connected with its formal proceedings would hurt many companies that had innocently slipped into technical violations that have no substantial competitive consequences.

The bulk of the enforcement of the Food, Drug, and Cosmetic Act<sup>7</sup> appears to rest on negotiation. Experts representing the agency and the companies can settle most problems through sensible discussions on a technical level, without the trappings of those procedural requirements that surround a formal hearing.

Public utility commissions must employ informal negotiation and administrative decisions. Otherwise, every service complaint would have to be ground through the procedural machine. Otherwise, every variation in rates and every differential or special charge would call for a full-dress rate proceeding.

The promotional functions of the agencies require negotiation. A decision to add another route may emerge from an airline's discovery that such a route would fit into its schedule so well that improved service could be added at low cost. The strict rule-and-adjudication tandem would make it awkward for a commission to entertain such a suggestion, much less act on it.

Again, promotional functions must bring a realistic note into some of the agencies' quasi-judicial proceedings. If an applicant for a certificate of necessity obtained a ruling that limited its capital-return too drastically, it would not construct the facility.

<sup>7</sup> 52 Stat. 1040 (1938), 21 U.S.C. § 301 (1958).

Hence, such a ruling would affect the growth of the industry. In such a proceeding, the agency cannot confine its consideration to the task of formulating an insulated judicial decision about the claims of two adversaries before it. The decision has such a direct link with future development that the agency must consider what rate will stimulate the investment without upsetting a general rate structure. It must, in effect, judge whether the protesting utility is bluffing when it says that a low return will foreclose investment funds, or whether the claim is genuine.

Because the dichotomy fails to encompass all the functions of the regulatory process, it provides an awkward setting for the consideration of policy formulation. It allows no distinction between policy formulation and policy enunciation. At the same time, it overlooks the roles of the major participants in policy formulation: Congress does more than pass laws; the President's role is not confined to issuing formal orders; department heads and the commissions may formulate policy through rules or case by case; agency staffs play a major role in uncovering policy problems, gathering information, applying the general policy decisions, and calling attention to policy deficiencies that show up in applications; the regulated industry participates in policy formulation through its pressures for changes in policy and through the information and arguments that it presents to the Congress, the agency, and the courts in individual cases; and much of the policy development depends upon judicial interpretations.

Policy formulation is a never-ending process. It calls for feedbacks of ideas and information coming from the administration of existing policies. New problems arise that cannot be foreseen when rules are developed. As conditions change, they may require changes in policy.

Above all, policy-making is and must be a political process. Policies that are more than ministerial cannot always be set by the experts of the regulatory agency. The learned disciplines have not achieved the capacity to guarantee consideration of all the factors in an industrial situation. Therefore, the positions taken by the industry and others help to spot the forces that may have been overlooked in the analysis. Further, such outside advice provides valuable clues regarding the practicability of a proposed policy. Else, a theoretically-perfect policy may be broken on the back of the political resistance in the industry, in the Congress, or in the executive agencies.

Many policies must be forged in the case-by-case mill. Neither existing knowledge nor research can provide substantial bases for all rules. Many policies must be developed gradually, moving from problem to problem and observing the effects of prior decisions. Without this process, some rules may be meaningless or so rigid that they defeat some of their own purposes.

There is an important distinction between policy development and policy enunciation. Some assume that regulation always requires clear-cut statements of policy. Therefore, if no rule is announced, they believe that the regulatory processes are injured. However, these assumptions have been neither tested nor established.



At times, the need for flexibility may be greater than the requirements of public knowledge. Indeed, a premature public statement may prevent an agency from developing a sensible course.

As a matter of fact, the drive for issuing rules covering all phases overlooks many aspects of deliberate national policy. For example, our antitrust laws are premised on case-by-case development. No provision is made for rule-making. The Federal Trade Commission has, on occasion, suggested guides for its staff and industry. However, it has consistently maintained that its antitrust guides are merely suggestions and not formal rules.

The criticisms of policy-making seem to be founded on the assumption that the agencies refuse to issue rules because of timidity, inability, and ineffectiveness. There seems to be no room allowed for the possibility that there exist reasonable grounds for the agency practice or institutional pressures against such a practice.

Yet, since resistance to enunciating policy is found at every level, reasons for it are probably more complex than mere administrative weakness. We have not investigated or evaluated the many factors behind the hesitation: the desire or need to maintain flexibility; agencies' fear of congressional attack on enunciated rules; the uncertainty of a generalization for lack of knowledge and analysis; the inability to generalize; and the lack of pressure for a commitment.

As a matter of fact, frequently the reluctance to spell out policy stems from the Congress. Often, Congress avoids policy problems by passing vague statutes. Such a practice may be followed, on occasion, in order to permit the regulatory agency and the courts to implement the general provisions. However, it may also be employed in order to avoid tough political decisions, "passing the buck" to the agency.

### C. Policies and Prejudgments

Several of the criticisms are difficult to reconcile. On the one hand, it is alleged that the agencies do not promulgate enough rules. On the other hand, agencies are criticized for prejudging many issues. Related to these issues is an interesting dilemma: Should agency heads maintain close contact with regulated industries in order to develop familiarity with their operations, or should they keep the industries at judicial arm's length?

Policy-making is a form of prejudice. The enunciation of a rule determines pertinent conclusions in future cases. Else, there would be no point in issuing a regulation. Therefore, the broad, general criticisms of these two factors are difficult to reconcile.

A more closely pointed analysis might indicate areas in which the two lines of criticism may be reconciled. If it could be shown that an individual case is prejudged in the absence of a policy or that the prejudice related to an application of policy, an agency might exercise policy-making functions and inconsistent prejudice at the same time.

However, the broadside criticisms are difficult to evaluate. If we want clearer policy guides, we must be reconciled to substantial prejudgment.

The problem of agency-industry contacts presents a difficult dilemma. If all agency functions could be sharply delineated into rule-making and adjudication, it would be possible to hang a set of principles governing industry relationships on those two pegs. *Ex parte* discussions would be proper during a rule-making process and improper in connection with adjudication. However, since the dichotomy does not fit the day-to-day operations of the agencies, it does not provide a satisfactory basis for constructing rules about industry relations.

If an agency exercised only one function at one time, a principle could be formulated: during the time that a judicial proceeding is in process, all *ex parte* discussions would be improper. However, some agencies rarely find a period when only one function is exercised. An agency may have under consideration at one time: a proposed policy; a field investigation of industry developments; a quasi-judicial proceeding that has no promotional consequences; and a proceeding that does have such consequences. To illustrate the differences between the last two types of proceedings: a decision about a rate base would affect the future development of the industry if it involved a proposed new pipeline; contrariwise, if the line had been constructed, then the rate decision would not influence its operation.

#### D. The Independent Commissions

The persisting drive to mold the independent commissions in the judicial image overlooks the historical reasons for their existence. At the same time, it provides another demonstration of the policy quirk—comparing the actual with the ideal. For, much of the criticism is based on a comparison of the commissions in operation with an idealized view of the Congress and the courts.

Curiously, public consideration of the regulatory process has tended to focus on the independent commissions and to slight the equally significant and more numerous regulatory functions of the executive departments. This preoccupation may be due to the rough historical coincidence of the inauguration of the commission form and of the development of scholarly interests in government regulation. Or, it may be due to the influence of the legal profession, which has exhibited the major interest in the field. The lawyers' admiration for the judicial process may have found a natural outlet in the commissions, which were vested with the coloration of "quasi-judicial."

The administrative agencies were set up precisely because it was recognized that the Congress and the courts could not cope with the regulatory problems. As our technological and industrial development became more complex, it became evident that Congress could not write the detailed policies needed for business regulation and that the courts could not apply them properly.

Congress could not devote sufficient attention to the complex problems of supervising industrial regulation or of guiding key industrial developments. It could not,

for example, undertake the supervisory encouragement of the important railroad industry. Nor could it refine policies through the case-by-case process.

The judicial procedure was not equipped for regulatory administration. Judges could not act until questions were brought to them. They had no mechanism for dealing with the problems of all of the members of an industry at one time, either through one proceeding or through an organized series of actions. They could not conduct independent investigations. They could not develop a specialized background. They lacked the capacity to handle the many involved types of regulatory situations that required flexible give-and-take negotiation, and they did not have adequate staff assistance for such activity.

Because of the need for developing and administering detailed policies, the executive departments were given various supervisory powers, subject to judicial review. However, when detailed regulation was considered for the railroads, Congress decided to set up an independent commission. The decision was made, in part, because many members of Congress feared to give additional powers to the Department of the Interior, which previously supervised the railroads. Since the Department was responsible to the President, who was a former railroad lawyer, they felt that it might be restrained from a wholehearted safeguard of the public interest.

After the establishment of the Interstate Commerce Commission in 1887,<sup>8</sup> the next important step in government regulation was the passage of the Sherman Act in 1890,<sup>9</sup> placing administration in the hands of the Department of Justice and the courts. However, by 1914, it was felt that the Sherman Act did not meet the needs. Both President Wilson and the Congress believed that an independent commission was needed to make up the deficiency. The Federal Trade Commission was organized to administer its own Act,<sup>10</sup> which contained a provision against unfair methods of competition. At the same time, it was set up to supplement the work of the courts in the administration of the Clayton Act,<sup>11</sup> which was passed in the same year in an effort to close some of the gaps that were found in the administration of the Sherman Act.

During the 1914 discussions, much was made of the need for an expert body. However, even at that time, reactions were ambivalent rather than consistent. For, having decided that more expertise was needed to effectuate the regulation, Congress confined the powers of the Federal Trade Commission to issuing orders to cease a specified practice. Meanwhile, the courts were left with broad discretion about the remedies that might be imposed for violations of the Sherman and the Clayton Acts. As a result, when the Commission finds that an industrial practice would tend to create a monopoly, it can only order the company to discontinue the

<sup>8</sup> 24 Stat. 383 (1887), 49 U.S.C. § 11 (1958).

<sup>9</sup> 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

<sup>10</sup> 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958).

<sup>11</sup> 38 Stat. 730 (1914), 15 U.S.C. § 12 (1958).

practice. On the other hand, a federal court can decide that the company should give up patent rights, or divide the enterprise into two or more parts.

Today, a number of other regulatory commissions are charged with several other forms of regulation—Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, Civil Aeronautics Board, Maritime Board, Federal Reserve Board, Tariff Commission, National Labor Relations Board, and Atomic Energy Commission.

### E. Departmental Agencies

As the regulatory functions proliferated, many were assigned to government departments. Such departments as Health, Education, and Welfare, Agriculture, Interior, Commerce, Post Office, Treasury, Labor, and Justice administer substantial regulatory powers. They supervise many activities—for example, those touching on the use of public lands, the marketing of agricultural products and those of fisheries, minimum wages and hours, customs, immigration and related affairs, anti-trust, literature, corporate securities, social security payments, alcoholic beverages, food, drugs, cosmetics, and hazardous substances.

Some of the most important regulatory functions of the executive departments rest on the authority to prosecute. The Antitrust Division of the Department of Justice was charged with the function of prosecuting antitrust violations in the courts. However, it has long engaged in regulation through the negotiation of consent decrees. Under the consent procedure, the Antitrust Division and the defendants conduct shirt-sleeve negotiations to work out a decree. The order is entered by the court with the same force as a decree written by a judge after litigation, except for its status in subsequent treble-damage actions. Between eighty-five and ninety per cent of the antitrust decrees of recent years have been negotiated in this manner. There are indications that the majority of these consent decrees are negotiated before any complaint is filed.

Hence, the Antitrust Division exercises the powers of a regulatory agency. In fact, its regulatory powers appear to be more significant than those of the Federal Trade Commission. The Antitrust Division's decrees can be more drastic than Commission orders. Further, the Antitrust Division's negotiations are conducted with greater leeway than those of the Commission. While approximately seventy per cent of the Commission's orders are negotiated, almost no orders are discussed until a public complaint has been filed. Therefore, the Commission's negotiations take place in the setting of the charges listed in a public record. In contrast, the Antitrust Division frequently formulates the complaint after it has negotiated the consent decree, a procedure that enables it to confine the public charges to the subject-matter of the decree.

Despite the many regulatory functions of the executive departments, criticisms of the regulatory process have been leveled almost exclusively at the independent commissions. The departments issue regulations, regulate entry into business, and adjust

controversies. Some of the functions of the departments are, as a practical matter, subject to no judicial review. Yet, the preoccupation with the independent commissions continues throughout all considerations of the regulatory process.

#### F. Malfeasance

Another type of criticism may be found in occasional attacks for specific malfeasance in office. On the whole, such charges have been related to issues of *ex parte* contacts with the regulated industry. Because of this connection, efforts to avoid questionable practices have been linked up with procedural safeguards and with improved selection of personnel.

In this approach, the strategic relationships between the substance of regulation and the ethical problems it generates have been largely overlooked. The influence of a regulatory pattern that exudes the aura of a give-away program may be so strong that procedural safeguards hardly meet the needs.

Television broadcasting provides an illustration of the need to consider problems of substance instead of confining attention to procedure. Recent hearings showed up questionable practices on the part of one member of the Federal Communications Commission in his consideration of a license for a new station. Criticism was directed to lack of ethical standards.

Unfortunately, the "affair" was used to spotlight questions of ethics, while the underlying condition that encouraged the criticized practice was ignored. There are reliable signs that the licensing system for television stations provides a natural breeding ground for responses to pressures based on friendship, political favors or contributions, and personal gain. Given the limited number of stations and the lack of rigorous standards for screening applicants, a number of equally qualified candidates are available for many franchises. Unless and until more definitive standards can be set, there is no clear public-interest basis for choosing among those who qualify. Against this background, there are estimates abroad that a television license in a town of moderate size can be worth between three and four million dollars.

In this situation, how can some form of corruption—intellectual or other—be avoided? Regulation and exhortation against *ex parte* influences may only encourage more subtle forms of pressure. Indeed, in such situations, the only way to force the regulators to follow their independent interpretation of the public interest may be to encourage enough pressures on all sides. Conceivably, a complex of pressures can serve to cancel each other. However, a procedural effort to eliminate all pressures may only put a premium on the more subtle types resting on personal and political friendship.

The affirmative criticism in such a situation might be more profitably directed to substance. Can more substantial public-interest standards be forged? Until significant progress can be had along these lines, it might be preferable to inaugurate a bidding system awarding the license to the qualified applicant who offers to pay

the highest annual fee. Such payments would not be difficult to justify, since the scarcity value of the license is based upon the use of the public domain.

### G. Coordination

One of the most serious deficiencies in our considerations of the regulatory process is the preoccupation with those phases of government activity that bear a regulatory tag. We have given insufficient attention to the wide scope of nonregulatory functions that bear heavily on the regulatory burden and on its chances of meeting public policy objectives.

Some of these activities work at cross-purposes with the regulatory functions. Some support regulation. Many provide the basic setting for the regulation and have a more profound influence on industry structure and practice than the regulatory agency can ever achieve. At the same time, not all of the regulatory activities appear to mesh with each other.

Competitive policy is a case in point. While a great deal of regulatory activity is dedicated to the promotion of competition, many government functions are not. Protective tariffs and other regulations block out foreign competition. Government purchasing and research and development programs frequently encourage industrial concentration and partial monopoly. In fact, much of the newly developing technologies are government subsidized, and contractual arrangements may have a profound effect on future industry structure. Meanwhile, some of the regulatory agencies have used their authority to curtail competition by limiting entry into markets and by maintaining higher rates for service than would obtain under more competitive conditions.

The air transport industry illustrates the all pervasive influence of other government activities on the work of a regulatory agency. The Civil Aeronautics Board exercises a number of regulatory functions: safety, routes, service, corporate structure, financing, and rates. Other agencies make and have made direct promotional and development expenditures: many airports were built by the federal government as military installations or in an effort to promote civil aviation; the program has been continued through partial contributions to airport improvements and to road-approach programs; safety equipment is financed and operated by the Federal Aviation Agency; and subsidies have been paid to aid the development of the airline companies, although today they are confined to feeder and helicopter services. The government gives indirect aid: the development of military aircraft, which substantially reduces the cost of civilian counterparts; mail contracts; and federal tax exemptions for the bonds of municipalities, which finance and administer most airports. Many other federal functions affect the airline industry: international agreements regarding rates and routes; the coordination of military and civilian flights; supervision of other methods of transportation, which affects airline competition with those other forms—for example, a railroad can be permitted to discontinue passenger service to small communities because subsidies are paid to

feeder airlines that will serve those communities; and the relationship between the rates set for railroads, trucks, and bus lines, which affects the level of airline fares and the volume of traffic.

Given such a variety of functions, evaluation of the regulation of rates and routes should take the entire pattern into account. Indeed, such evaluation should encompass the lack of coordination. Determinations regarding routes and rates depend upon a host of other functions. Safety regulations may increase operating costs. International pressures and rivalry may force airlines into expensive jet operations and investments before they are necessary. On the other hand, airport and road subsidies, the development of military prototypes of civilian aircraft, and operating subsidies may reduce airline costs and serve to increase the volume of traffic. Further, other regulatory and nonregulatory activities bearing on competing services, as well as the complementary features of transportation and communication by road, railroad track, water, wire, and radio, have a substantial influence on airline traffic and costs. In this setting, the regulatory process is part of a complex of government-industry relations. In fact, the final rate-role of the Civil Aeronautics Board may serve mainly to control the profit component of price, while other government activities control the cost component, which is clearly the more important.

### III

#### THE NEEDS FOR EVALUATION

As stated above, we require a fresh look at the regulatory process. The established confines of evaluation set such narrow limits for the public consideration of the problem that many of the most important public policy issues are slighted. Affirmative progress will require developing a broader orientation and avoiding a preoccupation with procedural problems.

Positive progress requires a recognition of the political nature of the regulatory process. For if regulatory problems are treated exclusively as technical questions, we will probably continue to confine our efforts to procedural issues.

In this examination, we must consider the relative advantages of the independent commission and the executive department. Such inquiry may indicate that one form is superior to the other for certain purposes. At the same time, it should provide clues to the most fruitful way to employ each form.

Finally, for basic evaluation we must develop criteria for policy evaluation and methods of policy review. Else, we shall continue to avoid the more important and more difficult problems and cater to our preoccupation with the peripheral issues of procedure.

#### A. Nature of the Regulatory Process

While the regulatory process finds expression in legal procedures, it must be recognized as a political function and not an exercise in technical jurisprudence.

As a governmental activity, regulation has a political orientation in its inception. Both policy formulation and execution are dependent on political outlooks and pressures.

Many critics, as well as supporters, either seem to ignore or want to avoid the political nature of the process. Independent agencies were frequently promoted by reform movements in order to avoid the pressure of politics and to base regulation on the nonpolitical analysis of the expert. However, Congress had to set the policy framework and will continue to do so, while the President can exercise varying degrees of leadership. Similarly, the regulated interests strive to influence the agencies in order to maximize their private goals. Hence, while the members of a commission are expected to maintain the cool aloofness of a judge, they are also required to maintain contact with the economic developments and to cope with political problems.

Part of the difficulty is probably semantic. "Political" is a term that covers a wide variety of concepts from the *quid pro quo* of activity in dishonest wards to the broad concept of the "body politic."

Somewhere between these extremes, there is an interpretation of "political" that reflects the workings of government organization, that encompasses the operations of political parties but that is not confined to them, and that recognizes the limitations of "independence" and the forces of pluralism in our society. Such a concept recognizes: that commissions are not completely independent agents free of political pressures and controls; that congressional committees are influenced by public opinion, the force of the press, and attitudes of other members of Congress; and that congressmen are influenced by popular opinion, their prospects for re-election, and the strength of partisan forces. The President, in turn, must consider popular attitudes, congressional pressures, party problems, and, in many instances, international factors.

In this context, the regulatory process is necessarily more political than the judicial. Moreover, even the judicial function, which is somewhat insulated from the political, is not entirely free. While judicial tenure is not political, the selection of judges is. What is more significant is that the selection of cases to prosecute and the legal theories underlying enforcement are in the hands of the regulatory agencies. No judge can affirmatively decide that a problem should be brought before him. The judicial process assigns him a passive role. Ultimately, he is bound by the evidence and arguments presented to him. He is not expected to take affirmative action either to investigate the evidence or to forge legal analysis that is unrelated to the arguments that have been presented to him. His work is strongly influenced by the activities of the regulatory agencies, which must participate actively in the broad process of government.

While regulation must accommodate and utilize the analysis of the technician, it cannot rest exclusively on technical expertise. In the development of policy, the expert is needed to suggest alternatives, to analyze them, and to predict their conse-



quences. However, the policy-maker must take account of the practicability and acceptability of the alternatives. The technician is required also in the administration of policy. Yet, the selection of cases, decisions about what problems to give priority, and final administrative conclusions require political as well as technical judgment.

As we have seen, the host of government activities that impinge on the regulatory fields are so important that they cannot be disregarded in any realistic evaluation or administration of regulatory policies. This feature is especially significant because it demonstrates the essential shortcoming of the exclusive legal-judicial interpretations of the regulatory functions.

For all of these reasons, the regulatory process is and must be political. Efforts to avoid or to ignore this condition have produced insubstantial results. These efforts have led us to accept *a priori* analysis because of the legal liking for the employment of precedent and principle. As a result, we have tended to formulate principles for judgment too quickly. We have generalized on the basis of slight evidence. Above all, we have clearly held back the empirical analysis that is so badly needed.

### B. Nature of Independence

Because of the efforts to regard the regulatory process as a technical function, the nature of the independent commission has been assumed to be clear without further consideration. We have not compared the relative strengths and weaknesses of such commissions with those of the single-headed agencies that may carry on similar functions. More seriously, after clothing the commissions in judicial robes that may not fit, we have criticized the wearers for not bearing the garments properly, instead of considering whether the robes fit the needs.

Many of the basic concepts of the commissions need clarification. Merely calling them the fourth branch of government offers no road to understanding. The single-head departments also combine legislative, judicial, and executive functions.

The conceptual nature of commission independence has not been defined. The commissions are not responsible to the President. Yet, he appoints all commissioners with the advice and consent of the Senate, and he designates the chairman of each, except for the Interstate Commerce Commission. His power to remove a commissioner is sharply limited. On the other hand, budget requests of the commissions go through his Bureau of the Budget, as do legislative recommendations, with one exception.

Commissions have carried a second tag, "arms of the Congress," which may provide a better clue to their position in the federal framework. There is room for believing that the major reason for the independence of the commissions is the rivalry between the Congress and the executive branch. Congress regards the independent commissions as its own agencies, independent of the President, following the tradition of the Interstate Commerce Commission. However, the general pat-

tern is so unclear that the designation has led some to believe that the commissions are and should be independent of everyone.

The confusion has been compounded by the status and functions of the hearing examiners employed by the commissions. In order to promote a judicial aura around the regulatory procedures, a number of efforts have been made to give the hearing examiners a high degree of independence. However, the basic status of the examiners has neither been analyzed nor been settled. Are they autonomous judges who act in their own independent capacities? Are they arms of the commissions, empowered to hold hearings in the agency's name and to report back their findings and to suggest decisions? Some of the efforts to change regulatory procedure seem to be directed to constituting the hearing examiners as district judges and the commissions as appellate courts. However, this direction has not been founded on a broad consideration of the functions of either the examiners or the commissions. Nor has it been based on an analysis of where the commissions fit in the general framework of government.

We need to develop an analytical structure for the relationship between the independent commissions and the executive departments. The relative strengths and weaknesses of the two need investigation to promote a clearer understanding of their functions.

The independent commission might have greater capacity for more independent judicial action and for closer relations with the Congress. Because of staggered terms and bipartisan composition, the commission might be able to maintain more stable policies in the face of changes in the administration.

On the other hand, the single-headed agency can enjoy a more affirmative direction. It can be coordinated more readily with the administrative policies that affect the pertinent industries through the many public activities that do not fit the legal definition of regulation. Its policies and activities can be coordinated with other regulatory functions more effectively.

Peculiarly, the single-headed agencies seem to have less congressional difficulty than the commissions. We clearly need empirical analysis to check this general impression and to discover the reasons for the condition.

Another difference between the two types lies in the method of treating charges of corruption, inefficiency, or poor judgment. When charges were made against a Secretary of the Air Force, President Eisenhower had no difficulty in replacing him. After the change, criticisms of the Air Force disappeared and the new Secretary carried on without unusual difficulty. In contrast, recent attacks on the Federal Communications Commission have been much harder to meet. Although one member of the Commission was dropped, the congressional criticism has continued. The development of a satisfactory situation is difficult. It would be impractical and unfair to replace all of the members of the Commission, or to set up a new body in the same way that the old Federal Radio Commission was treated. How-

ever, the steady stream of criticism can have such a demoralizing influence on both the Commission and its staff that positive action for improvement is impeded.

Currently we are employing both forms for similar activities without even attempting to analyze which is better suited for what task. In one field, antitrust, we have overlapping functions assigned to a commission and a department. As demonstrated in the discussion of the consent procedures, the Justice Department seems to exercise more discretionary power than the Federal Trade Commission. Yet, all efforts at procedural safeguards are directed to the Commission and not to the Department. Further, when the Department executes its functions through the courts, the procedural requirements, the substantive elements in some violations, and the nature of the remedies differ from those of the Commission.

An analytical re-examination should encompass both types of agencies. We must consider the regulatory process as a whole. Unless we can avoid the conventional preoccupation with the agency form, we will continue to impose restraints on our progress toward practical improvements in our regulatory functions.

### C. Criteria for Evaluation

An outstanding feature in the consideration of the regulatory process is the need for developing criteria for judgment. Most discussions rest on many yardsticks that are assumed but that are not enunciated or analyzed. On what basis should we evaluate the work of the agencies; how do we gauge their effectiveness; what yardsticks can be established to judge the length of time an administrative proceeding should take; what are the relative balances between assuring defendants and respondents that they will have their "day in court," and making sure that the proceedings are handled with expedition? Should we concentrate on procedure or give equal attention to effect? How should we evaluate policy?

By and large, evaluations concentrate on procedure. Little attention is paid to the effects of the regulation. Complaints are heard on all sides about delays in reaching decisions, but little or no consideration is paid to the question of how much time is enough. There is a dearth of attention to the need for policy review probably on the assumption that judicial review is sufficient.

However, any meaningful evaluation of the regulatory process should include a review of its industrial influence. Starting with the basic objectives of the regulation, analysis of economic and social effect should be foremost in evaluation. Such inquiry should relate the content of the regulation to its ultimate goals and should encompass the economic pressures within the regulated industry. At the same time, the rules should be reviewed to determine practicability and side effects.

The regulation of the television industry is in point. The goal behind the regulatory legislation seems to be to raise program levels. This objective calls for catering to minority groups that are interested in educational and cultural activities. However, raising program levels through regulation is an impossible task until we develop practical yardsticks for evaluation.

Furthermore, the economic conditions in the industry would seem to militate against educational and cultural programs. Given the limited number of channels available for television broadcasting, it seems likely that each station would find a larger listener audience by broadcasting "westerns" rather than informative and symphonic programs. Given three stations in a town, each would try to attract one-third of the "western" fans if it appeared that seventy-five per cent of the viewers wanted such programs. The alternative would be to cater to the next largest class—say, the ten per cent who are interested in symphonies.

Unless the number of channels can be increased, as in the case of radio with its good music stations, it would seem difficult to do very much about raising program quality. Therefore, it is quite possible that the underlying goals cannot be achieved by the current type of regulation. It may be practicable to force wider use of the UHF bands in order to increase the number of stations sufficiently to follow the radio pattern. Indeed, the goals of regulation might be furthered by a government-subsidized research program to increase the number of channels in use.

On the other hand, it may be preferable to discontinue the frustrating efforts to improve programming in the commercial stations. Perhaps the only effective solution would be to subsidize eleemosynary stations that are dedicated to educational and cultural programs. If such a move were considered, part of the funds could be raised through the annual fees developed by auctioning commercial licenses.

It should be noted that these illustrations are presented not as recommendations, but to demonstrate the prime need for developing criteria for evaluation that are based primarily on subject matter and only secondarily on procedure. What is the point of slavishly formulating procedures to avoid corruption if the underlying regulation provides a breeding place? What benefit is there in accelerating the process if it is headed in the wrong direction? Is there some advantage in the slow process if, as in rate regulation, it were to provide the only or major incentive for industrial efficiency?

#### D. Review and Generalization

Policy evaluation entails two important elements: the mechanism for policy review, and the development of appropriate levels for generalization. There are significant limitations affecting each of these functions today. Both reflect the great need to replace *a priori* argument with substantial empirical analysis.

We lack procedures for policy review. One of the main thrusts of the procedural considerations has been to develop adequate mechanisms for reviewing the work of the agencies. However, this campaign has not proceeded beyond judicial review. Little or no attention has been paid to broad policy evaluation as opposed to the case-by-case scrutiny of the courts.

The judiciary is not equipped for policy review. Judges rarely have an opportunity to consider a number of cases about the same subject at one time. They have

no basis for investigating the many problems that are handled by negotiation. They could not properly consider the relations between regulatory and nonregulatory functions.

Congressional and executive functions provide the only basis for policy review. However, we have not appreciated the need for such inquiry on a sustained, organized basis. True, there have been a goodly number of substantial investigations. However, they have been sporadic and have lacked follow-up studies. Agencies have been checked more frequently for specific incidents, for budgets, and for procedure than for substantive policy.

Some of the methods for reviewing the work of the agencies require serious reconsideration. For example, during budgetary scrutiny of the work of the Anti-trust Division and the Federal Trade Commission, attention seems to be directed to the number of cases instituted and of cases won. These yardsticks have probably pushed the agencies into a type of numbers game. By prosecuting small companies in unimportant markets, it is possible to start many proceedings and to obtain many consent orders through negotiation. The effects of the proceedings can be ignored as long as there is a great deal of motion.

One of the profound problems in policy review, as well as in procedural consideration, is the determination of what generalizations are appropriate. Many conclusions are hasty generalizations based on scanty information. The bothersome question is how to know that a review of one agency or two has any application to others.

On the other hand, many have taken the position, express or implied, that each agency is unique and even that each regulatory function is *sui generis*. This attitude would allow no room for generalization or principle. It would suggest that the experience of one agency can shed no light on the problems of any other.

Differences among the agencies are important. Compare, for example, the Civil Aeronautics Board and the Federal Trade Commission. The CAB deals with a handful of carriers in competition with each other. It must consider indirect effects of almost all decisions on this competitive situation. It deals regularly with the same "constituents." In contrast, the FTC has no closed group of companies under its jurisdiction. Most of its respondents have had only one experience with the Commission. It does not have to consider a continuity of relations.

However, there are levels of generalization that are appropriate. They require careful, sustained study of many situations. They cannot be achieved by any quick, dramatic flashes. Yet, basic progress in the analysis of the regulatory process requires that we drive for appropriate generalization and avoid the precipitate, overly broad conclusion.

#### CONCLUSION

The regulatory process is fast becoming an ubiquitous element in national life. All signs point to further increases in government activity. The combined influ-

ences of regulation and direct government operations affect all phases of economic and social endeavor.

However, we move in this direction with heavy ambivalence. Our national tradition points to a minimum of government interference. Yet, we look to governmental solutions for the many new problems that stem from the additional complications of economic activity, greater sectional interdependence, striking technological changes, and an uncertain international situation.

Our consideration of the regulatory process is colored by anxiety. We have great difficulty in finding a straight path. The process calls for the continual balancing of many interests and the resolution of many conflicts. Hence, with changing needs and pressures, it is almost impossible to chart a stable, consistent policy course.

As a result, the practical treatment of the regulatory process requires a recognition of its complexities and its dynamic fluctuations. We do not seem destined for a clear, resolute path in any phase of regulation. Unless and until we accept these underlying conditions, we will continue to seek the simple maxims that do not meet the complex analysis that the process requires.

In this setting, it would appear that much of our preoccupation with procedural problems simply permits us to avoid the tough policy issues. Unfortunately, settling issues of procedure and organization will not take care of the basic needs of the regulatory process. Procedures do have important influences. They can affect the equities and efficiencies of government activity. They can either help us to resolve policy issues or hinder such resolution. However, they do not constitute the sole feature of our regulatory pattern, and they avoid the important consequences of other types of governmental activity.

Above all, we need further empirical research and broad analysis to clarify how regulation works. We require a clearer understanding of where the process fits into the complex of our economic, political, and social goals. We should have more definitive information of just how the participants in the process function. We badly need a broader view of the basic issues that deserve attention.