THE REFORM OF THE REGULATORY AGENCY

Address of

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In the complex of government required to maintain order in an immense and powerful nation, a very great preponderance of the governmental tasks must be performed by persons other than those directly responsible to the people. In connection with even that most democratic institution, the New England town meeting, the actual implementation of the policies and programs approved by the electorate must be entrusted to personnel hired for that purpose by the village selectmen. As the political unit becomes larger, as we go from the village to the city, to the county, to the state and finally to the Federal government, there is an inescapable tendency for the elected legislative and executive representatives of the people to confine their attention to very broad expressions of policy and to delegate ever greater areas of responsibility to other persons whose function it is to carry out the policy directives so adopted.

It is a natural result of this tendency that powerful governmental agencies should be established in our national government. The President, as commander-in-chief of the armed forces, cannot in any real sense of the word supervise the activities of the enormous army, navy and air force which we are required to maintain. Nor can he devote any serious attention to the many other hundreds of activities entrusted to his executive authority by thousands of statutory enactments. As Edward Corwin once said "to conceive of the President as a potential 'boss of the works' save in situations raising broad issues of policy would be both absurd and calamitous." His only recourse is to farm out his powers, to delegate his authority and functions and to retain a most tenuous, though a most definitely final control over the execution of the law. This result has followed from the earliest days of our country, when the executive government was divided into departments, each headed by a Secretary who was a member of the President's cabinet, and who reigned practically supreme over his own organization.

But the national government cannot today be divided into neat compartments. It early appeared that there were certain responsibilities of the President which did not fall naturally into established departmental categories, and there were other spheres of government over which Congress felt it desirable to retain a more direct oversight. When it became apparent in 1887 that there must be a Federal regulation of railroads, the Congress determined to follow the pattern which had been

developed in the states and established the first of the so-called independent agencies, whose members are, with Senatorial approval, appointed by the President but whose decisions are subject to review only by the courts. This pattern was later followed in numerous situations, until today there are literally dozens of such bodies in Washington, the latest of which is probably the NASA, devoted principally to the highly novel problems of space exploration.

The independent agencies in government take as many forms as there are problems presented, and this very elasticity of form has induced Congress to establish first one and then another such institution. Of these, the independent regulatory agencies, which are those most in the public eye today, share one outstanding characteristic in that each of them exercises legislative, executive and judicial functions with reference to certain interstate business activities. There are six of these agencies which are generally so classified, though there are other agencies answering the same general description and there are some activities of some executive departments which it is difficult to differentiate.

This concatenation of powers makes very delicate the position of the administrator of these statutes. It has become a basic tenet of our law that every person who is exposed to penal sanctions is entitled to a fair and impartial trial. On the other hand, society has adopted a firm belief in specialization, in the superior ability to meet a given problem of a person who is specially trained in the field within which the problem lies. This dual concept introduces a duality also into the relationship between the administrator and the members of the regulated industry. On the one hand, he should theoretically stand aloof from the industry in order that he may maintain the Olympian impersonality of the judge; on the other hand, he should theoretically be thoroughly conversant with the industry and its techniques and problems in order not to introduce unwitting chaos into business. Accurate information of this type can ordinarily be acquired only through direct personal contact with the managers of the industry.

It is, at least to some extent, this dichotomy which has caused some misunderstanding and unmerited castigation of the administrative agencies. There has often been a failure in the press and sometimes in Congress to appreciate the distinction between the quasi-legislative or rule-making functions of the independent agencies and their quasi-judicial functions. I use this last phrase in a sense which embraces all administrative proceedings looking to an order directed to a particular person.

With respect to such proceedings, the Canons of Ethics of my own agency provide that decisions should be based solely upon the record and the arguments of the parties or their counsel properly made in the course of such proceedings. They also specify that communications by parties or their counsel to a Commissioner which are intended or calculated to influence his action in a quasi-judicial proceeding should at once be made known by him to all parties concerned.

The distinction between these two functions of the regulatory agency is explicitly recognized in the Federal Administrative Practice Act. There is nothing particularly arcane about this statute, and a careful observance of its intent if not of its letter serves clearly to delineate the respective positions in an adjudicatory proceeding of the agency staff, the respondent and the Commission.

The administrative official must be almost painfully careful to maintain this adjudicatory position. In Morgan v. United States, Charles Evans Hughes stated: "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." A quasi-judicial determination may involve the respondent's financial future; it may expose him to staggering liabilities and may subject him to the risk of criminal prosecution. It would appear to be an obvious corollary to the administrator's responsibility in such a proceeding that he should meticulously avoid any ex parte influences of whatsoever character which might affect, or might even appear to affect, his capacity to reach an unbiased decision.

On the other hand, in the performance of their rule-making and administrative functions, members of regulatory agencies should be free to solicit the views of all interested parties. I would go even further than that and say that the administrator has a duty to solicit such views. Criticism based upon the number of visits made by or conferences held with industry representatives stems largely from a failure to understand a basic function of the regulatory agencies. So, also, legislation which is not carefully drawn to distinguish between these two facets of the regulatory

process might result only in stultifying the entire work of the agencies. The ability of a regulatory agency to gather all relevant information and consult with all interested persons when it is formulating rules for general application should not be impaired. Decisions in this area must be made with a clear understanding of their impact upon the regulated industry, and are not and cannot be based exclusively on the facts in a formal record. Hence, such a record must be very largely supplemented by the expert knowledge of the agency as an institution, regardless of how such knowledge is acquired.

The fact that a member of a regulatory commission is none the less a person, a member of society and the center of his own individual social nexus gives rise to further problems. The social behavior of the bureaucrat is irrelevant to his official duties until it interferes or might interfere with his administrative impersonality. However, it is almost always extremely difficult to determine objectively a limitation so essentially subjective in nature. The Canons of Ethics of the SEC to which I have referred broadly proscribe participation in any official action when any personal interest exists which is incompatible with an unbiased exercise of judgment. Our conduct regulations implementing this policy sharply restrict the freedom of a Commissioner or employee in his private securities transactions, in discussing future employment and in his extra-governmental affiliations. Nevertheless, the propriety of any individual course of conduct except actions which are patently objectionable must to a very large extent be left to the individual taste. A fine sense of honor is the best armor against accusations in this field. It has repeatedly proved to be impracticable to create a moral sensitivity by legislation, although it is difficult to oppose such legislation as it is difficult to oppose legislation against sin. But, if such laws are to be enacted, it is important that they be so framed that, while they guard against conflicts of interest, they do not so stultify the economic life of the administrator as an individual as to make it impossible to attract any qualified person to fill the position. In this, as in so many fields, there must be a compromise between the most lofty idealism and the stubborn facts of reality.

While genuine improprieties must be harshly condemned, we must also, when we view the current scene, remember that motives of partisanship, malice or mere reportorial demagoguery may and often do suggest improprieties where none exist, that it is difficult to rebut such suggestions effectively and that they may have a cruelly unjust effect on those who are thus explicitly or impliedly accused. Anyone who has been long in the public eye will testify that the damage caused by an improperly emphasized

or even a downright erroneous news item can never be adequately repaired. As Joseph Conrad once said: "We live at the mercy of a malevolent word." Newspapers, being run by humans, do not relish an admission of error. Furthermore, even if such an admission is obtained, the negative news item can never command the same public attention as did the preceding positive and accusatory item nor can it entirely erase the suspicions so aroused.

I have already pointed out that the ubiquitous nature of the functions of the administrative agencies has caused some misunderstanding of the relationship between the regulators and the regulated. I should also point out that this conjunction of functions has, even recently, given rise to a more general criticism based on an assumed incompatibility of the various responsibilities of the regulatory agencies. The lawyer, being of an orderly mind and generally steeped in traditional political science, finds it very difficult to sympathize with the pragmatic philosophy underlying these agencies. His inclination is to bristle at the idea that the same person can be the repository of simultaneous judicial and prosecutory powers, or that the same person who drafts rules under a legislative power should apply them under an executive power and judge the results under a judicial power. This bewilderment is quite understandable, yet it is based on nothing more concrete than a dislike for disorder, a lack of mental flexibility which sees the law as a disembodied logic rather than as a set of ground rules for society, deriving its validity not from any immutable source but from social necessity or desirability.

During the 1930's, this bewilderment found expression in charges that the creation of independent agencies "did violence to the theory of the American Constitution that there should be three major branches of the Government and only three," established "a headless fourth branch of Government," and gave rise to a "haphazard deposit of . . . uncoordinated powers." These unbridled attacks were the spiritual progenitors of such contemporary criticism as that found in the so-called Hector Report, which was actually a memorandum filed with the President by Mr. Louis Hector of Florida at the time he resigned as a member of the CAB. It was subsequently given wide circulation by a leading article in a great magazine and by numerous comments of professional observers. Among other things, the report charges that the regulatory agencies have failed to operate as effective vehicles of administration and assails their purported inability to formulate policy and their alleged lack of thoroughness and objectivity in considering quasi-judicial matters. I shall not attempt a detailed analysis of this memorandum which has been adequately answered

by the agency with which he was formerly associated. However, it may be helpful to mention two points there made which seem to me to be particularly unfortunate.

In the first place, Mr. Hector and his disciples have recited what they conceive to be inadequacies within one particular agency, and on the basis thereof have attempted to criticize all of the independent regulatory commissions. The fallacy in this approach, which Mr. Hector himself subsequently acknowledged, is that the functions of the various regulatory agencies and the practices within them differ radically, and that there is no justification in logic for such a leap from the particular to the general. For instance, like some other agencies but unlike still others, the SEC is not confronted with the problem of choosing between competing applicants for economic benefits. The great bulk of our proceedings lie in the field of enforcement. As has been so often said, the SEC has nothing to pass out but trouble. An appraisal of the regulatory agency as a governmental institution can be made intelligently only while realizing the varying purposes for which they were severally created and the varying processes which they employ.

My second point refers to the proposals advanced to remedy these alleged defects. With some variations, these proposals envision a fragmentation of the administrative process, and suggest that the quasi-judicial functions of the agencies should be assigned to some sort of an administrative court; the prosecutory and investigatory powers should be placed with the Department of Justice; and the rule-making functions should be entrusted to a branch of the executive department. While this proposal is really nothing more than a modified and elaborated version of the plan for an administrative court which has been espoused for decades, the result would be a final triumph of what Dean Landis has described as "the compartmentalization of power along triadic lines."

The major defect in such a proposal lies in the concept that policy making can be severed from the other functions of the regulatory agencies. This is not the case. In its quasi-judicial proceedings, regulatory commissions such as the SEC arrive at determinations of policy through much the same process that courts make law, that is, on a case by case basis. Policy is not developed in a vacuum, but emerges and crystallizes as the necessity for its statement becomes evident. The creation of an administrative court would not result in the insulation of the policy-making from the adjudicatory functions of an agency, but would rather result in the

creation of two separate and uncoordinated policy-making bodies. Furthermore, the determination of who should be prosecuted and when that prosecution should occur would presumably be made by the Executive under such a concept, though this function is itself an aspect of policy making. Hence, Mr. Hector's proposal would create no less than three entities, each of which to some degree would have the same fundamental responsibility.

It is too much to expect that these three entities would not work at cross-purposes and that such a division of functions would not thus result in an atmosphere of murky uncertainty. Whether or not this result would follow, it is difficult to see how such a triptych of administrative units could accomplish the type of continuing oversight envisioned by our regulatory statutes. Indeed, it might well have the effect of precluding the flexible and informal approach which some of the agencies have found indispensable in meeting new regulatory problems, and would doubtless tend to duplicate efforts in one direction while overlooking requisite action in another. The administrative court would presumably be insulated from the ebb and flow of daily problems, a familiarity with which is requisite to informed policy decisions. This same type of insulation would, of course, cripple the effectiveness of the executive office which would be entrusted with the task of developing broad, black letter policy. Centralization of power within an administrative body is not per se undesirable. Such a phenomenon ought to be evaluated solely by the resultant regulatory efficiency.

Legislation modifying the administrative process ought not to be based upon generalizations originating in what are conceived to be the faults of particular agencies, nor should the public lose faith in the efficacy of these regulatory agencies because of isolated instances in which administrators may appear not to have exercised a degree of propriety consonant with their responsibilities. We have not found it necessary to change the form of municipal government because instances occur of individual ethical derelictions, nor ought we to abolish our police force because some police are found guilty of venality. The regulatory agencies ought by no means to be either sacrosanct or self-satisfied, and they can hardly object to a reexamination of existing administrative practices and procedures by any persons of good will. On the other hand, it is no more than right that an analysis upon which a reorganization of important governmental institutions is to be based should be both accurate and dispassionate.

The bureaucrat in Washington differs little from the lawyer in private practice. Most bureaucrats used to be practicing lawyers and many of them will return to practice some day. It has been my observation that they reap precious few harvests as the result of their labors in the public vineyard, but that they are none the less dedicated to the public service and motivated by the highest ambitions. Public service is now and always has been an attractive career to the fledgling attorney. However, it will continue to be so only so long as the critics of our form of government use a decent restraint and an understanding intelligence in cooperating with those responsible for the execution of the laws in working out the intricate problems of reform.