

REVIEWS

THE INDEPENDENT AGENCY—A NEW SCAPEGOAT
REGULATING BUSINESS BY INDEPENDENT COMMISSION. By Marver H. Bernstein. Princeton: Princeton University Press, 1955. Pp. xi, 306. \$5.00.

THE Independent Regulatory Commission is under heavy attack. The offense is being led by non-lawyers, among whom are Professor Marver S. Bernstein of Princeton and Professor Horace M. Gray of the University of Illinois.¹ The Independent Commission has, as a matter of fact, been the *bête noire* of political scientists for many years,² but the present attack is more comprehensive, more circumstantial and more effective. The independent agency has on the other hand been the darling of the lawyer,³ but some of them are beginning to be fickle.⁴ There can be no question in my mind that a re-evaluation of the role of the independent agency is indicated.⁵ I think it is clear, as Professor Bernstein's book demonstrates, that the case for the independent agency has been grossly overstated. But the present attack goes far beyond deflation. It makes the agencies a scapegoat. The battle against them is being fought with slogans: "industry-oriented," "politically irresponsible," etc. Lawyers shouted "Hosanna" in 1938 and saw the Promised Land revealed by Joseph ("Moses") Eastman. Now it is the turn of the Jeremiahs: the Promised Land has become a place of abominations. The agencies have betrayed reform and abandoned decency. Perhaps it is inevitable that Thought and History should move in this violently dialectic fashion, swinging from illusion to disillusion, from battlecry to battlecry, from slogan to slogan. These oscillatory lunges may be neces-

1. Professors Bernstein and Gray appeared recently before the Cellar Sub-committee of the House Judiciary Committee to testify on H.R. 9762, which was designed to amend the Sherman Act "to declare the primacy of free enterprise" by submitting regulated industries to a greater measure of control. Their remarks are reported in *Traffic World*, March 10, 1956, p. 76.

2. As for example in the famous report of the PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 39-40 (1937).

3. They were thus given a clean bill by a Task Force of the first Hoover Commission which was composed of two lawyers. *THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS* (1949) (hereinafter cited as *TASK FORCE REPORT*).

4. A notable example is Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 *HARV. L. REV.* 436, 464-71 (1954). My own comments on Professor Schwartz' article appear in Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 *HARV. L. REV.* 1105, 1134 (1954) and Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 *U. PA. L. REV.* 577 (1954).

5. I have attempted this in a general way in Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 *HARV. L. REV.* 1105 (1954).

sary to unsettle the vast mass of social inertia; but I think that we academicians should deal somewhat more subtly, more justly if you will, with causes and effects, with the description and evaluation of social consequence, and finally, with judgment.

Americans are a people not notably endowed with the historic sense. They are given to enthusiasm, and that is good because enthusiasm moves mountains. But enthusiasts are prone to violent disillusion: mountains are sometimes stubborn, and even when they yield the view on the other side may be displeasing. Although certainly exaggerated, the hopes set upon administrative agencies and particularly independent agencies were more completely realized than anyone had a right to expect, and it is just this which is part of the trouble. We find ourselves with vaguely felt and undefinable challenges. We are miserably bereft of a program for reform. The independent agency, ironically enough, is a microcosm of our present prosperous predicament—liking not what we see, we attribute our malaise to “industry-orientation” or some other half truth.

The constitutional basis for the independent agency is unsatisfactory. In *Humphrey's Executor*,⁶ the Court speaking of the Federal Trade Commission says,

“To the extent that it exercises any executive function—as distinguished from executive power in the Constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial power, or as an agency of the legislative or judicial departments of the government.
“....

“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control of coercive influence, direct or indirect, of either of the others, has often been stressed....”⁷

Mr. Justice Sutherland is here using the two analogies of court and legislature. The court analogy is an apt and sufficient one when applied to the Tax Court, Court of Claims, etc. Under *Crowell v. Benson*⁸ the Supreme Court held that Congress might endow the so-called legislative courts or agencies with judicial business, and that not all such business need be given to the “Constitutional” courts established under Article III. In aid of the power thus allowed to Congress, *Humphrey's Case* permits Congress to protect such courts from executive domination, a condition which in our tradition is necessary and proper for the effective exercise of judicial power. But the analogy of the agency to the legislature, its characterization as an “agency” of the legislature, is baffling and contradictory. In so far as such an agency is carrying out or “executing” a congressional mandate, it would seem to be performing precisely that function which the Constitution assigns to the Executive. It surely is not a premise of the Constitution that the execution of a law must for its proper exercise be independent of presidential control.

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

7. *Id.* at 628, 629.

8. 285 U.S. 22 (1932).

The campaign by the political scientists against the independent agency has proceeded on both constitutional and political grounds. The Constitution, it is argued, requires that all executive functions be subject to presidential control. The President's Committee on Administrative Management somewhat rashly, but picturesquely, called the independent agency "the headless fourth branch."⁹ They were forthwith accused by lawyers of conceptualism.¹⁰ Lawyers have been partial to these agencies. Liberal lawyers until their current disillusion believed that reforms could be more effectively realized outside of politics. In the fruitfully naive view of that era, "expertness" was envisaged as an objective force which if left to itself would inevitably produce reform. Conservative lawyers preferred the independent agency because it emphasized judicialization. This they hoped would act, if not at once at least in time, as a brake on power. And all lawyers could find common ground for their preference in the value set on formally rationalized action and on continuity.¹¹ But the autonomy of "expertness" as an objective determinant of policy is, I am afraid, an illusion. Policy-making *is* politics. Policy should, to be sure, be fairly and decently made; it should have continuity and dependability. But nothing that I have seen shows that these criteria are less honored and observed in executive agencies, at least when they are required by statute to observe procedural protections.¹²

The present attack goes much beyond the merely formal constitutional argument. It starts from a premise which we must all recognize: these agencies exercise policy making powers much broader than those which are the inevitable concomitant of judicial power. The exercise of policy making power, the argument continues, should *not* be independent of political control. As Professor Bernstein points out:

"[T]aking things out of politics' means 'taking things out of popular control. This is a frequent device of special-interest groups to effect the transfer of governmental power away from the large public to the special-interest small public.'"¹³

Power, therefore, should be exercised by either the legislature or the constitutional executive. The independent agency is criticized not only because it is politically irresponsible, but because from the total body of policy powers, most of which are committed to the President, it arbitrarily abstracts a segment and thereby impedes policy coordination.¹⁴

9. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *op. cit. supra* note 2, at 40.

10. "Such apotheosizing obscures rather than clarifies thought." LANDIS, *THE ADMINISTRATIVE PROCESS* 4, 47 (1938).

11. The lawyers' position is well stated by the TASK FORCE REPORT 19.

12. The TASK FORCE REPORT in invoking for the independent agency the values of fairness, continuity, etc., makes no comparison with executive agencies.

13. P. 73, quoting APPLEBY, *POLICY AND ADMINISTRATION* 162 (1949).

14. The TASK FORCE REPORT 25-28, found no significant evidence of lack of coordination with other agencies of government. But such evidence of hostility has been accumulat-

In reply to this argument, lawyers have maintained that the notion of presidential coordination is a myth. No man or organization representing him is capable of coordinating the multifarious conflicts entrusted to government resolution. A certain amount of unresolved conflict is inevitable, perhaps valuable. It attests to the fundamentally indeterminate, pluralistic character of our complex system. Though these things may be true, they do not seem to me to be an adequate answer. The question is not of complete coordination, but of the availability of the power to coordinate policy in a given area at a given time. The practical difficulties of coordination hardly warrant, except for strong and well-considered reasons, the creation of additional obstacles. It would seem to me, therefore, that at least in the future Congress should hesitate to set up further foci of independent policy-making power. Where the adjudicatory element is predominant, independence may be required or warranted. But this, as has been argued,¹⁵ may be a reason for stripping such an agency of as many of its executive and policy-making powers as is consistent with an adequate solution of the problem which the agency is being created to deal with.

The political argument is based on an attempt to document the charge that the independent agency, having no duly constituted master, is falling under the domination of private interests, characteristically the interests whose activities it is supposed to regulate. This is the so-called phenomenon of the industry-oriented agency. It should be noted that striking illustrations of this sort of thing have not been wanting in the past. The cry against it has sometimes come even from what might be called the other side of the fence. The National Labor Relations Board was accused, and it is impossible to deny that there was some justification to the accusation, of being partial to the labor unions. No doubt the present critics would argue that the bias is more appropriate in that case, since it operates in the direction of the reforming purpose of the statute. Be that as it may, it is at this point that I begin to part company with the critics. First, industry representation is not peculiar to the agencies. It is to my mind not a little curious that the critics limit their examination of this phenomenon to the independent agency. I would suppose that it was necessary first to establish the executive agencies as the norm and then to show how the independent agencies tend to depart from that norm. Yet anyone who follows the activities of the Department of Agriculture, for example, comes to feel (though this too is no doubt an exaggeration) that the Department is a glorified farmer's lobby.¹⁶ An examination of the milk licensing activities suggests the enormous

ing since then, for example, between the regulatory agencies and the Department of Justice on antitrust matters, and between the ICC and Agriculture.

15. See Professor Bernard Schwartz' review of Professor Bernstein's book. Schwartz, Book Review, 69 HARV. L. REV. 960 (1956).

16. For example, the Secretary of Agriculture seems to attack on principle every holding of the ICC that disadvantages the farmers. The Department apparently adopts quite frankly the view that it is a farmer's lobby. In hearings on a redefinition of the agricultural commodity exemption the following statement was made by the Department's representative:

"We know of no farmer or farm organization asking for or supporting these pro-

power of the farm cooperatives.¹⁷ It is certainly not my thesis that all departments, nor for that matter all independent agencies, are industry-oriented; but the current demonstration with respect to the independent agency is neither scientific nor scrupulous.

The distortion in the attack goes much deeper. As I see it the critics' real quarrel, if they would but recognize and admit it, is with Congress. The Interstate Commerce Commission, so much used as an example, is attacked for proceeding along the lines of its congressional mandate and at the same time for failing to create a mandate which neither Congress nor anyone else has been able to formulate.¹⁸ The Commission is criticized for being "railroad minded" and monopolistic. But can anyone find in the legislation of 1935 and 1940 an intention to establish competition as the presumptive norm of transportation regulation? Joseph Eastman, the intellectual godfather of that legislation, insisted that "free-for-all competition has never worked successfully, either here or elsewhere. It has been tried and found wanting." "Constructive coordination" is to be preferred to "destructive competition." The ICC is "to find the work which each form of transportation can do best and endeavor to build up a national transportation system in which the various agencies will function with more regard to correlation and less to competition and with a minimum of waste."¹⁹ Everyone seems to be agreed that the railroads and the large truckers were the dominant forces in procuring that legislation. Was this in the name of competition? When somewhat later the Supreme Court came close to holding that railroad rate conferences were a violation of the antitrust laws,²⁰ Congress immediately immunized them.²¹ Was this another indication of a congressional mandate for competition? The ICC is, it seems to me, at times more tender of the railroad interest than even a fair reading of its mandate would require, and it may be less adventurous in permitting new competition than it might be. But

posed restrictions on agricultural hauling. In opposing this legislation, we believe we are reflecting the views of the entire agricultural community. Instead of diminution or practical elimination of the present exemptions, the farmer and fisherman would be better served by their expansion."

Hugh M. Nicholson, Traffic and Management Division, Production and Marketing Administration, U.S. Dept. of Agriculture, testifying before a Senate Committee. *Hearings Before the Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation*, 82d Cong., 2d Sess., at 442 (1952). It is indeed arguable that the Department has been directed by Congress to act as an official farmer's lobby. See 60 STAT. 1087, 1088 (1946), 7 U.S.C. 1621(3), 1922(j) (1952).

17. Cf. *Brannan v. Stark*, 342 U.S. 451 (1952); Note, *Compensation of Dairy Cooperatives in the Federal Milk Marketing Areas*, 65 HARV. L. REV. 328 (1951).

18. See Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); I have commented on this in Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

19. Regulation of Transportation Agencies, S. Doc. No. 152, 73d Cong., 2d Sess. 4 (1934).

20. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

21. See the Reed-Bulwinkle Act, 62 STAT. 472 (1948), 49 U.S.C. § 5(b) (1952).

these are minor choices in the operation of a scheme in which the major policy directives are fairly clear. The railroads *are* after all the backbone of the transportation system, and there *are* tremendous economic and social advantages in using their facilities to the limit of their capacity. Any scheme based on the notion of finding "the work which each form of transportation can do best" must recognize this as a central fact.

On the other hand, the record indicates that the ICC has liberally authorized a vast increase in trucking facilities. The statistics show that the rate of growth in common carrier trucking has enormously exceeded that in railroading.²² It is indeed arguable that trucks have been permitted to take traffic from the railroads, even though our highways are overburdened and rail transportation is less expensive. Under the jurisprudence of the ICC the doctrine of protecting established "shares" of the traffic is now working as much in favor of the trucks as of the railroads. This kind of policy may be as doubtful as you please, but it is hard to see how an agency with a mandate to "coordinate" can fail to arrive at some such doctrine.

The greatest weakness of the critics, to my mind, is that they have failed to face honestly and wholeheartedly the most serious difficulty facing regulation today. That difficulty is the radical lack of a meaningful statutory policy in many of the areas where the independent agencies function. In some cases the policy has become obsolete. The coordination theory of the 1930's, for example, was based on the economic defeatism of that era. It was assumed that our economy had become static, and that therefore the economic problem was one primarily of allocating resources. Eastman was prepared to find what each means of transportation could do best, as if that were a discoverable quantity in a static world. Yet the tremendously dynamic character of our economic system has substantially altered most of the traditional premises for resolving the transportation problem. The constant engineering changes, the break up of old monopolistic situations because of new modes of carriage, the tremendous increase in freights—all of these raise questions both as to the desirability and feasibility of close regulation.

In radio the situation is somewhat different, for there never has been a statutory policy. The FCC was simply told to go ahead and regulate in "the public interest." I have studied for some years the attempts of the Commission to deal, in the absence of a congressional or popular mandate, with the baffling and manifold complexities in that field. The Commission has lacked foresight, has often been timid and has sometimes been subservient, but to my mind this is the result of the absence of congressional guidance. I conclude that it is much easier to criticize than to come up with an administrative program that could command support. It was long ago pointed out by Herbert Croly, as

22. Taking 1939 as a base of 100, the 1954 revenues of steam railway stood at 239.7, of motor property-carriers at 598.0, of motor passenger-carriers at 331.9, and the total national income at 411.9. "Transportation Economics" for January prepared by ICC Bureau of Transport Economics and Statistics, reported in *Traffic World*, January 28, 1956, p. 76.

Professor Bernstein reminds us,²³ that regulation creates a basic problem because it divides the responsibility for management. The gist of the difficulty, as I see it, is that the regulator accepts no responsibility for the ultimate success of the enterprise, yet his interference discourages entrepreneurial initiative and diminishes the sense of responsibility. If the regulator is given a clear mandate to remove a perceived evil, he has an adequate and limited basis for validating his interference with management, and management has a basis for calculating the effects of the interference. But in the absence of a clear mandate, it is not only inevitable, but appropriate that regulation take the form of an accommodation in which industry is the senior partner. This is the essence of "industry-orientation."

There is very little in our history, I think, to indicate that an executive agency will be much different from an independent agency in periods when public opinion or statutory policy is slack, indeterminate, or lacking in conviction. The odds are that it will respond in much the same way to the climate of opinion. The history of the antitrust division of the Department of Justice, for example, is one of alternation between strict and loose enforcement of the antitrust laws. The Federal Trade Commission, an independent agency, goes through similar oscillations. The Civil Aeronautics Board in the course of its very short history has shown an almost incredible flexibility in moving toward and away from competition. It is, I think, demonstrable that when a new reform is to be undertaken, an independent agency may provide a hard hitting, single-minded authority, oblivious to the immediate partisan requirements of the Administration. The Labor Board proved this up to the hilt. In time, the immediate problem solved, the agency loses its zest and settles into routine. What institution does not? It may be a shade easier at this later stage to infuse the executive agency with a new spirit, for in the absence of an adequate congressional mandate, there is perhaps a better chance that the executive will be able to evolve and gain support for a fresh approach. But if one has a "set" in favor of vigorous regulation, it is pretty much a matter of chance whether he will find it in executive or independent agencies. My arguments, of course, do not make a case *for* the independent agency. As I have already indicated, it seems to me sounder on balance that these policy-making agencies should be subject to presidential control. Rather, these arguments are intended to show that the critics of the agencies have attributed to the factor of agency independence all sorts of political ills and disappointments for which it bears no responsibility whatever.

Now Professor Bernstein, as a matter of fact, "sees" all this, but in my opinion he refuses to face its implications. He quotes from Merle Fainsod's study to the effect that regulation requires "the existence of a social and economic environment in which regulators can function without meeting frustration."²⁴ And he later says much the same thing himself in a variety of ways.

23. P. 42.

24. P. 65.

"The basic task of a regulatory agency is to fulfill the mandate of its enabling legislation and design a program to promote the public interest."²⁵ "Public understanding of the goals of regulation and public support for basic regulatory policies are essential to effective regulation of economic affairs."²⁶ I gather furthermore from his book that he would agree that there is today neither a popular support nor a congressional mandate with respect to many of the areas in question. How, then, can he insist that the "independence" of the agencies is the root of the trouble?

An underlying assumption of his thinking must first be brought to light. It might be thought that the absence of a formulated policy of regulation testifies to the absence of a felt need for regulation or of need for change in the existing regulation; or it could be said to point to a period of search in which the public is feeling its way to a new formulation. Professor Bernstein has a much more strenuous and heroic concept of government. He apparently assumes that there must always be "regulation" (at least of anything that has up to now been the subject of regulation), and that regulation must always be of a certain character. Obviously, therefore, the lack of any generally felt need is not particularly significant: a government worth its salt should always be up and doing. If industry is "dynamic," regulation must be "dynamic."²⁷ It is this assumption of the constant need for some vigorous type of regulation which leads him finally to his conclusion. His basic argument is that it is not possible to rely on the public or Congress or the independent agency to produce a continuous supply of this sort of regulation. "Because of the complexity of regulation and the reluctance or inability of Congress to clarify regulatory goals, a regulatory agency must play the creative role of formulating major regulatory policies."²⁸ Because the agencies have become committed to the *status quo* they will not undertake this role. "Without pressure from the president, Congress is unlikely to undertake progressive reform of regulatory policy."²⁹

I would agree with Professor Bernstein that we cannot look to the agencies for new thinking. In the early stages of its history while still engaged in dealing with the specific problem ("the evil") that brought it into being, the independent agency can be relied upon to fight for a program in and out of Congress. But once it has reduced the urgency of the problem and has, as it were, created its own world, it is apt to become a defender of the *status quo*. It looks upon its work and finds it good. We must therefore look elsewhere for new policy—to the President, to one of the executive departments, to Congress and its committees. The independent agency may even throw its force against the presidential initiative and provide leadership for the *status quo*. This picture, however, is one that is rarely realized in such simplicity. The ICC today *is* defending the *status quo*. In this position it is supported by the truckers and

25. P. 256.

26. P. 218.

27. P. 100.

28. P. 262.

29. P. 101.

not by the railroads to whose interest it is supposed to be so slavishly devoted. The Presidential Advisory Committee on Transport Policy has proposed legislation which the railroads favor and the trucks oppose. It is difficult to determine whether the President has thrown his effective support in any direction. The fact is that because the questions involved are so profoundly complex and difficult, because public and professional perplexity is so intense, and the opposing forces are so violently aroused, it is quite misleading to lay the blame for failure at any one door. Indeed, the inability to produce a new policy at will is not, in my book, ipso facto a failure, though it would seem to be in Professor Bernstein's.

One may, then, follow Professor Bernstein's argument that the merits of the independent agency have been exaggerated. But when he loads upon it all of the frustrations of his Utopian yearning, he is transcending analysis and providing himself with a sacrificial scapegoat.

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A COMMON LAWYER LOOKS AT THE CIVIL LAW. By F. H. Lawson. Ann Arbor: University of Michigan, 1955. Pp. xix, 238. \$4.00.

EXECUTIVE DISCRETION AND JUDICIAL CONTROL. AN ASPECT OF THE FRENCH CONSEIL D'ETAT. By C. J. Hamson. London: Stevens and Sons, Ltd., 1954. Pp. x, 222. 12s 6d.

Two recent books by English authors attest to the keen post-war interest in the United Kingdom in the teaching and research of comparative law. The authors, Professors Lawson and Hamson, hold the Chairs of Comparative Law at Oxford and at Cambridge respectively. Professor Lawson originally presented his essays as the Thomas M. Cooley Lectures (Fifth Series) at the University of Michigan; Professor Hamson's work represents the sixth annual group of lectures delivered in the United Kingdom under the terms of the Hamlyn Trust.

The Hamlyn Trust furnishes a convenient starting point for the present review. The terms for the administration of the trust provide for a lecture series "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples."¹ Yet, despite this admonition, Professor Hamson's lectures under the Hamlyn Trust are unmarred by any smug, *a priori* assumption of the superiority of English law to alien systems; nor, for that matter, do Professor Lawson's essays involve such an assumption. Therein lies the particular interest and significance of the two works. Neither book is an attempt to explore hitherto undiscovered source materials or to break new ground from

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1. EXECUTIVE DISCRETION AND JUDICIAL CONTROL ix.