PROBLEMS OF THE CAB AND THE INDEPENDENT
REGULATORY COMMISSIONS*

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WASHINGTON, D.C.
10 September 1959THE PRESIDENT
The White House
Washington, D.C.

DEAR MR. PRESIDENT:

As I stated in my letter of resignation to you, my experience on the Civil Aeronautics Board has convinced me that an independent regulatory commission is not competent in these days to regulate a vital national industry in the public interest.

This is not a judgment of the character or ability of the men who serve on the commissions today. Not with the Founding Fathers as members of its board do I think the CAB as now organized could fulfill its obligations to the American people.

In our time, civil aviation has become so necessary to the economy and the defense of a nation that we must make certain it is not handicapped in the United States by a regulatory system which does not work.

We have seen in recent years that an independent commission is not competent to regulate the safety of aviation; and we have therefore placed this grave responsibility in a single Executive agency—the FAA. I believe that a similar change in the machinery for regulating the economics of aviation is now also required, and in the hope that my experience as a member of the CAB may help in some way the advance of civil aviation, I submit this memorandum with recommendations to you.

The CAB is a creature imprisoned by its own structure and procedures. It is unable to form clear policy. It is unable to make sound and comprehensive plans. It is unable to administer its affairs with vigor and dispatch.

As a lawyer, I have been disturbed at the inability of an administrative agency, such as the CAB, to give a true judicial hearing to parties who come before it in litigated cases. The agencies are long on judicial form and short on judicial substance.

The policies and plans of the CAB are not coordinated with those of other agencies of our government; they are not responsive to the general policies of the President. The consequence is that our country has today no effective national policy on transportation.

The members of the CAB, like those of other regulatory commissions, have duties and responsibilities of policy-making, adjudication, administration

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and investigation which are by their very nature incompatible. In large part, this causes the personnel troubles so characteristic of the agencies.

The problems of the CAB are not transitory or superficial. They are basic. In my opinion, they are born of the very concept of an independent administrative commission.

In view of what seem to be these organic faults, I would recommend the following:

1. Transfer policy-making, planning and administration from the CAB to an executive agency, such as the Department of Commerce, the Federal Aviation Agency, or a new Department of Transportation.
2. Transfer the judicial and appellate duties of the CAB to a true administrative court.
3. Transfer the duties of investigation and prosecution to an executive agency such as the Department of Justice.

Respectfully,

LOUIS J. HECTOR

PLANNING AND ADMINISTRATION

The Organization and Procedures of the Civil Aeronautics Board Preclude Timely and Effective Policymaking, Planning, and Administration

THE most important responsibility of an economic regulatory agency such as the CAB is the formulation of broad plans and general policies to ensure that the regulated segment of the economy operates for the public benefit as defined by Congress.¹ This is more important than the decision of specific litigated cases. Planning and policymaking, however, when entrusted to an independent commission, are often accomplished with appalling inefficiency.

A specific case will best illustrate this—the *Seven States Area Investigation*.² This was the machinery through which the CAB formulated a plan of local air service for the states of North Dakota, South Dakota, Nebraska, Iowa, Illinois, Wisconsin, and Minnesota. It was an important and an urgent case, since the long-haul trunklines were not rendering adequate local air service, and the rapid decrease of passenger train service in the area had produced a serious transportation crisis for many smaller cities and towns.

The Board ordered the formulation of a plan of local air service for this area on December 14, 1955.³ It took three years to complete. It was a big job, but it was not a highly complicated one, nor were there a great many vigorously contested issues. The job took so long almost entirely because of the inefficient procedures by which it was handled.

A well-run Government agency or military command or business would handle a project like this by first blocking out the boundaries of the problem, making a few broad policy decisions at the top level, and then designating a

1. The congressional Declaration of Policy for the CAB is set forth in APPENDIX A, *infra* at 964.

2. No. 7475, CAB, Dec. 8, 1958.

3. Order No. E-9847, CAB, Dec. 14, 1955.

project director or chief of staff in charge of planning. The director would assemble the necessary personnel, divide up the research, set up a system of supervision, provide for necessary coordination, and within a few months have all the basic data in hand. This would be processed and systematized by a planning group which would pull together the outlines of a program in conformity with general policies already established. If more facts were needed, they would be secured. As problems arose they would go to the project director who would refer on to the top policy group any new major policy issues. As the job neared completion, the top policy group would become familiar with much of the detail. By the time the plan was finished, the staff, the project director and the policy makers would all be in substantial agreement, and final approval would follow swiftly. A job like the *Seven States* plan should take about a year.

The CAB did it differently. It designated a hearing examiner and defined the geographical scope of the case, but gave him no policy direction whatever. Instead, it told the examiner "to review the local air service pattern in the area covered by the States involved and develop a sound pattern of service to meet the needs of the entire area."⁴

For two years there was no further communication between the Board and the examiner. If he had questions of policy, he could not ask for guidance from his superiors—the members of the Board; if they had any views on policy as they saw the general local service picture developing, they could not communicate them to their subordinate—the examiner.

For the first two years the examiner worked at the job all alone. There was no machinery for him to seek out actively the information which he thought he needed; instead, he just sat and took what the interested towns and airlines brought him. One hundred ninety-four witnesses testified before him, and they filed over a thousand exhibits. The examiner personally read or listened to every word of this. By the time he sat down to draw up his plan for local service almost a year had passed; he had before him a pile of pleadings, transcripts, exhibits, and briefs five and a half feet high. It took him a year and two months to work through all this material and come up with a plan. He could not talk to anyone, or ask anyone for help or guidance. Even if he found he needed additional facts, he had to do without them. He had no assistance of any kind except a secretary.

Two years after the Board started the proceedings, on December 13, 1957, the examiner announced his plan in a document of 658 pages.⁵ It was a good job considering the handicaps built into the system under which it was prepared. Few of the parties were completely satisfied, however, and most of the parties petitioned the Board to change the plan in one detail or another. They filed an eight-inch pile of briefs and argued orally to the entire five-man Board for four solid days—a total of twenty-one hours and thirty-five minutes.

4. *Ibid.* These instructions were repeated in Order No. E-10100, CAB, March 20, 1956.

5. Initial Decision, No. 7454, CAB, 1957.

When the Board sat down to talk about the plan for the first time—two years and four months after the job had started—they quickly decided that the examiner had been restrictive in his proposals and that a considerably larger number of towns than he had recommended deserved local air service. So they had to do the plan all over.

The Board might have sent the plan back to the examiner to redo, but this would probably have taken another six months, and after that there would have been more briefs and another four-day oral argument. The five presidentially appointed members and their personal assistants therefore sat down together and in meetings totalling over thirty hours devised a new plan. In this process, they could not utilize the services of the examiner, nor any of the parties, nor even of the Board's own staff of experts. They did not have time, of course, to review the five and one-half feet of testimony and exhibits in the case. They worked mainly from briefs and from their memory of the long oral argument. They were not able to seek any additional facts even though they might be thought necessary to a sound decision. Finally, after seven months' work at the Board level, the plan appeared in December 1958, to take effect the following February⁶—well over three years from the day the job started.

A more inefficient, ineffective way to accomplish a major planning job would be difficult to conceive.

I believe that such planning jobs as determining the type of subsidized local air service required in the public interest and selecting the cities to be served should be accomplished within the executive branch as a normal governmental planning function. The selection of carriers to perform this service is the only issue which requires true judicial procedure in this type of case, and I believe that such issues, carefully delineated, can be handled quickly and effectively by a true administrative court not burdened with other duties.

The CAB and other regulatory agencies develop many of their basic plans and policies in the same manner as in the *Seven States* case. For example, the CAB *Latin Am. Air Serv. Case*,⁷ whereby a plan for air service by United States carriers to Central and South America was established, took almost five years—from 1943 to 1948. Three different plans were formulated—one by the examiner, one by the Board, and one by the White House staff, since the President must approve international decisions—without any one of these three groups consulting the other.

If a private business tried to conduct its affairs this way, it would go broke. If the federal government tried to formulate its foreign policy or its military strategy this way, the United States would never have become a great nation.

Railroad regulatory policy has been made this way for decades, and it is

6. Order No. E-13254, CAB, Dec. 8, 1958.

7. Pan Am.-Grace Airways Inc., 9 C.A.B. 325 (1948); *Latin Am. Air Serv.*, 8 C.A.B. 65 (1947); *Additional Serv. Latin America*, 6 C.A.B. 857 (1946). For discussion of these cases see COMM. ON PUBLIC ADMINISTRATION CASES, THE LATIN AMERICAN PROCEEDING (1949).

little wonder that the railroads today seem to be in one more of their periodic rounds of trouble. I fear that our civil aviation industry will in time become similarly hobbled by regulation unless we stop formulating plans and policies for Government control of business by procedures fashioned after legal proceedings which were never designed for this purpose.

Until the end of 1958, air safety policy was made in generally this same fashion. Following the Curtis report⁸ and a series of midair collisions in 1957 and 1958, however, both the Executive and Congress agreed that air safety policy, planning, and administration could not wait on endless debate and formal procedures. These functions were therefore transferred by Congress to an executive agency, the Federal Aviation Agency.⁹ I think it is now clear that the policy, planning, and administration of important economic regulatory matters must likewise be handled by executive agencies. Indeed, in some economic matters, such as the encouragement of air cargo, where the Board has achieved almost nothing in a decade, the FAA has already proved the value of an executive agency by evolving in a few months an imaginative and far-reaching program.

Because the procedures for making policies and plans in an independent commission are so inefficient, they are often not formulated in time and in some cases not at all. Thus the development of a reasonably clear policy for the nonscheduled carriers took from the end of World War II until the decision in the *Large Irregular Air Carrier Investigation* in early 1959.¹⁰ In the twenty years since its creation, the CAB has still not finished the formulation of a policy on the general level of passenger fares.

Our international civil aviation policy has needed a basic reappraisal for some time, as United States carriers are subjected to ever-increasing foreign competition and carry a steadily smaller percentage of international traffic. Congress, the carriers, and the executive branch have urged the necessity of such a basic policy review. But nothing has been done. We are still proceeding on the basis of a set of principles derived generally from an agreement made with the British at Bermuda in 1946, which has become confused and unrealistic in recent years. Not only has the CAB not taken a broad fresh look at international policy, it has refused assistance from others. In June 1958, the State Department offered to finance a study by independent consultants.¹¹ The CAB turned down the offer on the grounds that the Board could do the job better.¹² The study was not even started until more than a year later. This is not a criticism of the Board's excellent international staff, but rather one further example of how the whole structure of the agency discourages general planning.

8. U.S. PRESIDENT'S SPECIAL ASSISTANT, FINAL REPORT—AVIATION FACILITIES PLANNING (1957).

9. Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 (1958).

10. No. 5132, CAB, Jan. 28, 1959 (Order No. E-13436).

11. Letter From Asst. Sec'y Mann to CAB, June 14, 1958.

12. Letter From CAB to Asst. Sec'y Mann, July 1, 1958.

One of the important reasons why major policy and planning matters are handled inefficiently by the CAB and other regulatory agencies is that so much of the time of agency members is taken up with minor details.

The First Hoover Commission Task Force concluded that "the members of many commissions are too preoccupied with minor matters to be able to devote the necessary time and thought to the more basic issues of regulation."¹³ This report recommended positive steps to cure this. "The Commissions should devote more attention," it stated, "to developing standards and objectives and to planning the regulatory program." It urged that all administrative and supervisory duties be given to the chairman and an executive officer and that less important work should be delegated to the staff in order to free the time of members for more basic matters.¹⁴

Following this suggestion, a formal transfer of "the executive and administrative functions of the Board" to the Chairman was accomplished by Reorganization Plan No. 13 of 1950. But in the long run this really changed nothing, at least so far as the CAB is concerned. The theory of the reorganization was that the Chairman, as executive head of the agency, would direct the work of the agency in conformity with "general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make."¹⁵ As a matter of practice, however, the Chairman performs only the most routine ministerial duties without Board consultation. For example, all letters of any substance from the Board are cleared with all five members; all statements or intergovernmental memoranda are cleared. In fact, any document which leaves the Board undergoes not only substantive but also stylistic clearance by the whole membership. The mem-

13. U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT app. N, at ix (1949) [hereinafter cited as TASK FORCE REPORT]. See also Subcomm. on Surface Transportation, *Report*, S. REP. No. 1647, 85th Cong., 2d Sess. 12 (1958):

Over a period of many years regulatory commissions, like individuals dealing with controversial issues, tend to form habits of belaboring relatively unimportant details involving form rather than substance, while procrastinating on coming to grips with important policy matters that involve serious matters of public interest.

14. TASK FORCE REPORT ix. This was not the first time such a recommendation was made. The Attorney General's Committee had found exactly the same problem eight years before and had proposed the same solution:

Delegation must begin with internal management. The Committee has been impressed by the frequent reluctance of high officers, charged with serious policy-making functions, to relinquish control over the most picayune phases of personnel and business management . . . Intelligent conservation of an agency's resources demands the sloughing off of many of these routine tasks by assignment of the work of internal management to an executive officer.

U.S. Attorney General's Comm. on Administrative Procedure, *Final Report—Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 21 (1941) [hereinafter cited as *Ad. Proc. in Gov't Agencies*].

15. Reorganization Plan No. 13 of 1950, 64 Stat. 1266, 5 U.S.C. § 1332z-15, No. 13, § 1(b) (1) (1958).

bers spend hours in full Board meetings debating the phrasing or even the "tone" of letters.

Theoretically, the Board should agree by majority vote on a general policy and then leave it to the Chairman and the staff to draft documents, fill in details and apply the policy to routine cases. I am told that it has never worked that way. Certainly, it did not during my service on the Board. The CAB and apparently other regulatory agencies still spend many hours on routine licenses, exemptions, permits, approvals, waivers, interventions, and even minor personnel matters. Such waste is inevitable, I believe, in a large agency with extensive policymaking, planning and administrative functions headed up by a multimember bipartisan board or commission, where each member is appointed for a fixed term and has equal authority over policy.

Why do not members of the CAB and other agencies delegate all responsibilities except adjudication and basic policymaking to the Chairman as the reorganization plan clearly intended? The answer is this: the Chairman is a member as well, and he inevitably has strong personal views on matters on which the agency is sharply divided.

Suppose the Chairman is in the minority. The majority fear that he will not push their decision as vigorously and as firmly as they would like. Even when he is in the majority, the minority members want to be certain that the Chairman carries through only to the extent of the Board decision and no further. Such conflicts pose little difficulty on the usual multimember court, whose decisions are more or less self-executing. But in carrying out a large administrative job where policy affects every detailed action, it is very hard for a man to be at the same time an active participating member of a sharply divided multimember commission, and at the same time a neutral executive director acting always on behalf of the majority.

The same is true of personnel actions. A Chairman naturally tends to appoint and promote staff personnel whose work methods he approves and whose policy recommendations he deems sound. But other members may feel differently about the work of specific staff members. This is why all Board members continue to concern themselves with personnel. They must rely almost entirely on the staff for factual data, for policy recommendations, and for legal advice. If a Chairman were given free rein, the staff would inevitably come to be a reflection of his own policies and work methods. That is why the agencies do not give him a free rein, despite the reorganization plan.

A specific example may illustrate the inefficiency of multimember agency handling of administrative and executive decisions. The CAB recently decided to investigate an aviation trade organization which conducts numerous activities that would violate the antitrust laws were they not exempted by Board action. The organization had never before been investigated by the Board, and the decision was made that the Board has a continuing duty to see whether such substantial exemptions from the antitrust laws are in the public interest.

The order of investigation was not issued without long Board discussion. Some members felt that there was really very little necessity for an investiga-

tion and that in any event there should be no public order because it might reflect adversely on the organization. Others felt that the Board's duty was clear and that no discredit would be caused by a public order. Phrases were changed in the order proposed by the staff, sentences omitted, footnotes altered, and as a final concession to the members who did not see any necessity for an order, the word "Investigation" was changed to "Inspection and Review."

In this, as in all investigations, there have been many disagreements with the trade association over the scope of inquiry, access to documents, privileged status of documents, etc. Almost every point thus raised has been brought to the full Board for review. Each has been the subject of lengthy discussion at Board meetings.

Up to the present, the Board has spent over twelve hours in full Board meetings on the procedural details of this investigation. This means twelve hours of the time of five presidentially appointed officials whose total annual pay is 100,000 dollars and of a staff whose pay is at least equal.

It may be asked why the Chairman, or the executive director, or even a lesser staff officer, does not make the purely procedural decisions. The answer is that they cannot, because the Board is so divided in opinion that it is impossible to tell on any specific point just what Board policy might be.

At each step of the investigation, the battle between those who strongly support it and those who are lukewarm is fought out all over again. The members are not to be criticized for this. They have strong convictions on the matter, and they continue to hope that they can persuade their fellow members. There is no top executive who can bring discussion to a close, announce a policy and then carry it out.

Here, I neither support nor oppose the investigation in question—that is a matter of reasonable differing opinions. What is clear is that no agency can ever conduct a satisfactory investigation if every procedural step is debated by five men. If the Department of Justice or the FBI tried to run an investigation this way they would never get their work done. And no board or commission can ever make basic policy or devote themselves to serious adjudicatory matters if the major part of their time is taken up with administrative detail of this type.

A survey of the regulatory agencies will disclose today, I believe, the same inefficient and ineffective preoccupation with detail that has been criticized in past studies of the agencies. This is inevitable so long as we try to make plans and administer positive programs through agencies where five, seven, or eleven men are in practice all equally the boss.¹⁶

16. The Task Force of the First Hoover Commission saw this point clearly:

The common experience is that groups are better fitted for judgment and decision than for the execution of large-scale operations.

The very qualities which make these agencies valuable for regulation, especially group deliberation and discussion, make them unsuited for executive and operating activities. The work of day-to-day regulation and decision and the related super-

ADJUDICATION

Present CAB Procedures and Practices in Adjudicated Cases Do Not Give the Parties the Full Judicial Hearing to Which They Are Entitled

Not only the parties to litigated cases before the Board, but also the public in whose behalf regulation is undertaken, have the right to expect, as a part of basic judicial process:

1. That adjudicated cases will be decided on the basis of general principles and standards known to the parties and applicable to all cases, and
2. That the persons who decide adjudicated cases will do so on the basis of the voluminous testimony and arguments advanced by the parties and this alone, and that they will personally state the reasons for their decision.

Neither of these reasonable expectations is satisfied by present Board procedures and practices.

I. The historic lack of standards in CAB proceedings was pointed out in 1949 by the Hoover Commission Task Force: "In granting new route cases, for instance, the Civil Aeronautics Board provides little real help in understanding its governing principles; its opinions suggest that the Board has failed to face squarely the need for an underlying program."¹⁷ The Board's "handling of the domestic route pattern . . . has proceeded largely on an *ad hoc* basis."¹⁸

The example of the *Seven States* case discussed above shows how very inefficient it is to set up and try a case with no general policies or standards from the Board.

The lack of standards is not only inefficient, however. Equally serious is the fact that it is unfair to the parties, who have to try their case without knowing the policies to be applied.

Take the matter of competitive air service. Within the last year the Board has held that two-carrier competitive service to the southeast is needed from St. Louis, Louisville, Indianapolis, Cincinnati, Detroit, Cleveland, and Pittsburgh, but is not needed from Minneapolis, Milwaukee or Buffalo, although the traffic figures and the general characteristics of these markets are very similar.¹⁹ As the Hoover Commission Task Force commented, "Without ac-

vision of staff fully occupies most of the commissions and overtaxes the capacity of some of them

Ordinarily, we believe, such operating functions should be placed in the regular departments where they may be carried out under direct executive supervision and responsibility. This is more consistent with the structure of our Government and with the position of the President as Chief Executive.

TASK FORCE REPORT 30.

17. *Id.* at 40.

18. *Id.* at 41-42.

19. See Great Lakes-Southeast Serv. Case, No. 2396, CAB, Sept. 30, 1958 (Order No. E-13024); *id.*, May 7, 1959 (Order No. E-13835); St. Louis-Southeast Serv. Case, No. 7735, CAB, Sept. 30, 1958 (Order No. E-13026); Chicago-Milwaukee-Twin Cities Case, No. 3207, CAB, May 19, 1959 (Order No. E-13890).

cepted standards, . . . the agency often appears to act in an unfair or arbitrary manner."²⁰

Similarly inconsistent have been Board decisions selecting trunk carriers for new route awards. In the *New York-Chicago Serv. Case* in 1955,²¹ for instance, Capital and Northwest were awarded significant new routes for two reasons: (1) they were small carriers which needed strengthening, and (2) they could give the same or better service to the public as other larger applicant carriers. Colonial, although a small carrier that needed strengthening also, was not given any of the new routes because it was doubtful whether it could render as good service as other carriers. Later that same year, in the *Denver Serv. Case*,²² Continental and Western were given significant new route grants in the West because they were small regional carriers which needed strengthening and because they could presumably give good service to that region, although service comparisons were not emphasized as much as in the previous case.

Later, in the *Southwest-Northeast Serv. Case*,²³ Capital, Braniff, and Delta were all granted new routes on the sole ground that it was in the general public interest that they be strengthened, although it was clear in this case that on certain routes they could not offer the same public benefits as the larger trunk carriers which had been recommended by the examiner. The Board made it clear that the strengthening of weaker carriers was a positive goal to be pursued even when the service achieved might not be as good as that provided by bigger carriers.²⁴

Then in the *New York-Florida Serv. Case* in 1956,²⁵ a majority of the Board overrode the hearing examiner's recommendation of Delta and gave a new New York-Miami route to Northeast on the grounds of strengthening the weakest trunk carrier, although there was no real question but that Delta could do a better job on the route.

By this time it seemed clear that a definite Board policy had been established: strengthening of weaker trunks is the basic criterion to be applied in the selection of a carrier for a new route, and it overrides the greater public service potential of larger trunk carriers. Examiners were criticized in Board opinions for failing to follow this policy fully in their recommended decisions.²⁶ After the *New York-Florida Case*, an examiner had no alternative in a route case but to strengthen the weakest carrier.

It was on this basis that the examiners in the *Great Lakes-Southeast Serv.*

20. TASK FORCE REPORT 40.

21. No. 986, CAB, Sept. 1, 1955 (Order No. E-9537).

22. No. 1841, CAB, Nov. 14, 1955 (Order No. E-9735).

23. No. 2355, CAB, Nov. 21, 1955 (Order No. E-9758).

24. *Id.* at 2A-8.

25. No. 3051, CAB, Sept. 28, 1956 (Order No. E-10645).

26. See *Southwest-Northeast Serv. Case*, No. 2355, Nov. 21, 1955, at 2A-3 (Order No. E-9758).

*Case*²⁷ and the *St. Louis-Southeast Serv. Case*²⁸ the following year awarded National Airlines new routes from St. Louis and from Chicago to Florida. Thereupon, the Board in a sudden reversal of policy gave the St. Louis route to TWA and the Chicago route to Northwest because these carriers could give better service to the public.²⁹ Some months later a new Florida-Twin Cities route was given to Eastern, over the claims of Delta, Capital and other smaller carriers, on the same grounds.³⁰

There is no way to explain the outcome of these cases on the basis of consistent principles. The Board just changed its mind on policy from one case to another, and this in a field where rights worth many millions of dollars were at stake. Although I participated in the latter cases and have strong personal views on the policy issues involved, I do not argue here that one policy is better or worse than another. The point is rather that basic policy was changed by the Board with no advance notice, no opportunity for argument by the parties on a proposed change in policy, and no opportunity for the parties to present new evidence in the light of the new policies. Carriers who had prepared and argued their cases on the basis of a policy applied consistently in route cases for three years, suddenly found that the rules had been changed in the middle of the game.

So far as I know, this violates no applicable statute or regulation, but it does violate any normal idea of fair play. In my belief, true judicial process requires that the policies and criteria used to decide a case be made known in advance. If the policies are changed during a case, it should be tried over and the parties given a chance to introduce new evidence and argument in the light of the new policy.

27. Initial Decision, No. 2396, CAB, 1957.

28. Initial Decision, No. 7735, CAB, 1957.

29. Great Lakes-Southeast Serv. Case, No. 2396, Sept. 30, 1958 (Order No. E-13024); St. Louis-Southeast Serv. Case, No. 7735, Sept. 30, 1958 (Order No. E-13026). In the *St. Louis-Southeast Serv. Case*, the Board said:

. . . It is true that the need of a smaller carrier for route strengthening has been, and should be, an important factor to be considered by us in selecting a carrier to provide a needed service. But we have never regarded the strengthening factor as necessarily overriding the needs of the traveling public, any more than we have found the absence of such a need for strengthening as precluding an applicant from being selected. In determining the public interest no one factor is automatically controlling. All of the criteria applicable to selection of carrier must be considered and weighed in the light of the circumstances of each given case before we can reach a decision as to the choice of carrier.

Order No. E-13026, at 7, 1A Av. L. REP. ¶ 22210.02, at 14216.

This is a typical statement of regulatory agency policy. It is little wonder that a long-time practitioner before the Board recently referred to "the grubby, uninspired, and sometimes incoherent 'opinions' of the agencies." Westwood, *The Davis Treatise*, 43 MINN. L. REV. 608 (1959).

30. Chicago-Milwaukee-Twin Cities Case, No. 3207, May 19, 1959 (Order No. E-13890).

Actually the Board has almost no general policies whatever. Only a few minor matters have been covered by published general policy statements. In almost all fields of economic regulation, the Board proceeds on a pure case-by-case basis with policies changing suddenly, without notice, and often with no explanation or any indication that the Board knows it has changed policy.

The Board is not alone in this. It seems to be characteristic of the economic regulatory agencies.³¹

There are a number of reasons, in addition to those outlined under "Planning and Administration," for the failure of the regulatory agencies to develop general policies.

In the first place, it is harder work to devise clear, workable general policies than it is to make specific decisions in individual cases. There is a persistent desire on the part of the agencies for what they like to call "flexibility"; they say they must be free to change their policies as circumstances change. This is, of course, true of all government. No one can complain if an agency, after careful deliberation and hearing, changes a basic policy. What is complained of is that the agencies proceed with no clear statement of policy at all or on the basis of policies which seem to change without reason from one case to the next.

Another important reason for the failure of the agencies to enunciate principles is the fact that commissioners in most cases do not personally give the reasons for their votes and hence have no need to think in general policy terms. As explained below, in the CAB and other regulatory agencies, the members of the agency merely vote on the outcome of a case and the opinion justifying the outcome is written by a professional staff. Members of these opinion writing staffs explain that they consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to

31. Apparently the situation has not changed much over the years. The Attorney General's Committee in 1941 had this to say about the FCC:

The Federal Communications Commission is especially interesting with respect to adherence to precedents. It is believed by some that the Communications Commission goes further than other agencies of comparable importance in refusing to give weight to its own prior decisions. This view seems to be supported to some extent by the Commission's reluctance to cite in its formal opinions any of its own earlier decisions . . . Particularly in the broadcast field it is generally felt that there are seldom two cases where the facts are substantially alike and that any attempted general principles will necessarily have to give way in most cases to special circumstances.

Ad. Proc. in Gov't Agencies 469.

In 1958, the Chairman of the FCC said on the same subject: "You can't have any reliance. There is nothing, especially in the FCC, that you can really get hold of with a firm grip and say that you can rely on." 11 *AD. L. BULL.* 137 (1958).

The Board itself said in a recent opinion: "We waived [the *Sherman* doctrine] in this instance because of unusual circumstances which evolved in this proceeding. This, however, does not indicate that we would take the same action if a similar situation should arise in the future." *Transocean-Atlas Case*, No. 8943, CAB, Aug. 21, 1959 (Order No. E-14370).

write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles.

Many policies actually followed by the regulatory agencies in practice probably could not stand the light of clear public expression. Suppose the CAB, for instance, were to enunciate the following policies:

1. New routes will always be given to existing trunk carriers so as to strengthen them, and no new carrier will ever be given a route.

2. Even though an air carrier could cut tariffs or improve its service and still make a profit thereby, this will not be permitted if it would hurt the business of other certificated carriers.

3. Even though a large carrier could do a better job for the public on a new route, the route will be awarded to a small carrier if possible in order to strengthen that private business enterprise.

Suppose the Interstate Commerce Commission were to announce publicly that even though trucks can carry a certain class of freight more cheaply than the railroads, the trucks will not be permitted to carry it at lower rates if this type of freight has been historically carried by the railroads and the railroads would be significantly injured by loss of the traffic. If any of these policies were announced publicly, there would be an immediate popular outcry, and probably congressional and Executive inquiry. They might well be changed by legislation. Yet it is clear to anyone who reads the decisions of these agencies that these are basic policies which have apparently guided many decisions over the years.

The failure to make clear policy is thus not only unfair to individual litigants. Far more pernicious is the immunity from public, congressional, and Executive criticism and control which this failure entails. It is almost impossible to examine and weigh the policies of the agencies because it is almost impossible to find out what they are. They must be deduced from a string of disconnected, particular decisions often conflicting and seldom articulate. This seems to be the reason why so many congressional investigations into the work of the agencies concentrate on the wisdom of specific actions or on procedural or ethical problems rather than on fundamental substantive policies and plans.

A good example of this is the work of the Subcommittee on Legislative Oversight of the House Commerce Committee. Created in early 1957, the prime purpose of the subcommittee as expressed in the House resolution³² and in statements on the floor was to examine the substantive policies and plans of the agencies "to see whether or not the law as we intended it is being carried out . . ."³³ The subcommittee, with ample appropriations and staff, has been hard at work on the agencies for over two years now, but most of its studies have concerned procedural and ethical problems. The reason, I believe, is that such matters are readily susceptible to investigation, study and

32. H.R. Res. 99, 85th Cong., 1st Sess. (1957).

33. 103 CONG. REC. 1556 (1957) (remarks of Speaker Rayburn on the floor of the House).

appraisal, whereas the substantive regulatory policy of the independent commissions is so diffuse, indeed so nonexistent in many areas, that it is all but impossible to pin it down long enough to study or appraise.

This result of the failure of policymaking in the agencies has received much less attention than the effect on individual litigants. In terms of the general public interest, however, the inability of Congress to control the policies of the agencies it has created and the inability of the Executive to coordinate their policies, all because of the failure of the agencies to make any explicit, consistent policy, may well be the most urgent reason for a substantial change in the machinery for government control of business.

II. The failure of the members of regulatory commissions to decide cases solely on the basis of firsthand acquaintance with the record and their failure to explain personally the reasons for their decisions mean that the so-called "quasi-judicial" processes of the agencies bear little relation to what is normally thought of as judicial process.

An indispensable requirement of judicial process is that decisions be made on the basis of the facts in the record. The decision and knowledge of the record must go together.

In our court systems, trial courts make determinations of fact on the basis of personal familiarity with the record. Appellate procedures are confined to specific questions of law which the appellate court can decide on the basis of personal familiarity with those portions of the record which bear on the questions to be decided. If a change is made in the lower court's view of the law, the case is usually sent back to the lower court so that the corrected legal principles may be applied to the facts by one who is familiar with the facts.

In adjudicated cases before the CAB and other regulatory agencies, decisions are made on fact, policy, and legal questions by the Board or commission itself with little personal familiarity with the record. This process of decision has a long history of justification.³⁴ The fact of the matter is, however, that the system does not produce consistent, informed, responsible, or articulate judgments. And it is an ideal breeding ground for *ex parte* presentations and improper influence.

The Attorney General's Committee in 1941 recommended that hearings and appeals in the agencies be on much the same basis as trials and appeals in our courts.³⁵ The Administrative Procedure Act of 1947, although in large part an outgrowth of the committee's studies, did not adopt this theory. It gave the members of agencies full power to decide all aspects of a case.³⁶ This

34. A full statement is 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 11.01-.21 (1958).

35. "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court." *Ad. Proc. in Gov't Agencies* 51.

36. Administrative Procedure Act § 8(a), 60 Stat. 242 (1946), 5 U.S.C. § 1007a (1958); see U.S. ATTORNEY GENERAL, *MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 83-85 (1947):

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains com-

power has been used to the full and then stretched. And it could not have been granted with the expectation that decisions would be changed by agencies with little reference to the record.

In an adjudicated case before the CAB, all the evidence is heard by a hearing examiner, a permanent Civil Service employee. He conducts what amounts to a trial, and renders a decision. While this may be an inefficient process for the decision of certain types of questions as discussed above, it does give every party a full and fair hearing on controverted issues.

In almost every case before the CAB, every significant conclusion of the examiner on important issues is challenged by the losing parties, and the appeal procedure to the Board covers every aspect of the case—legal, factual, and policy. The Board, in effect, tries the case all over again, frequently overturning the examiner's conclusions, which are certainly not considered binding and, on major issues, are not even treated as persuasive. There is often no mention of the examiner's decision or discussion of his specific mistakes or errors in the arguments to the Board. The appeal is treated by most parties as a new proceeding to be argued all over again. Under the law this is proper. But the law could not have contemplated a situation such as that at the CAB, where cases are tried virtually *de novo* on the basis of briefs and oral arguments, to a body which will never really become familiar with the record.

If an administrative agency fulfilled its policymaking obligations as it should, it should seldom be necessary to reverse an examiner on policy grounds. He would know the policy to be followed. As pointed out, however, policy is not enunciated on a general, formal basis by the agencies but is made rather on a case-by-case *ad hoc* basis, with the result that any resemblance between an examiner's recommended decision and the final decision of the Board in a significant case is almost coincidental.

The ideal situation, of course, and the one I recommend, is that general policy and plans be made and enunciated by an executive agency of the Government and then applied to specific cases by an independent administrative court or set of courts. This is the only way to ensure that policy will be clearly formulated and publicly announced. If this be not the case, however, the least that comports with fair procedure is that a regulatory commission, when it disagrees with the policy decisions of an examiner, announce clearly what the policy is and then send the case back to the man who knows the facts. This is almost never done by the Board or the other regulatory agencies. They simply take the case over and decide it themselves.

plete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature . . . The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings.

It should be noted, however, that the *Manual* assumes that new findings by the agency will be made "*upon the record or upon new evidence which it takes.*" (Emphasis added.)

What justification is given for this? First, that the examiners are not competent. If that is true, they should be replaced, rather than pervert a whole procedural system to overcome their deficiencies. Second, that the examiners do not understand politics. That, of course, is all to the good. Decisions in specific adjudicated cases are not supposed to be influenced by politics. Third, that the examiners cannot make policy, which must be made instead by commissioners appointed by the President and confirmed by the Senate. This is true; the agency members should make policy. The trouble, however, is that commissioners seldom enunciate policy, and therefore examiners must decide cases in a policy vacuum.

Having taken over decision of a case, the members of the Board do the best they can, but there is no real chance for a review of the record. Cases are decided on the basis of an outline of the issues and a list of questions to be decided prepared by the General Counsel's office and never seen by the parties. The members hear the oral argument—or read it if they are not present—and study the examiner's decision and the briefs to the Board, either personally or through their single personal assistant. The pressure of administrative matters, routine decisions and other major cases effectively prevents any contact with the record. The thousands of man-hours which go into the making of a record are thus virtually ignored at the crucial moment of final decision.

The Attorney General's Committee in 1941 laid down a principle which seems unexceptionable: "[R]eview should be given by the official charged with the responsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions."³⁷ This "personal mastery" seldom obtains at the Board or any of the other regulatory commissions.

It is argued sometimes that the judges of appellate courts do not read the entire record in cases before them. This is true. But appellate judges do not purport to decide all the factual issues in a case on the basis of the evidence, as do the regulatory agencies. They decide only specific disputed issues of law and need therefore to refer only to the specific portions of the record which involve those issues. The agencies, on the other hand, undertake to redecide all the factual issues in a case on the entire record as compiled by the examiner.

There could be one saving grace in all this. The Administrative Procedure Act provides that "all decisions . . . shall . . . include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record."³⁸ If this were done personally by the members of the agency who make the final decisions in adjudicated cases, the litigants and the public would know why the agency decided as it did, and at least one member would have to study the

37. *Ad. Proc. in Gov't Agencies* 52.

38. Administrative Procedure Act § 8(b), 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958).

record personally in order to draft the opinion.³⁹ This, of course, is the procedure followed in all our appellate courts.

Not so on the CAB or other regulatory agencies. The decisions are written there by a staff of expert opinion-writers after the decision has been made, and often—in the case of the CAB and the FCC—after it has been announced publicly. Any safeguard that the opinion requirement might provide is dissipated by the public announcement of a naked conclusion and the subsequent delegation of the opinion-writing job. It is somewhat like playing golf by telling experts where to hit the ball for you and then claiming the score at the end.

There have been times when the Board made decisions in executive session and then told the opinion writers what answer the opinion should come out with. Major decisions of the Board have been made in that way. More often, the opinion writers sit with the Board when a case is discussed. There can be no real claim, however, that the Board tells the opinion writers in detail what to put in the opinion. The members do not know the detailed facts and statistics until the opinion writers dig them out of the record and present them in an opinion. A simple comparison in a number of major cases of the time spent in what is known as “giving instructions” to the opinion-writing division with the length and detail of the final opinion would afford simple proof that only a small part of the contents of the opinion was conveyed by the Board to the staff.⁴⁰

Nor can it be claimed that the opinions prepared by the staff are mere drafts and that the Board carefully reviews, edits, modifies, and rewrites the opinion. A comparison of the opinions as sent to the Board in what is known as “Study Copies” with the final published opinions will disclose significant variation in few cases.⁴¹ If the opinions of the Board express what actually goes on in the minds of the deciding members, this is coincidental or the result of the in-

39. The requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is freedom to announce a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process [T]he exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decisions run a professional and academic gauntlet.

Ad. Proc. in Gov't Agencies 30.

40. The job of the opinion writers is to draft an appeal-proof document which will support the result already reached by the commissioners. An important part of this process consists of having an attorney go through every brief and make a list of every point raised by every party. Each point of any significance is then mentioned in the opinion, often by the formula: “We have considered the contention of _____ to the effect that _____, but we find that this does not alter our conclusion.”

41. The scant importance attached to members' review of opinions was dramatically illustrated in a recent case in which four hours of opinion-writing instructions had been given to the staff in mid-1958. A detailed draft opinion of seventy-one pages first reached the members of the Board from the opinion-writing division early in March 1959. At a

tuition that a good staff can develop over the years. In neither case are the requirements of true judicial process satisfied.

I know of no case where the opinion writers ever came back to the Board and said that the facts in the record of a case simply would not support a substantial decision previously made by the Board. It is too much to expect that the ultimate facts of record when dispassionately viewed will always support a decision previously reached without close personal knowledge of the record.⁴²

It is sometimes argued that members of agencies should be able to hire skilled lawyers to explain their actions just as businessmen or government executives have attorneys to justify their actions legally. This argument merely serves to confirm the nonjudicial nature of the so-called "adjudicatory" processes of the regulatory agencies as they are conducted today. They are not really judicial at all, for the judicial process requires that the decider personally know the record on the basis of which his decision is made and that he state the reasons for his decision.

As the Attorney General's Committee said, "The heads of the agency should do personally what the heads purport to do."⁴³ Or as the *Declaration of Independence* puts it, "A decent respect to the opinions of mankind requires that they should declare the causes which impel them."

Board meeting the next day, members were urged to sign and release the opinion that same day because inquiries had been made about the delay in the case.

A similar episode occurred recently in the case of one of the most important general rulings made by the Board in many years. The request for the ruling was filed in early 1958. There were many lengthy comments from interested parties. The Board, however, for well over a year, never discussed the matter with each other or with the staff, and the staff at no time had any indication of the Board's thinking. The General Counsel's office proceeded to draft an opinion of the Board on the basis of what they thought the Board should hold and finally sent this to the Board more than a year after the request was filed. This twenty-nine page opinion was discussed for about an hour by the Board, a few changes were made in the text, and the document was issued within a few days. The document is headed "Opinion and Interpretative Ruling, By the Board." The phrase "By the Board" cannot be construed in anything like the customary judicial sense.

This is the procedure followed also in the great majority of safety appeals to the Board. The members never see the pleadings, the record, the examiner's decision, or the briefs. As a matter of fact, there are not even enough copies of some of these documents to go around. The General Counsel's office usually studies these documents and prepares a decision with no instructions from the Board, and then circulates the proposed decision together with a covering memorandum. This is not a true judicial appeal.

42. See LANDIS, *THE ADMINISTRATIVE PROCESS* 106 (1938):

... Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend. Delegation of opinion writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record. General impressions rather than that tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication.

43. *Ad. Proc. in Gov't Agencies* 52.

POLICY COORDINATION

The Plans and Policies of the CAB Are Not Coordinated in Any Way With Those of Other Government Agencies or With General National Policies as Established by the Executive

The CAB, like other independent regulatory agencies, operates with scant reference to other branches of the Government even when their activities have close interconnections. It operates also quite independently of general coordination by the Executive.

So far as the adjudicating of litigated cases is concerned, this is as it should be. A judicial body such as a court or an administrative tribunal should be guided only by the record. In the field of policy and planning, however, this lack of coordination makes no sense.

The CAB in recent years, for instance, has been busily engaged in certificating subsidized local air service into the smaller cities of the country as the railroads reduce or terminate passenger service to those towns.⁴⁴ The Board has done this on the general theory that the Board's job is to promote air travel, and that as the railroads pull out the airlines should move in and take up the slack. The ICC has permitted the railroads to reduce or eliminate passenger service because they have been losing so much money on it. But the airlines also lose money when they take over local passenger service in small towns. The only difference is that the federal government makes up the loss to the airlines in the form of subsidy.

Whether this takeover of nonsubsidized losing railroad passenger service by subsidized losing air service is in accord with sound national transportation policy or with the broader national interest is not a subject for discussion here. The point here is that there is today no machinery for determining such a question since there is no coordination between the ICC and the CAB on this matter, nor does either agency receive any coordinated guidance from the Executive branch.

The statutes enacted by Congress are far too general in their terms to provide detailed policy guidance on a matter of this kind. Thus each agency pursues an independent policy with no coordination of any sort, although the actions of each closely concern the other.

To take another example, the CAB has the power to exempt air carriers from the operation of the antitrust laws.⁴⁵ This is one of the most formidable powers possessed by any Government agency. The laws against monopolies and restraints of trade are built into the very fabric of our national economy and our business life. Not one, but two agencies of the federal government are charged with actively enforcing these laws—the Department of Justice and the Federal Trade Commission. Standing subcommittees of Congress keep

44. For example, the Northern Nebraska towns given air service for the first time in the *Seven States Case*. No. 7454, CAB, Dec. 8, 1958 (Order No. E-13254).

45. Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1958).

continual surveillance over monopolistic aspects of our economy. Any attempt to weaken these basic laws meets with strong public and governmental objection. Even the President himself cannot suspend them. But the CAB can, and it can do so without consultation or coordination with the Department of Justice, the FTC, Congress or anyone else, and the courts have severely limited their review of such cases by the doctrine of "primary jurisdiction."

It does not make sense for the federal government to be enforcing the anti-trust laws diligently through two agencies while a third agency on the basis of no coordinated policy is busy exempting an important segment of industry from these laws. No criticism of the Justice Department, the FTC or the CAB is implied in this. The problem is that there is no machinery whatever for coordination. Indeed if the CAB and Justice Department today attempted to establish a coordinated policy on antitrust matters, the CAB might well be accused of compromising its "independence."

The CAB has the power to obligate the federal government for large sums of money with no coordination whatever with the Bureau of the Budget or the President, and with no prior approval by Congress. By merely issuing or withholding certificates of public convenience and necessity for air service which will not pay its own way, the CAB can decide to spend twenty-five, thirty, sixty or a hundred million dollars a year on subsidy—and this without regard to the President's budget, the fiscal policy of the Government, or general transportation policy. Under today's conditions, with national budgetary and transportation policy of critical importance, such uncontrolled, uncoordinated expenditures are not good government. No criticism is intended here of any specific Board action on subsidy. Within the limitations imposed by its present organization and procedures, the Board has done a careful and conscientious job. But this job has been performed in a policy vacuum and may or may not comport with the best interests of national transportation generally or national fiscal policy.

Another example of the serious lack of coordination of civil aviation is in the defense field. The civil air fleet will be urgently needed in time of national emergency. The new fleets of civil jet aircraft, for instance, were justified by the carriers to the Board in part by defense considerations. And yet there has been no joint planning, no discussions, not even any high-level exchange of views between the CAB and the Defense Establishment on these matters. The CAB certifies routes, sets rates, encourages or discourages certain types and classes of air carriage—all of which may have important defense implications—without any real military consultations.

For the past several years the CAB and the Department of Defense have been engaged in a running battle over the proper role of the civilian carriers in peace time military airlift. What the proper answer to this problem is cannot be solved here. What is important is that there is no machinery whereby the actions of the CAB and Defense Department can be authoritatively coordinated on such a problem. It was only with the creation of FAA, an executive agency, that some coordinated policy began to develop.

It may be said that policy coordination of the regulatory agencies is effected through Congress, but this is true in only the most general sense. The basic statutes such as the Civil Aeronautics Act, the Interstate Commerce Act and the Motor Carrier Act list a large number of regulatory goals and purposes—all general and frequently overlapping or conflicting in character. Within these very general goals and purposes, the individual independent regulatory commissions develop their own specific policies and programs without reference to any larger program.

Although Congress exercises a legislative oversight over the regulatory agencies, this, as mentioned above,⁴⁶ is often concerned with specific cases and problems or with procedures and not with substantive policy. Because of its multitude of diverse responsibilities, the machinery of Congress is not adapted to day-by-day detailed policy coordination.

The only possible source of detailed coordination of economic regulatory policy is the Executive. Policy is made today by groups of men, whose composition is determined to a great degree by the accidents of terms, appointments, resignations, etc. These groups are in practice not responsible to anyone. Economic regulatory policy will not become fully responsive to the national needs and purposes until it is made within the framework of congressional legislation by men responsible to the Executive.

The Task Force of the First Hoover Commission believed that necessary coordination could be achieved by the President's power to name the chairman of each regulatory agency.⁴⁷ "This will enable the President," they said, "to obtain a sympathetic hearing for broader considerations of national policy which he feels the commission should take into account."⁴⁸

This, of course, has not worked as anticipated. In the first place, the chairman is only one member and often cannot command the concurrence of a majority of the commission. Indeed, the very fact that he does have private, personal communications or discussions with the executive branch may well produce a negative reaction by the other members, who feel that their role in determining regulatory policy is just as important as that of the chairman—which indeed it is in a multimember agency.

Furthermore, Congress clearly does not accept the idea of informal Executive influence through the chairman of the independent agencies or through other means. The whole drift of the hearings and reports of the House Subcommittee on Legislative Oversight⁴⁹ for the past two years is that neither the Executive nor anyone else should exercise any influence over the independent regulatory agencies. This is not just the particular view of one committee. The CAB has been severely criticized by the House Committee on

46. See text at 493-94 *supra*.

47. TASK FORCE REPORT 31-33.

48. *Id.* at 32.

49. See, e.g., House Subcomm. on Legislative Oversight, *Independent Regulatory Commissions*, H.R. REP. No. 2711, 85th Cong., 2d Sess. (1959).

Government Operations for membership in the Air Coordinating Committee,⁵⁰ which has been about the only instrument for coordination of civil aviation policy in recent years. Appointees to regulatory agencies are carefully quizzed by Senate committees on their determination to avoid any forms of Executive influence.⁵¹

The reason for this great emphasis on avoiding any influence on the regulatory agencies is clear. It was set forth in the *Report* of the First Hoover Commission Task Force: "[T]he commission should be independent and free from partisan influence in the decisions affecting individual rights and in the ordinary administration of the statute."⁵² The Task Force believed, as does everyone who considers the subject, that individual cases must be decided on the record alone. They felt, however, that such independence could be maintained in adjudicated cases despite Executive influence and coordination on policy matters.⁵³

This is the heart of the problem. Judgments in adjudicated cases affecting individual rights must be made with full judicial process and independent of any influence from the Executive, Congress or anyone else. Policy and general plans, however, if they are to be effective, must be made under the coordination and direction of the Executive within the framework of congressional policy determination. It is argued that commissioners can do both, that they can be independent half of the time as judges, and subordinate or at least "coordinated" the other half of the time as executives. Recent experience belies this.

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50. The presence of the Civil Aeronautics Board, an independent, quasi-legislative, quasi-judicial, regulatory body on the Air Coordinating Committee should be terminated at once. This is equally applicable to the membership of the Federal Communications Commission.

.....

The subcommittee believes that the continued membership in the Air Coordinating Committee by these regulatory bodies represents an undermining by the executive branch of the careful standards and safeguards of administrative law procedures prescribed by the Congress in creating both the Federal Communications Commission and the Civil Aeronautics Board

It is an illegal and unwarranted invasion by the executive branch by means of an Executive Order to assume, without consent of the Congress, powers the Congress specifically conferred on these independent tribunals.

Participation by regulatory bodies in Air Coordinating Committee matters and according Air Coordinating Committee decisions binding effect, without adherence to procedures prescribed by the Congress represents a flagrant flouting of the will of the Congress.

H.R. REP. NO. 2979, 84th Cong., 2d Sess. 21 (1956).

51. See, e.g., *Hearings on Miscellaneous Nominations Before the Senate Committee on Interstate and Foreign Commerce (Louis J. Hector to CAB)*, 85th Cong., 1st & 2d Sess. 52, 54 (1957).

52. TASK FORCE REPORT 31. (Emphasis added.)

53. *Id.* at 25-28.

One trend today is to make the agencies completely independent—both for adjudication and for policy and planning. The theory behind this is that if a body of men are to act like a court they must do so one-hundred per cent of the time. Congress and the public demand this, and I think the basic principle is sound. It is impractical and unrealistic for a man to try to be an independent judge part of the time and a coordinated administrator the rest of the time if he is dealing in both capacities with exactly the same industry, the same people and the same problems.

It would seem therefore that the only way to secure the necessary coordination of economic regulatory policies of the agencies and at the same time preserve the independence of adjudication of individual rights is to split the two types of responsibility, putting one in the Executive and the other in a special administrative court. In this way, the policies of economic regulation can be made fully responsive to national needs and purposes, and at the same time adjudication in individual cases can be guaranteed that independence which Congress and the public rightfully demand.

DUTIES AND RESPONSIBILITIES

The Members of the CAB, Like Those of Other Regulatory Agencies, Have Policymaking, Adjudicative, Administrative and Investigative Duties and Responsibilities Which Are by Their Very Nature Incompatible

1. The debilitating conflict between routine administration and the major tasks of policy formulation and adjudication in a multimember commission has already been discussed. The only way to solve this conflict is to remove administration from those charged with adjudication and to place it in an executive agency headed by one man who can delegate it in accordance with normal executive procedures.

2. The conflict between policy formulation and adjudication involves profound differences in attitude and procedure.

Policy—like legislation—is usually formulated on the basis of free, extensive, informal discussion with many interested or informed individuals or groups and on the basis of delegated staff work.

Most executives or legislators feel that they should see and talk informally with as many people as they can; they feel that they should see for themselves as much as possible the actual facts with which they are dealing. They will, of course, receive differing opinions and views from their constituents or those with whom they discuss matters, but an executive makes a constant series of pragmatic informal judgments on the basis of his own experience, the advice of his own staff, and on his varying confidence in the different people with whom he talks. An executive or a legislator cannot hold a judicial hearing every time he makes a decision. He would never get his work done.

Adjudication, on the other hand, depends on formalized procedures, the building of a record with opportunity for presentation and cross-examination of evidence, and final judgment on the basis of the record alone by the persons

responsible for decision. By the very nature of his job, a judge cannot talk informally with the litigants before him; he cannot personally view the subject matter of a case except under circumstances carefully arranged to give neither party an advantage. Judges decide cases on the formal record and must forget any other particular knowledge of the persons and problems involved.

There can be no informal, one-party presentations to judges. On the other hand, general planning and policy probably cannot be made efficiently without such presentations.

It has been suggested that commissioners should divide their work—making policy according to one set of standards and adjudicating according to another. But the work of one individual cannot be so neatly divided into watertight compartments.

The CAB, for instance, has for two years been urging the carriers to introduce new low promotional fares to build traffic. As a natural part of developing this policy, members of the Board discuss with the carriers various plans and proposals for new fares, the cost aspects, the potential stimulation of traffic, and such matters. This is the way policy is developed by the legislature, by the Executive, or by a private business organization, and in the process personal relationships naturally develop between men who are concerned with common problems.

But suppose in the case of the Board that one of the carriers makes a formal filing of a new low promotional tariff, and two other carriers file a protest that the fare is unjust and unreasonable. The gears are now supposed to shift. This is an issue on which all parties are entitled to a full hearing with all the elements of judicial process. They are entitled to a judgment on the record and the record alone, without any *ex parte* presentations.

But the *ex parte* presentations were already made when the members talked generally to the carrier about tariffs while they were still in the planning stage. How can the members of the agency now forget the talks and discussions held as policymakers and become judges who look only to the formal record—particularly when they are probably still talking informally to the same carriers on other tariffs still in the planning stage? The mind of man is not so neatly compartmented, and any system based on a theory that it is, is doomed to failure.

In one specific case, of course, a commissioner might be able to keep these two roles completely separate, driving from his mind as a judge what he knows as an administrator. But no man can possibly work all day every day with the same people in the same industry and discuss all aspects of it informally as a policymaker and then from time to time wipe every bit of that out of his mind in order to become a judge and decide a case solely on the record. As Donald C. Beelar, a former Chairman of the Administrative Law Section of the ABA has often said, "It is not possible for a man to be a judge on Monday, Wednesday and Friday and a legislator on Tuesday and Thursday."

Both Congress and the courts have recently criticized members of the FCC

for meeting informally with applicants for television licenses even though the specific application was not discussed.⁵⁴ The criticism is of course valid. It cannot improve the quality and impartiality of adjudication for the judges to have informal private chats with the litigants.

But what is a member of the CAB to do? Every airline of any size always has a case of some kind pending before the board. Following out the strict letter of judicial proprieties would mean that no Board member could ever talk to anyone in any airline, and policy would thereby be made by the CAB in a complete vacuum. On the other hand, the informal conversations customarily employed in policy formulation undoubtedly influence adjudication since the facts and impressions gained thereby cannot by an act of will be forgotten.

The answer to this problem, to repeat, is to separate policymaking from adjudication, putting the former in the Executive and the latter in a special administrative court. If the regulatory executive were thus freed from judicial responsibilities and restraints, he could maintain sufficiently close relationships with persons who have views or facts about the regulated industry to keep informed, without sacrificing the dignity and reserve appropriate to a responsible government officer. And the officers of the administrative court would be able to conduct themselves like judges.

3. The conflict between adjudication and prosecution has been explored more extensively in prior studies and hearings than any other type of conflict within the regulatory agencies.⁵⁵ The Administrative Procedure Act and other statutory reforms such as the recent changes in the organization of the NLRB⁵⁶ and the FCC⁵⁷ reflect the outcome of these studies. The basic purpose of these changes has been to protect defendants against a judicial hearing where the judges have already made up their minds because they initiated the investigation and directed the prosecution. Although there are still unsolved problems,⁵⁸ by and large this area of conflict and incompatibility has been handled by the ever-increasing application of the separation of powers doctrine.

54. See House Subcomm. on Legislative Oversight, *Independent Regulatory Commissions*, H.R. REP. NO. 2711, 85th Cong., 2d Sess. (1959); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *on remand from* 358 U.S. 49, *vacating per curiam* 255 F.2d 191 (D.C. Cir. 1958); *WORZ v. FCC*, 268 F.2d 889 (D.C. Cir. 1959), *on remand from* 358 U.S. 55, *vacating per curiam* 257 F.2d 199 (D.C. Cir. 1958); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958); *WKAT, Inc. v. FCC*, 258 F.2d 418 (D.C. Cir. 1958); *WIRL Television Co. v. United States*, 253 F.2d 863 (D.C. Cir.), *vacated and remanded per curiam*, 358 U.S. 51 (1958).

55. See the full treatment in 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 13.01-.11 (1958), and authorities cited. The most influential statement of the problem was undoubtedly that in *Ad. Proc. in Gov't Agencies* 55-60, which led to § 5(c) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1958).

56. Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-66 (1958).

57. 66 Stat. 712, 721 (1952), 47 U.S.C. §§ 155(c), 409 (1958).

58. See, e.g., *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir. 1959).

4. A serious conflict of duties and responsibilities which has yet been little mentioned is that between the responsibility for investigation and prosecution of law violations and the responsibility for formulating plans and policies to promote the economic well-being of an industry. It is this conflict which explains the failure of the so-called promotional regulatory agencies—the FCC, CAB, ICC, Federal Power Commission—to crack down vigorously on law violators within the industry except in those cases where the actions of one member of the industry threatens the economic stability of the industry as a whole.

A clear example of this conflict has occurred recently in the CAB. In July 1957, the staff informed the Board that certain loans to air carriers involved the possibility of illegal control situations or conflicts of interest. The staff was instructed to watch the matter. During the following year, the number, size, and complexity of the loans increased. It was generally agreed that the problem was serious, that potential control and interlocking relationships were possibly being created, and that the Board's staff was having little success in digging out the facts by informal means. Some of the staff urged an investigation; others took a different view. They urged that since the carriers were then having a hard time financing new equipment, the investigation might have an adverse effect on their negotiations, and that this was incompatible with the Board's promotional responsibilities. A majority of the Board accepted this argument and voted not to institute any investigation.

Again, I do not here support or oppose the proposed investigation. It can be argued that investigations should never be called off solely because they might hurt business, that investigations should be called off only when it appears that there is no significant probability of violation of the law. On the other hand, it is difficult to urge that the Board was neglectful of its duties, because it does have a statutory duty to promote the economic well-being of the industry and an investigation right at that time might have made financing more difficult. The answer to such conflicts is to separate promotional policymaking from investigation and prosecution.

Another example of the incompatibility between promotional policymaking and prosecution is the Board's treatment of the so-called Sherman Doctrine. This is the doctrine that if persons enter into control or interlocking relationships which require prior approval of the Board under sections 408 and 409, without having secured such approval in advance, the Board will require that the transaction be undone and the illegal relationship terminated before the Board will consider whether or not to give its approval. The doctrine was announced squarely and unequivocally in 1952, after long experience had shown that this was the only way to prevent the prior consummation of innumerable illegal transactions in the hope that the Board would subsequently approve them.⁵⁹

This policy was followed strictly for a few years and the number of illegal transactions under sections 408 and 409 markedly declined. Exceptions were

59. *Sherman, Interlocking Relationships and Stock Ownership*, 15 C.A.B. 876 (1952).

made when transactions were entered into in the honest and reasonable belief that they were legal, but exceptions were not made merely because of the size or urgency of the transaction, or the hardship of undoing the transaction. The most notable example of the firm application of the doctrine was when President Eisenhower disapproved an agreement whereby Eastern would acquire Colonial because Eastern had already acquired Colonial illegally,⁶⁰ and the Board in response to his views compelled Eastern to terminate this illegal control before considering whether to grant its approval to a prospective agreement.⁶¹ This, of course, was a very large transaction and the firm application of the doctrine worked hardship on the parties, but that did not deter the President nor the Board from applying it in the same way it had been applied in smaller cases.

Because of what the Board conceives to be its promotional responsibilities, however, they have now largely nullified the doctrine. In the last year, a number of transactions, some of them very large, have been approved by the Board, although they were entered into without Board approval. This has been done on the grounds that there was an urgent necessity for the transactions and that the parties would suffer hardship if they were made to disentangle or suspend them.

It is not argued here that these transactions are adverse to the public interest or should not have been approved if Board approval had been requested first. Nor is it argued that the Board or its staff have been derelict in carrying out their duties and responsibilities. The problem is that the Board has incompatible responsibilities. A body whose duty it is to look after the economic well-being of an industry cannot be expected at the same time to enforce vigorously penalty provisions when these would work economic hardship on members of the industry. The duties of promotion and investigation-prosecution can both be vigorously performed only when they are entrusted to different agencies.

AGENCY MEMBERSHIP

The rapid turnover of personnel on the regulatory agencies has long been a problem.⁶² It has produced equally rapid changes of policy and has made almost meaningless the "expertise" which agency members are supposed to develop in long terms of service. *Ex parte* presentations to members of regulatory agencies, excessive entertainment and presents, and questions of improper influence—the so-called ethical problems—are matters of general growing concern. In my judgment, such personnel problems are inevitable with the present organization and procedures of the agencies, which ensure inefficiency, lack of judicial process, and incompatibility of duties.

60. Eastern-Colonial, Acquisition of Assets, 18 C.A.B. 453 (1954).

61. Eastern-Colonial Control Case, 20 C.A.B. 629 (1955); No. 6998, CAB, Jan. 11, 1956 (Order Nos. E-9945, -9946).

62. See TASK FORCE REPORT 24, where the rapid turnover of Commissioners is discussed agency-by-agency with statistics showing the short average length of service.

No competent executive—Government, military or business—can tolerate for long the inefficiency and the confused administration of the regulatory agencies as they exist today. An executive accustomed to getting a job done cannot be content with procedures which preclude both an intelligent attack on general planning and policy problems and an expeditious handling of routine business.

No attorney who takes judicial procedures seriously, who has a lawyer's pride of draftsmanship, and who has a strong feeling for basic procedural fairness, can put up for long with a system where cases are decided without clear general policy and without an opportunity for actual study of the record, and where opinions do not necessarily have any connection with the thoughts of the deciders. It may be said that an attorney-commissioner could perform the job as it should be done even if other agency members do not, but such is not the case. Agency policy cannot be made without meaningful policy discussion between agency members. Cases cannot be approached in a judicial manner when most of a commissioner's time is absorbed in routine matters and when adequate personal staffs are not provided.

No man with a broad interest in the economy of our nation and in government processes as a whole can be content for long to regulate a slice of our national economy in a vacuum without any coordination either with other economic regulatory activity or with national policy in general.

These are some of the strongest reasons for the rapid turnover of commissioners. Men tend to move on to other positions where there is not only a job to be done, but where also they will have the tools to do the job.

The ethical problems, I am convinced, are likewise the product of the system. The proper mode of conduct—the ethical standards to be observed—in any particular job must be reasonably clear if compliance is to be expected. Yet members of regulatory agencies are in reality trying to live in two worlds with two separate sets of standards.

As discussed above, there are quite different codes of personal behavior for an executive or a legislator on the one hand, and for a judge on the other. It is quite customary, for instance, for an executive or a legislator to play golf or go fishing with someone who can give him information or opinions which he values. As a matter of fact, a busy executive often thus combines recreation with his job in order to get all of his work done, and no criticism is made, for a competent executive can maintain such informal relationships and still preserve his dignity, his reserve and his independence.

A judge in a litigated case cannot transact business in this way. He cannot get into any situation where he accepts favors or hospitality or obtains information or views informally from those who are actively litigating before him. How, then, is a member of an independent regulatory commission to conduct his personal affairs?

There are commissioners in our regulatory agencies who are fine executives, who do a splendid job of administration, who get results speedily and effectively, but who have no real concept of the judicial process. There are others

who make such a strong effort to comply with the ethics and conduct appropriate to a judge that they do not see or talk with members of the industry as much as they should.

Members of agencies are criticized today chiefly because they do not act enough like judges, in other words because they mix too freely and easily with those who appear before them in adjudicated cases. If they did not do so, however, they might well be criticized for failing to keep in touch with the industry they regulate, or as is often said, for regulating "in an ivory tower."

When men try simultaneously to abide by two such disparate patterns of work and codes of conduct, trouble and confusion inevitably results. It might be thought that a code somewhere in the middle could be established. Much sincere effort has been devoted to this end, and this is what most thoughtful commissioners try to do in practice. But like many compromises, this has really never satisfied anyone. The present agency codes as practiced do not really allow sufficient flexibility for an executive to get the jobs of planning and policymaking done with effectiveness and dispatch. But at the same time, present practices are too flexible to ensure full due process and fair judicial proceedings.

The whole system of adjudication by commissioners as practiced today inevitably raises suspicions of *ex parte* influence. Commissioners circulate more or less freely in the industry they regulate. As a part of this, there develops the social intercourse which is normal in business, executive or legislative life. When some of the groups in the industry then enter into a litigated case, the same commissioner climbs on the bench and is supposed suddenly to become a judge. But everyone knows that he really has no chance to familiarize himself with the record, and that the oral argument and briefs which only summarize the case are about all he will ever learn about it. It is obvious that under such circumstances, memories of casual conversations, tid-bits of information picked up here and there, trade-press editorials, and congressional or Executive views or desires, can exert a powerful influence which they would not have on judges intimately familiar with the record. Everyone knows that commissioners usually cast their votes with only the examiner's opinion, the briefs and oral argument to guide them, and that the record is thereafter combed by an opinion-writing staff for facts and data to support a predetermined conclusion. It is known indeed that in some agencies, such as the CAB, the decision is publicly announced in a press release and parties begin to act in reliance thereon, before the opinion writers even start their work. It is known that the staff prepares the opinion with little or no guidance or correction by the commissioners who sign it.

Under such circumstances, it is inevitable that charges of improper influence will be made. And the system is actually so inviting to improper influence that it will inevitably occur from time to time.

In such an atmosphere, it is not strange that the turnover of agency membership is a continuing problem.

CONCLUSIONS

In the last two decades, there have been many detailed, intensive studies of the regulatory commissions by official government committees, by the American Bar Association and other private groups, and by individual scholars.

The many changes in the regulatory commissions proposed in these studies have been of two general types: (1) basic reorganization of our whole governmental machinery for economic controls, or (2) procedural improvements in the existing organizations. The reforms actually adopted by Congress or the Executive during this period have been largely of the second type, for example, the Administrative Procedure Act, and the various reorganization plans. Much of the current discussion, within the Congress and within the agencies themselves, is devoted to further procedural improvements in the existing agencies.

It is my belief, based on personal experience as a member of a federal regulatory agency, that a far more basic and radical reorganization is required in order to bring to the regulatory process the efficiency and impartial judicial process which it should have. Such a reorganization would transfer to an appropriate executive department the functions of policymaking and administration, to an administrative court or courts the adjudicatory responsibility in major litigated cases and appeals from administrative actions, and to the Department of Justice the prosecution functions. Such a reorganization is supported by an ever-growing body of responsible opinion both within and without the government.

This is a matter of importance to the nation. The federal regulatory agencies wield great power over major segments of our economy and adjudicate private interests of vast size. Despite the importance of their missions, however, it is doubtful whether any branch of the Government today functions with less effectiveness.

Every session of Congress sees many proposals for new economic regulation or controls, and almost invariably these proposals involve the creation of new regulatory commissions. It would seem that before any new commissions are created along the old lines, it is important to find out why the ones we already have are not working as they should and to reorganize them or redistribute their duties so that the jobs of economic regulation already undertaken will be properly performed.

1. The formulation of the basic policies of Federal economic control can no longer be left to a group of agencies each operating independently of the other and independent of any executive coordination or control. This is particularly true in the transportation field, *i.e.*, the CAB, ICC, and the Federal Maritime Commission, but it is also true of economic controls in general where these infringe on broad economic policy, *i.e.*, the FPC and FCC. Economic regulatory policy should be formulated, within the broad boundaries established by Congress, on a unified and rational basis by the Executive branch of the Government under the direction of the President. A great nation with

worldwide responsibilities cannot continue to have an important part of its economy regulated without any coordination with the economic and defense policies of the President.

It may be argued that Congress would not delegate such sweeping powers to the Executive, but only to independent agencies thought to be "arms of the Congress" and therefore under close supervision and control of the Congress. I would hazard the opinion, however, that recent years have lessened the confidence of Congress that it can effectively supervise and control the substantive policymaking of independent commissions. Indeed, the House Subcommittee on Legislative Oversight was established largely on the premise that Congress had not sufficiently overseen the work of the agencies.⁶³ As described above, the work of the committee thus far, although productive in the procedural field, gives little hope that such oversight can be effective on a continuing basis in substantive matters.

I would further hazard the view that recent congressional hearings and actions indicate a renewed interest in more detailed regulatory policy formulation by Congress itself. If Congress does in the future make regulatory policy with greater specificity, surely there must at the same time be a renewed inquiry into the most suitable machinery for carrying out such policy. It is my belief that instead of giving such duties to multiheaded deliberative bodies which neither administer nor adjudicate effectively and which in truth are responsible to no one in the long run, the regulatory job should be given to the appropriate arm of the executive branch. Effective plans and policies to implement congressional policy could then be made in the normal executive manner; these actions could be coordinated properly with other governmental activities; one man would be in charge and fully responsible to the President; policies and plans would be more clearly articulated because they would be separated from adjudication; and Congress could keep greater control because policies and plans would be spelled out and responsibility for them pinpointed.

The transfer of policymaking and planning to the Executive of course does not mean that actions will be taken without necessary publicity. There is ample precedent for administrative notice and hearing procedures in many activities already carried on by the Executive.

2. Routine administration of economic regulation would under such a system be handled by delegation within the Executive branch in the same way that countless other administrative tasks are performed.

Agencies run by a group do not delegate and do not handle administration efficiently. Commissioners in the agencies are today solemnly discussing and voting on thousands of minor administrative matters, which should be handled by civil servants in an executive department or agency on the basis of general policy determinations. As shown above, this is one of the prime factors preventing commissioners from making clear policy determinations or handling

63. See remarks of Speaker Rayburn on the floor of the House, April 11, 1957. 103 CONG. REC. 5503 (1957).

adjudicative cases in a judicial manner. If policymaking and planning are transferred to an executive department under a single head, administrative detail can be handled properly.

3. Adjudication of major litigated cases and appeals from administrative action should be performed by an administrative court, free from policymaking or administrative detail. The members of such courts should be appointed for a fixed term and they should be as genuinely independent as judges of other statutory courts such as the Court of Claims and the Tax Court.

There is an old legal prejudice that since only "cases and controversies" are proper subject matter for constitutional courts, other matters such as the granting of franchises and the determination of the reasonableness of rates should therefore be handled by some group which does not act like a court. Licensing and rate determination are actually susceptible of full judicial consideration, provided the general policies to be applied have been announced by the executive branch. These matters involve complex situations in which factual conclusions must be drawn and policy applied to them.

Admittedly, the separation of policymaking and planning from adjudication is not a simple task. As is pointed out by many writers on administrative law, there is a large area of overlap in any field of regulation, and it is often difficult to say where general policymaking stops and adjudication of specific cases starts. This is a reason often given for putting both responsibilities in the same agency. But there has always been the same basic overlap between the legislative powers of the Congress and the judicial powers of the courts, and we have coped with that successfully for a century and three-quarters. The fact that there are gray areas does not mean that black and white are the same. Difficult as it may be on occasion to separate policymaking from adjudication, even a more or less arbitrary division is better than the confusion which has resulted from putting both in the same agency.

In any field of Government regulation there are major, contested matters, where there are parties in substantial and vigorous opposition, and where substantial rights—public and private—are involved. Such cases should be tried by an administrative court *de novo*, either by the court itself or by hearing officers performing the functions of special masters. Such cases should be decided on the basis of policies formally established and announced in regulations, or formal policy statements by the appropriate arm of the executive branch. Such policies would be binding on the administrative court unless they were held to go beyond the basic statutory authorization.

The extent and success with which the executive branch formulates general plans and policies would depend upon the vigor, interest and competence of the agency involved. If it did not make plans or policy, this failure would be clearly evident; the administrative court would be compelled then to interpret the broad congressional mandate as best it could. If the executive agency did actively make policy, the exact nature and content of its policies would be explicitly known and they could be judged both by the President and by the Congress.

A separation of adjudication from policymaking would compel active policymaking. No longer could policy statements be mere vague generalities in opinions prepared by professional staffs to justify particular results in particular cases. No longer could policymaking be put off until litigants had already made their factual cases.

An administrative court with more strictly judicial duties would require more explicit and detailed policy guidance than an administrative agency which purports to legislate as well. Congress itself might well in some instances retrieve some of its delegated legislative authority and make more specific policy by legislation on Government control of business. Certainly the Executive would be called on to fill in the details of congressional action with clear, detailed rules and plans. And both together would be far more responsive to the public will and to the needs of the nation than the specialized agencies which today find it far too easy to think only of the industry they regulate.

Regulatory matters of an informal or uncontested or comparatively unimportant character should be handled by delegation within the executive branch as countless other governmental transactions are presently handled. If a new administrative court were burdened with the same mass of detailed business that now smothers the members of our regulatory agencies, little progress would have been made.

This is a practical matter. Every case cannot be given the same full judicial treatment as every other case, and many small matters must be handled administratively if critical and important matters are to be given the full judicial process they have so long deserved and failed to enjoy. Just as there is a ten thousand dollar minimum amount for diversity suits in the federal district courts,⁶⁴ so there must be minimums of importance on the original jurisdiction of any administrative court, lesser cases being handled by executive processes. For the lesser cases, of course, there must always remain the safeguard of an appeal,⁶⁵ probably though not necessarily to the same administrative court that handles the major cases from the beginning.

One frequent objection to an administrative court is that it would lack the necessary "expertise." But we already have very "expert" courts—the Tax Court, the Court of Claims, the Court of Customs and Patent Appeals—and it cannot be claimed that they are any less expert than the regulatory agencies. Even our federal district courts with the vast purview of their jurisdiction are amazingly expert in such diverse and complicated matters as federal taxation, antitrust, admiralty, and bankruptcy. If administrative courts are given

64. 28 U.S.C. § 1332 (1958). Minimums, furthermore, must change as the burden of work changes. The diversity minimum was \$3,000 until raised in 1958.

65. Compare the new appellate jurisdiction of the Civil Aeronautics Board over certificate actions of the Federal Aviation Agency. Federal Aviation Act of 1958, §§ 602, 609, 72 Stat. 776, 779, 49 U.S.C. §§ 1422, 1429 (1958). Previously the Board heard many of these cases from the beginning. The new system has greatly reduced the burden on the Board and expedited the disposition of cases without impairing any of the rights of the pilots.

the status and the tenure to attract good men, they will be of a caliber to acquire quickly the necessary expert qualifications.

4. Investigation and prosecution is a minor part of the work of the promotional-regulatory agencies, and, as has been stated, they do not do it enthusiastically or successfully. These responsibilities should be given to an Executive department or agency, such as the Department of Justice, which does not have incompatible duties.

It has been argued for several decades now that the job of economic regulation cannot be handled by the Executive branch and administrative courts, but that it can be accomplished only by independent commissions combining both. The present state of the regulatory agencies and the fruits of their labors do not inspire much confidence nor hold much promise for the future.

Proposals in the direction of those advocated here have been made from time to time for the last twenty years both by official committees and by private groups. Such proposals deal with the basic problems of the regulatory agencies rather than with mere procedural changes. To get the regulatory job done properly, a basic overhaul is necessary. The Executive should undertake those tasks which are actually executive in character and special administrative courts should bear the duty of adjudication.

APPENDIX A

Section 102 of the Federal Aviation Act of 1958, 72 Stat. 740, 49 U.S.C. § 1302 (1958), reads as follows:

DECLARATION OF POLICY: THE BOARD

Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.