THE CURRENT ORDEAL OF THE ADMINISTRATIVE PROCESS: IN REPLY TO MR. HECTOR*

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I

WE are a nation of pragmatists. In our history—marked as it is by rapid change—new problems requiring governmental action have constantly arisen. As Congress has moved to meet these problems, solutions have been shaped in terms of practical responses to felt needs rather than by rigid adherence to philosophical criteria, abstract theory, or detailed organizational charts. No segment of governmental activity more clearly illustrates this shaping of practical solutions to felt needs than the history of the enforcement of our antitrust laws.

The current pattern of dual responsibility for enforcement vested in the Department of Justice and the Federal Trade Commission arose because of a realization that judicial enforcement of hard-core Sherman Act offenses was insufficient to prevent trends toward restriction of trade and monopoly. In 1912, all three political parties (Democratic, Republican and Progressive) called for the creation of an administrative agency empowered to reach monopolistic tendencies and unfair trade practices in their incipiency. The creation of the FTC was the response to this felt need. The forty-five years that have since passed have amply demonstrated the efficacy of this dual pattern of enforcement, despite the fact that this arrangement may offend those who subscribe to the principle that neat theorems rather than practical considerations should determine the distribution of governmental functions.

The role of the FTC in this system of dual enforcement is once again under attack. Or perhaps I should say that this role has been continuously under attack. The historical pattern of opposition to all governmental regulation by administrative agencies has taken the following form: Opponents of government regulation characteristically first attack the principle of regulation. This battle having been lost, the attack shifts to an assault upon the regulators, and if the second battle is lost, a more subtle campaign is then conducted to capture the regulators. With one or two isolated examples of ineptitude or moral failure, the cry then goes up for "reforms" that would abolish regulation. The

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history of the administrative agencies is replete with illustrations of this pattern.[1]

I need not belabor the reader with a list of the theoretical objections to the enforcement of national policy by an administrative agency that have been advanced in the past. I merely note that these criticisms have been raised strenuously and continuously. In recent years the proponents of these objections have capped their arguments with the proposition that FTC adjudicatory functions should be exercised by an administrative court. This proposal received support in the reports of a task force of the Second Hoover Commission in 1955[2] and the American Bar Association committee of fifteen in 1956.[3] I have argued against this proposal in many forums.[4] I have urged these points on all who paused to listen and consider:

1. See GELLHORN & BYSE, ADMINISTRATIVE LAW—CASES 27-59 (1954).

The late Justice Robert H. Jackson, an astute observer of the administrative process, who, because of his long government career was aware of the shortcomings as well as the benefits of the administrative process and was often sharply critical of it, placed the problem in proper perspective when he stated at the time he was Solicitor General:

> From the very beginning the administrative tribunal has faced the hostility of the legal profession . . . .
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> The administrative tribunal . . . is often penetrating into new fields where precedents do not exist. Its concern is with the future more than with the past, and it counts the probable progeny of its decisions as of more importance than their ancestry. . . .
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> Those who dislike such activities of the government as regulation of the utility holding companies, of labor relations, or of the marketing of securities, rightly conceive that if they can destroy the administrative tribunal which enforces regulation, they would destroy the whole plan of regulation itself.

Jackson, *The Administrative Process*, 5 J. SOCIAL PHILOSOPHY 143, 146-47 (1940).

2. 1 U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES recommendations Nos. 63-64, at 246-55 (1955) [hereinafter cited as TASK FORCE REPORT].

The Hoover Commission itself did not support the Task Force recommendations. In its recommendation No. 50 it stated: "Congress should *look into the feasibility* of transferring to the courts certain judicial functions . . . ." 1 U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 85 (1955). (Emphasis added.) Recommendation No. 51 stated: "An Administrative Court of the United States should be established . . ." with a Tax Section, a Trade Section, and a Labor Section, but "it is further recommended that the Congress should *study and determine* whether the Trade Section and the Labor Section . . . should have original or appellate jurisdiction." 1 *id.* at 87-88. (Emphasis added.) Actually, only six of the twelve Commission members "fully support" those uncertain recommendations. 1 *id.* at 95.

3. See SPECIAL COMM. ON LEGAL SERVICES AND PROCEDURE, ABA, REPORT TO THE 1956 MIDYEAR MEETING OF THE HOUSE OF DELEGATES (1956). The administrative court proposal was subsequently adopted by the House of Delegates. See Sellers, *A New Legislative Program of the Association*, 42 A.B.A.J. 637 (1956).

4. See, *e.g.*, Kintner, *The Trade Court Proposal: An Examination of Some Possible Defects*, 44 A.B.A.J. 441 (1958). See also Kintner, *A Government Lawyer Comments on the Davis Treatise*, 43 MINN. L. REV. 620 (1959).

A number of students of the administrative process have vigorously criticized the administrative court proposal. See Freer, *The Case Against the Trade Regulation Section*

1. That the proposal for an administrative court is bottomed on rigid conceptualism rather than on empirical, unbiased analysis;
2. That the proponents of an administrative court have not engaged in detailed study of the performance of existing agencies and have failed to document their charges against the independent agencies; and
3. That the burden of proof properly rests upon the proponents of change.

These three propositions are still valid, but the attack on the administrative process now comes from a new quarter, and new defenses must be devised. This new attack has been much in the news in the last few months. The speech of Mr. Louis J. Hector before the Section of Administrative Law of the American Bar Association[5] and his memorandum to the President submitted at the time of his resignation from the Civil Aeronautics Board[6] constitute the most detailed exposition of this "new criticism."

II

One of the most provocative aspects of the "new criticism," as given expression by Mr. Hector, is that it purports to abandon the attack on governmental regulation of business as such, and to decline to inveigh against the "headless fourth branch of government" because it offends the pristine concept of separation of powers. The basic contention is that the administrative agencies simply do not do the job assigned to them.

Mr. Hector arrives at this conclusion through a process of inductive reasoning. He begins by alleging certain specific horrible examples of administrative inefficiency which occurred during his two-year tenure as a member of the CAB. He then argues that these examples are typical of all CAB procedures and concludes by contending that these examples of ineptitude are common wherever the administrative process is employed. Inductive reasoning can be a seductive process. Its self-contained logic is smooth and round. The difficulty with such reasoning is that it may wither when the assumptions contained within it are subjected to comparison with a larger experience.

Thomas Reed Powell once said, "I can win any argument if you allow me to state the question." One of the sharpest difficulties facing those who oppose the dismemberment of the administrative process is that the proponents of abolition have not only seized the initiative in stating the question, but, hav-

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of the Proposed Administrative Court, 24 GEO. WASH. L. REV. 637 (1956); Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 IND. L.J. 1 (1955); Nutting, *The Administrative Court*, 30 N.Y.U.L. REV. 1384 (1955); Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273 (1955). See also Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483 (1956).

5. Hector, *The New Critique of the Regulatory Agency*, Remarks Before the Section of Administrative Law, ABA, Miami, Florida, Aug. 25, 1959 (mimeographed).

6. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960).

ing reached an a priori conclusion, have gone on to select a method of analysis to prove it.

Even if we accept the averments of the "new critics" that they accept the necessity of limited governmental regulation of business, and even if we yield to the seductive blandishments of inductive reasoning, there are still basic flaws in the concepts and methods of analysis of the "new criticism." These flaws must be exposed before a constructive examination of the administrative process can be conducted.

The "new criticism" begins with a basic comparison. This comparison is between the independent agencies as now organized and operated and the order of things that would obtain if the agencies were abolished and their policymaking functions were assigned to the Executive Branch and their adjudicatory functions were assigned to an administrative court. This basic comparison, then, has the present reality at one pole and a vision of Utopia at the other. The flaw is readily apparent. The picture drawn by the "new critics" does not allow for the possibility that the administrative process can be improved beyond its present state. I have never believed that the status quo is the best of all possible worlds. I have continually maintained that all reasonable proposals for improvement in the administrative process should be adopted. The Commission that I represent has continually striven to honor not only the letter but the spirit of legislative improvements to the process, and has examined and reexamined its own practices and procedures to uncover defects and to remedy them. We invite the aid of all informed and experienced groups in this vital task. But I maintain that if, as the "new critics" say, the sole question is how to accomplish governmental regulation of business in the most effective and least burdensome manner, and if pragmatism rather than adherence to philosophical criteria is to be the guide in this undertaking, then the administrative process itself should not be abandoned for an untested utopian alternative until it can be demonstrated that the administrative process would be ineffective even if improved to the limit of its capabilities. The true basic comparison should be between the administrative process as it can be improved and the proposals of the "new critics."

After the proper comparison is established, a rational method of analysis must be devised; and the first imperative must be the need for particularization of study and criticism. I have said that the process of inductive reasoning is a seductive one. But we lawyers know the danger of yielding unreservedly to its blandishments. Each administrative agency must be studied in the context of its own functions and procedures. I need not mention that there are radical differences between the work of the FTC and the CAB or the work of the National Labor Relations Board and the Federal Communications Commission. Any generalization based on the assumption that all these agencies are alike for all purposes is a dangerous one, very likely to be false.

A necessary first step in the task of testing proposals for the improvement or abolition of the administrative process must be a careful, unbiased study to discover real, not imagined, defects in the functioning of the administrative

agencies as they are now constituted. At first this may seem to be a call to pour old wine into new bottles. But, may I remind you that the last detailed study of the functioning of each administrative agency was conducted by the Attorney General's Committee on Administrative Procedure in 1941.[7] The proposal of the Second Hoover Commission Task Force for the establishment of a trade court was premised on the sketchiest of studies.[8] Any proposal for sweeping change must demonstrate the actual need for such a change by revelation of defects that would be cured by such a change.

Second, it must be determined whether the defects uncovered by such a study can be remedied by improving the procedures of the existing administrative agencies. Obviously, radical major surgery is not called for when a simple dose of medicine can effect a cure.

Third, if any real defects would remain even after the present system is improved to the limit of its capabilities, it must be determined whether abandonment of the present system and adoption of the proposed alternative would eliminate these net defects.

Fourth, it must be determined whether the proposed alternative, in this instance an administrative court, would be free of the defects that could be eliminated by improvement of the present system.

Fifth, it must be determined whether the proposed alternative would contain within it defects not to be found in the present system as improved. I am

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7. U.S. Attorney General's Comm. on Administrative Procedure, *Final Report—Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941). The Committee selected twenty-eight departments, boards, commissions, and agencies "which substantially affect persons outside the Government through the making of rules and regulations or the adjudication of rights. . . ." *Id.* at 3. The Committee assigned to a staff of lawyer-investigators the task of studying the procedure of these agencies. The staff interviewed agency officials, members of the staffs of the agencies, and attorneys who practice before these agencies. Staff members attended proceedings, read the records of cases, and examined administrative files. Upon the completion of these studies, the staff prepared for the Committee a description of each agency's procedures. As each study was made available to the appropriate agency for its consideration, the full Committee met for discussion of the study with agency officers. The reports of the staff, after final revision, were published in a series of twenty-seven monographs and widely distributed.

It should be noted that the House Special Subcommittee on Legislative Oversight, through its Advisory Council on Administrative Problems, is now conducting a study of the procedures of six agencies (CAB, FCC, FPC, FTC, ICC, SEC) which gives promise of a significant addition to the body of knowledge.

8. The report was "based primarily" on material contained in a single questionnaire sent to "the departments and independent establishments of the executive branch." The entire survey was done "in a period of 10 months with the assistance of only a few professional consultants and a small staff." 1 TASK FORCE REPORT 3, 4. The questionnaire consisted of fourteen basic sections in the pattern of the Administrative Procedure Act of 1946. The first thirteen sections requested statements of functions and procedures; the fourteenth section requested evaluation and recommendations from the reporting agency itself. The questionnaire is contained in an unpublished mimeographed compilation. 1 *id.* pt. VI (Appendixes and Charts).

not so optimistic as to believe that any method of government devised by man can be totally free of flaws. If we are contemplating a choice, we must weigh both the advantages and disadvantages of one choice against the advantages and disadvantages of the other. A comparison between the disadvantages of one choice and the advantages of the other is not a sound basis for decision.

Finally, we must assess the effects that adoption of the proposed alternative would have on the branches of government outside the system studied. It is obvious that abolition of administrative agencies would cause profound alteration of the functioning of the Congress, the Executive, and the Judiciary. Such a change would also have untold consequences in the interrelationships of these three. No drastic proposal for change should be adopted if too-heavy burdens would be assigned to others or if delicately balanced relationships would be disrupted.

I have stressed the need for particularization in study and analysis. I must also stress the need for particularization in the proposal of "reforms." Any proposal for change in the administrative process must be examined for adaptability to all administrative agencies; what may be needed to improve the efficiency of one agency or type of agency may actually impede the efficient operation of other agencies.

III

Having submitted to the lawyerlike discipline of articulating a method of analysis, let us now turn to an examination of some of the specific criticisms of the administrative process raised by the "new critics." It should first be reiterated that the defects in the administrative process identified by the "new critics" have not been isolated as the result of comprehensive study, any more than the defects identified by earlier proponents of the trade court idea were. Second, the identification of any defect necessarily implies that a standard of judgment is being employed. Such standards themselves should be open to examination and question.

Specific criticisms should not and cannot be examined in a vacuum. Therefore, we will consider them insofar as they may apply to the FTC.

First, do the FTC's procedure and organization preclude effective policymaking?

The Commission performs its principal task of policy formulation by giving specific content to the broad statutory prohibitions expressed in the Federal Trade Commission Act [9] and the Clayton Act,[10] as amended by the Robinson-Patman Act.[11] This task cannot be accomplished by the formulation of rules of general application outside the context of a specific case or by *ex parte* enunciation of principles. Congress recognized this, since it is obvious that if antitrust objectives could be accomplished in this manner Congress itself could

9. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958).
10. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958).
11. 49 Stat. 1526 (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a (1958).

have accomplished the task. The bare fact that Congress created the FTC shows that the Congress realized that a flexible method of providing detailed content for broad prohibitions was the only feasible one. Few statutory prohibitions are as broad as that contained in section 5(a) of the Federal Trade Commission Act.[12] If the purpose of that statute is to be given effect, however, there must be some device for adapting the statutory proscription to the myriad devices that can be invented by the mind of man. Thus, specific standards must necessarily be evolved in the context of specific cases. The forty-five years of precedent contained in the *Federal Trade Commission Reports* furnishes a valuable exposition of policy. This body of precedent should not be discarded lightly. Nor can it be assumed that the task of giving content to this phase of the nation's antitrust policy could have been accomplished more effectively by setting policies in another manner.

The FTC also enforces statutes containing a more limited legislative mandate. These include the Wool, Fur, Flammable Fabrics, and Textile Fiber Products Identification Acts.[13] Rulemaking is feasible as a means for giving specific content to these statutory prohibitions. And the Commission's exercise of its rulemaking authority under these statutes has been timely and effective.

Before we leave the assessment of the Commission's performance of its policymaking role, mention should be made of the Trade Practice Conference device employed by the Commission. The Trade Practice Conference does not formulate "rules" in the sense that term is employed in the Administrative Procedure Act.[14] But the Conference is a valuable tool in policymaking in that it provides useful guides to businessmen within a particular industry in obeying the statutory proscriptions that the Commission enforces. In recent years the Commission has also issued guides,[15] which are direct and informative statements useful to those wishing to comply with the law. These guides are a further indication of the Commission's effort to encourage voluntary compliance by businessmen without resort to adjudicatory proceedings.

IV

The "new critics" next charge that administrative agencies deprive parties to adjudicated cases of basic expectations to which they are entitled. Mr. Hector has stated two expectations as the basis of his criticism. They are (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

12. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958).

13. Wool Products Labeling Act of 1939, 54 Stat. 1128, 15 U.S.C. §§ 68-68j (1958); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1958); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (1958); Textile Fiber Products Identification Act, 72 Stat. 1717, 15 U.S.C. §§ 70-70k (1958).

14. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

15. See FTC, Guides Against Deceptive Pricing, 2 TRADE REG. REP. ¶ 5095.495 (1958); FTC, Tire Advertising Guides, 16 C.F.R. § 14.3 (Supp. 1959); FTC, Cigarette Advertising Guides, 2 TRADE REG. REP. ¶¶ 5029.13, 5055.15, 5055.44, 5081.115, 5097.10 (1957).

persons who decide adjudicated cases will do so on the basis of voluminous testimony and arguments advanced by the parties and this alone, and that they will personally state the reasons for their decision."[16] We may well quarrel over the interpretation of this first expectation. If it means no more than that the agency will give due regard to statutes, rules, prior court decisions, and its own prior decisions, then I do not dispute its phrasing. However, the "new critics" give this expectation a Pickwickian reading. They state that decision on a case-by-case basis rather than conformity to a general policy is undesirable, and that in order to satisfy this expectation the agency must enunciate broad general policies and follow them in all factual situations rather than developing principles on a case-by-case basis.

I cannot subscribe to the notion that a policy is legitimate only if it is announced in general terms. To say that a black-letter rule announced prospectively is always to be preferred to the development of a principle through constant testing and reexamination in litigated cases is to cast aside the teachings of the whole history of Anglo-American jurisprudence. The most prominent aspect of our heritage has been the development of tempered, tested principles through accretion in the context of individual cases. No party has an inalienable right to have his conduct tested solely by black-letter rules. The law must continuously be applied in novel situations. Any party to an adjudicatory proceeding may be represented by counsel, and any lawyer worth his salt knows how to extract governing principles from statements in decided cases and also how to use decided cases to make a reasoned estimate of the probable outcome if the question is one of first impression. Indeed, this is one of the basic skills of a lawyer; from the first day in law school we strive to develop this skill. The "new critics" ignore the existence of this skill. In the long history of the FTC a large body of precedent has accumulated. Those precedents are as susceptible of analysis and restatement as any others.

The second expectation upon which Mr. Hector bases his criticism is that commissioners will decide on the basis of the record and will explain the reasons for their decisions. The FTC satisfies this expectation.

Federal Trade Commissioners explain their votes in reasoned opinions. An opinion is issued in every case requiring explanation, whether it results in a cease-and-desist order or a dismissal. We do not contend that the quality of our opinions has been uniformly high, but we are constantly striving to improve them. The preparation of each opinion, save for a very few per curiam decisions, is the individual responsibility of a particular commissioner. The individual commissioner thus has the same opportunity a judge has to develop pride in his craftsmanship. The vigor of individual dissents filed in past cases shows how seriously this duty is discharged. The commissioners do not merely rubber stamp the work of an anonymous professional staff of opinion writers.

FTC decisions are never announced prior to the publication of a supporting opinion. The final vote in any case is never taken until the Commission has

16. Hector, *supra* note 6, at 939.

before it a draft opinion submitted by the commissioner assigned to that task. The commissioner-writer assigned to support the majority view after a tentative vote at the close of oral argument or following a later conference with his colleagues may report that his close personal examination of the record and his reasoning processes have led him to join the minority.

The FTC constantly strives to develop an elite group of hearing examiners and it gives due weight to their conclusions in any adjudicated case. The Commission gives particular attention to the decision of the hearing examiner in matters involving questions of credibility or choices between conflicting inferences, where the examiner's close personal observation is invaluable.

We think that the FTC has satisfied, in the main, the two basic expectations as phrased by Mr. Hector. But we are not content to rest upon the status quo. We are constantly striving to improve our procedures. One of my constant efforts has been to increase the stature of the hearing examiner.[17] If this task can be accomplished, then the delay that plagues administrative proceedings, just as it plagues judicial proceedings, may be reduced. Indeed, we at the FTC are engaged in a continuous search for methods that may be of use in eliminating delay. Increased use of pretrial-conference techniques and increased reliance upon the stipulation technique may be two means to this end. I again extend an invitation to practitioners and the organized bar to aid us in this vital undertaking. The administrative agencies need the same sort of devoted study and constructive criticism the bar has given to the courts.

V

The "new critics" have also charged that the administrative agencies have failed to coordinate policies with other organs of government concerned with the same problems. We may ask then whether the FTC has failed to coordinate its policies and undertakings with other agencies charged with enforcement of the antitrust laws. The answer to this question must be "No." The Commission and the Antitrust Division of the Department of Justice have long maintained a close and continuous liaison on all antitrust matters. There is a continuous interchange of information as to prospective actions to the end that any and all overlapping may be avoided. The success of this effort is reflected in the recommendation of the Attorney General's Committee to Study the Antitrust Laws that the dual enforcement of the antitrust laws be continued.[18]

17. I am convinced that the selection of responsible, highly qualified hearing examiners of judicial temperament, plus extending to them a proper measure of judicial discretion, will do more than anything else to improve the federal administrative process and guard its integrity. See U.S. Comm. on Hearing Officers, President's Conference on Administrative Procedure (Earl W. Kintner, Chairman), Draft Report—Appointment and Status of Federal Hearing Officers, 1954; U.S. PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT 9-11, 57-63 (1953).

18. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 375 (1955).

The continuing effort to avoid overlapping and wasteful activity is also exemplified by the FTC's formal negotiations with other agencies charged with trade regulation. For example, in 1954 the Commission entered into an agreement [19] with the Department of Health, Education and Welfare defining spheres of activity in the enforcement of sections 12-15 of the Federal Trade Commission Act and the Food, Drug and Cosmetic Act.[20]

Coordination has also been effected by means of recommendations for legislation. The 1958 amendment of the Packers and Stockyards Act and the Federal Trade Commission Act to clarify responsibility for supervision of nonmeat-packing activities of the packing companies is an example of the use of this means for coordination.[21]

These examples show that an independent agency can exploit means of coordination on its own initiative. Congress is another, perhaps the most important, coordinator of administrative agency effort. Congress often establishes important lines of demarcation by statute, but its role does not end there. Its investigations and informed staff studies and its questions to the agencies often isolate an area of conflict or overlap and provide the needed stimulus for a solution.[22]

The "new critics" ignore the existence of these two means of coordination, or at best minimize their effectiveness. They insist that the only way to insure continuous coordination is to transfer the policymaking functions of the administrative agencies to the Executive Branch. But is this a cure-all? Our history is replete with epic conflicts between executive departments. The only way these conflicts can be resolved within the Executive is to thrust yet another burden on an already cruelly overburdened President, who has a thousand other problems competing for his attention. Coordination may diminish, not increase, under such a "solution."

The best way to achieve coordination of effort, if it be needed, is to provide plural sources of initiative. These now exist. At one time an agency may take the lead, at another the Congress, at still another the Executive. Such a plural

19. Working Agreement Between FTC and Food and Drug Administration, 2 TRADE REG. REP. ¶ 8540 (1954).

Liaison has also been established between the FTC and the FCC on matters relating to the dissemination of deceptive advertising by radio and TV broadcast. 22 Fed. Reg. 2318 (1957); 2 TRADE REG. REP. ¶ 8541 (1957).

20. Federal Trade Commission Act, 52 Stat. 111 (1938), 15 U.S.C. §§ 52-55 (1958); Federal Food, Drug & Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1958).

21. 72 Stat. 1749, 7 U.S.C. §§ 192, 227 (1958).

22. The current studies of the House Special Subcommittee on Legislative Oversight and the establishment by that committee of the Advisory Council on Administrative Problems are excellent examples of the use by Congress of means of coordination other than legislation. See Address of Hon. Oren Harris, *Focus and Action on Administrative Problems—Mission of the Subcommittee on Legislative Oversight*, Before the Public Utility Law Section, ABA, Miami, Florida, Aug. 25, 1959 (mimeographed); House Subcomm. on Legislative Oversight, *Investigation of Regulatory Commissions and Agencies*, H.R. REP. No. 1258, 86th Cong., 2d Sess. 6, 59 (1960).

system exploits individual talents and energies wherever they may be found. To be sure, such a plural system lacks the neat lines of control and tables of organization that so gladden the heart of the technocrat. But this nation is a democracy, not a technocracy. Throughout our history we have been willing to sacrifice theoretical neatness for practical accommodation.

On a more basic level it is possible to argue that there can be too much coordination. The founding fathers recognized this in establishing the triune separation of powers that the old critics of the administrative process relied upon so heavily. I leave this question with you: Is it not possible that Congress, by dividing some responsibilities among administrative agencies, may well have felt that the national good might best be achieved by separate accomplishments along diverse lines?[23]

VI

Finally, the "new critics" contend that the lot of a commissioner, like that of a policeman, is not a happy one. They maintain that the imposition of basically incompatible duties, the involvement with minor matters of administration and personnel, and the lack of opportunity to develop true expertise makes for rapid disaffection with the role of a commissioner. Let us examine each of these contentions as they relate to the FTC. First, are the functions of the FTC basically incompatible? Again the answer must be "No." We have often heard that a man cannot continuously alternate between policymaking and adjudication and perform either of these roles effectively. But this point loses most of its effectiveness when an attempt is made to apply it to the work of Federal Trade Commissioners. Our principal role in policymaking is performed by applying broad statutes to individual cases. Little, if any, conflict is present when policy is made in this manner.

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23. A Senate committee rejected recommendations of the First Hoover Commission that certain "executive" functions of the regulatory agencies be transferred to executive departments with this comment:

> To the extent that such recommendations were consistent with established legislative policies and in conformity with the separation of regulatory functions from administrative controls of policy-determining departments or agencies, they received favorable action. These regulatory commissions were established primarily by the Congress to act on an independent basis in the public interest, and free from direct control by the President over either their activities or their decisions. The basic statutes provided that they be primarily responsible to the Congress of the United States as the elected representatives of the people in order that they might be responsive to the general public interest and in a position to carry on their activities without improper influences from other governmental agencies. This committee, and the Senate, determined therefore that favorable action on these proposals would seriously impair the operations of these commissions and would tend to undermine their independence of action.

Senate Comm. on Government Operations, *Senate Action on Hoover Commission Reports*, S. REP. No. 4, 83d Cong., 1st Sess. 67 (1953).

A careful distinction must be drawn between the work of the commissioners and the work of the Commission as a corporate entity. A careful study of the work of the Commission would also emphasize the basic continuity of its functions. For instance, the existence of the power to issue cease-and-desist orders assists the Commission in securing the closing of cases by voluntary compliance after investigation, by stipulations, and by consent orders after a complaint is issued.[24] Because of the presence of this power, the Commission often is able to dispose of complaints without resort to extended litigation. If these functions were separated, then all would suffer a loss of effectiveness.

The contention that prosecutory and adjudicatory functions should not be lodged in the same agency has been well ventilated. Even the sternest critics of the administrative process have recognized that the adoption of the Administrative Procedure Act [25] and internal reforms by the agencies have eliminated most objections. The FTC has been a leader in voluntary adherence to the spirit of the Administrative Procedure Act. The Commission's staff has been reorganized so that investigative, prosecutory, and adjudicatory functions have been separated on horizontal lines.[26] All the Commission's investigations are handled by the Bureau of Investigation with its own director and all prosecutory functions are handled by the Bureau of Litigation, also with its own director. The commissioners have no connection with the prosecution of cases other than their voting on whether a complaint should issue. And this act in no way indicates a prejudgment on the merits. Rather, it resembles the action of a court in passing upon a demurrer or a petition for certiorari.

We must next ask whether the commissioners are so involved with minor matters of administration and personnel that they lack sufficient time for major questions of policy and serious adjudicative matters. Again the answer must be "No." Coordination and direction come from the administrative staff headed by the Executive Director and not from individual commissioners. Most of the time of the commissioners is spent in preparation of opinions, in determining whether stipulations or consent orders should be approved, and in deciding whether complaints should issue. These tasks can hardly be called minor administrative matters.

The "new critics" say that the turnover in members of the administrative agencies has been too rapid to allow the development of a sufficient degree of expertness. This has not been our experience at the Commission. Within

24. The FTC disposed of 493 matters in fiscal 1959; 148 cases were terminated by stipulations accepted by the Commission without the issuance of a complaint; 298 were terminated by consent order after a complaint was issued; 40 cases were terminated by a final order after a full hearing.

Since 1914 the Commission has issued 5,772 orders to cease and desist, but in recent years a large number of these have been consent orders. Since 1925, when the first stipulation was accepted, the Commission has issued 9,255 stipulations. (Figures as of December 31, 1959.)

25. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

26. For a full account of the Commission's reorganization, see Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143 (1955).

recent years we have had commissioners whose service extends as long as twenty-two years.[27] The service of the four incumbent commissioners other than myself averages four years.[28] Commissioner Tait, who has served on the Commission for three years, had staff experience at the Securities and Exchange Commission before his appointment as a commissioner. Commissioner Anderson, a former attorney general and Governor of South Dakota, has served on the Commission for four years, and was recently reappointed for a further seven-year term. Commissioner Secrest has served on the Commission for five years. His government experience prior to appointment included sixteen years in Congress. And if we are adding the sum total of the Commission's expertness we surely must include experience gained by commissioners while serving on the Commission's own staff. Commissioner Kern, who has served on the Commission for four years, gained extensive experience in antimonopoly work during his fourteen years on the staff prior to his appointment to the Commission. My service as Chairman dates only from June of this year. However, it was my privilege to serve on the staff as Senior Trial Attorney, as Attorney-Adviser to a member of the Commission, and as General Counsel for almost six years prior to my appointment to the Commission. Finally, in assessing the expertness of an agency it is also important to examine the qualifications of the staff as well as those of the commissioners. At the FTC our devoted staff has acquired several thousand man-years of experience, which is constantly available to the commissioners.

VII

The specific criticisms that we have been considering do not constitute an exhaustive list. Critics old and new have raised many others and doubtless will raise many more. However, an examination of a few representative criticisms shows the need for careful questioning of unstated assumptions, and for patient study and careful analysis before actions are taken which may disrupt the entire regulatory process, terminate present benefits, and give birth to unknown evils. Administrative law, like all law, must gradually work itself pure. Only if the members of the commissions, their staffs, and the members of the bar cooperate in careful and clear-headed examination can real improvement be achieved.

27. For a tabulation of the service of all Federal Trade Commissioners in the period 1915-1958, see 1958 FTC ANN. REP. 80.

28. *Ibid.*