

The Yale Law Journal

Volume 84, Number 7, June 1975

Regulation and the Political Process

Lloyd N. Cutler[†] and David R. Johnson^{††}

Our nation's ideological commitment to the free market system and our recognition of the need to regulate particular markets have been in tension for a century. In recent decades we have come increasingly to accept the government's expanding responsibility for controlling business conduct and maintaining the health of the economy. Nonetheless debate continues, and the regulatory agencies and commissions that were created to discharge much of this responsibility are again being critically examined.¹ The pace of inflation has also contributed to the latest round in the debate about economic regulation, since it has made us much more sensitive to the danger that government intervention in competitive markets may deter innovation, protect inefficiencies and increase costs.

With these problems very much in mind, Congress, with the President's endorsement, has recently given serious consideration to several bills calling for the establishment of a National Commission on Regulatory Reform.² This commission on commissions would have a mandate to explore the need for fundamental change in the structure and

[†] Member, District of Columbia and New York Bars; Visiting Lecturer, Yale Law School.

^{††} Member, District of Columbia Bar.

1. A good list of the formal studies of regulation that have been undertaken over the years is found in the report of the most recent such endeavor. ASH COUNCIL, A NEW REGULATORY FRAMEWORK, REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 197 (Gov't Printing Off. 1971). A wide range of viewpoints, most often critical of regulation as it now stands, is collected in THE CRISES OF THE REGULATORY COMMISSIONS (P. MacAvoy ed. 1970).

2. See, e.g., H.R. 3104, H.R. 3007, H.R. 2859, H.R. 2514, H.R. 2277, S. 61, S.J. Res. 7, 94th Cong., 1st Sess. (1975); S. 4145, S.J. Res. 253, 93d Cong., 2d Sess. (1974). As will be discussed later, the congressional debate has more recently focused on proposals for more thorough and regular congressional oversight of the regulatory agencies. The House Commerce Subcommittee on Oversight and Investigations, chaired by Rep. Moss, has recently announced its intention to conduct a review of the independence, performance and economic effects of the Federal Power Commission (FPC), Federal Trade Commission (FTC), Interstate Commerce Commission (ICC), Securities and Exchange Commission (SEC), Consumer Products Safety Commission (CPSC), and Federal Communications Commission (FCC).

procedures of the independent regulatory agencies.³ During these deliberations, Congress is again hearing most of the traditional criticisms of economic regulation. A surprisingly broad coalition, however, now accepts the argument that regulation fails primarily because we regulate too much.⁴ In this new climate, it may be possible to make substantial strides towards eliminating excessive regulation.⁵ While this would be a healthy development,⁶ we must not ignore another equally important defect in our regulatory system.

Government intervention in many important economic activities will still be necessary to achieve equally major and accepted public goals, ranging from environmental health and social justice to honest advertising and product safety. For example, freer entry into the trucking business might well be desirable, but we will probably still wish to control the size, safety, noise, energy consumption, and air pollution of trucks.⁷ While we may doubt the wisdom of continued regulation of the content of television programs,⁸ we can hardly leave local telephone rates to the discretion of the utility with the only lines in town. Since we cannot blame all the evils of regulation on its excessive scope,

3. *Hearings on Regulatory Reform-1974 before the Senate Comm. on Gov't Operations*, 93d Cong., 2d Sess., pt. 1, at 4-5 (1974).

4. As early as 1971, the Council of Economic Advisors' Annual Report suggested that the deregulation of transportation might have to be considered "a matter of urgent national priority." Lewis Engman has recently observed that deregulation has growing support from both "survival-of-the-fittest, every-man-for-himself free-marketeers" and from people, like Ralph Nader, who are "generally viewed as liberal and interventionist in their approach to the economy." Address by Lewis A. Engman, Chairman, FTC, before the Financial Analysts Federation, in Detroit, Oct. 7, 1974, at 3. The Administration has endorsed the view that we overregulate certain areas of the economy. See *ECONOMIC REPORT OF THE PRESIDENT*, 1975, at 147-59. Indeed, the agencies themselves may now be leaning in the direction of policies more consistent with economic efficiency. For example, the Civil Aeronautics Board (CAB) has moved toward accepting the Department of Transportation's arguments for more flexible pricing in its Domestic Passenger Fare Investigation. See G. DOUGLAS & J. MILLER, *THE CAB'S DOMESTIC PASSENGER FARE INVESTIGATION* (Brookings Institution, Tech. Ser. Reprint T-008, 1974). Similarly, the Board recently withdrew its restrictive charter flight guidelines and announced its support for more liberal rules.

5. As Engman aptly warns, we simply cannot afford to let regulated industries "become federal protectorates, living in the cozy world of cost-plus, safely protected from the ugly specters of competition, efficiency and innovation." Engman, *supra* note 4, at 14. See also Baker, *The Great Regulatory Game: All Shall Have Prizes*, Apr. 1, 1975 (unpublished remarks at the NYU-Columbia Symposium on Regulation).

6. Reuben B. Robertson has asserted to the Senate Commerce Committee that "the concept of economic regulation has failed." *Hearings on S.J. Res. 253 before the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 230 (1974) [hereinafter cited as *Hearings*]. While this is an overstatement, we agree that the concept of regulation by independent agencies is in serious trouble.

7. A forceful argument can be made that trucking does not share the potential for natural monopoly that has been cited in support of regulation in other areas. See Kilborn, *Empty Trucks and Inflation*, N.Y. Times, Oct. 6, 1974, § 3, at 3, col. 1. No one would suggest, however, that all aspects of the trucking industry should therefore be beyond government control.

8. See Hentoff, *How "Fair" Should TV Be?*, LITTONION, Summer 1974, at 25.

we must not place all our hopes for regulatory reform on the relatively limited amount of deregulation that would be beneficial. It is equally important to reexamine the effectiveness of the regulatory programs that will still be required.

The “failure” of many of those programs grows out of a basic paradox of our regulatory philosophy: we respect the nonpolitical independence of the regulatory process, yet when we dislike independently made agency decisions, we invoke the political process to change them.⁹ Precisely because we permit the agencies to regulate independently, we find that they sometimes regulate in ways that elected officials find politically unacceptable. Statutory intervention by politically accountable decisionmakers then becomes necessary to change their courses.

Although one-shot statutory interventions are a step in the right direction, they cannot provide effective and lasting political control over agency decisions. We need also to consider whether and how to create a system for *continuous* political monitoring of all government regulation, to ensure its responsiveness to the changing economic and social needs that the political process reflects. If independent agencies are actually making democratic government less effective and less responsive, we may conclude that it is time to give continuing responsibility for agency action, and continuing power effectively to control such action, to the officials we elect to run the government.

I. The “Failure” of Regulation

There is widespread feeling that something has gone badly wrong with our attempt to promote the “public interest” in the regulated sectors of the economy through independent agencies. Critics have blamed regulatory failure on many different factors. Superficial critiques emphasize the role of personal incompetence, administrative bungling, and the corrupting (or co-opting) influences of regulated industries. All of these are present to a significant degree in any bureaucracy, but a theory of regulatory failure based entirely on continuing and pervasive ineptitude or conspiracy is unacceptably cynical. Other critics have looked to the way agencies conduct their business. They argue that agencies should engage in more planning,¹⁰ clarify

9. For a seminal analysis of this paradox and its roots, see T. Lowi, *THE END OF LIBERALISM* 125-56 (1969).

10. Louis Hector stressed the need for more effective planning in his thoughtful critique of the CAB. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *YALE L.J.* 931 (1960).

policy with more rulemaking,¹¹ eliminate procedural delays¹² or, conversely, build in better procedural protections to ensure against arbitrary or uninformed regulatory decisions.¹³

A few thoughtful commentators have sensed that some agencies may not be doing their job well because they have been given, or have selected, the wrong job to perform.¹⁴ The current attacks on overregulation argue, for example, that the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB) have failed because they have tried too hard to protect the industries they regulate from the forces of competition. Some observers claim that the Federal Trade Commission (FTC) has squandered its resources on relatively trivial matters, ignoring a legislative mandate that would permit much more innovative and significant action. Others suggest that regulation often fails because agencies are unwilling to be consistent or to follow through on their actions, creating conditions of partial regulation which are less desirable than either systematic or nonexistent control. Agencies thus create "monopoly without effective control, private enterprise without effective incentive or stimulus, governmental supervision without the possibility of effective initiative in the public interest."¹⁵

11. Judge Friendly has appealed for clear policies and standards in *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 862 (1962); see Hart, *The Exercise of Rule Making Power*, in PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 324 (1937).

12. One example of such delay is the FCC's attempt to resolve a dispute between radio stations KOB in Albuquerque and WABC in New York. The dispute is 33 years old and still going strong. See Bacon, *The Regulators*, Wall St. J., Oct. 15, 1974, at 1, col. 1. Delay has been called the Achilles heel of the regulatory process. Delay is Judge Friendly's first item on a bill of particulars against the agencies. Friendly, *A Look at the Federal Administration Agencies*, 60 COLUM. L. REV. 429, 432 (1960). On the other hand, it has been argued that "agency failures arise in large part from efforts to 'process' work quickly—to avoid a backlog of cases—while raising as little controversy as possible." S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 129 (1974).

13. The Administrative Procedure Act was the culmination of a long drive to establish mechanisms to ensure agency fairness, a drive pursued at the expense of agency effectiveness. A pending bill aimed at curbing overregulation (S. 4260, 93d Cong., 2d Sess. (1974)) may have equally dubious results. It would require each agency to accompany any major action with a "competitive impact statement" analyzing its cost-benefit effects. It seems more likely, however, that the requirement would prolong agency delays, without increasing the wisdom of agency decisions. A similar Executive Order, No. 11,821, 39 Fed. Reg. 41501-02 (1974), establishes a program requiring that each agency within the executive branch publish "inflation impact statements" in conjunction with major legislation, rules or regulations. The first lawsuit seeking to delay action by the executive branch because of failure to comply with this order already has been filed. See *Independent Meat Packers v. Butz*, Civil No. 75-1244 (D. Neb., filed Apr. 1, 1975) (preliminary injunction granted, Apr. 11, 1975).

14. See R. NOLL, REFORMING REGULATION (1971).

15. A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 328 (1971). To the extent that competitive forces are not perceived as providing the solutions to our social needs, nationalization—that historical hobgoblin—may receive more attention from those who feel the failure of regulation cannot be overcome by institutional reform. Indeed, it has been suggested that some critics of regulation favor deregulation because

Although there is truth in many of these observations,¹⁶ we need to identify and analyze a more basic type of regulatory “failure.” Regulatory agencies are deeply involved in the making of “political” decisions in the highest sense of that term—choices between competing social and economic values and competing alternatives for government action—decisions delegated to them by politically accountable officials. Agencies exercise their decisionmaking powers with respect to questions that Congress and the President, based on the best expertise available, *could* properly address on their own.¹⁷ Regulatory “failure,” then, as we would define it, occurs when an agency has not done what elected officials would have done had they exercised the power conferred on them by virtue of their ultimate political responsibility. Agencies would be said to fail when they reach substantive policy decisions (including decisions not to act) that do not coincide with what the politically accountable branches of government would have done if they had possessed the time, the information, and the will to make such decisions.

So long as agencies remain “independent,” this kind of regulatory failure is difficult to detect, because with rare exceptions there is no way of knowing what Congress and the President would have done. Nevertheless, this analysis suggests that agency success requires the creation of some mechanism allowing more frequent intervention in the regulatory process by politically accountable decisionmakers. Now that conditions change so rapidly and today’s massive problems arise

it is likely to create chaos, thereby giving a new measure of respectability to governmental ownership of industry. See R. NOLL, *supra* note 14, at 109-10. Although few of the critics are likely to be so motivated, we agree that the need for effective regulatory reform is grave and that failure to act decisively in this area will increase pressures for more, not less, governmental intervention in the economy.

16. It is particularly true that there is an important relationship between the clarity of an agency’s statutory mandate and our evaluation of that agency’s performance. See T. Lowi, *supra* note 9, at 130-43. However, even the new and decidedly useful notion that agencies tend to fail when pursuit of their mandates needlessly interferes with competitive forces, *see* note 5 *supra*, is inadequate, because it begs the difficult and highly subjective question of what restrictions on competition are “needless.” The bulk of current regulation is designed to achieve social goals that would not be served by the operation of competitive forces in presently free or newly liberated markets, and this kind of regulation cannot be said to fail simply because it is anticompetitive. Often, as in the case of reducing air pollution, regulation can succeed only if it achieves very different results from those a “free” or workably competitive market would produce.

As a note of caution to those advocating deregulation, we suggest that such a course, even accompanied by increased enforcement of the antitrust laws, would not necessarily produce a marketplace resembling the theoretical free market model. The benefits of removing regulation should always be analyzed in terms of the likely results to be reached by the market structure that can realistically be expected to evolve. In addition, it will be difficult to persuade courts to apply traditional *per se* antitrust theories to newly or partially liberated markets, and this problem should be taken into account when the likely results of deregulation are assessed.

17. See T. Lowi, *supra* note 9, at 126.

before yesterday's have been analyzed and solved, government policies must also change rapidly, and in coordination with one another.¹⁸ Our independent regulatory agencies, with critical powers over substantial segments of the economy, were created under statutory policy objectives framed years before many of our present problems arose. If our government is to respond to new problems, the agencies must be made responsible—and speedily responsive—to the elected power centers we have charged with the job of governing.

There are, of course, many regulatory issues which the President and Congress consider it politically safer *not* to address directly—issues on which they prefer to let the independent and politically unaccountable agency take the inevitable political heat. This can hardly be claimed as a virtue of the present system, since an elected government ought not to be able to avoid responsibility for governing effectively. If particular regulatory decisions (or failures to decide) aggravate inflation, retard desired economic growth, harm the environment, or achieve benefits worth less than their economic cost, the elected officers of our government ought to have the power to prevent such acts or omissions, and ought to be held accountable for letting them occur.

We can get some sense of how such a system would work in practice by looking at the relatively few instances in which Congress and the President have intervened or attempted to intervene to change a specific regulatory policy or result. For example, Congress acted decisively by statute¹⁹ to overturn the politically unpopular seatbelt interlock regulations of the National Highway Traffic and Safety Administration. There have been recent presidential and congressional initiatives aimed at achieving some deregulation of transportation, banking, and

18. One might fairly say that during the past 25 years "the" critical economic problem has shifted from (1) the economic prostration of Europe to (2) economic aid to developing countries to (3) our excessively favorable trade balance to (4) the Eisenhower recession to (5) the economic and social disadvantages of our minorities to (6) the inflation started by the Vietnam War to (7) the excessive accumulation of dollars abroad and the growing economic strength of Europe and Japan to (8) the protection of the environment and the curbing of growth to (9) the growing shortages of energy and other resources to (10) the OPEC cartel to (11) the deepening economic recession and the lack of economic growth throughout the Western world. The average time for a critical problem on stage center, before being displaced by a new one, is about two and one-half years, much shorter than the time required to deal with it adequately, given the cumbersome and uncoordinated regulatory and legislative processes that currently prevail. To the extent that we do deal with them, we tend to solidify our answers in new single-purpose statutes and single-mission institutions, oblivious to the likely need for rapid adjustment when the next problem hits.

19. Motor Vehicle and Schoolbus Safety Amendment of 1974, 88 Stat. 1470.

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natural gas.²⁰ The Federal Reserve's monetary policies and its long tradition of independence have also come under renewed attack.²¹

On the other hand, the limited nature of political intervention is not necessarily a fair measure of regulatory success. The current quasi-legislative, quasi-executive, quasi-judicial structure of the agencies gives them a powerful defense against overt political intervention.²² Moreover, it is difficult and time-consuming for the President and a working majority of Congress to unite to change a particular regulatory result or pattern of behavior by enacting a new law each time a change is desired. The Framers built into our constitutional system a large measure of inertia against change. Nonetheless, we may surely question whether they envisioned a governmental structure in which "independent experts" would make major policy decisions, for which the legislators and the President would not consider themselves—or be considered by the electorate—to be either responsible or accountable.

We must, of course, recognize that neither Congress nor the President can possibly deal with *all* of the numerous and complex questions necessarily involved in any attempt to regulate the economy. That consideration (as well as reluctance to accept the political risks) gave rise to the delegation of such matters to regulatory agencies in the first instance, and to the vagueness and inconsistency of the standards the agencies are instructed to apply. But the necessity of delegation should not disguise the fact that whatever legitimacy inheres in agency action stems from a delegation of politically based power. We cannot fault our elected leaders for delegating responsibility when that is the only way to do the job. But perhaps we should fault them—rather than praise their commitment to agency "independence" and "expertise"—when they delegate authority and refrain from reviewing

20. See H.R. 5291, 94th Cong., 1st Sess. (1975) (Financial Institutions Act); S. 3237, 93d Cong., 2d Sess. (1974) (Transportation Improvement Act); S. 2842, 92d Cong., 1st Sess. (1971) (Transportation Regulatory Modernization Act); S. 1092, 92d Cong., 1st Sess. (1971) (Modern Railway Transportation Act); H.R. 640, 94th Cong., 1st Sess. (1975); H.R. 2553, 93d Cong., 1st Sess. (1973).

21. See H.R. 3160, H.R. 3161, H. Con. Res. 133, S. Con. Res. 18, 94th Cong., 1st Sess. (1975). The numerous recent calls for general regulatory reform are themselves a good indication that many agencies are failing in the important sense that politically accountable officials perceive that their chances for reelection will be diminished if they are identified with and held responsible for the results caused by decisions of the regulators.

22. Doctrines as lofty as the principle of the separation of powers have been corrupted into an argument against such intervention. The agencies, according to the congressional debate on the Federal Trade Commission Act, were to be subject "only to the people of the United States," free from 'political domination or control' or the 'probability or possibility of such a thing,' to be 'separate and apart from any existing department of the government—not subject to the orders of the President.'" See *Humphrey's Executor v. United States*, 295 U.S. 602, 625 (1935).

and correcting the acts of their delegates in order to avoid responsibility for how the job is done.

II. Origins and Shortcomings of "Independence" and "Expertise"

Economic regulation by independent experts has grown in an incremental and fragmentary manner without any coherent underlying plan.²³ Since few government structures arise in any other fashion, it is meaningless to attribute the failure of regulation to its patchwork background. To the contrary, the misguided set of notions that have led to regulatory failure, as defined above, were all too consistently adhered to and applied during the evolutionary process. Any hope of improvement depends upon identifying, reappraising, and where necessary correcting these underlying conceptions.

Our early faith in independent expertise arose from the idea that regulation ought to be "kept out of politics." The essential impulse behind this idea was the notion that there is a discoverable, unitary and nonpolitical truth called the "public interest," that political concerns interfere with the objective search for this truth, and that we therefore need pristine decisionmakers who will not deviate from the search for this truth by taking into account the conflicting concerns of politically significant groups.

This concept is partly responsible for the early adaptation of the judicial model to the regulatory process.²⁴ Building on the constitutional right to due process and the valid principle that a good judge should be nonpolitical, we have judicialized our regulatory system to the point where administrative records are larger than judicial records and regulatory proceedings take longer to resolve than judicial proceedings. The idea that politicians and the political process are inherently evil, and that the judicial model of governmental decision-

23. The complex hodgepodge we call regulation is not "the product of any farsighted plan or design or the result of any thoroughly worked-out rationale or theory. Step by step, whether in state or nation, it has represented a series of empirical adjustments to felt abuses. It has been initiated by particular groups to deal with specific evils as they arose, rather than inspired by any general philosophy of governmental control." M. FAINSOD & L. GORDON, *GOVERNMENT AND THE AMERICAN ECONOMY* 226 (1948).

24. This acceptance of the judicial model may also have resulted in part from the historical accident that the first ICC chairman was a judge. Judge Thomas M. Cooley is hardly to be blamed for invoking the model of sound governmental action he knew best. In part, he merely realized early what many agencies were later to learn—that regulatory decisions were more likely to survive judicial review if they were clothed in the "protective coloration of the judicial environment." *Id.* at 35. Furthermore, then as now, businessmen tended to abstain from direct interaction with the government, thereby rendering lawyers, with their tendency to favor case-by-case consideration of issues by an objective decisionmaker, the "residuary legatees of the political process." *Id.* at 15.

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making is therefore to be preferred, is an idea deeply rooted in many American reform movements.²⁵ Covert attempts to influence regulatory decisions for unworthy political reasons, such as rewarding a contributor or punishing an opponent, are not mere folklore from our frontier past; they continue to the present day, as the Watergate tapes so starkly reveal. Our continuing interest in protecting economic regulation from this kind of political interference is therefore neither political naiveté nor idealistic paternalism. But the architects of our regulatory schemes appear to have extended a legitimate aversion to such covert methods to a more questionable elimination of mechanisms that would allow elected officers of the government to intervene openly in the regulatory process and take responsibility for its results.²⁶

In addition, support for regulatory independence has been generated, in part, by a desire for continuity and stability in the regulation of economic affairs. Some proponents of independence have suggested that regulators must have terms of office longer than that of any given Congress or presidential administration in order to have time to master the complex issues before them and to develop and apply reasonably predictable, consistent and stable policies. Similarly, the idea that agencies should be independent from one another has been buttressed by arguments that a narrow focus is required to foster expertise and professionalism. "Singleness of concern" has been cited as a virtue precisely because it is said to "quickly develop a professionalism of spirit—an attitude that perhaps more than rules affords assurance of informed and balanced judgments."²⁷

25. As Mr. Dooley put the matter in 1906:

It seems to me that th' on'y thing to do is to keep pollyticians an' business men apart. They seem to have a bad infloonce on each other. Winiver I see an alldherman an' a banker walkin' down th' sthreet together I know th' Recordin' Angel will have to ordher another bottle iv ink.

F.P. DUNNE, *DISSERTATIONS BY MR. DOOLEY* 275-81 (1906). The notion that government should be independent from politics stems, in part, from the fact that the first regulatory agencies were created during the late 19th century and the Progressive Era, when "good government" reformers were advocating the separation of administration from politics. As Marver Bernstein aptly states in his groundbreaking work on agency independence, regulation by independent commissions was designed to be "regulation without tears." M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 37 (1955).

26. One recent commentator speaks critically of presidential attempts to influence regulation. Despite his earlier acknowledgment that the President is the "sole officer of government who derives his mandate from the nation's voters at large," he decries "the rise of politics and the decline of expertise inside the agencies." L. KOHLMEIER, JR., *THE REGULATORS* 36-52 (1969).

27. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 99 (1938). Joseph B. Eastman, perhaps the most distinguished member of the Interstate Commerce Commission in the 1920's, told the American Political Science Association in Washington in December 1927 that the need for a regulatory commission arises "when the legislative body finds that particular conditions call for continual and very frequent acts of legislation, based on a uniform and

Our belief in the virtues of independence has even operated to limit the President's ability to give direction to the regulatory bodies that have been created within rather than outside the executive branch. The Food and Drug Administration, the National Highway Traffic and Safety Administration, the Federal Aviation Administration, the Comptroller of the Currency, the numerous agricultural commodity boards, the Social Security Administration, the Wage and Hour Administration, the Internal Revenue Service, the Oil Import Board and many other administrative bodies perform important regulatory functions within one of the executive departments. But, as a practical matter, none of them is at present significantly more amenable to presidential directives on specific policy issues than are the independent agencies.²⁸

The beneficial results predicted for regulation by independent experts have not been realized, however, despite all the claims made in their behalf. Some critics tell us that independent agencies have been captured by the industries they regulate.²⁹ Instead of praise for useful continuity, we hear complaints about excessive bureaucratic rigidity.

consistent policy, which in themselves require intimate and expert knowledge of numerous complex facts, a knowledge which can only be obtained by the process of patient, impartial, and continual investigation." J. Eastman, *The Place of the Independent Commission*, CONSTITUTIONAL REV., Apr. 1928, at 95-102.

28. There does not appear to have been any clean-cut separation or meaningful distinction between the sorts of problems committed to independent agencies and those committed to the control of bureaucracies within the executive branch. All governmental acts affect the economy in some way. Even if independence did give rise to some virtues, independence in any given field of government regulation is no more than an accident of history. For example, both the Food and Drug Administration (FDA) (in the executive branch) and the Federal Trade Commission (FTC) (outside the executive branch) concern themselves with consumer protection in overlapping areas. The Securities and Exchange Commission (SEC) (outside) and the Department of Agriculture (inside) have similar authority over exchanges; jurisdiction depends on whether a "security" or a "commodity" is traded. The functions of the Department of Justice (inside) and the FTC (outside) overlap. Numerous executive departments concern themselves with problems of a nature and magnitude not substantially different from those addressed by independent regulatory bodies.

As a practical matter, the inside agencies are no more subject to presidential directives on specific policy issues than the independent agencies. At least as to decision-making on a record, it would probably be regarded as a gross breach of the principle of independence for the President to order or even to suggest that one of the agencies decide a particular issue in a particular way. 5 U.S.C. §§ 556(e), 557 (1970). Even the relatively simple idea that the President should be able to achieve a common position by the executive departments on a given policy issue pending before an independent agency has been strongly resisted and hard for Presidents to achieve.

29. A perceptive observer sets forth the argument that regulators may become excessively interested in the problems and the needs of the regulated because the elected officers of government ignore the regulators, while representatives of industry are the only people in Washington who appear to think they are important. R. NOLL, *supra* note 14, at 100.

Instead of receiving credit for professionalism, agencies are accused of mediocrity³⁰ and an unhealthy and narrow parochialism.³¹ We have less faith in the independence of our regulators than we have in the integrity of our judges. As the present drive for deregulation shows, we lack confidence in the ability of appointed and independent “experts” to reach the correct balance between social goals and economic costs.

It could be argued that these failures and difficulties stem from not having insisted strongly enough on the absolute sanctity of agency independence and expertise.³² It is more likely, however, that the underlying problem stems from the very notion of delegating the various tasks of regulation to independent experts. Over the years, as society and technology have become more complex, the tasks facing the regulators have changed drastically. Basic policy decisions now need to be reexamined more frequently, more rapidly, and with broader perspective. The concept of delegation to independent experts fails to take adequate account of this change.

Expert advice and the independence of those who give this advice are still of great importance, and ultimate decisionmakers cannot be without such counsel. However, as we are beginning to recognize, regulation today involves political choices between competing interests—concerning which economic and social goals to pursue, how far and at what economic and social cost.³³ Under our constitutional scheme, these are choices that only politically accountable officials who are “dependent” rather than “independent” and “generalists” rather than

30. It has been suggested that Presidents hesitate to appoint capable and aggressive commissioners because such persons would be beyond effective control. E. HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 88 (1936). But it seems more likely that because of the multimember character of the commissions, the opportunity thus presented to reward campaign supporters, and the conviction that any given appointment will neither change agency policies nor arouse public scrutiny, Presidents conclude that such appointments do not warrant close attention and care.

31. We tend to agree with those critics who suggest that “professionalism,” even if it could be achieved, is not the virtue most appropriate to the task of making public policy. As William Cary has said, “professionalism is fundamentally destructive of good administration, because it is a special kind of class system which views public policy through blinders.” W. Cary, *The Federal Regulatory Commissions*, Apr. 4, 1952, at 3 (lecture delivered at Princeton University, mimeo).

32. Indeed, professionalism retains its defenders. They charge both that some regulators are too closely tied to industry by prior contacts or employment and that others are not expert enough because they have been appointed through the political process and have not had such prior experience. The ironies and contradictions inherent in “conflict of interest” reform proposals are well described by Bayless Manning in *The Purity Potlatch*, 24 *FED. B.J.* 239 (1964).

33. As Geoffrey Vickers has observed: “[All social goals] are systematically related; some require each other; some exclude each other; nearly all compete with each other for limited resources” G. VICKERS, *FREEDOM IN A ROCKING BOAT* 125 (1970).

"experts" should be making.³⁴ The regulatory agencies should not have more independence from the political process and more opportunity to apply expertise to nontechnical decisions than is consistent with effective, democratic government.³⁵

Furthermore, agency decisions based on professionalism in pursuit of a single objective are likely to fail us in an age when most of our important problems cut across the artificial boundaries of any given agency's jurisdiction and its narrow expertise. Agencies that focus mainly on energy resources and only tangentially on the environment, or vice versa, cannot take into account our priorities and interests as a whole.³⁶ Even if one were to make the absurd assumption that we could fill every position in every agency with a renaissance man, and a politically sophisticated one at that, no single agency has been given all of the tools that would be necessary to steer the economy in a coordinated and comprehensive fashion. Instead, we have a patchwork of specialized and fiercely independent agencies with different perspectives, whose concerns necessarily overlap and whose actions may contradict one another. For example, fossil fuels, nuclear power, pipe and transmission lines, rails, tankers, employee health and safety, air and water quality, motor vehicle performance standards, taxes, import restrictions, and energy research—11 related components of the energy problem—are each within the jurisdiction of a different agency.³⁷ Each would be the first to urge that its own statute does not permit it to subordinate its own mission to other interests. We can hardly depend on them to arrive at the right decisions by consensus.³⁸

Congress, assisted by the courts, has recently provided a vivid illustration of this overseparation of powers among independent agencies. The National Environmental Protection Act requires that before any

34. One early student of the regulatory process, John Maurice Clark, found the tendency to keep regulation out of politics quite disquieting. As he noted, "politics is the democratic way of governing; has it become necessary, then, to keep government itself out of politics?" J. CLARK, *SOCIAL CONTROL OF BUSINESS* 490 (1939).

35. See T. LOWI, *supra* note 9, at 154-56.

36. For a careful analysis of the need for centralized economic planning, and the suggestion that we need to "veer dangerously close to an abrogation of the market system in an effort to preserve it," see Address by Robert V. Roosa to the Atlantic Institute for International Affairs, *reprinted in* THE AM. BANKER, Dec. 10, 1974, at 4.

37. In order, Interior, Nuclear Regulatory Commission (NRC), FPC, ICC, Maritime Administration, Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Transportation, Treasury, International Trade Commission (ITC) and Energy Resources and Development Administration (ERDA).

38. Even if representatives of all the agencies sat down together to attempt to reach a consensus, their decision would be formed in large part by the institutional strengths of the various agencies represented at that meeting, a capricious factor at best. We have learned from experience that inter-agency committees are not very good at solving inter-agency problems.

agency takes a significant federal action, it must prepare—and then consider—an environmental impact statement, including a comparison of the proposed action with other less harmful alternatives. In *Natural Resources Defense Council v. Morton*,³⁹ the Court of Appeals for the District of Columbia Circuit ruled that before issuing licenses for offshore oil drilling, the Department of Interior had to consider other alternative courses of action to meet energy needs, including the construction of more nuclear power plants and a change in the Federal Power Commission policy on natural gas pricing, actions the Department itself had no power to take.

Suppose that the Department had opted for more nuclear plants and higher natural gas prices, judging them less harmful to the environment than offshore drilling, and that the power companies and natural gas producers had then applied to the Nuclear Regulatory Commission (NRC) and the Federal Power Commission (FPC) for the required approvals. Suppose next that the NRC, preparing and considering its own environmental impact statement, was persuaded by the foes of nuclear plants that they are more damaging to the environment than offshore drilling and gas pipelines, and that both more offshore drilling and more natural gas are superior alternatives to meet energy needs. And suppose finally that the FPC, in doing its own impact statement, concluded that gas pipelines are more damaging, or that there were other reasons for holding down natural gas prices, and that one of the other courses was preferable.

Under the present structure of regulation by separate and independent agencies, the impasse would be complete. All three agencies would have performed their statutory duties to the letter. Therefore, all three decisions would have been affirmed by the courts. The problem requiring action would remain unsolved.

These basic weaknesses of separate and independent agencies, each grappling with different small parts of large, interrelated problems are aggravated by the generality of the statutory mandates they have been given. With few exceptions, the agencies' enabling legislation casts them completely adrift in a sea of generalized and often conflicting policy objectives. The Regional Rail Reorganization Act, for example, requires the Final System Plan for the new eastern rail system to meet criteria of economic viability, effective competition, adequacy of freight service, establishment of improved high-speed passenger service, attainment of environmental quality standards and maximum efficiency

39. 458 F.2d 827 (D.C. Cir. 1972).

consistent with safety, and protection of labor and communities against losses—criteria that, if taken literally as having equal priority, could be achieved only in utopia.⁴⁰ In contrast, other statutes use as their sole guiding criterion “the public interest.”⁴¹

For all these reasons, independent agencies understandably find it hard to divine the decisions that would have, but have not, been made by politically accountable officials. The President and Congress find it equally difficult and often politically inconvenient to step in with specific guidance or direction. It is therefore not surprising that agencies, navigating by their own bureaucratic stars, frequently reach results that might be costly to incumbent politicians if they were viewed on election day as responsible for these actions and choices.

The success of regulatory agencies, like other efforts designed to promote the public interest, depends largely on obtaining political guidance and support for their actions.⁴² This may explain a puzzling phenomenon of the regulatory process—the fact that agencies “age,” much like human beings. Almost all agencies have been viewed as more vigorous and successful in their early years, and less effective as they grow older.⁴³ This perceived success of young agencies may result less from their youth than from their role in pursuing substantive goals that our political institutions have just recently proclaimed and continue to support. The politically determined social and economic priorities that are reflected during the process of creating a new agency change with the passage of time. The phenomenon of agency aging could have less to do with the symptoms of staff arthritis than with growing distance and alienation from the current political process.

While informal contacts with politicians continue and even increase as an agency ages, opportunities for formal and visible political direction of an agency decline over time as the presumption in favor of agency independence and expertise grows stronger. As intervention

40. Pub. L. No. 93-206, 87 Stat. 985 § 206(a) (1974).

41. See, e.g., Communications Act of 1934, 47 U.S.C. §§ 303, 307(a), 307(d), 309(a), 310, 312 (1970).

42. Agencies often do not realize the truth of this fact. As Marver Bernstein perceptively observed in 1955, “the single most important characteristic of regulation by commission is the failure to grasp the need for political support and leadership for the success of regulation in the public interest.” M. BERNSTEIN, *supra* note 25, at 101.

43. According to Washington folklore, Justice Black suggested that every statute creating a new agency should limit its life to 14 years. While Justice Black may have had tongue in cheek, Professor Lowi has made a serious and persuasive argument for just such a reform—a “Tenure of Statutes” Act that would require each agency to be legislatively renewed every five to 10 years. T. Lowi, *supra* note 9, at 309. The continuing vigor of the SEC—the most visible exception to the aging process—may be due to the clarity and continuing political acceptance of its antifraud and full disclosure missions.

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by politicians is channeled into less visible and less official modes, it is increasingly assumed that politicians need not undertake responsibility for agency actions and that any overt attempts by politically accountable officials to influence regulatory policy are improper. The cycle feeds itself until the reality—that the most important agency decisions have a political content for which politicians should be held accountable—is completely lost from sight.

Our faith in independence and expertise has created this dilemma, and only our faith in the political process can resolve it.⁴⁴ Only elected officials can provide the requisite overview, coordination, and practical political judgment to weigh competing claims, make the necessary ultimate decisions, and stand accountable at the polls. We need today a mode of economic regulation that is broad enough to consider the impact of regulatory decisions on the society as a whole, and flexible enough to adapt to crises we can rarely foresee much before they are upon us.⁴⁵ We need to allow for wider shifts in emphasis and direction within shorter periods of time. To paraphrase Clemen-ceau, economic regulation has become too important to leave to the regulators.⁴⁶

III. Returning Regulation to the Political Process

If we cannot rely on independent and expert agencies to provide us with flexible, coordinated, and politically acceptable policies of economic regulation, we must find guidance either from Congress or the executive branch, or some combination of the two. For many years, the President and Congress have been battling about which, if either, should exercise control over the hybrid fourth, or regulatory, branch.

44. William Cary, a staunch defender of agency independence, has said that an agency head is "in politics" "whether he likes it or not." W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 139 (1967). To the extent that agency actions often have substantial political importance, this statement is accurate. We also agree that politicians at times seek to influence agency action on an informal basis—but that sort of involvement hardly leads to political accountability.

45. For example, environmental policies formulated a mere five years ago now may need to be rethought in the face of the rapidly developing energy crisis and the pressure of rising energy prices on environmental protection costs. Our insistence on competitive behavior in our foreign as well as our domestic commerce may need modification to enable us to cope with foreign governmental commodity cartels. See generally Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 *YALE L.J.* 268 (1974).

46. "[T]he control of business remains too controversial and too vital a political issue to be entirely relegated to any commission independent of close control by the policy-formulating agencies of the government. Administrators cannot be given the responsibilities of statesmen without incurring likewise the tribulations of politicians." E. HERRING, *supra* note 30, at 138.

To a considerable extent, the struggle has been a defensive one, with each elected branch seeking to prevent the other from exercising active control, but with neither consistently wanting to do so itself. The appeal for independence is itself a battle cry often heard in congressional attempts to prevent presidential intervention in the regulatory process. That battle has cut agency policymaking adrift from any meaningful, coordinated and visible oversight by politically accountable authority. A top priority in reforming regulation should be to take a closer look at this ongoing battle between the branches, to reevaluate the code words so often invoked, and to reassess our views as to which branch, if either, should be the victor.

Of course, the presidential power to appoint agency members provides an occasional opportunity to influence agency policy; yet few Presidents have used it effectively.⁴⁷ President Eisenhower invented the idea of giving the chairman of each independent commission a second hat as special assistant to the President, a practice soon eliminated because of the jealousy of other agency members and opposition in Congress. President Ford has recently required all agencies within the executive branch to prepare economic impact statements on the inflationary results of proposed actions, although he felt unable to apply his order to the independent agencies.⁴⁸ There has never been a broad public perception that the President wields, or that he ought to wield, enough control to be held accountable for the actions of the independent agencies,⁴⁹ and congressional attempts to check the President's limited power to intervene in the regulatory process continue up to the present time.⁵⁰

If what we need is more flexible, coordinated and politically acceptable regulatory policymaking, it can be argued that the President

47. See R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 681 (1941); E. REDFORD, *ADMINISTRATION OF NATIONAL ECONOMIC CONTROL* 279 (1952). Even this power is limited, of course, since Presidents do not have the power to remove agency members. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

48. See Exec. Order No. 11,821, 39 Fed. Reg. 41501-02 (1974). No doubt because the tradition of independence has spread even to the agencies within the executive branch, see p. 1404 *supra*, they have been slow to respond.

49. For the view that agency independence from the executive has eroded severely over the years, see MacIntyre, *The Status of Regulatory Independence*, 29 *FED. B.J.* 1 (1968). The author cites budget approval, Department of Justice control over litigation, central clearance of legislative proposals, clearance of requests for information (now done by GAO), and the President's power to appoint chairmen as examples of this erosion.

50. Congress has recently been considering S. 704, 93d Cong., 1st Sess. (1973), a bill designed "to restore the independence of certain regulatory agencies." The bill would require, among other things, submission of agencies' budgets and legislative proposals to Congress at the same time they go to OMB. The bill would also give agencies more control over the conduct of their civil litigation, thereby diminishing the role of the Department of Justice.

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should be given much more extensive power and responsibility to intervene in the regulatory process—whether he wants it or not. Even the critics of expanded presidential power would probably admit that the President is capable of acting more quickly than can the Congress in formulating and articulating national policy goals. In addition, the President and his immediate staff have an overview of government management—and a constitutional responsibility for executing all the laws⁵¹—that is not shared by a single regulatory agency, by any specialized congressional committee or by the Congress as a whole. The President is the only nationally elected officer, and thus, at least arguably, our most politically accountable official. He is uniquely situated to intervene (at least in a limited number of critical instances) in order to expedite, coordinate, and, if necessary, reverse agency decisions.

Nevertheless, arguments for greater presidential involvement in the regulatory process⁵² are far from winning universal acclaim.⁵³ Even to advance an argument in favor of expanded presidential power over the regulatory process may appear rash at a period in our history when Watergate is such a vivid memory. We at least ought to look long and hard at all other feasible alternatives before advocating any further accretion of power in the White House. This is particularly desirable in light of recent developments indicating that the Congress itself may be willing and able to undertake increased oversight of regulatory policymaking.⁵⁴

There certainly are strong theoretical arguments in favor of legislative rather than executive oversight and intervention. Congressional inquiry and debate may be more likely to lead to sound policymaking than either the President's exercise of his own discretion or the limited give and take that may occur among the presidential staff. Just as many regulators have defended the virtues of the collegial body,⁵⁵ pro-

51. U.S. CONST. art. II, § 3.

52. See R. NOLL, *supra* note 14, at 92-93; E. REDFORD, *supra* note 47, at 306-12; A NEW REGULATORY FRAMEWORK, *supra* note 1, at 40-41.

53. Judge Friendly, among the most thoughtful and experienced critics of the regulatory process, has said of such proposals, "I find it hard to think of anything worse." H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 153 (1962).

54. See S. Res. 71, 94th Cong., 1st Sess. (1975) (proposed a joint study of regulation by the Senate Committees on Commerce and Government Operations). The House established oversight subcommittees by means of the Committee Reform Amendments of 1974, H. Res. 988, 93d Cong., 2d Sess. The Senate is currently considering similar action. S. Res. 55, 94th Cong., 1st Sess. (1975).

55. The Ash Council, *see* note 1 *supra*, of course took a strong opposing view. Virtually every student of regulation will concede that confining ultimate decisionmaking power to one person increases both the chances for efficient and decisive action and the risks of abuse.

ponents of greater congressional responsibility are sure to cite the dangers inherent in the possibility that a President and his staff may become isolated or responsive only to a favored constituency. Moreover, the Congress is in a way more politically accountable than the President. The members of the House stand for election more frequently,⁵⁶ and many members of both houses run for reelection. Therefore, unlike a second-term President, few are immune from the judgment of the polls.

The argument against the institutional superiority of Congress as a regulator of the independent agencies is also strong. It is based on practical considerations and historical experience. Neither Congress nor the majority party in Congress is responsible for "forming a Government" in the parliamentary sense, or for executing any of our laws. The institutional strength of Congress lies in setting policy standards that can command the support of a congressional majority. This often requires unfocusing policy decisions to a level of generality inadequate to provide continuing guidance to particular agencies on particular issues. Furthermore, Congressmen represent narrow constituencies and Congress itself is divided into committees and interest groups that frequently fail to reflect a truly national perspective and in fact often parallel the narrow interests of each regulatory agency.⁵⁷ This structure may prevent it from exercising the collective will required to undertake meaningful and formal oversight of the regulatory agencies as a whole.⁵⁸

There are some signs that this is changing. Congress has recently, for example, recognized the need to focus and exercise its collective judgment over fiscal policy as a whole by enacting the Budget Control Act of 1974.⁵⁹ And in an important recent address supporting a resolution to exert greater congressional control over the Federal Reserve Board, Senator Proxmire attacked the whole idea of independence and expertise:

If we have learned anything in the last few years, it is that so-called experts always can benefit from the views of Congress. It is time to recognize that this is not Plato's republic but the

56. As an institution, even the Senate is in this respect as accountable as the President, despite Senators' six-year terms, because one-third of the Senate must face the electorate every two years.

57. It has been pointed out that Congress has difficulty running its own restaurants.

58. We can hardly hope for a new Joint Committee on Economic Regulation with powers that will parallel those of the new Joint Committee on the Budget.

59. Pub. L. No. 93-344, 88 Stat. 297 (1974).

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United States of America. It is time that we in Congress rid ourselves of our institutional inferiority complex.

....

As elected officials we are accountable to the voters for our actions. When we cast a vote our political necks are on the line. If we were to direct the Federal Reserve to pursue an inflationary policy, we would soon be out of office

....

In contrast to the Congress, the members of the Board of Governors of the Federal Reserve . . . are accountable to no one. There are some who applaud this lack of political accountability on the basis of the mistaken theory that monetary policy should be insulated from political pressures. This ivory tower view of monetary policy is wrong both in theory and in fact.⁶⁰

Since the independence of the central banking function has long been considered almost as important as the independence of the judiciary, an appeal for political control over the Board signals a reevaluation of independence carried to the farthest extreme. Although both Congress and the President⁶¹ ultimately shied away from so overt an attempt to intervene in monetary policy, Senator Proxmire's attack on independence has been echoed in the present political drive to force more deregulation on the agencies. Perhaps for the first time in recent years, there is a growing awareness on Capitol Hill that regulation should be more politically accountable, and there is some indication that Congress may itself be able to undertake the necessary oversight role. It remains to be seen, however, whether this awareness will translate into effective action. The institutional obstacles persist.⁶²

If neither the President alone nor the Congress alone should be relied upon to give direction to regulatory policy, there remains the

60. Senator Proxmire was speaking in support of S. Con. Res. 18, 94th Cong., 1st Sess. (1975), designed to increase congressional influence over monetary policy as administered by the Board of Governors of the Federal Reserve. (A related resolution, H.R. Con. Res. 133, 94th Cong., 1st Sess. (1975), expressing the sense of the Congress with respect to monetary policy, was passed by both houses in the spring of 1975.) Since the Federal Reserve Board makes monetary policy by the purchase and sale of government securities through its open market committee, rather than by issuing regulations or adjudicative orders, Senator Proxmire was directing his remarks to a phase of the Federal Reserve's activities beyond the scope of the statute proposed in this article. 121 CONG. REC. S. 1843-45 (daily ed. Feb. 12, 1975). See also JOINT ECONOMIC COMMITTEE, 1975 REPORT, S. Rep. No. 61, 94th Cong., 1st Sess. 31, 77 (1975).

61. Conversation with the President, Apr. 21, 1971 (CBS interview).

62. The tendency of Congress to pass the policy buck has most recently and aptly been demonstrated by the passage by the Senate of the standby Energy Authorities Act of 1975, S. 622, 94th Cong., 1st Sess. (now in the House Committee on Interstate and Foreign Commerce). David Broder has said about this bill, "By the most charitable interpretation, the senators abdicated their responsibility for hard decisions and left the country with what can only be called a false front facade of an energy policy." Wash. Post, Apr. 23, 1975, at 18, col. 8.

choice of vesting this responsibility in some combination of the two. Such a system could combine the President's ability to act quickly and pursue a single consistent policy with Congress's collegiality and ability to check an arbitrary and isolated President. Political accountability would be maximized by involving both the President and Congress, who are responsible to different voting constituencies. Without infringing on the basic value of the separation of powers among the three original branches of government, such a system would reduce the present isolation of the hybrid regulatory branch, and the myriad sub-separations within that branch, to a point where government would be better able to perform the functions we demand of it today.

IV. A Proposal

To accomplish this, a series of one-shot statutory corrections of specific agency errors is unrealistic. Some more lasting kind of statutory change will be necessary. Professor Lowi, in a pioneering study, suggested that two types of statutes would be helpful—statutes setting more precise standards for actions by the agencies, and a basic Tenure of Statutes Act that would require each agency to seek statutory renewal of its mandate every five to 10 years.⁶³ Both types of statutes would make a positive contribution, but neither would provide a continuing responsibility to review and, where necessary, to correct agency decisions as they are being made. A more basic change is needed.

As a first step to bring the decisions and policies of the independent agencies within the continuing control of both elected branches of government, and to require the elected branches to assume continuing responsibility for the work of their offspring, we suggest a statute that would authorize the President to modify or direct certain agency actions, and to set priorities among competing statutory goals, subject to a one-house congressional veto and to expedited judicial review. Our proposed statute would have the following principal features:

(1) The President would be authorized to direct any regulatory agency (a) to take up and decide a regulatory issue within a specified period of time, or (b) to modify or reverse an agency policy, rule, regulation or decision (with the exception noted in paragraph 4 below). Such action could be taken only by Executive Order published in the Federal Register, setting forth presidential findings that the action or inaction of an agency on a regulatory issue (or a

63. T. Lowi, *supra* note 9, at 309; *see* note 43 *supra*.

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conflict in the actions or policies of various agencies) threatened to interfere with or delay the achievement of an important national objective, and stating the reasons for such findings.

The required findings are intended to limit exercise of the President's authority to truly significant policy issues, and to free the President from countless appeals to intervene.⁶⁴ The traditional reluctance of Presidents to take the political responsibility for intervening in agency affairs should provide an ample safeguard against overzealous use of this authority. The formal Order is proposed both to assure visibility and to require careful reflection and public explication each time the President decides to act.

(2) No such Order could be issued until 30 days after publication of a notice in the Federal Register stating the President's intention to consider doing so and inviting written comments from interested members of the public thereon. All such comments would be maintained in a public docket file. No public hearing would be required. The President and his staff would not be barred from receiving oral presentations from interested persons (except where the affected agency's own *ex parte* rules would bar such a presentation to the agency itself), but a public record of those attending any such informal meeting and a summary of what took place would have to be kept.

The purpose of the notice is to assure not only visibility but a chance for all concerned to make their views known. A public hearing at this stage would appear unnecessary, but it seems unwise to bar any oral presentation that would be permitted at the agency level, so long as the fact of the meeting is made public.

(3) Any such Executive Order would not take effect for 60 legislative days, and would not take effect at all if within such 60-day period either house of Congress adopted a resolution setting it aside.

The purpose of the 60-day period is to give Congress an opportunity to hold hearings and reach its own decision. If either house disagrees with the President, the agency would be left to pursue its own course. Although the constitutionality of this procedure, generally known as the "one-house veto," has not been squarely resolved, it does provide a practical and politically acceptable method for granting authority to

64. To ensure that the review process worked most effectively, the proposal is designed so that there would be few presidential interventions, perhaps fewer than 10 in a year.

the President that Congress would be unwilling to grant without such a condition.⁶⁵

(4) No such Order could be issued with respect to any agency selection among competing applicants for the grant or renewal of a particular license or privilege or any subsequent revocation of such a particular license or privilege.

The purpose is self-evident. Choices between competitors for government licenses, and decisions to revoke such licenses, are not necessary for the making of effective economic policy. There is no reason to create such an opportunity for presidential favoritism. An argument could be made for barring presidential intervention to change any licensing order, but this could prevent him from resolving such potentially critical policy issues as whether a proposed nuclear or coal-fired generating plant, or an Alaska pipeline, should or should not be licensed (as opposed to deciding which party should get a license that will as a matter of course be granted to one of several parties). On balance, and always subject to the one-house veto and judicial review, the President ought to have the final say on such critical policy issues.

(5) Any agency order resulting from such an Executive Order would be subject to judicial review for conformity with the statutory powers governing such agency, except that the President's determination of relative priority among statutory goals of the particular agency and of other government agencies would be deemed conclusive if a rational basis therefor is set out in the Executive Order. Judicial review of agency orders resulting from such Executive Orders would be expedited in accordance with a specified statutory timetable not exceeding 180 days for all proceedings up to and including the filing of appeals or petitions for review in the Supreme Court.

65. For a discussion of various mechanisms employed to change the traditional way in which Congress and the President interact see Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953). A case that may result in a definitive adjudication is now pending. It involves the Comptroller General's plea for a declaration that the President has wrongfully persisted in impounding funds despite a one-house veto of the impoundment order under the Budget Impoundment and Control Act. *Staats v. Ford*, No. 75-0551 (D.D.C., filed Apr. 15, 1975).

We have also considered the possibility that the proposed statute could authorize both houses of Congress to take the initiative by passing a joint resolution that accelerates an agency proceeding or modifies an agency action, subject to presidential veto. But since this is the practical equivalent of a statute, it is an option always open to the Congress, and does not require new legislation.

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The purpose of the judicial review provision is to assure both Congress and affected citizens that the President's decision is one authorized by the agency's statute, while at the same time authorizing the President, subject to House or Senate veto, to establish priorities among conflicting statutory objectives in the same or different regulatory statutes. The time limit on judicial review is one that was successfully applied in the Regional Rail Reorganization Act,⁶⁶ and seems appropriate for the small number of cases in which presidential direction would probably occur.

Conclusion

Obviously, the plan outlined above does not answer all possible questions about its thrust and practical application. It would have to be carefully structured to allow effective presidential intervention but at the same time to preserve the traditional values of fairness, open and public debate, and visible decisionmaking of the type that is necessary for meaningful accountability. The premise that underlies the proposal is that some increase in the President's ability to intervene openly when he deems the issue sufficiently important will make him chargeable with political responsibility for the agency's action, and will make him more accountable for not intervening when the electorate thinks he should. At the same time, the provision for a one-house congressional veto will require the Congress to assume a similar accountability, even when it is reluctant or unable to take the initiative by enacting a corrective statute. In short, our proposal would make a reality out of Harry Truman's pithy phrase, "The buck stops here."

Many voters will oppose any further concentration of governmental decisionmaking power, especially in "political" hands. For their part, many elected politicians would prefer not to be held so clearly responsible for regulatory actions. Moreover, there is always a danger that the power to intervene could be abused.

Nevertheless, since presidential intervention to favor special friends or interests would be highly visible and therefore involve high political risks, the dangers of abuse in our proposal do not appear overwhelming. Moreover, the President's actions will rarely if ever be directed at a

66. Pub. L. No. 93-206, 87 Stat. 985 (1974).

particular result for or against a particular company in a particular agency proceeding. Most instances of regulatory failure stem from the inability of independent and expert bodies with separate missions to set national policy priorities and execute them in a balanced and politically acceptable fashion. Under our proposal the President, if he persuades Congress not to block his action, would have the power to set and execute such priorities when he believes that an agency has failed to do so or that the policies set by two or more agencies are in conflict. That is precisely the power that no one possesses under the existing regulatory structure. It is nothing more nor less than the power to govern effectively and accountably in the present age.