

Fall 1955

Regulating Business by Independent Commission, by Marver H. Bernstein

Ivan C. Rutledge

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Administrative Law Commons](#), and the [Commercial Law Commons](#)

Recommended Citation

Rutledge, Ivan C. (1955) "Regulating Business by Independent Commission, by Marver H. Bernstein," *Indiana Law Journal*: Vol. 31: Iss. 1, Article 10.

Available at: <http://www.repository.law.indiana.edu/ilj/vol31/iss1/10>

This Book Review is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

BOOK REVIEWS

REGULATING BUSINESS BY INDEPENDENT COMMISSION. By Marver H. Bernstein. Princeton, New Jersey: Princeton University Press, 1955. Pp. xii, 306. \$5.00.

The author and the publisher agree that this study is an analysis, but it would be more accurately described as a series of opinions or views, offered for the most part without presentation of the information out of which those views have been formed. A preponderance of the assertions made seem to be directed at federal executive agencies generally, without differentiation of the independent commission; and when independent commissions are explicitly treated, the expected contrast or comparison with other organs fails to follow more often than not. Heavy blows descend towards the internal functioning of the agencies, but the main argument seems to be cast in terms of their relationship to the President. This argument favors a "coherent program of national regulation of economic affairs"¹ under presidential leadership. The underlying premises are: (1) that the courts, having written in a fine Spencerian hand, cannot be trusted with decisions as to what affairs in the economy should be subjected to governmental regulation; (2) that Congress, turning these decisions over to commissions piecemeal, has shown that it normally cannot itself define regulatory policy. However the author does say that executive coordination should supplement rather than replace congressional formulation of general policies, so that it is necessary to read further in order to see where he stands. Emphasis on "policy integration" elsewhere in the book leaves little doubt that he is a true believer in nationally centralized executive planning of economic affairs.

Among the chapters that seem to make no distinction between independent commissions and other agencies,² the chapter on adjudication carries the stock reproach to lawyers, that they are more concerned with the interests of their clients than the public interest. Thus they connived with certain groups to "judicialize" administrative adjudication and subject it to court review, and hence:

The model for the Administrative Procedure Act was the ordinary judicial procedure in an adversary action in which *the*

1. P. 163.

2. See c. 7: The Politics of Adjudication; c. 8: Enforcement of Regulations; and c. 9: An Approach to the Regulatory Process.

government has no more standing than a private party. . . .

The Act attempts to reduce the public interest to the status of an ordinary private interest.³ (Italics supplied.)

The foregoing passage reiterates the misconceived contraposition of "a private interest" and "the public interest" found in a passage elsewhere⁴ that asserts the existence of "an environment which is favorable to private interests and uncongenial to the broader interest of the country." While what is good for General Motors may not necessarily be good for the country, one hardly needs to go to the other extreme and conclude that what is bad for General Motors is good for the country. Specifically in regard to "judicialization," what the author seems to ignore is the interest of the public, if not of civilization, in maintaining and improving the fairness of process of law.⁵ Is the public interest subordinated to the individual by the requirement in criminal procedure that the government establish its case beyond a reasonable doubt?

The alleged ills of "judicializing" adjudication seem to be applicable to commission and non-commission government alike, but in the chapter devoted to qualifications of commissioners, the question is ignored as to whether Mr. Secretary is likely to be better qualified than Mr. Commissioner.⁶ Commissioners are portrayed as mostly of middle age or older. They are lawyers more likely than not. With few exceptions they lack any previous experience in regulated industries. Their turnover is rapid. Hence they are not experts, but a persuasive if somewhat labored argument is presented that expertise is not desirable. So, given the picture of a middle-aged lawyer who knows little about the industry and has recently come to the commission, the expected conclusion would be that he *might* be qualified, especially if the author had extended his survey to record the fact that many commissioners arrive fresh (or wilted) from a career in politics. On the contrary, the conclusion is that the lawyer, engineer, social worker, or even the expert in administration

3. Pp. 193-94.

4. P. 168.

5. The forces responsible for such legislation as the Administrative Procedure Act may have succeeded in imposing an array of procedural niceties disproportionate to the basic requirements of fair procedure for some kinds of determinations. The drive for uniform agency hearing procedures has yielded complaints about their cumbersome-ness. See REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953 (1955). Yet chapter seven of the book under review reports some of the history of the administration of the hearing examiner provisions of the Administrative Procedure Act, only to conclude with the singularly unsubstantiated charge that "deficiencies of due process" exist at the commission level because meetings of the commissioners "seem to be very informal." See pp. 195-212, and the quoted language at pp. 211, 212.

6. C. 4. In another chapter the explicit observation is made that problems of unethical behavior are common to commissions and departments. P. 187.

may be disqualified by his professional narrowness. Instead, then, of a handbook on how to recruit angels, the only affirmative specifications supplied are contained in this passage:

In commissions the staff experts are rarely balanced by commissioners who possess not the detailed knowledge of the experts but the aptitude for gauging the public mind and for integrating the points of view and proposals of the experts into a policy in the public interest.⁷

Commissions are singled out, in the same vein, without comparing bureaus or departments, for a discussion of their "life cycle."⁸ In "youth," which follows "gestation," the aggressive effort of the commission is frustrated by the vagueness of statutory objectives. The inexperience of the staff is overmatched by a well-organized private group prepared to stymie the agency in the courts. Then "maturity: the process of devitalization" sets in, and the standards of regulation set by the commission come to be "determined in the light of the desires of the industry affected." Later the commission suffers a decline which is characterized by budgetary neglect ensuing upon loss of confidence in its ability to overcome its inertia, clean up its backlog, and transcend its traditions.

The author "disavows a concern with the alleged virtues of structural neatness or organizational clarity in commissions,"⁹ and asserts that the independence of the commissions is more effective as myth than as fact. As myth, so the discourse runs, it renders the commissions strongly accountable to the special interests they are supposed to regulate, the unfortunate result of the desire of reformers to take political problems out of politics. Cut off from political support, the commission is projected into a dark corner where private interests can dominate it. There the commission responds more readily to the congressional committee, with its particularistic concerns, than to the President. "Normally, centrifugal forces in American political institutions discourage and discredit presidential efforts in the direction of integration."¹⁰ "The particularism of Congressional committees strengthens the centrifugal forces within the administration. Congress is not organized to focus its resources and attention on broad policy issues; it prefers

7. Pp. 124-25.

8. C. 3: The Life Cycle of Regulatory Commissions.

9. P. 6.

10. P. 165.

to consider economic policy questions in bits and pieces."¹¹

On the other hand, "the public interest can scarcely be identified and defined short of effective coordination of the various regulatory programs with each [sic] other and with national economic policy."¹² The Hoover Commission Task Force on Regulatory Commissions found that coordination of commission activities within the executive branch has not been a serious problem. However the author rejects this finding, on the ground that it does not really show effective executive coordination; on the contrary, it "merely illustrates the planlessness of the economy and the general disorder of which the independence of the regulatory commission is merely a part."¹³ The inference seems to be that executive coordination, or policy integration, would obviate the pull and haul in Congress which produces enactment of inconsistent policies into law and gives to courts the power that results from the duty of choice where reconciliation is impossible.

The biological analogy to the career of commissions is credible, even to a casual observer of government. The puzzling question is, against what criteria of vigor, procedurally, and what conceptions of the public interest, substantively, is the performance of commissions to be evaluated? If the analogy is supportable, is it not equally applicable to non-commission administration, or indeed to all forms of group effort to do battle with evil, in or out of government? Can any crusade be preached with evangelistic fervor until the millenium? Periods of war, near-war, and depression have yielded examples of presidential power carried in the direction pointed by this study. The author observes that in such emergencies the work of the commissions is eclipsed but does not seem to attach much significance to the fact. The hypothesis was not projected that the politics of a time of peace and prosperity are unfavorable to aggressive governmental regulation of economic affairs, hence favorable to Congress and the commissions. Nor was it expressly recognized that the myth of commission independence ceases to be a fetter on central planning when a strong President in a crisis mobilizes support for strenuous government. The author seems to advocate strenuous government as a perpetual vocation.

Government, and so much of it, to what end? The name of the faith is "policy integration," which places the emphasis on mobilizing popular support in behalf of more government, to the neglect of op-

11. P. 166. Perhaps the author would disagree with the observation by Mr. Chief Justice Hughes concerning the Sherman Act: "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

12. P. 163.

13. *Id.*

portunity for exposure of the political quackery by which excessive regulation is established. As a process rather than an end, the author admits, policy integration ideally implies the prior existence of a standard of public interest and a set of goals for national economic policy. However, neither is what the standard is, nor where the goals are to be found, anywhere identified. Would it be possible, without unleashing the "centrifugal forces," to engage in democratic debate of, say, the new economic policy in the round (or integrated)? Is Congress to be accorded the privilege of an item veto, at the risk of legislation in bits and pieces? Remarkable it is, but unremarked, that the greatest opportunity for policy integration rather quickly dissolved with the unlamented demise of the National Recovery Administration. If part of the reason for commission subservience to regulated clientele is the provision of oracular phrases like "the public interest" as standards for commission policy, some may wonder whose desires would condition the formulation of an integrated national economic policy. Skepticism of this kind is salutary, unless federal and tripartite forms of government are anachronistic.

Certainly the author does not advocate abolition of the states or the Congress, but the general theme is the desirability of increasing the responsibility of the national government in the management of the economy, and doing it not to solve specific problems but as a matter of principle in the public interest. Failure to do so is seen as stimulating a public demand for governmental ownership and operation "as the only practical alternative."¹⁴ This dilemma will not compel the assent of those who see government as a good servant but a bad master, hence most safely employed for specific contingencies rather than generally on principle. One may venture to suggest that if the commission has been endowed with more braking power than horsepower, this did not result from political abdication or absentmindedness in deciding where the public interest lies, but rather from a series of well or badly informed deliberate political choices, made by popularly elected representatives. Nor have all of them been in favor of braking power. An example is the persistent expansion of administrative powers of investigation notwithstanding the earlier opposition of the courts. Generalizations about commissions or policy integration may be of less profit than detailed examination of particular statutory programs on their merits. It cannot be gainsaid that reconciliation of policies ought in many instances to be effected under presidential leadership, and even in Congress, rather than to pass undigested problems of policy along for resolution in informal administrative dispositions or by formal processes of litigation. There

14. P. 287.

is a form of political irresponsibility that leaves to administration and adjudication the tasks of determining policy that should have been performed by statutory provision. Insofar as this work calls for examination of, and vigilance against, this kind of "delegation" it is on sound ground.

IVAN C. RUTLEDGE†

CONSERVATISM IN AMERICA. By Clinton Rossiter. New York: Alfred A. Knopf. 1955. Pp. xii, 327. \$4.00.

With this book we may have reached the crest of a wave in present-day political sentiment. The mountainous swell of conservatism, which makes the startling difference between American politics now and before the war with Japan and Germany, has by this time accumulated a considerable mass of intellectual—as well as emotional and voting—content. To discuss the contemporary conservative intellect broadly, certain journalists would have to be included and so of course would a handful of statesmen. But today's phrase, "the new conservatives," is used to indicate an academic element such as appears infrequently in American political thought. It is rather with the writings of a couple of historians than with more general political expression that the new work by Professor Rossiter, himself a political scientist, suggests comparison.

Six years ago Peter Viereck of Mount Holyoke, who teaches European history and who is also a distinguished poet, reminded us in *Conservatism Revisited* that the epoch of Metternich, which is commonly identified with black reaction and suppression, was in truth no worse than half bad, and that it did have certain saving graces. This bright book urges that the tranquilizing influences, which restrained awhile the disruptive forces of nationalism in Europe, are worth understanding, even imitating, in our own still more perilous period. More recently Russell Kirk's *Conservative Mind* and *A Program for Conservatives* have increased the weight of academic conservatism. As Rossiter notices, this scholar is quite Tory in spirit. His Burkean sentiments and his interest in the history of English as well as American thought give him, though in less degree than Viereck, an international rather than a national approach to conservative thinking.

Rossiter is the American nationalist of the company of the new conservatives. He does not pretend to be happy about some of the

† Professor of Law, Indiana University School of Law.