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Politics and the Regulatory Agencies

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BOOK REVIEW

Politics and the Regulatory Agencies. By William L. Cary. New York: McGraw-Hill Book Co. 1967. Pp. 149. \$5.95.

Government regulatory commissions are often referred to as "independent" agencies, but this cannot be taken at face value by anyone who has ever had any experience in Washington. In fact, government regulatory agencies are stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one.¹

Professor Cary's book is a short, concise exposition of this theme, relating his experiences as Chairman of the Securities and Exchange Commission, but also including related experiences and problems of the other regulatory agencies. Each of these, with the exception of the National Labor Relations Board, is referred to at some point in the book.

The author begins by noting several instances where the various agencies are subject to the actual control of Congress or to the quasi-domination of the White House. While the agencies are, by law, an arm of Congress, they are obviously prone to executive control. The legitimate basis of this control is the constitutional duty of the President faithfully to execute the laws under article II, section 3. Often, however, it would appear that presidential interference may have a more partisan motive. One of the author's several examples of White House interference illustrates the dilemma of attempting to reconcile an acceptable degree of control with the necessity of maintaining the independence and integrity of an agency. In 1964, President Johnson, seeking reelection, pointed out to the various chairmen "that this was not the time to rock the boat."² The President's primary concern was the enactment of certain basic legislation and a desire "to reduce the number of other variables which might affect his election."³ The author is unfortunately unclear as to any specific relation between regulatory action, legislative proposals, and other "variables." The omission leaves the general impression that the event was, with regard to the SEC, a bald attempt to court the support of big business in an election year. This situation does, however, adequately pose the question of how much influence the President may assert. The author maintains that the agencies, being crucial to the formulation of economic direction, "should be subject to a general framework of national policy . . ." ⁴ and, thus, properly within the purview of presidential influence. With this basic premise there can be little argument. Joseph Kennedy, the first Chairman of the SEC, recognized the necessity of maintaining the confidence of business in government and formulated regulatory policy with this in mind. However, the question surely arises as to whether the creation of an advantageous election year atmosphere is properly within "a general framework of national policy." Professor Cary was not unaware of the problem. He asserts that he would have been compelled to resign in protest if the presidential admonition had been to "slow down." The rather nebulous distinction between a "slow down" of activity and "not rocking the boat" is indicative of the dilemma of attempting to formulate a policy of partial subrogation to presidential influence. Without accepting

1. Cary, *Politics and the Regulatory Agencies* 4 (1967).

2. *Id.* at 19.

3. *Ibid.*

4. *Id.* at 20.

Professor Cary's rationalization of this particular assertion of control, one can appreciate the problems of a regulatory agency's chairman, dedicated to making his agency perform its necessary and valuable functions, and, at the same time, finding himself in opposition to the President. Professor Cary, by his own admission giving the views of "one who has been in the trenches,"⁵ has provided a necessary insight into a compromise between the views of Professor Redford, who proposes presidential responsibility for policy development by the agencies, and Judge Friendly, who finds policy guidelines promulgated by the President anathema to a viable concept of regulatory agencies.

Congress provides, on the one hand, a counterbalance to excessive executive interference, but, at the same time, a source of unlimited distraction from the basic agency functions. Congress considers the agencies an arm of the legislative branch. It jealously opposes executive influence. This attitude is illustrated by the relatively unfavorable congressional reaction to the Landis Report of 1961. The report proposed a transportation czar within the executive branch, thereby threatening the independence of the CAB, the ICC, and the Federal Maritime Commission. The author implies that the ultimate formulation of such a department will be affected by congressional belief that the authority of the related agencies should not be infringed upon.

Budget controls most directly result in subservience of an agency to Congress. Effective programs require manpower—ultimately the quantity and quality of agency personnel, at a minimum, will be directly related to their budget outlay. A particularly enlightening aspect of the book is the manner in which budget control is a vehicle for the implementation of specific constituent pressures. The Chairman of the Federal Power Commission, for example, has experienced special problems in obtaining funds necessary to effectively regulate natural gas. The author lays the source of this opposition to a subcommittee chairman from Texas.⁶ The Federal Trade Commission also has found specific projects eliminated by the refusal of the Senate Appropriations Committee, apparently in response to similar pressures.⁷ Professor Cary is unable to suggest any mode of relief from these constituent-congressional pressures. He does register a strong dissent to this encroachment on the agencies independent formulation of policy. Ultimately, there is no answer—the SEC is more of a "fourth branch of government" than an autonomous agency when considered in its relation to the legislative and executive branches. The agencies are in fact dependent upon the President and Congress just as those branches are dependent upon each other. Accepting a degree of dependency as being inherent in the agencies, the problem becomes one of creating an area in which the agencies can act autonomously and thus provide the second and necessary ingredient of a "branch" of government—a degree of freedom.

In a chapter entitled "The Vitality of a Regulatory Agency," the author, having outlined the external forces with which an agency must contend, provides an insight into the internal problems peculiar to the agencies. He first minimizes the role of political affiliation within the agencies by citing as example the Republican support among the members of both the FCC and the CAB for the Kennedy-appointed chairmen. Indeed, Newton Minow and Alan Boyd more often faced opposition from the Democratic members of their boards.

A second obstacle to the vitality of the agencies is the tendency toward over-

5. *Id.* at 139.

6. *Id.* at 38-39.

7. *Id.* at 38.

emphasis of the adjudicative role. Professor Cary, in his years as chairman, attempted to re-emphasize the legislative, or rule-making, powers of the SEC. A third barrier to vitality is the belief of the public that an agency has become the captive of an industry. Apparently this was not a serious problem with the SEC. Professor Cary nevertheless states his aversion to any activities which would even suggest undue influence. It is a hopeful, if incredulous, sign of "agency independence" from the private sector that the only instances of potential interference concerned state commissioners. The fourth, and perhaps most important, factor in preventing inertia from prevailing within a given agency is the influx of imaginative and highly qualified personnel. Professor Cary relied on a statistical survey to prove that superior lawyers leave the SEC no sooner than average ones and thus put to rest the claim that the rapid turnover of outstanding personnel militated against the desirability of recruiting top-ranking law graduates. I can think of no single more significant step toward revitalizing the agencies, with the exception, perhaps, of presidential appointments of the caliber of Professor Cary.

The agency as a fourth, but unequal, branch is illustrated by the author's experiences in guiding a bill through Congress. In 1964, the SEC proposed legislation aimed at applying certain investor protections to unlisted companies and raising the qualifying standards of broker-dealers. It was a "nonsponsored bill . . . having no identifiable partisan in the House or Senate."⁸ Further, in the eyes of the author, it was a non-controversial bill, "a reform measure which we thought no one could possibly oppose."⁹ In spite of this, passage of the bill "required patience, persistence, persuasion, a high boiling point, and, finally, a great deal of luck."¹⁰ While not listed among the specific attributes necessary to the sponsorship of a bill, Professor Cary's pragmatic approach to his agency's relations with Congress are revealed in this account. Without any strong support of the bill outside of that generated within the agency itself, the proposals were subject to any form of opposition which could be arrayed by a special interest group. Ultimately, the SEC yielded on three primary objections of the securities industry. The most controversial was the attempt by the SEC to apply the sanctions of section 16(b) of the Securities Exchange Act of 1934,¹¹ concerning insider's short-swing profits, to "market makers" in the over-the-counter market. In the absence of an exchange through which buy and sell orders may flow, these people stand ready to create a market. Apparently the same persons who are creating the market may have been among the original underwriters and members of the board. The SEC disagreed with the industry's basic contention that the application of short-swing sanctions would be detrimental to the industry, but nevertheless yielded to industry pressure to alter this element of the proposed legislation. Professor Cary's answer to the charges by a liberal congressman that his agency had made a "contract" with industry is that, if "there had been strong objection the bill might not even have received a hearing."¹² The author further documents opposition to the bill in the form of individual lack of understanding, the opposition of influential government officials, the pressure from various special interest groups such as the insurance industry, and, ultimately, the necessity to reconcile differences between the Senate and House versions of the bill without suffering a serious delay in enactment. Professor Cary's tireless efforts in support of his bill are at the same time both a tribute to

8. *Id.* at 90.

9. *Ibid.*

10. *Id.* at 91.

11. 48 Stat. 896, 15 U.S.C. § 78p(b) (1964).

12. Cary, *Politics and the Regulatory Agencies* 98 (1967).

his tenacity and a source of amazement that any agency can maintain its vitality when so much time and energy must be devoted to lobbying its proposals through Congress.

Professor Cary's concluding chapter contains a series of recommendations for the regulatory agencies. While conceding that the problems of each agency are unique, he strongly dissents from the proposals of Lewis J. Hector of the CAB and Newton Minow of the FCC, who have concluded that adjudicatory, legislative, and prosecution responsibilities are incompatible functions and should not be combined in a single agency. Professor Cary, on the other hand, finds that the judicial functions are a necessary adjunct to the policy-making role of an agency—the experience in reaching decisions providing the experience necessary to properly formulate policy questions. His position is well taken. The solution to the problems posed by Messrs. Minow and Hector would appear to be more an administrative problem than an indication of basic flaws in the structure of the regulatory agencies. As the author states, "Mr. Hector attempts to draw a line between policy and adjudication; a better one might be between the important and the delegable."¹³

Professor Cary's recommendations, his insight into the practical interrelation of the agencies and the other branches of government, and his frank and honest exposition of his own experiences, provide a unique avenue for further understanding the function of a continuing, vital element of the present government structure.

13. *Id.* at 133.