CONGRESS AND ADMINISTRATIVE REGULATION
FerreI Heady* and Eleanor Tabor Linenthal†

In the long history of the development of the process of administrative regulation in this country, the controversies that have taken place and the decisions that have been made have inevitably centered in the Congress of the United States. In our governmental system, the action of Congress has been required to put into effect programs of government regulation, to create the agencies of implementation through which these programs are to be achieved, to determine the balance of relationships between the government as regulator and the private regulatees, and in general to determine the characteristics of administrative regulation in our increasingly complex social and economic system. This is not to imply by any means that Congress has been the exclusive agent of authoritative choice in these matters. The courts have shaped the administrative process in a multitude of cases reflecting judicial views as to the permissible scope and method of regulatory action. The President is in a constitutional position to participate with Congress in the enactment of legislation and has frequently done so with decisive effect in this area. Moreover, and of even greater importance, the President, as chief of administration, can easily influence the development of regulatory administration, especially as it has become more closely identified with the executive branch of government. Spokesmen for organized groups outside government, particularly representing the legal profession and economic interests subject to regulation, have vigorously pressed their views upon the responsible governmental officials. At the center of this array of contending forces, however, is Congress. It may often play a passive rather than an initiating role, but its sanction must be secured. This is so because of its constitutional status and because of the impressive combination of legislating, appropriating, investigating, confirming, and related powers at its disposal.

Our purpose here is to describe the history of the efforts of Congress to cope with the problems of administrative regulation. If what has already been said is substantially correct, then it follows that the administrative process as it now functions is primarily the consequence of congressional action and reflects the cumulative judgment of Congress as to proper public policy in this area of governmental concern. In general and in the long run, Congress has been the sponsor and molder of our present system of administrative regulation, and has resisted strong urgings for its drastic reform or elimination. As Kenneth C. Davis has commented,†

† A.B. 1943, Radcliffe College; Ph.D. 1956, Cornell University. Research Associate, Institute of Public Administration, University of Michigan.
* Kenneth C. Davis, ADMINISTRATIVE LAW TREATISE § 1.07 (1958).
[the] undeniable fact still remains that the community as a whole, expressing itself through repeated legislative action, federal, state, and local, steadfastly rejects conclusions that the growth of the administrative process should be resisted and opposed. Indeed, the long battle over the fundamental desirability of establishing administrative agencies and of continuing to rely upon their processes is rapidly diminishing and may be about ended.

Of course, this generalization does not imply uniformity and consistency in congressional treatment of problems of regulatory administration. Accompanying this long-range support given to the administrative process, Congress has shown a succession of concerns about the nature of regulatory agencies and their operating methods. In the following discussion, we have identified in chronological order four periods, each evidencing a different emphasis for congressional attention and action contemplated or taken. There are no distinct transitions from one phase to the next, and the correct characterization of shifts in congressional intent is certainly subject to dispute, but we believe that this account accurately reflects the important trends.

The first of these periods is the longest, but will receive the least attention here. It extends from the beginnings of what we now call the administrative process to the decade of the 1930's. During this time, the pattern of administrative regulation was established and its significance expanded tremendously. These developments came mainly in the twentieth century, although they began earlier. Kenneth C. Davis estimates that about one-third of federal peacetime agencies were created before 1900, and another third before 1930.2

The period produced the familiar combination of legislative, executive, and judicial type powers in regulatory agencies, particularly the so-called independent regulatory commissions. It brought the growth of administrative law, described by Arthur Vanderbilt as "the outstanding legal development of the twentieth century, reflecting in the law the hegemony of the executive arm of the government."3 Despite the implications of this comment on the legislative-executive balance of power in our constitutional system, Congress made possible and in general facilitated the remarkable expansion of the administrative process that occurred.

In recent years, despite continued general support to the existing system for administrative regulation, Congress has shown a recurrent interest in re-examination and possible reform of the administrative process. In its first phase, during the decade of the 'thirties, this took the form of proposals for drastic alterations, culminating in the passage in 1940 of the Walter-Logan bill,4 which failed to go into effect only because of a presidential veto. Following this event, and continuing until recently, has come a period of emphasis upon procedural uniformity with only minor adjustments in the basic machinery, exemplified by the Administrative Procedure Act of 1946 (APA),5 which continues to be the landmark effort by Congress to improve

---

2 Id. § 1.04.
the administrative process. Now Congress seems to be entering a period of reexamination as to the finality of the current procedural code and of exploration of proposals, both old and new, for solutions to commonly recognized deficiencies in administrative regulation. The direction in which Congress will choose to go is still uncertain, but the more likely paths can be mapped out.

We will now examine more closely the role played by Congress in appraising the administrative process during each of these three chronological periods covering the last three decades.

I

THE CAMPAIGN TO RESHAPE THE ADMINISTRATIVE PROCESS

Despite the willingness of Congress to assist in the growth of the administrative process, there were always those in Congress who deplored what was taking place. In 1886, when the Interstate Commerce Act was under consideration, Representative Oates declared: "I believe it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps, the executive power of the Government in the same law."7

As the scope of the administrative process broadened and the importance of administrative regulation increased, such grave misgivings were repeated by those both in and out of Congress who opposed the combining of legislative and judicial functions, and who further decried that judicial self-denial that served to aid and abet this tendency. Louis Caldwell commented:7

So far as I know, not a single federal decision declares or even hints that it is unconstitutional to combine judge with prosecutor or legislator, and there are many decisions which can be cited as giving tacit approval to that combination.

James M. Beck’s Our Wonderland of Bureaucracy, was an extreme but widely publicized expression of aversion to the administrative process.

In Congress, one early indication of reappraisal was the introduction by Senator Norris, in January 1929, of a proposal for a court of administrative justice. In support of this bill,8 the senator stated:9

... It creates no innovations, but it does propose to reorganize and simplify the procedure of securing judicial review of administrative acts and decisions. The bill merely provides for the consolidation of certain special courts, the transfer to the consolidated court of the jurisdiction now exercised by those special courts and by the Supreme Court of the District of Columbia, the simplification of procedure, and recognition of the practice, in extraordinary proceedings against officers of the Government, of having them represented in whole or in part by their own subordinates who are especially skilled in the laws of controversy. ...
Senator Norris directed attention to the existence of a similar institution—a single court to hear and determine all claims and controversies with the government—in France and the various subdivisions of the German Republic, though he clearly indicated no desire for a breadth of jurisdiction in the American model comparable to that enjoyed abroad.\(^{10}\) Nothing further came of the bill; Senator Norris had apparently expected and hoped for no more than discussion of its objectives in a general way, by members of Congress, by government officials, by attorneys generally, and by the people at large.

By 1932, notice was directed to the “growing quantity of delegated legislation” and “numerous offices, boards, and commissions authorized to make administrative orders, rules, and regulations.”\(^{11}\) By 1934, a committee report of the American Bar Association had been released that urged first, the creation of a federal administrative court, with an appellate division and accompanying branches and subdivisions; second, that judicial review of administrative acts should include appeal on facts as well as law; and third, that existing boards and commissions should be abolished.\(^{12}\) A bill proposing a federal administrative court was again introduced in 1936, but had little impact. This bill, designed to achieve, *inter alia*, the consolidation of the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and the Board of Tax Appeals—“an independent agency in the executive branch of the government”—did not have the sponsorship of the American Bar Association.\(^{13}\) Yet, to many, this bill represented a major stride forward in the control of administrative adjudication.

Despite the emphasis in this period upon the merits and desirability of a federal administrative court, a new approach began to gather strength. For its proponents, the creation of an administrative court appeared to be a step “in derogation of the regular courts” and further, would not “reach and control the administrative process at its source.” Further, by 1938, there were those who argued that\(^{14}\)

\[\ldots\] any reform in the procedure for judicial review of administrative decisions should commence with the administrative processes themselves \ldots\] that by such improvements the necessity for judicial review will be reduced to a minimum.

\(^{10}\) Ibid.


\(^{12}\) This report is critically reviewed in Phillips, *An American View of Administrative Law*, 52 L.Q. Rev. 25 (1936). The prevailing English position is distinguished on three grounds, in that the Committee on Ministers' Powers (1) “briefly and without hesitation” had advised against a regularized system of administrative courts; (2) had opposed “emphatically” appeals on issues of fact; and (3) “deliberately” had set out to establish administrative bodies with a maximum of freedom from political influence.

\(^{13}\) See generally 60 A.B.A. Rep. 136 (1936), for a discussion of the committee report.

\(^{14}\) McGuire, *Current Administrative Law Proposals*, 3 Fed. B.A.J. 239, 242 (1938). A 1937 report of the American Bar Association's Special Committee on Administrative Law had proposed control of administrative agencies via elaborate procedural safeguards and comprehensive judicial review of rules, orders, and decisions. The draft bill that resulted was altered in 1938 and again in 1939. The latter version became S. 915 (Walter-Logan) and represented abandonment of two previously prevailing approaches to control of the administrative process—namely, (1) consolidation of legislative courts into administrative courts; and (2) the abolition of many independent agencies.
The Walter-Logan bill, which was officially sponsored by the American Bar Association, marked the culmination of this phase of congressional activity. The terms of this proposal, and the debate that it generated, thrust into sharp focus the change in direction of congressional thinking on the matter of its role vis-à-vis administrative regulation. Via this measure, for the first time, Congress sought to meet the clamor for administrative reform by the device of prescriptions for uniform procedures. The implementing provisions, however, were not designed to strengthen the functions of administrative agencies. To the contrary, in the view of many serious critics of the proposal, who themselves recognized and urged the need for improvements in the administrative process, the Walter-Logan provisions represented a deliberate effort to hogtie administrative regulation. They viewed it as reflecting fear of "bureaucracy" and a threat to legislative authority; an unwillingness to accept the administrative process as a proper mode of action in American governmental life; and a predilection to identify the security of the canons of due process with traditional judicial process.

The specific provisions of the Walter-Logan measure, which had as its immediate purpose the establishment of uniform procedural regulations for administrative agencies, dealt with the following matters: (1) issuance of rules and regulations; (2) administrative adjudication of controversies between the government and a citizen; and (3) judicial review of final orders and decisions of administrative agencies.

By the terms of the bill, administrative rules were to be issued only after publication of notice and public hearings. All rules and regulations that were in existence on the date of enactment were required to be reconsidered, after public notice and hearing, by the issuing agency, if such consideration was requested by any person substantially interested in the effects of the rule or regulation in question. Such requests were to be made within one year following enactment. Further, all rules and regulations were to be issued within one year of enactment of the authorizing statute, but could be amended and modified at a later date. Approved rules were to be published in the Federal Register, and any individual acting in good faith in accord with a published rule was to be protected for thirty days after publication notice in the Register of either a rescinding of the rule or a holding of invalidity. In addition, within thirty days of publication of a rule or regulation in the Register, any person substantially interested in the effects of a rule could petition the United States Court of Appeals for the District of Columbia to enter a declaratory judgment that would determine whether the rule was in conflict with the Constitution or with its authorizing statute, or whether it issued under the proper authority. This review by the Circuit Court was to be final.

"To prevent arbitrary and irresponsible action by administrative officers in the

15 Landis, Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1077 (1940); Jaretzki, The Administrative Law Bill: Unsound and Unworkable, 2 La. L. Rev. 294 (1940); Remarks of F. Blachly, printed as part of the Hearings Before Subcommittee No. 4 Senate Judiciary Committee on . . . and H.R. 6324, 76th Cong., 1st Sess. 156 (1939).
administration of . . . statutes and the rules and regulations issued thereunder,” the Walter-Logan bill provided that a person aggrieved by an administrative decision could, within twenty days, address a written petition to the agency head, state therein the nature of his objection, and, at the same time, request a hearing. The head of the agency was to designate an intra-agency hearing board of three, one of whom was to be a lawyer. The number of boards was to vary with the need for them; such boards were to meet at various places throughout the country. The individual aggrieved was to be allowed to call his own witnesses; he could cross-examine government witnesses and compel production of documents. Further, the complainant did not have to petition the agency to issue a subpoena; by the language of the act, he had the right to request such action by the agency. A copy of the proceeding was to be given to the complainant, and within thirty days, the intra-agency board was to file written findings of fact and a written decision. The authority to approve, disapprove, or modify rested with the agency head. Where independent agencies were involved (defined as those with two or more officers at the head), the act specified that such agencies could, by rule, provide for an initial hearing by the trial examiner. Following the submission of his written findings of fact and decision with the agency and the complainant, the agency would hold a hearing only if the complainant filed written objections. Where agencies had three chief officers, the hearing could be held by these three; where there were fewer than three, the intra-agency board technique was to be utilized.

Those who supported the Walter-Logan legislation held a strong conviction of the need to establish not only uniform procedures of judicial review for all administrative orders and decisions, but uniform rules as well that would define the scope of judicial review. Accordingly, by the terms of the legislation proposed, within thirty days after notice of a final agency order or decision, any party to a proceeding could file a written petition for review with the circuit court of appeals where he resided, where he had his principal place of business, where the controversy arose, or, with the Court of Claims, if the cause of action was within that court’s jurisdiction. The court could affirm or nullify the agency decision or order, remand the matter for further evidence, or direct the agency to modify its decision. Several grounds for reversal were prescribed. Decisions were to be final, except for the allowance of review by the Supreme Court on certiorari or certification. And, “as a final rule of uniformity,” it was specified that a court that found itself in disagreement with a previously rendered opinion of another court was to certify the matter to the Supreme Court.

Justifying grounds for legislation along the lines of the Walter-Logan bill, as viewed by its supporters, may be summarized as follows. First, unlike actions at law and equity, the administrative process had no uniform procedure for hearings and no uniform method or determined scope of judicial review. Second, given such a lack of uniformity, administrative agencies were not disposed to heed decisions of either other administrative agencies or the courts, nor were they helped much if
they did. Third, where statutes had not been devised as guidelines for improve-
ments in the administrative process, the consequences were *ad hoc* procedures in
the agencies, with accompanying unnecessary fumbling and undeserved criticism of
courts that sought to define rules for trial or appellate proceedings. There were
those who saw in the Walter-Logan measure a means of reversing
the drift into parliamentarism which . . . could but result in totalitarianism with complete
destruction of the division of governmental power . . . and with the entire subordination
of both the legislative and judicial branches of the Federal Government to the executive
branch wherein are included the administrative agencies and tribunals of that Government.

There were others for whom the measure spelled a rejuvenation of congressional
authority, the security of a government of laws, and freedom from administrative,
and more specifically departmental, absolutism.\(\text{16}\)

Adverse reactions to the legislation were prompt and vigorous, and criticism was
directed to virtually all sections of the bill. Prominent individuals in the legal
profession and several significant segments of the bar withheld support of the bill,\(\text{17}\)
although the American Bar Association itself officially endorsed the Walter-Logan
measure. Passed by Congress in 1940, the bill was vetoed by President Roosevelt
in December of that year. In his veto message, the President indicated his desire to
wait for the report and recommendations of the recently created Attorney-General's
Committee on Administrative Procedure “before approving any measure in this
complex field.” The message reflected, however, the view of those who had sharply
criticized the proposed legislation, for it stated:\(\text{18}\)

. . . The very heart of modern reform administration is the administrative tribunal.
Great interests, therefore, which desire to escape regulation rightly see that if they can
strike at the heart of modern reform by sterilizing the administrative tribunal which
administrators them they will have effectively destroyed the reform itself.

That the presidential veto was sustained by Congress is not surprising, however,
notwithstanding the originally substantially favorable vote and the impassioned pleas
in behalf of the bill. There was also in Congress, at this time, a well-articulated
awareness of the dangers inherent in the Walter-Logan bill, for as Kenneth C. Davis
has pointed out:\(\text{19}\)

Its proponents seemed fully aware of its devastating character, for they exempted from its
provisions the agencies whose work they were anxious to protect.

\(\text{16}\) 84 CONG. REC. 9392 (1939).

\(\text{17}\) Strongly opposed were the Committees on Administrative Law and on Federal Legislation of the
Association of the Bar of the City of New York, and Louis Caldwell who said, “With minor exceptions,
it is difficult to know just what agencies and what quasi-judicial functions are reached by this bill that
are not already equipped with at least equal and usually superior machinery.” 86 CONG. REC. APP.
2223 (1940).

\(\text{18}\) Id. at 13942-43, and reprinted in Message from the President of the United States, *Providing
for the Expeditions Settlement of Disputes with the United States*, H.R. Doc. No. 986, 76th Cong.,
3d Sess. (1940).

\(\text{19}\) Davis, op. cit. supra note 1, § 1.04.
The Walter-Logan bill marks the extreme in efforts by Congress to accomplish a drastic overhaul of the machinery for administrative regulation. As described by one commentator:\textsuperscript{20}

The bill contained gross infirmities. It prescribed a single, impossibly rigid procedure for rule-making and subjected almost every administrative action to judicial review, on questions of law and fact, and for almost any conceivable reason. It proposed a sterilization of the administrative process.

James M. Landis asserted that it would “cut off here a foot and there a head, leaving broken and bleeding the processes of administrative law.”\textsuperscript{21} What the actual consequences would have been we cannot know, because the Walter-Logan bill never became law. The presidential veto thwarted what was, at the moment at least, the recorded majority will of Congress.\textsuperscript{22}

II

REFORM THROUGH A GENERAL CODE OF PROCEDURE

In the years that followed the defeat of the Walter-Logan measure, several developments transpired: the report of the Attorney-General’s Committee was published, and legislative measures proposed by both a majority and minority of that committee were recommended; the American Bar Association drafted and adopted a declaration of principles that, in its view, would provide a proper conceptual framework of subsequent administrative procedure legislation; a subcommittee of the Senate Judiciary Committee held hearings on the Attorney-General’s report; in August 1943, the House of Delegates of the American Bar Association authorized its administrative law committee to draft legislation that would further the objective of fair administrative practice and, following Association approval, to work for the enactment of such legislation; and in June 1944, bills were introduced, followed by revisions in 1945, that provided the principal essentials of the APA.

Throughout this period, congressional concern with the administrative process, as well as external pressures upon Congress for its reform, continued to be vigorous—and, in one respect, consistent. Conceptually, the problem remained one of conflict between two types of governmental action, administrative and judicial.\textsuperscript{23} Writing in 1949, Walter Gellhorn could speak of agreement in the legal profession that “judicial review of administrative decisions is a poor substitute for good admin-

---

\textsuperscript{20} Rinehart J. Swenson, Federal Administrative Law 121 (1952).

\textsuperscript{21} Landis, supra note 15, at 1102.

\textsuperscript{22} What Congress failed to focus on in this bill is in many ways more revealing of its perceptions than what it actually tried to enact. Specifically: (1) the Government would not stand on an equal footing with a corporation or individual when a rule was contested; (2) no distinctions were drawn between substantive, interpretive, and procedural rules; (3) informal administrative proceedings were ignored; (4) the problem of the combination of the prosecutor-judge function was scarcely touched; (5) the qualifications and tenure of the hearing officers were not dealt with; and (6) recognition of the diversity of functions within agencies was lacking.

\textsuperscript{23} See generally MacMahon, The Ordeal of Administrative Law, 25 Iowa L. Rev. 425 (1940).
istrative decisions in the first place." He could not, either as an observer of the administrative scene or of its critics, record much in the way of unity where discussion arose as to the most desirable means of achieving good administrative decisions. In this period of the early 'forties, the legislative antecedents of the APA were numerous and their provisions reflected a jockeying between conceptions—that which characterized the Walter-Logan legislation and that which ultimately characterized the APA.

The provisions of that Act may be broadly summarized; the congressional mood that its acceptance reflected may be variously interpreted. The significance of the Act may similarly be variously regarded. But whatever the construction put upon legislative motive and administrative impact, the following points stand out in any consideration of the APA. First, whatever its deficiencies, in its drafting or operation, the Act reflected acceptance of the administrative process to the point where legislative authority would be utilized to improve that process, not to restrict it to the point of crippling. Second, the language of the statute reflected awareness of the functional diversities implicit in regulation. Third, it has had the consequence of allowing Congress and the agencies a measure of flexibility for dealing with those niceties of procedure and substance that are not readily discernible in the elemental stages of any emergent governmental process. Congressional efforts, via the APA, to cope with the impact of the administrative process upon the traditional canons of due process, as they relate to personal and property rights, may well have the ultimate result of an ever-increasing congressional involvement in administrative operations.

The courts have, over a wide range of specifics, construed the "intent" of Congress in enacting the APA, but the congressional mood is perhaps best described by focusing on the areas in which Congress acted: publicity of administrative material (rules, orders, regulations, procedures); systematization in administrative operations (rule-making, adjudication, hearing procedures, role of the trial examiner); and provision for judicial review, a "remedy for every legal wrong."

In the words of one observer, the APA represented an effort to answer the questions, how to assure public information, how to provide rule-making where no formal hearing is provided, how to assure fairness in adjudications, how to limit sanctions, how to state all the essentials of a right to judicial review, and how to make examiners independent.

For Senator McCarran, the APA was a "bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated . . . by agencies of the Federal Government." The legislative history of the Act reveals a view of the need for such legislation that was grounded on three principal points: (1) that the subject of

---


26 Id. at 298.
administrative law and procedure was not mentioned in the Constitution; (2) that there was no extant recognizable body of administrative law for administrative agencies as there were substantive and procedural guidelines for courts; and (3) that there were further no clearly recognizable legal guides for the public or administrators in the implementing of administrative process. The APA, therefore, was designed to achieve the following: issuance, by agencies, as rules, of certain specified information as to administrative organization and procedure; statement of the essentials of the several forms of administrative proceedings and general limitations on administrative powers; provision in more detail of the requirements for administrative hearings and decisions in cases in which statutes require such hearings; and a simplified statement of judicial review of administrative acts. By the terms of the Act, administrative rule-making and administrative adjudication were distinguished. Rule-making procedures were characterized by flexibility and informality, whereas procedure in adjudication was more formalized and followed judicial procedure more closely. Aside from requirements concerning publicity and the effective date of rules, the legislation merely afforded interested persons the opportunity to submit written data, views, or arguments and required the agency to consider relevant matters submitted. Oral presentation at a hearing was optional with the rule-making agency, although the APA did make provision, in special circumstances, for a more formal rule-making procedure patterned after adjudicative procedure. With respect to administrative adjudication, the key provisions in the APA established a semi-independent corps of hearing examiners who would preside in cases not heard by agency heads and who could issue initial or recommended decisions.

The language of the APA broadened the base for judicial review of administrative actions and reflected adherence, on the one hand, to the generally accepted substantial evidence rule, but rejection, on the other, of limitations upon the reviewing court that would permit review of one side of the evidence only.

Four years after enactment of the APA, Mr. Justice Jackson said that it "represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." That the APA was a landmark in the strife surrounding the administrative process is certain. But today, in 1961, it is hard to discern exactly what contentions were settled, harder to set forth the precise formula presumed to have brought peace to the contending forces, and still harder to justify the claim that opposing forces have, indeed, come to rest.

III

Emerging Trends and Developments

In recent years, Congress has again become the arena in which consideration is being given to issues of administrative regulation, both old and new. The interim

nature of the settlement of the 1940's, as represented by the APA, has become more and more apparent, but it is too early to discern clearly what patterns of revision will emerge during the decade of the 1960's.

The many and serious problems confronting the administrative process currently have led many of its critics to charge that administrative agencies are not “doing their job.” Earlier attacks on the administrative process turned on constitutional questions. Subsequent criticism hammered away at the need for procedural requirements to conform more closely to judicial procedures. The “not doing the job” critics, however, may well represent one of the most formidable sources of opposition, for the implication of their argument is that administrative agencies cannot do the job, absent certain restrictive changes. It may be argued that it is not for lack of ability that some agencies do not function effectively, but for (1) a want of congressional concern with a wide gamut of policy questions that affect day-to-day administrative processes, and (2) a continued lack of clarity in legislative-administrative relationships.

In the tangled web of these relationships, certain points stand out: the element of political support so necessary for administrative programs; legislative devices for control of administration that are not always clearly apparent; legislative control devices that are all too apparent and that provide a vehicle for congressional crippling of administrative efforts; the practical need of the legislature to rely on agencies or regulatory commissions; the positive, beneficial aspects of congressional interest in administrative matters; the compromise nature of those legislative mandates.

28 Marver H. Bernstein, Regulating Business by Independent Commission (1955); Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 931 (1960) [this report has been published as a committee print by the Senate Committee on Government Organization, 86th Cong., 2d Sess. (1960), and is hereinafter cited as Hector Memorandum].


31 Statutory provisions, where they define agency relationships, “run a gamut, permitting the exchange of information, providing formally prescribed sources of advice, compelling agencies to consult, to consult and consider, to consult prior to taking specific action, hinging action to the receipt of a prior enabling report or request, requiring prior consultation and fact finding, requiring clearance or approval from a source external to the agency, and finally, compelling action in conformance with the request of another agency.” See generally Cotter & Smith, Administrative Responsibility: Congressional Prescription of Interagency Relationships, 10 W. Pol. Q. 765, 782 (1957) [reprinted as Stanford University Political Sciences Series No. 62].

32 Among the more obvious devices: (1) undue number of watchdog committees; (2) improper congressional pressures on matters pending before agencies; (3) appointment of high-level administrative personnel to satisfy political and interest pressures, rather than reliance on merit and suitability; and (4) detailed committee hearings, on proposed contracts, which have a “pressure effect,” despite the inadequacy of a congressional committee to validate or invalidate a contract. Two excellent discussions in point are Ginnane, The Control of Federal Administration by Congressional Resolution and Committees, 66 Harv. L. Rev. 569 (1952); Morrison, Federal Support of Domestic Atomic Power Development, 12 Vand. L. Rev. 195 (1959).

33 The congressional tradition of reference has led on occasion to serious problems of ethics. However, positive aspects of the tradition are pointed up by testimony in Hearings Before the Subcommittee of the House Committee on Interstate and Foreign Commerce on Administrative Process and Ethical Quer-
that the administrative process must implement; and the need of the administration to
convert "the controversial into the routine." Yet, considerations such as these, which
describe crucial relationship points of legislative-administrative life, are deeply
involved with certain, if not most, of the major problems that confront the admin-
istrative process. Congress has shown no great haste in the direction of new admin-
istrative procedure legislation, although considerable legislation has been proposed.
But Congress is, by hearings and agency surveys, addressing itself to specific thorny
spots in administrative life.

Friends of the administrative process must also be its strongest critics. The
staunchest supporters of that process can scarcely fail to perceive that there are
prominent problems in administrative life: there is, unquestionably, in many in-
stances, a level of expense and delay in administrative proceedings that defeats an
essential purpose of administrative process; there are serious questions that can be
raised with respect to "expertise" in administration, particularly at the decision-
making level; comment has ranged far and wide as to the responsibility of agency
heads to write decision-making opinions; considerable attention has been directed
to the problem of voluminous records that emerge from administrative proceedings
upon which decisions and appeals must be based, as well as the tangential and
derivative problem of \textit{ex parte} communications; the question of the desirability of
general fact pleading has, in terms of quick and precise illumination of issues, come
to the fore; the entire area of informal procedures, described by the Attorney-
General's Committee as early as 1941, as "the life blood of the administrative
process," requires continuing appraisal; and the need is increasingly apparent for
reliable information on the present and potential operating capacity of an agency and
the staffing and management problems that are involved as a consequence.\textsuperscript{84}

In terms of specifics, these are but a few of the knotty questions with which
Congress must come to grips. But the shortcomings of administrative life go beyond
such specifics. Above and beyond procedural questions is the need to rethink the
role of regulatory commissions and agencies, their position in the structure of gov-
ernment, and the degree to which responsibility and authority are meshed. Al-
though his remarks were directed principally to regulatory commissions, the recent
statements of the Deputy Director of the Bureau of the Budget before a congressional
subcommittee are of interest generally, for he said:\textsuperscript{85}

Policy decisions of far-reaching importance are committed to the heads of regulatory
agencies. The Bureau of the Budget suggests that the Senate consider whether they
should not have the authority and the discretion to adopt the organization and procedure
\textsuperscript{84} HEARINGS BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMMITTEE ON THE JUDICIARY ON S. RES. 234, 86th Cong., 2d Sess. 37-38 (1960). An informative account is given of the results of two or more management firm surveys, 1953-60, of problem areas of regulatory agencies.
\textsuperscript{85} Id. at 565 (1953).
which would assure fair and equitable administration, and also would be suited to their respective activities and the industries with which they deal.

In the early years of regulation, the legislative mandate indicated with some clarity the economic or social program visualized. Today, in too many instances, the legislative mandate is not clear, is outdated, or is not revealed. Further, there is, as James M. Landis suggests, a need for creative thinking by administrative groups. But the benefits of the most uniquely creative approach are likely to be minor if Congress, given the practical realities of technological and economic complexity, fails to recognize that procedure is the instrument of administrative fair play, in the larger social and constitutional sense, only when it does not shape substantive action away from the objectives for which the administrative agency exists. Today, in the area of administrative regulation, Congress must address itself to two primary matters: (1) the determination of those principal problems that do, in fact, hinder administrative effectiveness and the fair disposition of administrative justice; and (2) the need to assess the range of its own role in administrative life, or, put differently, the question of whether the quest for control of governmental administration can be met "by arduous feats of legislation."

It remains yet to be seen whether Congress will see fit to tackle some of the current problems of administrative life by (1) piecemeal changes in existing requirements as to procedure; (2) legislation that would focus on changes in the structural organization of the administrative process; (3) an emphasis on the possibilities of agency self-improvement; (4) a new uniform code; or, (5) resort to increased congressional oversight.

As used here, the term "piecemeal changes" includes either of two possible courses of legislative action: formal amendment of the APA, or statutory additions to other legislation that regulates the administrative process. Congress might choose to meet certain immediate and pressing problems in this fashion. For example, the House Legislative Oversight Subcommittee has proposed that those in the regulatory agencies who make the decisions shall be required to write the opinions themselves or direct the writing of them personally.⁸⁶ The notion of "anonymous opinion-writing" has been strongly criticized in some quarters on the grounds that "it creates a blank facade, behind which the individual commissioners become mere shadowy figures on the bench."²⁴ Further, it is argued, if commissioners lack the technical know-how and rationalization know-how of the opinion-writers, and if the opinions and decisions suffer thereby, a benefit will, nonetheless, result—namely, the bringing of "appellate review into closer conformance with the judicial theory on which it rests."³⁷ Third, the practice of group opinion-writing is held to be contrary to the view expressed in 1941 by the Attorney General's Report on Admin-


²⁵ Ibid.
CONGRESS 251

istrative Procedure that “the heads of the agency should do personally what the heads purport to do.”

Built into the criticism of the group opinion-writing process is the notion that review of the record by those who are entrusted with the decision-making authority is somehow inadequate. But, as Kenneth C. Davis states:

Despite its immediately appealing quality, the broad ideal that agency heads should do personally what they purport to do is for many functions impractical and unworkable. Increased subdelegation is clearly indicated. Decisions by panels of or divisions of agencies may help. But a rigid enforcement in all circumstances of a requirement that agency heads must read all records in all cases is not the answer, however appealing that idea might be in the abstract.

The problem of review by administrative officers and the related question of subdelegation are beyond the scope of this paper, but both questions are patently tangential to the matter of personalized opinion-writing, for there are those who believe that

... if the members of an agency do, in fact, decide the cases that come before them, and if in order to decide these cases they go through all the requisite mental processes, then there should be little extra burden in setting these mental processes down in an opinion. But if, as a matter of fact, they do not go through the requisite mental processes, then their decisions are in reality not supported by the necessary legal and factual foundations and are not rendered in accordance with law.

Agency criticism of any legislative proposal like that of the Harris subcommittee turns on points of efficiency, the more likely achievement of a “blending of views” where the opinion is not personalized, and consistency in agency opinions—a feature viewed as threatened by prescription for mandatory personalized opinions. Nonetheless, the possibility of congressional action in this direction must be reckoned with, given strong pressures to “bring together the decision-making process and the facts in the case.”

Conceivably, Congress may choose to focus on problems pertaining to hearing examiners via “piecemeal” legislation. This officer, described as the “alter ego” of the agency he serves, was, prior to 1941, totally subject to agency controls. From 1941, when the Attorney General’s Report was issued, to 1946, when the APA was enacted, the hearing officer’s role reflected a curious blend of dependence and in-

91 2 Davis, op. cit. supra note 1, § 11.07.
94 The disadvantages inherent in the separation of opinion-writing from the decision-making process were pointed out as early as 1938 by James Landis. But, as Kenneth C. Davis currently states, “The objection to the separation of deciding from opinion writing may be unanswerable except in terms of inevitability. No one has yet conceived a system which will dispose of the quantity of adjudication, without an undue diversity of results, and will at the same time permit the deciding officers to write their own opinions.” 2 Davis, op. cit. supra note 1, § 11.11.
dependence with respect to his functions and his relationship with the agency. There are many who hold that the dimensions of this office could have developed along substantially different lines, but Congress in the APA clearly followed the “push” of the Attorney-General’s Report. In enacting the APA, Congress plainly did not promote the hearing examiner to a position that would deny an agency effective power or grant him authority comparable to that of a trial judge. Via the APA, Congress strengthened the role of the examiner with respect to both the conduct of hearings and the filing of initial or recommended decisions. Yet, by legislative provision and judicial construction, the status of the hearing officer has been pegged at a subordinate, if increasingly prestigious, level. There are those who, in surveying the role of the hearing examiner, (1) plead the need for greater assistance to him—legal, clerical, statistical, analytical—given the voluminous records he reviews; (2) urge that greater weight be accorded his decisions; and (3) argue for the elimination of interlocutory appeals from proceedings, barring the examiner’s permission. The status generally of the hearing examiner (including salary, rank, promotion) poses prominent questions. But, despite a growth in prestige of the examiner, and despite increased recognition of his scope of effort, it is evident that agencies continue to regard the examiner as their alter ego; second, that they persist in the view that adjudicatory matters before a commission are not routine factual determinations, but problems of policy determination for which the agency is responsible; and third, that agencies are opposed to any effort to place examiners in a position of independence vis-à-vis the agency whose cases they hear. In Judge Friendly’s view, . . . the same considerations that oppose a separation of adjudication and policy show the limits on deference to decisions by hearing examiners . . . . In those few cases in which the agency is simply applying a definite rule to the facts, the decision of the hearing examiner should be conclusive unless the commission grants review, and it should exercise great abstinence in doing that. In the cases in which fact finding and policy determination are mingled, deference should be paid to the examiner’s findings on the facts; and it would be well if examiners were encouraged to devote more effort to this part of their work . . . rather than to spend time and thought, at least in the great cases, in preparing arguments and conclusions to which the commissioners surely will not and perhaps ought not give much weight.

44 Kenneth C. Davis notes the following as major developmental stages in the role of the examiner, prior to enactment of the APA: (1) initially, under the enabling acts of the early regulatory agencies, the totally subordinate position of the hearing examiner; (2) “the ICC experience of finding some degree of one-man responsibility desirable for some proceedings and group responsibility desirable for others” as a basis for developing the examiner role; and (3) the impulse, generated by the Attorney General’s Committee on Administrative Procedure, towards an increase in power and status which “has been strongly felt ever since.” 2 Davis, op. cit. supra note 1, § 10.01.


46 President’s Conference on Administrative Procedure, Report 62 et seq. (1955); Hearings, supra, note 30; Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L. Q. 281 (1955).


Whether Congress will move within the confines of principle that holds as desirable a "semi-independent" role for the hearing examiner, if it does seek to improve the status of the hearing examiner, remains to be seen. But any congressional action should reflect the admonition of one distinguished observer of the administrative process: 253

What should be the status of the examiner? The answer must obviously depend upon what his functions should be. To begin with the idea of life tenure and high salary and to build around that idea would be to begin at the wrong end. The starting point must be to discover what functions examiners do and should perform. The status must depend upon the functions.

Of late, Congress has concerned itself increasingly with the problem of ethical standards in the federal government. It has addressed itself, as well, to the question of how such standards, once described, are to be enforced. Any one likely course of congressional action is impossible to predict, for the "problems of ethics" differ in kind; and legislative action, if desirable at all, must reflect this difference. Individual conduct, reflective of a wide range of group-interests, gives rise to a considerable portion of the criticism that clamors for more precise standards of official behavior. But, as one congressional subcommittee noted, much criticism of official behavior 254... has to do with situations or institutional arrangements which aggravate pressures or make it more difficult for a public servant to act independently, i.e., to judge issues on their merits.

The entire issue of consultation is very much in point here. The question—should deciding officers, at initial or final stages of decision, be allowed to consult staff members who have not been investigators or prosecutors in the case—includes, inter alia, the "use of ideas or advice from extra record sources." 255 The congressional stand on this question has varied significantly: 256

The Taft-Hartley Act seems to express congressional dislike for consultation except between the examiner and members of the Board. The 1952 amendments to the Communications Act are far more restrictive than any other legislation... The Immigration Act of 1952 moves in the opposite direction, removing all restrictions on consultation by deciding officers, even to the extent of legalizing consultation of investigators and prosecutors.

The most important congressional position is that taken in the APA, which leaves agency heads free to consult any staff members except investigators or prosecutors, but which forbids examiners to consult off the record any person or party on any fact in issue.

Remedies proposed in the last ten years, with respect to external pressures upon individual official conduct, fall into the following categories: (1) the enactment of a

2 2 Davis, op. cit. supra note 1, § 10.01.


254 2 Davis, op. cit. supra note 1, §§11.08-11.18, 11.21.

255 Id. § 11.21.
formal code of ethics that would govern the conduct of commissioners, commission employees, practitioners, and others who appear before the commissions;\(^6^3\) (2) legislation that would require mandatory disclosure of income, assets, and transactions in securities and commodities; (3) amendments to the APA that would deal with a variety of defined improper practices (e.g., appearances of former federal officials and employees before agencies in which they were formerly employed in cases which they previously handled or of which they had some direct knowledge, and acceptance of valuable gifts or services directly or indirectly from any person or organization with which the official or employee transacts business for the government); (4) changes in the criminal law relating to bribery, conflicts of interest, and \textit{ex parte} communications in quasi-judicial cases;\(^6^4\) (5) the establishment of a Commission on Ethics in Government that would investigate ethical standards in government in the interest primarily of "moral dynamics" rather than "abstract standards"; (6) the establishment of a Committee on Ethical Standards, if a code of ethics is enacted, to (a) adjudge violations, (b) render advisory opinions concerning ethical questions submitted to it, (c) promulgate interpretive rulings, and (d) recommend amendments and additions to the code; and (7) steps to upgrade the caliber of appointees to administrative positions.\(^6^5\)

Those who argue in favor of a code of ethics are confronted by several significant counterarguments. First, personal integrity and courage of governmental personnel are the well-springs of ethical behavior as officials. Even in the presence of undue pressures and influence peddling, it still, as the saying goes, "takes two to tango." Second, there is merit to the view that one can rarely create morality by pronouncement. Third, enactment of a general code would not release individual agencies from the need to identify and deal with their own unique ethical problems. If Congress should choose to move in the direction of "ethics by statute"—and, given recent events, it may choose to do so—it will still have to come to grips with three


\(^{64}\) In Senator Douglas's view, the distinction, drawn by S. 2374, between adjudicating and rule-making procedures should not stand for purposes of defining standards of propriety of \textit{ex parte} communications. He argues that there are adversaries in rule-making proceedings, just as in adjudication, and that "fairness" does not turn on the label of "rule making" or "adjudication."

\(^{65}\) Proposals designed to improve the caliber of administrative personnel fall into two categories, the pious and the practical. The former stresses the need for the President to appoint eminently able men and for the Senate to evaluate them in terms of merit, not politics. The practical suggestions contemplate lengthier tenure for commissioners, legislation dealing with the practice of appointments for unexpired terms of agency members, studies in salary policy, vigorous staff recruitment of high-caliber legal personnel, and encouragement of career staff people to work toward appointment as an agency member. The proposal most recently suggested recommends legislation to increase the terms of regulatory agency members to uniform terms of ten years, together with an annual increment in salary and improved retirement benefits. See Senate Comm. on the Judiciary, \textit{Administrative Practice and Procedure}, S. Rep. No. 168, 87th Cong., 1st Sess. (1961) [hereinafter cited as S. Rep. No. 168]. See also Kintner, \textit{Federal Administrative Law in the Decade of the Sixties}, 47 \textit{A.B.A.J.} 269, 272-73 (1961); \textit{Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Major Administrative Process Problems}, 86th Cong., 1st Sess. (1959).
major needs: (1) Congress, in approving administrative appointments, must follow carefully drawn standards, not politics; (2) certain major policy areas require either a statement, clarification, or redefinition of congressional intent; and (3) it must not, in an effort to cope with improper pressures, "surround the Government service with so many snares, snags, and spring-guns that only the unwary can be recruited."56

Turning to another possible congressional approach—namely, legislation that would affect the administrative structure—we note the suggestion made by Mr. Hector in his now famous and much-answered memorandum.57 In his view, congressional regulation would be more specific and executive responsibility enhanced if (1) policy functions of agencies were transferred to the executive branch; (2) the adjudicating function was placed in an administrative court; and (3) policymaking and planning became the responsibility of a single agency head.

In essence, this approach follows the course of action proposed by the President's Committee on Administrative Management.58 Congress, however, has been reluctant, except in isolated instances, to support these views.

Proposals to establish a Federal Office of Administrative Practice, comparable to the suggestion of the Attorney General's Committee in 1941, have also drawn congressional interest. The creation of a continuing, independent body in the executive branch of the government that could study problem areas in administrative life and report on its findings to the President and the Congress is regarded in many quarters as an eminently desirable step. Testimony before the Carroll subcommittee, however, raised significant discussion as to the scope of authority to be accorded such an office and, more specifically, its director. There is, apparently, considerable agency concern that with respect to problems of administrative procedure, anything more than an advisory role for a director would lead to difficulties, given existing statutory requirements.59

If Congress follows a course in response to the recommendations of the Landis report,60 it will, by basic structural changes, reach towards the achievement of what James Landis terms "a prime and immediate need"—to develop and coordinate policy immediately at a high staff level. Such a course might require congressional support of the President that would allow the latter to propose reorganization plans; congressional support of reorganization plans that would clarify the scope of authority of the chairmen of certain major regulatory agencies; congressional support of reorganization plans that would strengthen the position of the President vis-à-vis the FPC and the ICC; and congressional support, by statute, of the organization of a

57 Hector Memorandum.
58 President's Comm. on Administrative Management, Report with Special Studies (1937).
59 Staff of Senate Comm. on the Judiciary, op. cit. supra note 47; see also Remarks of Walter Gellhorn in Hearings, supra note 34.
60 James M. Landis, Report on Regulatory Agencies to the President-elect (1960) [this report has been published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960)].
secretariat to assume the duties performed by the Office of Administrative Procedure, which currently is located in the Department of Justice.61

Congress may choose to direct its attention to a re-evaluation of its intent in certain policy areas (e.g., transportation and the notion of constructive coordination) and a definition or description, however broadly drawn, of some statutory policy in others (e.g., communications). In the latter instance, the ever-vague concept of the public interest has controlled over the years, not the terms of a statutory mandate. Efforts in this direction—namely, changes in basic legislation, might help diminish the area of the controversial in which the administrator must function. Given any success in this direction, an important step may have been taken to meet what many view as a basic problem of regulation—the division of responsibility for management:62

If the regulator is given a clear mandate to remove a perceived evil, he has an adequate and limited basis for validating his interference with management, and management has a basis for calculating the effects of the interference. But in the absence of a clear mandate, it is not only inevitable, but appropriate, that regulation take the form of an accommodation in which industry is the senior partner. . . .

There is very little in our history . . . to indicate that an executive agency will be much different from an independent agency in periods when public opinion or statutory policy is slack, indeterminate, or lacking in conviction. The history of the antitrust division of the Department of Justice, for example, is one of alternation between strict and loose enforcement of the antitrust laws. . . .

Congressional action to clarify congressional purpose, coupled with piecemeal amendments to the APA, would strengthen the efforts of agencies to evaluate performance and procedures. If Congress chose to study specific agencies, with a view to concentrating upon individual agency needs, structurally or procedurally, it would further stimulate agency efforts at self-improvement.63 The work of the Advisory Panel on Labor-Management Relations Law provides a precise example.64 Congressional recognition that the Taft-Hartley provisions for structural change in the NLRB (which resulted in “two-headed administration”) were “a costly mistake,” has led to concentrated study of the NLRB, by the Panel, as an agency that, with respect to areas of concern, type of litigation, and function, is unique. Recommendations of the Panel, therefore, have been framed, taking into account the distinctive functions of the NLRB.

Congress has been urged, particularly by the American Bar Association, to adopt

61 For a good account of the operations of the Office of Administrative Procedure, see Remarks of John F. Cushman, Director, Office of Administrative Procedure, Dep't of Justice, in Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. Res. 61, 86th Cong., 1st Sess. 211 et seq. (1959).
63 This approach appears particularly desirable in view of individual agency efforts to improve their methods and procedures. In the last two years, the AEC adopted a code of ethics; the ICC streamlined its procedural rules; and the NLRB has almost completed total revision of its administrative rules. S. Rep. No. 168, at 3.
a Code of Federal Administrative Procedure that would supplant totally the APA. Analysis of the proposed Code is beyond the scope of this paper, but we should like to indicate, in broad terms, what its objectives seem to be.

In essentials, the proposed Code reflects the view that procedures must be formal if they are to be fair, and that the regulatory process will improve in proportion to the degree to which it becomes "judicialized" in its methods and more directly controlled by the Congress and the courts. For example, the APA definition of rule-making included agency statements of "particular" application and future effect as well as statements of general application and future effects. The proposed Code moves in the direction of formalization of procedure in a definition of rule-making that, being limited to statements only of general application and future effect, places statements of "particular" applicability and future effect in the category of adjudication. Further evidence of the "remarkable vitality of the lawyer's concern with the administrative process" is apparent in the proposed Code's provisions that would (1) "further restrain adjudicatory proceedings"; (2) significantly alter the role of the hearing officers; and (3) materially enlarge opportunities for judicial review of final agency action or proceedings prior to final action.

In the view of one critic, the proposed Code would place agency heads "between an upper and a lower millstone," and he added, "I think this code misconceives the principal problems that should concern us in relation to administrative processes." There is, currently, considerable congressional sentiment in support of this critical attitude. If Congress chooses to reject the proposed Code as a course of action, it will, by its choice, give tangible assent to two fundamental points of view: first, the APA does suffer from many imperfections, but it has been effective and can be made more effective "given sympathetic and imaginative interpretation"; second, the problems that confront the administrative process require more for their solution than "increased formalism in agency proceedings."

One further course of congressional action is possible, and perhaps even likely: substantially increased legislative oversight through reliance on structural and

---

62 Pleadings, for example, are required to conform closely to the pleading requirements in United States district courts. Code of Federal Administrative Procedure § 1004(a) (proposed).
63 In adjudicative proceedings, the hearing officer would be barred from any consultation, even with members of the agency staff, in the course of formulating an initial decision. Id. § 1005(c). Further, hearing officers' decisions on questions of evidentiary fact would be required to stand unless "contrary to the weight of the evidence." Id. § 1007(c).
64 Under the APA, an agency determination of fact may be reversed if unsupported by substantial evidence. Under the terms of § 1009(f) of the proposed Code, the standard for reversal would be broadened "to the formula now applicable to appellate review of non-jury district court determinations of fact, whereby determinations which are clearly erroneous on the whole record may be reversed." Further, courts could "stop agency investigations either when the agency comes to court seeking enforcement of a subpoena or in a new type of proceeding to enforce agency investigations." Id. § 1005(a), (b).
67 Id. at 11.
68 Ibid.
procedural devices that would increase legislative involvement in the administrative process.

One possibility of this kind is the proposal to establish a permanent standing Committee on Administrative Procedure. Such a committee should (1) "screen and study complaints" relating to agency procedures in the interest of fair play and due process; (2) "... exercise continuous watchfulness over the APA and laws of like character"; and (3) "... determine whether the administrative agencies are complying with the requirements of the APA and laws of like character, and with the principles they embody...."74

This proposal is objected to in some quarters on the ground that it implies, mistakenly,76 that the House and Senate Judiciary Committees which handled the Administrative Procedure Act are no longer competent to deal with this subject... that the various standing committees of the House and Senate with jurisdiction over specific administrative agencies are no longer competent to oversee the procedure of the agencies committed to them... that major changes in administrative procedure somewhat along the lines of the second Hoover Commission Task Force Report are in order, and that, because the Judiciary Committees and other standing committees have failed to act on these proposals, some new committee should be created so to act.

Criticism further goes to the point that a separate committee will not be "oriented to the substantive role of the agency."77 In addition, given some of the arguments advanced to justify a "supercommittee," such a committee might be regarded as a means by which to press the cause of judicialization.78

Supporters of the proposal do not deny the necessary relationship of procedure to substance, but argue (1) there are certain aspects of administrative procedure in which all administrative agencies share; (2) substantive tasks of the established committees are vast and necessarily preclude effective oversight of procedure; and (3) established committees would have continuing contact with all agencies.

If Congress chooses to strengthen its oversight function, there are several other procedural devices at its disposal that could be relied upon more extensively. Watchdog committees have clearly demonstrated their capacity to increase legislative oversight and control. The history of the Joint Committee on Atomic Energy is a clear case in point.79 Legislative involvement in pending administrative matters; prior committee clearance of administrative decisions;79 prior congressional approval of administrative action by resolution;80 legislative review of, and authority to annul,
federal regulations—these techniques give to Congress a formidable array of opportunities to become significantly more visible in the administrative process.

CONCLUSION

In its treatment of problems of administrative regulation, Congress has played an ambivalent role that cannot be clearly analyzed without much more attention than has yet been given to it. As has been pointed out, the growth of regulatory administration would not have been possible without congressional sustenance, and Congress has been the prime molder of the regulatory system that has been developed. Nevertheless, Congress has often shown a mood of apprehension concerning the evil inclinations of its offspring among the regulatory agencies.

Some of the reasons for this mixture of parental pride and concern can be surmised. Basically and in the long run, Congress has responded positively to what was perceived as necessary action in enacting regulatory programs and creating regulatory agencies. Misgivings and second thoughts, leading to control measures, can be traced tentatively to several sources. One is a natural reluctance on the part of Congress to disturb the balance of power between the legislative and executive branches in the direction of executive enhancement—and the regulatory agencies have increasingly become identified with the executive side of government. As legislators have realized this, they have frequently reacted in the direction of narrowing the scope of regulatory action or by shifting much of the work of regulatory agencies either to the legislature or to the courts.

Another consideration is that opponents of regulatory programs who have failed to prevent the imposition of regulation have often then turned their efforts toward hampering restrictions on the effectiveness of regulatory operations and have received a more sympathetic hearing. Also, Congress has shown a special willingness to consider favorably suggestions for procedural reforms put forth by spokesmen from the legal profession—no doubt in part because of the preponderance of lawyers among the members of both houses. At the same time, the technical complexities of proposed reforms sometimes make it difficult for many members of Congress to make an informed judgment on measures under consideration.

If Congress has failed to work out a consistent approach or definitive solutions to the issues posed by the regulatory process, however, the explanation does not lie primarily in shortcomings of understanding by legislators. Instead, the persistence of regulatory dilemmas is due to deficiencies in our knowledge of how regulatory administration actually functions, and a preoccupation with procedural devices for resolving what are really great issues of public policy. That Congress is becoming more receptive to a reconsideration of regulatory problems is clearly evident. A recent Senate subcommittee report offers significant reason to hope that con-

---


gressional action will reflect several of the approaches suggested in this paper. The subcommittee report shows an awareness of the need to think above and beyond the procedural questions; it implies that fairness in administrative life is more complicated to achieve than has perhaps been understood; it proffers the hope and expresses the need of cooperative legislative-executive relations as each group tries to upgrade the administrative process. In short, Congress seems to be more inclined now than ever before to search for concepts that may lead to an administrative process that is both vigorous and effective in the achievement of its initial goals, as well as those not yet perceived. There may be "no single center of gravity in the regulatory system,"83 but Congress is perhaps in the prime position to lay out the paths for development of administrative regulation.