

Book Review

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

Recommended Citation

Book Review, 28 Md. L. Rev. 185 (1968)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol28/iss2/8>

This Book Review is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Book Review

Politics And The Regulatory Agencies. By William L. Cary. McGraw-Hill Book Company, New York: 1967. Pp. 149. \$5.95.

It has been widely noted that the independent regulatory agencies are not achieving the high expectations held for them at the time of their creation.¹ It is in an attempt to assess the potential for agency vitality that Professor Cary has undertaken his book, which is based on the Cooley Lectures he delivered at the University of Michigan in 1966. The book is largely a record of his personal impressions and experiences during several years as Chairman of the SEC, one of the six independent regulatory agencies that he groups together for purposes of his analysis.² In light of the author's experience, the book qualifies as an authoritative alternative to the appraisals of the functioning of the independent regulatory agencies made by Louis J. Hector and Newton N. Minow at the end of their tenure with the CAB and the FCC respectively.

Focusing on the viability of an agency in its political context, Cary examines the important obstacles and forces affecting the independent regulatory agencies both in their day-to-day operations and in their attempts to take creative new steps in their fields. One such influence is the White House. Actually, however, as Cary is quick to point out, "the White House" is a term that very rarely denotes the President, ordinarily connotes only a presidential assistant, and frequently connotes a second-echelon political assistant who has as a major concern his own advancement and aggrandizement. The principal White House means of influence on agency action arise out of White House power to name the chairman, its power to appoint commissioners, its control over the budget (which may be coupled with the power to allocate supergrades),³ and its power, through the Bureau of the Budget, to control both the detail and the policy of substantive legislation. However, the White House does not ordinarily exercise a day-to-day control over the independent regulatory agencies. It may set a climate for certain types of agency action (as the Kennedy administration apparently did in its first years), but generally the White House is interested and involved only if there is a scandal or a major public issue.

1. See, e.g., Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 430 (1960); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Letter from Newton N. Minow to the President, May 31, 1963, on file with FCC.

2. It is, perhaps, interesting to note that Judge Friendly in his article, *supra* note 1, excluded the SEC from this group of independent regulatory agencies that he was discussing, on the theory that its operation differed from that of the other agencies.

3. See 5 U.S.C. § 5317 (1964).

Congress, on the other hand, appears to stress commission independence, but in fact it is concerned mainly with independence from the White House. Cary reports that the basic congressional attitudes are the somewhat contradictory views that the independent regulatory commissions are principally judicial or quasi-judicial organs and that they are exclusively arms of Congress.

Congress has available a number of means of direct power over the commissions. Most obvious is the budget power. Congressional budgetary control is basically negative, but it may be used in several different ways; for example, by affecting the size of an agency's budget or by attaching specific instructions on how appropriated funds are to be spent. In addition to budgetary power, Congress has certain substantive controls over the agencies. A congressional investigation or a hearing by a legislative oversight committee can so paralyze an agency that it is nearly incapable of moving forward. The oversight power may, in fact, be the most potent weapon in the congressional arsenal. Agency rule-making can be affected by congressional assertions that the agency is exceeding its jurisdiction, and agency adjudication may be interfered with by congressional hearings on matters which are still in the agency adjudicatory process. At least one court has held that such intrusions may under some circumstances void the commission action.⁴

Cary concludes that Congress has a great deal of influence over agency action. Frequently this influence is used to inhibit the agencies in the dynamic performance of their functions. Two types of commission action particularly concern Congress: action which can be construed as an attempt to extend the agency's mandate and action to which constituents object.

It is this political subordination to both the Executive and the Congress that is the major source of the difficulty in maintaining agency vitality and creativity, Cary asserts. This position of subordination alone is enough to ensure that competence, faithfulness, and experience are all that can be expected with regard to a large part of an agency's business. Yet there are still other possible obstacles to agency vitality.

Among these is the "balanced commission" concept. A balanced commission is not necessarily balanced in terms of political parties. More commonly it is balanced in such terms as industry-oriented versus public-oriented members. The result of balance is often near-paralysis. Another major obstacle within the commissions themselves is a tendency toward over-judicialization of commission work. While adjudication may be an avenue to policy development, over-judicialization prevents adequate attention to broad issues in policy making.

Despite these obstacles, Professor Cary reports that there are occasions when the agencies may rise to creativity. He lists three general prerequisites: favorable political climate, an appealing agency program, and funds. There are several possible approaches for rising out of inertia to gain the prerequisites and achieve creativity. Among these is the "dramatic speak-out." Cary cautions, however, that success

4. *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

can rarely be achieved in this manner because it requires the pre-existence of the favorable economic and political climate. A second potential approach to attaining creativity is the occasional hiring of consultants from outside the agency. Somewhat related is the undertaking of broad surveys and special studies with an admixture of outsiders and insiders. The SEC, which Professor Cary chaired, undertook such a study during his tenure. The concluding section of the book is devoted to a case study in which the efforts of the SEC to undertake the study and convert its product into legislation are detailed.

There can be no doubt that this book contains numerous penetrating insights into the workings of the independent regulatory commissions and their relationship with the rest of the government. The book is particularly interesting because in it one with approximately the same experiential background in the independent agencies as Hector and Minow rejects the Hector-Minow thesis that the "organic" flaw responsible for poor agency performance is the commingling of executive, legislative, and judicial functions in the agencies. However, in posing the question of agency viability in the context of structural political forces affecting the agencies, Cary is apparently advancing an organic theory of his own, *i.e.*, that structural political forces (centered in Congress and the White House) act upon the agencies so as to substantially limit agency independence and in this manner are largely responsible for poor agency performance, particularly the lack of agency vitality and creativity.

It is this relationship between independence from Congress and the White House and creativity that is open to some question. There can be little dispute that the agencies might achieve more if they were less subject to White House and congressional political pressures. However, a reader of Cary's treatise may indeed form the impression that it is a *belief* on the part of many commissioners and staff people in the need for structural political independence in order to proceed creatively that may be responsible for much agency inertia. Cary, for instance, gives very little attention to the possibility that an agency might create a favorable climate for action by selecting an issue with public appeal and seeking to inform the public about the issue. Although he mentions "dramatic speak-outs" by the agencies, he discusses the possibility of creating public interest in agency programs, and with it a certain degree of agency independence, with the observation that the FCC did it once in putting some order into the television industry, but such an approach in most regulatory fields rarely would be feasible. In the securities industry, for instance, it might be "disastrous in its market impact." Instead, Professor Cary looks for support for proposed agency action principally to the industry being regulated and concludes, "I have become convinced that no major step forward can be achieved by an old-line regulatory agency in the absence of support from some of the leaders in the industry it regulates."⁵ He fails to note that the regulated industry is rarely going to be a source of agency creativity or dynamism. In short, despite his apparent thesis that

5. W. CARY, POLITICS AND THE REGULATORY AGENCIES 69 (1967).

structural political influences present the biggest threat to agency creativity, Cary lends credence to the proposition that old-line agencies present a substantial danger of becoming industry captives and that this may be the most significant threat to the loss of their vitality and creativity.

The loss of independence to the industry being regulated is far less defensible than the lack of independence from the Congress and the White House. Cary admits that the Executive and the Congress may have at least some justifiable interest in such agency activities as the making of major controversial policy decisions. Congress and the White House are, after all, directly politically responsible to the public. The independent regulatory agencies are not. On the other hand, the lack of independence from and loss of creativity to the industry is a surrender by the agency of potential power which it could generate by focusing on public issues and gathering public support. This power could make independence from the Congress and the White House virtually a moot question in many instances.

One other point which can hardly be overlooked about the book is the manner in which it is written. It suffers from two notable stylistic flaws. The first is internal textual references to succeeding and preceding chapters, frequently without page references. The second is a lack of adequate editing, with a resulting large number of grammatical mistakes. Each of these problems makes the reader's progress less pleasant.

However, the negative is not to be overemphasized, because Professor Cary's exposition of his experience is an invaluable opportunity for the reader to see the workings of the commissions nearly first hand. In particular, the exposition presented by Professor Cary is so comprehensive that the reader is able to draw his own conclusions as well as benefit from many of those drawn by Professor Cary.

*David C. Daneker**

* Deputy Counsel, U.S. Senate Subcommittee on Improvements in Judicial Machinery. A.B., 1963, Haverford College; LL.B., 1966, Harvard Law School.