

## Consumer Rights and the Regulatory Crisis\*

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I am writing to ask you to join in Common Cause . . . . We are going to build a true "citizens' lobby"—concerned *not* with the advancement of special interests but with the well-being of the nation.<sup>1</sup>

### *Introduction: The Great Disintegration*

As our big, bustling nation races through the dawn of the new decade into the Spring of 1971, the American people seem peculiarly melancholy. Our government is failing us.

The message comes from many tongues in many parts of the land. National news magazines do cover stories on "What Ails the American Spirit." The politicians talk of a pronounced psychic downturn, a recession of the spirit. Historian Richard Hofstadter calls the 1960's "The Age of Rubbish." Historian Andrew Hacker speaks of our time as "the end of the American era."

The government is not working. Mason Williams knows it. He says: "Government makes better deals with business than it does with people." John W. Gardner knows it too. The Chairman of the Urban Coalition, in a remarkable letter he is writing to 200,000 Americans in every part of our land, thinks the situation is so bad we need to "build a New America." He says: "We must shake up and renew our outworn institutions."

About seven months ago, 75 distinguished philosophers, historians, economists, and scientists gathered in Aspen, Colorado, to discuss our na-

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1. Letter from John W. Gardner to America, Fall 1970. [hereinafter cited as Letter to America].

tion's fate. James Reston reported the meeting's gloomy conclusion: Inefficient governments, greedy men, and modern technology are gathering together to debase human values, ruin the quality of our environment, and threaten the future of a decent and civilized world.

No one has captured the mood better than journalist Nicholas von Hoffman:

The preachers and the hawkers forecast the apocalypse, yet the premonitions that come from our daily life experiences—waiting in the supermarket check-out line, calling a policeman, getting automobile insurance—these all tell us that what's building up isn't the Grand Revolution but the Great Disintegration.<sup>2</sup>

The intent of this essay is to focus on that part of the new American mood that should be most pertinent to the Federal Bar Association and lawyers everywhere. I want to focus on our failing governments, or, if you will, those oft-used (but more or less accurate) bromides about the "consumer crisis" and the "regulatory crisis."

Clearly, the system is not working.

Just as clearly, this places a heavy responsibility on every attorney. Canon 8 of the American Bar Association's new Code of Professional Responsibility makes it the lawyer's duty to assist in improving the legal system.<sup>3</sup>

While the foremost task of this essay is to address the so-called "Crisis of the Regulatory Commissions,"<sup>4</sup> it is important—indeed crucial—to recognize first that this malaise spreads across the whole strata of our governmental alignment from state legislatures and county courts to public schools, universities, the draft, the police, the welfare system, and even whole cities. These are the staging areas for the battalions of national problems that daily troop to Washington to keep the Presidency, the Congress, the Judiciary, and our own headless fourth branch of government—the regulatory commissions—constantly under siege.

We cannot hope to understand the problems of the regulatory commissions without first studying the crisis in governments generally.

Seldom since the nation's Grangers and shopkeepers marched on the state legislatures in the 1870's to demand protection from the railroad rate rape has the consumer tide ridden so high in this country.

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2. von Hoffman, *If the Senate Changes Hands*, Washington Post, Aug. 28, 1970, § B at 15, col. 2.

3. The Code was adopted by the American Bar Association's (ABA) House of Delegates on August 12, 1969, effective January 1, 1970. It is intended to replace the Canons of Professional Ethics, which were promulgated by the ABA in 1908. The bar is now engaged in a nationwide effort to secure adoption of the Code in every state.

4. This phrase was coined from the title of a recent book, *THE CRISIS OF THE REGULATORY COMMISSIONS* (E. Phillips & P. MacAvoy ed. 1970).

What is happening now appears to be a major movement of public opinion across the nation. The effectiveness of the regulatory commissions has been raised once again as an issue of broad popular interest and concern. The people are interested. They want to know what's going on, what's wrong. This is new. Washington insiders, who have long manipulated this administrative process to their own advantage—and to the detriment of the public—are worried.

In theory, the administrative process as originally conceived was to have been the consumer's friend. The legal architects had in mind a fourth branch of government, one that would stand alongside the executive, the legislative, and the judicial branches as an independent sentinel to guard the consumer's civil rights. James Landis, the great student of administrative law and late Dean of the Harvard Law School, stressed that the administrative process

is not, as some suppose, simply an extension of executive power . . . . In the grant to it of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole.<sup>5</sup>

The theory of the administrative process was to imbue independent commissions and commissioners with potent tripartite powers (to prosecute, to legislate, and to judge) to pursue the public interest. The theory has not been allowed to work. Over the last half century the regulatory process seems to have become frozen while the regulated industries have grown up, developed around the commissions, and engulfed and dominated the very agencies that were established to keep the corporations in line.

The stamp of failure has been written large across the work of our administrative agencies. In later years Dean Landis himself was greatly disillusioned. The regulatory agencies were no longer planning, promoting, and policing. They had found procrastination, plunder, and polluting a more profitable path.

Critics have counseled us for decades with now-shopworn recommendations to abolish, demolish, dismantle, or sterilize the "independent" agencies. Some want to strip away the agencies' adjudicative powers. Others would eliminate the commissions altogether. Obviously the decades of criticism are having little effect. The ICC, the FTC, the FCC, and all the rest are still very much with us.

What can be done? Plenty.

First, if we are to accomplish any meaningful reforms of the regulatory agencies, we must draw back and take a look at government as a whole—not

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5. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 15 (1938).

just the headless fourth branch.

Second, it is not that the regulatory scheme as presently constituted *cannot* work. It can. With modifications, all designed to bolster the original theory as Dean Landis and others have spelled it out, the agencies could come to serve the public interest as they were originally designed to do in theory; the present system could be turned into the consumer's best friend.

After some generalized comments on the state of government as we find it today, I want to develop three specific suggestions that could go a long way toward revitalizing our watchdog agencies:

1. The commissions need more independence.
2. Stronger public-interest advocates need to be developed, and they must be ensured fair opportunities to influence agency decision-making.
3. The press (and thereby the public) must be given freer access to information about the administrative process.

These three suggestions will be discussed against the backdrop of two fundamental assumptions. First, I think that thoughtful lawyers will agree that representation is vital to a person seeking to maintain a free flow of consumer communication—perhaps equally as vital as to the defendant in most criminal cases. Citizen participation in the FCC's decision-making process, much like citizen participation in the work of sister agencies, has historically been virtually non-existent. This in large part has been due to the complex rules and procedures we lawyers have evolved (and profited from) and the ordinary citizen's inability to hire competent counsel to lead him through the maze.

A second aspect of the commissions' ineffectiveness is their continual refusal to give those citizens groups that do dare to approach their doors the "standing" to participate in the decision-making process. To be sure, citizens groups have, over the past few years, slowly won significant victories in their right to be heard. But their progress has come only from the courts over agency opposition, has been snail-like in affecting the substance of decisions, and has had to proceed against virulent opposition from entrenched industry supporters, both inside and outside the commissions.

In any context, the consumer's fundamental civil right is the right to get his money's worth.<sup>6</sup> Yet with the decay of governmental institutions origi-

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6. Schrag, *Consumer Rights*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* (N. Dorsen, ed. 1970), quoted in 1970 COLUMBIA UNIVERSITY FORUM 4 (Summer). I have elsewhere had an opportunity to discuss my views of five bills dealing with consumer affairs. See *Hearings Before the Senate Comm. on Government Operations on S. 2045, S. 3097, S. 3165, and S. 3240*; *Hearings Before the House Comm. on Government Operations, on H.R. 14758*, 91st Cong., 2d Sess. (1970) (remarks of FCC Commissioner Nicholas Johnson).

nally designed to guard this central civil right of consumerism, misleading advertising and high-pressure sale tactics have taken a heavy toll. Philip G. Schrag, a consumer advocate who heads an investigative staff for the New York City Department of Consumer Affairs says, "American manufacturers are now finding the cost of quality control to be so great that they are frequently willing to accept the high rate of defective products. It is cheaper to replace merchandise for those who complain than it is to ensure that few defective products are distributed, even when the defects pose a hazard to human safety."

Consumer sovereignty is dead, many appear to be saying—if, indeed, it ever lived. If consumers prefer smaller American cars, or cars that do not pollute the atmosphere, and only large cars that do pollute the atmosphere are being merchandised by our television sets and sold on our car lots, the consumers' sovereign right to participate in a competitive marketplace is meaningless. Mary Gardiner Jones, the Federal Trade Commissioner, says: "The list of such non-options is, of course, endless."<sup>7</sup>

#### *The Growth of Non-responsive Government*

Most parts of the system have grown so rigid that they cannot respond to impending disaster. They are so ill-designed for contemporary purposes that they waste taxpayers' money, mangle good programs and frustrate every good man who enters the system.<sup>8</sup>

The central problem of government today is that it is too often not responsive and not representative. Government has become an anachronistic spider, spinning an impenetrable web of vested interests.

#### *The General Problem*

A little over 183 years ago, on September 17, 1787, the Founding Fathers signed the original Constitution in Philadelphia. While our Constitution has turned out to be an achievement unmatched in all of history, one increasingly hears the argument advanced these days that our present constitutional framework is no longer adequate. In order to stimulate thinking about the shortcomings of our present government, the Center for the Study of Democratic Institutions in Santa Barbara, California, began circulating a plan for a better national government: the draft of a 20th century constitution.

For six years the center has been engaged in a serious effort to draft a

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7. *Congress and Consumer Rights*, address by Commissioner Mary Gardiner Jones, Federal Trade Commission, before a meeting of the Consumer Federation of America, Madison, Wisconsin, August 28, 1970.

8. Letter to America, *supra* note 1.

better Constitution for a modern America. The draft of a proposed new constitution for the "United Republics of America," which abolishes the states as we know them and sets up a scheme with six branches of government, two vice-presidents, and a Chief Executive limited to a single nine-year term, should inspire a new national debate on how we can best rearrange our decision-making process to bring our government in tune with the technological revolution.

In the preface to the Center's draft constitution, Rexford G. Tugwell, the Roosevelt braintruster, states his belief that the time might come when the American people, exasperated by the obstructionism of their Congress, the unwarranted assumption of legislative powers by their Supreme Court or the unbearable load of duties undertaken by their President, might decide that new institutions are necessary to fulfill their reasonable expectations of progress.<sup>9</sup>

It is this feeling that we could be doing much better on *all* governmental levels, not in the regulatory process, that I want to stress first; for many of our regulatory problems can be traced beyond the administrative process to the doorsteps of Congress, the Courts, and the White House.

Congress itself, for example, is being attacked currently on several fronts. The *New York Times Magazine* recently led off an issue with an article titled "We Can't Depend on Congress to Keep Congress Honest" in which the author charges that there have been an unusual number of criminal or questionable actions involving Congressmen recently.<sup>10</sup> One of the youngest members of the Senate, 37-year-old Robert W. Packwood of Oregon, said on the Senate floor not long ago that the seniority system in Congress needs to be abolished because "it has caused Congress to be a laughing stock among the public."<sup>11</sup>

The New York City bar has become so outraged about the shoddy ethics of many Congressmen that it has written a whole book on the subject.<sup>12</sup> The New York City bar makes 17 specific recommendations for reform of congressional conduct, including a model code to govern the way in which members of Congress deal with their own outside interests when they war with the public interest, as they often do. Still, this lawyers' study of Congress will anger many fair-minded citizens, as it did a book reviewer, who remarked: "What angered me was the manner in which this prestigious group

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9. N.Y. Times, Sept. 8, 1970, at 30, col. 7.

10. Sherrill, *We Can't Depend on Congress to Keep Congress Honest*, N.Y. Times, July 19, 1970, § 6 (Magazine) at 5.

11. Packwood, *The Case Against the Seniority System*, Washington Post, August 30, 1970, § C at 6, col. 3.

12. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST, REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS (J. Kirby ed. 1970).

of ethically minded lawyers completely disregarded the participating role their profession plays in arranging some of the corruption they seem to so abhor."<sup>13</sup>

If Congress is getting a bad press these days, the courts are doing no better. In his first State of the Judiciary address, Chief Justice Warren Burger sounded the clarion call for the bar to get on with the job of much-needed reforms.<sup>14</sup> American justice today is sorely strained; in fact, some thoughtful men of the law fear that the out-moded court structure may be closer to collapse than anyone dares admit. The hottest document around the Washington courts these days is not the Chief Justice's address (though it should be), but rather a recent issue of *Washingtonian* magazine, which contains an article rating the performance of more than 90 trial judges who preside in courts throughout the metropolitan area.<sup>15</sup> The article found only 22 of the judges outstanding, and it recommended that 18 judges should be removed at once.

Only drastic social, legal, and constitutional change can bring meaningful reform; yet this faces serious challenge from those who feed on the present system—lawyers, politicians, and many judges.

Little wonder the Congress and the courts—institutions that are supposed to monitor the regulatory agencies on behalf of the public interest—have actually contributed to the morass the commissions have been slowly sinking into for years and years.

The public process has become caught up in a downward spiral of congressional rigidity, declining court prestige, administrative politicking, and increasing corporate socialism that has placed national power not in the people and their freely elected representatives, but rather in the managements of the country's most powerful corporations and financial conglomerates. Increasingly, the public has become alienated from its government. Theologian Paul Tillich writes:

There is a tendency in the average citizen, even if he has a high standing in his profession, to consider the decisions relating to the life of the society to which he belongs as a matter of fate on which he has no influence—like the Roman subjects all over the world in the period of the Roman empire, a mood favorable for the resurgence of religion but unfavorable for the preservation of a living democracy.<sup>16</sup>

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13. *Washington Post*, July 2, 1970, § E at 7, col. 1.

14. *State of the Judiciary*, Address by Chief Justice Warren E. Burger, ABA Convention, St. Louis, Mo., Aug. 10, 1970 reprinted. 116 CONG. REC. S. 13234 (daily ed. Aug. 12, 1970).

15. Katz, *Some Call It Justice*, WASHINGTONIAN, Sept. 1970, at 46.

16. P. TILlich, *THE FUTURE OF RELIGIONS* (1966), quoted in, J. UPDIKE, *COUPLES* 6 (1968).

Walter Lippmann had summed up the plight of the private citizen in this manner:

In the cold light of experience he knows that his sovereignty is a fiction. He reigns in theory, but in fact he does not govern. Contemplating himself and his actual accomplishments in public affairs, contrasting the influence he exerts with the influence he is supposed, according to democratic theory to exert, he must say of his sovereignty what Bismarck said of Napoleon III: "At a distance it is something, but close to it is nothing at all."<sup>17</sup>

#### *Common Cause*

How can a people respond to such a plight? John W. Gardner, the former Secretary of Health, Education and Welfare, current Chairman of the Urban Coalition, has one possible solution. He recently announced plans to launch a broad-based "citizens' lobby" to press for reform of social and political institutions.

The Common Cause, as Mr. Gardner calls his citizens' lobby, is still at the letter-writing stage. But nearly a quarter of a million letters to citizens of all social levels in all parts of the country have been sent in a test mailing. This "Letter to America" is recruiting an "active, powerful, hard-hitting constituency" to fight for reforms necessary to protect citizens' rights. The letter asks each recipient for a \$15 enrollment fee. The target is institutional decay and government's general nonresponsiveness.

Common Cause's program is as yet undeveloped. Yet those of us familiar with the regulatory process can get excited about such a citizens' lobby if the effort is properly conceived and executed, for Common Cause could become a potent coalition of moderate Americans for funding and encouraging many more public-interest attorneys who badly need money and manpower to challenge the vested corporate interests and bring the adversary process more into balance.

But Common Cause, in order to make any real headway, will have to become truly broad-based; it will have to more than duplicate the membership of existing liberal lobbying efforts and political-action groups (such as Planned Parenthood, Friends of the Earth, the Consumer Federation of America, and the Sierra Club) if it is to become an effective cutting edge for social change.

Whatever the drawbacks, John Gardner's concept is exciting nevertheless. The people may be on the verge of reclaiming their government from the cor-

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17. Harwood, *America and Ferment*, Washington Post, Sept. 2, 1970, § A at 21, col. 7.



porations. There is increasing precedent for this movement. Consider what's been happening right here in Washington. Like a reluctant swimmer toe-testing the water, the city announced not long ago a trial closing of F Street between 7th and 14th Streets, N.W., the main downtown shopping mall, for a few hours. The Washington test run followed larger-scale daylight street closings in New York and Tokyo in recent weeks. To their surprise, the merchants found that shutting out the cars and letting in the people was actually good for business as well as for people.

### *The Lawyers' Role*

The responsibility for allowing the land's legal institutions to deteriorate weighs heavily on each attorney and the organized bar. Few lawyers can feel free to relax while simple justice wanes, inequitable laws remain, and delays in adjudication abound.

The bar must assume a greater role in reform.

But because lawyers have abdicated their responsibilities to the public, there has been a long-standing anti-lawyer sentiment welling up in the country. Keep lawyers on tap, not on top, the populists used to grouse. We recall all too easily these days that refrain from Carl Sandburg, "Tell me why a hearse horse snickers hauling a lawyer's bones." Or Shakespeare's lines in Henry VI: "First thing we do, let's kill all the lawyers."

Listen to a view that is given prominence today:

[W]hile the law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers.<sup>18</sup>

The lawyer's duty to the law has been declared loud and clear. The American Bar Association's new Code of Professional Responsibility, in Canon 8, states: "A Lawyer Should Assist in Improving the Legal System."<sup>19</sup>

One quality that distinguishes the great from the mediocre lawyer is that the great one will do his part, individually or as a member of the organized bar, to improve his profession, the courts, and the law. Theodore Roosevelt put it well: "Every man owes some of his time to the upbuilding of the profession to which he belongs."<sup>20</sup>

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18. Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 283 (1962), quoted in Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 39 GEO. WASH. L. REV. 547 (1970).

19. ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS 33 (1969). See note 3, *supra*.

20. Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954).

Many establishment attorneys are worried today because the better younger lawyers are increasingly turning away from Wall Street firms and establishment practice to pioneer into new fields of legal research and reform. That's what Nader's Raiders, who now number in the hundreds, are all about.

This alienation of the young is understandable. I have come to have a deeper belief in the rather elementary proposition that you can't really separate quality of life and life style and personal attitudes and philosophy—or religion or whatever you may call it—from what it is you do. You can't have a sense of beauty and art, music, depth of human relationships, sense of human decency, and what it is we originally set out to try to do in this country, and have some job where you're not permitted to use your skills to the full extent to which you're capable, a job where you're required in effect to prostitute your talents to serve some end that you know is almost always wrong and occasionally venal. It's inconsistent.

We need whole people to make America work, and we need whole lawyers in and out of government to make the agencies work.

One choice for young attorneys today is what I call the "Solid Gold Train." The Solid Gold Train stops at the door of most of the major law schools on graduation day. It provides a mighty nice ride. It's air conditioned, there's nice upholstery, you're given a car all to yourself, nice food, alcohol served 24 hours a day, a nice view from the windows, lots of entertainment in the evenings, a nice wardrobe, and an ever-escalating salary. It's a pretty nice life, and many fellows opt for it. There's only one small sacrifice—kind of like the choice a woman has to make when she decides to become a prostitute. She has to give up a part of the integrity of her body in exchange for a financially rewarding life. And that's the choice a professional man has. Because before you can get on the Solid Gold Train you have to undergo this little bit of brain surgery—they remove your brain and use it for the course of the ride.

When the corporations are found guilty of polluting the air, or spreading oil on troubled waters, you go to court and defend them. When Ralph Nader points out that automobiles are unnecessarily causing 60,000 deaths a year, you go conduct an investigation of Ralph Nader. They have little jobs like that for you to do from time to time. But you are handsomely rewarded.

There's another option for young attorneys, and although it is not very attractive many more are beginning to choose it. This option is the dusty road that runs alongside the Solid Gold Train. There's no nice ride. You have to walk. It's not air-conditioned. The food is not so fine. The clothes are not so splendid. You are not always too sure where your next check is coming

from. It goes through the grape fields out in California, it leads around through Harlem, and it beats a path to the government in Washington now and then. A lot of people along the road can't afford to pay much, if anything, but they do appreciate your help. And the young lawyers who pass by the Solid Gold Train are helping the people change the country a little bit. They are providing the people with a little more education, a little more food to eat, a little better television, and a little more even-handed treatment from their government. That's not too much to ask is it? The people just want their sky back. And their bodies. And their heads.

The attorney has an immense responsibility to make the system work right. The bar needs to follow Louis D. Brandeis' example. Brandeis' career as a corporation lawyer for the railroads was characterized by an unusual "judicial temperament" that has never been deeply instilled in the bar as a whole.<sup>21</sup> In times like this, the bar might profitably study Brandeis' example of how individual attorneys on the Solid Gold Train can begin to curb some of their excesses.

"At his best," writes former FCC Commissioner Lee Loevinger, "the Washington lawyer serves as a corporate conscience; in business, as in personal conduct, the counsel of conscience is usually more lofty and effective in its demands than the threat of the public prosecutor." Even so, the profession would be much improved if the best lawyers in the best law firms would take a walk on the dusty road. There are more helpless people along the dirt road today than ever before, and they need our profession's compassion and competence.

We need to relearn this lesson the leaders of the organized bar learned some time ago:

The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon the unwilling Bar, the public's least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of *his* profession will, therefore, interest himself *actively* in the improvement of the law.<sup>22</sup>

So that is the lawyer's task as I see it. With this picture of the sorry state of our government and the law profession's duty to remedy it firmly in mind, we can now turn to the specific job of reforming the regulatory agencies.

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21. Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374, 386 (1969).

22. Report of Joint Conference of the ABA and the Association of American Law Schools, *Professional Responsibility*, 44 A.B.A.J. 1159, 1217 (1958) (emphasis added).

*Regulatory Crisis—Watching the Watchdogs*

We want public officials to have literally millions of American citizens looking over their shoulders at every move they make. (We want phones to ring in Washington. . . .) We want people watching and influencing every move that government makes. We want weak public officials to know they will be subject to criticism.<sup>23</sup>

The plight of our regulatory commissions is well known. Almost from the turn of the century, when Theodore Roosevelt first denounced the Interstate Commerce Commission, the federal regulatory agencies have been repeated and popular targets of criticism from all sides. Generations of blue-ribbon panels, bar association investigators, and muckraking journalists have chronicled the abuse.

The abuse remains. The Hoover Commission, among others, took the Federal Trade Commission to task in 1948. Three years ago a team of Nader's Raiders found that little had changed. The ABA's investigation which followed redocumented the charges.

Nearly all the agencies suffer from paltry budgets and political spoils systems that award high-paying staff jobs to loyal party members of doubtful competence. In large measure, our Presidents have as much of the blame to shoulder as anyone, for it is they who are ultimately responsible for the quality of the appointments. Bad appointments demoralize both the staff and the public.

*The Toll of Government's Abdication*

Until recently, many consumers probably thought their government was protecting them through agencies like the Food and Drug Administration, the Federal Communications Commission, the ICC, and FTC, and all the rest. Many citizens still think no company would dare sell a hazardous product. An editorial writer says: "The consumer with notions like that is a dreamer."<sup>24</sup>

Does anyone really doubt that the time for real consumer protection has come? Does anyone really doubt that we need a strong, effective independent citizens' protection agency somewhere—inside or outside government?

If there is any doubt, the skeptics should talk with the bloodied who walk into glass doors that are not safety-glazed, the orphans of men killed by unvented gas heaters, and the children blinded because of defective glass bottles.

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23. Letter to America, *supra* note 1.

24. *The Time for Consumer Protection*, Washington Post, July 6, 1970, § A at 18, col. 1. "Federal authority to curb hazards in consumer products," said the Product Safety Commission, "is virtually nonexistent." *Id.*

These horror stories, and many more, have been amply documented by a recent important report of the congressionally-appointed National Commission on Product Safety.<sup>25</sup> The commission documents how 30,000 citizens are killed every year, and 110,000 permanently disabled, merely because they consumed products that were hazardous or defective.

No wonder we have Nader's Raiders attacking the agencies across a broad front. In three exhaustive studies out last summer, the Raiders document in agonizing detail how the abdication of good government aids and abets corporate violence, lying, and abuse. The study group focuses on the Food and Drug Administration, the Interstate Commerce Commission, and the air pollution agencies.<sup>26</sup> The lessons, though, go beyond these three commissions to the whole range of regulation wherever it touches our national life. A reviewer was wont to remark after studying the three latest Nader reports:

The consumer of average ignorance has only the dimmest idea of how he is being lied to, cheated and manipulated by men of America's corporations, large, small, known and unknown.<sup>27</sup>

### *The Ailing ICC*

One current case in point is the ICC. The thunderous collapse of the Penn Central in June threw so much dust into the air that at first the ICC did not seem to be in the picture.<sup>28</sup> Only later, as the dust began to settle, did it become clear that the Penn Central's high-speed collision with bankruptcy—the largest business failure in history—provides a classic lesson in how regulators can help ruin a railroad. The court appointed trustees picking over the wreckage are finding plenty of people to blame for the crash—including auditors, directors, and regulators who asked too few questions too late.

Senator William Proxmire, the Wisconsin Democrat, was so disturbed at the collapse of the Penn Central he told a nation-wide audience on CBS' "Face the Nation" that the railroad's collapse illustrated the need for abolition of the ICC. The ICC, he said, has "failed and failed dismally." An ICC report, said to have been circulating within the agency for nearly a year, had reportedly concluded that many of the railroad mergers and reorganizations it has approved in recent years (perhaps including the Penn Central

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25. National Commission on Product Safety, Final Report (June 1970).

26. ESPOSITO, VANISHING AIR, THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION (1970); R. FELLMETH, THE INTERSTATE COMMERCE COMMISSION, THE RALPH NADER STUDY GROUP REPORT ON THE ICC AND TRANSPORTATION (1970); J. TURNER, THE CHEMICAL FEAST, THE RALPH NADER STUDY GROUP REPORT ON FOOD PROTECTION AND THE FOOD AND DRUG ADMINISTRATION (1970).

27. Washington Post, July 30, 1970, § D at 10, col. 3, 4.

28. For a detailed account, see Loving, *The Penn Central Bankruptcy Express*, FORTUNE, Aug. 1970, at 104, 164-65.

merger) have not been in the public interest. Yet the ICC raised hardly a whisper of protest as the Penn Central merger went through.

### *The Failing FCC*

The record has not been much brighter at my own commission. Last July I had the opportunity to do a survey of anti-consumer, anti-citizen activity at the FCC.<sup>29</sup> Nothing since that survey indicates that any dramatic improvement is in store for citizens' groups championing the public interest, as these specific decisions demonstrate:

1. The Commission, contrary to the clear implications of recent Supreme Court decisions, has imposed technical, legalistic "standing" requirements to prevent a citizen from offering information to us concerning the renewal of the licenses of powerful broadcasters. The majority rejected my argument that since the Communications Act requires us to make an affirmative finding that the renewal would be in "the public interest," we should not reject any information which would better enable us to make a rational decision.
2. The Commission refused to approve an agreement that would have allowed a Texas television station to reimburse the United Church of Christ for expenses the church incurred in helping Negroes oppose the station's license renewal. The church dropped the costly hiring and programming. If the Commission had chosen to approve the \$15,000 reimbursement, it could have set a powerful precedent to encourage local public-interest groups to fight as "private attorney generals" in forcing stations to do what the FCC is unable or unwilling to do: upgrade their performance.
3. In August 1970, the Commission rejected a petition by Friends of the Earth, a New York City-based ecology committee, that wanted spot advertisements aired to point up the less glamorous polluting effect of America's "automotive lifestyle." There is ample legal precedent for the Commission to encourage American television to put its automotive fantasies aside, pull its head out of the smog, and put the most potent merchandising tool yet developed by man—the spot ad—to work in curing instead of creating, in addressing rather than avoiding, one of America's greatest social ills: pollution.
4. The Commission has given few, if any, indications that persistent over-commercialization is enough of a problem to really bother about. Robert J. Choate, a nutritionist, appeared before a Senate subcommittee to complain about the "junk cereals" television merchandises to the nation's youngsters every day. For years the FCC has ignored this problem. Just how far will we allow the com-

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29. See *Hearings on S. 3434 and S. 2544 Before the Senate Subcomm. on Administrative Practice and Procedure, 91st Cong., 2d Sess. (1970)*.

mercial exploitation of television to go? A government commission in France has rejected a proposal for an independent TV network there in competition with the state-owned broadcasting system. The French fear commercially dominated telecasts. It's worth noting that ads on French state networks are restricted to 8 minutes a *day*; our networks run more than twice that much an *hour*.

5. The Commission recently found the public served by the merger of the nation's largest cable television company with the nation's third largest cable system. Needless to say, the rationale for this extraordinary conclusion is extremely hard to fathom—especially in view of the detailed and thoughtful concerns expressed by the Justice Department's antitrust division. It is ironic that at a time when the Commission is attempting to formulate wise, broad national communications policy in cable television it is prepared to approve, willy-nilly, on a case-by-case basis, the corporate requests which may wholly gut the Commission's general policies.

6. And, of course, the Commission has a long and undistinguished history of finding the public interest served, and renewal of licenses warranted, for stations that have proposed 33 minutes of commercials per hour, no news or public affairs programming, or that have been found guilty of dozens of technical violations, or even—in one instance we call “The Great Cocoa Fraud”—a station charged with bilking advertisers of \$41,000 through fraud.

With government agencies performing this way, no wonder the people are beginning to demand new consumer protectors, private and governmental, to restrain the agency-corporate interest alliance—what Mason Williams calls “The U. S. Government, Inc.” In the past few months there have been several significant reform proposals. They need to be analyzed and enlarged by all who know the inner-working of our agencies.

#### *Talk of Remedy*

Two significant programs for reform have been circulating. One set of proposals comes from Philip Elman, the widely respected member of the Federal Trade Commission who is retiring after nine years of Commission service. Commissioner Elman urged at the recent American Bar Association meeting in St. Louis “radical structural reform” of all the regulatory agencies.<sup>30</sup> Commissioner Elman would replace the cumbersome structure with a single administrative head and delegate all the judicial powers to an administrative court.

Commissioner Elman finds the agencies a confusing mixture of the in-

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30. *The Regulatory Process: A Personal View*, Address by Commissioner Philip Elman, Federal Trade Commission, at the ABA meeting, St. Louis, Mo., Aug. 11, 1970, excerpted in *WALL STREET JOURNAL*, Aug. 12, 1970, at 12, col. 3.

vestigative, judicial, and administrative. Their independence from direct control by the President (but still subject to White House pressure) has worked, paradoxically, Commissioner Elman believes, to make the agencies responsive to the narrow interests of the industries they regulate rather than to the broad public interest.

While I do not necessarily endorse all the specifics of Commissioner Elman's proposals, I do respect his scholarship, sense of responsibility, and practical wisdom; it is important to listen to the broad themes he is postulating:

It is almost a century, however, since the Interstate Commerce Commission, the grandfather of the Federal agencies, was created in 1887. We must now look to experience more than theory. And, like Louis Hector [of the CAB] and Newton Minow [of the FCC] before me, I have come to the view that the chronic unresponsiveness and basic deficiencies in agency performance are largely rooted in its organic structure and will not be cured by minor or transient personnel or procedural improvement. . . . It is time for radical structural reform.

. . . Broadly speaking, Government regulation is necessary and justified only when it serves the public interest, not the special interest of private groups or industries. . . . So-called "infant" industries may perhaps need a helping hand from Government for a short time; but we should not go on sheltering and subsidizing them forever in the guise of protective regulation. The present transportation mess is an obvious example of what results from misguided regulation. . . .

It is perhaps unnecessary to say, in conclusion, that no reforms in the structure of the regulatory agencies will succeed unless there also are radical changes in the climate of government and the political process. . . . We must institutionalize the means whereby the public may be aware of, and participate in, political and governmental processes that affect the quality of all our lives.<sup>31</sup>

Some of Commissioner Elman's suggestions are in accord with a report prepared by the President's Advisory Council on Executive Organization, headed by Litton Industries President Roy L. Ash.

The Ash report has yet to be released to the public. But already the report's broad outlines have emerged from the flow of comment on the recommendations in the business press. *Business Week* calls the Ash report "a

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31. *Id.* As the U.S. Court of Appeals for the District of Columbia recently said in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970):

[I]gnoring the general public's interests in order to better serve the carriers is not the proper response to the difficulties supposedly created by an outdated or unwieldy statutory procedure. After all, there is more to rate-making than providing carriers with sufficient revenue to meet their obligations to their creditors and to their stockholders.

*Id.* at 901.



dramatic set of proposals for reorganization" that in "most cases" means the commission form of government should be done away with altogether.<sup>32</sup> Multiheaded commissions, the Ash report apparently has decided, are slow to agree on decisions, prone to bog down in their own judicial procedures, and glacial in adapting to change.

A major Ash proposal is to merge the ICC, CAB, and Maritime Commission into a single transportation regulatory agency headed by a single executive. Except for the FCC, the other commissions would be restyled similarly. Following the Elman argument, the Ash council would transfer the agencies' judicial functions to a new administrative court.

Consumers must be wary.

The Ash "reforms" may prove to be nothing more than a monumental red herring. Under the twin veils of "revitalization" and "reformation" the Ash Council appears to be quietly burying what little hope of vigilance there remains for the lowly consumer in the regulatory process.

Perhaps this judgment is too hasty. But there must be some good reason why the White House has never released the Ash proposals to the public for debate on the national level. Why must we only learn of the council's work through leaks to the business press? From what little has surfaced so far, the Ash proposals appear noticeably *devoid* of any strong sentiments toward the current plight of the American consumer. Apparently no well known consumer advocates were on the President's panel.<sup>33</sup> As a columnist has pointed out, "The council is headed by Roy Ash, president of Litton Industries—one of the corporations, incidentally, that doesn't like to be regulated."<sup>34</sup> While the agencies surely need reforming, the columnist went on

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32. *Nixon Sends Up an Ash Balloon*, BUSINESS WEEK, Aug. 29, 1970, at 24.

33. In addition to Ash, according to BUSINESS WEEK, the council included: Former Texas Governor John B. Connally; Frederick R. Kappel, chairman of the executive committee of American Telephone & Telegraph Co.; Richard M. Paget, president of Cresap, McCormick & Paget, a management consulting firm; Walter N. Thayer, president of Whitney Communications Corp., and George P. Baker, former dean of the Harvard Graduate School of Business Administration. Mr. Baker did not participate in the regulatory reform studies, since he served on many boards of companies involved in the regulatory process. *Id.* at 25.

34. Anderson, *Nixon Bent on Regulator Overhaul*, Washington Post, Sept. 12, 1970, § C at 13, col. 7. The column begins:

President Nixon is planning a drastic overhaul of the Federal regulatory agencies. If he carries out his 1968 campaign pledges, a timid hierarchy of reluctant regulators will emerge from the reorganization.

The special interests simply don't like to be regulated, and in return for their campaign contributions, Mr. Nixon sympathized with them in 1968. He wrote a private letter to stockbrokers, delivered a campaign pitch to oilmen and gave personal assurances to other business tycoons that he would end 'government harassment.'

*Id.* at col. 5.

to say, "the public had better keep a watchful eye to make sure the fox doesn't redesign the chicken coop."

### *Suggestions for Reform*

I propose a rather different approach to this task of reform. I would not shuffle the bureaucracy organization charts into new forms with the same old hands in charge. I would not abolish the commissions, nor would I assign their tasks to the already overburdened court system. In many ways, the commissions' tripartite powers could be their greatest strength. Regulatory history at the Labor Board, and to a lesser extent at the Securities and Exchange Commission, bears this out.

When a great new job of lawmaking needs to be done there is no known substitute for a strong commission properly imbued with a firm legislative mandate and vigorous tripartite powers to prosecute, legislate, and judge.

There *are* remedies.

But these remedies are not the ones so often bandied about. There is nothing wrong with the regulatory theory at bottom, just as there is nothing wrong with democracy itself *in theory*. What democracy needs is nothing more than activation: reapportionment, voter registration (especially among the poor and black), and informed citizen discussion. Likewise, what the regulatory agencies most need is not so much new theory as new fidelity to established forms.

Stronger public-interest advocates need to be developed, and they must be ensured fair opportunities to participate in regulatory decision-making. The commissions need more independence. And the press (and thereby the public) must be given freer access to the administrative process.

Here are some specific ways we could begin to develop true participatory democracy:

1. *Private Attorney Generals.* What our regulatory process sorely needs now are strong, independent public interest law firms, along the lines outlined by Ralph Nader and others, so the law's vaunted adversary process can be balanced in fact—instead of gruesomely dominated, as it now is, by the law's corporate elite.

Here is one way Common Cause, or some other broadly based citizens' groups, could begin watching the watchdogs on behalf of the people. Common Cause could use part of its resources to fund talented young citizens' lawyers, in effect private attorney generals, to participate in the adversary process. What the nation needs is a thousand Naders, not just one, with hundreds of thousands of dollars, so our rusty legal machinery can begin humming again.

There are many other ways citizen participation in the administrative process could be enhanced. Consider these:

(i) The commissions generally do not hold investigatory hearings in selected communities throughout the country. They should. The commissions could begin making fact-finding tours through communities with problem situations—as congressional committees have done on issues concerning hunger, Indians, welfare, national parks, civil rights, and other pressing social problems. As it now stands, the FCC and its sister agencies play only passive roles waiting for the relatively rare citizen to come in and present his view (with the result that the citizen is often ignored or shut out).

This approach can work. Not long ago, for example, the Illinois Commerce Commission toured all over the state and listened to telephone customers by the hundreds. As a result, one of the commissioners reports, the Illinois commission refused to grant a rate increase until multiparty rural telephone service is upgraded.

(ii) The commissions' internal investigatory facilities can be improved as well. When citizens do file complaints, the response of my own commission, and I suspect of others too, is usually cursory and unresponsive. Complaints may be ignored altogether, or they may be dismissed with unhelpful and discouraging "boilerplate" replies. At least at the FCC this is not the fault of a staff which includes some of our ablest and most dedicated employees. Much of this is due to the commission's lack of investigative personnel, time, and money.

(iii) Because citizens groups often lack the experience and financing to obtain top-quality legal assistance, the commissions should consider asking law firms' young attorneys to contribute their assistance *pro bono*. This is often done in the criminal law. There is no good reason why it might not be established as well in administrative law—where the issues involved affect the daily lives of millions of Americans.

The agencies should at least request "amicus" briefs from independent sources. And if this proves insufficient, we might even consider establishing a "legal aid" bureau within each of the commissions separate from all other bureaus. This bureau could employ qualified lawyers trained to act as ombudsmen between citizens and their regulatory commissions.

Ralph Nader has told a Senate subcommittee:

The strongest case can be made . . . for actually requiring that the 300 top lawyers in Washington—already rich beyond the dreams of avarice—spend all their time representing the public interest. This is on the same level as telling people to stop what they are doing and put out fires, or stop what they are doing and

fight an epidemic, or stop what they are doing and save the country.<sup>35</sup>

(iv) Assuming adequate funding from Congress, and strong executive leadership with the will to act, many procedures are possible. Radio and television public service announcements could be prepared by the commissions to inform the public of their policies and to announce forthcoming adjudicative and rule making proceedings of wide importance. Similar notices could be run in newspapers and magazines. Direct mailings could be sent to all public-oriented interest groups, informing them of the commissions' actions. The agencies could draft and disseminate regulatory "primers" on how to present one's views to the various agencies.

2. *Commission Independence.* The original theory behind the "headless fourth branch" was to endow the commissions with sufficient independence in order to allow them to successfully pursue the public interest. Yet weakness—not independence—has come to be the hallmark of commissions and commissioners.

Today we have lost sight of this original goal of independence. A year ago, the ABA report on the Trade Commission noted that one of the qualities the commission needed most was "sufficient strength and independence"<sup>36</sup> to resist pressures from Congress, the Executive Branch, or the business community that "tend to cripple effective performance"<sup>37</sup> by the FTC. In theory perhaps there is independence, but it does not exist in reality. On Capitol Hill Sam Rayburn's admonition to young Congressmen, "To get along, go along," has long been the watchword for success; this is doubly true of the so-called "independent" regulatory agencies.

The current administration is unusual in its boast that the hallmark of its appointment policy is "political emphasis"<sup>38</sup> at the expense of expertise, independence, and diversity of views. This pressure on the so-called independent agencies has been well documented in our daily press. Headlines from the front page on the *Wall Street Journal* tell the story: "*Feeling the Heat:*

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35. N.Y. Times, July 22, 1970, at 24, col. 1.

36. ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 35 (1969).

37. *Id.*

38. Lydon, *Administration Is Stressing Political Loyalty for Jobs*, N.Y. Times, Sept. 9, 1970, at 30, col. 3 (City Ed.). The Administration also stresses industry loyalty more than consumer loyalty in FCC matters. J.W. Roberts, of Time Life Broadcast in Washington and president of the Radio and Television News Directors Association, reports on a luncheon conversation he had with Herbert G. Klein, Director of Communications for the Nixon Administration: "Klein maintained that the real way to determine the Nixon Administration's attitude toward broadcasters is from its appointments to the Federal Communications Commission, not through its speeches. And he posed the question—aren't the two Nixon Administration appointees good men, from the industry point of view?" RTNDA BULLETIN, Jan. 1970, at 2.

Regulatory Agencies, In Theory Independent, Face Nixon Pressure"<sup>39</sup>, and "Bugged by Burns: Some Nixonites Fret As Their Man at Fed Shows an Independence"<sup>40</sup>. On the same day the first *Wall Street Journal* headline appeared, I testified before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee to register my own feeling about the "vendetta against Commission employees" at the FCC who support the public interest.<sup>41</sup>

What can be done?

Again, plenty. As a starter, a prestigious citizens' committee, like Common Cause or any alliance of national citizens' action groups, could begin keeping and publicizing lists of recommended commissioners for the various federal regulatory agencies much in the way the organized bar now screens judicial appointments for the President and Congress. In this way, the public can begin to see to it that commissioners and commissions are more responsive to and representative of America, representative enough to include black commissioners, women commissioners, academics, the poor, more youth, and the numerous other elements of contemporary society that are now wholly shut out of the regulatory process.

On another level, it is clear that staff improvements could contribute greatly to strengthening commission independence. In general, entrenched bureau chiefs and agency co-ordinators dominate decision-making at the FCC and, I suspect, at the other agencies as well. At the FCC, the commissioners' own offices are hopelessly understaffed (two assistants per commissioner to confront an agency of 1,600), and it is a major undertaking for each commissioner to be prepared even to ratify whatever is presented by the agency staff, let alone participate intelligently.

There is a positive (although understandable) disinclination on the part of the agency staff to present alternatives to commissioners for their consideration. On those rare occasions when the staff is unable to work out their own compromises on important questions before presentation to commissioners,

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39. *Wall Street Journal*, July 21, 1970, at 1, col. 6; *Influencing the Agencies*, *Wall Street Journal*, Aug. 7, 1970, at 8, col. 1, 2.

40. *Wall Street Journal*, Aug. 31, 1970, at 1, col. 6.

41. Testimony of FCC Commissioner Nicholas Johnson during *Hearings on S. 3434 and S. 2544 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 91st Cong., 2d Sess. (1970); *Washington Post*, July 22, 1970, § D at 9, col. 7. The FCC's general counsel is a prime example. On July 2, I told the subcommittee: "General Counsel Henry Geller has recently won an important award as one of the most outstanding Federal employees in Washington. His distinguished services as the agency general counsel cover a nine-year period that included four chairmen, Republicans and Democrats. Chairman Burch has given him the highest public praise for his abilities. But Henry Geller soon will no longer be the FCC General Counsel—another victim of White House pressure. . . ."

the resulting staff disagreement is discouraged. It shouldn't be. The staff should be allowed the formulation of alternative and dissenting views so commissioners have the full panoply of options open to them when they determine major issues.

Now may be the time to build independence into the regulatory process by giving commissioners salaries comparable to the captains of industry they are supposed to keep an eye on, as well as adequate pensions. This would allow the President and Congress to recruit more competent regulators, and, in turn, bar the regulators return to the industries they regulate after a period of government service. Now many civil servants are performing in the agencies with one eye on their next job in the industries they are supposed to be monitoring. Compromises are inevitable. The public interest is bound to suffer.

With the public interest so guarded, there would be no need to strip the agencies of their adjudicatory functions for reassignment to the courts. If the commissioners were truly independent, and consumer advocates were participating actively, in fact as well as in the theory, commissioners could be insulated from venal influence from the vested interests and thereby free to work as true judges on behalf of the public interest.

3. *Let the Press In.* There is abroad today a far too facile assumption by the press and government alike that, on a broad range of public policy questions, the public is just not to be trusted with a knowledge of what is going on. This notion strikes at the deepest tap roots of our democratic process.

The denial of information which a person needs in order to have a rewarding existence—or even to survive—in our modern, complex society can have as important an effect on a person's life as years of imprisonment. As Fred Friendly, former president of CBS News says, "What the American people don't know can kill them."

NBC newsman Sander Vanocur recently gave a tough talk on the relationship of the media and the government. At one point he said, "All governments wind up lying deliberately or inadvertently because they have to justify their policies. . . ."<sup>42</sup>

It is the media's job to keep government honest. And if we are going to keep the watchdog agencies honest, the press as well as the public must have access to the bureaucratic process of settling issues and making decisions.

Bureaucrats frequently pay lip-service to the press and its first amendment rights. All of us like to remind ourselves that we have a free press vigor-

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42. VARIETY, July 22, 1970, at 1, col. 2. The address was made at Harper College in Palatine, Illinois.

ous enough to search out the government goldbrickers, the public policy bumlbers, the penny-ante politicians, and the lawyer-lobbyists who champion the corporate interests. Yet in the regulatory agencies, our free press is free in little but name only. The Freedom of Information Act, which was designed to give citizens access to information about their commissions, has actually been hung by its many loopholes. Again, the beautiful theory is there. But when information is selectively withheld from the public and policy pronouncements are drowned in a self-serving trade press, the free-press theory quickly evaporates into an illusion.

The press, though, can still be potent. This is illustrated in a passage of Douglas Cater's new Washington novel where a bureaucrat gets to "bellyaching" about the press. It seems that a new policy he has carefully nurtured for months has been blasted into oblivion by a single newspaper story leaked by a foe:

Henry Mann, waxing self-righteous as spokesman for the free press, puts up a spirited defense. "My dear boy," he addresses the bureaucrat five years his elder, "you seem to think policy can be grown like mushrooms in a damp dark cellar. You are wrong. This is a democracy and the people have a right to know what you are doing for them, or, should I say, *to* them."<sup>43</sup>

The Federal Power Commission is caught currently in a squabble over public information that is characteristic of an increasing trend. Consumers are demanding that the FPC make public the information the agency has acquired on natural gas reserves of companies operating in Louisiana. The accuracy of the information on natural gas reserves has become an issue since the FPC announced last year, after studying industry-furnished data, that the fuel was in short supply—and the industry has now used this to ask for a rate hike that could double the price gas producers get for the fuel. Consumers are understandably outraged. They fear that their government may be about to act without giving the public a chance to pick through the corporate reasons why.

At the FCC the public also suffers from information discrimination. The commission is infamous for its "leaks" of private information, which flows down a direct and much-used pipeline to elite broadcasters, the trade press,

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43. D. CARTER, DANA: *THE IRRELEVANT MAN* (1970), *quoted in* Washington Post, Aug. 16, 1970, § B at 3, col. 3.

Sam Lubell, the polster and political analyst, sees a "new structure of political bargaining" which has come into being, a "struggle for political visibility, to make oneself seen and heard." This makes our press—print and broadcast—important as never before. Mr. Lubell writes in a forthcoming book: "The great peace and civil rights marches on Washington have been the TV spectaculars which illustrate the huge scale on which attention-getting is being organized." S. LUBELL, *THE HIDDEN CRISIS IN AMERICAN POLITICS* (1970), *excerpted in* Wall Street Journal, Sept. 1, 1970, at 12, col. 5.

and the lawyer-lobbyists who have built lucrative careers on getting information and using it before the public does.

If the public interest is ever to be served, the agencies must be opened to the press and public alike so citizens have a better idea of what is being done for and to them. The sooner the agencies dispense with many of the unneeded "executive sessions," secret staff documents, closed meetings, and industry-oriented oral presentations—the sooner the agencies allow reporters and television cameras into closed meetings—the sooner the commonweal will begin to emerge through the web of vested interests.

#### *Toward More Responsive Government*

There is work to do, and I am inviting you to help get it done. We must end the war. We must bring about a drastic change in national priorities. We must renew our attack on poverty and discrimination. And we must keep at it until we build a new America.<sup>44</sup>

In sum, let me restate the theme; rather than dismembering the agencies as we know them we must revitalize the commissions by paying a new fidelity to the original theories.

The Ash Council may be right on several counts. Perhaps the ICC, the CAB, and the Maritime Commission could be constructively constituted under one super transportation agency. The need for the other suggested reforms is far from clear. There is nothing wrong with the current regulatory process that sound presidential appointments could not cure. The public trust would be in secure hands with a majority of Philip Elmans and Mary Gardiner Joneses on the FTC, or a majority of Kenneth Coxes at the FCC.

There is no known substitute for our commission system when the legislature has decided that what is needed is a continuing, systematic supervisory authority. True, the commissions have not been able to fulfill the original lofty theory. But this can best be remedied by refurbished presidential appointments, provocative new legislative mandates with adequate funding, and sterner judicial review.

Indeed, the commission form of government—properly goaded and guarded—may be the consumer's last best hope for promoting his civil rights. Apparently we cannot count too heavily on the packages of consumer legislation currently being wrapped up by the Congress. Under the pretty ribbons, the consumer experts say, the congressional and White House plans are little more than empty boxes.<sup>45</sup>

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44. Letter to America, *supra* note 1.

45. The Time for Consumer Protection, *Washington Post*, July 6, 1970, § A at 18, col. 1-2.



If there is to be a great process of uplifting, the organized bar and the industries themselves will have to play major roles. The communications industry serves to illustrate.

Edward R. Murrow believed, along with Jefferson, that an informed public will make its own best decisions if given the facts on which to judge. Edward R. Murrow, in his time, felt that television did not demand enough of its audience. The same is even more true today. Alexander Kendrick writes of Murrow that, “[h]e himself appealed to the courage, decency and fair play in people; he was able, like Churchill, a man with whom he was much taken, to lift people out of themselves.”<sup>46</sup>

That is television’s great task today. To help lift a people out of themselves.

Yet the feeling lingers that our government, like television, is letting us down. There is a mood akin to what historian Charles A. Beard expressed upon his resignation from Columbia University in 1917. He was bitter. He felt the university trustees’ conduct betrayed a profound misconception of the true function of institutions and learning. “I have been driven to the conclusion,” he said, “that the University is really under the control of a small and active group of Trustees who have no standing in the world of education, who are reactionary and visionless in politics, narrow and medieval in religion.”

That same feeling lingers about television, the bar, government, and other institutions today. One of the young New Lawyers expresses it best:

Much more is askew than the regulatory system. The failure of the grand design touches all American institutions—regulatory agencies, Congressional bodies, courts, corporate entities, universities—none have been successful in insuring the highest quality of life possible for the most number of people. All have fallen short of their professed goals.<sup>47</sup>

As the Great Disintegration sets in, government at all levels (the regulators as well as the regulated) has become so suspect that the American public appears on the verge of telling its various governmental entities what Cromwell told the Long Parliament in the late 1640’s on the eve of the revolt against the king:

You have sat too long here for any good you have been doing.  
Depart I say and let us have done with you. In the name of God,  
go!

There are answers. Will you help?

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46. A. KENDRICK, *PRIME TIME 6* (1969).

47. J. TURNER, *supra* note 26, at 252.