Readings
of particular interest

In the Same Boat

Bureaucrats and Brainpower: Government Regulation of Universities, edited by Paul Seabury (San Francisco: Institute for Contemporary Studies, 1979), 171 pp.

This collection of essays, edited by University of California political scientist Paul Seabury, examines the growing impact of government regulation—federal and state, but mostly federal—on American universities. Major themes recur: So far, the regulatory thrust has stopped short of the substance of research and teaching —but that threat is coming closer, and at an accelerating rate. Thus, universities find themselves increasingly in the same boat as other autonomous institutions in our society—targets of governmental intrusion into their proper business and of blanket rules (often laudable on their face) imposed for "the common good." As Seabury puts it: "The once-private sector of American life, what remains of it, is . . . indivisible."

Nathan Glazer, Harvard professor of education and sociology, recalls that, whereas government regulation of business was rooted in suspicion and even hostility, the regulation of higher education arose from wholly benign motives. Seabury expresses the same idea in his epilogue: "Universities were *not* charged by Washington lawmakers and rulemakers with being malefactors of great wealth, social predators, or ruthless exploiters of the masses. . . . The regulations flowered in consequence of a benign beneficence. . . . So valuable were . . . [universities] that they could be regarded as key social laboratories in which a new and better generation of Americans could be raised." According to Seabury, it was hoped that the "gentle hand" of the state would make "the good" still better.

Glazer believes, however, that what once was benign has become an adversary relationship, for three reasons. First, the regulators soon uncovered abuses on the campus that they felt needed policing, such as discrimination (which Glazer thinks has been exaggerated) and the shoddy practices of some profit-making proprietary vocational schools catering to GI-bill veterans. Second, regulations designed for industry or employers in general (concerning health, safety, equal pay, and so on) were inappropriately applied to the academic setting. Third, many of the officials charged with "helping" the universities by dispensing federal grants came to see them as elitist (in their application of what the universities regarded as selection by merit) and as insufficiently responsive to the special claims of affirmative action. This adversary relationship between educators and bureaucrats has been exacerbated by the "inevitable tendency for regulation to expand" —even beyond what the law requires—and by the activities of "special interest groups" backed by the courts.

The president of Stanford University, Richard W. Lyman, provides a first-hand account of the effect of proliferating federal regulations on the university. Affirmative action, OSHA and environmental rules, labor regulations, and a host of other directives from Washington (and, in his case, Sacramento) are beginning to imperil the core functions of research and teaching. Lyman counsels against overreaction, however: many of these measures are inspired by a desire to make the university, and the nation, more just, more egalitarian, and more humane. So far, the critical interests of academic freedom and curriculum content have not come under direct attack. But should it come, Lyman concludes, "we cannot expect others to save us."

In two complementary articles, former HEW Secretary Caspar W. Weinberger and Miro M. Todorovich, a City University of New York physicist and executive secretary of University Centers for Rational Alternatives,

bracket the issue of affirmative action—and in their judgment its inevitable twin, reverse discrimination—from their different perspectives of "chief regulator" and academic. They share the views that affirmative action is neither mandated in law nor clearly defined in regulations; that federal regulators are pushing "nondiscrimination" in hiring even beyond the bounds of remedying past discrimination; that "hiring by the numbers" threatens not only universities but all private, autonomous institutions in our society; that the would-be beneficiaries are themselves demeaned by the presumption that they cannot succeed on merit alone (which, ironically, was the essence of the problem of discrimination in the first place); and that random selection according to statistical models does particular violence to the basic academic principle of hiring the "best" and the most promising among available specialists. Weinberger also describes the near impossibility of even a cabinet officer enforcing policy guidance on his own bureaucracy: the regulators take on their own causes in their own way. Todorovich makes the point that, in the wake of *Bakke*, a "new regulatory strategy" is shifting onto the targets of regulation not only the burden of "proving the negative" but also a major share of the costs of regulation—thus further eroding congressional control through the appropriations process.

Robert L. Sproull, himself a scientist and now president of the University of Rochester, traces the history of government support of scientific research—a relationship that, in its World War II phase, brought rich returns to both university research and society. This cooperative era has now given way, Sproull argues, to "we/they" tensions—to duplicative regulation, excessive paperwork, micromanagement from Washington, and less of productive and imaginative research for each federal dollar. Among the specific sources of tension, Sproull identifies the following: (1) the better a university functions, the harder it is to "unscramble the costs"—which is anathema to the government auditor; (2) the typical government contract permits little of the flexibility, the following out of unplanned paths, that is the mark of the best scientific research; (3) research thrives on the freedom of the individual investigator and thus on decentralization—which, again, goes against the regulatory grain; and (4) science, and basic research most of all, look to the twenty-first century and even beyond—for which "there is no constituency" in the special-interest world of the typical regulator. Sproull is pessimistic about the short-term prospects for any substantial change in this adversary environment and about the extent to which basic scientific research has become hostage to political fashions and unpredictabilities.

Seabury makes a similar point in his introductory essay: "Probably very few university administrators, at the beginning, were perceptive enough to wonder at what point the pleasant experience of being a beneficiary of government largesse would be transformed into the *condition* of permanent dependence. Yet such," he believes, "is the condition of most universities today."

Choosing Decision-Making Procedures

"The Choice between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy" by Richard J. Pierce, *Hastings Law Journal*, vol. 31 (September 1979), pp. 1-102.

Richard J. Pierce of Kansas University School of Law argues that formal adjudication is used too often in regulating the energy industry. He maintains that the trial-type procedures regularly used by the Federal Energy Regulatory Commission are more expensive and less effective than alternative procedures that are an outgrowth of informal rulemaking.

The article begins with an empirical study of FERC's attempt to develop and apply natural gas curtailment policy through adjudicatory proceedings. Pierce shows that nine years of litigation in eight such proceedings have not yet produced a definitive policy, while costing the parties over $60 million in litigation expense. Moreover, the social costs of using formal adjudication far exceed the out-of-pocket litigation costs because (1) prolonged uncertainty concerning gas curtailment rules inhibits business investment and (2) decisions based on lengthy trial transcripts filled with stale specific facts are likely to ignore broad policy issues.

Turning to alternatives, Pierce examines the many techniques proposed for expediting adjudication proceedings while retaining their basic characteristics. He finds that these techniques have only limited potential for reducing decision-making time but require substantial sacrifice of the values of the judicial paradigm on which formal adjudication is modeled. Formal adjudication is an expensive and time-consuming method (1) because regulatory proceedings have become very complicated, requiring resolution of hundreds of issues in each proceeding, (2) because public policy encourages broad public participation in regulatory decision making, permitting scores of affected individuals and groups to become parties, and (3) because the sole method of resolving factual disputes in formal adjudication is cross-examination. Cross-examination by scores of parties concerning hundreds of disputed issues requires considerable time and expense no matter how effectively an agency or administrative law judge manages the litigation. Thus, if cross-examination is retained, formal adjudicatory proceedings can be expedited only by artificially reducing the number of disputed issues or limiting public participation. But, Pierce maintains, there is no satisfactory way of doing the first of these, and the second must be rejected on policy grounds.

The alternative to formal adjudication provided in the Administrative Procedure Act is informal notice-and-comment rulemaking. Taking several recent regulatory decisions as examples, Pierce analyzes the way this procedure has worked and concludes that it does not provide an adequate check on agency discretion: too often it permits regulatory decisions premised on demonstrably inaccurate facts. However, there is a way to incorporate into informal rulemaking proceedings methods for challenging factual predicates that are equal or superior to those available in formal adjudication and that do not sacrifice efficiency of informal rulemaking. According to Pierce, the key to procedural reform of regulation can be found in the concept of "expanded notice," developed by the U.S. Court of Appeals for the District of Columbia in *Portland Cement* v. *Ruckelshaus* (1973) and incorporated by Congress in the Department of Energy Organization Act. Expanded notice requires an agency using informal rulemaking to make available to affected members of the public—in time for effective public comment—all studies and other kinds of data used by the agency in formulating its proposed rule. This requirement forces agencies to identify and consider critically their sources of data, and gives affected members of the public an opportunity to note significant flaws in data or methodology.

Pierce then analyzes the legal framework within which agencies can select decision-making procedures. Two significant questions were left open by the Supreme Court's decision in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, Inc.* (1976): (1) Should an agency be permitted to eliminate formal adjudication even when the agency makes a decision based on adjudicative facts unique to an individual or company? and (2) should an agency be required to use expanded notice when it acts through informal rulemaking? Pierce says yes to both questions. Formal adjudication is so costly and time-consuming that an agency should only be required to use it in very rare cases, such as where a penalty is being levied. Expanded notice, however, is capable of bringing about a substantial improvement in the quality of agency decision making, with only a slight increase in the time and the cost of informal rulemaking proceedings.

Rules and Risks

Employment Hazards: An Investigation of Market Performance by W. Kip Viscusi (Cambridge: Harvard University Press, 1979), 311 pp.

Proponents of government regulation of occupational hazards generally cite as the justification for intervention the inadequacies of the labor market, particularly imperfect information about job risks. W. Kip Viscusi, deputy director of the Council on Wage and Price Stability, provides a conceptual and empirical analysis of the economic implications of job hazards that challenges many of these traditional views.

Viscusi's approach begins with Adam Smith's classic analysis of compensating wage differentials in which workers will demand additional wages to compensate them for jobs

perceived as more hazardous. The principal premise on which the theory operates is that workers are aware of the risks they face. Viscusi's examination of a large sample of blue-collar workers indicates that, contrary to the widespread belief, Smith's premise is often correct.

For both subjective measures of risk perception and objective industry risk indices, total compensation for all job risks was $400 per blue-collar worker in 1969. Translated into current dollars, these results imply that workers receive wage premiums for risk that reflect an implicit value of $2 million for a life and of $17,000 for a nonfatal job injury.

Although the importance of risk premiums is well established, few analysts would maintain that all workers are fully informed of the risks they face. Viscusi maintains, however, that market outcomes are not entirely capricious even if worker information is not perfect. In particular, there is often the opportunity for on-the-job learning about the risks. If the information acquired by the worker is sufficiently unfavorable, he can quit. On an empirical basis, job risks are powerful determinants of worker job-search activities, job satisfaction, and the propensity to quit jobs. As many as one-third of all those in manufacturing who quit their jobs may do so because of post-hiring realization of job risks.

Viscusi concludes that the quit mechanism and wage premiums for risk are complementary economic processes. The existence of informational inadequacies does not imply that labor markets cease to function. Rather, new forms of economic response are brought to bear.

Measuring OSHA's Impact on Injury Rates

"The Impact of OSHA Inspections on Manufacturing Injury Rates" by Robert Stewart Smith, *The Journal of Human Resources*, vol. 14 (Spring 1979), pp. 145-170.

The task of identifying and measuring the impact of the Occupational Safety and Health Administration on injury rates in the United States has proved to be difficult. For one thing, according to the author of this article, so many different forces affect injuries that year-to-year movements in the aggregate injury rate are an unreliable basis for estimating the agency's impact. For another, it is probable that OSHA's maximum impact is modest and confined to the firms inspected. Studies of the causes of work injuries indicate that OSHA's regulations could, at most, reduce injuries by approximately 25 percent. Given that the fines levied on first offenders are tiny, one is led to speculate that an impact even close to the maximum could be felt only among *inspected* plants.

In this study, economist Robert Stewart Smith of the New York State School of Industrial and Labor Relations, Cornell University, assesses the effects of OSHA inspections by comparing the time path of injury rates for plants inspected "early" with those inspected "late" in 1973 and 1974. The idea is that the injury rates of firms inspected in March or April of either year should show a decline relative to those inspected so late in the year (November-December) that abatement of violations could not possibly affect the yearly injury rate. Injury rate data for firms inspected in 1973 were compared for both 1973 and 1974, but data limitations confined the analysis of 1974 inspections to the effects produced during that one year. The study covers 2,362 inspections in 1973 and 2,492 in 1974. Controls for a plant's 1972 injury rate, its employment changes, and its industry were utilized in order to isolate the independent effects of OSHA inspections.

Smith finds that his data support the following conclusions: (1) The 1973 inspections reduced injury rates in inspected plants by 16 percent—with the full effects estimated to have occurred within three-and-a-half months. (2) The 1974 inspections, however, had no apparent effect—a result the author tentatively attributes to an increased proportion of repeat inspections (where violations are less likely) and to a dramatic influx of new, inexperienced inspectors. (3) The largest inspection-related reductions in injury rates occurred at the smallest and most dangerous plants, suggesting that OSHA's inspection program should continue to emphasize high-injury plants but should be extended to cover a larger proportion of small plants.

In Smith's view, it would be incautious to assert, as some observers have done, that

OSHA's program has had no benign influence on injury rates. However, to judge whether the benefits of this effort have exceeded the costs is another matter—one not dealt with in this analysis.

On the FTC's Antitrust Caseload

Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy by Robert A. Katzmann (Cambridge, Mass.: MIT Press, 1980), 223 pp.

The debate over whether the Federal Trade Commission goes too far in taking antitrust action against large businesses, or not far enough, raises the fundamental question of why the agency has pursued the kinds of antitrust cases it has in the past years. In this book, Robert A. Katzmann examines the factors that explain the FTC's caseload and account for the difficulties that the agency has encountered in pursuing the "big" case. Katzmann, who holds a Ph.D. in government from Harvard University, is now a J.D. candidate at the Yale Law School.

The book focuses on the organizational context in which the FTC makes its decisions, showing how organizational arrangements affect the distribution of power among the participants in the case-selection process, the manner in which information is gathered, the types of data that are collected, the kinds of policy issues that are discussed, the choices that are made, and the ways in which decisions are implemented.

Katzmann finds that, in the period examined, the FTC's caseload resulted largely from the interaction between two often-opposed bureaus charged with antitrust enforcement responsibilities—the Bureau of Competition (the lawyers' unit) and the Bureau of Economics (the economists' unit). These bureaus are separate and coequal; and each has its own conception of the kinds of antitrust goals and cases the agency should pursue. Disputes between them arise in part because of legitimate differences about how data should be interpreted, but more fundamentally, because lawyers and economists have different professional norms and personal goals. The economist, by training wary of interference with the market mechanism, perceives his task as the prevention of unwarranted government action. In contrast, the lawyer, trained to be prosecution-minded, believes his career prospects depend upon his securing trial experience. Clearly, Katzmann maintains, an organizational study of the FTC tells us much about the impact of professionalism on outcomes.

Within the Bureau of Competition, debate about the ends of antitrust policy and the means to achieve those objectives has centered on two different conceptions of antitrust policy: the "reactive" and the "proactive" approach. Proponents of the "reactive" approach, which holds that the Bureau of Competition should rely upon letters of complaint to prompt its investigations, tend to be skeptical about big structural cases—cases that seek to attack fundamental market imperfections and presumably to yield substantial benefits for the consumer. They stress the problems associated with prosecuting such cases, including technical complexity, lack of qualified staff, high turnover rate, and the uncertainty of the outcome, and argue that the FTC should pursue, instead, cases directed against illegal practices because such cases are relatively simple to investigate and try. Proponents of the "proactive" approach believe the agency should focus its scarce resources on combatting abuses in those sectors of the economy that most affect consumers and should champion structural cases as a vehicle to achieve its goals. They argue that, with the aid of planning mechanisms, the FTC should be able to establish priorities and to weigh the costs and benefits of possible enforcement actions.

Although the FTC has given increasing emphasis to the "proactive" approach, decision makers still allocate resources to some "reactive" cases that are unlikely to yield much consumer benefit. Such cases are pursued in order to establish a legal precedent, to deter businesses that might be tempted to violate the law, and to show Congress that the commission intends to enforce all the laws. Perhaps more important, the director of the Bureau of Competition, notwithstanding his desire to satisfy the Bureau of Economics or his preference for structural cases and industry-wide investigations, authorizes the opening of a number of easily prosecuted cases in order to meet the career expectations of attorneys

who value trial experience. Such cases lessen (if only temporarily) the dissatisfaction among attorneys who are assigned to the large, structural investigations that involve years and years of effort.

While the FTC has demonstrated its commitment to undertake large cases, it is clear, Katzmann states, that merely allocating resources to such cases does not ensure their successful prosecution. Complex structural matters require lawyers who are not only highly skillful in the law but also familiar with industrial organization—a combination that comes only with long experience. If the mammoth structural cases are to be pursued efficiently, then years of coordinated activity by a cohesive and experienced team of attorneys is demanded. The high turnover rate among FTC lawyers, lured away by the higher salaries offered in the private sector, makes prosecution of such cases especially difficult. By the time the matter reaches trial (if it does at all), the original team of attorneys (and most probably several later teams) will almost certainly have left the agency.

Katzmann disputes the twin claims that governmental decisions simply reflect the desires of agency officials to maximize their budgets, power, or convenience and that government necessarily serves the economic interest it is supposed to regulate. In his view, the FTC's behavior is not simply that of a rational, self-interested actor. Rather, the commission has struggled in the last several years to pursue actions that it perceives to be in the public interest, although it has not always been certain as to which policy course would serve that interest.

The author also discusses the commission form of governance as well as proposals for upgrading the quality of antitrust enforcement —for example, procedural reform, contracting for services from the private bar, rulemaking, the Trade Court, and shifting the FTC's antitrust duties to the Department of Justice's Antitrust Division. He argues that the latter course would not solve the difficulties involved in prosecuting the "big" case. Finally, the book assesses whether legal processes are always fit to resolve complex economic questions and examines the role of the FTC as a protector of competition.

National Health Insurance
(*Continued from page 28*)

that would assist those who fall between the cracks of current public programs and the private insurance market and yet preserve the basic elements of our health-care system as it now exists.

The difficulty with bills like Kennedy-Waxman is not that they would improve coverage for the disadvantaged, but that they also would stifle competition in the health insurance market. Indeed, competition in this market needs *encouragement*, and the tax-incentive proposals represent a step in the right direction. But the tendency of advocates of this approach to couple it with a universal standard health package reduces the potential for moderating cost increases. While the tax incentives might induce consumers to shop for the mix of premiums, risk, and copayments that suits their preferences, the more comprehensive the accompanying universal "floor" on covered benefits, the less meaningful the consumers' actual choice. The initial benefit package might indeed represent minimum coverage that no one should be without; once the principle of a minimum is established, however, it would be easy to enrich the package regularly—and the march toward comprehensive national health insurance would surely proceed.

Whether we want to make comprehensive health coverage available to everyone in the United States is obviously a momentous policy question, and I do not seek to answer it here. What I criticize in both Kennedy-Waxman and Carter is the insistence—indeed, the fiction—that we can avoid the long-term inflationary impact of such a policy by imposing strict provider controls. This promise is misleading. If we are going to make these improvements in insurance coverage, we are going to have to pay for them. An elaborate system of provider controls may make it possible to mask this cost or temporarily divert some of it from a monetary to a nonmonetary form; but it cannot make the cost go away. And in addressing the problem of the health insurance "have nots," we must recognize the potential of all these current proposals, good intentions notwithstanding, for altering the basic character of a health-care system that, on the whole, gives American consumers what they want. ■