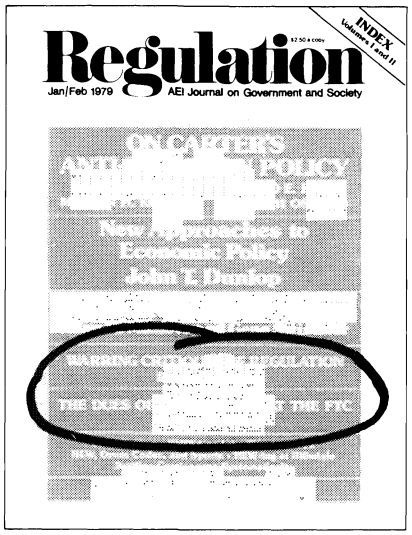
Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.



Critiques of Regulation

TO THE EDITOR:

In *Warring Critiques of Regulation* (*Regulation,* January/February 1979), Robert Reich develops the theme that there are two distinct strains of criticism of contemporary government regulation, one holding that the process suffers from an inadequate infusion of democracy in the form of effective public participation, and the other pointing to a lack of focus on economic consequences. I agree with him about the ultimate potential for conflict between these views, but I question whether they are at present—as the title of the article suggests—such complete antonyms.

The pressure for increased public participation is only partially related to the idea that the regulatory process should be democratic in the sense that the views of particular constituencies should be important, regardless of basis, simply because they are indeed the views of these groups. To the courts, at least, another and perhaps stronger reason for forcing agencies to adopt more open regulatory processes is discomfort with the quality of agency technical analysis and hope that public participation will prove an effective method of quality control. See, for example, the recent decision in *Environmental Defense Fund* v. *Blum,* 458 F. Supp. 650 (D.D.C. 1978), which makes the usual judicial deference to agency expertise explicitly contingent on the existence of an opportunity for outside parties to review the work.

Nor does the "economic impact" critique as currently practiced seem to me quite as extreme as the article would have it. While the argument that regulatory policies should maximize public welfare from an economic point of view is readily defensible, much economic criticism of regulation at present is even more fundamental. It is based not on the conclusion that regulation is failing to maximize welfare but on the conclusion that the very sign of the impact is wrong, and that better economic analysis might at least change it from minus to plus.

Over the longer term, though, the potential for conflict does exist. As Professor J. O. Freedman points out in *Crisis and Legitimacy* (Cambridge University Press 1978), the current crisis of regulation is at heart a problem of legitimacy. The classic view that agency action is cloaked in the legitimacy of the democratic legislature has come unraveled, and the democratic and technocratic critiques represent alternative ways of trying to create an acceptable rationale for the existence of agency power. The first would do this by applying direct democracy to the regulatory process itself. The second concentrates on reweaving the congressional cloak by emphasizing that the historic basis for legitimacy of administrative action has been that agencies could, under the direction of the democratic legislature, apply expert knowledge to problems in a way that is not possible for a representative assembly. In this technocratic view, the existence and use of genuine rather than presumed or fictional expertise is the key to acceptance by the Congress and by the people, and much of the current problem is due precisely to the fact that the agencies have let their bases of expertise and competence deteriorate because they have been captivated by the idea that they can function as mini-legislatures.

James V. Delong,
Administrative Conference of the United States

Due Process

TO THE EDITOR:

Jeremy Rabkin's assertion that it would be "plainly unfortunate" if courts review rulemaking proceedings to determine whether regulators harbor inappropriate biases ("Rulemaking, Bias, and the Dues of Due Process at the FTC," *Regulation,* January/February 1979) is built on the traditional rigid dichotomy between rulemaking and adjudication. The distinction applies relatively well when rulemaking proceedings remain inquiries into general, policy-type facts or "legislative" facts—the kind that are presented in a congressional hearing. A prime example of such a proceeding is the one in which the FCC determined the number of radio stations any one company could own: it is purely a policy choice.

Unfortunately, much modern rulemaking simply does not fit this mold and so the former stark distinction between rulemaking and adjudication has become increasingly blurred. Rulemaking authority today is often predicated on a prior determination of facts—not facts involving a single company or a particular past event, as in adjudication, but on technical facts. The factual determination limits the discretion available to the agency and holds it in check. For example, OSHA can regulate occupational exposure to a chemical only if to do so would improve the health of employees. Thus, before OSHA can issue a standard, it must make a factual determination that the chemical causes illness. Only then can it exercise its discretion in determining what level of exposure to permit

and which safeguards in particular to require.

Rabkin's analysis ignores the important factual component of modern rulemaking. It is plainly inappropriate for regulators to take so strong a position on a proposal that they could not fairly consider the factual information to be determined before the agency acts. It would, for example, be inappropriate for an administrator of OSHA to argue for the ban of a chemical from the workplace before any factual inquiries have been made. Rather, the facts must be fairly considered before there is room for policy.

As to general policy, Rabkin is probably right: The President is entitled to appoint people with particular viewpoints, and they in turn are entitled to seek implementation of the policies they favor. On the other hand, the regulator must not take such an adamant position that he can no longer be fair in making necessary factual determinations. If the bias in favor of a particular policy is so strong that it corrupts the ability to make the required determination, then the administrator can no longer perform his job and should be disqualified.

Contrary to what Rabkin intimates, the mere discussion of a proceeding with others does not lead to disqualification, nor does an expression of policy. Thus, for example, it is *not* inappropriate for the chairman of the CAB or ICC to support the policy of deregulation. But in rulemaking, as in adjudication, a prejudgment of critical facts must not be made.

The court's recent disqualification of the FTC chairman from a rulemaking proceeding because his actions clearly indicated he had made up his mind on the facts before the proceedings even began is an important check on extreme actions by regulators. Surely the precedent will not often be invoked, but its very existence serves to define the boundary of propriety. That is important if we are to have faith that the part of the regulatory process that is supposed to be rational is rational in practice as well as in theory.

Philip J. Harter,
Washington, D.C.

JEREMY RABKIN responds:

Mr. Harter maintains that the courts ought to intervene to prevent bias in rulemaking—as well as adjudication—because rulemaking today also rests on factual determinations. His account of "modern rulemaking" makes one envy the lot of the old-fashioned kind of administrator, who, it seems, did not have to consider facts at all—or at most only had to consider "legislative facts," which are apparently not quite the same as real facts. The congressman's lot sounds still more enviable: nothing to determine but "pure policy." I do worry, though, what may happen when Mr. Harter's colleagues of the Washington bar discover that congressional enactments sometimes do rest on prior assessments of fact—even (to use his term of distinction) "technical fact." Will they ask the courts to disqualify Senator Kennedy from voting on the windfall profits tax because his rhetoric indicates clear bias on some factual premises of the legislation?

Mr. Harter stresses that an agency's authority to issue any new rule in the first place may be contingent on a prior factual determination—as in his OSHA example. But this situation is not unique to modern administrative agencies. Congress, itself, retains only specifically delegated powers under the Constitution, much as agencies do under their statutory mandates. There was even a time when the courts would invalidate congressional enactments because there was insufficient evidence that their policy objects were related to "interstate commerce," as the constitutional grant required.

Of course, it has been a long time since the courts have dared to discipline Congress in this way. But they are still quite willing to overturn administrative rules that are unsupported by factual evidence. If OSHA bans a particular substance from the workplace without strong evidence that it is dangerous, the courts can overturn the action as arbitrary. But to do so, they need not inquire at all into the preconceptions, the state of mind—or the public rhetoric—of the commissioners who voted for it. Mr. Harter's demand for safeguards against bias points to a different issue, altogether. When the courts disqualify a regulatory commissioner for bias, they are acting not to safeguard the reasonableness of the result but the atmosphere of the proceeding.

No doubt even the appearance of bias must be avoided in the special circumstances of adjudication, because public confidence in the authority of judges (or administrative officials acting as judges) derives ultimately from our trust in their impartiality. It is only because judges strive to appear impartial that it is acceptable for them to be politically unaccountable. But Mr. Harter's principle—that the appearance of bias must be avoided any time an assessment of facts is required—would oblige us to put the entire government into the hands of judges or judge-like officials. It is surely too late—or too early—in American history for that.

In a healthy democracy, legislators should feel obligated, in most circumstances, to express their views openly and try to persuade the voters of the correctness of these views. At the least they must give the public opportunities to judge the perspective that underlies their policy views. That is the only way elected officials can lead while remaining politically accountable. A system in which candidates were disqualified from taking legislative office because of their campaign rhetoric would hardly be accounted a democracy.

Nothing in Mr. Harter's letter persuades me that administrative rulemaking should be regarded any differently from legislative activity in this respect. In their rulemaking capacity, regulatory commissions are accountable to Congress, if not directly to the voters. Whether or not it is wise for Congress to delegate so much legislative authority to administrative rulemakers, it is surely dangerous to pretend that their activity can ever be nonpolitical. Doubtless the public—as well as Congress and the courts—will place less confidence in the policy decisions of a commissioner whose rhetoric suggests a demagogic or fanatical stance rather than a sober and conscientious approach. But we are better off, in any case, with a clear picture of the men who govern us.

A final point. Mr. Harter insists that no commissioner would ever be disqualified for expressing general views in favor of deregulation. In fact, after the Pertschuk disqualification, a suit was launched against ICC Chairman O'Neal for doing just that. The mere threat of bias suits may have a chilling effect on the public pronouncements of regulatory officials, beyond the restrictions the courts might actually impose. Mr. Harter himself, at any rate, does not offer any more reliable formula for distinguishing legitimate from unallowable public pronouncements than for distinguishing factual determinations from "mere" policy judgments in administrative rulemaking. ■