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on Trends and Developments
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Editor's Message

The Fine Print is a product of the Information Age. People of responsibility now are finding it necessary to absorb an unlimited amount of information in a limited amount of time. *The Fine Print* is designed to inform the nation's bar of current legal developments in a time-effective manner through concise articles by distinguished legal figures. Authors for our Fall 1982 issue include I.R.S. Commissioner Roscoe Egger, F.C.C. Chairman Mark Fowler, Department of Defense General Counsel William H. Taft, IV, and former Secretary of State Dean Rusk, currently Sibley Professor of International Law at The University of Georgia.

The Fine Print fills the vacuum left between traditional law reviews and the less technical law-related tabloids. Articles in *The Fine Print* are easy to read and substantive. Specialists and generalists alike will profit from our authoritative and timely articles which cover a wide variety of legal topics.

The Fine Print has already gained national recognition and has been welcomed at the highest levels of the legal community. It has been cited in law reviews and quoted in the popular press. United States Supreme Court Associate Justice Harry A. Blackmun stated that "*The Fine Print* . . . . is most interesting and imaginative" and former Yale Law School Dean Eugene Rostow commented that "*The Fine Print* is the first new idea in the field I have seen for years—and an excellent idea, too."

We hope you will agree.

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Copyright and Home Taping: Old Rights in New Markets

David Ladd

On April 21, 1982, Senator Charles Mathias chaired hearings on his bill which would impose a levy on the sale price of recording equipment and blank tapes. The funds collected would be distributed to copyright owners in compensation for home video and audio recording of protected works. Additionally, copyright owners of certain works would be given control over the commercial rental of their works to the public. Merely enumerating the hotly disputed contentions of the parties involved would consume pages.

The Mathias Amendment to the 1976 Copyright Act represents, however, something more profound and crucial to our intellectual property policy than its particular solution to the home taping problem. It represents a bold and innovative legislative stroke directed at a fundamental and spreading problem in copyright; well-proportioned to its gravity.

Barely six years have elapsed since Congress comprehensively revised the old 1909 Copyright Law. Yet, such copyright issues as cable television, satellite signal "poaching," film and record piracy, computer programs, and home recording continue to crowd the legislative calendar. Clearly the 1976 revision, while settling a large number of copyright questions for the future, does not fully chart the course to accommodating authors' rights to new technologies. In fact, the day of Revisions with a capital "R" is over. From now on, the copyright law will be in a constant, rolling revision.

The principles of compensating authors, in the service of both justice and utility, remain fixed. But technology is not fixed, and its rapid changes have wrought radical changes in how the author's creation reaches the author's public. In short, the change in copyright markets is caused by changes in technology, and is similarly awesome.

The market environment which includes off-air taping is characterized by large-scale diffusion of reproduction and performance technologies, *e.g.,* videorecording, removed from the control of a relatively small number of companies, *e.g.,* movie studios, distributors and exhibitors, into the hands of millions of consumers. The number of potentially remunerative uses of protected works such as tape rentals and home recording, has increased dramatically and become impossible to detect and quantify. The absence of any privity between copyright owners and the ultimate users diminishes the role of contracts as the basic instrument of legal control in public distribution of works; the enforcement of copyright remedies, for the first time, appears to clash with notions of privacy. Put simply, new technology threatens to undermine the reality of authors' rights, by making their administration and enforcement practically unworkable through traditional legal means.

Opponents to the Mathias Amendment argue against proprietary claims for control and remuneration, claiming that the industries concerned are now making money, no financial losses can be proximately linked to the activities complained of, and extension of copyright controls to the new technological use is "proprietary aggrandizement."

This line of argument rests upon two unfortunate fallacies: first, that copyright exists only to *mitigate the economic harm to authors* which would arise in its absence, and that the need for recognition of proprietary rights in the potential markets of post-industrial America is determinable with reference to commercial profitability *today.*

The first fallacy is easily disposed of: the purpose of copyright is found in the plain statement of Article I, sec. 8 of the Constitution: "To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Copyright, therefore, exists to achieve a positive social goal, utilizing private property and public tastes, however vulgar or refined. Through the copyright owners' good business sense, yielding maximum returns on creations, and the consumers' cultural preferences, investment in the creation of new works will expand with growing demand and will achieve their widest dissemination.

The second fallacy is harder to deal with, since the only hard information we have about the changes taking place are those which are before us today. It is in this respect, however, that the Mathias Amendment is an important model. Far from creating new rights, the amendment would preserve those which are well established, but now imperiled by the gradual collapse and reordering of important markets.

The videocassette renter, by making works available for home viewing, is performing a function now done by broadcasters or theaters. The law should take account of this and impose liabilities analogous to those which govern broadcasters and theater owners. Similarly, where private individuals utilize technology to engage in reproduction activities which impinge upon potential markets for the sale, rental or controlled performance of works, account should be taken of this to ensure continued adequate incentive to invest in the creation of new works.

The Mathias amendment is hardly perfect. It builds upon previous experience in compulsory licensing of certain performance rights, rather than leaving rate setting, collection and distribution of royalties to private institutions. But until we can formulate ground rules to allow large scale collective licensing of copyrighted works, Senator Mathias' step is an important one.

The success or failure of this effort will be closely watched, because the modalities involved will surely be raised in other high technology-copyright controversies. In such areas as computer usages, reprographic reproduction, and the satellite-to-home "celestial juke-box," the question presented is whether we are imaginative enough to understand that as every theatre has a box office, every home must have its equivalent.

David Ladd is U.S. Register of Copyright.

A Common Law for the Age of Statutes

Guido Calabresi

The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, developed by courts, to one in which statutes enacted by legislatures have become the primary source of law. The consequences of this "orgy of statute making", as Professor Grant Gilmore has called it, are just beginning to be analyzed.

One consequence is that we are increasingly being governed by laws that remain in effect only because they were once enacted by legislatures, and not because they are wanted by a current majority. Bicameral legislatures, legislative committees, separation of executive and legislative branches of government, in fact *all* of our so-called "checks and balances," create inertia. And inertia means that even a small minority can often keep an existing law on the books, however much that statute becomes anachronistic. This fact, undesirable in itself, has been particularly galling to judges, and their responses to it have created problems at least as severe as those they sought to avoid.

When most of our law was judge-made, it was relatively easy for judges to undercut rules that no longer made sense, that responded to needs that were no longer valid, that treated some people differently from others without a good present reason. The "great judges", whose deeds form the basis of many a first-year law school curriculum, were those who were able wisely, perhaps slowly but nonetheless effectively, to adapt the common law to the needs of their time, to keep the common law functional and up-to-date. The lesson the student—who later becomes a judge—inevitably learns, is that, in a system like ours, if the law is outdated, it is up to the judges to bring it into line.

Yet at the same time the student learns another lesson —that statutes enacted by legislatures are not to be trifled with by courts. If they are constitutionally valid, they must be enforced. That is the essence of legislative supremacy.

When statutes were few and far between judges could abide by both lessons without too much strain. They could keep the bulk of the law current by updating common law rules and still honor legislative supremacy. Today, doing both no longer seems possible. Faced with this dilemma, it is little wonder that the least willful of judges have responded to their task with open aversion as they enforced timeworn interpretations of even more timeworn laws. Other judges have acted more aggressively and have used constitutions to strike down laws whose flaws were not that they violated fundamental rights but only that they had become inconsistent with the rest of our growing law. Still other judges have "interpreted" the dated statutes in ways which would make the proverbial Jesuit blush, in order to keep them current.

Not surprisingly, as more and more judges have taken these last two roads, concern has increased. Holding a statute unconstitutional is very different from updating the common law. A bad common law ruling by a court can be reversed by the legislature. A constitutional decision goes a long way toward depriving the legislature of its last say. False or casuistic interpretations may seem less dangerous since they can be reversed by legislatures. But they require judges to lie, and if fictions and lies become common judicial currency we lose all control over judges. Much current judicial activism, and much of the justified criticism it has aroused, can be traced to the rather desperate responses of our courts to obsolete statutes and to the manifest incapacity of our legislatures to keep such statutes up-to-date.

What then are we to do? Legislative solutions, like sunset laws, which would automatically repeal all statutes or regulations after a fixed number of years, are doomed to failure. They are too mechanical and would destroy laws that are still fit. If they were taken seriously, they would put the inertia inherent in our system of checks and balances at the disposal of those who want no laws. And this is just as bad as favoring, through inertia, those who benefit from dated laws. Delegation of the authority to update laws to administrative agencies has been tried and has been a disaster. We could, of course, abolish our checks and balances. Yet such a move seems fraught with danger. It was fear of real evils that led to the creation of checks and balances. Those evils remain real today.

What is needed is a new approach—a form of *judgmental* rather than automatic sunset. This would permit courts to induce legislative reconsideration of only those laws that are anachronistic. It would lead to a review of those statutes, whatever their chronological age, which, were they common law rules, would be overturned by courts doing their traditional job. Some techniques for doing this already exist; others could easily be developed. Such an approach would help legislatures keep the law current without undermining those laws that, even if ancient, are still integral parts of our legal fabric, and without depriving legislatures of the final word in ordinary law-making.

The ability of judges and courts to spot what does not fit the changing legal landscape was a significant source of their authority to update the common law. It is the reason they have, today, felt pushed to misinterpret statutes and to abuse constitutional adjudication, in order to make outdated laws conform. It can become, if openly recognized and used to further legislative decisionmaking, the means by which we can retain both checks and balances and legislative supremacy while eliminating those statutes that are out-of-phase with the whole of our law and that are not demanded by a current majority. It can give rise to a common law suited to our age of statutes.

Guido Calabresi, Sterling Professor of Law at Yale University, is author of the recent book: *A Common Law for the Age of Statutes;* Harvard University Press, 1982.

A Litany

Harry A. Blackmun

The Court is a special place from which to observe, for one has a view of all that is happening on constitutional issues in the courtrooms of America. One sees what people are litigating about, not only with each other but with their governments: federal, state, and municipal. One gets a sense of their desires and of their frustrations, of their hopes and of their disappointments, of their profound personal concerns, and of what they regard as important and as crucial. The following is what I have seen. It is not all good, and it is not all bad:

On the **negative** side are things that are also obvious to you. We see in our cases:

1. The widespread drug problem with its consequent misery, its abandonment of moral standards, and its accompanying crime.
2. The absence of safety in our streets, our parks, our homes, everywhere.
3. The ever-present challenge to the basic guarantees set forth in the Bill of Rights, the constant attempt of government to impinge bit by bit upon those rights, an impingement sometimes occasioned by abuses in the assertion of those rights, senseless disregard and attack upon law enforcement officers, and vandalism everywhere.
4. The pollution in every street, every public place, along the highways, in the natural waters we value so highly.
5. The growing and seemingly insolvable needs of America—poverty—the unnecessary injury to life and body and property and the human spirit.
6. What seems to be the gradual disappearance of private and parochial schools because of financial problems, a decreasing supply of personnel, and the difficulty now to obtain significant public aid.
7. The increasing dependence upon big government —the plight of the cities—the States' desperate efforts to keep solvent in the face of a widening need for welfare even during periods of seeming affluence.
8. The bigotry and hatred that flow from racial prejudice.
9. The changes in moral concepts—the public servicing of pornography and license—the ultimate acceptance of the obscene and of the massage parlor—that bow in the direction of the inevitability of the lesser dimensions of human nature.
10. The many new problems of the electronic age, surveillance and bugging, the pen register, unlicensed copying, record piracy.
11. The seemingly perpetual conflict over welfare—claimed inequality—the stark evidence of the welfare state in which we seem necessarily to live.
12. The clamor over the gagging of the press—the tension between the First Amendment's guaranty of a free press and the Sixth Amendment's guaranty of a fair trial.
13. The loss in individuals of the senses of personal obligation and of personal dependability.
14. What some feel is the loss of America's moral leadership in the world at large, a decline, seemingly, in the integrity demands of the several professions, the failure of the church and of the schools and of the family to provide guidance.

Yet on the **positive** side, we see:

1. The constant application in American courts of the principles of the Bill of Rights, day by day without much noise or clamor.
2. The increasing awareness and a broadening concept of individual rights and freedoms.
3. The struggle with the media in connection with the invasion of privacy and with defamation under the guise of a free press.
4. The recognition of rights of those in prison or on probation or parole.
5. The recognition of rights of those in mental institutions.
6. The continuing stress upon equality of educational opportunity.
7. The recognition of the presence of constitutional rights for school children.
8. The long overdue revolution in the criminal law from my days in law school.
9. An awareness of the value of our environment, and the constant pressure now to *do* something about it.
10. The racial revolution.
11. The voting revolution—one man, one vote—the elimination or lowering of durational residency requirements.
12. Broadening concepts of privacy, occasioned in part because of pressures of the press to invade, and in part because of the sexual revolution.
13. A vast demand for and strengthening of ethical standards for the judiciary.
14. A growing demand on the part of the public for performance and for integrity in public office and for a greater openness in the administration of government.

And then we see some issues, emotional, always agonizing, and either positive *or* negative, depending on the point of view: the death penalty—reverse discrimination—abortion — affirmative action — inverse condemnation — limits upon commercial advertising—professional adver-

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Harry A. Blackmun is Associate Justice of the United States Supreme Court. This litany is excerpted from the Justice's 1981 Law Day Address at the University of Georgia School of Law.

Antitrust Enforcement in the Reagan Administration

Earl W. Kintner

During the past year the media has given considerable attention to so-called drastic changes in antitrust policy under the Reagan Administration. As a result, some companies and individuals have concluded that their business activities no longer need to be restrained by the antitrust laws. For a while this attitude became particularly prevalent with regard to mergers, and led, in the words of Sylvia Porter, to "merger mania." In part, top officials at the Justice Department and Federal Trade Commission are to blame for the situation, since certain unfortunate statements by those officials were seized upon by a press corps all too willing to characterize the Reagan Administration as being weak in the area of antitrust enforcement. These officials subsequently disclaimed any intent to drastically alter most traditional antitrust concepts, but these statements received far less publicity.

My conclusion is that the antitrust laws are continuing to be enforced and will be enforced in the Reagan Administration. Republican administrations traditionally have been strong supporters of the antitrust laws. Despite all the rhetoric, the Justice Department and Federal Trade Commission are continuing to vigorously prosecute hard core antitrust violations and mergers between significant competitors. While restrictions in the context of supplier-customer relationships, and mergers between non-competitors, will see reduced enforcement activity from the federal antitrust agencies, private plaintiffs and state attorneys general will remain very active in these areas.

Of special significance to business will be the Justice Department and FTC's development of a very active program of intervention before the ICC and other regulatory agencies, plus the antitrust agencies' plans to closely scrutinize recently deregulated industries, such as transportation, for antitrust violations.

With respect to the hard-core antitrust violations—for example, agreements among competitors to fix prices, to divide territories or customers, or to engage in boycotts of competitors, suppliers or customers—the Reagan Administration will be enforcing the antitrust laws as vigorously as they have ever been enforced. The Justice Department has made it clear that such activities are likely to be prosecuted criminally, that there will be a greater emphasis on indicting responsible individuals as well as their corporations, and that prison sentences will be sought in almost all such cases. In recent years the courts have been increasingly supportive of the Justice Department's efforts to impose prison sentences for hard core antitrust violations.

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In contrast, vertical arrangements—in other words, an arrangement between a supplier and its customer which restricts one party's freedom to set prices or select the persons with whom it will do business—will receive significantly reduced scrutiny under the Reagan Administration. Under the previous Administration, both federal antitrust agencies were extremely active in investigating and challenging vertical arrangements. The Justice Department even brought a criminal action against a manufacturer's alleged restrictions on the prices at which its distributors could resell its products. In contrast, Assistant Attorney General William Baxter, who heads the Justice Department's Antitrust Division, has been quoted as saying that the Antitrust Division will "seldom to almost never" bring a case involving vertical activity. The FTC may be somewhat more active in the area of vertical restraints, but the Commission's activity may be diminished from what it was in prior years. Nevertheless, private plaintiffs continue to bring vertical restraints cases, and the courts generally continue to view vertical restraints involving prices as *per se* unlawful, and to hold other types of vertical restraints illegal if they unreasonably restrain commerce.

Probably the most publicized aspect of the Reagan Administration's antitrust policy has been with respect to mergers. Unfortunately, some heavily publicized statements by top Justice Department officials during the early months of the new Administration led to the erroneous belief in some quarters that the anti-merger statute would not be enforced by the Reagan Administration. While mergers involving firms which are not direct competitors are substantially less likely to be challenged than they were under prior administrations, the standards applicable to horizontal mergers (in other words, mergers between competitors) have not been changed significantly. For example, DuPont was required to eliminate a horizontal over-

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tising—televised court proceedings—closure of criminal trials.

And, finally, one has glimpses of what lies ahead—the problems that will present themselves as science takes us still farther into knowledge about life itself, as we learn more about extra-terrestrial regions and matter, as we develop the law of the Sea and the law of Space—all this in our relationships with others and within the framework of our Constitution.

We see, in sum, what I think is a constant, seething, economic, domestic, ethical or, if you will, legal struggle. Yet I am not discouraged by it, for it all is, I believe, a striving among us as a people to evolve that which is right and that which is fair. Could we call it a struggle for Justice under a Rule of Law that must constantly be reaffirmed?

Environmental Litigation: The Case for a Judicial Advisory Body

Joel Yellin

The intrinsic complexity of modern environmental controversies is at war with the notion of simple, feasible action upon which our theories of judicial review depend. Environmental cases present questions whose technical dimensions are foreign to judicial experience and education. They invite courts to formulate complex remedies that require long-term oversight. Moreover, the adversary process compounds the difficulties. It encourages the presentation of simplistic arguments that divert attention from the substance of environmental issues and sow confusion in the minds of generalist judges.

That the environmental era has raised new and delicate problems for decisionmakers has not escaped notice. Regulatory reform is a constant presence on the legislative agenda, and over the last decade the establishment of advisory bodies for improving technological decisions by Congress and the Executive has proceeded apace. Detailed study of major cases has convinced me that the judiciary has an important role to play in assuring the quality of environmental decisions. To paraphrase then-Professor Frankfurter, science and technology cannot reshape society while the traditional boundaries of the legal process are maintained. In my view the critical ingredient the judicial system can supply is effective cooperation among the engineering, scientific, and legal communities.

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Cooperation of that kind can be encouraged by establishing, on a trial basis, a committee of standing masters—preferably trained in appropriate fields of science and law—available to the appellate courts in controversies involving complex scientific and engineering questions. This would not be a major break with accepted practices. It is settled law that courts may submit complex questions to masters, even without the consent of litigants. I suggest the proceedings before such a committee be split into two stages. In stage one the committee would act as masters ordinarily do, reporting on technical questions formulated by the referring court—questions the court feels are separable from legal issues and necessary to resolve the instant controversy. Stage two proceedings would be novel. The committee would consider the whole case informally. It would not confine itself to the record, but would draw as it chose upon the relevant experts and technical literature. It should not be supposed that such proceedings would enable precise resolutions of controversies over standards for air and water quality or for public exposure to low levels of ionizing radiation. Given the mix of ethics, law and science that these issues present, precise answers are not possible. What such a process can do is mutually to educate the masters and the referring court, and through them the technical and legal communities, about the interrelated scientific, technological and legal problems that increasingly characterize environmental litigation.

Such a proposal raises obvious questions. Would the masters' proceedings derogate the rights of litigants? Would they lengthen the legal process and increase

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lap before it was allowed to acquire Conoco, and Mobil's attempted acquisition of Marathon was challenged by the FTC. Several less publicized horizontal mergers have been challenged as well.

The Justice Department is developing revised merger guidelines which should eliminate some of the present uncertainty in the merger area. While the guidelines may introduce new methods for measuring the competitive effect of a merger, and add more factors to the equation, I predict that the bottom line will not be changed drastically—mergers which involve substantial competitors will remain prime candidates for antitrust challenges. Businessmen and their legal counsel must also keep in mind that private plaintiffs and the courts will not be restrained by the new guidelines. As the Mobil-Marathon litigation demonstrates, private enforcement of the merger laws can be as effective as governmental actions.

Just as the Reagan Administration's changes in merger policy have proven to be much less than some predicted, so too are the funeral notices for the FTC an overstatement. While the Federal Trade Commission has come under intense criticism from some segments of business and has taken some lumps during the Congressional appropriations process, I predict that the Commission will remain a strong, viable enforcement agency. As an independent regulatory agency, the Commission is in essence an arm of Congress. In the past, Congress has protected the agency from Administration initiatives which could have seriously affected the Commission's enforcement abilities. In particular, Congress has insisted upon continued funding of the Commission's regional offices and has dampened initiatives to remove the Commission's antitrust enforcement authority. Congress is now gearing up to renew the Commission's funding authorization. In coming months we undoubtedly will hear a lot of additional complaints about the Commission's activities and there will be calls for the Commission's demise. However, I predict continued Congressional support for the Commission's traditional enforcement missions, although Congress may block certain specific Commission actions as it did in 1980.

The Administration's Commitment to Law Enforcement

Edwin Meese

This is a time of great public concern about the problems of crime. One paragraph from an article in *The New York Times* symbolizes the problems, as it states the following:

> Crime is up, but arrests are down. The police cite a lack of personnel. Prosecutors and courts are unable to cope with the numerous cases before them so they bargain for guilty pleas to flush all but the most serious cases through the system as quickly as possible. Local jails and state prisons have run out of space to hold sentenced criminals. The probation department reports it's unable to supervise properly. Thousands of the law breakers in its custody leaving them essentially unpenalized for their acts.

The article sums up that "these factors combined have worsened an already severe problem, for the less likely it appears that a person will be punished for a crime, the more likely he is to attempt one."

The article does not provide information that is new, as anyone involved in the field of criminal law knows, and yet it does pose the problem for us. The situation is getting worse, the facilities are getting more meager, the money is not available in many places. It is in this context that the Chief Justice of the United States Supreme Court has said that we really do need to take important steps to bring about a return to a more orderly society and to literally salvage the criminal justice system.

If there's any priority of government next to defending us against external enemies, it is certainly to defend the law abiding citizens of this country against those who would prey upon their fellow man.

At this point we would hope to clearly define the role of the federal government, a role which has been somewhat diffused over the past ten years, as to its responsibility for the crime problem. The federal government has a role, but that role is a limited one and it should be recognized as such. I am sure that many members of the bar hope that the federal government will restore LEAA, will have billions of dollars ready to pour out on state and local governments to continue the fight against crime, and that a beneficial federal administration will fund all the things they want to have accomplished in the next few years. Nonetheless, the facts of life of federal fiscal policy and the situation the administration found itself in on the 20th of January 1981 makes a promise of such action impossible.

Even if that promise could be made, it may not be a good one. In the decade when federal funds were more readily available to local governments there was a blurring of the lines of authority and a vast increase in paper while there was no material decrease in the crime rate. Although there were some improvements in the ability of society to handle the crime problem, those improvements were not nearly proportionate to the amount of additional money that was poured into the system.

It is very unlikely that there will be large amounts of federal funds available to state and local governments for the fight against crime. The economic recovery program has made it mandatory that we impose fiscal and budgetary controls on the federal government. We think in the long run there will be an impact on the crime problem because the recovery of the economy is one of the factors that will shape a society in which some of the conditions that contribute to crime will be lessened. In order to meet our commitment to a balanced budget by 1984, it is necessary to constrain the growth of the federal government in each of the next two fiscal years so that we can achieve the goal of lessening inflation. But the federal government does have a role in crime abatement and this is a role that will contribute to and support state and local law enforcement authorities in their work against the criminal activity that plagues our cities. First of all, the federal government has a definite role which we wish to expand and improve in the field of narcotic and drug enforcement. The federal government is the only law enforcement level with the ability and the responsibility to stop the flow of drugs into this country, and it is a responsibility that has not in the past been carried out as effectively and as extensively as it should have been. This is one of the priorities of the administration, to utilize all of the resources of government and new resources that have not been tapped in order to interrupt this flow of narcotics and dangerous drugs across the borders.

A second area where the federal government has to be of help is in the area of prisons and jails. If you had to isolate one problem in the criminal justice system right now, it's the shortage of prison and jail space. As a result of the Attorney General's efforts, and the rest of us interested in this field, the Secretary of Defense is now inventorying all of the unused military installations around the country to see what facilities might be made available to state and local governments. We have already found fully developed prison facilities and fully developed military jails which are unused at the present time. The administration hopes to be able to make these facilities available to state and local governments so that they can utilize them either on a

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Edwin Meese is Counselor to the President. This article is adapted from the Counselor's August 1981 speech before the American Bar Association.

Providing Legal Services to the Poor

Wm. Reece Smith, Jr.

History teaches us that since the dawn of civilization, mankind has sought justice. Justice is, of course, not solely a matter of law; it is the aim of many institutions —religious, social and economic. But in the Anglo-American tradition, law has always been a major preserve of justice, and equality under the law an essential element of justice. The Magna Carta provides: "To no one will we sell, to no one will we refuse or delay, right or justice."

But the promise made at Runnymede seven centuries ago still awaits fulfillment. Our forefathers on this continent —the framers of the Constitution and the Bill of Rights— sought to establish justice by securing inalienable rights to which we are all entitled by law. The challenge we face today, especially those of us who are lawyers, is to assure that every American, whether rich or poor, has access to the legal system which preserves and safeguards these rights.

The private bar in the United States has an abiding tradition of, and strong commitment to, public service. And there is no facet of our public service obligation that is more important than our responsibility to help meet the legal needs of the disadvantaged. Since the early beginnings of the legal aid movement over a century ago, generations of American lawyers have served the cause of the poor. The legal profession can be justly proud of this history of service.

But as our nation has grown, so have the legal needs of the poor. The affairs of human society have become more and more complex for everyone. Not without justification, the complaint is often heard that one can hardly move in daily routine without encountering law and lawyers. As the authority of other institutions has waned, that of the law has grown. More than ever in our history, access to justice has come to depend on access to law. Because of these developments, the legal needs of the poor have proved simply too great for the private bar to serve alone.

With the advent of publicly funded programs such as the Legal Services Corporation, we have made progress in meeting these needs. The Corporation has provided geographic uniformity of legal services and a corps of workers skilled in poverty law. It has afforded the administrative framework essential to any effective delivery system. By coordinating Corporation programs with organized voluntary legal aid, we have made remarkable strides in serving the poor throughout the country. The effort has proved an excellent example of the private sector and government working together to solve society's problems.

Unfortunately, the Corporation is now in danger. It has been politically controversial and the subject of criticism for perceived abuses. Proposed legislation has been designed to foreclose every possible excess. Given these changes, it is difficult to see how any American who believes in equal justice could oppose the Corporation's continuation.

It must be remembered that inadequate legal services for the poor is a national problem. Its causes run deep throughout the structure of society. And because the problem is a societal one, responsibility for its solution must lie, in part, with society as a whole. Publicly funded legal services are a means of fulfilling that societal responsibility. Their existence is an affirmation of our national commitment to equal justice for all.

Whether or not the Corporation survives, the need for private bar commitment to help the poor will be great. Even with the Corporation's present funding level, the needs of millions remain unserved. If the Corporation dies or is weakened, these numbers will increase. Though we have long realized that we cannot do the job alone, we lawyers have a special obligation to help the poor through *pro bono* representation. Better than most, we understand that access to legal advice and representation is essential to the exercise of the rights and privileges of citizenship. Better than most, we know the impact of government and law on the poor. And better than most, we are equipped, by education and experience, to provide help where it is needed.

As lawyers, we have long proclaimed that we are members of a learned profession with an ethical duty to serve the poor. We are also aware that change abounds today in our profession. Trends in our attitudes and practices and in the ways we are regulated seem to threaten to reduce a learned profession to a mere commercial enterprise. We must remember that the central issue is not whether we change some of our practices or even whether we are subject to new modes of regulation, but whether we continue to strengthen our commitment to the highest goals of public service.

There is much at stake. Whatever the fate of publicly funded programs, the fulfillment of our duty to serve the poor will be crucial for the proper functioning of our society. Learned Hand said that if we are to keep our democracy, we must honor one commandment: "Thou shalt not ration justice." It is time for us to embrace this commandment anew and fulfill the promise of the Magna Carta. Seven centuries have been long enough to wait.

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Lawyer-Client Confidentiality and the Proposed Model Rules of Professional Conduct

Robert J. Kutak

In early August the American Bar Association's House of Delegates will formally debate the merits of the proposed Model Rules of Professional Conduct. The Model Rules are intended to replace the 1969 Model Code of Professional Responsibility, the ABA's official recommended code of ethics for lawyers, which has been adopted, with sometimes significant variations, by virtually every American jurisdiction.

The Model Rules are a comprehensive reformulation of the law of lawyering, covering a wide range of subjects. Scholarly reviews of the proposed Final Draft, which have begun to appear since that draft's publication in May of 1981, have generally been favorable. But the Rules have not been without controversy.

A great volume of comment, both favorable and not, was generated by an earlier Discussion Draft released in January, 1980. While many changes were made in the text between the Discussion Draft and Final Draft, substantial controversy seems still to exist with regard to the Model Rules' treatment of the confidential nature of the client-lawyer relationship. It is important, therefore, to focus on the precise language of the Final Draft as proposed to the House of Delegates, for the drafting task has been a long one and many revisions and refinements in the text have been made.

The Model Rules do not regard either the evidentiary privilege of confidentiality or the ethical principle of confidentiality to be absolute. In this, the Rules agree with the current Model Code of Professional Responsibility, with its predecessor, the Canons of Professional Ethics, and with virtually every scholar and court that has considered the matter.

In keeping with the underlying philosophy of the project, however, the Rules eschew the approach of previous statements on professional conduct whereby inherently conflicting obligations such as client confidentiality and candor to the courts were simply baldly stated. Those duties interact and compete for the attention of lawyers. In the context of confidentiality and a client's future crimes or frauds, the competing duties are particularly excruciating for conscientious lawyers and judges.

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Agency law, criminal law, tort law, constitutional law—all have something to say on this subject. We believe the Model Rules fairly reflect the teaching of those other bodies of law. Specifically, the Rules recognize a limited discretion for a lawyer to disclose otherwise confidential information to the extent necessary to prevent a client's future crime or fraud that is likely to result in death, serious bodily harm or substantial economic injury to another (Rule I.6(b)(2)).

Similarly, law outside of legal ethics has a great deal to say about complicity in illegal or fraudulent conduct. Accordingly, the Rules recognize a limited discretion to disclose confidences to the extent necessary to rectify the consequences of a crime or fraud in the commission of which a lawyer's services had been used (Rule I.6(b)(3)).

This dimension of personal involvement of the lawyer also accounts in the Rules for the rare instances of required disclosure: namely, the duty to disclose to a court corrective information in the event the lawyer comes to know that material evidence offered by him is in fact false (Rule 3.3(a)(4)). This flows from the lawyer's obligation not to make false statements of material fact or law to a court (Rule 3.3(a)(1)). Likewise, under the Model Rules, a lawyer may not knowingly permit a fraud to be perpetrated on a court if a disclosure of fact by the lawyer could prevent such a fraud (Rule 3.3(a)(2)). All this is clearly subject to any constitutional limits which may develop with regard to criminal proceedings.

Outside the courtroom, a lawyer likewise may not make false statements of material fact nor, under the Rules, may a lawyer assist a crime or fraud even if disclosure of client information is necessary to avoid such assistance (Rule 4.1).

I restate the essence of the confidentiality rules at some length, for I believe that such a review of their content reveals that the principles they explicate are neither radical nor new. In fact, these principles and the Model Rules are more truly protective of what Justice White has called "our modified adversary system" than are other more absolutist views of confidentiality as are occasionally advanced or, at the other extreme, more disclosure-oriented views. A proper understanding of confidentiality by both lawyers and clients should place the client-lawyer relationship on a solid footing, preventing the client from being misled or left unprotected as a result of incorrect expectations.

In miniature, the discussion of confidentiality has recapitulated much of the larger debate over all the provisions of the Model Rules. In reviewing that debate, it is clear that the Model Rules may indeed not comport with what some would believe professional lore teaches about our craft, but they comport with law. And there are those of us who believe that to be a higher goal and a harder one to achieve.

Adventure in Collectivism: The Kutak Rules

Theodore I. Koskoff

The "final" Kutak Rules offered the House of Delegates of the ABA in Chicago last winter remind one of Professor Fred Rodell's *bon mot* about law reviews. He said that there were only two things he did not like about most law review articles: one was the form and the other was the substance.

Shorn of all their footnotes, the Kutak Rules do not use a synergism of form and substance to bore its readers. But they probably will confuse you, even if you have been paying very close attention to the last three years of debate about the rules of lawyers' conduct. And they will do so, in great part, because their form seems to have been chosen to conceal what they say, rather than to make it clear.

I am referring, of course, to the Kutak Commission's decision to replace the Code of Professional Responsibility with a completely new format, with a completely new name. That decision has been affirmed by the House of Delegates of the A.B.A. The A.B.A. is going to try to get all of us to switch from the Code, which our state courts adopted during the seventies, to the Rules of Professional Conduct which Mr. Kutak has described as "Ethical Standards for the Eighties and Beyond." (7 ABAJ 116 (9/81)).

Not one rationale or alleged improvement that the Kutak Commission has given for changing from the present Code to the Kutak Rules would not have been equally applicable to an intelligent revision of the Code effected by competent drafting.

The Commission tried to make us think this was not so by purporting to publish its proposed Rules both in its own format, and in the format of the present Code. The New York State Bar Association accurately described that Alternative Draft as "no more than patchwork" and not "a serious attempt to adapt the substantive content of the Model Rules to the . . . format" of the Model Code.

Why did the Kutak Commission go to the trouble of producing and widely distributing a 360-page volume, purporting to show us that its work cannot be accommodated in the present Code? The phony and fallacious nature of this demonstration was quickly shown by the National Organization of Bar Counsel, which managed to do in 60 pages what the Commission could not do in 360. Why did the Kutak Commission engage in this caper of intellectual deceit? Just to sell us a format?

Everyone knows that form and substance are not readily separated. You cannot tell the dancer from the dance, as Yeats put it. It is not form that the Kutak Commission is trying to put over on us, but substance. What substance?

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Under the guise of enlarging the attorney-client privilege, the Kutak Rules destroy that privilege. For example, Kutak Rule 3.3 requires lawyers to disclose information otherwise confidential under Rule I.6. Entitled "Candor Toward the Tribunal," it requires disclosure whenever you know that non-disclosure is the equivalent to material misrepresentation; whenever you know that not speaking up will result in "a fraud on the tribunal;" and whenever you discover that you have, however inadvertently, offered material evidence that you come to know is "false." This, as well as other "blowing the whistle" provisions, is an adventure into collectivism.

The heart of the matter is where the lawyer's obligation to the client comes in conflict with the duty to the tribunal, where both candor and confidentiality cannot co-exist. The ABA's Ethics Committee has consistently held, under both the present Code and the old Canons of Ethics, that the client comes first. Almost all American authorities on legal ethics have agreed, going back to Judge Sharswood, the American doyen in the field, in 1854.

The Kutak Commission thinks it has avoided the problem of forcing the lawyer to incriminate the client by this clause, which it adds to the end of its Rule 3.3:

> CAVEAT: CONSTITUTIONAL LAW DEFINING THE RIGHT TO ASSISTANCE OF COUNSEL IN CRIMINAL CASES MAY SUPERSEDE THE OBLIGATIONS STATED IN THIS RULE.

It is not just in criminal cases that we find this conflict between candor and confidence, and the constitutional problem is not just a Sixth-Amendment one. Quite obviously, it is also a Fifth Amendment problem; placing an obligation of candor on the lawyer really makes the client incriminate himself, by proxy. In *Upjohn, Inc. v. U.S.,* 499 U.S. 383 (1981), a unanimous Supreme Court held that attorney-client confidentiality, at common law, is broader than, and independent of, the attorney-client privilege or the privilege against self-incrimination.

We know that the Framers assumed a confidential attorney-client relationship when they wrote the Bill of Rights. The Constitution sees the lawyer as the client's champion against a hostile world. It is so basic, and so obvious a premise of the adversary system, which is itself an unarticulated premise of the Constitution, that the Framers did not think they had to spell it out. Inherent in both the "assistance of counsel" guaranteed by the Sixth Amendment, and the privilege against self-incrimination, guaranteed by the Fifth, is that something told a lawyer can not be learned from the lawyer, if it can not be learned from the client. If the Kutak Rules were as constitutional as Mr. Kutak claims they are, they would show it in their treatment of confidentiality. They are, unhappily, a step backward from the Model Code.

The Kutak Commission asks us to commit a betrayal of

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Reining in the Regulators
Independent Regulatory Commissions Assessed

Stuart M. Statler

There is a hybrid out on the political landscape which has elements of all three branches of government. It has some legislative powers of the Congress. It enforces laws like the executive branch. It exercises certain judicial powers of the courts. Yet on a day-to-day basis, the independent regulatory commission works outside the control of any of those branches.

There are about a dozen such independent commissions.[1] Probably no other creation of Congress has caused so much debate—nor so much consternation amongst constitutional scholars. In a period of regulatory reform and streamlining of government, few areas warrant closer scrutiny than this so-called "fourth branch" of government: independence from whom and for what purpose? The underlying theory was enlightened; but changing economic and political circumstances can make even bold ideas obsolete. Through the years, particularly in the last decade, the vaunted independence of these agencies has been diluted. Today, one must question the continued value of independence when viewed against a growing public mandate for more efficient, coordinated, and less burdensome government. Instead of relying on the theory of how independent regulatory commissions *should* perform, we can now look to experience to judge how they *do* perform. These commissions have major economic impacts, and they function beyond the control of our national leadership.

HISTORY OF "INDEPENDENCE"

The first independent regulatory commission was the Interstate Commerce Commission. Established in 1887, the ICC was not strictly independent; it was part of the Department of the Interior. In fact, the term "independence" does not even appear in the legislative debate about the ICC. Most of that debate focused on the collegial structure—a group of co-equal commissioners using majority vote to determine policy. The issue of independence was first raised in 1889. The concern of a Representative Reagan (D–Texas) about the possible adverse effects of President Harrison's influence on the Commission led to a bill conferring full independence on the ICC. A man by the name of Reagan distrusted a sitting president, and we ended up with a constitutional curiosity.

Today, "independence" might confuse more than describe. All independent agencies are run by commissions. Commissioners are appointed for a set term of office, can be removed only for cause, and operate outside of executive control. For example, the five commissioners of the Consumer Product Safety Commission serve for seven-year terms and may be removed only for "neglect of duty or malfeasance in office." The decision-maker, once appointed, does not depend on any political event or individual politician, not even the President, for continuance in office (although, in almost every case, an incoming administration can name its own chairman).

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[1]These independent regulatory commissions include the: Civil Aeronautics Board, Commodity Futures Trading Commission, Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Election Commission, Federal Maritime Commission, Federal Reserve Board, Federal Trade Commission. Interstate Commerce Commission, National Labor Relations Board, Nuclear Regulatory Commission, and the Securities and Exchange Commission.

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Steven J. Buckley co-authored this article while Special Assistant to Commissioner Statler.

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trust. It may not seem that way to the Commission, because its members' clients are mostly corporations and, as their proposed Rules tell us, a lawyer for a corporation serves the corporate entity, and not any particular person. Perhaps to a lawyer whose clients are abstractions, abstract truth is a higher value than loyalty to legal fictions. If your vision of the American lawyer is that of "just a privately employed bureaucrat," you naturally define the lawyer as Kutak does—first, "an officer of the legal system," and only secondly "a representative of clients."

We are not just part of the system, to be defined in such dull milk-and-water terms. We are part of the very life blood of American democracy. As Justice Story stated, lawyers are the "sentinels on the outposts of the Constitution." That is our highest function.

I would rather work from a Code that was written in the sixties, and that breathes the spirit of that decade. There are things in that Code that make me proud to be a lawyer. I do not find them in the Kutak Rules. Kutak's proposal should be rejected.

Why so much latitude? Congress meant to insulate these commissioners from partisan considerations and ensure that they not reflect only the views of a particular administration. Of the more than one hundred federal regulatory agencies, very few enjoy this measure of autonomy. The bulk, instead, are executive branch agencies contained within the various Cabinet departments, and answer ultimately to the President. Some are highly visible and semi-autonomous; others are buried in the bowels of bureaucracy. Almost all are headed by a single administrator who is accountable to the department secretary. All administrators serve at the pleasure of the President and may be removed at any time for any reason.

The Environmental Protection Agency is sometimes wrongly termed an "independent" agency in the executive branch because it is *not* part of a Cabinet department. But being "separate" is not the same as being "independent." The administrator of EPA has no job security—like the heads of other executive branch agencies, he or she can be fired at the whim of the President. The Federal Energy Regulatory Commission is a true curiosity: its commissioners have set terms of office with removal only for cause, yet the agency is wholly contained within the Energy Department.

Given the confusion about "independence," critics and proponents are often not talking about the same thing. The focus here is on the dozen or so commissions whose members have set terms and job security. Theory tells us that commissioners in these agencies can discharge their duties without fear of being tossed out for a politically unpopular decision.

PROS AND CONS

Political Taint. Independence insulates decision-makers from the more pernicious influences associated with politics. We have certain assurances that a securities investigation will not be compromised because it involves a large campaign contributor; that a television license will not be awarded arbitrarily to the President's friend. Further, requirements for open meetings allow all to review the decision and satisfy themselves of its fairness and completeness. In theory, commissions are havens for good-willed experts to make objective decisions about difficult policy issues without favoritism or fear of personal reprisal. But some critics view this structure as undemocratic. Commissioners get together and decide what people and companies can and cannot do in such areas as transportation, trade, securities, communications, and banking. By granting or denying a license, rate, or route, or prohibiting certain commercial practices or banning specific products, they can make or break a business. Some contend that independent commissions are just not accountable to anyone—the White House, the Congress, regulated firms or the American public. That overstates the case, but there is some merit to the point.

Moreover, the most immediate failing of independence stems from its arbitrary application. No theory guides us regarding *when* a particular area should be regulated by an independent body. Why do so few of the more than one hundred regulatory bodies merit such independence? Why should some types of regulation be promulgated by independent commissions while others are subject to White House influence or control? For instance, in the health and safety field the CPSC and NRC are independent, but every other health and safety agency—FDA, OSHA, EPA, NHTSA, FAA, FHA and the FSQS—is not.[2] The independent/dependent split is not based on economics in that the NHTSA and EPA have far greater economic impacts than CPSC. Nor is the split based on some fuzzy notion of regulatory zeal. Few businessmen would argue that OSHA, a "non-independent" agency, has been noticeably restrained in exercising its powers. There is neither rhyme nor reason in who gets independence and who does not.

Instant Rewrite. The independent commissions do not suffer from "instant rewrite" of regulations by a new administration, which executive agencies may encounter. Regardless of the merits of such actions, agencies smart under such blows to their integrity. By contrast, if the President wanted to redirect an independent agency's path, he could so do only through legislation or by persuading—but not ordering—the commission to revise regulations. The agency cannot be directed to change a decision nor can the commissioners be fired if they choose not to.

Many regulations, however, should be rewritten . . . or rescinded. On some issues, commissioners are out of touch with everyday public sentiment: bureaucratic myopia can produce poor regulations and bureaucratic inertia can keep them alive. Even when a commission decides to revise specific rules, lengthy delays are commonplace. Procedural roadblocks abound; and special interests (be they fervent public interest advocates or businessmen concerned about "unfair competition") ingeniously exploit these loopholes.

Policy Consistency. Election results will not dictate dramatic shifts in policy within the independent regulatory commissions. Both industry and the public can bank on some constancy, and be certain the rules of the game will not change in mid-course. Naturally, the independent commissions will to some degree reflect the changing political climate. An incoming administration can appoint a new chairman and fill vacancies as they arise, especially at the start of a new regime. In addition, commissioners, like most of us, are affected by the tides of public opinion. Still, sudden departures from previous policy are unlikely.

Paradoxically, the downside of internal consistency within an independent agency can be government-wide inconsistency. Not one of these independent agencies has a national perspective, in that not one of them adds up the

[2]These familiar acronyms identify the Consumer Product Safety Commission (CPSC); the Nuclear Regulatory Commission (NRC); the Food and Drug Administration (FDA)/Department of Health and Human Services; the Occupational Safety and Health Administration (OSHA)/Department of Labor; the Environmental Protection Agency (EPA); the National Highway Traffic Safety Administration (NHTSA), the Federal Aviation Administration (FAA) and the Federal Highway Administration (FHA)/all three, Department of Transportation; and the Food Safety and Quality Service (FSQS)/Department of Agriculture.

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sum of the individual actions to assess their total impact. Thus, we may find a government fraught with contradiction or disarray on the national level. The economic chaos that besets the nation today has not come from any single blunder. To the extent regulation is at fault, it is the cumulative result of many actions that are outside the direct control of an elected President pledged to take strong corrective action.

Expert Boards. Through non-political expert boards, independence also seeks to foster informed decisions on technical matters that can have broad policy implications. Experts are chosen for their knowledge, credentials, and interest in the field. A President should carefully select—subject to considered Senate approval—the most qualified experts to render public service on these commissions.

This ideal, however, is seldom achieved. Because the commissions are independent, their performance does not reflect directly on the President. Since they generally do not reflect negatively on the administration, presidents have been known to abuse the appointments process. Commission appointments in many cases have become political plums—jobs awarded for years of loyal service to a prominent public figure or to a political party. Political patronage, not merit, accounts for many of the appointments to the independent commissions.

WHITE HOUSE PURSE STRINGS

Congress has given the Office of Management and Budget (OMB) vast discretion over the independent commissions' budgetary and personnel matters. As a result, the commissions are becoming much more susceptible to pressures from the administration—pressures subtle and not so subtle.

The administration has come to exercise the power of the purse by setting the "mark" that *every* agency must support in going to the Congress for an appropriation. This gives OMB enormous influence with the independent commissions. While Congress retains ultimate funding control, OMB sets the stage for, and the terms of, the debate.

White House authority extends to other key areas. OMB can review, delay, or veto an independent agency's information requests to industry and thereby frustrate ongoing investigations. OMB sets agency personnel ceilings regardless of how much money Congress appropriates. Plus, at a moment's notice, OMB can freeze all hiring activities. Finally, although independent agencies for the most part are not subject to substantive Executive Orders, the pressures for "voluntary" compliance are intense. Congress often questions agencies about whether and how they are responding to such directives. The independent commissions have little recourse but to conform.

CONGRESSIONAL TUGS AND PULLS

Congress has been no less energetic than the President in asserting influence over the independent regulatory commissions. Holding ultimate control through its constitutional power of the purse, Congress can make the independent agencies hop, skip, or jump, on cue. Funds may be slashed, or the reauthorization period may be shortened to give added leverage. For example, the CPSC received a triple-blow during its 1981 reauthorization: wide-scale budget and personnel cutbacks (both down some 30%) and a short two-year lease on life that may have to be renewed under still less favorable circumstances. Nothing is more likely to make a bold agency timid and reluctant to use its *statutory* powers.

Congress also does a lot of tugging and pulling through its oversight committees. The committees instruct agencies to investigate or cease investigating specific issues, and mince no words in telling an agency *how* to proceed.

Finally, all the recent hue and cry about legislative veto signals Congress' changing attitude toward independence. The veto gives Congress a short-cut to summarily overrule an agency's decision. While Congress can already accomplish the same end through legislation, the veto injects Congressional influence earlier and more quickly. But when Congress decides to pass on agency rules even before they have had a trial run, agencies become gun-shy, and their coveted independence meaningless.

TRADEOFFS

Despite all these limits, the independent regulatory commissions still enjoy a measure of autonomy. The President and Congress tend to shape the context—not the content—of regulatory decisions. The distinction is between what can be done now and what can be done over time. The President and Congress exert influence over budget, personnel, and jurisdiction. But actual decisionmaking remains the exclusive domain of the commissioners. The nitty-gritty of regulating—who gets stuck, how badly, and for how long—usually lies beyond the immediate control of Congress and the President.

Clearly, agency independence involves tradeoffs. For too long though it has survived by tradition alone. It is time to re-evaluate the entire concept of independence. To prevent the President from tackling large sectors of the economy that are regulated by a host of independent regulatory commissions—established and preserved largely through historical accident—is self-defeating. The President *cannot* today direct all the key players in the federal government to follow his lead. Unless some compelling reason dictates otherwise, the President should have sufficient authority to coordinate the activities of as many of the federal agencies as possible.

These commissions represent a valuable means of relieving some of the political pressures in the decisionmaking of a representative government. But tradition and happenstance should not dictate that their independence be maintained. Some agencies that needed to be independent at an earlier time do not have that need today. The advent of watchdog media and public interest groups, widespread openness in agency decisionmaking, toughened conflict-of-interest laws, and increased judicial review may be more than enough to guard against favoritism or impropriety. We should reassess whether we still need so extensive a "fourth branch" of government.

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temporary or permanent basis to relieve some of the overcrowding in our state and county institutions.

In addition to this, the administration is looking at unused lands of the federal government to see whether these lands could be made available to state and local governments for reasonable amounts of money so that they could be used as the sites of future construction of prison and jail facilities.

A third area where the federal government has a role is in the support of local law enforcement where centralized facilities are important, such as in law enforcement training and education, as well as in research, and central statistical activities. In this regard the federal government is expanding the facilities being made available to state and local governments.

And finally, the federal government will increase its investigation and prosecution of federal offenses that have an impact on local criminal activity, and particularly on street crime. The administration is worried, for example, about the possible advent of terrorism, about assassination attempts, and about guns being used in street crimes. One way that the federal government can cooperate with local law enforcement is to be more vigorous in the enforcement of federal firearm crimes so that, for example, the possession of firearms at airports, of which there are hundreds of known instances every year, can be effectively prosecuted by the federal government.

These are some of the crime-related areas in which the federal government will be active. In addition, federal, state and local officials, as well as members of the bar, must cooperate to simplify and accelerate the process of adjudication in order to enhance certainty and deterence in criminal law. We must also stress individual responsibility, a greater respect for the law, for truth and for justice, not only through our official criminal justice system, but also in schools and in other institutions that shape values. We must carry out the axiom that only the law-abiding can hope to enjoy a lawful society.

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costs? Would they encourage undesirable judicial intrusions into policymaking?

These are serious questions. But I am not persuaded they raise problems that warrant setting aside the opportunity for trying a masters' system. First, the two-stage process is designed to protect litigants' rights. No doubt some freedom of action will nevertheless be lost. But respect for the rights of contending parties should not be the dominant theme of environmental decisionmaking. That the merits of the cases in question are heard at all is in large measure a consequence of relaxation of the rules restricting access to the courts, as a result of judicial decisions and environmental legislation. The justification for that relaxation is that better decisions will serve the public interest. It is not that corporations and environmental organizations will thereby be fairly treated. Second, environmental controversies already run a long regulatory and appellate course. Time would be saved if the burden of educating judges about scientific and technical matters could be lightened. Properly organized, the masters' proceedings should do just that. Third, stage one costs can be controlled in the normal fashion used for the participation of masters: by judicial allocation among the parties. Stage two costs should be provided for in judicial appropriations; the number of cases is small, and the resulting increase in the judicial budget will not be onerous.

As to the danger of encouraging judicial policymaking, a reading of recent opinions—for example in cases involving OSHA's proposed one part per million benzene standard, EPA's phaseout of leaded gasoline, and the NRC's rulemaking efforts with respect to nuclear waste disposal—makes clear that no defensible set of rules will exclude the judiciary from substantive review of regulatory decisions. Even the most conservative of courts have been forced to review technical matters more deeply than administrative law traditionally allows. The lesson of the environmental cases is that hybrid technical and legal questions demand special attention if judicial review is to be more than *pro forma* approval of agency actions or naive application of preexisting prejudices.

It has been suggested that technological decisionmaking can be improved only by reforming the administrative agencies and bringing technical expertise properly to bear on outstanding problems. Internal regulatory reform, it is argued, will revitalize the cooperative relationships among judges, legislators and regulators envisioned during the New Deal. If that is the hope, regulatory history is not encouraging. To one who observes the heavy impact of the inertia of past policies on present environmental and economic regulation, skepticism about a cure of the regulatory malaise via agency reforms seems the only justifiable position. It remains to implement a hardheaded vision of what is required by a complex technological society: independent decisionmaking institutions with skills, interests and powers adequate to face the problems upon whose solutions our collective future turns.

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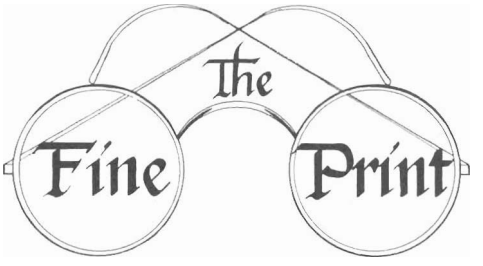

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