

context in which the right originated, a journalistic era characterized by extreme callousness for the feelings of the individual, accounts for the continued overzealous protection of an individual's privacy. Certainly, continued adherence to the fact-fiction concept, unwillingness to recognize educational material, and emphasis on the purpose of the publisher or the recipient cloud and confuse the proper determination of a given publication's value. Accordingly, any attempt to achieve a judicious balance between a free press and the right to be let alone would be well served by discarding these concepts.⁸⁹ Indeed, the tremendous variety of fact situations suggests that the test should be broad and possess a certain flexibility.⁹⁰

DIMINISHING APPLICABILITY OF THE ANTITRUST LAWS IN REGULATED INDUSTRY: CONGRESS, THE COURTS, AND THE AGENCIES

Members of commerce and industry have allegedly been plagued with uncertainty as to their rights and liabilities under the Sherman and Clayton Acts.¹ This obscurity is at times even more prevalent in segments of the economy which are also subject to regulation by federal administrative agencies. Whereas the antitrust laws, which remain applicable in some degree to such industries, forbid restraints of trade by various types of concerted activity and combinations of ownership which result in undue economic power,² several regulatory agencies have, either

89. "To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare would be a difficult task." Warren and Brandeis, *supra* note 2, at 214.

90. Implicit in any mechanical consideration of the problems involved is an unwillingness to examine each case upon its own merits. Or as Mr. Justice Holmes stated: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Dissent in *Hyde v. United States*, 225 U.S. 347, 384, at 391 (1911).

1. See Callman, *The Essence of Antitrust*, 49 COL. L. REV. 1100 (1949); Handler, *Anti-trust—New Frontiers and New Perplexities*, 6 RECORD 59 (1951). But see Bennett, *Some Reflections on the Interpretation of the Sherman Act Since the Emergence*, 8 FED. B.J. 317 (1947).

2. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1946). The Clayton Act was enacted to supplement the Sherman Act by halting practices tending toward restraint of trade or commerce. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1946); see EULER, *MANUAL OF MONOPOLIES AND FEDERAL ANTI-TRUST LAWS* (1929).

Mere existence of a regulatory statute does not impliedly render inapplicable the Sherman or Clayton Acts; the antitrust laws are superceded by specific statutes only to the extent of repugnancy between the two. *United States v. Borden Co.*, 308 U.S. 188, 198-199 (1939). An indictment charging a criminal violation of the antitrust laws

by the statutes creating them, or by judicial decision, been empowered to sanction similar practices. The apparent trend toward minimal application of antitrust laws in regulated industries is underscored by: (1) legislative enactments which authorize specified agencies to exempt enumerated practices from the operation of antimonopoly laws; (2) judicial extension to a regulatory body of the power to exempt a particular course of conduct from the antitrust laws although the exception is not granted by statute; (3) the primary jurisdiction doctrine, which the courts apply in order to refer questions requiring utilization of specific knowledge to the proper agency for initial consideration.

A pointed illustration of statutory exemption from antitrust laws is found in the legislation prompted by government proceedings against railway rate bureaus³ and the suit in *Georgia v. Pennsylvania R. R.* under the Sherman Act.⁴ The complaint in the *Georgia* case charged a conspiracy among some twenty railroads to restrain trade and commerce in violation of the Sherman Act.⁵ Allegedly, the defendants had fixed arbitrary and non-competitive rates for freight transportation to and from Georgia so as to impair the economy of the plaintiff state. Approximately sixty rate bureaus, committees, conferences and similar private rate-fixing bodies had been utilized to establish the rates complained of and, according to the plaintiff, no road could change its joint through-rates without approval of these private rate bureaus. Southern roads were subject to coercion by northern roads and could not, even if they so desired, publish joint through-rates between Georgia and the North when the northern roads would refuse to join in such rates. As a result of this activity, the rates charged were about 39 percent higher than the rates for transporting like commodities the same distances in the North. In the light of cases holding that contracts between competing roads for the sole purpose of affecting traffic rates,⁶ and that combinations which restrict the right of a carrier to set its own rates,⁷

is generally within the jurisdiction of the court. *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87, 105 (1913); *United States v. Borden Co.*, *supra*. Finally, rates, although reasonable and non-discriminatory, arrived at through the operations of a private association of railroads whose purpose was to determine uniform rates among what would otherwise have been competing carriers, were held subject to criminal actions brought by the government. *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922); *but cf. Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936).

3. *United States v. Association of American Railroads*, 4 F.R.D. 510 (D. Neb. 1945); *United States v. Terminal Railroad Ass'n*, 224 U.S. 382 (1912); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

4. 324 U.S. 439 (1945).

5. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1946).

6. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

7. *United States v. Northern Securities Co.*, 120 Fed. 721 (C.C.D. Minn. 1903), *aff'd*, 193 U.S. 197 (1904).

place a restraint on commerce, the alleged rate-fixing machinery in the *Georgia* case was illegal under the Sherman Act.⁸ Prior to this litigation the Interstate Commerce Commission had no authority to approve and legalize the operation of private rate bureaus, but this power was conferred upon the Commission by the Reed-Bulwinkle Amendment in 1948.⁹

Other instances of litigation evidence the supremacy often accorded legislative determination of agency objectives over the stated policy of antitrust laws. In 1929, the ICC approved the acquisition of control of Railway Express by more than eighty railroads; the Commission also sanctioned proposed uniform operating agreements calling for a pooling and division of earnings among the roads, noting that the agreements would appoint Railway the exclusive agent for conducting all the express transportation on the lines of the participating roads.¹⁰ In *United States v. Railway Express Agency, Inc.*, the complaint was founded upon the agreements which constituted the defendant the ex-

8. ". . . notwithstanding the important statutory function in the determination of interstate railroad charges . . . of the Interstate Commerce Commission, the Sherman Act applies to interstate common carriers by rail as well as by other means." *United States v. Association of American Railroads*, 4 F.R.D. 510, 524 (D. Neb. 1945). Price-fixing under the Sherman Act is illegal *per se*. *United States v. Paramount Pictures*, 334 U.S. 131, 143 (1948); *United States v. Frankfort Distilleries*, 324 U.S. 293, 296 (1945); *United States v. Masonite Corp.*, 316 U.S. 265, 274 (1942).

The opinion in the *Georgia* case was occasioned by the plaintiff's motion to file an amended complaint; the motion was granted. The validity of the allegations concerning the activities of the defendant railroads was not determined. The Court, however, concluded that the complaint stated a cause of action under the antitrust laws, and if the charges were shown to be true, relief could be granted. Subsequently, a petition for rehearing was denied, 324 U.S. 890 (1945); a Special Master was appointed, 326 U.S. 693 (1945); the Special Master's report was received and filed, 339 U.S. 975 (1950); and the Court in a per curiam decision dismissed the amended bill of complaint, 340 U.S. 889 (1950). The dismissal of the complaint indicates that the Special Master's report did not find the allegations in the complaint to be true.

9. "Any carrier party to an agreement between or among two or more carriers relating to rates, [etc.] . . . may . . . apply to the Commission for approval of the agreement. . . ." 62 STAT. 472 (1948), 49 U.S.C. § 5b(2) (Supp. 1952). "Parties to any agreement approved by the Commission under this section . . . are . . . relieved from the operation of the antitrust laws with respect to the making of such agreement, and . . . to the carrying out of such agreement. . . ." 62 STAT. 473 (1948), 49 U.S.C. § 5b(9) (Supp. 1952). Utilizing the authority granted it by this Amendment, the ICC has approved agreements which call for an establishment of an association of carriers to provide procedures for the joint consideration and initiation of rates by the members of the association. *Lake Coal Demurrage Committee—Agreement*, 279 I.C.C. 40 (1950); *Eastern Railroads—Agreements*, 277 I.C.C. 279 (1950); *Western Traffic Association*, 276 I.C.C. 183 (1949). A similar private rate bureau was sanctioned by the ICC subject to the condition that the agreement be amended to provide that any passenger motor carrier should be admitted to membership in the association, as of right, upon the same terms as existing members. *National Bus Traffic Association, Inc.—Agreement*, 278 I.C.C. 147 (1950).

10. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423, 429 (1929).

clusive agent of the railroads and prohibited the roads from engaging in the express business.¹¹ The court requested from the ICC a determination as to whether the Commission, by its approval of the uniform operating agreements, also approved the exclusive agency provisions.¹² Relying upon ICC determination that the exclusive agency was an essential part of the previously endorsed pooling arrangements, which were insulated by statute from antitrust authority, the court refused to invalidate the compacts.

In *Pennsylvania Water & Power Co. v. Federal Power Commission*, the question was raised concerning the validity of rate schedules prescribed by the FPC which necessitated coordination between Penn Water and another utility in buying, selling, and transmitting power.¹³ The Maryland Public Service Commission had asked the FPC to investigate the excessive rates Penn Water was allegedly charging Consolidated Gas Co. of Baltimore. After extensive hearings, the FPC found that Penn Water had charged Consolidated almost three times the amount that would have constituted a reasonable rate; upon this finding, Penn Water was ordered to file a new schedule of rates to meet the required reduction.¹⁴ Subsequently, the FPC denied Penn Water's application for a rehearing,¹⁵ rejected new rate schedules filed by the plaintiff, and prescribed the rate schedules which Penn Water sought to avoid in court.¹⁶ The Supreme Court upheld the authority of the FPC to direct the company to use rate schedules which would necessitate cooperation with Consolidated,¹⁷ although Penn Water contended that similar interconnection had been held violative of the Sherman Act when arranged by private contract.¹⁸ The Court found that Penn Water had been given a fair hearing on adequate notice, the order was within the authority

11. 101 F. Supp. 1008 (D. Del. 1951).

12. *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981 (D. Del. 1950).

13. 343 U.S. 414 (1952).

14. *Pennsylvania Water & Power Co.*, 8 F.P.C. 1 (1949).

15. *Pennsylvania Water & Power Co.*, 8 F.P.C. 170 (1949).

16. *Pennsylvania Water & Power Co.*, 8 F.P.C. 1193 (1949).

17. "Whenever the Commission . . . finds such action necessary or appropriate in the public interest it may by order direct a public utility . . . to establish physical connection of its transmission facilities with the facilities of . . . other persons . . . to sell energy to or exchange energy with such persons. . . . The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order. . . ." 49 STAT. 848 (1935), 16 U.S.C. § 824a(b) (1946).

18. Penn Water had previously sought a declaratory judgment to determine whether or not certain contractual arrangements between it and Consolidated, calling for combined operation, were in violation of the antitrust laws. The circuit court reversed the district court, holding that the contract was invalid as it violated the Sherman Act. *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U. S. 906 (1950).

of the FPC, and the Commission acted to further the congressional purpose articulated in the Federal Power Act.

The Far East Conference, a voluntary organization of water carriers engaged in Far East trade, established a dual system of rates, not approved by the Federal Maritime Board. Shippers who bound themselves to use only Conference ships paid a rate lower than that charged shippers who did not so bind themselves. The government brought an antitrust action against the Conference since the inducement to exclusive dealing arrangements here apparently restrained trade.¹⁹ But, because the instant offenses were also violations of the Shipping Act, for which the FMB could grant an adequate remedy,²⁰ the Court in *Far East Conference v. United States* ruled that the Board had primary jurisdiction;²¹ *United States Navigation Co. v. Cunard Steamship Co.* clearly governed the disposition of the present case.²² On the basis of past FMB decisions, a fair prediction can be made that if a complaint is presented to the Board, it will issue a cease and desist order against the Far East Conference and require the Conference to compensate any water carrier injured as a result of the illegal arrangement.²³

Do these situations exhibit conflict between antitrust law enforcement and regulatory administration, or do the regulatory agencies protect the public interest by statutory means as vigorously as the antitrust laws operate in relation to the economy generally? Certainly, the common purpose is to safeguard the public interest, but the effectiveness of alternative means to this end may differ. The legislative choice of the impelling mechanisms should be guided by a realistic appraisal of particular controls in the fields in which they are employed.

Statutory Exemptions

Although existence of industry regulation does not create an automatic exemption from the operation of the antitrust laws,²⁴ certain

19. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1946). "It may be conceded that looking alone to the Sherman Anti-trust Act the bill states a cause of action. . . ." *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 480 (1932).

20. "No common carrier by water shall . . . [r]etaliate against any shipper by . . . resort to . . . discriminating or unfair methods, because such shipper has patronized any other carrier. . . ." 39 STAT. 733 (1916), as amended, 46 U.S.C. § 812 (1946). ". . . the Board . . . may direct the payment . . . of full reparation to the complainant for the injury caused by such violation." 39 STAT. 736 (1916), as amended, 46 U.S.C. § 821 (Supp. 1952).

21. 342 U.S. 570 (1952).

22. 284 U.S. 474 (1932).

23. See note 39 *infra*, and accompanying text.

24. In *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 560 (4th Cir. 1950), the question of antitrust enforcement in

acts can be perpetrated by the members of a regulated industry with immunity from liability under the Sherman and Clayton Acts, at least if statutory prerequisites are met. Notable among these exempting clauses are those in the Interstate Commerce Act, Shipping Act, Civil Aeronautics Act, and Federal Communications Act.

The ICC may approve a division of traffic or earnings if such a division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition."²⁵ The Commission may approve acquisition of one carrier by another if it finds the consolidation to be in the public interest.²⁶ If the Commission finds an agreement between carriers to establish rates is in "furtherance of the national transportation policy," it may approve such agreement.²⁷ The FMB may sanction contracts and arrangements between water carriers "fixing or regulating transportation rates; giving or receiving special rates; . . . controlling, regulating, preventing, or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative arrangement," which the Board finds not to be "unjustly discriminatory . . . as between carriers, shippers," and others, "or to operate to the detriment of the commerce of the United States. . . ."²⁸ The CAB may approve any merger between air carriers which it finds is not inconsistent with the public interest. The Board cannot, however, sanction any consolidation "which could result in creating a monopoly . . . and thereby restrain competition or jeopardize another air carrier not a party to the . . . merger. . . ."²⁹ Similarly, the FCC may approve the consolidation of domestic telegraph carriers if the Commission finds such consolidation to be in the public interest.³⁰ The agreements or practices authorized by the foregoing agencies in accordance with the statutes are exempted from the provisions of the antitrust laws which would otherwise make them illegal.³¹ This relief

regulated industry is briefly summarized: ". . . the grant of monopolistic privileges, subject to regulation by governmental body, does not carry an exemption, unless one be expressly granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them."

25. 41 STAT. 480 (1920), as amended, 49 U.S.C. § 5(1) (Supp. 1952).

26. 41 STAT. 481 (1920), as amended, 49 U.S.C. § 5(2) (b) (Supp. 1952).

27. 62 STAT. 472 (1948), 49 U.S.C. § 5b(2) (Supp. 1952).

28. 39 STAT. 734 (1916), as amended, 46 U.S.C. § 814 (Supp. 1952).

29. 52 STAT. 1001 (1938), as amended, 49 U.S.C. § 488 (1946).

30. 57 STAT. 6 (1943), as amended, 47 U.S.C. § 222(b) (1) (Supp. 1952).

31. ICC—"The carriers affected by any order . . . to effect a consolidation approved and authorized in such order . . . are . . . relieved from the operation of the 'antitrust' laws. . . ." 41 STAT. 482 (1920), as amended, 49 U.S.C. § 5(8) (1946); and see 62 STAT. 473 (1948), 49 U.S.C. § 5b(9) (Supp. 1952), pertaining to relief from liability for rate-making agreements. FMB—"Every agreement . . . lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title

applies only to the specifically defined acts and must be secured in the exact manner set forth by the statute.³²

Since Congress has excused certain behavior in regulated industry from the operation of the antitrust laws when suitably sanctioned, consideration of the background of these exemptions is necessary to discover, if possible, the legislative purpose in enacting the exceptions. The Sherman and Clayton Acts are an attempt to keep competition relatively free from interference to the end that prices and business practices may be determined by the operation of a free market.³³ Regulation of a specific industry exhibits a congressional recognition that competition by itself protects the public only to the extent that a free market is actually advantageous; commercial rivalry fails as a protector of the public where the general welfare of the country is harmed³⁴—for example, by cut-throat competition. In determining policy affecting commerce and industry, legislators have been faced continually with the issue of whether competition or regulation is economically more desirable, and, which system offers the greater protection to the public interest.

Congressional provisions for exemptions from antitrust law in regulated industry may bespeak an intent to depend upon competent administrative bodies to enforce the basic rationale of the antimonopoly legislation, or, such exceptions could indicate an intent to abandon the philosophy of the antitrust laws in such industries. The former seems

15. . . ." 39 STAT. 734 (1916), as amended, 49 STAT. 2016 (1936), 46 U.S.C. § 814 (1946). CAB—"Any person affected by any order made under sections . . . shall be . . . relieved from the operations of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." 52 STAT. 1004 (1938), 49 U.S.C. § 494 (1946). FCC—" . . . the Commission shall enter an order approving . . . such consolidation . . . and thereupon any . . . laws making consolidations . . . unlawful shall not apply. . . ." 57 STAT. 7 (1943), as amended, 47 U.S.C. § 222(c)(1) (1946); and see 57 STAT. 6 (1943), as amended, 47 U.S.C. § 222(b)(1) (1946).

32. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940); 40 OPS. ATT'Y GEN. 338 (1944).

33. Acknowledging the non-existence in the economy of a literally free market governed by pure competition as defined by economists, the term "free market" is here used as employed in H.R. Doc. No. 599, 81st Cong., 2d Sess. 119 (1950): "The American system is based on the maintenance of a free market wherein the products of farm and factory are offered for sale in competition which insures the movement of the greatest quantity of goods at the lowest possible price." For an enlightening discussion of the varying degrees of market freedom existing in the national economy today, see WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 1-18 (TNEC Monograph 21, 1941).

34. "It [Federal Power Act] evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business." *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 193 F.2d 230, 234 (D.C. Cir. 1951).

more likely where Congress has included express standards for granting immunity which, of necessity, call for a reconciliation between the anti-trust policy and the concepts of regulation;³⁵ the latter intention seems more plausible in statutes placing no restriction other than the public interest upon the power to grant absolution.³⁶ Notwithstanding the possibility of legislative displacement of antitrust policy in these latter instances, Mr. Justice Douglas, dissenting in *McLean Trucking Co. v. United States*, expressed the view that the public interest embraced a substantial consideration of the antitrust laws.³⁷ And, the Supreme Court has accepted the proposition that the FCC should administer its duties always aware of the aim expressed in the passage of the Sherman Act.³⁸

35. See notes 25, 27, 28, 29 *supra*.

36. See notes 26, 30 *supra*.

37. 321 U.S. 67, 93 (1944). In 1941, Associated Transport, Inc., was incorporated so as to effect the consolidation of eight large motor carriers. The corporation applied to the ICC for approval of the merger. Opposition to the consolidation was presented in ICC hearings by the Secretary of Agriculture, the Antitrust Division of the Department of Justice, the National Grange, four fruit growers' associations, and a motor carrier. At the conclusion of the hearings, the Commission authorized the merger. Associated Transport, Inc.—Control and Consolidation, 38 M.C.C. 137 (1942). The McLean Trucking Co., a competitor of some of the carriers who were parties to the merger, brought suit to set aside the Commission's order; the district court dismissed the complaint. *McLean Trucking Co. v. United States*, 48 F. Supp. 933 (S.D.N.Y. 1942). On appeal, the principal issues were whether the ICC applied the proper standard in granting approval, and whether the Commission gave due weight to the antitrust policy. The Court affirmed the lower court decision.

Mr. Justice Douglas felt the ICC should only authorize an agreement which would violate the antitrust laws if it were not approved by the Commission, in situations where no other method for furthering the policy prescribed for the ICC by Congress was presented. In evaluating Mr. Justice Douglas' contention in his dissent that antitrust policy is strongly embodied in "public interest," the reader should bear in mind the fact that Douglas has consistently favored strictest enforcement and application of the antitrust laws. See Mr. Justice Douglas' dissents in *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952); *Far East Conference v. United States*, 342 U.S. 570 (1952); and see Epstein, *Economic Predilections of Justice Douglas*, 1949 Wis. L. Rev. 531, 556.

38. The Supreme Court, in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), approved the report of the FCC as to the agency's function in balancing the antitrust policy against that of regulation. At page 223, the Court quoted the Commission's self-determination of its regulatory duties: "This Commission, although not charged with the duty of enforcing that law [Sherman Act] should administer its regulatory powers . . . in the light of the purposes which the Sherman Act was designed to achieve. . . ." See the discussion by Mr. Justice Frankfurter in *Radio Corporation of America v. United States*, 341 U.S. 412, 421 (1951) (dubitante). *But cf.* *RCA Communications, Inc. v. Federal Communications Comm'n*, 21 U.S.L. WEEK 2217 (D.C. Cir. Nov. 11, 1952), in which the majority opinion concluded the Communications Act was not intended to promote competition but was for the purpose of permitting entry into the field of only those who can prove that such entry would serve the public interest. This opinion was in contrast to the Commission's conclusion that the proposed service should be authorized, in that it would do the public no good, but little harm, and would promote competition. Judge Prettyman dissented, saying the mere fact that a development would foster competition does not prove that such practices are not in

Assuming the sufficiency of the statutory guides, are administrative agencies observing and giving due deference to them? A cursory examination reveals that administrative bodies usually articulate the conclusion that a particular practice has been found to conform to the legislative standards prescribed for the agency to follow; the conduct should therefore be granted agency approval.³⁹ Critical appraisal of agency operation by experts has resulted in vigorous criticism of the manner in which the statutory standards are applied by the administrative bodies.⁴⁰ Agency findings usually come after extensive hearings and are accompanied by voluminous detailed opinions. A reader of these reports is frequently unable to ascertain whether the stated facts actually prove that the statutory standards have been met, since the opinions necessarily adduce mainly the circumstances which support the stated conclusion.⁴¹ Although a court has access to the entire record, as well as the agency's report, and is presented various guides, such as parties' briefs, to aid it in grasping and evaluating the facts, it is not unreasonable to assume

the public interest; he believed the agency's approval of the proposed service should have been affirmed.

39. FCC—*e.g.*, Mutual Telephone Co., 12 F.C.C. 875 (1949); Western Union Telegraph Co., 12 F.C.C. 1010 (1948); Southeastern Massachusetts Broadcasting Corp., 12 F.C.C. 363 (1947); Providence Journal Co., 12 F.C.C. 267 (1947); Sherwood B. Brunton, 11 F.C.C. 407 (1946); Julio M. Conesa, 11 F.C.C. 200 (1946). FPC—*e.g.*, Atlantic City Electric Co., 8 F.P.C. 949 (1949); Carolina Power & Light Co., 8 F.P.C. 829 (1949); Pennsylvania Power & Light Co., 6 F.P.C. 1114 (1947); The Connecticut Power Co., 6 F.P.C. 451 (1947); Arkansas Power & Light Co., 4 F.P.C. 948 (1945); California Public Service Co., 4 F.P.C. 812 (1944); Public Service Electric & Gas Co., 1 F.P.C. 748 (1938); Newport Electric Corp., 1 F.P.C. 699 (1937). FMB—*e.g.*, Black Diamond Steamship Corp., 2 U.S.M.C. 755 (1946); Rates From Japan To United States, 2 U.S.M.C. 426 (1940); Waterman Steamship Corp., 2 U.S.M.C. 238 (1939); Storage Charges Under Agreements, 1 U.S.M.C. 750 (1938); Philadelphia Ocean Traffic Bureau, 1 U.S.S.B.B. 538 (1936); Port Differential Investigation, 1 U.S.S.B. 61 (1925). ICC—*e.g.*, Lumber From And To Hampton & Branchville R.R., 264 I.C.C. 419 (1946); Consolidation Of Railroads, 235 I.C.C. 1 (1939); Operation By Manufacturers Railway Co., 145 I.C.C. 715 (1928); Acquisition Of Control By Central R.R., 145 I.C.C. 279 (1928). CAB—*e.g.*, Air Freight Forwarders Case, 9 C.A.B. 473 (1948); American Airlines, Inc., 6 C.A.B. 371 (1945); Pan American Airways, Inc., 6 C.A.B. 143 (1944); Pan American Airways, Inc., 3 C.A.B. 540 (1942); Pan American Airways, Inc., 3 C.A.B. 32 (1941); United Air Lines Transport Corp., 1 C.A.B. 739 (1940).

40. See Durham and Feldstein, *Regulation as a Tool in the Development of the Air Freight Industry*, 34 VA. L. REV. 769 (1948); Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and The Public Interest*, 61 YALE L.J. 467 (1952); Warner, *The Administrative Process of the Federal Communications Commission*, 19 SO. CAL. L. REV. 312 (1946); Notes, 64 HARV. L. REV. 947 (1951); 64 HARV. L. REV. 1154 (1951); but see Smith, *The Application of the Antitrust Laws to Regulated Industries*, 14 I.C.C.P. JOURNAL 181 (1946); Stough, *Origination and Procedures of the Civil Aeronautics Board*, 11 I.C.C.P. JOURNAL 372 (1944).

41. Judge Frank has said that a judicial opinion "is a censored exposition, written by a judge, of what induced him to arrive at a decision which he has already reached." Frank, *Why Not a Clinical Lawyer-School*, 81 U. OF PA. L. REV. 907, 911 (1933). This statement would be equally applicable to administrative determinations.

that a court also encounters great difficulties in attempting to ascertain whether the conclusion necessarily follows from the evidence.⁴²

The Sherman Act was designed to protect interstate and foreign commerce from unlawful restraints of trade and monopolies; the Clayton Act was passed with the goal of insuring there would be no lessening of competition in interstate commerce resulting from harmful practices. Administrative agencies, on the other hand, were created because Congress felt a need for the substitution of regulation for competition in certain areas to improve the performance of the industrial and commercial machinery of that segment of the economy.

If administrative agencies were nonexistent, Congress would be forced to legislate with a view to correcting evils already present.⁴³ Admittedly, this is the usual method of congressional action, but, if the legislature must wait until detrimental practices in an industry vital to the national economy become manifest, corrective measures may come too late to prevent severe injury to the economy. Creation of an agency to supervise the field permits preventive measures to impede a harmful course of conduct. Congress was also aware of its own limitations in regard to certain questions requiring expertise and specialization for intelligent evaluation and solution, and so created administrative agencies embodying the requisite knowledge found wanting in Congress. Since the legislature intended to replace competition with regulation in specified areas, ostensibly, the antitrust laws should not apply with full force and vigor to regulated industries.

The antitrust laws and the doctrine of illegality *per se*⁴⁴ only consider the public interest in so far as it is supposedly served by the strict enforcement of antimonopoly legislation. An agency, on the other hand, has the advantage of continuity of attention and clearly stated responsibilities for the public interest in its empowering act. It is not impossible to conceive of practices beneficial to the public and, yet, in opposition

42. The Court, recognizing its own shortcomings in accurately and justly determining technical questions, such as rates, has paid due deference to administrative bodies. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), climaxed a series of disputes which struggled with the problem of judicial review of agency rate-fixing to determine the reasonableness of such rates: See *Chicago, M. & St. P. R.R. v. Minnesota*, 134 U.S. 418 (1890) (rates must be fair and not confiscatory); *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362 (1894) (reasonable return on the investment); *Smyth v. Ames*, 169 U.S. 466 (1898) (formula set up to evaluate the investment to ascertain reasonable return).

43. See REP. ATT'Y GEN. COMM. AD. PROC. 13 (1941).

44. See Schueller, *The New Antitrust Illegality Per Se: Forestalling and Patent Misuse*, 50 COL. L. REV. 170 (1950); and ANTITRUST LAW SYMPOSIUM 20 (1950 ed.) for a thorough treatment of the increasing use of the illegality *per se* doctrine in antitrust cases.

to the antitrust philosophy; indeed, Congress has perceived such instances and provided for specific exemption of these acts from prosecution under the Sherman and Clayton Acts.

Exemption by Judicial Decision

Although Congress has evidenced an intent to allow certain regulatory agencies to operate in segments of the economy without necessarily following the antitrust laws, it has not seen fit to extend such authority to all regulatory administrative agencies. Whatever the congressional purpose, the fact is that only four major agencies were granted power to absolve practices from the operation of the antitrust laws; the FPC is not among them. In the *Penn Water* case, an order of the FPC was contested on the ground that compliance with its directive would force the company to violate the Sherman Act.⁴⁵ In upholding the order, the Supreme Court said: "The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts," and, "[i]n the highly unlikely event that Penn Water's managerial freedom is ever threatened by such an order, it will be time enough to consider its validity."⁴⁶

Could the Justice Department successfully prosecute an action in this situation? If so, would the fact that the utility was acting under a Commission order be a complete defense? The Court implied there would be no antitrust proceedings instituted against Penn Water based on the present arrangement; whether this assumption is founded upon the conclusion that the FPC order calls for cooperation between the two companies sufficiently different from prior illegal coordination, or on the rationale that has led to congressional grants of this type of power to agencies, is speculative. Whatever may have motivated the Court, a possibility arises that conduct sanctioned by an agency may be exempted from the antitrust law by a court, absent specific authorization by Congress. Congress has limited exception clauses to specific agencies, and this power of exemption should not be extended other than by legislative enactment.

Primary Jurisdiction

Theoretically, the right of persons to bring proceedings under the antitrust laws against a member of a regulated industry is not abrogated merely because the industry is subject to regulation. The doctrine of

45. *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952); see notes 13-18 *supra*, and accompanying text.

46. *Id.* at 421-422.

primary jurisdiction, however, is pertinent in this situation. This doctrine originated in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*⁴⁷ Abilene sued to recover damages, alleging the carrier had exacted an unjust and unreasonable rate for a shipment of cotton seed from Louisiana to Texas. The rates charged were covered by the Interstate Commerce Act, which provided that a person claiming to be damaged by a carrier under the provisions of the Act might bring an action either in the district court *or* before the ICC.⁴⁸ The defendant asserted that since the contested rate had been filed with the ICC, the court was without jurisdiction to question it, or that, if the court had jurisdiction, it could not grant relief from a rate which had not been found to be unreasonable by the Commission. Finding that judicial determination of the question of the reasonableness of the rate would defeat one of the purposes of the Interstate Commerce Act, which was to establish uniformity and equality of rates, the Court concluded *the Act required* that the question of reasonableness must be originally resolved by the ICC, and, hence, Abilene must seek redress by primary resort to the Commission.

In applying the doctrine of primary jurisdiction, the courts have evolved the general thesis that questions which fall peculiarly within an agency's competence are not subject initially to determination by a court.⁴⁹ When an agency has authority to grant a remedy for a complaint, primary resort should be made to the agency; if the issue is entirely outside the agency's authority, the courts will retain jurisdiction.⁵⁰ In addition, primary resort to an agency is not essential to support the jurisdiction of the courts over cases involving questions within the dominion of the agency, but where the controversy is not over a question of fact and there is no occasion for the exercise of administrative discretion.⁵¹ The doctrine is generally inapplicable to criminal antitrust actions.⁵² Primary jurisdiction precisely effectuates the overall congressional intent regarding the role of administrative agencies.

47. 204 U.S. 426 (1907).

48. 24 STAT. 382 (1887), as amended, 49 U.S.C. § 9 (1946).

49. "And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter." *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 487 (1932); *accord*, *Far East Conference v. United States*, 342 U.S. 570 (1952); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 164 (1922).

50. *E.g.*, *Texas & Pacific R.R. v. Gulf, C. & S.F. R.R.*, 270 U.S. 266 (1925); *Civil Aeronautics Board v. Modern Air Transport*, 179 F.2d 622, 624 (2d Cir. 1950); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951).

51. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922).

52. *United States v. Borden Co.*, 308 U.S. 188, 206 (1939).

Dismissal of a court proceeding is not a necessary consequence of the use of the primary jurisdiction doctrine. The court may retain jurisdiction of the cause, pending agency determination of the administrative questions.⁵³ This course will usually be followed if the case presents questions which necessitate a conclusion by the agency as to whether any aspect of the alleged offenses falls within the agency's authority.⁵⁴ The complaint will be dismissed by the court only if the disputes are entirely within the scope of the agency's dominion.⁵⁵ As a practical matter, then, the ultimate result will probably be indicated by the agency.⁵⁶

United States Navigation Co. v. Cunard Steamship Co. typifies the operation of the doctrine of primary jurisdiction.⁵⁷ Navigation Co. was operating steamships carrying general cargo between New York City and foreign ports. Cunard was engaged in foreign commerce and carried 95 percent of the general cargo trade from North Atlantic ports in the United States to ports in Great Britain and Ireland. Navigation and Cunard were the only general cargo carriers supplying this area. The defendant, Cunard, had established a dual system of rates, a general tariff and a lower contract rate; the latter was made available only to shippers who shipped exclusively with the defendant. In numerous instances the tariff rate was 100 percent higher than the contract rate. This scheme was resorted to by Cunard for the purpose of coercing shippers to deal solely with the defendant and thereby to necessitate the plaintiff's withdrawal from competition with the defendant. Cunard was also alleged to have given rebates and employed other illegal practices to the end of forcing Navigation to withdraw from the general cargo carrying business in this area. Plaintiff brought action to enjoin

53. "For the purpose of deciding the case on the merits, however, the case must first be referred to the . . . Commission for a finding as to the proper rental chargeable for tank cars furnished by non-shippers. . . . The measure of damages . . . if any . . . depends wholly on the Commission's findings with respect to tank car rentals." *Keith Railway Equipment Co. v. Association of American Railroads*, 64 F. Supp. 917, 921 (N.D. Ill. 1946).

54. *Apgar Travel Agency, Inc. v. International Air Transport Ass'n*, 107 F. Supp. 706 (S.D.N.Y. 1952); *S. S. W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951), cert. denied, 343 U.S. 955 (1952). Also see note 64 *infra*, and accompanying text.

55. *Slick Airways v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951). Also see note 61 *infra*.

56. *Isbrandtsen Co. v. United States*, 81 F. Supp. 544 (S.D.N.Y. 1948). This may involve application of the doctrine of exhaustion of administrative remedies. See Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939); Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction*, 28 TEX. L. REV. 168 (1949); DAVIS, ADMINISTRATIVE LAW §§ 182-196 (1951).

57. 284 U.S. 474 (1932).

Cunard from continuing its practices. Here, as was conceded by the Court, violations of the antitrust laws were clearly present, but the alleged offenses were also infractions of the Shipping Act. The remedy, then, was that afforded by the FMB under the latter Act since the matter was entirely within the Board's primary jurisdiction. The recent holding in the *Far East Conference* case adopts the same conclusion in a proceeding brought by the government.⁵⁸

Two recent decisions pertaining to the CAB indicate a conflict in delineating the effective scope of primary jurisdiction. In *Slick Airways v. American Airlines, Inc.*, both plaintiff and defendant were engaged in the air transportation business.⁵⁹ Slick sued for triple damages amounting to ten million dollars and to enjoin further action by the defendant in violation of the antitrust laws.⁶⁰ The complaint alleged that American and other airlines conspired to monopolize the air transportation business and to restrain trade and commerce by utilizing "predatory rate policies and a process of attrition to waste the resources of the plaintiff . . . and . . . cause them to operate at a substantial loss." In addition, the defendant was charged with waging "a campaign of unfair competitive practices designed to appropriate the [air transportation] business." Basing its contention upon the primary jurisdiction of the CAB, American claimed the court was without jurisdiction to hear this case. The district court concluded that since alleged violations of the antitrust laws could not be dealt with by the CAB, the court had jurisdiction.⁶¹

58. *Far East Conference v. United States*, 342 U.S. 570 (1952). See notes 19, 20 *supra*. A district court has expressed the view that ". . . where an antitrust proceeding is brought by the Government . . . civil or criminal, the . . . court has . . . plenary jurisdiction, even though there are issues in the case which may involve what are broadly termed administrative questions." *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981, 986 (D. Del. 1950). The *Far East Conference* case overrules this determination: "The same considerations of administrative expertise apply, *whoever* initiates the action." *Far East Conference v. United States*, 342 U.S. 570, 576 (1952).

59. 107 F. Supp. 199 (D.N.J. 1951).

60. "Any person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ." 38 STAT. 731 (1914), 15 U.S.C. § 15 (1946).

61. The court observed that the CAB is not empowered to award damages for a violation of the Civil Aeronautics Act. The CAB could prevent present and future infractions by issuing a cease and desist order; it could not give a remedy for past offenses. Upon this ground, the court distinguished CAB cases from those concerning the antitrust laws and the FMB. The latter agency has power to allow monetary damages for alleged grievances resulting from practices in violation of the Shipping Act. Since there is no repugnancy between the Sherman Act and the Civil Aeronautics Act, the former is not impliedly repealed by the latter. Further, the court did not feel the matter presented administrative questions such as must be determined by the CAB. Consequently, it did not order a stay of proceedings pending CAB resolution of administrative problems.

In a similar case, *S.S.W., Inc. v. Air Transport Association*, the plaintiff, a "nonscheduled" air carrier, sued Air Transport, an association of regularly certificated air carriers, for treble damages and to enjoin defendants from continuing an alleged combination in restraint of trade.⁶² The plaintiff accused the defendants of conspiring to monopolize air commerce and of employing various wrongful methods to achieve their end. The principal allegations charged Air Transport with coercing ticket agencies to refrain from becoming agents for the plaintiff, influencing administrative agencies to impose regulations which favored the certificated carriers and proved burdensome for the "non-scheds," and offering transportation at cut prices until competition was eliminated. These offenses also constituted violations of the Civil Aeronautics Act.⁶³ The district court had denied relief on the ground that the complaint raised matters which the Civil Aeronautics Act was designed to correct and which fell within the primary jurisdiction of the CAB.⁶⁴ The circuit court referred the part of the complaint asking for injunctive relief to the CAB, since the Board could grant that remedy. The portion of the complaint charging antitrust violations and seeking treble damages was remanded to the district court to retain jurisdiction of the antitrust suit while the plaintiff sought his remedies from the CAB. If the Board found the matter to be within its jurisdiction and the alleged practices legal under the Civil Aeronautics Act, there could be no antitrust violation.⁶⁵ The court and agency were thus made cooperative instrumentalities for the dispensation of justice.⁶⁶

Conclusions and Suggestions

There may be a danger that limitation of the applicability of the antitrust laws, while full scope is given to the authority of the admin-

62. 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).

63. "The Board may, upon its own initiative or upon complaint by any carrier . . . investigate and determine whether any carrier . . . has been engaged in . . . unfair methods of competition in air transportation. If the Board shall find . . . that such air carrier . . . is engaged in . . . unfair methods of competition, it shall order such air carrier . . . to cease and desist from such . . . methods of competition." 52 STAT. 1003 (1938), as amended, 49 U.S.C. § 491 (1946).

64. *S.S.W., Inc. v. Air Transport Ass'n*, 91 F. Supp. 269 (D.D.C. 1950).

65. "The proceedings before the Board will result in a determination by it of the extent of its jurisdiction over the subject matter. In addition, they will produce a record, findings of fact and conclusions of law. . . . The District Court, which will . . . have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation." *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); *accord* *Apgar Travel Agency, Inc. v. International Air Transport Ass'n*, 107 F. Supp. 706 (S.D.N.Y. 1952).

66. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 264 (1951); *United States v. Morgan*, 313 U.S. 409, 422 (1941).

istrative agencies, may result in allowing the regulated industries to shape the controls which supposedly limit them. Some commentators believe that as the extent of government supervision increases, the regulatory authorities become industry-oriented and fail to protect the public;⁶⁷ writers have pointed to the ICC as an example of an industry-oriented agency which has lost its effectiveness to defend shippers and consumers against abuses by the carriers.⁶⁸ If such criticism is valid, what check is there on administrative bodies? Aside from political restraints, one answer obviously lies in judicial review. All agency empowering acts and the Administrative Procedure Act provide for judicial review of agency action.⁶⁹ However, judicial review of agency directives, as it functions today, is hardly an adequate safeguard against capricious and arbitrary determination by agencies.⁷⁰

In order to assure the proper application of the guiding principles in the empowering acts of the various agencies, reliance must be placed upon a factor other than judicial review, especially since a reviewing court cannot compel an agency to exercise its given authority.⁷¹ Criticism of administrative bodies has been directed at the personnel and actual operation of the agencies, rather than at the existence of agencies *per se*.⁷² Selection of competent administrators is the most effective safeguard against abuses of power and to a considerable extent assures compliance with congressional policies expressed in the creation of the

67. EDWARDS, *MAINTAINING COMPETITION* 251 (1st ed. 1949).

68. *E.g.*, Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952); Note, 64 *HARV. L. REV.* 1154 (1951).

69. 60 *STAT.* 243, 5 *U.S.C.* § 1009 (1946) (Administrative Procedure Act); 52 *STAT.* 1024 (1938), as amended, 49 *U.S.C.* § 646 (1946) (Civil Aeronautics Board); 48 *STAT.* 1093 (1934), as amended, 47 *U.S.C.* § 402(a) (Supp. 1952) (Federal Communications Commission); 39 *STAT.* 738 (1916), as amended, 46 *U.S.C.* § 830 (1946) (Federal Maritime Board); 49 *STAT.* 860 (1935), 16 *U.S.C.* § 825(l) (1946) (Federal Power Commission); 24 *STAT.* 385 (1887), as amended, 49 *U.S.C.* § 17(9) (1946) (Interstate Commerce Commission).

70. Extensive treatment has been accorded the scope and effect of judicial review upon administrative determinations in other discussions. *E.g.*, DAVIS, *ADMINISTRATIVE LAW* §§ 210-257 (1951); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927); LANDIS, *THE ADMINISTRATIVE PROCESS* 123 (1938); Daily, *Practical Value of an Appeal Under Section 1006(e) of the Civil Aeronautics Act*, 15 *J. AIR L.* 365 (1948); Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 *COL. L. REV.* 759 (1949); de Smith, *The Limits of Judicial Review: Statutory Discretions and the Doctrine of Ultra Vires*, 11 *MOD. L. REV.* 306 (1948); Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 *A.B.A.J.* 434 (1947); Dickinson, *Review of Administrative Determination, A Summary and Evaluation*, 25 *MINN. L. REV.* 588 (1941); McCarran, *Improving "Administrative Justice": Hearings and Evidence*; *Scope of Judicial Review*, 32 *A.B.A.J.* 827 (1946).

71. See *REP. ATT'Y GEN. COMM. AD., PROC.* 76 (1941).

72. See notes 40 and 68 *supra*.

agencies; a conscientious and intelligent choice of commissioners should alleviate the danger of agencies becoming industry-oriented. The heyday of the ICC⁷³ and the recent disposal of government-owned wartime aluminum plants⁷⁴ illustrate the accomplishments of responsible administration.

While capable personnel is of prime importance, adequacy of appropriations is equally significant; an inadequate staff coupled with too limited access to funds can result in the deterioration of any governmental body. Agencies must not be treated as a minor component of the American economic system, but should be established in the position they were intended to occupy—leading elements of the economy.

There is, however, need for improvement in the structure of the administrative agencies. As such agencies operate, each is an independent entity with little or no correlation or coordination with other regulatory bodies. Much can be said for individuality; considerable advantages, however, can be gained from a program of cooperation among the independent agencies. Formation of a Commission for Coordination of Regulatory Agencies bespeaks recognition of the faults of the subsistent scheme and proffers correction of them.⁷⁵ Unquestionably, opposition to the creation of one more bureau would arise in many quarters. Such resistance could point to inefficiency in agencies presently

73. Huntington, *supra* note 68.

74. United States wartime aluminum plants were to be sold to private owners. The administrators of the operation could not strengthen monopolies by such disposal as they might make of these plants under the Surplus Property Act of 1944, 58 STAT. 765 (1944). In the words of the statute: "The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as . . . (d) to discourage monopolistic practices and to strengthen and preserve the competitive position. . . ." 58 STAT. 766 (1944). The board, acting under this statutory obligation, not only disposed of the plants, but actually promoted competition by enticing two new competitors to enter the field, making a total of three where previously there had been only one—the Aluminum Company of America. For an excellent report of this undertaking, see STEIN, *THE DISPOSAL OF THE ALUMINUM PLANTS* (Comm. or Pub. Adm'n Cases 1948).

75. The structure of the central authority would follow the pattern established by present administrative boards. The central control would be exercised by seven commissioners appointed by the President with the advice and consent of the Senate. The Commission would include a chairman, general secretary, general counsel, general engineer, general accountant, general economist, the Attorney General, and assistants to each of these. The authority would be able to employ such other personnel as necessary to the effective exercise of its function. None of the commissioners, officers, or assistants should be members of present regulatory agencies.

Although it would be virtually impossible to find men who are experts in all fields of regulation, the technical make-up of the central authority would guarantee intelligent evaluation of the reports submitted by the lower agencies. This thesis would be equally applicable whether the report came before the central authority in an action appealing a lower agency directive, or on initial inquiry by the central board.

in operation as illustrative of the evils incident to expanding governmental regulation. But, creation of another bureau to enhance the proper administration of existing agencies should not fail because of such analogies. General principles of control, and skills applicable to all agencies, could be elicited and employed to increase the efficient management of each in the exercise of its duty.⁷⁶

Upon acknowledging the desirability of establishing a central authority, the amount of power to be vested in it becomes a paramount concern. Fearing the possibility of centralization of control over the entire economy in the hands of one agency, writers have advocated restricting the central authority to an advisory position⁷⁷—making recommendations to the lower agencies on overall economic policies and supplying Congress with reports concerning the competency of the various agencies, as well as submitting recommendations to the legislature for increasing their effective operation. Notwithstanding the admittedly favorable results to be gained from a purely advisory authority, greater advantages are promised by the establishment of a commission which, in addition to its other functions, would also be empowered to review lower agencies' determinations and to compel them to exercise their granted powers.

Since members of the Commission would not be dealing exclusively with the problems and personnel of one particular field, there would be little possibility that the Commission's directives would further the interests of the members of one regulated industry in opposition to the general welfare of the public. In sum, the Commission could provide a check on industry-orientation, a source of counsel for, and a coordinating factor between, the agencies, as well as an impetus to more conscientious exercise of the agencies' granted powers.

Nevertheless, as Edwards has said, "[i]f competition is abandoned more widely than control is applied, there will be a no man's land of business activity in which the public interest is safeguarded by neither competition nor control."⁷⁸ Avoidance of this lacuna requires some plan to assimilate the conflicting policies of competition and regulation. The Attorney General, or one of his staff, should be a member of the Commission; his advice would be of singular value regarding the effect of the antitrust laws on proposed practices, particularly in areas where

76. Edwards, *op. cit. supra* note 67, at 274.

77. *E.g.*, Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies*, 16 *TEX. L. REV.* 335 (1938).

78. Edwards, *op. cit. supra* note 67, at 259.

restraint of monopolies is part of the agency's statutory obligation or the public interest is not included in the agency's standard.⁷⁹

If the nation continues to rely upon administrative agencies as the custodians of the public interest in some areas, the protectors must be energized to better enable them to adequately fulfill their designated function. Since existing supervisory agencies manifest a need for increased adjustment between the policies of regulation and competition, creation of a Commission for Coordination of Regulatory Agencies is indeed warranted. The end result of statutory evolution in this area should be effective protection of the public, whether by regulatory acts or by the antitrust laws. Where supervision is not complete, there is a role for commercial rivalry to play. Once complete regulation has been chosen, however, no room remains for the conflicting concept of promoting competition.

STATE TAXATION OF VEHICLES MOVING INTERSTATE: THE INTERVENTION OF THE SUPREME COURT

In their widening search for sources of revenue the states find themselves subject to control by courts acting under various clauses of the federal Constitution. The taxpayer, on the other hand, finds the Constitution and the courts a sometime protection against what may seem to him the depredations of money-hungry state legislatures and tax administrators. The commercial enterprise which operates in more than one state is in the fortunate position of having two constitutional shields in its armory which are granted to few other taxpayers—the due process clause of the Fourteenth Amendment and the commerce clause.

The mandate of the due process clause with respect to state taxes is that a tax "bear fiscal relation to the protection, opportunities, and benefits given by the state."¹ Despite difference of opinion among members of the present Supreme Court regarding applications of this test,² the basic criterion has not been challenged. The commerce clause

79. "Officials of the government are aware of and, for the most part, responsive to their duty to respect the laws of the United States and to conform to its policies. Hence they are likely to keep their actions reasonably consistent with the competitive policy in so far as they have it in mind." *Id.* at 310.

1. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

2. See Mr. Justice Jackson's dissent in *State Tax Commissioner v. Aldrich*, 316