
Changing the Guard: Notes on How New Presidents Meet Old Agencies

When I picked today's subject, I didn't realize that when the time came for me to actually give it, the two major Presidential candidates would also be talking about it--that it would be a full-blown campaign issue.

When I decided to talk about what happens when new Presidents meet old agencies, I had in mind a few anecdotal experiences going back to post-election 1960, when Senator Kennedy had narrowly defeated Vice President Nixon. At that time, I had a very small role in a little operation run by Sargent Shriver and Bob Kennedy devoted to getting the best possible people for all the policy jobs in the new administration, and the best possible jobs for all the loyal campaign workers--both at once, where possible.

We had the famous "Green Book" which the Wall Street Journal says is always available to an incoming administration--so far as I know, the "always" refers to that one time. However that fact may be, there was in the book, besides all the assistant secretaryships, bureau headships; and "Schedule C" policy jobs, the names of all the regulatory commissioners with their political affiliation and expiration dates for their appointment, and information as to the incumbent chairmen.

As a small footnote, let me say that at that time I had credentials as a campaign worker, and I had my spot in the Green Book staked out--I wanted to be a Federal Power Commissioner. I made it, too--six years later.

As far as I recall, the 1960 campaign didn't find either candidate telling his views about the independent regulatory commissions, either by letter or campaign statement. The "talent hunt" headed by Mr. Shriver wasn't burdened, so far as I ever knew, with any pre-election statement about what kind of men would be sought for vacancies on the regulatory commissions.

As I started out saying, two months ago when I picked this subject I had no way of knowing that by the time I reached Florida, and your convention, one of the candidates would have said that as President he would use his powers to appoint new regulatory agency officials to achieve a stated goal "through the appointment of men to the regulatory commissions whose views . . . correspond with my own."
Without identifying the view of the candidate who made that statement, and without getting into the political wisdom or unwisdom thereof, let me say that the relationship between Presidents and the independent commissions has been a puzzle to political scientists and other students of government ever since the federal regulatory creature was first spawned in 1887.

"All presidents have tried in one way or another to influence the conduct of commissions, but the principal tool of presidential influence has been the appointing process." So an eminent student of the subject summarized in 1955. Another mechanism open to a President is in selecting chairmen for the agencies from among their members—a power he doesn't uniformly have for all the agencies.

But our topic today is not so much how a President finally influences regulatory agencies, but rather what kinds of opportunities are open to the President (any President), particularly early in his incumbency.

Al Smith's stricture to "look at the record" took me first to the agency in which I serve. Is there a pattern in the appointments made by new Presidents to this Commission? Since its creation as a five-man, bipartisan, independent agency in the administration of Herbert Hoover in 1930, there have been 34 appointments, or an average of fewer than one a year. Five of these were initial appointments on December 30, 1930, and it was not until 1961 that any President appointed more than two in one year. It was in 1961 that President Kennedy appointed four members of the Federal Power Commission. In only five of that thirty-eight years did any President appoint more than one FPC commissioner, and in four of these five years the President in question was serving his first year in office.

President Kennedy, besides appointing four federal power commissioners, also made four new appointments to the SEC and three new appointments to the FCC in his first year in office. President Johnson named three new men to the SEC in 1964, his first year in office.

The President of the United States has the authority to designate the chairmen of most commissions. Generally, this authority includes the power to redesignate—in other words, the chairman remains such at the pleasure of the President.

One notable exception is the ICC, where the chairmanship still rotates among the commissioners. Another possible exception presents an interesting story.

When President Kennedy came into office in 1961, he announced that Joseph Swidler, of Tennessee, would be a member of the FPC and its chairman. Under the act creating an independent Federal Power Commission, the power to select the
A chairman was granted to the Commission, with the proviso that "each chairman when so elected [is] to act as such until the expiration of his term of office."

In 1950, this grant of power to the Commission was revoked by Reorganization Plan No. 9, and transferred to the President in these simple words: "The functions of the Commission with respect to choosing a Chairman from among the commissioners . . . are hereby transferred to the President."

When the announcement concerning Mr. Swidler's future was made in early 1961, Jerome Kuykendall was Chairman, having been appointed by President Eisenhower in 1953 and reappointed in 1957 for a term ending in 1962. Mr. Kuykendall obviously could read his authority to extend until his term expired, more than a year later.

Did President Kennedy have, then, two chairmen? Well, Mr. Swidler's confirmation was a little delayed, by matters not involving him, and thus he did not take office until June 28, 1961, when he was sworn in as Commissioner. The following September without fanfare or public announcement, Mr. Swidler took over the chairmanship, and a few weeks later President Kennedy announced that the former chairman would resign on January 1, 1962.

Some say this graceful solution was worked out by one of the President's White House assistants—a fellow named Lee White. I believe it is the same Lee White who has a commission from President Johnson to be Chairman of the Federal Power Commission, and whose term runs until June 22, 1970.

The power to designate the chairman of an agency is almost as important as the power of appointment itself, and history shows that Presidents have recognized this.

Although the then-effective statute was silent on who selected SEC chairmen, President Roosevelt's nomination of Joseph P. Kennedy to the SEC was followed by his selection by his colleagues to be their chairman. The President's interest seemed apparent, also, in that key role for William O. Douglas. Indeed, it seemed that an unwritten executive prerogative was firmly established in that agency until Harry Truman became President in 1945. When he was asked about his wishes when first thereafter a vacancy in the chairmanship occurred, he sent word back that the members should select whomever they thought would be best for the Commission.

Bracketed between Mr. Kennedy and Mr. Douglas as a chairman of SEC was another well-known figure whose role in these matters was destined to continue—Dean James M. Landis of Harvard Law School. He later served as Chairman of the Civil Aeronautics Board, and earlier had served on the Federal Trade Commission.
But it is not in connection with the President's power of appointment or of selecting chairmen that I mention Dean Landis. President-elect Kennedy showed how one new President confronted old agencies by commissioning Landis to report to him on the regulatory agencies, shortly after the 1960 election. That Report, released to the press the day after Christmas in 1960, had a profound impact on all the agencies, appointment and chairmanship-designating power aside.

I say the impact of the Landis Report was profound, but this was not because its recommendations were generally accepted. Indeed the opposite was the case. The Interstate Commerce Commission still elects its chairman; no reorganization plan has made clear that the FPC chairman serves at the pleasure of the President; agencies do not generally delegate authority to panels; the White House hasn't been enlarged to house special assistants for transportation, communications, or energy, each to help the President watch the commissions—all these things were recommended. An Administrative Conference was eventually authorized by Congress, but even that was delayed much longer, as President Johnson continued his search for the right man to head it, succeeding just last year.

Nevertheless, Dean Landis's detailed criticisms of several agencies, including particularly the FPC, produced a great deal of activity, even while the need therefor was being denied by the agencies singled out for the strongest criticism.

The Landis Report identified three kinds of problems for President Kennedy, and Professor Carl McFarland of the University of Virginia characterized them as "inside", "outside", and "topside". A new President is bound to be concerned with how an agency operates, with the quality of its leadership and its general efficiency. These are "inside" problems. "Outside", of course, refers to the relationship of the industry and its access to members or staff, the maintenance of independence of the examiners, and the like. "Topside", in his summary, means the quite legitimate interest of the President in seeing that the administrative role of the independent agency meshes with the executive departments, and conforms with the general goals of his administration.

President Johnson faced the same kind of problems, exactly, in 1963 when he assumed the Presidency, and whether it be Humphrey, Nixon, or Wallace, so will the new man in 1969.

The Presidency, as Teddy Roosevelt said, is a "bully pulpit". A President's leadership can manifest itself in many ways, ranging from the caliber of his appointments, to his speeches, messages, and personal interest.

Most of the agencies are required to be bi-partisan.
Once in a while Presidents have seemed slightly to bend this law by naming "Independents", thus leaving the minority party with one of five, or two of seven, instead of two and three as had usually been the case.

Looking only to past performance, if the first vacancy which occurs in an agency is that of the "other" party, the chances of reappointment are measurably slimmer. However, in some agencies at least the folklore is that even party members with the new President can be tainted by association with a former President who appointed them. In one agency, for example, the oldtimers firmly believe that President Eisenhower had a policy never to reappoint any appointees of Roosevelt or Truman, even if they were appointed as Republicans. However, the record doesn't bear out this generality—at the FCC, President Eisenhower reappointed one of Truman's Republican appointees. Interestingly, Democratic Presidents have shown more willingness to reappoint Republicans, than have Republican Presidents to reappoint Democrats.

It may generally be concluded that recess appointees don't fare well, if their man or their party doesn't make it.

Also, chairmen are seldom selected from the other party, although President Johnson did select to be the present chairman of the FCC a Republican who formerly had been chairman for a period in a Republican administration.

One of the subjects which was once considered central to any discussion of the relationship of commissions and Presidents is the President's power to remove his appointees. Congress can and has specified limits upon this power, different for different agencies, but as a practical matter I think no President now would challenge the independence of the agencies by removal action, except for cause.

Public morality is, in my opinion, highly developed in the federal regulatory agencies, and one evidence of this is the virtual absence of attempts to remove commissioners during the last twenty or thirty years.

So far, it may seem that the action and reaction of agency and President, particularly in the early years of the latter as President, is that and no more—an executive striving to gain control and devise and carry out a program, and an agency whose very structure resists rapid change.

There is another force, namely the Congress. As Speaker Rayburn said in 1959, all of the agencies except ICC were created while he served in Congress, and most of them came from bills which passed through the Interstate and Foreign Commerce Committee while he was its chairman.
President Kennedy showed his sensitivity to Congressional possessiveness respecting the independent agencies in his reaction to the Landis Report. When asked about it soon after the inauguration, he was careful to emphasize that he had already talked with Chairman Oren Harris, and he said that even though he was asking Dean Landis to come to work at the White House, he was not assuming the role of "czar" which the press had rumored was in store. Indeed, in the President's words, "the Congress bears special responsibility for these agencies, and therefore, I think it is probably not likely that major responsibility in this area would be released to the White House, and I am not completely sure it is wise."

The Congress created the agencies to exercise legislative-type jurisdiction in complex matters like utility ratemaking, and the award of government license and franchise privileges. It specified a duty of promoting certain industries in their infancy, notably air transportation. As mentioned earlier, the agencies concerned with transportation, communications, and energy, because the federal interest therein traces to the Constitution's Commerce Clause, came under the jurisdiction of the Interstate and Foreign Commerce Committee of the House of Representatives and the Commerce Committee of the Senate in their authorization phase, and substantive legislative matters affecting them continue to be referred to these committees.

But Congressional surveillance of the agencies does not end with the legislative committees. The budget for the agencies has to be acted upon by the appropriations committee, first in the House, and then in the Senate, and the Independent Offices Subcommittees of these committees have powerful influence over the agencies. The President, through his Bureau of the Budget, must ask for the money for the agencies in his budget.

Former Chairman Cary, of the SEC, was most poignant in his book about Politics and the Regulatory Agencies, heaping blame equally on the White House and the Congress, but singling out the Budget Bureau as "the Cerberus at the gate of any program."

Finally, the Constitutional confirmatory function of the United States Senate with respect to Cabinet members, judges, and ambassadors, is statutorily repeated with respect to all the independent agency commissioners. Although seldom utilized, the Senate's prerogative of refusing to confirm is a realistic limitation on the appointment power, and this is particularly true where the law provides for appointments from the "other" party--here the ways of the Senate in the matter of "Senatorial courtesy" can effectually frustrate a President.

It would be an over-simplification for a President-elect to think of the independent regulatory agencies only in terms
of his power to appoint members, or to select chairmen, or to manipulate budget or to try to accommodate to legislative sensitivities or Senatorial prerogatives. The agencies are themselves bureaucracies, whose component parts are headed by officers and employees with considerable power and influence.

The "staff" of an agency, like the bureaucracy in any of the executive departments, is protected by civil service rules which insulate them to some extent from major disruptions when administrations change. Indeed, because the agencies are bipartisan, the insulation may be greater in the regulatory agency than in the Cabinet agency.

This does not make the "staff" any less a force to be reckoned with, in terms of advocating or dampening a change in regulatory course. The independent functions given to staff components, as in the case with the original NLRB, makes it necessary for a new President or his advisers, to look into the particular agency situation, in terms of his own program goals.

Dean Landis considered this problem principally in terms of the role of the chairman within the agency, and the role of the President in appointing the chairman. Of course, if a President cannot select the chairman (as he cannot in the ICC), then his interest in promoting more centralization of administrative power over the staff in the office of the chairman may be somewhat tempered.

Furthermore, within the agencies, tradition or the inclinations of the current chairman or the fractiousness of some agency members may diminish the chairman's role, notwithstanding the statutory grant of special powers to him. By reorganization plans in 1950, the chairmen of FPC and SEC were the transferees of powers theretofore vested in the respective commissions, of "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel . . . , (2) the distribution of business among such personnel . . . , and (3) the use and expenditure of funds. The power is circumscribed, in later sections of the plan, but the chairman's leeway is still broad, and the loyalties of the staff are naturally and properly owed primarily to him.

It is in connection with the role of the staff that I add the final dimension of my discussion, which is the relationship between the agency and the industry it regulates.

To me, the foremost lesson of Professor Cary's book about his experience as the Chairman of the SEC was in his story about getting amendments to the Securities Act in 1963. For therein, he identified the pragmatic considerations such as Congressional attitude, budget and personnel limitations,
workload requirements, and simple "political clout" which led him to propose and defend a system of supervised self-regulation by the affected industry. In another section, he compared the relative volume of staff-handled and Commission-handled matters in his agency.

The lesson, to me at least, is that avoidance of legislatively-proscribed practices, and the assurance of legislatively-encouraged goals, not only does not preclude contact between agency and industry, but often affirmatively requires it.

The process, however, must be carefully supervised, and the lion's share of day-to-day interaction has to be at staff level.

Staff, therefore, can have the fate of an agency and in some situations, of an administration, in its hands.

Turning to the comparable relationship within the executive agencies, I would say that President Eisenhower's difficulties in the Department of Agriculture (to pick but one example), and President Kennedy's relatively easier assumption of command in this area, was traceable far less to policy differences than to differences in administration attitude about the professional staff in each case. In 1953, the professionals were viewed most suspiciously, and in 1961 they were assiduously courted. I would expect that lesson to be noted, if the White House again changes party.

A President's appointive alternatives many times will present him with some fundamental issues: should the man selected be required to have knowledge of the industry, or be disqualified for prior connection with it? Should career professionals like Chairman Hyde of FCC or Chairman Cohen of SEC be promoted from within the agency? Is "balance" a proper objective, with liberals and conservatives, or so-called industry or consumer advocates neatly matched?

Certain it is, and properly so, that the President will hear from each and every segment of the American political mosaic which even remotely sees its interest affected by his selection. A new President is likely to find far more interest in some of the agency appointments than he had ever imagined to exist.

I only promised to give you "notes" on how new Presidents meet old agencies. I didn't promise any conclusions, earth-shaking or otherwise.

Still, a speech can't simply end, so let me attempt a few summary remarks:
In 1964, President Johnson signed the Presidential Transition Act, which declared it the policy of the United States to promote orderly transfer of executive power from one President to "a new President." All officers of the Government are adjured therein to "conduct the affairs of the Government for which they exercise responsibility and authority as (1) to be mindful of problems occasioned by transitions in the office of President, (2) to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power, and (3) otherwise to promote orderly transitions in the office of President."

As a practical matter, the independent agencies are not greatly affected by these transitions, but since a great deal of the public's business is committed to these agencies, new Presidents have a legitimate interest in folding considerations affecting them into their transition programs.

This interest, to use Professor McFarland's scheme of classification, is "inside", "outside", and "topside".

In each category, however, there are limitations and restrictions. A President must wait for vacancies to change the makeup of commissions. Some of these vacancies are committed to the other party. Generally speaking, he can pick a new chairman, but whether that chairman in turn can be a man new to the commission will depend on the existence of a vacancy--otherwise, his choice may be limited to designating a member from the commission who, though from his party, may have been originally appointed by his predecessor. Occasionally, as President Johnson demonstrated, he may want to look to the other party for a chairman.

The record shows that notwithstanding all the limitations, a President generally can reshape a Commission fairly soon after he takes office. [I haven't discussed the matter of Presidential "strike-outs"--the situations where the performance of a commissioner is markedly different from that which was presumably expected.]

The relationship of the chairmen of the various agencies to the office of the Presidency is a spongy one. Clearly, chairmen must get along with Presidents if they want to get cooperation in their budget, personnel, and legislative problems. Though agencies are often called "arms of Congress" they can't rely on Congress to get them their office space, their supergrades, or White House help in pushing their legislative goals.

On the other hand, chairmen are also commissioners--they only have one vote in that capacity, and when wearing their commissioner hat they are as subject to ex parte rules as their colleagues, and they must resist certain kinds of White House pressure.
Agencies like FPC overlap with executive departments like Interior, just as CAB and ICC overlap with the Department of Transportation, and the FCC with the Department of Commerce. Sometimes the boundaries of cooperation and coordination are hard to see, and a President is bound to be impatient where breakdowns occur.

It has occasionally been observed that even Supreme Court Justices can read the election returns. Depending on how next week's election turns out, the problems of a President Humphrey or a President Nixon may vary considerably, apart from the obvious fact that a President Humphrey will represent the same party as President Johnson. Whether the election is close, whether there are marked sectional or regional cleavages, indeed whether the election is accomplished at the Electoral College or in the House of Representatives—these are matters which commission members are likely to be attuned to.

All of you here at INGAA are vitally concerned with one or more of the regulatory agencies—I hope that whoever may be your choice for President, you will say a little prayer for the one who is elected, that he may have the wit and wisdom to grapple with the problems of regulation.

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