REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT. By R. Shep Melnick. Washington, D.C.: Brookings Institution, 1983. Pp. x, 404. Cloth $29.95, Paper $11.95.

Over the past two decades, a revolution of sorts has occurred in administrative law. The federal courts, formerly content in allowing government agencies almost unfettered latitude in policy formulation and implementation,[1] have become deeply involved in the bureaucratic policymaking process.[2] The courts have viewed bureaucratic action with increased skepticism while opening channels through which citizens' groups, in addition to industry, have gained access to agency decisionmakers. Although many have hailed this new activism, serious questions remain concerning the appropriateness and utility of the judiciary's behavior.

In REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT, R. Shep Melnick, an assistant professor of Government at Harvard University, examines the role the federal courts have played in shaping bureaucratic policy within the limited context of a single major area of legislation. His purpose is to discern the actual nature of the interaction between judiciary and bureaucracy and to evaluate the long-range consequences of such interaction. By the author's own account, the book is both a description of the process of regulatory policy formulation and an in-depth examination of how a large regulatory agency responds to stimuli from an outside source (p. 23). Melnick aims to provide an understanding of the consequences of judicial activism through an analysis of six significant environmental and administrative issues arising under the Clean Air Act.[3] In each case study, the courts play a pivotal role in shaping the policy of the Environmental Protection Agency ("EPA"), and in each instance Melnick uncovers significant flaws in judicial understanding of the longer-range problems involved.

Melnick's choice of the Clean Air Act as background for his analysis is by no means a random one. He emphasizes that the Act

1. *See, e.g.*, Gray v. Powell, 314 U.S. 402, 412-13 (1941) (stating that courts should affirm an administrative decision if it has a rational basis).

2. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (requiring EPA to go beyond minimum requirements of the Administrative Procedure Act in revealing the basis for agency standard setting).

3. Clean Air Act of 1970, 42 U.S.C. §§ 1857-1858 (1976), Pub. L. No. 91-604, 84 Stat. 1676 (1970) (current version at 42 U.S.C. §§ 7401-7642 (1976 & Supp. V 1981)).

"presents a leading example of the new regulation" and that judicial decisions under it have provoked emulation in other areas (p. 19). Additionally, he cites the quantity and diversity of court decisions under the Act as providing "a number of useful comparisons" all within the field of pollution control (*id.*). It is significant that the Clean Air Act became law at approximately the same time that the new judicial activism firmly took root. The Act provides a ready-made vehicle for judicial assertiveness in that its subject is the direct concern of numerous interest groups within our society while its novel nature allows for much creativity in interpretation.

The focus of Melnick's narrative shifts frequently from the courts to EPA and back again. This is a result of Melnick's emphasis on process rather than organization, an emphasis developed through observance of the long-term effects of confrontation and compromise on institutional decisionmaking. While he portrays the courts as ultimately creating many of the problems involved in administering the Act, these problems often become apparent only when EPA attempts to carry out the judicial mandates. Melnick moves from court decision to bureaucratic implementation and then seeks to retrace the steps to uncover the true sources of the problems. The courts themselves interpret the Act largely on the basis of their perceived notions of congressional intent, but in doing so they expand the scope of their own discretion. The agency responds to this judicial action by formulating policies designed both to toe the court-imposed line and to further the agency's own perceived goals. Quite often, EPA is shown to have tailored its action to what it believes courts will find acceptable in the future rather than chance an ultimately more beneficial policy which is less assured of judicial acceptance. This attitude is rational from the point of view of the bureaucracy, but not necessarily from the viewpoint of Congress, the White House or the country as a whole.

A major portion of the book is dedicated to understanding the bureaucratic processes at work within EPA itself. The Agency is composed of offices which differ radically in style and training, as well as in point of view on particular issues. Melnick's own belief appears to be that the legal departments of the agency, most notably the Office of General Counsel, have held sway over policymaking and have sacrificed much long-range planning in an effort to appease the courts. The result of such myopia is that the Agency often finds itself locked into an unworkable policy which cannot easily be altered. As his analysis unfolds, it becomes apparent that

Melnick favors granting EPA's engineering and technical departments greater influence over agency policymaking. More specifically, he believes the usually realistic views of the Office of Air Quality Planning and Standards' technical personnel have too frequently been dismissed simply as evidencing a perceived lack of political awareness.

The use of the case study technique enables in-depth examination of important issues under the Clean Air Act while at the same time providing an effective way of breaking down the issues so that they can be studied independently. Melnick attempts to do a very difficult thing: trace the evolution of policy by rigorously reconstructing its formulation and then dissecting the intricate process piece-by-piece to indicate its flaws. Melnick provides a very thorough analysis. His selection of the case study form of presentation, while entirely logical in view of his stated objectives and mode of analysis, may present problems of comprehension for those readers who are not well versed in the subject matter. He seems to recognize this shortcoming, emphasizing that the length of each story merely "indicates how long it can take for the full impact of court decisions to appear" (p. 22). True as this observation may be, one must question the necessity of subjecting the reader to six extremely well-documented case histories in his effort to make the point. Fortunately, Melnick does an exceptional job of tying the bits and pieces together in the final chapter, and his conclusions are in general strongly reasoned and well-documented by his substantial accumulation of evidence.

The case studies explore prevention of significant deterioration, dispersion, variances, enforcement, standard setting and transportation controls. Melnick cites the variance decisions as providing "the only examples of counterproductive decisions studied in this book" (p. 351). He means that the courts did more than simply make bad policy—their decisions put EPA in an untenable position which eventually resulted in considerable friction between the Agency and state officials. Since the Clean Air Act is designed to function through state implementation plans approved by EPA,[4] any series of judicial decisions causing significant damage to state-federal relations must presumably be considered counterproductive. The other case studies, while not illustrative of counterproductivity as the author apparently defines it, are certainly indicative of

4. Clean Air Act of 1970, § 110, 42 U.S.C. § 7410 (1976 & Supp. V 1981).

varying degrees of policy failure, and EPA itself often receives much of the blame. Melnick's contribution to understanding in these areas is that he has largely shifted primary blame to the courts in instances of policy failure, while he sees EPA's actions as representing a symptom rather than the ultimate cause of this failure.

One may be prompted to ask: Why the courts? Obviously, there can be many sources for bad policy and the courts are but one example. But they are a strikingly obvious example, especially when the foundations and implications of their decisions are dissected as they are here. In Melnick's words:

> The courts never understood the problems they were creating for the agency or the policies they were helping to produce because they never looked behind the abstract terms of their opinions . . . . The courts fell into this trap by concentrating their analysis on identifying legal rights and wrongs and dealing with remedies almost as an afterthought (p. 368).

Indeed, the courts have pushed EPA to extend the scope of its programs while simultaneously diminishing its ability to achieve its publicly proclaimed objectives (p. 344). This situation is largely a result of the Clean Air Act's scheme for court action. Under section 307 of the 1970 Act,[5] challenges to agency regulations that are nationally applicable or have nationwide scope or effect must be brought before the District of Columbia Circuit, which has often rendered decisions favorable to environmental groups. Citizens' suits, often brought by environmentalists to force EPA to institute new programs under the "nondiscretionary duty" rubric,[6] may be heard in any district court.[7] Citizens' suits may also be brought directly against polluters in the district court for the area where the polluting source is located.[8] Moreover, section 304 does not require the challengers to be adversely affected by the agency action in question. Standing, therefore, is often not an issue. Finally, EPA

5. 42 U.S.C. § 7607 (1976 & Supp. V 1981).

6. Melnick's opinion is that the non-discretionary duty provision was originally intended to spur EPA enforcement efforts rather than pressure the agency into beginning additional programs (p. 57). Major examples of environmental groups utilizing this provision to force EPA program action include Natural Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1973) (transportation controls), and Natural Resources Defense Council v. Train, 545 F.2d 320 (2d Cir. 1976) (airborne lead standard setting).

7. Clean Air Act of 1970, § 304, 42 U.S.C. § 7604 (1976 & Supp. V 1981).

8. *Id.* § 7604(c) (1976 & Supp. V 1981).

enforcement suits[9] are brought in the district court for the district in which the violation allegedly occurred. Thus different types of cases go to different courts, which vary widely in their opinions on environmental issues. This system makes for a good deal of forum-shopping, and industry and environmental groups have both learned how to get important issues heard before their respectively favored courts.[10] The Supreme Court has not, in general, been effective in resolving disputes among the lower courts.[11]

The fact that enforcement cases go initially to district courts while challenges to agency regulations are heard most frequently in the District of Columbia Circuit means that different judges must define EPA's proper administration of the Act. The District of Columbia Circuit, hearing cases of national import, has been in a position to render wide-ranging decisions expanding the scope of agency programs. But the district courts hearing the enforcement cases are more attuned to local concerns, especially unemployment, and therefore tend to be sympathetic to local industry. For instance, the Act makes no provisions for EPA to consider the cost of achieving the air quality standards upon which state implementation plans are based, and EPA has in fact been barred from taking economic and technological feasibility into account when setting the standards.[12] District courts have nonetheless seen fit to "balance the equities" in enforcement cases by endeavoring to examine cost questions in great detail. Melnick believes the dichotomy between policy and enforcement has caused EPA many of the problems it now faces. He indicates that the Supreme Court, which has allowed district court judges increasing discretion in an effort to curb the regulation-extending decisions of the District of Columbia Circuit,

9. Clean Air Act of 1970, § 113, 42 U.S.C. § 7413 (1976 & Supp. V 1981).

10. The rather ironic result of this structuring of jurisdiction is that the principal special interest groups concerned with environmental policy rarely confront each other directly in the courts. In Melnick's words: "Each side has won its biggest victories by concentrating on issues assigned a low priority by its adversary. When both sides throw themselves into the same case, the result is usually stalemate or a victory for the EPA" (p. 361).

11. One reason may be the Court's unfamiliarity with air pollution issues. On the average, the Supreme Court hears less than one Clean Air Act case a year (p. 366).

12. *See* Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980); Am. Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982). The court has justified its holdings in these cases by citing numerous congressional committee statements emphasizing the need to protect sensitive persons from health risks rather than engage in cost-benefit analysis. Melnick remains unimpressed (pp. 264. 356).

has been in large part responsible for the evolution of the present unsatisfactory situation (p. 390).

Melnick criticizes the courts for imposing upon EPA an expanded regulatory scheme while simultaneously hampering enforcement efforts. The result is invariably an enforcement scheme which lacks any purposeful connection with broader environmental policy concerns and therefore is haphazard and hopelessly inadequate. Industry finds little reason to obey environmental regulations of its own accord, since it knows that procrastination and resistance are frequently less costly in economic terms and often effective. Melnick feels that the courts' process of policy guidance threatens to undermine whatever respect one might have left for the system of environmental regulation. Moreover, the system has become grossly inequitable because new pollution sources are discriminated against in favor of existing ones. For example, the district court in *Sierra Club v. Ruckelshaus*[13] ordered EPA to initiate a nationwide prevention of significant deterioration program. The evolved nature of this program, coupled with the courts' reluctant attitude toward enforcement against existing polluters, has placed an ever-increasing and unjustifiable regulatory burden on new polluters.

The courts have also succeeded in distorting the influence of various pressure groups and institutions involved in the formation of environmental policy. The judiciary has placed undue reliance upon sketchy legislative histories, ostensibly to increase congressional control over the bureaucracy, but the result has been merely to enhance the pull of subcommittee leaders and their staffs while reducing the control exercised by Congress as a whole over these individuals (p. 375). Concomitantly, the courts have weakened the role of the White House by, ironically, characterizing major policy decisions as matters for "experts" to decide (p. 376). Finally, the courts, in their effort to force EPA into an ever tougher policy stance, have at times invoked the "spirit of the Act" in justifying expansions of the law to solve problems that Congress "should have addressed" (p. 65). Melnick concludes that:

> To perform competently the tasks they have taken on, judges must learn more about the nature of the problem they seek to cure, the policy options open to administrators, and the constraints on those who must carry out their orders. Judges can take a major step in this direction by starting to think about

13. 344 F. Supp. 253 (D.D.C. 1972).

> specific remedies as soon as they consider possible interpretations of the law (p. 388).

Basically, Melnick has reached a reasonable conclusion. The courts have failed and so the system has largely failed. The courts, in their attempts to prevent EPA from compromising its goals while at the same time seeking to rein in overzealous regulation, have in effect created the mirror image of the bureaucratic monster they set out to avoid. Melnick's solution appears to entail both more political awareness on the part of the judiciary and a more technically-oriented approach toward pollution control on the part of EPA. Though once again Melnick is probably correct, his proposed solutions could bear some additional comment.

REGULATION AND THE COURTS amounts to a superb rendition of political history. The author's analysis is complex but in the end comprehensible. He succeeds in uncovering key problem areas and revealing their evolution in great detail. However, it is significant and disappointing that a scant seven pages are devoted to recommendations of how to solve the problems so painstakingly uncovered. These recommendations are so general that the contrast with the rest of the book's style is striking. It is evident that the author has given some thought to future behavior, but a more in-depth prescription for righting the system would have been an appropriate, indeed expected, manner of ending the discussion. In fact, the simplicity of Melnick's recommendations does an injustice to the bulk of his analysis. His belief that judges should rely more often on procedural impediments such as standing to prevent diversion of agency resources (p. 391) smacks of yet another form of judicial authoritarianism. His statement that "judges should also avoid letting the agency and the plaintiff reach a consent agreement solely between themselves" (p. 391) has implications that he does not appear to consider, such as further judicial interference. Nonetheless, Melnick's final assessment that courts need better education on the politics of regulation, and must look outside the law to find it, certainly rings true.

There are a number of other concerns that Melnick might have addressed in greater detail. For example, one might well lay more of the blame for the Clean Air Act's structural and administrative deficiencies directly on Congress. And one is struck by the thought that Congress, not the courts, may be in the best position to straighten the mess out. True, the courts must accept their deserved share of the blame, but a large percentage of the Act's problems are

systemic and can be traced directly to their ultimate source—Congress and its committees. For example, Congress could better coordinate the policymaking and enforcement forums.[14] Melnick appears to understand this point, but perhaps because his focus is primarily on court decisions, he does not deal effectively with it.

Additionally, Melnick engages in some questionable analytic over-simplification. In an attempt to draw together the strands of policy resulting from a number of significant court decisions, Melnick seems to be seeking, above all, a common denominator that will justify constructing a model of understanding for judicial policy as a whole. It is debatable whether broad generalizations of this kind are necessary or even possible, given the context. If bureaucratic policymaking has been haphazard, it has been due in good part to the rather haphazard decisionmaking of a number of federal courts. This problem, however, may be endemic to our decentralized court system, at least under circumstances in which the Supreme Court has not finally put an issue to rest.

Despite these points of contention, REGULATION AND THE COURTS is interesting and provocative reading and provides greater insight into the bureaucratic policymaking process. If the final measure of a book's value is its contribution to the understanding of its subject, this book is unquestionably valuable. The author largely succeeds in achieving what he sets out to prove, and the result is a book which sheds new light on a subject of importance for practitioners and scholars alike.

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14. *See supra* notes 5-11 and accompanying text.