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THE LITTLE AGENCY THAT COULD

*Sallyanne Payton**

REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE. By Robert A. Kagan. New York: Russell Sage Foundation. 1978. Pp. xi, 200. \$10.

The first observation that must be made about this modest and insightful book is that its title verges on deceptive labeling.¹ *Regulatory Justice* is not a comprehensive treatment of the problems of legality in the administrative process; it is not even an exhaustive analysis of the problems of fair enforcement of the wage-price freeze of 1971. It is, rather, a carefully rendered account of the process of rule formulation and interpretation as viewed from the vantage point of the General Counsel's Office of the Office of Emergency Preparedness, in which Kagan served as an attorney during the freeze. Robert Kagan is both a lawyer and a social scientist;² his research method was that of the participant-observer. He has thus given us a fine insider's view of the rule-making process, one perhaps unsurpassed in the literature. The book is rich in conceptual understanding and well-chosen example. The fact is, however, that the freeze was in effect so briefly that most of the truly interesting problems of regulatory administration did not have time to mature within the freeze agencies. *Regulatory Justice* gives us a simple story, a purified example of basic regulatory process, that can help us greatly in understanding the more complex phenomena with which we must customarily deal.

The purpose of the freeze was straightforward. In the judgment of the national political leadership, inflation was out of hand in 1971 and threatening to get worse. The previous year, Congress had passed the Economic Stabilization Act of 1970,

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1. The practice of giving expansive titles to modest monographs can produce some striking incongruities. I have on my shelf a work whose dust jacket edge proclaims grandly its subject, "Jurisprudence and Statecraft." On closer examination, it turns out to be an account of the brief passage of the Wisconsin Development Authority. S. MERMIN, JURISPRUDENCE AND STATECRAFT: THE WISCONSIN DEVELOPMENT AUTHORITY AND ITS IMPLICATIONS (1963).

2. The dust jacket announces that Kagan holds a Ph.D. in sociology from Yale. He is presently Associate Professor of Political Science at the University of California, Berkeley.

granting to President Nixon startlingly broad powers "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries" ³ The President was not anxious to use this authority; his vigorously expressed distaste for wage and price controls arose out of both his conservative political philosophy and his personal experience as a lawyer for the Office of Price Administration during World War II. He resisted the imposition of economy-wide controls until it became apparent that even the business community favored them. ⁴

When the President finally acted, however, he issued a dramatic order. On prime-time television, the evening of August 15, 1971, the President announced: "I am today ordering a freeze on all prices and wages throughout the United States" He promised government enforcement without "a huge price control bureaucracy." ⁵

The President had ordered the inflationary spiral to stop dead in its tracks. ⁶ But secrecy in developing the President's action had made it impossible to plan the actual implementation of the program: administration thus had to be improvised. No large new agency could be created, and primary authority could not be given to an existing agency with special interest constituencies. The President himself needed to be insulated from individual decisions, but the agency administering the freeze had to be clearly identified with the President.

Out of these imperatives emerged the Cost of Living Council

3. Act of Aug. 15, 1970, Pub. L. No. 91-379, §202, 84 Stat. 799. President Nixon used the Act once before the freeze, to create the Construction Industry Stabilization Committee (CISC), part of an effort to slow down wage and price increases in the construction industry. When Congress extended the Act in May 1971, it also provided that the President could not single out a "particular industry or segment of the economy" unless he determined that prices or wages in that industry or segment had risen at a rate that was "grossly disproportionate" to rises in the economy generally. Act of May 18, 1971, Pub. L. 92-15, §3, 85 Stat. 38. The official history of the freeze is N. YOSHPE, J. ALLUMS, J. RUSSELL & B. ATKIN, *STEMMING INFLATION: THE OFFICE OF EMERGENCY PREPAREDNESS AND THE 90-DAY FREEZE* (1972) [hereinafter cited as YOSHPE.]

4. For an account of the political and economic background of the freeze, see A. WEBER, *IN PURSUIT OF PRICE STABILITY: THE WAGE-PRICE FREEZE OF 1971*, at 1-9 (1973).

5. Nixon, *The Challenge of Peace*, 7 WEEKLY COMP. OF PRES. DOC. 1168, 1170 (Aug. 23, 1971) (text of the President's radio and television address of Aug. 15, 1971).

6. The symbolic impact of the word "freeze" was stunning. It easily drew on the familiar physical experience with things frozen, motionless, stiff. But it also implied sudden stopping—as in equally familiar movie images of gunmen bursting into bars or banks and shouting "Alright, everybody freeze!" The metaphor itself created public expectations of how the stabilization policy would be administered. (It is interesting to speculate on what greater administrative flexibility is implied by the word "stabilization" than by the word "freeze.")

(CLC), composed of Cabinet-level officials, whose Executive Director was also designated Special Assistant to the President.⁷ For operating responsibilities the CLC turned to the Office of Emergency Preparedness (OEP), which was already housed in the Executive Office of the President. The OEP was primarily responsible for civil defense planning but also dealt with natural disasters. It was thus blessed with a short-term crisis orientation, a neutral political image, good contacts with state and local governments and major industries, and a nationwide communications system. It was thinly staffed, however, and thus had to borrow most of its freeze personnel from other agencies. In the field, its own slender resources were augmented by the Internal Revenue Service (IRS) field offices and, for rural areas, the Agricultural Stabilization and Conservation Service. For its headquarters operation as well, it borrowed widely throughout the government.

For three months, this odd collection of commandeered regulators fulfilled the President's promise: they enforced a freeze. They held the line against the appeals and temptations of individualized justice, allocative efficiency, pressure group politics, natural sympathy, and a sense of proportion. General Motors, the unions, antique dealers, and the Girl Scouts⁸ were all frozen together. At the end of November 1971, when the regulators went back to their other lives, the rise in the consumer price index had been trimmed to an annualized rate of 1.6%, the index of average hourly earnings for employees in manufacturing had risen at an annual rate of only 0.6%, and the wholesale price index was actually declining at an annual rate of almost 0.4%.

Why did the freeze turn out so well,⁹ when the history of

7. The members of the CLC were the Secretary of the Treasury, the Chairman of the Council of Economic Advisers, the Director of the Office of Management and Budget (OMB), the Director of the Office of Emergency Preparedness, the Special Assistant to the President for Consumer Affairs, the Secretaries of Agriculture, Labor, Commerce, and Housing and Urban Development. The Chairman of the Board of Governors of the Federal Reserve System was designated special Adviser to the Council. The Executive Director of the CLC was Arnold R. Weber, a University of Chicago economist who had been serving as an Associate Director of the OMB. Weber has written a fine memoir of the freeze. See A. WEBER, *supra* note 4, at 20-27. The Director of the OEP was General George A. Lincoln, a retired Army general who had taught economics at West Point for 22 years and had spent his career in security and strategic planning. See *id.* at 99-105; YOSHPE, *supra* note 3, at 21-22.

8. Kagan's account of the Girl Scout episode alone is worth the price of the book and the time to read it. See R. KAGAN, *REGULATORY JUSTICE* 119-21, 152 (1978) (hereinafter cited by page numbers only).

9. Arnold Weber has had some second thoughts about the wisdom of a freeze as

regulation is a history of agencies gone soft, regulators being captured, public attention wandering away from regulatory issues, political support falling away from agency zealots? As Kagan tells it, the answer is that the freeze, and the freeze agencies, were unique.

First, the people in the freeze agencies had not committed themselves to careers as wage-price regulators. The members of the Cost of Living Council all had major management responsibilities for ongoing government functions. For the OEP itself, the freeze was just another assignment to short-term domestic crisis management that had to be carried out simultaneously with its principal missions. The OEP's borrowed staff members also had primary attachments to their home agencies. Kagan describes "this hastily assembled pickup team" as "reasonably well-educated but not brilliant, neither dedicated nor hostile to the idea of wage-price controls, without prior knowledge of the subject, and without ambition for careers in the presumably temporary program."¹⁰ Other agencies, and other regulators, would carry out subsequent phases of the stabilization program after the freeze had ended.

Second, both policy and politics allowed the agencies to treat the freeze as a problem of enforcing a stringent rule whose single purpose was to halt wage and price increases.¹¹ Although the explicit words of the Executive Order were not dramatic,¹² the public rhetoric and administration of the freeze were intended to have

"hard" as the one that was imposed. See A. WEBER, *supra* note 4, at 126-29. He acknowledges, however, that the performance of OEP and IRS was "something of a bureaucratic miracle." *Id.* at 128.

10. P. 24.

11. The CLC's interpretation of the term "transaction" indicates most clearly the commitment to stringency. Many increases in prices, wages, and fringe benefits had previously been scheduled to go into effect after August 15, 1971. In many cases, contracts had been signed and preliminary performance had begun. The CLC held that no "transaction" had occurred unless the employee had worked at the higher rate, the goods had been delivered by the seller, or the rental unit had been occupied (pp. 52-56). See A. WEBER, *supra* note 4, at 57-58. This interpretation ran counter to contract law principles, vernacular understandings of when someone "has" something, and widely held notions of justice, at least on the part of persons whose legitimate expectations were defeated. In December 1971, as a result of vigorous lobbying by labor unions and teachers' organizations, the Congress explicitly permitted most frozen pay increases to go into effect retroactively. See A. WEBER, *supra* note 4, at 127.

12. Executive Order No. 11615 provided that prices and wages "shall be stabilized . . . at levels not greater than those pertaining to a substantial volume of actual transactions . . . during the 30-day period ending August 14, 1971, for like or similar commodities or services." The order exempted "raw agricultural products." 36 Fed. Reg. 15,727 (Aug. 17, 1971).

“a shock effect on expectations,” to buy time while the Administration developed a more comprehensive policy. The OEP and the CLC decided to preserve as many policy options as possible for the subsequent phases of the program, a strategy that required that the freeze raise few if any expectations of favored treatment for particular groups, interests, or philosophies. For example, freeze policy could have allowed generous treatment for low-income wage-earners¹³ or special hardship consideration for businesses that had received cost increases just before the freeze went into effect but were prevented by the freeze from passing them along to their customers. If the freeze agencies had recognized such claims, however, they would have reduced the public’s expectation of a halt to inflation (thereby detracting from their own mission) and would have created an expectation that subsequent phases of the program would recognize the same claims (thereby tying the hands of their successor agencies). The freeze agencies therefore had good reason not to accommodate values, even widely shared ones, that competed with the dominant goal of stringency. Any inequities or distortions in individual cases were justified by the overall salutary effect of the freeze and were, in any event, temporary.¹⁴

Third, the enforcement of a stringent rule was politically and economically feasible. Because the economy was in a slack period, no severe hardships or shortages developed. The freeze did not become a partisan political issue. Although Kagan does not deal with politics, it bears noting that the freeze was a Democratic policy put into effect by a Republican administration; the national political leadership was thus united on the need for the freeze, if not always on specific strategies and tactics. For ninety days, the country was willing to accept a stringent rule, and the agencies were structured so that application of a simple stringent rule was a satisfying short-term assignment for the heterogeneous staff assembled for the purpose.

Simple commands may be hard to carry out. The freeze purported to cover nearly every transaction involving wages or prices¹⁵ in a complicated economy. There were tens of millions of

13. Eventually the CLC exempted wage increases that would have brought workers up to minimum wage standards of general applicability. See A. WEBER, *supra* note 4, at 46, 75-76.

14. *Id.* at 36.

15. The CLC read the term “price” to include voluntary association dues, the term “wages” to include fringe benefits of all kinds, the term “rent” to include college dormitory fees. On the other hand, it refused to assimilate to the terms such items as dividends,

such transactions every day, almost all of them between consenting adults. The freeze officials quickly perceived that success depended upon voluntary compliance, which would only be achieved if citizens could find out, easily and quickly, just what was expected of them. Citizens also had to believe that their sacrifices were being reciprocated by others in a great universal rising to the occasion. The most promising way to administer the freeze, therefore, was to announce simple, clear, and specific rules, develop a mechanism for answering individual inquiries quickly and authoritatively, and adhere to a policy of uniform rule application. These formalities were accompanied by boundless public exhortation on the part of government officials. It is important, particularly for lawyers, to understand that the freeze was mainly *administered* through the dissemination of information rather than *enforced* through official investigation and prosecution. The freeze agencies conceived of their task primarily as a venture in governance rather than law enforcement.

The core of *Regulatory Justice* is a description of how the freeze agencies developed a regime of rules during the ninety-day period. No law compelled them to do so. The Economic Stabilization Act contained no standards to guide presidential discretion, except the direction that the policies had to be universal unless the President had superior justification for treating industries or segments of the economy unequally. The Executive Order particularized the command only by giving the CLC a date around which to freeze wages and prices. Both the Act and the Executive Order were silent on whether the Administrative Procedure Act applied,¹⁶ and they provided no independent procedural guid-

corporate profits, welfare payments, and local taxes. Executive Order 11615 did not cover interest rates, which declined during the freeze, as expected. Kagan suggests that the CLC decided that the freeze did not apply to interest rates (p. 50-51). Weber gives a fuller explanation, but also says that the CLC itself debated the point. A. WEBER, *supra* note 4, at 38-39. However, Yoshpe quotes a statement by Treasury Secretary Connally on August 15, 1971, just *before* the President's freeze announcement, to the effect that the planning group had decided to exclude interest rates. YOSHPÉ, *supra* note 3, at 17-18.

16. It is not at all clear just how the freeze agencies' activities would be viewed under the Administrative Procedure Act (APA). Most of their actions consisted of informal jawboning, exhortation, public shaming. See 86 HARV. L. REV. 1380, 1403-06 (1973). Executive Order 11615 required a good deal of interpretation. After the CLC delegated to the OEP the authority to "implement, administer, monitor and enforce" the freeze (CLC Order No. 1, Aug. 17, 1971), the OEP Director, General Lincoln, issued Economic Stabilization Regulation 1, defining most of the key terms. The regulation itself was clearly an "interpretative rule" within the meaning of the APA. It was amended five times. For even more particularized guidance there were the Economic Stabilization Circulars, which crystallized policy decisions that had been made in the context of individual cases. The

ance. Neither the CLC nor the OEP promulgated procedural regulations. The courts largely deferred to the agencies on matters of substance,¹⁷ and only one court purported to impose procedural requirements: Judge Leventhal, in the course of upholding the freeze against objections founded on the nondelegation doctrine, held that the judicial review and rule-making provisions of the Administrative Procedure Act applied to freeze activities.¹⁸ Since the agencies were by that time proceeding almost entirely by informal action and interpretative advice, the imposition of the formal core of administrative law upon their activities had little tangible effect, though it might have served as a reminder to seasoned intuitions that the federal judiciary would not tolerate obvious abuses of administrative discretion.

For all practical purposes, therefore, the freeze agencies were law unto themselves with respect to both substance and procedure. The agencies were in theory free to devise whatever rules they liked, subject to judicial review only for rationality; the public had no opportunity to participate in making the rules; individual citizens who wished to challenge the agencies' interpretations of their authority had to run the risk of defending an enforcement action in order to be certain of being heard. The situation, so described from the standpoint of administrative law, sounds like the nightmare of delegation run riot.¹⁹ But no disaster ensued. All the practical pressures pushed the agencies toward consistency and uniformity, toward a rule-bound legality. The freeze was administered by officials who believed that the program would be viewed by the people as legitimate, and therefore would succeed, only if it were based on a set of apparently rational rules that were being applied universally, uniformly, and fairly. If there was a danger in these agencies, it was that legality might bleed into its excess, legalism, not that uncontrolled discretion might lead to

courts treated these as interpretative rules. In addition, the agencies issued hundreds of opinion letters. See Gellhorn, *The Legal Effect of Anti-Inflation Advice from Government Agencies*, PRAC. LAW., Dec. 1971, at 13.

17. The government filed suit against violators in only eight cases, selected mainly for their symbolic value. The government itself was sued in 37 cases. Most of the cases had not been decided by the time the freeze ended; of the eight that had, the government had won six and lost two. For an account of the freeze agencies' enforcement tactics, see A. WEBER, *supra* note 4, at 84-98; YOSHPE, *supra* note 3, at 117-42.

18. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

19. Kagan notes that "there was in fact no significant interference by the courts with the over four hundred rules and thousands of individual rulings issued by the administrative agencies which were regulating the central economic decisions of millions of corporations and business firms across the whole nation" (p. 123).

enforcement by whim.

The most important source of reinforcement for the agencies' standards of legality was the program's need for public support, which could only be gained if the press accorded the freeze both extensive news coverage and at least mild editorial approval. The price of press coverage is press scrutiny; the national press reported agency rulings throughout the duration of the program and was alert to charges of inconsistency or favoritism. Unlike most regulatory agencies, therefore, the CLC and the OEP did not recede into obscurity during the life of their program. The fact of daily exposure to powerful news agencies sharpened the agencies' desire to administer the freeze in a way that would be broadly perceived as fair. "Fairness," however, quickly came to mean fair *rules*. Particular cases were viewed as occasions to make or apply rules, not as opportunities to do individualized justice. The administrative techniques of the agencies reflected these objectives: the agencies wished to be able to tell inquirers promptly what rule governed their case. The transmission of the information was to be individualized; the content of the information itself was not.

The danger of governing through a body of written rules is that the officials who interpret them may not be aware of, or may ignore, the purposes that individual rules, or the body of rules, are designed to serve. The rules then take on a life of their own through the elaboration of the conventional meanings of their words, divorced from purpose and direction. This phenomenon is generally called "legalism." It seems inevitable that a good deal of it must have occurred in the freeze operation: with over 360 IRS and OEP field offices receiving in excess of 800,000 inquiries, some of the advice given must have been mistaken or unnecessarily rigid. On the other hand, the stringency of the freeze tended to encourage legalism: when in doubt, it was best for an official answering an inquiry to err on the side of deciding that the price or wage increase was frozen, without close inquiry into the economic goals undergirding the program. The field forwarded to the OEP national office only 1,100 questions that they were unable to answer,²⁰ most of which involved requests for exception or exemption.²¹ The OEP General Counsel functioned as the agencies'

20. See YOSHPE, *supra* note 3, at 68-69.

21. The initial rules themselves excepted raw agricultural products, school tuitions, stocks and bonds, and exports. Most of the CLC rulings thereafter elaborated on the boundaries of the initial exceptions, mainly in order to confine the reach of economic or

court of appeals with respect to difficult questions of rule interpretation.

Within the OEP General Counsel's office the problem of informing the borrowed staffers of the agency's purpose and the problem of maintaining rationality in rule application were both solved by a single technique: staff members were encouraged to consult one another when they were in doubt about the proper handling of a question.²² Colleagues consulted among themselves; disagreement or uncertainty on a question resulted in referring it to the next superior level, all the way to the OEP General Counsel himself, who would try to divine what the CLC itself would do with the issue. Where significant doubt remained, the CLC was asked to make or clarify policy. This process kept lower-level officials informed of the policy norms of the principal officials responsible for the freeze and provided collective judgment on virtually every issue, thus building an institutional memory of case precedent.

The staff was preoccupied, Kagan tells us, with reaching the right result in the cases presented to it, which meant finding the rule that the CLC would apply if the CLC were making the decision. The focus was on purposive rule interpretation, and the only legitimate authority with respect to policy was the CLC itself. There was no informal support for individual staffers' pursuit of their own policy preferences. Nor did the office itself contain competing power centers that might have developed institutional interests and rivalries, however temporary.

True fidelity to the CLC's desires, and true consistency within the body of rules, required that the staff pay constant attention to the policy goals of the freeze. Within the OEP General Counsel's office, at least, Kagan assures us that the rules did not take on a life of their own, independent of their policy foundation. In truth, however, the stringent freeze policy as formulated by the CLC did not lend itself to much shading,²³ and the presumption in favor of stringency, coupled with time pressure, inev-

justice objectives that might be inferred logically from the exceptions. The overwhelming number of requests for exception (by rule) or exemption (of individuals or firms because of individualized hardship) were denied. See pp. 62-64; YOSHPE, *supra* note 3, at 96-116.

22. The behavior of the OEP General Counsel personnel supports the intuition that consultation among colleagues engaged in administering a common set of rules is a natural and perhaps irrepressible form of behavior. See P. BLAU, *THE DYNAMICS OF BUREAUCRACY* 121-43 (rev. ed. 1963).

23. See generally pp. 99-110.

itably pushed the OEP General Counsel's staff toward legalism.²⁴

On the level of pure description, the story of the freeze agencies may seem unexceptional, routine, a mildly interesting story about a short-term government program that worked. The most interesting fact for administrative-law scholars to ponder, however, is that the model of the freeze as a regime of rules was developed mainly by nonlawyers, operating within the political-governmental culture. Most of the CLC members were economists or businesspeople. The Director of the OEP, General Lincoln, was an economist by training; the design of the program owed a great deal to his developed techniques of crisis management.²⁵ Even within the OEP General Counsel's office not all of the professionals were lawyers.²⁶ It further appears that the prospect of judicial review of agency decisions had no significant effect on freeze policy. In fact, Kagan tells us that "[a]s a day-to-day inducement to legal craftsmanship and sensitivity, the close attention of the news media was distinctly more important."²⁷ Administration of the freeze took the form of a regime of rules because a set of stringent rules, consistently applied, fitted the program managers' requirements for efficient enforcement.²⁸

24. See pp. 132-33.

25. See YOSHPÉ, *supra* note 3, at 27-29.

26. The General Counsel's office reached a peak strength of 28 attorneys, 11 "specialists," and 20 secretaries. YOSHPÉ, *supra* note 3, at 49. The Special Assistant to the General Counsel, who played an important role in the development of freeze policy and in decisions on hard cases, was Major John Simpson of the United States Army, a systems analyst by training. See p. 100 n. 1.

27. Pp. 123-25.

28. It should not surprise us that laypeople can develop and apply rules intelligently. The legal culture is so self-absorbed, however, that lawyers occasionally forget that rationality is part of the professional culture of the senior levels of government. Kagan's own terminology unfortunately feeds the myth of the superiority of lawyers. In describing the technique of interpreting a body of rules in a way that furthers program goals, he coins a new usage, "the judicial mode of rule application." See p. 91. It turns out that this technique consists of looking behind the words of a rule to see whether the substantive outcome of a particular application of the rule is consistent with the purpose of the rule and the overall goals of the program. While judges have been more articulate than other professionals in interpreting rules (which is why Kagan dubs the process "the judicial mode"), the technique is used widely by rule-applying organizations, at least at the policy-making levels. To call it "the judicial mode," however, conveys the impression that lawyers have, if not a monopoly on the mode, at least a special expertise in it. The usage helps perpetuate the myth that lawyers have unique authority in interpreting words in statutes and regulations. Of course this myth is helpful to the lawyers' mystique and consequent power within a rule-applying organization. The myth (which lawyers seem to believe) also helps account for the surprise that lawyers themselves feel when they encounter laypeople who are skilled in rational thinking about rules. Even Kagan is surprised when he discovers that he could see very little difference between the lawyers and the non-

Legality was thus the governing principle; however, the freeze agencies did not adhere to other conspicuous values of the legal culture, principally those of public participation in the development of rules, care in making determinations of fact both in disposing of individual cases and in formulating policy, and giving statements of reasons for official action.

The lack of public participation in rule formulation is easy to understand: the urgency of developing and implementing rules for a ninety-day program could reasonably be thought to preclude notice and comment. Likewise, the task of issuing explanations for rules could reasonably be thought to produce more expenditure of resources than was justified in view of the simple nature and brief duration of the program.

The agencies' casualness about factual accuracy, however, is slightly more troubling. Individualized wage and price advice affected not only the inquirer but also other parties to transactions involving the wage or price at issue. Yet the process worked almost entirely *ex parte*. Inquiries and complaints came to the agencies in the form of telephone calls, letters, and personal visits from inquirers or their representatives.²⁹ Where the inquiry was a request for advice, the agencies acted on the basis of facts submitted by the inquirer. Sometimes the inquiry would be accompanied by a factual presentation and argument of considerable complexity, sometimes not. Sometimes the inquiry would come through a congressional office or administration official; occasionally the inquirer would manage to arrange a personal visit to a freeze official.³⁰ However the inquiry arrived, it was decided on

lawyers he observed in their approach to rule interpretation (pp. 99-100). An earlier study of lawyers and nonlawyers working together in a rule-making group had similarly concluded that their approaches were not significantly different, at least once the lawyers stopped trying to monopolize the process of rule-interpretation. See V. THOMPSON, *THE REGULATORY PROCESS IN OPA RATIONING* 102-04 (1950).

29. There were thousands of investigations. In 62% of them the IRS found no violation. In most of the rest, the seller or landlord agreed to roll back the price increase. Only 214 cases were forwarded to the OEP for review; only eight lawsuits were filed, principally because of the expense of time and resources involved in litigating cases *de novo* in federal district court. In addition, the IRS did not have subpoena power. Both Justice Department and CLC lawyers were nervous about the ability of the freeze program to withstand challenges on constitutional- and administrative-law grounds, a fear that later proved excessive. The result of these impediments was that "the *threat* of legal sanctions was the preferred technique rather than the actual initiation of court proceedings [and] emphasis was placed on the manipulation of such threats of legal action . . ." A. WEBER, *supra* note 4, at 95; see *id.* at 84-98 for an account of the legal enforcement effort.

30. Kagan tells us that interests that were well-organized or well-represented did not obtain accommodative rulings more often than those that were not, even though the well-

the basis of the unverified facts set out in the inquirer's submission, with no participation by parties who might disagree with those factual assertions or be affected by the agency's ruling. On the rare occasion when facts presented by an inquirer were challenged by an interested party, the OEP was unequipped and unwilling to resolve the factual dispute.³¹

This unwillingness to deal with problems of factual accuracy, however troubling it may be to lawyers, is understandable if viewed from the perspective of the program-managers.³² Individualized fact determination is associated with selective government action; the freeze agencies, by contrast, were primarily interested in gross results. Making certain that individuals were not distorting facts in their requests for advice was less important than developing general rules, knowledge of which could be disseminated throughout the system and affect the actions of many other parties.

The standards of official behavior that actually controlled the administration of the freeze arose unmistakably out of the political-governmental culture rather than the legal culture. Yet, in general, it is clear that the program-managers' need for efficient administration, the public's vernacular understanding of the concept of "fairness," and the legal culture's ideal of rationality all pushed in the same direction. In agencies with more complex missions and longer time horizons, they nearly always pull apart. Indeed, they had begun to pull apart as the stabilization program entered its second phase, which is beyond the scope of Kagan's book.

The freeze experience is a meteor in the history of the administrative process, but its light throws into relief our previous understanding of administrative agencies with more complex pro-

organized or well-represented could command the attention of higher-level officials. Their superior advocacy and access were more than offset by the visibility of any concession that might be made to them (pp. 157-61).

31. See pp. 128-32.

32. If the program had been of longer duration, it probably would have been forced to develop more procedural regularity. The lawyers would have encouraged the program managers to allow public comment on the rules and to be more careful in accepting the truth of facts conveyed *ex parte*. Compare pp. 123-25. Weber's final judgment was that the system worked because the task generated a sense of importance and dedication that is rare in large bureaucracies. Essentially, the administrative system did the job because it was not ensnared in procedures that often constrain normal governmental activities. The structure that was designed would have proven too cumbersome and diffuse to operate effectively over a long period.

A. WEBER, *supra* note 4, at 35.

gram missions and more permanent institutional interests. This simple tale about a simple program reminds us that regulatory purpose and structure are at least as important as law in influencing the degree to which an agency will be inclined toward legality in its decision-making.

Kagan has written a good book. *Regulatory Justice* should go onto the short list of essential works on the administrative process. What it lacks in complexity of subject matter it more than makes up in theoretical insight and bibliographical reference. Kagan is scrupulous in locating the freeze experience against the background of existing jurisprudential and social learning on the administrative process. The book is a concise and thoughtful guide to the literature. It is honest and careful, a model of its genre. It should not, however, be taken for what it is not. It is not a history of the freeze; nor is it an explanation of the total process of freeze policy formulation and enforcement. The General Counsel's office of the OEP was only a small part of the operation, and Kagan barely hints at the rest of the activities of the freeze agencies. What he gives us, however, is of exceptionally high quality. We can hope that he will continue to do work of this kind. It is badly needed.