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## Commissions and Public Land Policies: Setting the Stage for Change

# COMMISSIONS

## COMMISSIONS AND PUBLIC LAND POLICIES: SETTING THE STAGE FOR CHANGE

BY PERRY R. HAGENSTEIN\*

If you're pestered by critics and hounded by faction  
To take some precipitate, positive action  
The proper procedure, to take my advice, is  
Appoint a commission and stave off the crisis.  
A royal commission is strictly impartial,  
The pros and the cons it will expertly marshal  
And one of its principal characteristics  
Is getting bogged down in a sea of statistics.<sup>1</sup>

[If only,] as in England, or governments . . . appointed periodically commissions of inquiry . . . armed with the same plenary powers to get at the truth . . . [and with] men as competent, as free from partisanship and respectful of persons as are the English [commission members] . . .<sup>2</sup>

### I. THE COMMISSION IN A HISTORICAL CONTEXT

There are two views of advisory commissions. One, most common in the press and journals of commentary, is that advisory commissions are ineffectual and used to avoid, rather than solve, difficult problems. Some political scientists and students of government, on the other hand, find advisory commissions a useful device, one of many, for solving problems of government. Whatever the extremity of the problem that brings about the creation of an advisory commission, commission reports are usually cast in terms of crises.<sup>3</sup> Despite criticism, commissions continue to be created, to write their reports, to have their day on the front pages of the newspapers, and to influence, subtly, the course of public affairs.

This paper is concerned with national advisory commissions

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<sup>1</sup> Parsons, *Royal Commission*, PUNCH 25, Aug. 1955: This is a favorite poem of commission watchers. It is quoted in H. SEIDMAN, *POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* 23 (1970) [hereinafter referred to as SEIDMAN].

<sup>2</sup> K. MARX, *CAPITAL*, xviii (1939).

<sup>3</sup> M. Derthick, *On Commissionship—Presidential Variety*, 19 PUBLIC POLICY 623, 628 (1971) [hereinafter referred to as Derthick].

in general<sup>4</sup> and with the Public Land Law Review Commission [PLLRC], which existed from 1965 through 1970, in particular.<sup>5</sup>

The most common advisory commission is the presidential commission, which is created by a public action; is advisory to the President; is appointed solely by the President; has at least one public member; is ad hoc; and whose report is public.<sup>6</sup> The PLLRC, in contrast, had a majority of its members appointed by the President of the Senate and Speaker of the House.<sup>7</sup> Its report and recommendations were presented equally to the President and to the Congress. In most ways, it functioned much the same as a presidential advisory commission, but there are some important differences.<sup>8</sup>

#### A. *The Use of Commissions*

Categorizing and characterizing government commissions is difficult because of the great variety of their purposes and operations. One distinction lies between "informative" and "administrative" commissions.<sup>9</sup> The latter are concerned with the execution, as well as the establishment, of policies and include, in addition to the regulatory commissions, a range of coordinating boards, councils, and committees. The focus here, however, is on the informative, or fact-finding and opinion-guiding, commissions.

Study commissions are suspect because their reports commonly fall victim to "the national sport of shelving expert stud-

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<sup>4</sup> Information on commissions in general is drawn largely from the available literature and to a much lesser extent from conversations with people who were involved with one or more commissions.

<sup>5</sup> The Public Land Law Review Commission was created by Public Law 88-606, 78 Stat. 982 (1964) (later codified at 43 U.S.C. §§ 1391-1400 (1970)), and held its organization meeting on July 14, 1965. It went out of existence in late December 1970. Portions of the paper concerning the Public Land Law Review Commission are drawn in large part from my experiences as a member of the Commission's senior staff.

<sup>6</sup> T. WOLANIN, *PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON* 7 (1975) [hereinafter referred to as WOLANIN]. Marcy, in a shorter monograph, covered presidential commissions from the beginning of Theodore Roosevelt's terms as President through 1940. C. MARCY, *PRESIDENTIAL COMMISSIONS* (1945) [hereinafter referred to as MARCY]. See generally F. POPPER, *THE PRESIDENT'S COMMISSIONS* 63-64 (1970) for a discussion of legislative-executive commissions as an alternative to presidential commissions [hereinafter referred to as POPPER].

<sup>7</sup> P.L. No. 88-606, 78 Stat. 982 (1964); see text accompanying note 55 *infra*.

<sup>8</sup> See notes 50 and 51 and accompanying text *infra*.

<sup>9</sup> MARCY, *supra* note 6, at 23.

ies."<sup>10</sup> Yet they have been frequently used in the United States since 1900 and were even used to some extent prior to that. The commission sometimes cited as the first in the United States was not an advisory commission. George Washington appointed a presidential commission to help in settling the Whiskey Rebellion of 1794.<sup>11</sup> Although called a commission, it was more in the nature of a three-man task force which had an action, rather than advisory, mandate. From the start of Theodore Roosevelt's incumbency through the end of Calvin Coolidge's tenure, there were "no less than 471 federal commissions, committees, boards and similar bodies created."<sup>12</sup> Not to be outdone, Herbert Hoover appointed sixty-two commissions during his four years, and Franklin Roosevelt appointed more than one hundred such bodies from 1933 through 1940.<sup>13</sup> Between the start of President Truman's incumbency in 1945 and the end of President Nixon's first term in 1973, there were ninety-nine presidential advisory commissions, not including joint legislative-executive commissions.<sup>14</sup>

### B. *The Impact of Commissions*

Part of the discredited image of commissions results from a failure to comprehend the reasons for appointing a commission. Harold Seidman suggests that presidents

employ committees and commissions to capture and contain the opposition. . . . [that committees and commissions] can also offer an immediate, visible response in times of national catastrophe . . . . [that they] are employed as a kind of tranquilizer to quiet public and congressional agitation . . . . Prestigious commissions can also build public support for controversial courses of action. What is wanted is endorsement, not advice . . . .<sup>15</sup>

Elizabeth Drew identifies eight reasons for appointing commissions:

- 1) to obtain the blessing of distinguished men for something you want to do anyway;

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<sup>10</sup> Chase, *The Longest Way from Thought to Action*, THE REPORTER, June 22, 1961, at 28. The quoted phrase in the text was originated by Henry Heald, formerly head of the Ford Foundation.

<sup>11</sup> POPPER, *supra* note 6, at 7.

<sup>12</sup> MARCY, *supra* note 6, at 3-4.

<sup>13</sup> *Id.*

<sup>14</sup> WOLANIN, *supra* note 6, at 205-15.

<sup>15</sup> SEIDMAN, *supra* note 1, at 23-24.

- 2) to postpone action, yet be justified in insisting that you are at work on the problem;
- 3) to act as a lightning rod, drawing political heat away from the White House;
- 4) to conduct an extensive study of something you do need to know more about before you act, in case you do;
- 5) to investigate, lay to rest rumors, and convince the public of one particular set of facts;
- 6) to educate the commissioners, or get them aboard on something you want to do;
- 7) because you cannot think of anything else to do; and
- 8) to change the hearts and minds of men.<sup>16</sup>

It should be obvious that presidential commissions are often used for political purposes. In fact, it has been charged that many of the commissions appointed by President Hoover "were political in character, meaning that they were devices for avoiding taking a stand on controversial issues."<sup>17</sup>

Nevertheless, the primary purpose for most commissions is "to formulate innovative domestic policies and to facilitate their adoption," although "ducking issues" may also have been of some importance as a reason for creating commissions, especially those dealing with policy analysis.<sup>18</sup>

It is still difficult to assign particular results to advisory commissions. They are reflective, rather than active, organizations and, in this, they are criticized along with planning agencies, interagency boards and councils, interstate compact commissions, and, not to spare the Congress, nonlegislative committees. Advisory commissions make their recommendations and then disappear. If action eventually occurs, there are other active people and organizations ready to claim parenthood. Nevertheless, the record of commissions, though fuzzy, is not as bad as it may appear, especially if those commissions whose purpose was to avoid action are not considered.

By contrast, the English royal commissions have had a remarkable record of achievement. They have been perhaps the most important source of ideas for social reform in England,<sup>19</sup>

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<sup>16</sup> Drew, *On Giving Oneself a Hotfoot: Government by Commission*, ATLANTIC MONTHLY, May 1968, at 45-46 [hereinafter referred to as Drew].

<sup>17</sup> MARCY, *supra* note 6, at 43-44.

<sup>18</sup> WOLANIN, *supra* note 6, at 11, 22.

<sup>19</sup> The Royal Commission on the Poor Law and Relief of Distress of 1905 to 1909 was

though they are used less frequently than advisory commissions in the United States.<sup>20</sup> Appointment by the sovereign gives a degree of separation and disinterest from the head of government and makes the public, rather than the government, the client of the royal commission.

One does not have to turn to royal commissions to find examples of commissions that have been successful in pointing the way to new policies.<sup>21</sup> One of these helped to establish what became one of the categories of public lands later considered by the Public Land Law Review Commission. Recognizing the severe problems in the Great Plains States caused by the Great Depression and drought, Franklin Roosevelt in 1936 created a Special Committee on Farm Tenancy which was made up of government officials and representatives of the lay public. It was given two and one-half months to report. The President suggested that the committee, which functionally was a commission, consult with two members of Congress who had been working on the problem, Senator John H. Bankhead and Representative Marvin Jones. One observer remarked, "[T]here is no doubt but that the Bankhead-Jones Farm Tenant Act of 1937 owes its existence in part, at least, to the work of the President's Committee."<sup>22</sup> On the other hand, there was the famous Wickersham Commission, the National Commission on Law Observance and Enforcement, cre-

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formed to deal with the laws relating to relief of poor persons that had been in effect for three-quarters of a century since the time of the previous royal commission on poor laws. The Poor Law Amendment Act of 1834 embodied the principles of the Royal Commission on the Poor Law of 1832, which included a provision that still frames debate over welfare policy: "That the public relief of destitution out of funds raised by taxation—as distinguished from the alms of the charitable—devitalized the recipients, degraded their character and induced in them general bad behavior." B. WEBB, *OUR PARTNERSHIP* 317-18 (1948).

Although the Royal Commission of 1832 may have been wrong when judged against modern concepts of welfare, it nevertheless had an enormous impact.

<sup>20</sup> POPPER, *supra* note 6, at 50.

<sup>21</sup> Wolanin found that presidential support for commission recommendations and the impact of these recommendations were surprisingly high. His analysis showed that 68% of the commissions that were examined had received positive presidential support in the form of a message, introduction of legislation, or administrative action on significant or major recommendations of the commissions. Further analysis showed that 58% of the commission reports ended up with significant or major recommendations that were, in fact, implemented by legislative or administrative action. WOLANIN, *supra* note 6, at 133-39.

<sup>22</sup> MARCY, *supra* note 6, at 30.

ated by President Hoover following a campaign pledge to deal with the problems of prohibition, a pledge designed "to corral both the wet and dry vote." That Commission's report was "an unmitigated failure."<sup>23</sup>

A former staff member of an advisory commission that has been given high marks for effectiveness, the Outdoor Recreation Resources Review Commission of 1959-1962 [ORRRC], gave four reasons for its success: timing; nonpartisan membership; insistence by the chairman, Laurance S. Rockefeller, that there be no minority report; and the ability, with help from the Rockefeller philanthropies, to find key people for report writing and funding a strong follow-up effort.<sup>24</sup> Two of these points, timing and the consensus report, deserve some further comment.

An advisory commission has little control over either the specific time at which its report is released or over the general political circumstances into which its recommendations are dropped. All commissions hope for front-page headlines on the day of release, but most settle for less. Yet a report's public reception is determined to a great extent immediately following its release. A more important consideration is whether the President, the Congress, and the country are ready for the commission's recommendations. Often, the failure of a commission may be due to reasons lying beyond its control, such as the release of its report.

ORRRC's report came at a time when outdoor recreation in the country was booming, the states and federal land management agencies were not able to cope with the surge of people to the outdoors, and Congress was looking for answers. There was a problem, and the Commission had new and relevant solutions.

Most commissions, not just ORRRC, seek to have unanimous or consensus reports.<sup>25</sup> The price of gaining that consensus frequently is fuzzy recommendations supported by generalities in a report that lacks passion, none of which bodes well for convincing the public, the Congress, or the President. The problem becomes one of gaining too little attention for recommendations that may

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<sup>23</sup> *Id.* at 39, 40.

<sup>24</sup> Conversation with Professor Hugh C. Davis, University of Massachusetts, former staff member of the Outdoor Recreation Resources Review Commission.

<sup>25</sup> Derthick, *supra* note 3, at 635.



have the support of an entire commission, but are difficult to translate into meaningful legislation or administrative action.

### C. *Why Commissions Are Appointed*<sup>26</sup>

Five purposes served by advisory commissions may be identified and ranked according to their frequency of use:

- 1) *Policy analysis*: when the commission is expected to decide what to do within the broad boundaries of *nonradical* federal action;
- 2) *window dressing*: when an "elite consensus" to support presidential proposals is needed;
- 3) *long range education*: when calling public attention to problems and creating "a frame of reference" for debating them is desired;
- 4) *crisis response*: when something has to be done to show recognition of a problem; and
- 5) *issue management and avoidance*: when the President needs "to feel his way into a controversial, complex, or new area."<sup>27</sup>

Advisory commissions are not, of course, the only devices available to presidents and the Congress for accomplishing these purposes. White House Conferences, public hearings, presidential trips, and various other means of capturing public attention can further the purposes of window dressing, crisis response, and issue management and avoidance. Government task forces, universities, and foundations or institutions, such as the National Academy of Sciences or the Brookings Institution can aid in policy analysis or long range education. No single approach has a unique ability to fulfill the assigned purposes. Advisory commissions do, however, have some characteristics that are particularly well suited for policy analysis and long range public education where problems of government and public policies are involved.

First, they are outside the usual channels of government, and, therefore, are blessed with a detached point of view. Second, they are generally able to attract highly qualified members and a staff of bright and diverse people who would not be available in individual government agencies or could not be assembled to serve on interagency task forces. Third, because commissions often have the ear of the President or key members of Congress

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<sup>26</sup> See also text accompanying notes 15 and 16 *supra*.

<sup>27</sup> WOLANIN, *supra* note 6, at 23.

and remain independent, they are able to get information and access to assistance that would not otherwise be available.<sup>28</sup> While advisory commissions may not be the best device for dealing with some problems, they are well suited to work on matters of public policy and administration, which are surely the kind of issues that have faced public land commissions.<sup>29</sup>

## II. A SHORT HISTORY OF PUBLIC LAND COMMISSIONS

Prior to the Public Land Law Review Commission, there were three commissions that dealt with public land issues: those of 1879, 1903, and 1929. Each was important in focusing attention on public land issues and abuses.

### A. 1879

The first public lands commission in 1879 was established because "Congress had gone on piling land law upon land law . . . without considering how later legislation might affect or be quite out of harmony with earlier laws which were not repealed."<sup>30</sup> A movement to reform the land laws led Congress to authorize a Commission made up of the Commissioner of the General Land Office, the head of the Geological Survey, and three nongovernment persons appointed by the President.<sup>31</sup> One member of the Commission, Commissioner Williamson of the General Land Office, importuned the Public Lands Committees of both houses of the Congress to appoint three members each to participate in the Commission, but neither house responded to this suggestion.<sup>32</sup>

Among the recommendations of the report of the Public Land Commission of 1879 was a "proposal to classify the lands . . . into arable, mineral, arid but irrigable, pasturage (for grazing), and timberland . . . [but the report made] little effort to establish criteria for classification or to determine how it was to be achieved."<sup>33</sup> The 1879 Commission's conclusion and recom-

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<sup>28</sup> *Id.* at 38-53.

<sup>29</sup> Derthick, *supra* note 3, at 635.

<sup>30</sup> P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 422 (1968) [hereinafter referred to as GATES]. Similar reasons are given for establishing the PLLRC.

<sup>31</sup> *Id.* at 423.

<sup>32</sup> *Id.* at 424.

<sup>33</sup> *Id.* at 428. The PLLRC in its 1970 report also found that land classification was a relevant issue and that it was easier to recommend that criteria for classification be established than to specify the criteria. Hagenstein, *One Third of the Nation's*

mendations were contained in a short forty-seven page report signed by all members of the Commission, although one member, Powell, added a two page statement with proposed modifications on water and mineral rights. The report was accompanied by proposed statutes that would implement the recommendations and were more concrete than the recommendations, and four additional volumes of background information.<sup>34</sup>

#### B. 1903

The second Public Land Commission was appointed by President Theodore Roosevelt<sup>35</sup> in 1903, after Congress had refused to provide for a commission at Roosevelt's request, to consider abuses of the Desert Land Act and other matters of concern.<sup>36</sup> The three appointees were all government employees: Commissioner of the General Land Office, Chief Engineer of the Reclamation Service, and Gifford Pinchot, who at that time headed the Bureau of Forestry in the Department of Agriculture. This Commission, which was highly critical of the Desert Land Act as making possible the creation of large landed estates, again decided that there was a need for land classification, which in this case would assign some land for disposal and some for leasing of grazing

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*Land—Evolution of a Policy Recommendation*, 12 NAT. RESOURCES J. 56-75 (1972) [hereinafter referred to as Hagenstein I]. This article details the PLLRC's approach to land classification, which was the subject of considerable criticism by various detractors from the Commission's report.

<sup>34</sup> GATES, *supra* note 30, at 429.

<sup>35</sup> Advisory commissions had been used as a governmental device only sparingly in the nineteenth century, and "Theodore Roosevelt probably deserves the title of Father of the Presidential Advisory Commission." WOLANIN, *supra* note 6, at 5. Although enthusiastic about his creation, Roosevelt found, much to his disgust, that the Congress had some doubts about his authority to establish commissions. The National Conservation Commission and the Country Life Commission were appointed in 1908, and both served without appropriated funds. When the report of the National Conservation Commission was transmitted to Congress in 1909 with a request for \$50,000: "[The President] was accommodated not by an appropriation, but by an amendment to the Sundry Civil Act which denied him any funds and also sought to prevent the appointment in the future of such 'unauthorized' commissions." MARCY, *supra* note 6, at 37-38. Similarly, Roosevelt asked for \$24,000 for the Country Life Commission "to digest the material it has collected" and this request was refused, in part on the grounds that the President had no power to create the Commission in the first place." *Id.* Congressional displeasure with Theodore Roosevelt's Commissions is also illustrated by the fate of the report of the President's Home Commission. It was attacked in Congress as being absurd, and a resolution was introduced to exclude the report from the mails "as obscene literature unfit for circulation." *Id.* at 118.

<sup>36</sup> GATES, *supra* note 30, at 488.

rights.<sup>37</sup> The Commission's recommendations, with one limited exception, were disregarded by the Congress, which resisted Roosevelt's lecturing it on matters involving conservation.<sup>38</sup> In contrast to other presidential commissions, the Public Land Commission of 1903, which did not have nongovernment members, might instead be viewed as an interagency task force having somewhat less standing than the usual blue-ribbon advisory commission with public members.

The first Roosevelt's relations with the Congress in general may have helped to determine the congressional reaction to his commissions. Although for a time they may have been less inclined to create commissions without approval of the Congress, those who followed Roosevelt as President were not greatly deterred in the use of presidential commissions to achieve their ends.

### C. 1929

In 1929 President Hoover had concluded that, "For the best interest of the people as a whole, and people of the western states and the small farmers and stockmen by whom they are primarily used, [the public lands] should be managed and the policies for their use determined by state governments."<sup>39</sup> He asked Congress for authority to appoint a commission to study what to do with the public domain and was duly authorized to appoint a Committee on the Conservation and Administration of the Public Domain. He appointed as chairman James R. Garfield, who had been Secretary of the Interior under Theodore Roosevelt, and eighteen other public members, in addition to the Secretaries of Agriculture and the Interior who were *ex officio* members of the Committee. Reflecting Hoover's views, the Committee recommended that those public lands important for national interest purposes should be retained, that the states should be offered the remainder of the public lands and given them when prepared to provide administrative control, and that those lands not accepted by the states should be placed under organized federal management.<sup>40</sup>

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<sup>37</sup> B. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 432 (1924); GATES, *supra* note 30, at 489-91.

<sup>38</sup> GATES, *supra* note 30, at 491-92.

<sup>39</sup> *Id.* at 524.

<sup>40</sup> *Id.* at 525-26.

Congress was sufficiently interested in the expected results of this presidential commission that it asked that the report be transmitted to the Congress.<sup>41</sup> The old Roosevelt conservationists, in Senate hearings, voiced opposition to the transfer of federal lands to the states and unwillingness on the part of at least some of the western states to accept federal lands without mineral rights.<sup>42</sup> The result was that the Committee's recommendations were not enacted, although its report helped set the stage for passage in 1934 of the Taylor Grazing Act.

### III. THE PUBLIC LAND LAW REVIEW COMMISSION

#### A. Formation

The Public Land Law Review Commission was the fourth advisory commission in 100 years to make recommendations on public land policies. Congressman Wayne N. Aspinall, then Chairman of the Committee on Interior and Insular Affairs of the House of Representatives, wrote President John F. Kennedy in October 1962, saying,

I think that any student of the public lands situation will recognize that we have reached a point where it is essential to establish clear-cut legislative guidelines concerning the management, use, and disposition of our public lands. This has come about because of past inaction of Congress, coupled with the growing scarcity of land in the United States and the parallel need to preserve some of our undisturbed areas in their natural setting.<sup>43</sup>

In his reply, President Kennedy noted that

the public land laws constitute a voluminous, even forbidding, body of policy determinations within which the land management agen-

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<sup>41</sup> MARCY, *supra* note 6, at 27.

<sup>42</sup> GATES, *supra* note 30, at 527-28.

<sup>43</sup> Letter from Wayne N. Aspinall to John F. Kennedy (Oct. 15, 1962), reprinted in COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2d SESS., THE PUBLIC LAND LAW REVIEW COMMISSION 121 (Comm. Print 1964).

About the time of his letter to the President, Congressman Aspinall was noting that the Public Lands Subcommittee of the House Committee on Interior and Insular Affairs would have only "between 90 and 100 hours [during the 88th Congress] in which to consider all of the matters within its jurisdiction." Address by Wayne N. Aspinall, Western Regional District of the National Association of Counties (Dec. 12, 1962), reprinted in COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2d SESS., THE PUBLIC LAND LAW REVIEW COMMISSION 28 (Comm. Print 1964). Given the scope of public land issues described by Aspinall as needing attention, Congress would clearly be hard put to deal with them in its committees in the thorough manner that they deserved.

cies must operate. Dating back as much as a century and a half, this complex of statutory guidelines varies from the most detailed prescription of ministerial acts to mere definition of an objective coupled with broad grants of discretion to administrators. Viewed in this perspective, the deficiencies of the present structure become apparent.<sup>44</sup>

In these "two strong and patriotic statements,"<sup>45</sup> the foundation was laid for the creation of the Public Land Law Review Commission. The result was "the most searching assessment, the most fundamental public exposure and discussion ever concentrated on a broad natural resource issue."<sup>46</sup>

Responding to a growing national interest in recreation and preservation of natural values on the public lands, the administrative agencies, under the broad grants of authority referred to by President Kennedy, were increasingly restricting economic uses of these lands. These uses—mining, grazing, and logging—had strong local constituencies from which western members of Congress derived much of their support and which provided grist for the legislative mills of the Interior and Insular Affairs Committees. At least some members of the Interior Committees realized that they were unable to slow the administrative agencies against which they were arrayed and which had the discretionary authority ultimately to bring economic uses of the public lands to a halt. As Chairman of the House Interior and Insular Affairs Committee, Aspinall was looking for a way to place some of the control over public land decisions back in the Congress and especially in his Committee.

Given the various resources available to the Congress for developing information on legislative matters, as well as the low esteem with which commissions are sometimes held, the choice of a commission as the mechanism for reviewing public land issues is perhaps surprising.<sup>47</sup> It is obvious, however, that assigning

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<sup>44</sup> Letter from John F. Kennedy to Wayne N. Aspinall (Jan. 17, 1963), *reprinted in* COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2d SESS., THE PUBLIC LAND LAW REVIEW COMMISSION 121 (Comm. Print 1964).

<sup>45</sup> John A. Carver, Jr. (unpublished paper), Public Land Law Review Regional Conference, Syracuse, New York (Dec. 14, 1970).

<sup>46</sup> *Id.*

<sup>47</sup> By August 1963, Aspinall had settled on a congressional-executive commission as the mechanism necessary for "a complete review of all laws and regulations affecting Federal public land ownership and the natural resources thereof," which would have three

the necessary studies and review to the executive branch would not do; after all, the executive branch was in part the subject of the review. Aspinall explored other possible institutional havens for the task, including what was then the Legislative Reference Service of the Library of Congress, but the resources necessary for a major effort of this sort could not be made available in ongoing institutions.<sup>48</sup> A temporary commission was required.<sup>49</sup>

Although there are remarkable similarities in some of the words used to describe the problems facing this and its predecessor commissions, as well as in the kinds of recommendations that were made, there are also important differences. First of all, the initiative for creation of the PLLRC came from the Congress rather than from the Executive. It was Congressman Aspinall who, as a representative from a public land district in Colorado, most acutely felt the contrasting development and preservation pressures on the public lands. In one sense it was western congressmen who had most to gain through a revision of the public land laws that would provide a more rational system of allocating public lands to conflicting uses and one that would satisfy, even if only for a time, the various interests clamoring for their votes.

Second, this was not a presidential commission. It was made up of members of Congress, appointed by the Speaker of the House and President of the Senate, as well as appointees of the

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and one-half years to make the necessary study and prepare a report. Remarks before the Section of Mineral and Natural Resources Law, at the American Bar Association Annual Meeting, Chicago, Illinois (Aug. 14, 1963).

<sup>48</sup> Interview with Theodore M. Schad, Legislative Reference Service, Library of Congress, in 1964-65. Schad recalled Congressman Aspinall's inquiry.

<sup>49</sup> Advisory commissions, nevertheless, "face a formidable set of tasks." They must:

- translate their mandates into operational terms;
- recruit a competent staff;
- establish their own credibility through background studies, public hearings, and visits to relevant locations;
- reach a consensus on recommendations; and
- put forth these recommendations in a report that will capture public attention and at the same time show such understanding of the problems faced that the proposed solutions are convincing.

WOLANIN, *supra* note 6, at 96.

Wolanin found many similarities in the presidential advisory commissions that he examined, which covered the period from 1945 to 1973, and found that little change in commission work had taken place during this time. *Id.* at 123. With the only major exception of the important joint legislative-executive character of the PLLRC, its operations fall into the patterns recognized by Wolanin for presidential advisory commissions.

President. It was to consider problems that faced both branches of the Federal Government and that involved fundamental issues of the separation of legislative and executive powers. All three of the previous public land commissions, as well as most other advisory commissions that have been appointed since 1900, were presidential in terms of appointees and character.<sup>50</sup> The PLLRC had members not appointed by the President, and it reported to the Congress as well as to the President.

The reasons for the joint legislative-executive form of the Public Land Law Review Commission were several. Participation by the Executive Branch in this predominantly congressional effort was necessary to give the Commission credibility with recreation and preservation interests and to illustrate commitment of the Executive Branch to its recommendations.

In addition, choice of this form was based in part on the performance of the Outdoor Recreation Resources Review Commission, whose report had only recently been released. The structure of ORRRC was similar to that of the PLLRC and it was viewed as a remarkably successful commission.<sup>51</sup> Congressman Aspinall had been a member of ORRRC, along with three other members of the House of Representatives, four members of the Senate, and seven Presidential appointees.

Third, the scope of the PLLRC study was broader than that of its predecessors, encompassing all federal lands, rather than just the remaining unreserved and unappropriated public domain lands. The intent also was clearly not limited to a codification of the public land laws, but rather concentrated upon a full-scale review of the law, policies, and practices governing the disposal, retention, and management of these lands.<sup>52</sup> If a more limited purpose for the Commission was understood by some, it was not evident in the law that established it.

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<sup>50</sup> Wolanin's definition of a presidential advisory commission is one that is *inter alia* "advisory to the President, . . . all members of which are appointed directly by the President, . . . [and] at least one member of which is public . . ." *Id.* at 7.

<sup>51</sup> Its report led directly to the creation of the Bureau of Outdoor Recreation and the Land and Water Conservation Fund, and its study reports were important as sources of new and well-organized information. See generally Wolfe, *Perspective on Outdoor Recreation: A Bibliographical Survey*, 54 GEOGRAPHICAL REV. 203 (1964).

<sup>52</sup> P.L. No. 88-606, 78 Stat. 982 (1964) (codified at 43 U.S.C. §§ 1391-1400 (1970)).



Finally, the time and effort devoted to this review far exceeded that of previous public land commissions.<sup>53</sup> The initial authorization of \$4 million in funds and slightly over four years in which to report was later extended to a total funding authorization of \$7,390,000 and a total time of almost six years.<sup>54</sup>

### B. *The Commission Itself*

A commission sets the tone of its work through selection of a chairman and a staff director, the attention it gives to its work and report, and its willingness to agree on consensus recommendations. The PLLRC had nineteen members: six Senators and six Representatives, all ranking members for the respective Committees on Interior and Insular Affairs and with equal majority and minority party representation, six presidential appointees, and a chairman chosen by the other eighteen.<sup>55</sup>

The Chairman was Congressman Wayne N. Aspinall of Colorado, Chairman of the House Interior and Insular Affairs Committee, and there was no question that he was the dominant figure on the Commission. It was his idea originally, he was given broad operational latitude by the other members, and the Staff Director reported directly to him. Yet, the recommendations of the PLLRC, as is common with commissions generally, represented a broadly agreeable consensus. Members of the Commission accepted the idea that only a consensus report would be likely to have a significant impact, but perhaps more important was the fact that involvement in the Commission's work tended to develop a similar set of experiences with respect to public land policies that affected the Chairman's views as well as those of the other members.

Although the public members of the Commission initially had less extensive knowledge of the policy issues facing them than did at least some of the congressional members, as time went on

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<sup>53</sup> Even after allowing for a year of delay before the Commission held its first meeting in July 1965, the time and funds allowed for the Commission's work were handsome compared to those allowed for earlier commissions. On the other hand, they were not overly generous when compared with those allotted to other advisory commissions of its time. The National Water Commission, established in 1968, had a more limited mandate, but was given five years and \$5 million with which to do its work. P.L. No. 90-515, 82 Stat. 868 (1968).

<sup>54</sup> P.L. No. 90-213, 81 Stat. 660 (1967).

<sup>55</sup> P.L. No. 88-606, 78 Stat. 982 (1964).

they began to exert greater influence on the Commission's findings and recommendations. Not only were the public members able to spend more time at the Commission meetings than were many of the congressional members, but each of them was also a swing vote in the sense that each had little previous public commitment to positions on specific issues before the Commission.

Some congressional members found it difficult to separate their public posture in committee hearings and with constituents from the private deliberations at the Commission meetings. Others, however, found the Commission meetings to be a congenial forum for developing statesmanship. One congressional member made the point clearly when he said during a private session:

As a representative of the fine people of the sovereign state of \_\_\_\_\_, I must oppose in no uncertain terms this hare-brained proposal, which would lead to disaster and confusion throughout my state. But, as a member of the Public Land Law Review Commission, I applaud the highmindedness of this statesmanlike approach and urge my fellow members to join me in voting for it.<sup>56</sup>

The consensus nature of the Commission's recommendations made it possible for congressional members to rise above the need to satisfy voters in the district on each issue.

### C. *The Advisory Council*

The Act that created the PLLRC also established an Advisory Council of twenty-five members appointed by the Commission who were to be "representative of the various major citizens' groups interested in problems . . . of the public lands"<sup>57</sup> and departmental liaison officers from major agencies with public land responsibilities. It also directed the Commission to invite each Governor to appoint a representative to the Commission.<sup>58</sup> The Act further specified some sixteen categories of interests to be represented, at a minimum, on the Advisory Council.<sup>59</sup>

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<sup>56</sup> Paraphrased from the author's notes from an executive session of the Commission.

<sup>57</sup> P.L. No. 88-606, 78 Stat. 982 (1964).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The Act identified the following major citizen groups to be included among those represented on the Advisory Council: organizations representative of state and local government, private organizations working in the field of public land management and outdoor recreation resources and opportunities, landowners, forestry interests, livestock interests, mining interests, oil and gas interests, commercial outdoor recreation interests, industry, education, labor, and public utilities.

Advisory Council members and Governors' Representatives met with the Commission at two planning meetings during the early stages of its work, in a series of eleven public meetings throughout the country between June 1966, and April 1968, and at a series of meetings to consider study reports and policy alternatives beginning in November 1968. In addition, written views of the "official family" were solicited throughout the Commission's life.

The PLLRC Act specified that the Advisory Council was to "advise and counsel the Commission concerning matters within [its] jurisdiction"<sup>60</sup> and indeed this is what the Advisory Council did during the Commission's active life.<sup>61</sup> Advisory Council members, acting as individuals or representing their constituencies, were generally helpful in providing information and suggesting directions that might be taken by the Commission.

Beyond this, it was the stated hope of Chairman Aspinall that, on release of the Commission's report, each member of the Advisory Council would advise the groups that he represented that the Commission's recommendations necessarily reflected a balancing of the various interests and that his constituents had fared as well as could be expected. It was also hoped that each member of the Advisory Council would be able to muster the support of the groups he represented for legislative proposals growing out of the Commission's recommendations.<sup>62</sup>

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It is not at all clear that the members saw themselves as representing the categories of interests specified in the PLLRC Act, although with some mental gymnastics, at least one member of the Advisory Council could be fit into each of the specified categories. Nevertheless, one of the respondents to my letter to Advisory Council members denied that he represented any groups to the Commission, although he noted considerable knowledge of two of the important categories specified in the Act. A second respondent, in defining his understanding of his own representation on the Advisory Council, generally agreed.

<sup>60</sup> P.L. No. 88-606, 78 Stat. 982 (1964).

<sup>61</sup> Although the Commission itself resisted efforts of the Advisory Council to organize as a formal body competing with the Commission, the relationship between them was cooperative and cordial.

<sup>62</sup> To determine how well Advisory Council members performed these latter two functions, which they may not have clearly perceived or accepted as appropriate functions, I wrote seventeen members of the Advisory Council, asking to what extent they had counseled their constituency groups to support the Commission's recommendations and to what extent they had attempted to muster support for legislative proposals that grew out of the recommendations. Of the seven responses, most suggested that they, as individuals, saw their role primarily in terms of advising the Commission and not in counseling consti-

In the year following publication of the Commission's report, Chairman Aspinall introduced a bill, H.R. 7211, which incorporated many of the Commission's recommendations and was intended to set the policy framework for other legislation that would be introduced later. Five days of hearings were held, during which two former members of the Advisory Council presented oral statements and two other former members submitted written statements. One oral statement indicated support for most of the Commission recommendations, but disagreement with many of the provisions of H.R. 7211. One written statement indicated support for the bill as an outgrowth of the Commission's report. The other two statements did not relate the bill to the Commission's recommendations.<sup>63</sup>

This sample for judging the effectiveness of the Advisory Council following submission of the Commission's report is admittedly limited. Furthermore, a number of Advisory Council members assisted in Commission-sponsored regional meetings to acquaint interested groups and people with the recommendations. It appears, however, that hopes that the Advisory Council members would lobby their constituencies for the Commission's approach and recommendations once the report had been filed were not well founded, for Advisory Council members were chosen by members of the Commission, and to some degree there was an understanding on the part of Advisory Council members that they were the nominees of particular Commission members. This undoubtedly affected their perception of responsibilities to the Commission and the channels through which they could operate most effectively.

#### D. *The Staff*

Commission staffs are often seen as exerting an undue influence over a commission's work, its recommendations, and its report. There is sometimes tension between a commission and its

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tuency groups. Three of the responses indicated that an effort was made to help constituency groups interpret the Commission's recommendations, but none of the three indicated any effort to gain support for them. Only one of the responses indicated efforts were made to support legislation that grew out of the Commission's report. Responses are treated confidentially in appreciation for the willingness of Advisory Council members to participate in the survey.

<sup>63</sup> *Public Land Policy Act of 1971: Hearings on H.R. 7211 Before the Subcomm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971).*

staff and a suspicion of commission staffs by interested constituencies of the commission. Two common sources of tension between a commission and its staff are fear by commissions that some staff members are "overzealous for social reform, with a corresponding bias emerging in their work" and suspicion in "formally bipartisan commissions . . . that top staff members are really very partisan."<sup>64</sup>

Fears that staff, however qualified and persuasive its members may be, will dominate a commission are generally not well founded. While staffs generally write commission reports, members of the commission have a decisive influence on their content because most commission members are actively involved in the decisions leading up to the report, they have considerable opportunity to review and comment on report drafts, and they are generally "strong-minded and intelligent."<sup>65</sup>

It is true to a degree in most commissions that "the staff is often composed of young, less experienced people who still think the world can and should be changed; the commissioners know better."<sup>66</sup> More accurately, however, "[n]ot only are the views of commission members often broadened and liberalized [by the commission experience], but those of the staff are often moderated and tempered."<sup>67</sup> The very context in which a commission operates places the commission and its staff in a relationship that is separate from what is happening in government in general. In the end, the names of the staff members, as well as those of the commission, appear on the commission reports. Both are staking their reputations on having a good report, and neither commissioners nor staff members are well served by divisiveness.

Although the total number of staff of the PLLRC at one time grew to forty-eight members, the basic work of preparing policy materials for Commission meetings and writing the final report was the responsibility of six members of the "senior staff." The

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<sup>64</sup> Lipsky & Olson, *Riot Commission Politics*, in *POLITICS/AMERICA: THE CUTTING EDGE OF CHANGE* 198 (W. Burnam ed. 1963).

<sup>65</sup> WOLANIN, *supra* note 6, at 111-15.

<sup>66</sup> Drew, *supra* note 16, at 48.

<sup>67</sup> WOLANIN, *supra* note 6, at 117 (footnote omitted). Wolanin also notes that commission staffs by their very background tend "toward a method of problem solving . . . of making pragmatic adjustments and modifications in the existing programs and approaches." *Id.* at 101, 117. This is particularly true of senior staff members.

identification of this senior staff during the life of the Commission was based in part on their skills and knowledge of the issues, but equally important was their ability to work with the Commission and express Commission decisions in a way that reflected fairly the views of the Commission. Partisan party views were not an issue with respect to the staff of this "formally nonpartisan" commission since the issues that it faced did not divide on party lines as much as on regional or substantive grounds.

Of more importance to the Advisory Council and other interest groups was the perception that the staff served as a screen between them and the Commission. The Advisory Council saw its function as providing advice to the Commission, not to the staff. Commission members were not always available at and between meetings, but the staff was available. To some extent, whatever concerns Advisory Council members may have had regarding the staff were mitigated by their access to the Commission members who had championed their nominations to the Advisory Council.

#### E. *Public Meetings*

Some 900 witnesses were heard at the Commission's regional public meetings held at 16 locations throughout the country and at most meetings, tours of nearby public lands were arranged for members of the Commission, staff, Advisory Council, and Governors' Representatives. Little new information was developed at the public meetings, especially for congressional members of the Commission who had attended numerous committee hearings on the same subjects. The meetings, however, served three very useful purposes.

First, they gave interested people in each region a chance to be heard regarding the problems as they viewed them and to have a sense of participation in the Commission's work. Second, they gave the Commission's "official family" a firsthand chance to see some public land problem situations. But the most important purpose was the common experience that they built among the official family. During the decisionmaking stages of its life, when the Commission met in Washington, there were numerous instances when illustrations were drawn from these experiences together at the public meetings. This united the Commission on issues on which it might otherwise have been divided.

## F. *Study Program*

Thirty-three subjects were studied, mostly under outside contract, and reports were prepared for the Commission. Most subject areas included studies of the existing legal structure for use and management and the resource characteristics and status of the public lands relative to the subject. By the time the study program was concluded, seven feet of study reports had been prepared. "Massive" is a reasonable adjective to describe the study program. Unfortunately, its usefulness to the Commission was limited.

To a considerable extent the study program served a political rather than an analytical purpose. The scope and detail of the study reports offered convincing evidence that the Commission had explored every nook and cranny of the public lands and the laws, policies, regulations, and practices that determine their administration. They also provided the Commission with organized statements of the law and with resources data that might otherwise have been difficult to assemble readily when the Commission was writing its report. But there was little in these reports in the way of ideas to help the Commission and staff in defining new and better approaches to solving public land issues.<sup>68</sup>

A handful of the study reports were very well done, although even these had limited analytical value for the Commission. Some of the reports were at best mediocre. There are two explanations for this occurrence. First, the contractors were asked to provide only facts without any new ideas, because the Commission did not want itself to be cornered by the forceful presentation of a particular policy option favored by a contractor.

Second, the size and scope of individual studies, the relatively short time in which they had to be completed, and their emphasis on simple data collection and organization, as well as the nature of the government contracting process, made it very difficult to get a truly outstanding study team to take a contract. The notable successes among the studies were most often those

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<sup>68</sup> The PLLRC was like many other commissions, most of whose recommendations "might be considered by many to be old hat and a collection of tired clichés . . . [but which nevertheless] represent substantial departures in policy when viewed in the context of the normal pace of change and the range of line policy alternatives within the federal government." WOLANIN, *supra* note 6, at 128.

with a narrow focus and where the responsibility for the report fell on one person. The reports that were less well done usually involved both legal and resources materials and were prepared by a team of assorted private consultants, practicing attorneys, and academics.

### G. *Policy Evaluation and Final Report*

Decisions by the Commission on public land policy matters before it were made at a series of nineteen Commission meetings during the sixteen months prior to sending the final report to the printer. Each meeting included one and a half or two days of executive sessions of the Commission and its senior staff. Reviewing drafts of the Commission's final report was limited to the last six or seven meetings. Major decisions by the Commission were made on the basis of "policy evaluation papers"<sup>69</sup> prepared and presented by senior staff for each major subject. When policy evaluations and decisions for each of the thirty-three subjects facing the Commission had been completed, there was not only a foundation for drafting the Commission's report, but there was a clear understanding of what the report would say and how it would be said. The policy evaluation process was the linchpin of the Commission's efforts. Several points with regard to this process are worth noting.

The policy evaluation papers set the agenda for Commission decisions<sup>70</sup> and preparing them was a function of the staff. The staff did not influence the Commission by whispering in members' ears or standing between the Commission and its Advisory Council. It did influence the Commission's report by deciding on the order in which decisions would be presented to the Commission and by phrasing the questions that had to be answered.

The second point was the decision, reflecting the pragmatic character of the Commission and its staff, to leave the decisions

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<sup>69</sup> These policy evaluation papers, typically 40 to 60 pages in length, were structured by the staff to provide the Commission with a series of "yes or no" questions. The Commission's answers were based on a good deal of discussion among themselves and with the senior staff and in many cases were shaded to achieve consensus and to recognize the ambiguities of public land issues. Together, they provided an excellent basis for defining a set of policy recommendations for each subject. Hagenstein I, *supra* note 33, describes in some detail how this process worked for one major recommendation and its corollaries.

<sup>70</sup> How the agenda for Commission decisions flavored its recommendations is covered in another paper. Hagenstein I, *supra* note 33, especially at 66-75.



on grand policy designs to the last. If meaningful consensus were to be achieved, it would come not on grand declarations of policy, but rather on the details of those policies. The Commission's report starts with "A Program for the Future," seventeen general recommendations and four "fundamental premises" on which the report was based.<sup>71</sup> These general recommendations did not frame, but rather were drawn from, the 137 major recommendations in the report.

Finally, during the concluding series of six or seven Commission meetings, the draft report was read aloud, word by word, by the Staff Director to the assembled Commission. Changes were voted on and made by the Commission as the reading progressed. This procedure, which is often used by commissions, enables supporters of the Commission's report to point out that every member had a full opportunity to read the report and influence its content. It also focuses attention on the specific content, rather than the general tone, of the report. If the PLLRC report<sup>72</sup> is seen as uneven, this may well be the result of the decision-by-decision and page-by-page way in which it was prepared.

#### H. *The Follow-up*

The very facts of independence and limited duration that are of great value to a commission in pursuing its work are a hindrance when it comes to doing the follow-up that is necessary if recommendations are to be effected. Commission recommendations and reports are "orphans."<sup>73</sup> They are cast adrift in a sea of ongoing agencies, programs, and issues that are competing for attention. The lack of mechanisms for follow-up to commission recommendations is a matter of some recent concern to the General Accounting Office.<sup>74</sup>

Following submission of the PLLRC report to the President and the Congress in June 1970, the Commission had six months of life remaining. It sponsored a series of regional public meetings

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<sup>71</sup> PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 1-7 (1970) [hereinafter cited as PLLRC REPORT].

<sup>72</sup> PLLRC REPORT, *supra* note 71.

<sup>73</sup> WOLANIN, *supra* note 6, at 157.

<sup>74</sup> U.S. GENERAL ACCOUNTING OFFICE, BETTER FOLLOWUP SYSTEM NEEDED TO DEAL WITH RECOMMENDATIONS BY STUDY COMMISSIONS IN THE FEDERAL GOVERNMENT, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL (1975) [hereinafter cited as USGAO].

to gain the attention of "opinion makers."<sup>75</sup> Members of the Commission and its official family were key participants in these meetings, which also served as forums for debating the recommendations, and some momentary attention for the PLLRC's recommendations was achieved.

In presenting the Commission's report to President Nixon, Chairman Aspinall noted "the preparations being made by the public land management agencies to review the report"<sup>76</sup> and welcomed a recent statement by the Attorney General that the Justice Department would assume a leadership role in developing by 1976 "a complete and modern statutory code for . . . our public land resources."<sup>77</sup> However, no systematic effort by the executive branch to implement the Commission's recommendations has occurred and, despite a formal analysis by the Department of Agriculture that was sent to the White House in July 1970, the "executive branch has not designated an action agency or official to formulate an overall policy or plan."<sup>78</sup> The Bicentennial Year came and went without a sighting of the promised Department of Justice public lands code.

Although the PLLRC reported to President Nixon, was conceived during President Kennedy's term, and had its public members appointed by President Johnson, it had no home in the White House. Its recommendations, many of which were critical of the way in which the laws were being administered, did not have the enthusiastic support of the public land management agencies.

Chairman Aspinall stated at various times that once the Commission finished its work, the next step would be up to the Congress. And so, in a way, it was; but six months went by before the next Congress convened. The Commission had done no drafting of possible legislation. It had not even gone so far as to suggest how the recommendations might be packaged in legislative proposals. Because of the complexity of the issues and their interrelations, packaging the recommendations was a matter of substance. Finally, some three months after the ninety-second Congress con-

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<sup>75</sup> PLLRC REPORT, *supra* note 71, at 307.

<sup>76</sup> Public Land Law Review Commission, Press Release, June 23, 1970.

<sup>77</sup> *Id.*

<sup>78</sup> USGAO, *supra* note 74, at 5.

vened and nine months after the Commission's report had been filed, H.R. 7211, a bill that put a number of Commission recommendations in a cumbersome package, was introduced by Chairman Aspinall. The bill in its entirety had a constituency of one, Chairman Aspinall,<sup>79</sup> and he was never able to bring H.R. 7211 to a floor vote.<sup>80</sup> Faced with its own problems of timing, elections, and politics, the Congress is not the place to center responsibility for follow-up.<sup>81</sup>

Lack of a follow-up mechanism for the PLLRC does not mean that the Commission's recommendations have not had some impact. The Bureau of Land Management Organic Act<sup>82</sup> enacted during the ninety-fourth Congress contains much that appeared in the PLLRC report and in H.R. 7211. The Joint Federal-State Land Use Planning Commission for Alaska historically is tied to the Commission's report. Other recommendations have appeared in legislation and administrative orders. To attribute these actions solely to the persuasiveness of the Commission's report and the soundness of its ideas would be exaggeration, but there can be no doubt that the terms of the dialogue leading up to these actions were influenced by the PLLRC.

#### IV. ARE COMMISSIONS A VIABLE DEVICE FOR INSTIGATING CHANGE?

##### A. *Commission Form*

Form must follow function, and the form of advisory commissions should follow the purposes for which they are established.<sup>83</sup>

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<sup>79</sup> Even that constituency lost its power when Chairman Aspinall was defeated in a primary election toward the end of the 92d Congress.

<sup>80</sup> Hagenstein, *Changing an Anachronism: Congress and the General Mining Law of 1872*, 13 NAT. RESOURCES J. 480, 492 (1973).

<sup>81</sup> By contrast, following publication of the report of the Outdoor Recreation Resources Review Commission, a Citizens' Committee on the ORRRC report was established, following a model provided by the follow-up to the Hoover Commissions on government organization. POPPER, *supra* note 6, at 47. Funds were provided through Laurance S. Rockefeller, who had been Chairman of ORRRC, and a small full-time staff was hired. The Citizens' Committee is believed by many to have had a significant effect in getting the ORRRC recommendations put into law.

<sup>82</sup> 43 U.S.C.A. §§ 1701-1782 (West Supp. 1977).

<sup>83</sup> For example, the Senate Select Committee on National Water Resources of 1959-61, in effect a congressional commission, had a "considerable influence" on national water policies. Schad, *An Analysis of the Work of the Senate Select Committee on National Water Resources, 1959-1961*, 2 NAT. RESOURCES J. 226, 247 (1962). An alternative suggestion is that the appropriate client for advisory commissions is "the public" and not the

In a broad sense, the function of an advisory commission as a policy analyst is two-fold: It must analyze and it must promote its results in a political context. If the results are to be effected through presidential action, including in many cases the development and submission of legislation, a presidential commission is a suitable approach. Where the problems are seen as largely within the purview of Congress, a legislative commission may be more appropriate. The joint legislative-executive form of the PLLRC was appropriate for the issues that it faced, which penetrated deeply into the matter of the appropriate separation of legislative and executive responsibilities.

There seems to be a common, but unfounded, presumption that having members of Congress on a commission will help pave the way for any legislative proposals that may ensue. For one thing, being party to a commission's report does not bind a member to support its recommendations.<sup>84</sup> In addition, members of Congress face the realities of change. Although only one of the thirteen congressional members of the Commission failed to serve in the Congress following release of the Commission's report, six more, including the Chairman, had dropped by the wayside in the next Congress, the ninety-third. Today, only two members of the PLLRC, the Chairmen of the Senate Energy and Natural Resources Committee and the House Interior and Insular Affairs Committee, remain in Congress.

Having congressional experience and viewpoints on a commission, on the other hand, is valuable. The congressional members initially brought a better understanding of public land issues to the PLLRC deliberations than did the public members. But the fact that they were elected officials in itself added little to the credibility of the Commission's report and, as noted above,<sup>85</sup> did little in the end to smooth the path of its recommendations through the Congress.

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President who created the commission. Therefore, commissions should be a joint responsibility of the President, the Congress, and even the Supreme Court, and serve much as the royal commissions in England. POPPER, *supra* note 6, at 63. The PLLRC was a joint legislative-executive advisory commission which saw its client not as the public, but as the institutions of the Congress and the Presidency.

<sup>84</sup> Within 48 hours of the release of the PLLRC report, one of the Commission's influential congressional members denounced the report roundly and disassociated himself from some of its major recommendations.

<sup>85</sup> See notes 79-81 and accompanying text *supra*.

The idea that having presidential appointees on a largely congressional commission would somehow tie the executive branch to the Commission's recommendations also seems to have been ill-founded. Even if the Nixon administration, to which the PLLRC reported in 1970, had been interested in the recommendations of a commission with Johnson appointees, it is not likely that it would have believed itself committed to recommendations that favored greater congressional control over public lands. Administrative agencies have an increasingly national constituency whose interests are at odds with those of the production-oriented constituency of the congressional committee members.<sup>86</sup> That the administrative agencies should change their views because of the recommendations of a handful of presidential appointees on a largely congressional commission in the absence of compelling reasons is not plausible.

#### B. *Commission Membership and Operation*

Commission members are chosen because of their competency and knowledge of issues facing the commission, their perceived ability to represent important constituencies, and their public visibility for adding to the report's credibility. Membership should also be balanced in terms of geography, constituencies, and viewpoints. The critical choice, though, is that of the chairman. Those who never see a commission's report will have a perception of its contents consistent with their understanding of his views.

The membership of the PLLRC met the above criteria. It was bipartisan; the Senate and House members were equally divided between the majority and minority and were the senior members of the two Interior and Insular Affairs Committees. As such, they were knowledgeable about public land matters and were, with three exceptions, from western public land states. Three of the presidential appointees, all of whom could be described as conservationists, were from the East; the other three, one of whom generally voted with the conservationists, were from the West. They included a state official, a local official, a professional resource manager, a national conservation figure, a practicing at-

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<sup>86</sup> See text following note 46 *supra*.

torney, and a professor, and one was a Republican—all together a collection typical of advisory commissions.

Chairman Aspinall was the dominant influence on the Commission for two reasons, neither of which was expressed in an overt attempt to dominate.<sup>87</sup> His knowledge of the issues, gained through eleven terms in the Congress, some six of which were as Chairman of the House Interior and Insular Affairs Committee, was more extensive and detailed than that of any other commissioner. The second reason is that the Chairman, in very typical congressional fashion, was allowed to dominate simply because he was Chairman. In the frenetic atmosphere of the Congress, chairmen are assigned tasks and then allowed to pursue them much as they see fit.

Among congressional members of the PLLRC, there seemed to be two attitudes. For several, especially those who had other significant responsibilities, the attitude was one of "The Commission is Wayne's baby and I am not going to interfere." If there were doubts about the Commission's direction, the tendency was one of not bucking the Chairman in the Commission, but waiting until the issues came out in the Congress.<sup>88</sup> As for those who were not holding their fire for later, they appeared to be willing to follow the Chairman's lead in any case.

Whenever members of Congress also serve on advisory commissions, it is probably unrealistic to expect that they will act much differently or follow a different set of rules than in their roles in the Congress. If this is the case, as the example of the PLLRC seems to suggest, one might well ask if the Congress should not appoint public members to represent it on joint legislative-executive commissions, just as presidential appointees are drawn from the public.<sup>89</sup> Given the overloaded schedule of

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<sup>87</sup> Chairman Aspinall stated his position or voted on issues in only the rare instances when the other members were evenly divided.

<sup>88</sup> This is suggested in part by the fact that only one congressional member of the Commission joined with three of the six presidential appointees in the only significant dissent filed with the Commission's report.

<sup>89</sup> Popper, in his favored scheme of having national advisory commissions that report to the public, specifically suggests that each branch appoint members, "none of whom would come from the executive, legislative, or judicial branches." POPPER, *supra* note 6, at 64.

most members of Congress, this approach would surely have some advantages, as well as some disadvantages.

The fact is that presidents have done rather well in choosing commission members from their national constituency. Blue ribbon commissions typically have blue ribbon members and the PLLRC was no exception. Presidential appointees to commissions are drawn from a "distinctively national elite" and tend to be cosmopolitan, rather than parochial, in viewpoint.<sup>90</sup> They usually have achieved national recognition and view themselves as representing national viewpoints.

Members of Congress, on the other hand, represent largely local constituencies and bring a different, and useful, perspective to commissions such as the PLLRC. One might well question whether the Congress, if asked to make public appointees to legislative-executive commissions, would be able to do as well as the President in making appointments from a national constituency or to improve on its own members in representing local constituencies.

### C. *Timing and Policy Context*

Advisory commissions do have a finite life span, which can have important implications. In fact, as noted earlier, some commissions are established to study issues with the hope that the issue will simply evaporate in the meantime, and, for them, passage of time is necessary.<sup>91</sup>

Beyond the buying of time, the life span of commissions is important in relation to the policy context within which the commission exists. This is well illustrated by the PLLRC. Two policy matters dominated the PLLRC work and report. One was whether the nation had reached the point where broad disposal of federal lands no longer served a valid national purpose. The other matter was the nature of the management system that should govern the use of federal lands. This was the context within which the Commission was established and within which it saw its report. Yet, in the six years between passage of the law creating the Commission and release of its report, there was a major change in the policy context within which the PLLRC rec-

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<sup>90</sup> Derthick, *supra* note 3, at 631.

<sup>91</sup> See note 16 and accompanying text *supra*.

ommendations were to be debated. The implications of this change were not fully recognized by the Commission, nor in all likelihood could it have done much about it if they had been recognized.

This change was dramatized by Earth Day and institutionalized by the signing of the National Environmental Policy Act of 1969 (NEPA),<sup>92</sup> both in early 1970. Obviously, the Commission was not unaware of these occurrences, and its report, released some two months after Earth Day, has its share of references to environmental quality and ecological imperatives.<sup>93</sup> But this was not enough. The report, with its emphasis on resources management and land use allocations, was met with opposition by an environmentalist constituency that to a large extent did not even exist in 1964.

Prefacing the first substantive chapter in the Commission's report, a chapter on planning future land uses, is a picture of two government land managers comparing a broad expanse of public lands with a planning map spread out on the rocks in front of them. Had the Commission fully understood the policy context in which the report was being released, this picture might better have been one of two officials with badges driving in a stake with a sign that read, "Don't pollute! Violators will be prosecuted!" The context for debating the report was one where regulation was seen as a substitute for management, and the Commission had opted for management. In the broad history of public land policies, six years is not long, but these particular six years appear to have coincided with the threshold of major changes in the way these policies were to be viewed.

#### D. *A Commission's Impact*

Perhaps it is idle to speculate on the impact the PLLRC report may have had if the timing had been different, if the Commission membership or staff had been different, if the Commission's process for making decisions had been different, or indeed

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<sup>92</sup> 42 U.S.C. §§ 4321-4347 (1970).

<sup>93</sup> Caldwell, *Policy, Planning, and Administration*, in NATURAL RESOURCES COUNCIL OF AMERICA, *WHAT'S AHEAD FOR OUR PUBLIC LANDS* 116-17 (H. Pyles ed. 1970). Caldwell, in this review of the PLLRC report, notes that the report's acceptance of the need for including environmental considerations in public land decisions would probably not have been as strong if the report had been issued in 1968.



if its recommendations had been different. What is clear, however, is that the Commission's report, instead of framing the debate over public land policies since its release, has provided only some of the necessary pieces of the framework.

The unique contribution of an advisory commission to problems of government policy and administration is its perspective. In the case of the PLLRC, three aspects of its perspective were derived from its temporary, detached, and joint legislative-executive character.

First, the PLLRC was concerned with the whole range of federal public lands. In the executive branch, responsibilities for public lands are split among four major bureaus in two departments, as well as several other agencies with lesser responsibilities. In the Congress, legislative responsibilities are split among at least three committees in each house. An advisory commission was uniquely able to bridge these divisions in considering a unified policy framework. That there is continuing resistance within both the executive branch and the Congress to such a unified view does not deny its soundness.

Second, the historical perspective of the PLLRC, as one of four public land commissions in the past 100 years, was broader than that characteristic of most internal or congressional policy reviews. Long-range impacts of possible policy changes were developed in addition to the usual short-run considerations.

Third, the Commission was by its very form well placed to consider and define the appropriate balance between legislative and executive responsibilities, which was the goal established in Congressman Aspinall's letter to President Kennedy and the President's response some two years before passage of the Act creating the PLLRC. That the Commission worked hard on this issue, which permeated all of its discussions and decisions, and yet failed in achieving this goal does not detract from the potential usefulness of a joint legislative-executive commission. Where Congress and the President have equivalent interests in finding a solution to a public policy problem, the joint commission is a logical form; but where only one party sees the joint commission as a means of finding a solution, the results are almost sure to be limited.

Providing a different perspective than that provided by other government institutions and supporting policy proposals from

this perspective with well-reasoned and well-documented arguments is the chief role of advisory commissions. It is one in which they do not always perform perfectly, but their record is much better than is often claimed.