1943

# Administrative Boards and Delegation Power

William Burns Lawless
*Notre Dame Law School*

# CONTRIBUTORS TO THE MAY ISSUE

RALPH S. BAUER, A.B., 1904, Univ. of Illinois; A.M., 1906, James Millikan Univ.; J.D., 1909, Univ. of Chicago. Author of: CASES ON DAMAGES (3rd Ed., 1940); TEXT ON BUSINESS LAW. Co-author of: BRITTON AND BAUER, CASES ON BUSINESS LAW (3rd Ed., 1941); BAUER AND DILLAVOU, CASES ON BUSINESS LAW; BAUER AND WATKINS, CASES ON CARRIERS; BAUER AND SIMPSON, LAW OF BUSINESS; ILLINOIS SUPPLEMENT TO BOHLEN'S CASES ON TORTS (1939). Edited the 4th Edition of JOHN'S AMERICAN NOTARIES (1931). Professor of Law, De Paul University.

BRENDON F. BROWN, A.B., 1921, LL.B., 1924, Creighton University; LL.M., 1925, and J.U.D., 1927, Catholic University of America; D. Phil. in Law, 1932, Oxford University, England. Author of: THE CANONICAL JURISTIC PERSONALITY; THE ROMAN CONCEPTION OF LAW and THE LAW OF TRUSTS IN THE EIGHTEENTH CENTURY. Contributor to various law reviews. Professor of law in the School of Law, Catholic University of America.

CLARENCE E. MANION, A.B., 1915, St. Mary's College, Ky.; A.M., 1916, Ph.M., 1917, Catholic University of America; J.D., 1922, Univ. of Notre Dame; J.U.D., 1942, Boston University. Author of: AMERICAN HISTORY (1926); LESSONS IN LIBERTY (1939); WHAT PRICE PROHIBITION (1927); LIBERTY AND THE POLICE POWER (1928); CATHOLICS IN OUR COUNTRY'S STORY (1929). Dean and Professor of Law, University of Notre Dame, College of Law.

# NOTES

ADMINISTRATIVE BOARDS AND DELEGATION OF POWER.—With the growth of American federalism and the passing of the doctrines of *laissez faire* as axioms of economic and political legal theory, the Congressional function magnified. Throughout the last decade the multiphased problems of Congress has necessitated the creation of administrative commissions to perform the policies of the legislature. Congress continues to declare the law and determine the legal principle to control in given cases. In the same breath of legal creation it goes farther and provides for an administrator or commission to vitiate the doctrine set-

out. The transfusion of power from the national legislature to the administrator promotes sensitive Constitutional objection. Close followers of the separation-of-powers doctrine forget that Montesquieu lived in an era much less affected by a complex federalism than our present conditions present. Despite the conflict arising over the delegation of legislative power, overwhelming authority will admit the delegation of a ministerial function to an administrative group. This harmony discords, however, when the question of statutory standards arises. How much discretion may the established board enjoy? To what extent must they be kept on the puppet-strings of Congress? Recent decisions continue to reflect contrary opinion. From the conflict we may make some conclusions.

The very nature of a delegation demands that the agency of Congress will employ some amount of discretion. As early as 1825 Chief Justice Marshall stated that when Congress had decided the general principle of the measure, the administrative body might Constitutionally "fill in the details." This principle roots deeply in American Constitutional law.[1] The Supreme Court has consistently intimated that Congress must demarcate as completely as is practicable the limits of the general rule it has laid down. Yet Congress has authorized the Secretary of the Treasury "to establish standards" for the admission of tea to this country;[2] it has delegated to the Inter-State Commerce Commission the power "to designate rates and set the maximum variation and standard drawbars for freight cars";[3] it has authorized the same commission to require railroads to keep accounts in a manner specified — not by the national legislature, but by the commission itself.[4] Congress has even delegated the power "to make regulations" pertaining to the sale of oleomargarine.[5] In the creation of the Federal Trade Commission, the Security Exchange Commission, the Federal Communications Commission and a bevy of other bureaus Congress delegated rate-making and regulatory power in terms of sweeping generality as the few instances above show. It must be remembered that a subject of this type requires legislation for the regulation of future conduct. The objects of the delegation are obviously set-out in a declaration of policy but the particular grants of power are so diffuse and

1 Wayman v. Southard, 10 Wheat. (23 U. S.) 1, 6 L. Ed. 253 (1825); United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Hannibal Bridge Co. v. United States, 221 U. S. 194, 31 S. Ct. 603, 55 L. Ed. 699 (1911); Inter-State Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912); J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928).

2 Butterfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904).

3 St. Louis, Iron Mountain & So. Ry. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061 (1908).

4 Inter-State Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912).

5 In Re Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. Ed. 813 (1897).

variable that they can not be distinctly apprehended and comprised in the ordinary terms of legislative classification. If Congress were to classify a complete nomenclature of cases and events in which the board should function, describe a course of action for each possible future event, the very purpose of the delegation would be defeated before the enactment was drawn.

In the decision of the now famous *Schechter Poultry* case,[6] Chief Justice Hughes stated: "Section three of the recovery act is without precedent. It supplies *no standards* for any trade, industry or activity. It does not undertake to prescribe rules of conduct, it authorizes the making of codes to prescribe them." Later in the opinion he continues to say: "For that legislative undertaking section three sets up no standards, aside from the general aims of rehabilitation, correction and expansion." The 1935 high tribunal obviously took little notice of the earlier chain of cases which held: "Standards may be laid down in broad and general terms. If the legislature were required to specify minutely and in detail the course to be pursued by the administrative agency, there would be no advantage gained by the delegation";[7] nor to the previous holding that: "A discretion — broad or narrow as the legislature shall deem expedient — may be vested in the delegate." [8]

In the early years of the Inter-State Commerce Commission the delegation of the rate making power was often challenged on grounds that it provided no standards. In 1913 Mr. Justice Hughes stated: "The rate-making power necessarily implies a range of legislative discretion, and so long as the legislative action is within the proper sphere, the Courts are not entitled to interpose and, upon their own investigation of traffic problems and conditions, to substitute their judgment for that of the legislature or of the railroad commission exercising its delegated powers." Subsequent tests of the constitutionality of the transportation-governing commission have failed to disturb this expression of the earlier court. The Federal Trade Commission has likewise been exposed to this attack on standards and the discretion of the boards. Judge Baker stated the accepted rule to this group of cases when he ruled: "The commissioners, representing the government as *parens patriae,* are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law." [9] In this instance the statute did not define the meaning of "unfair trade." Such neglect did not, however, defeat its legality.

---

6 A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

7 Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230, 35 S. Ct. 387 (1915).

8 Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U. S. 380, 32 S. Ct. 152 (1911).

9 Sears, Roebuck & Co. v. Fed. Trade Comm., 258 F. 307 (1919).

The latest challenge of a legislative delegation of power on grounds of "unfettered discretion" and failure of Congress to provide standards is found in *Roach v. Johnson.*[10] Federal District Judge Slick ruled the Emergency Price Control Act [11] unconstitutional on this ground. The decision states: "Congress, under its War Powers, has authority to regulate prices limited only by the Constitutional inhibition to provide standards." Further along it states: "Again in the case at bar, as was held in the Panama case,[12] if it could be inferred that Congress intended certain circumstances or conditions to govern the exercise of the authority conferred, the Administrator could not act validly without complying with the circumstances and conditions and findings by the Administrator that these conditions existed and were necessary, else it is left entirely to the unfettered discretion of the Administrator." A close inspection of the Emergency Price Control Act leads one to believe that this holding is not entirely founded. Section 902 of the statute states: "So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to prices prevailing between October 1st and October 15th, 1941 . . . and shall make adjustments for each relevant factor as he may determine." Admittedly the statute permits the Administrator discretionary power to investigate previous rentals and commodity prices, to peg both at the date specified and to adjust equitably if the prices of October, 1941 are not generally representative. How else could Congress provide for price fixing? No two districts in the country have identical food, clothing and rental values. By delegating a latitude of operation to the Administrator, the purpose of the act — to prevent inflation by price stabilization, is affected intelligently. We have already seen that general terms stating standards may provide for the power transfusion. Yet this case would confine Congress to specific delegations within stated standards and defeat the expeditious purpose of this War necessity. It is interesting to note that Judge Slick did not cite one of the many authoritative cases providing that Congress "shall do no more than lay down the general rules of action under which the Commission shall proceed," [13] nor was the often cited *Sears, Roebuck* case [14] mentioned — a leading authority for the contrary view which defends the constitutionality of the Federal Trade Commission because Congress declared "the public policy applicable to the situation."

From the majority of cases we would surmise that Congress may delegate legislative power — legislative in the sense of providing rates,

10 Roach v. Johnson, 48 F. Supp. 833 (1943).

11 U. S. C. A. Title 50, App. § 901.

12 Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935).

13 Roach v. Johnson, 48 F. Supp. 833 (1943).

14 Sears, Roebuck & Co. v. Fed. Trade Comm., 258 F. 307, 169 C. C. A. 323, 6 A. L. R. 358 (1919).

rules and regulations for future conduct — to administrative bodies. In the majority of cases general standards suffice as we have seen from the creation of the Inter-State Commerce, Federal Trade and Federal Communications Commissions. In other instances, the National Industrial Recovery Act and the Emergency Price Control Act being typical, more specific statements by the legislature is necessary — 'though questionably so. What the future of Administrative law will be we can not predict. Perhaps our present Supreme Court will give us a clue in the very near future when the rent-control case [15] stands review.

*William B. Lawless, Jr.*

---

CONSTRUCTIVE TRUSTS ARISING OUT OF PURCHASES AT JUDICIAL SALES.—While the English Statute of Frauds of 1676 required a writing to create an express trust in real property, such statute has had no application in cases where the law raises a constructive trust by reason of the fraudulent acts and purposes in procuring title to the land.[1] Constructive trusts have been held not to be within the statute of frauds because they rest in the end on the doctrine of *estoppel* and the operation of an *estoppel* is never effected by the statute of frauds.[2]

A common situation whereby such a (constructive) trust might come into being, would be where A who had mortgaged land to C was about to lose it through foreclosure proceedings. B, a relative of A, came to A and represented to A that he would buy it at the sheriff's sale and hold it for A's benefit, offering also to give A a writing to this effect and containing also permission for A to redeem it, but he baffled A in relation to this writing and never gave it to him. By these circumstances A was prevented from raising money to purchase in the land until it was too late for him to succeed in so doing, and B purchased at the sheriff's sale. It is generally held that B must be taken to have purchased in trust for A.[3] For one purchasing land at a judicial sale under an oral agreement to purchase for the benefit of another will be decreed to hold the land for the benefit of the promisee where there existed between them a confidential relation aside from that created by the agreement to purchase,[4] or where the promisee supplied a part of

---

15 Roach v. Johnson, 48 F. Supp. 833 (1943).

1 Johnson v. Hayward, 74 Neb. 157; 103 N. W. 1058 (1905).

2 Parker v. Catron, 120 Ky. 145; 85 S. W. 740 (1905).

3 Dickson v. Stewart, 71 Neb. 424; 98 N. W. 1085; 111 Am. St. Rep. 596 (1904).

4 Strasner v. Carroll, 125 Ark. 34; 187 S. W. 1057; Ann. Cas. 1918E 306 (1916); Carter v. Gibson, 29 Neb. 324; 45 N. W. 634 (1890); Cutler v. Babcock, 81 Wis. 195; 51 N. W. 420 (1892).