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Independent Regulatory Commissions and the Separation of Powers Doctrine

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INDEPENDENT REGULATORY COMMISSIONS AND THE SEPARATION OF POWERS DOCTRINE

When the United States was predominately agricultural and its processes of government fairly simple, it could be said with some accuracy that the legislature made the laws, the executive enforced them, and the judiciary construed and applied them. As the national economy became industrialized, however, governmental activity was forced into new fields, and traditional institutions became inadequate. The legislators lacked the ability and the time to deal with the new problems. The judges were faced with situations requiring specialized knowledge which few of their number possessed. Accordingly, as new needs developed, executive boards or commissions composed of experts were established with powers to formulate "laws," apprehend violators, determine mooted facts, construe the "law," and render decisions affecting the rights and duties of the parties. Thousands of such tribunals sprung up, ranging from municipal boards of zoning appeals to the great federal administrative commissions.¹

¹ "Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices," C. G. Haines, 26 Am. Pol. Sci. Rev. 875 (October, 1932); "Administrative Commissions and the Judicial Power," R. A. Brown, 19 Minn. L. Rev. 261 (February, 1935); "The Task of Administrative Law," 75 Univ. of Penn. L. Rev. 614 (May, 1927); "Non-Judicial Administration of Law," J. B. Smith, 12 Univ. of Cinc. L. Rev. 459 (November, 1938). The President's Committee on Administrative Management, in its report, pointed out the following facts which have vitally influenced the evolution of regulatory commissions: "First, the decline of laissez-faire and the growth of governmental regulation of business that followed upon the heels of the Civil War and Reconstruction. Second, the emergence of vitally important economic problems demanding Federal rather than State regulation. Third, the growth of the technique of governmental regulation through the legislative formulation of 'standards' of business conduct to be applied in concrete cases by the quasi-judicial decisions of administrative agencies. Fourth, the emergence of the idea that governmental regulation of business should not be confined to the enforcement of criminal penalties but should partake of continuous and not unfriendly supervision. Early congressional experimentation with the independent commission was influenced by the experience of the States. Twenty-five State commissions were already regulating railroads when the Interstate Commerce Act was passed in 1887. The seeds were being rapidly sown for the growth of the multitude of State boards and commissions that were ultimately to produce the
These tribunals mock the separation of powers dogma at every point. It is exceedingly difficult to place them in any one of the three departments, for they appear to exercise functions which are both legislative and judicial as well as executive in character. This serious constitutional question cannot be solved through the medium of definition or through the process of analytical differentiation. When judges are faced with the contention that an administrative commission is really performing legislative and judicial functions, they maintain that, though such functions may be "quasi-legislative" and "quasi-judicial," they are not legislative and judicial in the constitutional sense.²

The Federal Trade Commission furnishes an interesting illustration of this commingling of functions in administrative tribunals. The functions performed by the Commission are partly administrative in nature, but predominately quasi-legislative and quasi-judicial. In administering the provisions of the statute concerning "unfair methods of competition" the Commission acts quasi-legislatively when it fills in the meaning of the general standard set forth in the act and quasi-judicially when it institutes proceedings, conducts hearings, and issues orders to "cease and desist." When it conducts an investigation at the direction of the President, it serves in a legislative capacity, providing him with information on which to base his recommendations to Congress. In making investigations and reports for the information of Congress it functions as a legislative agency. The Commission serves as an agent of the judiciary when it acts as a master in chancery under rules prescribed by the court in anti-trust cases. Indeed it exercises administrative pow-

ers only to the extent that such is necessary in the discharge and effectuation of its quasi-legislative and quasi-judicial powers or of its duties as an agency of the legislative or judicial departments of the government.  

The use of the prefix "quasi" is intended to avoid the separation of powers objection. It is argued that, while legislative powers may not be delegated by the legislatures, there are no prohibitions against the delegation of quasi-legislative powers. Likewise, while judicial powers may not be granted to any agency but the courts, there is nothing to limit the grant of powers of a quasi-judicial nature. The term "quasi" means "almost, but not quite." Thus, although legislative and judicial powers may not be vested in executive agencies, powers which are "almost" legislative and "almost" judicial may be constitutionally conferred. Such labels — artificial and indefinite though they seem — constitute the important criterion of legality applied by the courts which are called upon to determine whether delegated powers are legislative and judicial or quasi-legislative and quasi-judicial. Court decisions indicate that a matter is quasi-legislative and delegable where the legislature has set forth a general policy or standard for the guidance of the body to which the delegation is made. In the case of judicial delegations, where the administrative determination is to be merely advisory and without effect until approved by a regul-


4 "The Constitutional Status of the Independent Regulatory Commissions," R. E. Cushman, 24 CORNELL L. Q. 13, 28-29 (December, 1938); "The Legal Status of a Board of Zoning Appeals," G. A. Warp, 27 KY. L. J. 185 (January, 1939); "Wage-Fixing by Administrative Agencies—Legislative or Judicial?" G. P. O'Grady, 27 GEORGETOWN L. J. 486 (February, 1939). "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." Union Pacific R. Co. v. United States, 99 U. S. 700, 761, 25 L. Ed. 496 (1878). The fallacy underlying the rule against delegation is stated in " 'Government,' 'Law,' and the Separation of Powers," K. C. Cole, 33 AM. POL. SCI. REV. 424 (June, 1939).
lar judicial tribunal, the courts usually find no difficulty in holding that the functions conferred are quasi-judicial in nature.

The legislature is frequently in such a position that it cannot itself practically or efficiently perform the duties of determining the rights, duties, and liabilities of persons and corporations under certain factual conditions. Obviously, it cannot remain in session and pass a new act upon every change of conditions, but, since the power to enact a law includes the right to adopt a procedure for its administration, it may designate some tribunal to perform the duties necessary to carry out its legislative purposes. The fact that the law creates commissions or boards with power to administer it does not render it invalid as delegating legislative power though it invests such agencies with the exercise of discretion in the performance of their duties. It is impractical for the law itself to prescribe every detail of the duties to be performed by the boards and commissions charged with its administration. While the power to determine the policy of the law is primarily legislative and cannot be delegated, the power to make rules of a subordinate character in order to carry out that policy and apply it to varying conditions is in its dominant aspect administrative and may be delegated. When the legislature has indicated its will by the enactment of a law, power to determine the facts upon which the operation of the statute depends may be conferred on a commission. The law is thus made by the legislature, and


6 Miller v. Schuster, 227 Iowa 1005, 289 N. W. 702 (1940), noted in 25 IOWA L. REV. 812 (May, 1940); Chambers v. McCollum, 47 Ida. 74, 272 P. 707 (1928);
the facts upon which its operation is dependent are ascertained by the administrative board.

Under these court-made rules state boards and commissions have been empowered to prescribe regulations governing health, welfare, police, education, civil service, public works, drainage and irrigation. In many cases the scope of such regulations is broad. If the powers granted to commissions are too broad, however, the statutes conferring them may be invalid. The standard must be reasonably clear and must constitute a check on the administrative body applying it. While it may be vague in its terms, it cannot be broad and meaningless. When Congress, under the National Industrial Recovery Act, tried to grant the President unlimited power to enact laws which he might deem beneficial in meeting the conditions confronting commercial and industrial interests, the United States Supreme Court
ruled the attempted delegation unconstitutional. In his concurring opinion, Mr. Justice Cardozo termed the Act "delegation running riot." He said that "There can be no grant to the executive of any roving commission to inquire into evils and, upon discovering them, to do anything he pleases to correct them." The same remarks would have been applicable had the delegation been to a board. Thus, a statute attempting to confer unlimited power on a state railroad commission to authorize an increase in the capital stock of railroad corporations for such purposes as it may deem desirable is unconstitutional. For the same reason, the policy "to maintain a balance between agricultural producers and consumers, to restore normal economic conditions, and to eliminate unfair practices" will not warrant a *carte blanche* transfer of authority to an administrative agency over the control generally of vegetable produce. Similarly, the legislature may not delegate to a board the power to declare what acts shall constitute a criminal offense. But the legislature may go far. Thus, the Interstate Commerce Commission, in addition to its rate-making powers, may be authorized by Congress to conduct investigations and be given power to summon witnesses, obtain records, etc. The Commission may determine the order of purposes for which coal may be shipped in interstate commerce in case of emergency, prescribe a uniform system

20 State v. Anklam, 43 Ariz. 362, 31 P. (2d) 888 (1934); People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751 (1889); Sutherland v. Müller, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917D, 1040 (1917); 65 A. L. R. 525, 527. However, the legislature may empower a board to prescribe duties on which the law may operate in imposing a penalty and in realizing the purpose of the law. 32 L. R. A. (N. S.) 639.  
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of accounting and bookkeeping for carriers,23 and fix requirements for drawbars of uniform height under the safety appliance laws.24

Not only do administrative tribunals exercise legislative powers but they exercise powers so obviously of a judicial nature that it has been suggested by some that they be termed "administrative courts"25 and by others that their judicial functions be divorced from them and exercised by a separate body.26 In the course of their administration of laws these commissions are empowered to determine questions of fact and apply the existing law. Their conclusions may be given such probity that courts may not overturn them except on clear and convincing proof that they are erroneous.27 Indeed, many boards are created whose decisions of fact honestly made within their jurisdiction are

26 The President's Committee on Administrative Management recommended that the work of each commission be split, its judicial duties going to a "judicial section" and its administrative duties going to an "administrative section." "The Judicial Section should be set up on an independent basis in the executive department, and its name might well contain the word 'judicial' or 'court,' in order to draw attention to the judicial nature of its work. ... In the matter of size no arbitrary rule can be laid down, but the section should be kept as small as possible and still do its work effectively. Excessive size retards judicial deliberation, but a body that must handle a complex job will need more members than one that does not. The existing commissions range in size from three to eleven. Probably most Judicial Sections could manage with five members. A body doing only quasi-judicial work could be smaller than one burdened with rule-making and administrative duties. ... The terms of office should be 12 to 14 years and appointments should be staggered to assure continuity of policy and experience. Everything should be done to encourage the reappointment of competent members. Removals from office should be made only for incompetence and misconduct. Salaries should be adequate. ... The Administrative Section should have a bureau or division status ... (with) a responsible head, replacing the board or commission form of organization. ... Every effort should be made to set up the Administrative Sections on a career basis. ... The relations between Administrative and Judicial Sections would, in actual practice, have to develop by trial and error." REPORT OF THE COMMITTEE (1937), pp. 232-34. The argument against taking away judicial functions from such boards is presented in "Separation of Functions and the National Labor Relations Board," H. W. Davey, 7 UNIV. OF CHIC. L. REV. 328 (February, 1940).
not subject to review in any proceeding.\textsuperscript{28} One court has gone so far as to indicate that the findings of the commissions may be made as final as the action of the legislature in enacting a statute.\textsuperscript{29} Of course, the decision of such a board may be made conclusive only when the board is acting within its jurisdiction. Consequently, the question of jurisdiction is always open to the courts for review. The commission cannot itself conclusively settle that question and thus endow itself with power.\textsuperscript{30} Even though no appeal from its conclusions be provided, when a commission has clearly violated the law in arriving at its result,\textsuperscript{31} it has committed jurisdictional error. Its action may be reversed by the courts just as effectively as when it has failed to take proper steps to acquire jurisdiction at the beginning of the proceeding.\textsuperscript{32}

It is axiomatic that courts of justice, in their popular sense, may not be set up and established in the executive department, for they pertain exclusively to the judicial branch. If the duty to be exercised is primarily to decide questions of legal right between private parties, the function clearly belongs to the judiciary. When an executive board has regulatory functions, however, it may hear and determine controversies which are incidental to those functions.\textsuperscript{33} Thus, a fish and game commission may hold hearings and determine facts incidental to regulation of fish and game.\textsuperscript{34} A state compensation commission may determine questions of

\textsuperscript{28} \textit{State ex rel. Crabb v. Olinger}, 196 Wash. 308, 82 P. (2d) 865 (1938).
\textsuperscript{30} \textit{State ex rel. Williams v. Whitman}, 116 Fla. 196, 156 S. 705, 95 A. L. R. 1416 (1934).
\textsuperscript{31} For example, when it makes a decision contrary to all the evidence.
\textsuperscript{32} However, the proceedings before commissions are not expected to be as “formal and cumbrous” as court proceedings. The greater flexibility which such bodies must possess demands greater freedom of action. \textit{Borgnis v. Falk}, 147 Wis. 327, 133 N. W. 209 (1911).
\textsuperscript{33} \textit{In re Opinion of the Justices}, 87 N. H. 492, 179 A. 344 (1935).
\textsuperscript{34} \textit{Globe Cotton Oil Mills v. Zellerbach}, 200 Cal. 276, 252 P. 1038 (1927).
fact and apply the state law thereto.\textsuperscript{35} A statute providing for sexual sterilization of certain patients of state institutions afflicted with recurrent hereditary insanity and resting discretionary powers on the state board of public affairs does not violate the separation of powers doctrine.\textsuperscript{36} Such administrative bodies have been held not to be judicial bodies and not to exercise judicial functions, yet their procedure is judicial and they use processes similar to those used in courts of law.

There seems to be little question but that administrative tribunals seriously infringe the judicial function of the courts. The gist of the judicial power is to decide. Where that ultimate decision, as a practical matter, rests with an administrative tribunal, to that extent the judicial power has been affected. If the courts merely furnish the enforcement process for the administrative determination, the essence of the judicatory function is with the boards and not with the courts.\textsuperscript{37} Likewise, judicial review of only a small part of the commission’s determination leaves that body as the sole and final arbiter of the part of the controversy to which the review does not extend. Anyone familiar with workmen’s compensation litigation knows that in nearly all of the cases it is the commission’s determination of facts that is the conclusive and decisive factor. Even where judicial review is permitted, the administrative decision may be the final word. One who tells the poor fisherman whose nets have been destroyed by a game warden that this destruction has not affected his rights is guilty of contemptuous irony. While the fisherman has the liberty of an action against the officer for damages,\textsuperscript{38} he must spend time and


\textsuperscript{36} \textit{In re Main}, 162 Okla. 65, 19 P. (2d) 153 (1933).


\textsuperscript{38} \textit{Lawton v. Steele}, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1893).
money far beyond his ability to command if he follows such a course.\textsuperscript{39} In the last analysis it would seem that the only limits on the granting of judicial powers to administrative commissions is that the power of enforcement be left with the courts and that a modicum of judicial review be available.\textsuperscript{40}

In brief, the separation of powers dogma has not been invoked to obstruct the delegation to administrative tribunals of substantial legislative and judicial functions.\textsuperscript{41} While it is true that most governmental agencies are located wholly within the boundary lines of a single department, the doctrine of separation of powers does not necessarily require such allocation. It would seem wise to recognize frankly the convenience and necessity of having governmental agencies which are not in one department to the exclusion of the others—agencies which straddle several departments while forming essential parts of each.\textsuperscript{42}


\textsuperscript{42} "Administrative . . . tribunals did not come because anyone wanted them to come. They came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasingly complex social organization made it necessary for the government to perform. . . ." "Administrative Law and the Constitution," M. B. Rosenberry, 23 AM. POL. SCI. Rev. 32, 35 (February, 1929). "These boards have been created in response to a public demand for increased efficiency in government and to meet social needs. . . . Their procedure is uniformly characterized by inexpensiveness, swifter and less complicated modes of trial, and by authority to assert an initiative in the conduct of a case. . . ." "Administrative Tribunals," W. H. Pillsbury, 36 HARV. L. REV. 405, 407 (February, 1923). But administrative tribunals have been vigorously criticized. The President's Committee on Administrative Management found that "the independent regulatory commissions constitute a serious and increasing problem. They exist as areas of complete irresponsibility within which important policy-determining and administrative functions are being carried on. . . . They hinder coordination of policy and coordination of administration. At the
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The problem of just how far the legislature may go in clothing an administrative tribunal with a garb resembling legislative and judicial power is one of the most intriguing in American public law. While courts have not been very consistent in dealing with it, the main tendency appears to be toward a considerable intermingling of powers. The views of Mr. Justice Holmes in the Springer Case would seem to represent the present position of the courts. Dissenting from the other members of the Supreme Court, he said:

"The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on. . . . It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi. . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments. . . ."

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