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James D. Hayes

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SOME LEGAL ASPECTS OF THE SOCIAL SECURITY ACT

I. HISTORICAL REVIEW

On March 18, 1935, a confidential print of the result of the consideration of the original bill by the Committee on Ways and Means, House of Representatives of the Seventy-Fourth Congress, was introduced but was held for numbering.

On April 4, 1935, a confidential print of the original bill was introduced and numbered H. R. 7260, entitled, "The Social Security Act," August 9, 1935; the Senate accepted the conference report without record vote.¹ The Social Security Act was approved by the President on August 14, 1935. On August 24, 1935, the Senate approved the nomination of the Social Security Board members.² The act which operates under a number of titles consists of a series of related measures designated as a uniform, well-grounded program of attack upon the principal causes of insecurity. These measures are divided into six broad fields: first, old-age assistance; second, old-age insurance; third, unemployment compensation; fourth, aid to dependent children; fifth, public health; and sixth, aid to the blind.

II. CREATION OF THE SOCIAL SECURITY BOARD

The Social Security Board was created under Title VII, section 701 of the Social Security Act. The House Bill established a Social Security Board in the Department of Labor. However, Report No. 1540 (page 11) changed this and set it up as an independent agency answerable by report directly to the Congress.

¹ CONG. REC. (August, 1935) p. 13257.

² CONG. REC. (August, 1935) p. 14767.

Its personnel, with the exception of attorneys and experts are recruited from civil service registers. Members of the Board are appointed by the President by and with the consent of the Senate. The President designates one of the members as Chairman of the Board.³

III. DUTIES OF THE SOCIAL SECURITY BOARD

The general supervision of the Social Security Act is placed upon the Social Security Board with the exception of the problem of taxation, which is placed under the control of Treasury Department (Internal Revenue). The Board passes upon state laws as to whether the minimum standard is maintained as prescribed by the Act. As a matter of necessity, it must check and audit expenditures and materially help the states by setting up a standard of reports. The Board must maintain the records of approximately thirty million persons. These records must show the total earnings received by the worker during his insured lifetime. The Board adopts rules of policy in respect to the interpretation of indefinite terms. In addition, the Board shall make full reports to Congress at the beginning of each regular session. It further promulgates regulations and sets up procedures for the administrative control of all phases of the Social Security Act.

IV. POWERS OF THE SOCIAL SECURITY BOARD

The most difficult legal problems in the field of administrative law today flow from the fact that we are in the process of placing in the hands of administrative officers and boards certain adjudicating powers, called quasi-judicial, and certain rule-making or legislative powers, called quasi-legislative. It has been argued in a number of cases that the assumption of these powers by administrative officers constitutes an unwarranted delegation of legislative power.

³ Social Security Act § 701.

A. *Quasi-judicial and quasi-legislative aspects*

When the boards and commissions are delegated the power to "find the facts" that is quasi-legislative. The sufficiency of these "standards"⁴ has been defined.

Moot questions present in the so-called "New Deal cases"⁵ were whether Congress had delegated legislative powers without adequate standards within which the agency was to function. It is clear that the Social Security Act "standards" are suitable to meet the requirements. The delegation of power to administrative officials without suitable standards would inevitably result in the violation of the doctrine of "separation of powers,"⁶ because it could not lawfully administer the various titles for the want of "due process of law." The theory of legislative standards serves two purposes: (1) The constitutional limitations on the separation of powers; and (2) The degree of discretion conferred upon the Board. The test is whether or not Congress has set up "standards" within which the agency created by Congress should function, or whether Congress has unduly delegated away the power to create the "standards" to the agencies set up by Congress. In the latter event the delegation would be unlawful.

It may be argued that the legislative and judicial powers granted unto the Social Security Board are rather broad in their scope. In conducting investigations and reporting to Congress its recommendations in aid of legislative action, the Board acts as a semi-legislative agency. In the settlement of claims under Title II, according to the law of the respective states, the Board acts as a judicial and administrative agency.

⁴ *Welton v. Hamilton*, 344 Ill. 82, 176 N. E. 333 (1931); *Sundeen v. Rogers*, 83 N. H. 253, 141 Atl. 142, 57 A. L. R. 950 (1928).

⁵ *Wisconsin Inspection Bureau v. Whitman*, 220 N. W. 929 (Wis. 1928); *Schecter Poultry Corp. v. United States*, 295 U. S. 495 (1935); *Panama Mining Co. v. Ryan*, 293 U. S. 388 (1934).

⁶ *Tige v. Osborne*, 149 Md. 349, 131 Atl. 801, 43 A. L. R. 819 (1926).

From the beginning of government, the Congress has conferred upon its executive officers the power to make regulations, not necessarily for the government of their respective departments, but expressly for the administering of laws which *per se* govern. It has been held that such regulations become binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the "standard" which the legislature has sufficiently defined; these regulations then assume a quasi-judicial and legislative aspect. It has been held in a number of cases involving the power of independent agencies that when an administrative agency is required as a condition precedent on order, to make a "finding of facts,"⁷ the validity of such an order must rest upon the law itself. The true distinction between the delegation of power and enacting laws is the discretion as to what it shall be and conferring authority or discretion as to its execution. The discretion, however, must be exercised in pursuance of the law.

B. *Interpretations, rules, procedure, regulations and administrative problems*

1. The interpretations of "wages" are usually considered in the light of rulings in other fields of law. For example, the Board may elect to follow the rulings of the Bureau of Internal Revenue, the Comptroller General. However, they are not bound by these rulings. It may and does make its own definitions of "wages," when a payment of benefits under Title II is contemplated. Of course, as a general proposition and for obvious reasons, the interpretation or definition as to what constitutes "wages" should be and usually is the same in all governmental agencies.

2. The Board has promulgated regulations governing the confidential nature of its records,⁸ also the settlement of

⁷ Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693 (1908).

⁸ Regulations No. 1 (Social Security Board).

claims arising under Title II of the Social Security Act.⁹ These regulations are essential to the Board's efficient operation. However, broad construction must be used as a matter of expediency.

3. New methods of administrative procedure of the Social Security Board are reflected in the constant and ever-changing instructions in light of the experience gained.

4. Administrative problems. Ordinarily when a claim against the United States Government is presented, and the claimant is indebted to the Government such indebtedness is set off in the settlement. A statute¹⁰ provides that it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt justly due the United States. The settlement of claims under Title II are made prior to audit¹¹ by the General Accounting Office. Set-off provisions are questionable as pertains to claims under Title II. However, it must be admitted that if the Board has been put on notice that the debt is due and the Board makes a payment without arranging a set-off, the disbursing officer does so at his peril as the General Accounting Office may elect to suspend his account for the indebtedness. A recent decision of the Comptroller General¹² leaves the question of "set-off" in doubt; in this case payment had been made, thereby eliminating the possibility of set-off in this particular case. It is interesting to note that the Comptroller General in his decision pointed out to the Board that the "matter appears to be one which would require careful consideration," further leaving the Board to "adopt such measures as may be deemed appropriate to cover the situation."

⁹ Regulations No. 2 (Social Security Board).

¹⁰ U. S. C. A. Tit. 31, § 227.

¹¹ Social Security Act § 207.

¹² Comptroller General's Decision A-89228 (Nov. 1937).

V. ADMINISTRATIVE CONTROL

A. *Grants-in-aid to States*

Title I of the Social Security Act provides for federal grants-in-aid to the states for the payment of old-age assistance to persons over 65. These grants are made on an equal matching basis except that no individual shall receive from the Federal Government's share to exceed \$15 per month. This federal grant-in-aid legislation of the Social Security Act includes provisions that each state, in order to receive the benefits of the federal appropriation, must make an appropriation for the same object, as well as enumeration of other conditions which the state must fulfill. The administrative responsibility of the Social Security Board relative to Title I of the Act is that the method of administration of the state plans insofar as they are found by the Social Security Board to be essential for the plans' efficient operation, must be approved by the Board and reports must be made to the Board but the state is reserved the right to exercise its full discretion in the matter of the selection, tenure and compensation of state and local personnel. The quasi-judicial aspects of this Title are apparent under the right of appeal by individuals, which is guaranteed under the Act. The Board computes and pays to the state upon the following estimates:

- (1) State report of total sum to be expended each quarter for old-age assistance;
- (2) Record of total number of aged individuals; and
- (3) Such investigation necessary for payment made at time fixed by the Board
 - (a) Which payments are certified to the Treasury and paid through the Division of Disbursement.

The Board, after reasonable notice and opportunity for hearing to the state agency administering or supervising the administration of the state plan, if necessary withholds grants if the plan has been so changed as to impose prohib-

ited age, residence, or citizenship requirements or failed to comply substantially with conditions required for federal approval.¹³ These powers are indicative of the fact that the Board is a quasi-legislative and quasi-judicial body.

B. *Federal Old-Age Insurance*

Title II creates federal old-age insurance which is administered solely by the Federal Government through the Social Security Board. It is illuminating to note that the word "federal" was used because under a federal plan no state can gain advantage in competitive systems by failing to establish.¹⁴ The Title provides for the payment of cash benefits to every qualified individual who has attained the age of 65 and participated in the Act for five years or more. These benefits will be paid to him monthly as long as he lives in an amount proportionate to the total amount of wages earned.¹⁵ In order to finance the benefits under Title II, there was set up in the Treasury Department an "old-age reserve account."¹⁶ This account was modeled closely after the adjusted service certificate fund.¹⁷ The appropriation to the account is based upon such tables of mortality as the Secretary of the Treasury shall adopt. The amounts accredited to the account are made available for payment of benefits. The payment of benefits are certified to the Treasury by the Social Security Board,¹⁸ and if, during the course of payment to any recipient, it is found that he has been overpaid or underpaid, it shall be an administrative function of the Social Security Board to make the necessary finding and adjust accordingly. The power to make adjustments under this title also applies to an aged person otherwise qualified for benefits, who is reg-

¹³ Conference Report, pp. 66-68. Theory of Federal Revocation. Federal-State Relationship, by Clark, Vol. 1, pp. 269-283.

¹⁴ Minute Report No. 628, Calendar No. 661, p. 36, Comm. W. and M. P. 253.

¹⁵ *Op. cit. supra* note 14.

¹⁶ Social Security Act § 201.

¹⁷ U. S. C. A. Tit. 38, §§ 645-657.

¹⁸ U. S. C. A. § 204 (a).

ularly employed. The Board has the right to withhold the monthly benefits from such persons. The Board has promulgated regulations governing the adjudication of such cases.¹⁹ It is noted that the death benefit provided by the Act was not and is not the primary purpose of security, but only for the purpose of restoring to the estate of the deceased employee the amount approximately figured to have been paid in by him and not returned to him in monthly benefits during his lifetime. On the other hand, the Act provides for lump-sum payment to any individual who, upon attaining the age of 65, is not a qualified individual within the terms of the Act,²⁰ in an amount equal to $3\frac{1}{2}$ percent of wages determined by the Board to have been paid him with respect to employment after December 31, 1936, and before he attained the age of 65. In the event he is entitled to payment under that section of the Act, but dies prior to age 65, payment shall be made to his estate.²¹ The Board, from time to time, prescribes regulations to pay an estate in the amount of \$500 or less without the necessity of compliance with the requirements of the state law with respect to the administration of such estate.²² Further, the Board may, under the Act, disregard the law of the state in which the deceased was domiciled relating to the administration of such estate if the amount is less than \$500.

The Board may also authorize the collection of overpayments if death occurs before the overpayments have been adjusted. This can be deducted from the lump-sum payment: if no lump-sum payment is due, then from the estate. The Social Security Board is further charged with the administrative responsibility of determining the total wages paid to each individual for employment subject to the plan and as stated above, to certify to the Secretary of the Treasury the

¹⁹ Social Security Board Regulations No. 2.

²⁰ Social Security Act § 204 (a).

²¹ Social Security Act § 204 (a).

²² Social Security Act § 205.

amount of monthly payment to which each individual is entitled and also to certify the time in which each payment is to be made. The Treasury Department is to make the payment according to the certification of the Board; and there can be no appeal over this certification.²³

In so far as the Social Security Board is concerned under Title II, it is an administrative necessity that a number of returns be filed with the Bureau of Internal Revenue in connection with federal old-age benefits, that is to say, the taxing provisions of the Social Security Act. It is necessary that there be available an individual wage record for each employee covered by the Act; and hence employers must furnish these reports quarterly to the Collectors of Internal Revenue who, upon verification, transmit them to the Board's office in Baltimore.

Over 38 million American wage earners had completed applications by March 1, 1938, in order to participate in the federal old-age benefits' plan. Most of the field work necessary in the program had been completed by that date. Headquarters' work has kept pace with field operations; accounts have been established for individual workers by orderly, mechanical processes as applications were received from the field. Already the Board has put into effect preliminary phases of the program to maintain a record of wages on each account.

The information required for each employee goes easily on one card. Twenty million such cards, however, will fill thousands of mail-sacks. The mere checking and sorting of such masses would consume a vast amount of time unless carefully planned. Experts of the Social Security Board spent months in devising the quickest and most accurate methods of handling the applications. The details of distributing and collecting forms were worked out in advance as carefully as was their mechanical manipulation when complete.

²³ Social Security Act § 207.

C. *Assignment of Social Security Account Numbers*

Each employee account is simply a sheet of paper with the name and account number of the employee at the top. So many of us have the same name, however, that care must be taken to distinguish between the various John Smiths. Each employee, therefore, is asked to state the date and place of birth, the names of both parents, sex, race and present employer. This information is held in strict confidence, and used only to identify accounts. In the Social Security Board office, this information is ample to distinguish one account from another.

However, whenever an employer reports that he paid John Smith \$127 in the past quarter, the Social Security Board must know which John Smith is meant. Smith and other employees would not want to tell their employers every month the dates of their birth and the names of their parents. Their employers would not want to clutter up their pay rolls with all that information. An obvious alternative is to give a number to each employee account. This plan has been adopted; so every employee will be furnished with an identification card, bearing the number of his account. This number is given to the employer who will put it on all reports of earnings which he subsequently renders. It will identify the employee's account when the employer's report reaches the Social Security Board.

Within fifteen days after an employee has attained the age of 65 or dies, a return must be filed on a Form SS-3. This return covers the period beginning with the first day of the quarter in which either of the events occurred, ending on the date of the occurrence. A separate return is made for each employee. The return must show the taxable wages paid during the period and the wages accrued during the period that will be taxable when paid. Both the employer and the employee's account number must be shown on this return. If the employee has reached the age of 65, proof of that fact

must be attached to the return. These returns are posted to the account of the employee and are used as a basis in the adjudication of the claims arising under Title II. The function of the Claims Adjudication Operations Section, which is a part of the Bureau of Old-Age Insurance, is quasi-judicial in nature. There are a number of questions involved in the adjudication of claims arising under this title. For example, there are the laws of absentees, the rights of widows and minor children, the proof of age, adoption, aliens, assignments, records applicable to prove death and a host of other legal questions. For example, the adjudicator acts not only as a juror but as a judge. From a legal standpoint of view, they must determine the facts and adjudicate death claims upon the law in the state wherein the applicant was domiciled at the time of death. Some of the common questions are: (1) When is a person presumed to be dead? (2) Who is the survivor of a common disaster? Since there are 48 states, the adjudicators must necessarily know the law of descent and distribution in each of the states. They must know the divorce laws, laws of executors and administrators, and the jurisdiction of the court. The Board will under certain circumstances protect the rights of minor children. The appointment of guardians and committees will inevitably result. It may be well to add that the exemption law, the laws governing husband and wife, infants, inheritance taxes, marriage, and wills play a decided part in the adjudication of claims. For example, was the testator competent to make a will? Does the state in which the deceased lived recognize nuncupative wills? Was the will revoked? Does the state recognize foreign wills?

D. Unemployment Compensation

Title III of the Social Security Act provides for unemployment compensation. This title is analogous to Title I of the Act in regard to the principle of federal grants-in-aid to states for meeting the administrative cost of the unemploy-

ment compensation system.²⁴ This money is not used for compensation itself, but only for expenses of administration. It does not set up a federal unemployment system. What it seeks to do is merely to make it possible for the states to establish unemployment compensation systems. The same system of control and functions of the state organization is identical with the grant-in-aid principles as outlined heretofore. However, it is noted that the determination of the appropriation is based on the population of the states, estimates of the number of persons covered by the state law and the cost of administration and such other factors as the Board finds relevant.²⁵ The Board here again assumes an aspect of quasi-judicial determination, because it can refuse to authorize payment to the state if the law of the particular state does not provide "opportunity for fair hearing before an impartial tribunal for all individuals whose claims are denied."²⁶ It also provides periodical reports to the Board along such lines as it may direct. The withholding of payments to the states is an administrative function of the Board.²⁷ However, it must be considered that the words "a substantial number of cases"²⁸ limit the power of the Board in the state. It apparently diminished the power rather than increased it. It has been argued that this type of legislation places on the state a burden and is coercive in nature. However, the Supreme Court in the *Stewart Machine Company* case²⁹ held that the provisions of the federal law may operate to induce the state to pass unemployment laws if it regards such actions to be in its interest. Mr. Justice Sutherland, in his opinion, said that this is not coercion. It appears that the principle involved in the unemployment compensation feature of the Social Security Act is also applicable in the old-age provisions under Title I.

²⁴ Report No. 628, Committee on Finance, pp. 513, 898, 890, 6907.

²⁵ Social Security Act § 303 (a), (b).

²⁶ Social Security Act § 303 (a).

²⁷ Social Security Act § 303 (b) (1), (2), (3).

²⁸ Social Security Act § 302 (b) (2).

²⁹ Chas. C. Stewart Machine Co. v. Davis, 301 U. S. 548 (1937).

In determining whether an employer or an employee is subject to a particular state unemployment compensation law, the provisions of the state act and the regulations and rulings promulgated thereunder must be carefully studied. Various state acts differ considerably with respect to conflict of law problems, and it is extremely hazardous to generalize on the subject. It becomes necessary, therefore, to consider each of the state unemployment compensation acts thus far passed with respect to this subject. Some of the problems arising in this connection are that under the provisions of some of these state laws, the situations may inevitably arise where an employee's wages will be taxed by more than one state. Thus, in the case of an employee who performs the greater part of his services in the State of Wisconsin, for example, and renders the remainder of his services in Massachusetts (whose laws provide that contributions may be assessed on such an employee's wages to the extent prescribed by the Commission) it is possible that the wages paid for the services rendered in Massachusetts may be taxed in both Wisconsin and Massachusetts. Sound social policy dictates that an employer should not be required to pay taxes in two or more states with respect to the same wages of the same employee and that an employee should not be permitted to collect benefits in two or more states at the same time. In order to eliminate some of the conflict of law problems and duplication of taxes which will occur in the operation of the state unemployment compensation acts, many of the acts provide that services performed outside of the state, which ordinarily would be covered by the Act, are subject to the Act only if contributions are not required and paid for such services under the unemployment compensation law of any other state. Furthermore, it is noted that some of the state acts, as for example, Alabama, provide that "in the case of all other persons employed partly in this State and partly in other states, the Commission is authorized, with the approval of the Governor, to enter into reciprocal arrangement with

other states as to the extent the employment of such persons shall be included." It is possible, therefore, that pursuant to this authorization and under the guidance of the Social Security Board, reciprocal agreements may be entered into by the states to prevent duplicate taxation of the same services of the same employee. There are many problems that arise that require careful analysis and study. It is unnecessary to discuss the grants-in-aid titles of the Social Security Act for the reason they were covered in principle under Title I. The method of control of the Social Security Board under Title IV, Grants to States for Aid to Dependent Children, Title V, Grants to States for Maternal and Child Welfare, is subdivided into parts as follows: Part I, Maternal and Child Health Services; Part II, Services for Crippled Children; Part III, Child-Welfare Services; Part IV, Vocational Rehabilitation; Title X, Aid to the Blind. The administration of the appropriation for the effective carrying out of these titles is handled by other government agencies, such as the provisions relating to children under the Children's Bureau, Department of Labor; vocational rehabilitation in the Bureau of Education, Department of the Interior; public health features of the Act under the Treasury Department. Under these titles, the payments to the states are made on an equal matching basis and were modeled on the provisions of Title I relating to old-age assistance, where the administration control by the Board is identical. Title VII deals with the establishment of the Board and its duties and in reality merely constitutes an enabling section referred to more in detail at the opening of this article. Title VIII provides for the assessment of taxes on employers and employees, the former being required to deduct and submit the employees tax with his own. It is the function of the Internal Revenue Bureau to administer this feature of the Act and hence little effort will be made at this point to explain some of the difficulties of interpretation involved. However, it should be noted that perhaps the greatest potential weakness of the entire Social

Security Act and program appears at this point by reason of diversity of administrative controls involved. It must be apparent at a glance that it is entirely possible—nay probable, and has already happened—that the Treasury (Internal Revenue Bureau) may decide that an employer and his employees are exempt from tax as not being within the “coverage” provided under Title VIII and yet the Social Security Board may hold to the contrary under Title II covering the same employer and employees under the benefit provisions of the law. The converse of this problem can also readily occur. Obviously the “giving” and “taking” provisions of the Act must be accomplished by one agency if chaos is to be avoided and it is hoped that Congress may recognize this serious threat to the entire structure of the Act before it is too late. It must be remembered that the test for “payment” of a benefit is not whether tax was collected but whether under the *Board’s interpretation* of Title II the employee is entitled.

Title IX is also a taxing title applicable however to state unemployment features of the Act and Title XI prescribes definitions of a few general terms used in the Act.

The only known reason for separating Titles II and VIII when the framers enacted the Statute appears to have been in the blind hope that the Supreme Court of the United States in deciding the constitutionality of Title II might overlook the existence of Title VIII.

The learned Justice Cardozo, in his opinion in *Stewart Machine Co. v. Davis*,³⁰ obviously was not misled by the placement of the Titles in the Act and swept away much of the doubt existing in legal minds as to the meaning of public welfare clause of the Federal Constitution when he said:

“When money is spent to promote the general welfare the concept of welfare or the opposite is shaped by Congress, not the States, so the concept be not arbitrary the locality must yield. . . . Title II being

³⁰ *Op. cit. supra* note 29.

valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught."

It is not the purpose of this paper to comment as to the whys and wherefores of Social Security. Opinions may differ as to the need for such a measure but it is safe to forecast that the first few years will decide its future. If the Act can be sanely and economically administered, particularly Title II which establishes the largest insurance company in the world, it is here to stay. If however the operation functions are permitted to sink into the morass of red tape, theorism and idealism, it will fail quickly and surely leaving no trace but the embittered "little fellow" who lost his tax also and who indeed will be the forgotten man. In the words of Pope Leo XIII,⁸¹ "there is a dictate of nature more imperious and more ancient than any bargain between man and man that the remuneration must be enough to support the wage-earner in reasonable and frugal comfort." Should the Act or its administrators fail to meet this test indeed "the last stage shall be worse than the first."

James D. Hayes.

Washington, D. C.

⁸¹ ENCYCLICAL ON CONDITION OF LABOR (May, 1891).