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Otis P. Dobie

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AN IDEAL PRESERVED (?)

OTIS P. DOBIE*

A current British historian, writing of the Regency Period (*circa* 1800), after recounting the glorious achievements of that lusty era — the defeat of Napoleon in global war, the repulsion of revolution, the expansion of trade and the empire; all without loss of the political liberty of the citizen — attributes the latter to the political structure of the government of the time, which kept the ministries too small for mischievous power expansions, constantly subjected to scrutiny and curb by the sources of their powers: Crown, Parliament, and People, and mindful of the right of the citizens to hold them accountable in the Courts to the Rule of Law.¹ One has only to read the Declaration of Independence to note that this was the Ideal of Government to Americans of the time and the genesis of our constitutional structure of checks and balances, rule of law, and diffusion of power. But, Historian Bryant, in closing, recalls that this ideal proved inadequate to the problems of later times and underwent gradual revision. By the decade of the 1930's, both in Britain and America, in the wake of depression, new power groupings and wholesale yearnings after new political panaceas, the hitherto gradual revision of the Ideal was speeded. The development of large ministries, including prominently the so-called independent administrative boards, claiming broad powers and relative freedom from scrutiny and curb by the executive, legislature, and the courts, especially the last two, was not without bitter opposition which harked back to the Historical Ideal and gloomily predicted loss of the citizen's liberty to these unfathomable labyrinths of irresponsible power.² By the decade of the 1940's, the boards had established their right to exist, even in large size,³ as necessary and expeditious means of accomplishing demanded state action. The opposition and detached observers retreated to the task of salvaging a desirable minimum of the Historical Ideal by formulating rules of scrutiny and curbs of board powers by the executive, legislature, and courts. This process of formulation is still in progress, is an important problem of our time, and can be discussed in terms of the relations of the boards with the institutions just mentioned and certain others.

*B.A. 1928, Randolph-Macon College; LL.B. 1932, University of Virginia; LL.M. 1935, Harvard University; Member of the Virginia Bar; Flexner Professor of Law, University of Louisville Law School.

1. BRYANT, *THE AGE OF ELEGANCE* 259-63 (1951).

2. The dramatic story has been told to the point of nausea in a vast literature with which the lawyer is familiar. Concise résumés, with bibliographical references, are in DAVIS ON ADMINISTRATIVE LAW 4-10 (1951); GELLHORN, *CASES AND COMMENTS ON ADMINISTRATIVE LAW* 758-67 (1940).

3. Attacks on board size have decreased as the boards, after initial periods of growth, have tended to stabilize their complements.

RELATIONS WITH THE EXECUTIVE

Usually boards are given some executive functions of a specific nature. Examples are the CAB's and ICC's duties to maintain programs of research aid for their respective carriers. The Hoover Commission has suggested that these duties be turned over to appropriate older government departments.

More generally, boards' relations with the Executive, arising out of their general duty to enforce their programs of regulation, are most acute in times of political change. The new board is established to carry out a program of regulations of certain groups brought into being by the political victory of other groups. For a time, the new board is likely to regulate the subjected groups with a heavy hand; its statute so directs and its initial membership is weighted with friends of the victorious political climate. But then comes the usual political reaction, both generally and specifically as the boards' excesses are displayed. Then, the political pendulum swings again to reform, but with different orientations, and usually with a new Executive-Party Leader who demands that the board get in tune with the new "mandate of the people." More often than not, the legislators-party stalwarts will have their own versions of the mandate. Through it all, the board has its own peculiar mandate that it follow the popular mandate, if such can be found, and yet not so closely that its regulatory regimen can be branded "political" rather than "legal." If the disputants cannot agree, each resorts to the available legal and political pressures, the ultimate of which is "carrying the case to the people."⁴ While all this causes agony to the advocates of streamlined government, it is, with its checks and balances, scrutiny and curbs, soundly in accordance with the Historical Ideal.

As the number of boards increase, the possibility of "jurisdictional disputes" among them mounts. The courts may take a hand if the involved statutes give a sufficient legal handle and the problem be important and yet not too much of a "political question" such as they avoid.⁵ More frequently, the Executive, concerned over the effect of confusion upon his program and prestige, attempts co-ordination.⁶

RELATIONS WITH THE LEGISLATURE

The constitutional rule is usually stated that the legislature cannot delegate its legislative power too broadly to boards; it must state the general

4. See *Rathburn v. United States*, 295 U.S. 602 (1935) for President Roosevelt's efforts to bring the FTC in line with the New Deal by firing the Hoover hold-over chairman for "political incompatibility." F.D.R. also attempted to convert the ICC and FCC by revising their Acts and packing their membership. See Herring, *Politics, Personalities, and the FTC*, 28 AM. POL. SCI. REV. 1016 (1934), 29 AM. POL. SCI. REV. 21 (1935). In recent months, President Truman and the Federal Reserve Board have more or less carried to the people their differences over inflation control policies. See Back, *The Federal Reserve Board and the Treasury*, 29 HARV. BUS. REV. 29 (1951).

5. *Shields v. Utah Idaho R.R.*, 305 U.S. 177 (1938); *Thompson v. Texas Mexican R.R.*, 328 U.S. 134 (1946).

6. HYNEMAN, *BUREAUCRACY IN A DEMOCRACY* (1950) develops the theme of a central administrative council of various officials and elder statesmen to co-ordinate policies and conflicts in the governmental structure generally.

legislative policy under standards reasonably specifying the limits of the board power, leaving the latter merely power to "fill in the details," "fix the contingencies of application" or "fit to specific situations."⁷ Actually, when the legislature is faced with a heavy agenda, a "political hot potato" or a highly novel subject, it is likely to delegate the problem to the boards in very broad terms.⁸ As these states of affairs become the normal, and especially, as the legislature is engrossed in investigations, appropriations and foreign policy, such delegations will doubtless increase. There are those who argue that this type of delegation is salutary, the boards legislating from their expertise, with the legislature free to check up and correct when necessary.⁹ Though how far the legislature, under the conditions just mentioned, will do so is problematical.¹⁰ All in all, the boards today, under their inherent rule-making power, their interpretive power, their investigations and framing of bills for the legislature, exercise great legislative power.¹¹ However, the legislature itself is still far from inactive.¹² The boards, legislating in the relative quiet and deliberateness of their legislating procedures, have the invaluable opportunity of working out rules meeting the unanimous approval of all affected parties and the general public, and thus avoiding one of the great dangers of democracy, the possible tyranny of majority rule.¹³ Of course, the boards must be careful to insure that all affected parties and the general public are represented in their procedures. Recently, concern has been expressed over the tendency of some boards to legislate by summary fiat: the board, or, even worse, merely some member, without the use of any legislative procedures, will utter by word, letter or press release, an informal "warning" or "policy declaration" which, practically if not legally, has an immediate and injurious effect on the operations of subjected parties.¹⁴ If

7. *Yakus v. United States*, 321 U.S. 414 (1944).

8. Jaffe, *An Essay on Delegation of Legislative Power*, 47 COL. L. REV. 359 (1947).

9. See Griffith, *The Place of Parliament in the Legislative Process*, 14 MOD. L. REV. 279 (1950); Griffith, *The Constitutional Significance of Delegated Legislation in England*, 48 MICH. L. REV. 1079 (1950).

10. The N.Y. Times, Aug. 21, 1951, p. 35, col. 6, 7, reported the House Judiciary Committee projecting a sweeping investigation of the SEC, following accusations of favoritism to subjected groups represented by former board staffers.

11. I.C.C. 49 (1945); I.C.C. 61 (1950). Recently, the FTC has been drafting a comprehensive revision of the acts relative to interlocking directorates. See Copeland, *The FTC Indicts Itself*, 29 HARV. BUS. REV. 25 (1951). While the boards' power of investigation is not as broad as that of the legislature, because of the prerequisite of showing that the exercise is within the statutory power of the board, it is very broad. See *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); Davis, *Administrative Power of Investigation*, 56 YALE L.J. 1111 (1949). And note the vast possibilities of *United States v. Shapiro*, 335 U.S. 1 (1948).

12. See the ICC Reports, *supra* note 11.

13. Morris L. Cooke has recently suggested that Washington administrators are increasingly aware of the feasibility and desirability of working out regulations having unanimous consent, N.Y. Times, June 17, 1951, § 6, p. 21. Admittedly, the task would be difficult but worth the effort, to avoid having 50% to 55%, the usual politically victorious majority, be tyrants over the strong minority.

14. This problem is dealt with in *Columbia Broadcasting System Inc. v. United States*, 316 U.S. 407 (1942). See Davis, *Administrative Powers of Suspending, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193 (1949).

the subject-matter be one of great current political agitation or one transcending the specialty of the board, it would seem advisable for the board to refer it to the legislature itself.¹⁵

RELATIONS WITH THE COURTS

The Ideal posed at the start of this discussion emphasized that the boards should be constantly accountable to the rule of law in the courts at the suit of affected citizens. The advocates of great board power argue that this rule of law is not necessarily court-monitored, that, as King James and many executives since have protested, the boards can read the law and will follow it; that the boards from their expertise can give a better reading; that resort to the courts will frustrate the regulatory program by technicalities; and, finally, that the wronged citizen has his remedy at the polls.¹⁶ The courts, while rejecting any abdication of their historical power of review,¹⁷ have attempted to lay down rules that preserve their power and yet meet the force of the fears just expressed. They admonish themselves that they must cooperate reasonably with the other branches of the government, and that their role is to review constitutional and statutory power and not legislative or judicial wisdom.¹⁸ They accept the fact findings of the boards if supported by substantial evidence. The important recent cases on the subject, *Universal Camera Corp. v. NLRB*,¹⁹ and *NLRB v. Pittsburgh Steamship*,²⁰ construe the Administrative Procedure Act of 1946 as directing the courts to review board fact findings more completely than some of them had done in recent years; at least to the extent of reviewing the whole record and not merely looking for some evidence to support the findings. The rule announced in *Ohio Valley Water v. Ben Avon Borough*,²¹ and *Crowell v. Benson*²² that courts will review more broadly, even to the

15. Note, 37 VA. L. REV. 617 (1951) suggests that the issue of whether women may serve as bartenders is one transcending the labor law field and should be left to the legislature. Of course, the legislature and the executive may at times wish the board to act and take the political pressure from them. *Time*, July 30, 1951, p. 79, col. 1, reported pressures exerted on the appropriate boards to handle the question of the regulatory status of non pipeline-owning gas companies, after the presidential veto of the Kerr Bill.

16. Robson, Book Review, 26 N.Y.U.L.Q. REV. 534 (1951); GELLHORN, *op. cit. supra* note 2. Various proposals have been made for the establishment of special Administrative Courts to review board actions. The American Bar Association Section on Administrative Law opposes: see the Section Bulletin for 1951, Vol. 3, No. 3, p. 78. For general discussions of the idea, see Schwartz, *The Administrative Courts in France*, 29 CAN. B. REV. 381 (1951); Howe, Book Review, 13 MOD. L. REV. 527 (1950). That an aggrieved citizen can obtain relief at the polls would seem highly questionable, unless he be of great political influence or one of a politically formidable number of aggrieved ones.

17. *Universal Camera Corp. v. NLRB*, 179 F.2d 749 (2d Cir. 1950), 340 U.S. 474, 190 F.2d 429 (2d Cir. 1951).

18. *United States v. Morgan*, 307 U.S. 183 (1939); *ICC v. Illinois Cent. R.R.*, 215 U.S. 452 (1910).

19. *Supra* note 17.

20. 340 U.S. 498 (1951). See also *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951); *NLRB v. Hart Cotton Mills Inc.*, 190 F.2d 964 (4th Cir. 1951); Davis, *Scope of Judicial Review of Federal Administrative Action*, 50 COL. L. REV. 559 (1951); Jaffe, *Substantive Evidence and the Whole Record*, 64 HARV. L. REV. 1233 (1951).

21. 253 U.S. 287 (1920).

22. 285 U.S. 22 (1932).

possible extent of trial de novo, board findings on constitutional or jurisdictional facts, though long unused,²³ has not been overruled expressly and may be brought into play in the federal courts as it has been in state courts.²⁴ In the much discussed *Dobson* case²⁵ the Supreme Court, after citing prior decisions to the effect that the boards are more than fact-finding bodies, and noting the fact that the distinction between issues of fact and of law is difficult to draw, announced a rule of respect for board conclusions, except on clear-cut issues of law (by which the Court apparently meant issues not peculiar to the board's expertise); those that could be conveniently handled by the judges or such as, either because of the subject-matter or the course of past decisions, should be given the dignity and stabilizing status of law.²⁶ Subsequent to the *Dobson* case, Congress indicated its dislike of the rule there announced and attempted to lead the Court back to the common law rule based on the traditional distinction between issues of law and fact, reserving the former to the courts.²⁷ A good guess is that the Court will manage to retain much of the *Dobson* doctrine which, after all, relieves the courts of heavy and troublesome traffic, and yet denies the boards the power of radical departure from established legal concepts as in the days when the New Deal was young and the current crop of judges untried.²⁸

These decisions, together with those on administrative procedural due process, indicate that the courts are not yet ready to abdicate their scrutiny and curb of the Historical Ideal and leave the citizen to the mercies of the ballot box.

RELATIONS WITH AFFECTED PARTIES OR GROUPS

Groups benefiting by the board's regulatory programs, of course, press for active enforcement and expansion of the boards' powers, and accuse the cautious board of dallying, reactionism and bias. On the other hand, the subjected groups accuse the energetic board of bias, political radicalism, exceeding its powers and invasion of management's prerogatives.²⁹ Both groups

23. Davis, *supra* note 20; Fuchs, *Administrative Determinations and Personal Rights in the Present Supreme Court*, 24 *IND. L.J.* 163 (1949); Note, 25 *CORNELL L.Q.* 274 (1940).

24. Fuchs, *supra* note 23; 36 *GEO. L.J.* 337 (1948); 15 *TEMP. L.Q.* 185 (1941).

25. *Dobson v. Commissioner*, 320 U.S. 489 (1943).

26. *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25 (1946).

27. Congress revised the act involved in the *Dobson* case in 1948, 62 *STAT.* 870 (1948), 28 U.S.C. § 41. (Supp. 1951). Just as the *Dobson* rule was used beyond the tax subject, so is the revision likely to be expanded. The historical common law distinction between issues of fact and law was stated by the eminent Lord Mansfield in *Tindal v. Brown*, 1 *T.R.* 168 (1786) that law issues were those likely to recur frequently and those of such importance that the courts wished to give them the dignity of Law.

28. See the *Highland Park* case, *supra* note 26, and note the Court's conciliation of the changing scenes in the *Universal Camera* case, *supra* note 17.

29. Though the boundary between permissible regulatory power and owner-management power has greatly shifted at the expense of the latter, see *Petitions of New Eng. Bell Tel. & Tel. Co.*, 80 *A.2d* 671 (*Vt.* 1951).

marshal their legal, political and social friends and procedures.³⁰ The courts have refrained from laying down specific rules as to when they will prod the hesitant board or restrain the zealous one. They frequently use the analogy of the boards to public attorneys with considerable discretion as to enforcement and to taking soundings of political, social and practical conditions.³¹

RELATIONS WITH THE POLITICAL PARTIES

The Hoover Commission in 1949 found that the boards in their adjudicatory actions were relatively free from political pressures and, in any event, had not yielded to such.³² This is reassuring, and one can only hope that the condition will continue in these days when politics are increasingly all-pervading.

Of course, in their legislative actions the boards are more legitimate game for political pressures. Doubtless a more frequently used device will be for the administration to have the boards participate in allegedly impartial investigations of citizen interests and groups by "outside, impartial experts or authorities." Some of these latter, whose sympathy with the administration policy will have been carefully ascertained in advance, can always be found.³³

THE LARGER ISSUE

Scrutiny and curbing of board action by these other groups, particularly the courts, become more and more difficult as the number of boards and the scope of each expands. Indeed, board power is a phase of the larger problem of modern leviathan government. We shall probably never again have the political liberty of the citizen of the days when government was small and its actions limited and followable.³⁴

The leviathan state is the product of prevailing tendencies to refer all problems to the state, in the belief that politicians, however we may joke about them as a defensive reflex, are the best resolvers of our troubles. The

30. See Dykstra, *Impact of Pressure Groups on the Legislative Process*, 26 WASH. U.L.Q. 306 (1951), relative to the lobbying activities of subjected parties and of the boards themselves.

31. That federal courts apply the *ultra vires* brake to a dynamic board sparingly, see, as an extreme example, *Gemsco v. Walling*, 324 U.S. 244 (1945). *But cf.* *Baltimore & Ohio R.R. v. United States*, 71 F. Supp. 499 (D. Ohio 1947). In the famous case of *ICC v. Humbolt Steamship Co.*, 224 U.S. 474 (1912), the Supreme Court prodded the reluctant Commission to extend its jurisdiction to Alaska. Doubtless, the Court was impressed by the enormity of the restriction and absence of probable political repercussions. *Cf.* *NLRB v. Townsend*, 185 F.2d 378 (9th Cir. 1950); *Haleston Drug Stores Inc. v. NLRB*, 187 F.2d 418 (9th Cir. 1951), indicating broad discretion in a cautious board to not use its power for a variety of considerations. Perhaps the most unusual instance of directing board action was that of the ICC and Regional Rail Rates Revision. The culminating case was *New York v. United States*, 331 U.S. 284 (1947).

32. HOOVER COMMISSION, TASK FORCE REPORT, Appendix N 20 (1949). *Cf.* N. Y. Times, May 8, 1951, p. 45, col. 4, 5, reporting the Union Pacific Railroad asking dismissal of a rate proceeding because of the pressure activities of certain western senators.

33. See N.Y. Times, Dec. 24, 1951, p. 20, col. 4, Financial Page Editorial, discussing the famous TNEC investigation of monopoly in the 1930s.

34. One need not be an Orwell (ORWELL, NINETEEN EIGHTY FOUR [1949]) or a Hayek, (HAYEK, THE ROAD TO SERFDOM [1944]) to be concerned.

advocates of these tendencies argue that social achievement cannot be by private action, or that if left to such, narrow, predatory groups will triumph.³⁵ But certainly, in the light of history, a good brief could be made that most of our achievements have been by private action. One may also ask whether the politicians are not more predatory than private groups ever were, and if political control, subject to error even if properly motivated, is not more dangerous because of its vast coverage and difficulty of correction.³⁶ Perhaps as the errors, shenanigans, and costs of the state "boys" become more apparent, private groups will insist upon and develop attitudes and techniques of resolving their problems themselves. Then the citizen may rest easier, and the mink coat producers recall 1951 as a boom period.

35. McDougal, *Fuller v. the American Realists: an Intervention*, 50 YALE L.J. 827 (1941); SANTAYANA, *DOMINATIONS AND POWERS* 426 (1951).

36. GOOCH, *COURTS AND CABINETS*, Preface xx (1946), after reviewing the activities of some governments of the eighteenth century that would compare more than favorably in ability and devotion to the general weal with modern successors, concludes that it is a sad tale of waste of the hard-earned wealth of the people by their officials. In *Dairymen's League v. Brannan*, 173 F.2d 57, 65 (2d Cir. 1949), Judge L. Hand registers an eloquent note of scepticism about the possibility of modern administrators handling the tasks given them. In *United States v. Wunderlich*, 72 Sup. Ct. 154 (1951), Justice Douglas becomes almost Actonian in his expression of fear of the aggrandising and corrupting effects of unfettered political power.