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PROBLEMS OF LAW IN CIVIL AVIATION*

JAMES R. DURFEE**

I appreciate the opportunity your invitation has given me to come back to my home state today for a short visit amongst old friends.

The invitation came at a particularly opportune moment, almost exactly one year after I took up my new duties as Chairman of the Civil Aeronautics Board, when I was taking stock of my own reactions to the many and varied new experiences my work has brought me.

One of the things I should like to do tonight is to discuss with you the differences between the Civil Aeronautics Board and the Civil Aeronautics Administration, and I assure you that there are major differences despite the similarity of their names. One of the constant sources of confusion in Washington, and I am sure elsewhere in the country, is the extent to which agencies are identified in the public mind.

A curious feature of this confusion, and perhaps an explanation for it, is that originally the Board and the Administration were one and the same organization. In 1938 when Congress passed the CIVIL AERONAUTICS ACT it established a Civil Aeronautics Authority which performed most of the work now divided between the Board and the Administration. This Authority—which, incidentally, had the same initials as the Administration now has—CAA—was an almost exact counterpart to the ICC which has a similar plenary authority over rail transportation.

The present set-up of agencies regulating air transportation was substantially established in Reorganization Plans submitted to Congress by President Roosevelt in 1940. In general this Plan made the Administrator responsible for all functions relating to the enforcement and policing of the safety provisions of the Act and of the safety rules and regulations established by the Civil Aeronautics Board. The Board was assigned the tasks of economic and safety regulation.

To make this distinction a little clearer, let me give you some examples. It is the Board's responsibility to establish standards by which the "airworthiness" of aircraft is determined; and it is the Administrator's responsibility to certify aircraft as airworthy under those standards. It is the Board's responsibility to fix standards for licensing pilots; it is the Administrator's responsibility to examine and test pilots to decide whether they measure up to the standards in much the same way as drivers are tested for licenses—but with far more stringent standards. It is the Board's responsibility to set up the traffic

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** Chairman of the Civil Aeronautics Board.

rules for flying planes; it is the Administrator's job to supply the traffic cops and to keep the traffic moving. It is the Board's job to decide, from an economic standpoint, which airlines should fly where; it is the Administrator's responsibility to check regularly to assure that those airlines operate over their routes safely.

This difference in jobs, of course, requires an entirely different type of organization for each. The CAA is a vast operating organization—of about 18,000 employees at present—with professional people of all types engaged in inspecting, testing, planning, research, design and control—with a network of offices and employees spread throughout the country working on airports, controlling air traffic, examining pilots, mechanics, and schools, and doing research on the problems related to its different jobs.

The Board (the CAB) is a small organization of about 600 just about 1/30th of the size of CAA, centered largely in Washington with a staff of specialists of a different sort—economists and accountants, engineers, hearing examiners and lawyers—devoted to helping the Board formulate rules and regulations and arrive at decisions, by gathering information, holding hearings and advising the Board.

The authority of the Administration is vested in one office that of the Administrator^o who exercises a normal executive control. The authority of the Board is vested in a five-man body—and I should add, a bi-partisan five-man body—acting by majority vote. The Administration is part of the Department of Commerce, directly responsible to the Secretary of Commerce and through the Secretary, to the President. It is an executive agency. The Board is responsible to the Congress and is independent of direct executive control in all except the initial appointment of the members.

Now I have reviewed these distinctions between the Board and the Administration partly just to straighten out the differences between them in your minds, to give you some idea of the kind of agency I work for in Washington. I also had another purpose in mind, however, namely to put some flesh on the bones of the main topic I want to talk to you about tonight—the difference between purely administrative executive agencies of the government and the independent regulatory agencies the so-called “quasi-legislative, quasi-judicial” commissions.

These two agencies—the CAA and the CAB—epitomize a distinction, a distribution of government functions, that runs through our whole system of government today on both the federal and state levels. It is not, I hasten to add, a hard and fast distinction, for the business of government isn't parceled out among agencies according to some theoretical master plan.

The Board, for example, as one of its important duties, has the

job of advising the President on the aviation-economic implications of route awards in the international field. Obviously this job, which regularly entails participation with the State Department by the Board in negotiations with foreign governments over the exchange of air routes, is not of the sort that we normally think of a regulatory commission engaging in. By and large, however, the Board fits the classic notion of a regulatory commission with delegated legislative powers and the CAA, the notion of an executive agency with ministerial administrative powers.

The distinction between the independent regulatory agencies and executive agencies is not a new one to the lawyer—in fact, the underlying concepts already have a “hornbook” quality about them even though much of the doctrine of Administrative Law has evolved in our own life-times. The concept of the independent regulatory agency has been with us in Wisconsin since 1874 with the creation of the original Railroad Commission, predecessor to the present Public Service Commission of Wisconsin. In the Federal Government, the creation of the Interstate Commerce Commission in 1887 marked the first real federal independent regulatory agency.

I have noticed in my reading of late, and in speeches I have heard, an increasing tendency to ignore the distinction between independent regulatory agencies and executive agencies—a tendency to ignore the vital differences in the character of their work that require an entirely different approach to their tasks. The point I want to bring home tonight is that these differences are being subjected to a subtle and unfortunate erosion, partly at the hands of members of the Bar itself and partly at the hands of other professional interest groups.

I am not talking here of the constant—and I might say, welcome—constructive criticism and constructive legislation that helps the administrative agency do its job and serve the nation more efficiently and fairly. The administrative process and the regulatory agencies need a constant airing of their methods and objectives if they are not to stagnate and become ineffectual, or to grow beyond our concepts of constitutional government.

We are all familiar with the long and often bitter battle to make the courts take over this function of regulation—a battle which has, by and large, been decided in favor of administrative independence, subject to court review of action or conduct which, as some have put it, is *ultra vires*.

But this battle was hardly over, with the passage of a FEDERAL ADMINISTRATIVE PROCEDURE ACT, which did not materially expand the function of judicial review, when efforts broke out on new fronts to stifle regulatory independence. Efforts are made to have Congress withdraw the limited quasi-legislative powers delegated to the regula-

tory agencies. Other efforts are made to concentrate control of regulatory functions in the executive branch of the Government.

What makes these counter-thrusts against the regulatory process seem so anomalous is that despite the difference in objective, both schools of thought express their aims in virtually identical terminology. Both groups speak broadly of attaining a more efficient service of the public interest that will be more responsive to the popular will.

In detail, however, the expressions of these two groups reflect a considerable divergence in objective. The exponents of greater executive concentration say there is excessive emphasis by regulatory agencies on formal, judicial-like procedures. The exponents of greater Congressional control speak of the inadequate protection of procedural rights that the present administrative process provides. Those favoring Congressional control emphasize the oppressive exercise of unfettered administrative power; while those favoring executive concentration speak of the inability of multi-headed, independent agencies to act effectively or obtain popular support for their programs.

In reciting these criticisms of the administrative process I do not mean to suggest that the exponents of either of these approaches to government intend to destroy the regulatory process. On the contrary, I think their criticism flows from an honest and well-intentioned desire to improve the government—to make it more responsive to the needs and desires of the nation, to assure greater protection of individual rights, to do the government's work more efficiently—all laudable objectives. The problem lies, I think, in the overemphasis in each case on a different one of these sometimes conflicting objectives.

But before I elaborate on this problem I want to tell you something more about the relations of the Civil Aeronautics Board with the Congress and with the Chief Executive—relationships that are by and large typical of those of all the independent federal agencies. When you realize the nature of these relationships and when you realize how extensive they are, I am sure you will all agree with me that the independent regulatory agencies are far from being a headless fourth branch of the Government and, more important, are far from being unaccountable repositories of unfettered power.

The record shows that while the Civil Aeronautics Board is independent in voting and in exercising the broad discretionary powers vested in it, it renders a strict and regular accounting of its stewardship—a strict accounting for its program, its expenditures and the results of its work.

In these days when the newspapers are so full of controversy about the size of the federal budget and so full of reports demanding that the President or the Congress should trim the budget, it should be obvious that the purse-string is a potent instrument of control in

the hands of the President and the Congress over the activities of every Federal agency and department.

In addition, each year there are numerous appearances by the Board members or its staff before the Commerce Committees of both Houses, again in review of past actions and in consideration of the dozens of bills introduced each year contemplating the modification of the statutory scheme under which the Board operates.

Each year special problems arise which are the subject of searching scrutiny by Congress. For example, a Senate Investigating Subcommittee of the Government Operations Committee, headed by Senator Jackson of Washington, is now conducting public hearings on an unfortunate premature "leak" of information about a Board decision last summer in order to check on the adequacy of the Board's information security measures and to determine whether stronger legislation is needed to prevent unauthorized disclosure of Board proceedings in process.

Last year a House subcommittee under Representative Celler of New York held extensive hearings on anti-trust aspects of the Board's record while other committees of both Houses considered proposals for a pervasive change in the basic statute under which the CAB operates. The Commerce Committee of the House conducted extensive investigation of the Board's safety regulations following the Grand Canyon accident last year and again this year after the recent tragic air accidents in New York and California. As Chairman of the Board I have testified eleven times within the past year before Congressional Committees on Board matters.

In hundreds of instances each year members of Congress appear formally before hearings of the Board to urge the interests of their constituents in cases pending before the Board. And in literally thousands of instances the Board is quiered by Congressional letters or phone calls to explain or justify its decisions, its policies and programs. This evidences a proper and careful concern by the Congress in the conduct of the powers delegated by it to regulatory agencies.

With this constant review of the Board's work by Congress and by the President I must admit that I am somewhat amused when I read about the unfettered discretionary power that the Board, as an independent agency, supposedly exercises. And with the constant Congressional attention that is focused on the Board's functioning, I have a similar reaction to suggestion that: "The technique of direct legislative supervision has largely been neglected."¹

From the Board's experience with Congressional and Executive supervision, as I have summarized it here, but by no means exhaus-

¹ Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19, 20 (1957).

tively, I think it is simply incorrect to think of the independent regulatory agencies as being in any sense "unaccountable." The Board, and all the other independent regulatory agencies, are held strictly accountable to Congress from whom we derive our powers.

Does all this review impair the independence of the agencies? In a sense it obviously does. We on the regulatory agencies always know that if we were to embark on some foolish course, Congress is ready to pin our ears back. We always know that the President, with the prestige of his office, can criticize our programs or our decisions with a very powerful impact.

But in a very real sense these limitations on regulatory independence are nothing more than the limitations of responsibility in handling a public trust which, in the last analysis, we are nevertheless free to carry out and defend independently.

Now you may well ask at this point, after I have outlined the large extent of supervision of the Board, why I am concerned with proposals for greatly extended executive supervision or constant legislative intervention. The answer is simple. Both of these notions go far beyond what I have outlined as the existing measure of control.

Both ideas contemplate the direct intervention of legislative or executive control in the decision-making process, either by a general curtailment of the discretion of the independent regulatory agencies (called "canalization of delegated power") or by vesting final authority outside the agencies for the dictation of specific results in individual cases.

Perhaps we can bring these problems into somewhat better focus if we consider for a moment exactly what the regulatory agency does in acting under its enabling statute. Other students of the process have said it far better than I, so let me refer to the words of Justice Jackson in *Federal Trade Commission v. Ruberoid*,² decided in 1952, where in a dissenting opinion he gave what I consider to be one of the clearest and most realistic descriptions of the process I have ever seen:

"It may help clarify the proper administrative function . . . to think of the legislation as unfinished law which the administrative body must complete before it is ready for application. In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another smaller and specialized agency. It is characteristic of such legislation that it does not undertake to declare an end result in particular cases but rather undertakes to control the processes in the administrator's mind by which he shall reach results It attempts no more than to indicate generally

² 343 U. S. 470, at 485 (1952).

the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case ought to be."

Professor Davis, in the introduction to his treatise on Administrative Law, outlined some of the reasons for the trend to this broad type of law-making that vests regulatory agencies with this peculiar status and authority:

"The fundamental reason for resort to the administrative process is the undertaking by the government of tasks which from a strictly practical standpoint can best be performed through that process."³

"The legislative process and the judicial process, which are the principal alternatives to the administrative process, frequently fall short of providing what is needed. A legislative body is at its best in determining the direction of major policy. It is ill-suited for handling masses of detail, or for applying to shifting and continuing problems the ideas supplied by scientists or other professional advisers."⁴

From my experience with the Civil Aeronautics Board I would say that the rationale of these quotations is especially apropos to the functions of the Board. I think it is true that none of the regulatory agencies have had to concern themselves more exclusively than has the Board with purely legislative type work—the issuance of route certificates or franchises to airlines, rate-making, the granting of subsidies, the regulation of competition and the encouragement of new aviation businesses—work which is policy-making of the highest order having an almost determinative bearing on the development of an industry.

I think, at the same time, that the Board's experience demonstrates the wisdom of the original broad legislative grant of power to the Board and suggests the possible danger of extensive "canalization" of delegations of power. Let me again cite some examples.

The Congress gave the Board plenary authority over new route authorizations in 1938, after granting "grandfather rights" to existing operators. Aside from the customary public convenience and necessity standards adapted from older laws, the Congress gave the Board no guide to the resolution of elementary problems such as the extent of competition to be allowed except in the Statement of Policy in the Act which provided that the Board should consider to be in the public interest—and I quote: ". . . competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the

³ Davis, Administrative Law § 3 (1951).

⁴ *Ibid.*

United States, of the Postal Service, and of the national defense." These general mandates the Board had to fashion into a workable policy. And it has had to apply this policy—or perhaps I should say policies, since there have been changes—to widely varying conditions that have prevailed in the airline business since 1938.

Naturally while the industry was heavily subsidized with government funds, the Board was especially cautious in authorizing competition that would have been nothing more than a drain on the Federal treasury. But with the tremendous expansion in the air travel market since the beginning of the Korean War, an entirely different approach was called for. An approach that emphasized the need for improvement in the quality and quantity of service, which seemingly, only competition could bring. And an approach which recognized the concurrent need to strengthen and balance the overall air transportation system, a result that could only be accomplished by authorizing some of the smaller and weaker carriers, which were in some instances still subsidized, to participate in the major air travel markets.

The wisest of legislators would have been hard put to develop specific directions to the Board—for authorizing competition under the changing circumstances that the Board has faced since 1938.

One of the major purposes of the creation of the administrative body exercising legislative powers under Congressional supervision was to bring legislative powers to meet just the type of problem I describe.

It would be a tremendous task and burden for Congress to legislate a specific and workable program for such a situation; and it seems clear that the national interest precludes Congress from attempting to do the job when it has so many even graver responsibilities to which its attention must be devoted.

This short example I have given you of the creative demands on the regulatory agency only begins to suggest the legislative problems the Civil Aeronautics Board has met in the nineteen years of its existence. Since its inception new aeronautical enterprises undreamed of in 1938 have sprung up and taken their place with the pioneers.

To name some of the major ones that have arisen in commercial transportation, there are the all-cargo carriers; the irregular or supplemental carriers, which are still before the Board in the last stages of a definitive investigation into their role; the air freight forwarders; the local service carriers; and, there are our international carriers, which today carry most of the global commerce of the world.

The challenge which, for example, the local service carriers present, a challenge which is the subject of intense study by the Board at this very time, is perhaps as great or greater than that of the trunkline carriers in 1938. The Board faces this challenge of adequate local air

service and has faced it since the second World War, with no specific direction from Congress and no change in the original statute except for the grant of permanent certification by Congress in 1954.

These problems are not subject to an a priori Congressional fiat. The needs of each of these carriers including their need for subsidy, the needs of each city they serve, and numerous other elements must be weighed in the balance if we are to achieve a healthy local service system bringing air transportation to the maximum number of communities in the United States with a minimum subsidy cost to the taxpayer.

Awaiting us just over the horizon are problems of still greater magnitude with the advent of what has come to be called the "jet age" — problems that will require us to reexamine the fundamental predicates of the economic and safety structure of air transportation in the United States and throughout the world.

Again, these problems cannot be met with a priori legislative assumptions — but neither can they await the inauguration of widespread commercial flights for by that time it will be too late. These are the kind of problems the independent regulatory commission is designed to cope with.

In discussing this concept of independent execution of a broad mandate I have concentrated exclusively on the experience of the Civil Aeronautics Board, but I would venture to say that each of the other six independent federal regulatory agencies could match these examples from their experience and their prospects—the ICC, for example, in coping with the problem of declining passenger volume in the rail field; the FCC in coping with the advent of television, or the FPC in coping with the problems of regulation of the production and transmission of natural gas and of further power development throughout the country.

The dynamic forces at play in all these areas will certainly test the vitality of the independent regulatory process and will undoubtedly strain the process at certain points. Congressional intervention will undoubtedly be necessary on occasion to direct the efforts of these agencies and the refinement of procedural techniques will undoubtedly continue.

In the last analysis, however, the process will best meet the demands on it if given the discretion within a broad outline determined by Congress, to proceed empirically, fashioning methods and remedies as it goes along and as conditions change.

In the face of the experience of the Board in the past nineteen years, and of other agencies in the past thirty to forty years, a return to narrower delegations of authority would be a retrogression that would threaten the continuation of effective government regulation.

While improvements in techniques of Congressional supervision may be needed, "canalization" of authority is not one of them.

Let me summarize now some of the major points I have made on this subject of broad delegations versus specific delegations. If the commissions are to bear the responsibility for regulation in the various business fields, they need authority commensurate with that responsibility. If Congress is really going to delegate power—to free itself of the burdensome details once it has defined the basic policy objectives—it must delegate sufficient authority so that the agency can really choose the course best suited to the public interest without constantly asking for additional legislation.

In short, if the business of government is to progress, freeing Congress for the consideration of major policies and the supervision of delegated authority, the direction must be away from "canalization" of delegated powers. I think it may even be safe to hazard the opinion that increased "canalization" of legislative authority, except where needed in order to correct an administrative policy, is inconsistent with the important objectives of legislative oversight, for inevitably, the filling in of legislative detail deprives Congress and the legislatures of the time needed to devote to basic policy examination and reexamination.

In my enthusiasm to deal with this question of legislative oversight I have allowed myself very little time to discuss the counter-trend I mentioned earlier, the trend toward executive concentration or domination. Perhaps it really isn't necessary to discuss this problem in front of a group of lawyers, for if it can be said that many American lawyers distrust the administrative exercise of legislative power, they abhor the very thought of the executive branch of the Government exercising a similar authority. Congress is even more adamant on this subject than is the legal profession.

It may be true, as critics of the independent commission movement have said, that executive agencies could conduct some of this regulatory business more efficiently than a commission. An executive agency could undoubtedly match a commission-type agency for "expertise." It could probably gather facts and information just as effectively. It may even be that a regulatory program would have greater support with the prestige of the President's high office behind it.

The fact remains that the independent commissions are exercising legislative, not executive or judicial powers. Recent history in some foreign countries has reinforced the historical belief in this country that the executive should not exercise legislative power. Congress is not going to give those powers over to the executive nor will it, I am sure, ever prefer the executive decision-making process to the deliber-

ative process of the independent commission with its hearing procedures and decisions on the record.

On many occasions, of course, Congress has delegated broad authority to executive agencies, particularly under the emergency War Powers. But as I have said, the fact remains that as a general rule, Congress will not deliver its legislative authority to the executive even if it could constitutionally do this.

Perhaps the prevailing political situation in Washington provides another key to the understanding of this proposition, aside from any constitutional barriers. The responsibilities delegated to the commissions must be exercised in season and out, when Congress is in session and when it is not, and whether the White House and Congress are controlled by the same party or not. A Congress of one party will, I presume, never freely entrust its legislative powers to an executive of another party if it has any alternative. It will—and perhaps somewhat reluctantly at times—entrust some of those powers to a bipartisan Commission responsible to the Congress.

This mention of the relation of independent commissions to the executive gives me an opportunity to bring up an aside that is nevertheless very close to my heart. I am sure that everyone here knows that I am a Republican. I am proud of it and both proud and happy to have been appointed by the Eisenhower Administration to my present post with the Civil Aeronautics Board. I bring to that post the ideals and principles which have governed my whole lifetime. But this does not alter my realization and conviction that the President has appointed me to a bi-partisan legislative body that draws its power from, and is responsible to the Congress. I think all of the members of all independent commissions must listen to what the President has to say and give it serious consideration—just as Congress itself listens to the President when he sends up his legislative and budget programs and the various other messages he submits.

This is not political servility. It is the very essence of responsibility. However, just as Congress retains its freedom to act as it sees fit after it hears the President, so do the members of the independent commissions in their exercise of the legislative powers which they get from Congress.

I think that I have said enough now to convey to you my basic ideas on this subject of independent commissions. Before I close, though, I should like to hit one more relevant point. All of the lawyers here are familiar with the classic description of the independent commission which says that these commissions exercise quasi-legislative, quasi-judicial and quasi-executive powers. You see that the word “quasi” is in there in each part of the description. The dictionary says

that "quasi" means "as if" or "in a sense." I suppose it has been used in the description I have just given you to mean "like" or "similar to."

There may be some truth to that kind of a description of administrative powers and I know that I often use the word "quasi-judicial" as a short-hand description of the Board's decision process in route cases. But the description makes me a little "queasy"—intellectually queasy.

Justice Jackson described the use of the word "quasi" as a "smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed," and I would alter this slightly to say that the word "quasi" in this context is an intellectual counterpane used to conceal disordered thinking. The truth is that the independent regulatory commissions are legislative, pure and simple, exercising delegated legislative powers.

They may follow judicial procedures in exercising their legislative powers, they may have judicial duties and executive duties incidentally, but the essence of the commission statute—the reason for its being—is the legislative power granted. Maybe it would help our thinking some if we borrowed a descriptive term from the lawyer's office which to my mind gives a pretty good idea of what a commission is—and that term is "junior partner." The commissions are legislative junior partners, given a responsible position in the firm with considerable leeway in making decisions but always subject to the senior partners ultimate supervision and authority where needed.

I have brought you this message, on a subject that is probably far from the daily interests of most of you, because I feel that there is a real need, throughout the Bar and not just among administrative practitioners, for a better understanding of the administrative process. I have only touched upon one of the host of problems in this field, but it is an important one because of the emphasis on this problem in the American Bar Association's general program. I am convinced, as a former trial lawyer myself, that as fuller understanding of the value of the administrative process to our government increases among lawyers, we shall see the legal profession turn its attention away from efforts to cripple or destroy this process, to efforts to improve it. That will be a good day for both our profession and the regulatory agencies. Still more important, it will be a good day for the people of this country in their constant search for better government.