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The Problem of the Independent Regulatory Commission: Still Unsolved

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NOTES

THE PROBLEM OF THE INDEPENDENT REGULATORY COMMISSION—STILL UNSOLVED

"The independent regulatory commissions create a confusing and difficult situation in the field of national administration. There is a conflict of principle involved in their make-up and functions. They suffer from an internal inconsistency, an unsoundness of basic theory. This is because they are vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President, and at the same time they are given important judicial work in the doing of which they ought to be wholly independent of Executive control."[1]

To obviate this "inconsistency" the President's Committee on Administrative Management recommended the division of the functions now being performed by each of the independent regulatory commissions into two distinct groups, namely, administrative and policy-determining on the one hand and judicial and quasi-judicial on the other—the former to be placed in the hands of agencies within the regular departmental organization of the government so as to make them amenable to executive control, the latter to be put in the hands of agencies independent of executive control except for administrative "housekeeping" purposes.[2]

Professor L. D. White in a discussion of the problem to which the President's Committee was directing its attention points out by way of specific example that in some "respects the policy work of the Interstate Commerce Commission transcends technical problems and is caught up in the broader aspects of the general social and economic programs of the government of the day. Here it is that the necessity for coordination of the policy of the Commission with that of the government becomes important; and it is at this level, rather than the level of technical determinations, that the proposal of the (President's) Committee on Administrative Management is directed. Thus in times of economic depression or recession railroad rate structures and by implication employee pay scales are important aspects of adjustment for recovery. The President must be interested in this area and may hope that the policy of the Interstate Commerce Commission will be reasonably consistent with his own broad program of economic rehabilitation. In case of conflict he has no administrative recourse. In 1935 the Resettlement Administration undertook to remove the population

[1] President's Committee on Administrative Management, Report With Special Studies (1937) 40.
[2] *Ibid.*, 41.

from sparsely watered regions of the west to other more promising agricultural sections. The rate structure on agricultural products from these areas can be so adjusted as to facilitate or to hamper this program."[3]

Thus the President's Committee recommends in effect that the Interstate Commerce Commission be reorganized in such a way as to bring its rate-making functions within the ambit of executive control with a view towards insuring the coordination of railroad rate policy with the policies and activities of other governmental agencies.

In short the President's Committee says that in the determination of railroad rates the policies of the government of the day ought to be taken into consideration.

But it is precisely considerations of this kind which the Supreme Court of the United States has indicated may not properly be taken into account in determining railroad rates.

Thus, in a case which arose upon the application by a railroad company for authority to increase certain lumber rates, the Interstate Commerce Commission refused to permit the increase on the ground that it would adversely affect the lumber business which had been established in reliance upon the old rates. The Supreme Court held that the Commission had erred in that its determination had been based not upon

> "the intrinsic unreasonableness of the new rate, * * * but (upon) the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just."[4]

Or again in a rate discrimination case it was said by way of dicta

> "To bring a difference in rates within the prohibition of (the Statute), it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."[5]

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[3] WHITE, L. D., INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION (1939) 118. That Professor Cushman upon whose study the recommendations of the President's Committee apparently are predicated would agree with these statements seems clear. See his own remarks with respect to the rate-making functions of the Interstate Commerce Commission at page 220 in the President's Committee on Administrative Management, Report With Special Studies (1937).

[4] Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433, 445 (1911).

[5] United States v. Illinois Central R. R., 263 U.S. 515, 525 (1924).

Finally the Court remarks that carriers may not

> "adjust their rates with the motive of impairing or aiding a shipper, a particular kind of traffic, or a locality, for to do so is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or aid of some other place, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel."[6]

In short the Court holds under the statutes as now drawn that only factors "intrinsic" to the "transportation standard" may be considered by the Commission in fixing railroad rates.[7] *This, it is submitted, precludes the consideration of the policies of the government of the day.* Finally even though the statutes were amended in an effort to permit such considerations to be taken into account, there would still remain the constitutional prohibition of rates so low as to be "confiscatory."[8] Above that minimum perhaps there is an area within which Congress would be free to set what standards it might choose to be considered for rate-making purposes.[9]

It is not the purpose of the present note to discuss these latter propositions. Rather its purpose has been simply to indicate the writer's belief that the President's Committee in its statement of the "problem" of the independent commissions, and in its solution thereto, failed to take into consideration the constitutional and statutory limits on the discretion of at least one of those agencies. It is believed that similar difficulties would be encountered with respect to the other independent commissions.

WALLACE MENDELSON*.

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[6] Texas and Pacific Ry. v. United States, 289 U.S. 627, 637-638 (1933).

[7] For the fate of Congress' attempt in the Hoch-Smith Resolution (January 30, 1925) as a consequence of the "agricultural depression" of the early twenties to direct the Interstate Commerce Commission in rate making to take into consideration "the conditions which at any given time prevail in our several industries," see Ann Arbor Railroad v. U.S., 281 U.S. 658 (1930).

[8] See Smyth v. Ames, 169 U.S. 466 (1898), St. Louis and O'Fallon R. Co. v. U.S., 279 U.S. 461 (1929).

[9] Does the constitution fix a maximum, as well as a minimum, limitation on rates? That is, is there a point at which rates might become "confiscatory" from the point of view of the shipper? This question was raised but not answered in Dayton-Goose Creek Ry. v. U.S., 263 U.S. 456, 480 (1924).

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