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THE CIVIL AERONAUTICS ACT OF 1938 AND DEMOCRATIC GOVERNMENT*

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Democracy stumbles and muddles. It is too slow for the man on horseback.

But now and then it takes a great stride forward to catch up with the times. Those strides confound its critics.

During the last session of Congress our democracy took one of those strides when it adopted the Civil Aeronautics Act.

To us in aeronautics that Act means much. But it may prove of even deeper significance to the nation at large. For it represents the first attempt by Congress to meet and master a fateful problem of modern democratic government.

Mr. Justice Stone has stated that the most striking recent change in our legal structure has been the rise of a system of administrative law. For a half century the federal and state governments have been adopting isolated measures which vest in administrative agencies combined legislative, judicial and executive functions. This union of functions would no doubt have shocked the Constitution makers. But the insistent demands of civilized life in a machine age have spoken louder than voices from the grave. The sharp impact of the facts of life has shaped to new lines our ancient theory of the separation of powers.

While these new lines of constitutional doctrine have by no means destroyed, or even impaired, the liberty which it is the design of separated powers to secure, they have permitted the appearance of certain tendencies which, if pursued, might become dangerous. Notable is the tendency to make the same person both prosecutor and judge. Notable also is the tendency so to burden the judicial officers of an administrative agency with duties of an executive nature that the efficiency of those officers is threatened.

The fear that these tendencies would develop has led many eminent gentlemen vigorously to oppose the creation of administrative agencies of government. This opposition has, at times, verged upon hysterics. There are those who have insisted that we return

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to the conceptions of a simple society and transfer to the courts the judicial functions now vested in administrative bodies.

Such reaction would plunge us into hopeless confusion. Imagine if you can where aeronautics would be twenty years hence if there were no speedy administrative instruments for determining disputes and securing compliance with law. Under such circumstances aeronautics would be grounded in twisted wreckage.

The suggestions of extreme reaction should not, however, obscure the grievances which they represent. Let us examine those grievances more closely.

The tendency to make the same agency both prosecutor and judge quite properly evokes protest. Where the legislature simply creates an administrative agency charged with the regulation of an industry or of certain practices, without making provision for the separation of judicial and prosecuting functions, it is easy for the two to become blended. Administrative bodies have made notable efforts to avoid this union and the courts have elaborated rules of procedure designed to the same end. But even the familiar device, adopted by some agencies, of proceeding by an examiner's hearing, with proposed findings and argument on exceptions thereto, has not altogether avoided the difficulty. Too often we find that the same person in an agency institute a case, prepare it for presentation, and then act as advisors to the administrative tribunal when it is finally decided. Where this occurs it requires a profoundly judicial temperament to advise without preconception.

The tendency to saddle executive duties upon administrative officers also presents a serious problem. This tendency springs not so much from the necessities of our machine age as from our Anglo-Saxon propensity to deal with problems one at a time as they arise. Upon only a few occasions in our history have we sought to anticipate problems by the laying down of general rules. Most of the time we eschew general rules, simply pouncing upon individual questions and dealing with them with no particular relation to other issues or to broad implications for the future.

As Dean Landis of the Harvard Law School recently said:

"The administrative agency came into being not as a single, comprehensive, philosophical conception but by a process of empirical growth. These agencies have always sprung from a concern over things rather than over doctrine."

This has resulted in the creation of a maze of agencies with the most bewilderingly different kinds of powers. An agency once

created is vested first with one power and then with another until through the years the process of accretion produces a veritable potpourri of governmental functions, the administration of which would challenge the ingenuity of a Pooh Bah.

The dangers of this development are patent. Chief among them is the fact that the officer charged with the task of determining rights and obligations between man and man and between man and society may likewise be burdened with so much administrative detail that he finds it impossible to maintain the atmosphere of detachment which is indispensable to judicial action. Equally serious is the danger that the agency will be forced to divide its duties among its members, with the possibility of creating the confusion which comes from the right hand's ignorance of the left hand's behavior. Finally there is the very real fact that human beings have limited capacities, and dissipation of their energies is a fatal blow at the quality of their labor.

I have referred to tendencies, and I want to be understood as meaning nothing more. I do not join those who protest that our governmental agencies have broken down or have been transformed into instruments of tyranny. I mean only that we have reached a point where dangers lurk if we continue blindly to bestow variant powers upon administrative bodies. I mean only that the warning signs are out and our democracy will do well to heed them.

There is an additional factor which complicates the problem of government through administrative bodies and which makes it of particular importance that we take stock of our governmental methods.

Hitherto, when we have approached questions of governmental regulation, we have thought largely in terms of protecting the public from abuse of economic power in private hands. Until very recent years we have thought of government almost altogether as a policeman, whose duty was done when it had swung its club upon the skulls of malefactors.

For example, the Interstate Commerce Act of 1887 was conceived in the belief that the power of the railroads required bridling in order to safeguard the interests of shippers. The need for government to take a hand in conserving and planning the development of our railroad resources found no clear expression in legislation until 1920, and then only modestly.

It is true that in certain restricted channels—such as lighthouse building and road building and the provision of a postal sys-

tem—government has gone beyond the policeman's role to an important extent. But generally speaking government's relation to industry has been regarded as that of the policeman on the beat.

That government should accept as a portion of its regular responsibility the function of assisting industry, and even assuming leadership, in the solution of industry's economic problems, would have seemed preposterous a few years ago. Thus when we created a Department of Commerce we felt that government had done its part when it was provided that the Department should

". . . foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities of the United States . . . ."[1]

However, we are now aware that such a broad statement does not come to grips with the economic ills besetting many of our industries today. It is necessary for government to deal more specifically with economic diseases, the symptoms of which are idle plants rather than exploitation of the public.

To some extent government has already begun to respond to this need. The NIRA and the Bituminous Coal Act have given us examples of this response. But, particularly in the NIRA, the emphasis was largely upon the so-called chisler or cut-throat. This is important, but even with no chiselling there would still be basic and challenging problems which call for the cooperation and aid of the government.

To illustrate, I quote from the recent report to the President, submitted by the Chairman of the Interstate Commerce Commission, upon the critical condition of the railroads:

"In recent years there has been a great and radical change in transportation conditions, brought about principally by the rapid development of new forms of transportation, not all of which are subject to the (Interstate Commerce) Commission's jurisdiction. The railroads have lost much of their former dominance. Competition has become a continually increasing, and often a profoundly disturbing, factor. The present 'transportation problem' is very largely the product of that competition, combined with depression. It has created need for readjustments between and within the different branches of the transportation industry, for consideration of present tendencies and their probable results, for the avoidance of uneconomic and wasteful practices, for the survey and possible amendment of govermental policies, and in general for the determination, creation, and protection of the conditions most favorable to the development of a transportation system which will best serve the public interest. Much of this is planning and promotional work, as distinguished from regulation.

1. 32 Stat. 826; 5 U. S. C. §596.

"In view of the multitude of conflicting interests among those engaged in transportation, we believe that it is necessary for the Government to take the lead in this planning and promotional work. Probably the need has long existed, but it has been vastly intensified by the recent great change in conditions."[2]

The transportation problem is not the only one upon which government will probably advance in our lifetime with a new set of tools and with purposes differing vitally from those which have motivated the more traditional type of regulation. If, when government assumes these new functions, it simply vests new powers in the administrative agency as we have known it, our governmental machinery will approach a breakdown. As I have said, there is already a tendency to bestow all sorts of varied functions upon the administrative agency which impair its efficiency as a judicial body, a tendency which even now calls for reappraisal of our machinery of government. If we further complicate the situation by plunging administrative bodies, as presently organized, into a new realm of planning and promotion we will have taken a fatal step.

The report to the President to which I have just referred had this to say of the ability of the Interstate Commerce Commission to handle the new governmental activity which was recommended:

"The Commission, however, is not suited to the purpose. It was constituted for an essentially different purpose. Its methods and organization were designed for regulatory work requiring quasi-judicial procedure. We believe that planning and promotion are separate and distinct from regulation, can be separately pursued without interference, and require unlike procedures and methods."[2]

To sum up, there is a problem developing respecting administrative machinery which has three aspects:

1. There is a tendency unduly to blend the function of judge and prosecutor.

2. There is a tendency to weigh down the members of administrative commissions with varied duties of an executive nature.

3. We are on the threshold of a new departure in governmental activity which the traditional judicial type of administrative body is not suited to handle.

The importance of meeting this problem is manifest. Chief Justice Hughes recently commented upon the function of the regulatory commission, stating that the spirit which should animate its action

2. House Doc. No. 583, 75th Cong. 1st Sess. at p. 34.

"must be the spirit of the just judge,"
and that it will succeed only to the extent that it performs its work
"with the recognized responsibility which attaches to judges and with the impartiality and independence which is associated with the judicial office."[3]

For the judicial—or, more properly, the quasi-judicial—officers of administrative agencies to be able to discharge their functions in this spirit, they must be able to act as judges and should not be compelled to become likewise the prosecuting attorney, the chief of police, the supreme economic council, and the governmental jack-of-all-trades.

At the outset I said that the significance of the Civil Aeronautics Act was not confined to aeronautics. The reason is that in that Act Congress has explicitly recognized, almost for the first time, and has sought to deal with, in a preliminary way, these problems of administrative government.

In adopting legislation for civil aeronautics, Congress faced a situation almost without parallel.

In the *first* place, the industry embraces not only commercial carriers but almost all other civil fliers. In the *second* place, the industry covers not only domestic commerce but also commerce with foreign countries in aircraft under both our flag and the flags of other nations. In the *third* place, the problems of the industry involve matters both of economics and of safety, intimately interrelated and of equal importance. In the *fourth* place, the industry, despite its present relatively modest size, is of peculiar significance to basic national interests in both our peace-time and war-time life. *Finally,* and this is of first importance, the need for legislation springs not at all from a need to protect the public from exploitation but rather from the need to assure to the industry itself opportunity for vigorous growth. The familiar reasons for regulation of other industries in the past, notably the need to assure that the public be protected from exorbitant rates and discriminatory practices, would not in this case have prompted a solitary vote in Congress.

The task of Congress in framing the Civil Aeronautics Act was, then, to deal with a subject matter the scope and variety of which cannot be matched in the case of any other industry, with ends in view altogether different from the ends with which regulation has normally been concerned. Obviously, Congress would have invited trouble had it simply provided for an independent com-

3. Address before American Law Institute, May 12, 1938, as reported in N. Y. Times of May 13, 1938.

mission, equipped with a number of powers to deal with the civil aeronautics industry. Planning, prompting, regulating, experimenting, studying, policing—a cluster of powers to secure the accomplishment of all that was necessary would have presented a new record of confusion.

Happily Congress took steps to avoid this impasse.

The steps are *four* in number.

(1) The *first* will be disclosed in sections 201 (b) and 301 to 307 of the Act. These sections provide that in addition to an independent Authority there shall be an Administrator responsible directly to the President, whose duty it will be to undertake the promoting of civil aeronautics, to provide for the establishment and maintenance of airways and landing fields whereby air commerce can operate, and to engage in development work. These duties are not suited either to judicial officers or to a board, but should properly be discharged by one man in a position to work closely and without embarrassment with other executive agencies. The particular allocation of functions to the Administrator may or may not be sufficiently exhaustive, but the recognition by Congress that these matters of an executive nature ought to be handled by an executive officer is a far-reaching and important precedent.

(2) The *second* step taken by Congress is disclosed in section 308 of the Act. This section provides that the Authority may assign to the Administrator powers and duties other than those specifically vested in him by the Act. In the statement of the House Managers on the Conference Report it was said that under this section the Authority could assign to the Administrator "the executive duties which are incidental to the exercise of the quasi-legislative and quasi-judicial powers" conferred upon the Authority.[4] The Authority will thus be able to make use of the Administrator so as to relieve its members of much administrative detail, and to promote coordination in the extraordinary varied work of the agency. Likewise it may be that through appropriate use of the Administrator the Authority will be able to avoid the undue union of judge and prosecutor. The opportunity offered by this device is as happy as it is unusual, and it may well be that through its wise use the Authority will be able once and for all to answer the polemics that have so frequently been directed at our administrative machinery.

(3) The *third* step taken by Congress is to provide, in Title

4. House Rep. No. 2635, 75th Cong. 3d Sess., at p. 67.

VII, for a Safety Board charged with the duty of investigating accidents and making recommendations for improved safety measures. Through this Board the Authority will be able to secure criticism of its own work in a forthright manner which would be otherwise impossible. At the same time the Authority will be free of the responsibility—which should not belong to it—of investigating accidents and engaging in the studies incidental to the Safety Board's work. The Board, on the other hand, is not permitted under the law to exercise any of the regulatory or promotional functions so that it will not be placed in the untenable position of passing judgment upon its own work. It will stand apart, to examine coldly and dispassionately, without embarrassment, fear or favor, the *results* of the work of *other people*. In the Safety Board the Congress has established a truly academic agency, but it is academic with an intensely practical purpose: to discover what is wrong, and to suggest how the Authority and the Administrator can right wrongs. Thus Congress has recognized the virtue of providing a regularly established medium for self-criticism in government and has at the same time avoided the danger of imposing upon an administrative body essentially contradictory functions.

(4) *Finally,* by Sections 412 and 414 of the Act, Congress has established the means for simplifying the Authority's task both in the immediate and distant future. In these sections it is provided that when agreements between carriers are approved by the Authority the execution of those agreements will be free of the anti-trust laws. By this conditional exemption from the anti-trust laws the industry is given a chance to govern itself, to eliminate abuses, to conserve its resources, and to forestall the necessity of further governmental regulation. The Authority, on its part, is to see that no oppressive or unreasonably discriminatory agreements are permitted. If the industry and the Authority make wise use of the privileges thus bestowed by Congress, we may have found a way to escape the growing danger of bureaucracy which each year threatens more seriously the success of our administrative machinery.

These features of the new Civil Aeronautics Act help to explain the unusual fact that the industry welcomed adoption of the legislation. The industry saw in the Act promise of the advantages of sane and orderly democratic government with the opportunity of avoiding many of the dangers which hitherto have been thought inevitable incidents of so-called governmental interference. With a clear indication by Congress that it expects of the new

agency a fresh approach to the difficult problem of administration which I have tried to describe, the industry feels that it is justified in anticipating with some confidence a regime of efficiency, dispatch and impartiality which will prove a model.

The importance to the industry that its hopes be realized is obvious enough. In aeronautics expenses are enormous, and they must always be so because of the necessity for taking every possible measure to assure safety. If to the cost of day-to-day business there were to be added the incalculable expense caused by governmental red tape and delays and hasty judgments, the industry would face a dark future. If it were to prove necessary for every carrier to have constantly on hand lawyers and representatives to dog the footsteps of the Authority in order to see that things are done, if it were to prove necessary to spend hours of time in filling out forms and in seeking permits and approvals and authorizations, if it were to prove necessary constantly to revise practices and methods and to re-educate personnel in order to conform to multiplying regulations, then indeed this industry would have misplaced its confidence. But there is no reason to believe that any such fate is in store for us. For Congress has provided ample means for securing an administrative machinery which will rival the vaunted efficiency of private business.

In thus declaring my faith that democratic government can and will operate well and efficiently, I do not mean to leave the impression that I expect government to perform industry's own job. "Public regulation," the Interstate Commerce Commission recently said, "is necessarily an interference with management, but it is not management . . ."[5] A thorough appreciation of the implications of that statement is the only guarantee we have of maintaining a system of free enterprise.

My lawyer friends tell me that when a court passes upon the validity of the regulations or orders of an administrative body it ordinarily asks this question: Did that body have any reasonable basis for taking the action? In other words, the court does not substitute its judgment for that of the administrative body. It will interfere only if there is no possible justification for the administrative action, no matter what might be the court's own views of what it would have done had it been taking the action in the first instance.

An administrative body bears a relation to private management which, in a very real sense, is similar to the relation between

5. 51st Annual Report of the Interstate Commerce Commission, at p. 9.

a court and the administrative body. It is an administrative court, passing upon the validity of the decisions made by management in attempting to comply with the statutory duties laid down by Congress. And it should not penalize management, or interfere with its decisions, unless it finds that the decisions which management has made cannot be upheld by any reasonable view of the facts—even though hindsight may disclose those decisions to have been unwise and even though the administrative body may feel that it would have acted differently had it been standing in management's place.

In short, just as a healthy self-restraint must be exercised by courts in passing upon the validity of administrative law is to work at all, so administrative bodies must exercise self-restraint in passing upon the propriety of the conduct of management if our system of free enterprise and individual initiative is to be preserved. "Public regulation . . . is not management . ' " Upon diligent adherence to this principle rests hope of working out the problems of industry in a day when governmental participation in the affairs of business is necessarily increasing.

Therefore when I say that we may anticipate a new era of governmental activity and leadership, marked not only by regulation but also by a greater degree of planning and promotional work, and that the pressing problem of our democracy is to provide administrative machinery which will operate fairly and efficiently in a business-like way, I do not mean that I expect our democratic state to do the work of industry. There remains for industry, so long as our system endures, its own task to be done by it and it alone—and the prerogative of performing that job should be as jealously guarded as the Bill of Rights.

Through the administrative agency government provides the medium for a partnership with industry in the one enterprise which commands the unswerving devotion of all of us—the public service. Each partner has his own appointed function. In the Civil Aeronautics Act the Congress has made a new effort to facilitate the operation of that partnership by making it possible for government to keep abreast of the new duties and burdens of the modern era with a more efficient machinery. The Civil Aeronautics Authority, we may be sure, will put that machinery into operation in the spirit which motivated Congress. We may be equally sure that the other partner, the civil aeronautics industry, will rise to the occasion. In the successful administration of this Act, and in the growth and development of this industry, we shall not fail.