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THE ANOMALY OF THE CIVIL AERONAUTICS BOARD IN AMERICAN GOVERNMENT

By Harold A. Jones

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The Civil Aeronautics Board is a recently created anomaly in our American social and political system. Our whole American social and political philosophy, and our social and political institutions, have been posited largely on the fear of a too strong state, and a belief in a maximum of personal freedom for the individual American. The requisite for this maximum personal freedom, as Robin Williams points out, is a political structure based on: (1) The dispersion (separation) of the power of Government; and (2) The limitation of both public and private power.

The purpose of this article is to present this problem, to propose an approach to its solution, and to ask a few questions. No attempt is made to offer a solution.

The anomaly is that, pressed by the expediency of wartime, depression emergencies, and the almost unbelievable expansion of Government, we have, during the past 30 years, created so-called independent Government commissions which unite in one Government agency the three powers of government — legislative, executive and judicial, with little limitation of public power, but almost complete limitation of private power within the scope of the particular commissions' activities and contrary to our long established basic political and institutional philosophy and practice. This is the nub of the problem. It is not a problem of the reorganization of the executive, or any other Governmental department. It is a problem particularly within the realm of social science and the more narrow field of political science. It is a bedrock problem.

There Is Something Wrong With the Independent Regulatory Commission

It must be granted that the independent regulatory commission has become an important part of the machinery of government. As Justice Jackson said, in his opinion in Wong Yang Sung v. McGrath:

1 American Society, Robin M. Williams, Jr. (Knopf, 1951).
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"Multiplication of Federal Administrative Agencies, and expansion of their functions to include adjudications which have serious impact upon private rights has been one of the dramatic developments of the past half century."

Admittedly, also, there is something wrong with the independent regulatory commissions. In the past ten years more than a dozen committees or boards, appointed either by Congress or by the Executive, have turned critical eyes upon the performances of these commissions, and have found that none of them were functioning in the manner wholly expected or intended. Some thirty bills were introduced in Congress between 1933 and 1946 intended to reform Administrative Procedure and Practice alone.

Government reorganization plans, principally relating to the 100 major Federal agencies exercising delegated powers, but including the independent regulatory commissions, have been presented by each Administration for the past 25 years, culminating in the "Hoover Report" of 1949.

The very volume of these studies, reports, and the proposed legislation resulting from them, indicates the pressing importance of the problem and that something must be done about it.

THE CIVIL AERONAUTICS BOARD—A GUINEA PIG

Obviously, the nine listed independent regulatory commissions cannot be examined in one short article. The Civil Aeronautics Board is chosen because: (a) It is the youngest of the commissions; (b) The Act creating it was supposed to be the ultimate in such legislation, giving greatly more power and wider discretion than ever before given to a regulatory agency; and great expectations were held for this "new deal" in regulatory commissions.


For excellent chronological chart, see Federal Administrative Law, Laverty (West Publishing Co.—1952), page 4.

See note 4, supra; see also Federal Administrative Law, Laverty (West Publishing Co.), pp. 373-382.


"Patterned in some respects as to Administrative setup on the provisions of the ill-fated (Brownlow) Reorganization Plan, drafted by the draftsman of the Brownlow Committee which formulated that Plan, the Act is expected to be the 'guinea pig' in an effort to work out a scheme whereby the President, in spite of the Humphrey's decision, can exercise control over executive functions of Administrative Agencies exercising quasi-legislative and quasi-judicial functions. "We thus have a 'New Deal' in Administrative Agencies... Just how well
This new "model" agency was supposed to comply with (or perhaps circumvent) the Supreme Court decision in the *Morgan* cases\(^9\) and the *Humphrey's* case.\(^{10}\) What is wrong with it (if there is anything wrong) should be easy to discover, since there has been little patchwork done on it in the 14 years of its existence and its record of experience is long enough to show up weaknesses. Also, it has been subjected to more investigations in the last 6 years than any other commission.

Above all, the social and political atmosphere existing at the time of the enactment of this particular Act is very important and must always be kept in mind.

Prior to the passage of the Civil Aeronautics Act and the later "new deal" regulatory legislation, regulatory commissions were not paternalistic. They were not regarded as planning adjuncts to the State, nor as agencies formed for the purpose of operating State controlled activities. The Interstate Commerce Commission, the Federal Power Commission, and the Federal Trade Commission were essentially "thou shall not" commissions. Congress created them to correct very real and existing abuses and to prevent the future happening of similar abuses harmful to the public welfare. Their duties were pretty well defined and limited by the abuses they were expected to correct. However, the later "new deal" commissions, such as the Federal Communications Commission and the Civil Aeronautics Board, were paternalistic in concept. They were supposed to operate, promote, aid, reward, and control, as well as to punish and prevent abuses — all in the name of the public welfare.

The 3 years of hearings on the Civil Aeronautics Act (1935-1938) was a period of political and social State planning. State enterprise plans took precedent over private rights and private enterprise. Industry was suspect. It should be recalled that the battle cry of the "new deal" administration in the 1938 elections was — "we planned it that way!"

**CERTAIN PRINCIPLES OF AMERICAN GOVERNMENT**

No extended examination of our American society, its political institutions and Government, shall be attempted here. For a common understanding of the discussion to come, however, it will be necessary to set forth certain principles which have been established for a long time and accepted by the American people.

Government, like everything else in life, is an evolutionary process. Principles of government are evolved by trial and error. Hundreds of

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\(^{10}\) *Humphrey's* *Exec.* vs. *U.S.* 295 *U.S.* 602 (1935).
principles, devices, and institutions are tried out by a society over a period of, say, fifty, one hundred, two hundred, or a thousand years. Those that really work out over a long period of time survive and are accepted as basic principles — until something else comes along which works better. No society or nation is going to voluntarily abandon a working principle for some untried theory. Certainly, the new theory, in times of economic stress, war emergency, or other human crisis, will be given a try; but if it doesn’t work a lot better, it will be discarded when the crisis is over.

The tried principle and untried variation go along side by side until one or the other proves to be the fitter by popular conviction.  

The principles of American Government hereinafter set forth have survived and worked very well during our brief national life. They may not be perfect, but until some other principle or device comes along which works better over a sufficient period of time, I believe we will hold on to them.

Separation of Powers

The dispersal and separation of the power of government into three branches — the legislative, executive and judicial, is not a new device. It is as old as society itself, but probably more emphasis has been placed on this principle (or device) by our American society than by any other modern society. This is probably due to the fact that we Americans have had greater fear of a powerful central government and greater appreciation of individual freedom — and the corollary, i.e., the least dependency on a powerful state, and the greater opportunity to achieve individual freedom.

There is no such thing as an absolute principle of society or of government. Not even the “right to life.” A drafted man in Korea has no right to life. The principle of the separation of powers is no exception. The Constitution made no attempt to establish a complete separation of powers. In fact it set up a system of checks and balances contradicting the absolute right of either of the three departments to solely and exclusively exercise the powers allocated to it.

Examples are the Chief Executive’s veto power; his power to introduce legislation and to hand out patronage, etc.

The legislative branch checks the executive powers of the President by its appropriation power, approval of Presidential appointments and treaties, etc. The judiciary check both other branches. It may withhold approval of legislation departing from the Constitution or traditional principles, or the acts of a President (such as the recent steel plant seizure order) which are capricious and arbitrary.

However, this system of checks and balances does not change the fact that, until very recently, the legislative, executive, and judicial

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powers were separate, and performed separately—except within well-defined limits. The principle has had the strong backing of public conviction. I believe it still has wholehearted popular support. Witness, for example, the Steel Plant Seizure order, and likewise the attempt to pack the Supreme Court by President Franklin D. Roosevelt in order to carry out certain "new deal" planned programs.

This is a good place to bring out the effect of wars and internal economic crises on the evolutionary process. The basic motives which compel men to form a society in the first place are to keep alive, to propagate, and to better life conditions. Spencer called these basic motives the permanancies of any society. Take away any one and there is no society. But the individual members of society are willing to modify for the time being their most cherished beliefs under certain conditions. Patrick Henry's cry of "Give me liberty or give me death" is good oratory; but, faced with the choice, an overwhelming majority of Americans are willing to give up temporarily a pretty large part of their cherished liberty.

The thing to which they surrender some part of their liberty, or freedom, is the State or Central Government—the thing American society has most feared. However, when a Hitler threatens, or economic disaster seems to threaten, the public reluctantly submits to plans which take powers away from the legislative branch and the judicial branch, and lodge them with the executive branch. During these periods we have war powers and emergency powers. "War Production Boards," and "Blue Eagles," new deals, and fair deals.

When the crisis is over the American people revalue these emergency programs against the background of their fundamental philosophy—the fear of statism, and their belief in the maximal freedom of the individual. And it is this process which is going on now. And it is against this background that we are examining the powers and functions granted to the Civil Aeronautics Board and other so-called independent regulatory commissions, because most of them came into being during these past twenty years marked by economic crisis, World War, and the unprecedented growth of a central government to cope with the situation.

This growth of the central Government, and the concomitant mushrooming of administrative agencies within the departments of the executive branch and the creation of so-called independent commissions exercising executive, legislative, and judicial powers, does not mean that American society has abandoned its fear of big government or its belief in the separation of powers. It merely signifies that the evolutionary process has not caught up with the crisis born expansion of the executive branch of Government. The American people still fear a too powerful state, and still believe in a maximal freedom for the individual. They still hold that: (1) The division, separation, and dispersal of power between the Executive, Congress, and the Judiciary;
and (2) The limitation of both public and private power, it requisite to an American system of government.\textsuperscript{12}

\textit{Limited Power of Congress to Delegate Legislative Authority}

The power of Congress to delegate legislative authority to independent commissions or the executive branch of the Government is limited. The limit, I think, was well stated by Chief Justice Marshall long ago. “A general provision may be made,” said Marshall, referring to legislation enacted by Congress, “and power given to those who are to act under such general provisions to \textit{fill up the details}.”\textsuperscript{13} (Emphasis added.

Congress may not, in other words, avoid or shirk its duty and responsibility to decide what is in the public interest by delegating that power to the executive branch or an independent commission.

This principle of American Government is, of course, closely akin, or part of, the principle of the separation of powers. It grows out of the same fears and hopes. It is found in the belief of the people that Congress is more of the people, closer to the people, and better fitted to decide what is in the public interest than the Executive, or a commission appointed by the Executive.

The difficulty arises, of course, when these questions are asked: What is a “general provision” of legislation? What is a legislative detail?

At one end of the scale there is a broad zone which clearly is not a “detail” zone. On the other end of the scale is another zone which clearly is a “detail” zone. In between there is a rather narrow, hazy, overlapping zone where these questions may arise.

\textit{Reasonable Predictability of Commissions Actions}

A third working principle of American Government is that the law delegating powers to a department of Government or commission should be of such nature that those who are to act under it may, or must, apply known principles and reasoning so that there will be reasonable predictability as to the outcome.

The background of this principle is the Common Law, and the rule of \textit{stare decisis}.

“I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of \textit{stare decisis}. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of \textit{ex post facto judicial law making}. Moderation in change is all that

\textsuperscript{12} American Society, \textit{supra}, pp. 262-264.
\textsuperscript{13} \textit{Wayman vs. Southard} (1828) 10 Wheat. 1; 6 L. Ed. 253.
makes judicial participation in the evolution of the law tolerable. Either judges must be fettered to mere application of a legislative code with a minimum of discretion, as in continental systems, or they must formulate and adhere to some voluntary principles that will impart stability and predictability to judicial discretion.

"The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it. When that thoroughness and conviction are lacking, a new case, presenting a different aspect or throwing a new light, results in overruling or in some other escape from it, that is equally unsettling to the law."1

It cannot be argued that the rule of stare decisis be absolute. In fact in administrative law it must be reasonably adaptable or the rule will defeat the purpose. But a provision in an Act which a quasi-judicial board or quasi-legislative board is called upon to interpret must be subject to disposal by the application of some known principles and previously disclosed courses of reasoning, or we sacrifice to administrative expedience our judicial or legislative process and submit to "the most intolerable kind of ex post facto judicial law making."

The doctrine of stare decisis and predictability is not confined to the judicial process. The members of the American society also expect the legislative branch and the executive branch to do justice, and to follow known principles. The methods and philosophy may differ, but unless these principles are followed by Congress, or by the Executive, the electorate will see that a new set of Congressmen or a new President will be elected to carry out the principles established by public conviction.

The above applies equally to an independent regulatory commission, especially one dealing with private rights. If by trial and error over a period of time it appears that an agency is incapable of the application of known principles backed by public conviction in the disposal of a matter before it — either judicial, legislative, or executive, then the public will either abolish the agency or see that Congress enacts a law correcting the situation. The members of American society must have reasonable predictability from its Government. It will not long stand for ex post facto law making by an agency of Government, be it a department or a commission.

**Independent Commissions Must Be Free From Pressures**

A fourth principle is that in order to function properly an independent commission must not be subjected to pressures by any of the three branches of Government or by any private persons or group.

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ANOMALY OF CAB IN U. S. GOVERNMENT

THE CIVIL AERONAUTICS ACT AND THE FUNCTIONS OF THE BOARD RUN CONTRARY TO THE FOUR DESCRIBED PRINCIPLES OF GOVERNMENT

The Civil Aeronautics Board (and the Civil Aeronautics Act) must be tested for fitness against the background of the four guiding principles before set forth. It may be that the complexity of modern American society and its Government, have made some, or all, of these principles obsolete. Perhaps some, or all, need modification. But until this is proven by actual experience, we would be foolish to abandon them.

The questions to be asked, therefore, would seem to be: (1) Does the Civil Aeronautics Act, and the functions of the Board under it, run contrary to any or all of these principles? and (2) If so, how has the experiment worked out?\(^{15}\)

Separation of Powers

The Civil Aeronautics Act purposely scrambled or combined broad executive, legislative, and judicial powers in an Act to be exercised by one “authority.”

Applying the test: How has this experiment worked out, I find that it has not worked out very well. In every route case the Board wears three hats — the promoter (representing the executive branch of the Government), the regulatory (representing the legislative branch), and the judge of a controversy often involving important property rights and private interest (representing the judiciary).

It is improbable that two of these functions could be combined in one proceeding and substantial justice be done. It is well nigh impossible that all three can be successfully combined in the same proceeding and substantial justice be done to all parties concerned.

We also have (since part of the promotional powers were taken away from the Board and given to the Department of Commerce in 1940) the exceedingly contradictory and anomalous situation of the Department of Commerce developing a route pattern through its power to finance and lay out airways, airports, and facilities, and to furnish them free of user charges; and a so-called independent regulatory commission also planning an air route system and an air transport system and bringing such plans into being by the devices of certificates of public convenience and necessity and subsidy in the form of air mail pay.\(^{16}\)

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\(^{15}\) The Civil Aeronautics Act and the Board were a “New Deal” experiment—a guinea pig. See note 8, supra. See also “The Effect of Political Interest Groups on C.A.B. Policies” by Basil J. F. Mott, Jr., 19 J. Air L. 379.

\(^{16}\) “In addition to the failure to relate the various promotional activities of the federal transportation agencies, there are other defects which stand in the way of a rational program of transport development. Among these is the fact that many highly important administrative and planning functions which properly belong in the executive branch of the government have come to be confused with regulatory functions and included among the responsibilities of the independent commissions. . . . To illustrate, the Civil Aeronautics Administration
The Hoover Commission had something to say on this scrambling of the three major powers of Government. "Purely executive duties," the report stated (Book 2, p. 7), "have been imposed on the commissions with the result that these duties have sometimes been performed badly. The necessity for performing them has interfered with the performance of the strictly regulatory functions of the commission."

Promotional functions, the Hoover Commission held, being executive functions, should be the responsibility of the executive branch, saying (separate pamphlet—Department of Commerce, pp. 23-24) "Hitherto, route patterns have been determined haphazardly upon a case-by-case basis by regulatory commissions. Routes should be planned with careful consideration for the total transportation needs of the country and the areas to be served, and for the services already available by all means of transportation. Aviation route planning particularly is a highly important promotional tool. Air route planning should be coordinated with airway and airport development programs.

"A regulatory body which operates on a case-by-case basis is inherently unable to engage in the long-range research and planning which air-route planning requires."

It would seem that the old and tried principle of the separation of powers is sound on a pragmatic basis as well as a basic principle of American Governmental philosophy.

**Limited Power of Congress to Delegate Legislative Authority**

Section II of the Civil Aeronautics Act has been interpreted by the Board and the courts to be a delegation of power to carry out the broad objectives there stated.17

I do not believe Congress may state a broad national policy found by it to be in the national interest, and then delegate to a Presidentially appointed five man commission the duty and responsibility of enacting legislation (in the form of regulations, grants of subsidy, or certificates of public convenience and necessity) to carry out such a policy. I con-

 attempts in its airway and airport programs to plan an air transportation system which will meet the objectives laid down by Congress. But obviously a system of air transportation does not consist merely of the basic physical plant; it includes in addition the services provided by equipment operating over these facilities. Determination of the routes over which public carriers shall operate, and the nature of these operations, however, is under jurisdiction of the Civil Aeronautics Board. We thus have the anomalous situation of one federal agency determining the route pattern for air carriers and another planning the federal program to bring the routes into being."

"Confusion of the proper functions of the executive branch of the government and the proper role of the independent commissions has likewise been seen in the untenable division of authority for aviation safety, and in the promotional objectives of air mail payments which are entrusted to the C.A.B. This confusion between planning, promotion and administrative responsibilities on the one hand, and the regulatory activities of the independent commission on the other, not only deprives the executive departments of effectively exercising their responsibilities, but imposes burdens and distractions which interfere with the effective conduct of the regulatory function."—National Transportation Policy—Brookings Institution (1949), pp. 134-136.

sider such a case to be clearly an abrogation of duty and responsibility and not a Constitutional delegation of power.

I do not believe Congress may state to a commission: "It is in the national interest and public welfare to promote an air transportation system adequate to the needs of commerce, the Postal Service, and the national defense— you go ahead and fill in the details."

The Civil Aeronautics Board, under the Act as interpreted by the courts, now has the power to virtually nationalize the air transport system. If Congress intended this result, certainly the American public did not.

For example, in the *Air Freight Case* the Board in effect held that the Civil Aeronautics Act delegated to it the duty and responsibility of "promoting" an air transport system adequate to meet the present and future needs of the commerce of the United States, of the Postal Service, and of the national defense (all national interest objectives); that granting certificates of public convenience and necessity was an act of promotion; and that the decision could be predicated, in part at least, upon its "vision of the shape of things to come"—all in the public interest.

This decision was not the "filling up the details" under a general provision of law. It was legislation *de novo* under a declared objective of national policy—a duty and responsibility which I do not believe Congress can escape or delegate, and certainly not one which a five man board, appointed by the President for six years terms, and not experienced in legislation, can properly perform. It may be that Government and industry have grown so complex that our fundamental principles must be disregarded, and it has become necessary for Congress to turn over to some agency appointed by the President a broad national objective and say, in effect: "Promote for the Nation an adequate communication system—you make the laws." Even so, I do not believe a five man, President appointed, commission is the proper agency.

Aside from the legal point, we must still ask the questions: Does such a delegation, which is contrary to our second principle of good government, work? Has the Board been able to "fill up the details?"

The answers are quite generally, no.

Two or three examples should demonstrate this point. The Board was given the broad duty of planning and promoting an air transportation system sufficient for the needs (present and future) of commerce, the Postal Service, and the national defense. It has not done so to anyone's satisfaction.19

It has been unable to determine criteria which will enable it to "fill in" what charges to the public (rates) or need mail pay to the air

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19 "Too engrossed in case-by-case activities and thus fails to plan its role and to promote the enterprise entrusted to its case." Report of Hoover Commission; see, also, Report of President's Air Policy Commission, 1948; National Transportation Policy, supra, p. 134.
lines (subsidy) shall be paid to promote such a system and to provide these services at reasonable cost.\footnote{20}

But the most striking example of its inability to “fill in” details appears in its duty to provide competition \textit{to the extent necessary}. Over the fourteen years of the Act’s life, successive Boards (for the membership turnover has been such that there have been several Boards, in fact) and the members have reacted like the “blind men and the Elephant” in the old verse.\footnote{21} The phrase is so broad in the context of the Act that it has meant all things to all members, and no majority could agree from route case to route case, just what application it should have.

Consequently, the Board (or various combinations of members) have boxed the compass a dozen times on the point—from “competition for competition spare” to competition only when substantial evidence proves that the carrier or carriers serving a route are not providing service adequate to the economics of the case.\footnote{22}

The failure of Congress to limit its delegation of powers under the Act to legal, reasonable, and workable limits seems to be indicated by past experience.

\textit{Reasonable Predictability of Commission’s Actions}

Repetitious as it may be, I must again state that the structure of American society pretty much rests on a \textit{fear} of a too strong central Government, and a \textit{belief} in the maximum of freedom for the individual.

“Requisites for maximal freedom are: (1) Dispersion of power; and (2) Limitation of both public and private power by rules that take their departure from a high evaluation of individual personality and consent.”\footnote{23}

The consent of the people to the lodgment of power in any branch, department, or commission is subject to various limitations. One of the chief ones (which is the foundation of our common law) is that such agencies of Government must exercise their powers with a reasonable degree of predictability. Those who are to act under powers entrusted to them by consent must apply known and accepted principles and reasoning to matters submitted to them for disposal.

If a contract be broken there are certain known principles and reasoning which the courts will apply. Private enterprise and private

\footnote{20} For an excellent comment on this point, see National Transportation Policy, \textit{supra}, at pp. 215, 217.
\footnote{21} “It was six men of Indostan
To learning much inclined
Who went to see the elephant
(Though all of them were blind)
That each from observation
Might satisfy his mind.” Stanza I.
\footnote{23} American Society, Robins, pp. 263, 264.
property rights cannot exist otherwise. Known principles and reasoning must be applied in cases of theft, fraud, or unlawful seizure of property. The situation would be intolerable if this were not the case.

The acts of the Civil Aeronautics Board are no exception. Matters are submitted to it for decision which involve very important private rights, including valuable property rights. In submitting these matters, individual Americans (persons or corporations) are entitled to demand that known principles or standards and previously disclosed courses of reasoning will be applied by the Board in making its decision.

We now come to the question: Has the Civil Aeronautics Board developed known principles or standards? Has its applied courses of reasoning with any degree of consistency?

The answers to both questions seem to be negative. And this failure to develop standards, principles, and courses of reasoning is apparent in its decisions.

The examples given in the previous subsections are applicable here: (1) The case-by-case approach in route cases marked by inconsistency in approach and inconsistence in the application of standards; (2) The inability to adopt principles or standards relative to such matters as "necessary competition"; (3) The inability to determine criteria for determining rates and subsidy.

The objective of a sound, stable air transportation system cannot be attained unless the commission entrusted with its regulation and development is itself sound and stable. Unless private enterprise entrusted with organizing, financing, managing, and operating the system can predict with a reasonable degree of certainty what the commission will do with regard to private enterprise and property interests under given conditions, it cannot organize, finance, or operate properly.

Independent Commissions Must Be Free From Pressures

The principle hardly needs stating as applied to the Civil Aeronautics Board. It has been entrusted with matters of vast importance to the commerce, Postal Service, and national defense. It has also been entrusted with matters of vast importance to private enterprise and private rights.

Balancing national interest and the private rights of individuals is difficult at the best. For example, the Board is presented with this prob-

24 "It still appears that many of the Commissions have not gone as far as is feasible or desirable in laying down standards or in adhering to their announced standards. In granting new route cases, for instance, the Civil Aeronautics Board provides very little help in understanding its governing principles; its opinions suggest that the Board has failed to face squarely the need for an underlying program." (emphasis added) Hoover Commission Task Force Report (separate pamphlet) on Regulatory Commissions, p. 5.

"The investigative staff was advised by one carrier that it had been admonished by the Accounting and Rates Division for over-scheduling on one segment of its route—and yet had been ordered, by another Bureau of the Board, to show cause why a competing carrier should not be certificated to service the same segment because existing service was inadequate." Hearings before Subcommittee of Committee on Appropriations, 81st Congress, Second Sess., p. 1835.
lem: Carriers A, B, and C have been certificated to operate a route between East Coast City and West Coast City. They have spent millions of dollars to organize, finance, and operate their respective business on this route. They are providing adequate, excellent service on the route and are doing a profitable business without Government assistance.

The claim is made that other carriers should be permitted to operate the same route in order to build up a larger reservoir of planes and men in the interest of possible future use in the national defense; that these additional carriers would "promote" the kind of system envisaged by the Act; and that competition is needed. These additional carriers would divert sufficient revenues so that the profitable businesses built up by A, B, and C would become unprofitable. The act of the Board in granting certificates to additional carriers for the same route would, in effect, destroy the property rights of A, B, and C.

The preservation and protection of these property rights is pretty important to A, B, and C and the air industry. People are not going to invest their money unless they have some assurance of some protection. But it is of much wider significance to our American social structure based, as it is, on a fear of strong government and a belief in the maximum of individual freedom, than it is to the individuals affected.

The possibility of impairing or weakening this underpinning of our American society is very important to the national interest, too. There should be very convincing proof that the granting of these new certificates is of the utmost necessity to our national defense and general public welfare before the investment and property rights of the individual be confiscated or destroyed by the state.

The commission called upon to balance these two matters in the national interest has a very difficult job. It must ask itself: Which is more important to America: (1) The adding of twenty more reserve planes and five hundred more reserve air men to our national defense; and/or the promotion of an air system we think adequate; and/or needed competition; or (2) Safeguarding the property rights of persons and the preservation of private enterprise?

If at this point pressure groups step in and are permitted to exert pressure on the court (Board), there must be something very wrong.

We are now ready for the next question. Is the Civil Aeronautics Board subject to pressure in such cases? The answer, of course, is "yes."

Senators and Congressmen from every city along the route, Chambers of Commerce from every city, veterans' groups, groups organized by the interested airlines pro and con, all exert pressures on the Board and its individual members, by letter and telegram, visits, telephone calls, and intervention in the proceedings, etc.

In a strictly judicial proceeding, any judge permitting such pressures should be removed for cause; any person attempting to exert some of these pressures would probably be fined or jailed for contempt of court.

However, the very nature of the Civil Aeronautics Act and the
mixed functions of the Board in a route case, i.e., executive (promotional), legislative, and judicial, make much of this pressure not only inevitable but not improper. The various Congressmen have the right and duty to legitimately press for proper executive action. The various groups have the same privilege to "lobby" for their interest as they do before Congress or the executive departments of the Government.

In this atmosphere, of course, some improper pressures are attempted.

**The Federal Courts and the Regulatory Commissions**

No attempt will be made in this article to discuss the power of the Federal Court to do by interpretive decision what Congress did not do when it enacted the Civil Aeronautics Act. Nor will there be any extended discussion of how far the court may fix certain standards or principles (filling in the details) under the Act where the Board has not done so or seems incapable of doing so. Courts can and do legislate by interpretive decision within a limited and well defined zone, for, as we have pointed out before, the division of powers between the Executive, the Congress, and the Judiciary is not an absolute and complete division under our American system of government. But the overlapping zones are pretty well defined and limited.

This power of the Federal Courts, and the limits of the power, as applied to statutes such as the Civil Aeronautics Act, is a difficult political problem. It will be the subject of another article. We will, however, point out briefly one of the difficulties of the court in reaching proper decisions and doing justice in its every day dealing with appeals under the Civil Aeronautics Act, or similar acts.

*The Theory of Expertise*

To state the doctrine or theory of "expertise," it is first necessary to again state the philosophy of government behind the regulatory commissions. The corner stone supporting this philosophy is the conclusion by Congress that the independent commission is a necessary and useful type of agency for the regulation of industry or industrial activities under certain conditions.

This conclusion arose out of the conviction of Congress that: (1) Industry, generally, or some certain industry or activity, required Federal regulation to correct threatened or existing abuses harmful to the national welfare; (2) That while Congress could prescribe broad standards or principles designed to check, abolish, or prevent such abuses, it had not the expertness to prescribe detailed self enforcing rules in a business world, where economic conditions and industrial technology are constantly changing; (3) And even if Congress did have expertness, the solution of the varied and specific problems could only be worked out by trial and error, and continuous application and adaptation against the background of experience — a time consuming process not adapted to Congressional procedure.
The result of these conclusions was that Congress created the various commissions *each presumed to be a body of experts* in their respective fields; capable of filling in the details of the broad provisions prescribed by Congress; and developing and applying principles, and standards, and processes of reasoning to the varied and specific problems constantly arising in a rapidly changing business world.

Of course, as the Hoover Commission Task Force points out, the real experts are on the commissions' staff, but the commissioners themselves, if properly chosen, may develop a degree of expertness, or at least be able to intelligently apply the advice of their staff of experts.

The courts in turn accepted the presumption that an independent regulatory commission is in fact a body of experts advised by a staff of experts, operating in a field unfamiliar to the court, capable of interpreting and *filling in* the broad provisions of the legislation under which it acts, and capable of developing and applying standards and principles of its own within the scope of its delegated power and in the light of its accumulated background of expertness and experience in its respective field.

This presumption is the so-called rule (or doctrine) of expertise. The courts have continuously accepted and applied it, have seldom ignored or looked behind it, and have usually upheld the decisions based on the expert opinions of the commissions without examining the basis of the "expert" opinion or the qualifications of the "experts."

Obviously if the presumption in any given case is erroneous for any reason—be it because of the act under which the commission works, or because the commission and/or its staff are not in truth experts—then there is apt to be a miscarriage of justice.

It is also obvious that the court cannot do much about it if the doctrine is defeated by poor appointments to the commission and its staff. It cannot act as a board of impeachment, and the work of government must go on.

Nor can it do much about it if the act under which the commission acts is such that no group of men can be found who can fulfill the requirements of expertise. A word or two of repetition on this point. The regulatory legislation which first gave rise to the rule (or doctrine) of expertise were "thou shalt not" laws designed to correct very real existing abuses existing in certain industries or activities. "Thou shall not gouge or defraud the public," said Congress. "We hereby create an independent regulatory body with delegated powers to stop you from so doing."

True, there were some broad statements in the purpose provisions, but in view of the facts surrounding the particular industries these amounted to little more than noble declarations. Essentially, the jobs of the commissions were to correct known abuses and to prevent future abuses of substantially the same nature.

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Congress and the courts could very well accept the presumption that experts could be found to carry out these limited delegated powers and accomplish these limited purposes. But the Civil Aeronautics Act implies that a commission of five men can be found who are experts in political science, military science, the business of transportation, corporation finance, and experts in legislation and the law. This is not a logical presumption.

Let me give an example using the hypothetical route case described at page 152, supra. Restating the hypothetical case:

Carriers A, B, and C have been certified to operate a route between East Coast City and West Coast City. They have invested millions of dollars to organize, finance, and operate their respective business on this route, and are doing a profitable business without Government assistance.

The claim is made that other carriers should be permitted to operate the same route in order to build up a larger reservoir of planes and men in the interest of national defense. It is also claimed that these carriers are exercising monopoly privileges and that more competition is needed. Furthermore, that commerce and the Postal Service would benefit if additional carriers were added.

Under its own decisions the Board must answer these questions:

1. Are additional carriers needed over this route in the interest of the national defense? Now the Board obviously is not composed of military experts. The doctrine of expertise cannot apply here.

2. Are the additional carriers needed in order to satisfy the demands of the general commerce? The Board is certainly not expert in this field — certainly no more than the ordinary Federal court.

3. Are additional carriers needed to satisfy the needs of the Postal Service? The Board and staff have no expert knowledge in this field.

4. Are more carriers needed to supply necessary competition? The Board has never agreed on a standard of necessary competition and therefore cannot be said to be expert on this question.

Finally, we must arrive at the same conclusion that the Interstate Commerce Commission arrived at years ago. If the Board has any expertise in a case like this, it is merely to determine on the evidence and in the light of past experience whether or not the public need and would commercially support additional air carriers over this route.

But the Board need not decide the case on this ground alone. It may assume the role of military expert, commercial economist, political scientist, and Postal expert, and in a shot gun decision cover the field.

The Federal court, under the expertise rule, may sustain the decision on any of the four grounds unless it appears clearly and on the record that the Board acted capriciously and arbitrarily.
The Board Partially Successful

These tests do not prove that the Civil Aeronautics Act has been a complete failure, or that the Board has been unable to function under it. In fact, domestically, the Board has been moderately successful in the "thou shall not" field. It has had a restraining effect and has prevented wild and speculative expansion. It has also restrained the prevalent tendency of industry to consolidate into a few powerful groups. There is but little criticism of its exercise of its safety rule making powers. And it has protected the public from unfair or discriminatory fares.

Internationally, the Board took the leadership, under Chairman Welch Pogue, in planning a post war international air transport system, and played an important part in negotiating bilateral air transport agreements enabling our airlines to operate this system.

The Board's fact finding and fact analysis service has been of great help to the industry.

But the Act has not brought into being a sound and efficient air transport system. Someone says — "but see how well the airlines are doing and what a wonderful system we have." Memory of bad times is short. Only five years ago many of the airlines were insolvent — in fact, none were too prosperous. Only a very liberal use of Government subsidy kept the sheriff away. A moderate recession (not a depression) would probably create the same situation again. Civil air transport cannot be called a sound and efficient industry under such circumstances.

Further, I do not like to contemplate what a socialistic minded Board supported by a sympathetic President might do to the airlines in time of crisis. For reasons particular to its members, the Board has not fully used or asserted the great powers given to it under the Act, but that does not mean that they are not there and that a Board consisting of different members wouldn't or couldn't assert such powers.

A Suggested Approach

We must concede that a very convincing argument can be made supporting the claim that the "new deal" experiment in independent regulatory commissions under the Civil Aeronautics Act has not worked out very well, principally because of the reasons before set forth. Further, that something must be done about it. We now come to the "how" and the "what."

As I stated at the beginning, the problem is not one of mere reorganization or "patching up" of existing legislation. If the problem arises because basic and fundamental principles of our American social and political systems were ignored by a "New Deal" Congress and President, then we must go back to the beginning and examine the problem against the background of these beliefs and principles. This involves asking ourselves a few questions. They are:

1. Against the background of the American social structure, its basic political principles and institutions, and fundamental
fears and beliefs — what powers can be properly and safely delegated to an independent regulatory commission, such as the Civil Aeronautics Board?

2. Against the background of experience — which of these powers (the powers which can be properly delegated) can or cannot be properly applied by the ordinary independent regulatory commission, such as the Civil Aeronautics Board?

3. Of the powers which can be properly delegated and which are susceptible to proper application by a commission — which are necessary to carry out the regulation found by Congress to be needed in the national interest?

We are now in a period of revaluing the variation from older and more traditional principles and beliefs instituted by the “New Deal” and the “Fair Deal.” Some of the “New Deal” variations seem at this time to be an improvement on the old principles. However, twenty short years have proven that many of the variations do not work as well as the old principles, or that they conflict with traditional beliefs which our people trust and hold to and believe more important.

We believe that a complete and thorough examination, evaluation, and assessment should be made of the Civil Aeronautics Act experiment by a committee analogous to the Hoover Commission, and against the background of the American social structure, traditional political institutions, and fundamental fears and beliefs. It may be that this committee might decide that changing conditions justify the concentration of executive, legislative, and judicial powers in one Government agency with little or no limitations of its powers in respect to private rights and private enterprise, except the use of its powers in a capricious, arbitrary manner. And it may be that Congress will agree with it. In any event the aviation industry and all individual Americans are entitled to know this.

The Hoover Commission was not concerned with the independent regulatory commissions per se. It was concerned with the “organization of the Executive Branch of the Government.” Its examination of the regulatory commissions was incidental and collateral to this subject. While it revealed many of the things wrong with these regulatory commissions, and while it recommended certain shifts and transference of powers, it was not its responsibility to investigate the role of these agencies in American society. Its report is very valuable as a point of departure for such an investigation.