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Independent Agencies in the United States:

The Responsibility of Public Lawyers

By Marshall J. Breger
and Gary J. Edles

Independent federal agencies occupy a special constitutional position in the governmental structure. Their stock-in-trade is the expert, apolitical resolution of regulatory issues. They are supposedly “independent” of the political will of the executive branch. Because most are multi-member organizations, they are also perceived as accommodating diverse views and able to prevent extreme outcomes through the compromise inherent in the process of collegial decision-making. But such a view is not universally held. A well-known examination of such agencies in the 1930s described them uncharitably as a “headless ‘fourth branch’ of government, a haphazard deposit of irresponsible agencies and uncoordinated powers.”¹

Most modern independent agencies, in fact, are not simply impartial government referees. Nonetheless, as Justice Breyer has suggested, they possess “comparative freedom from ballot box control”² and “enjoy an independence expressly designed to insulate them, to a degree, from the ‘exercise of political oversight . . .’ that affects cabinet or cabinetlike executive agencies.”³ So, precisely what is the place of independent agencies today, and what does their role in the governmental structure mean for public lawyers?

The Advent of Federal Independent Agencies and Railroad Regulation in Britain

The modern independent agency at the federal level emerged in 1887 when Congress established the Interstate Commerce Commission (ICC). But the ICC had its forebearers. Britain examined railroad regulation as early as the 1830s, in response to shipper complaints about monopoly practices.

The British Railway Regulation Bill of 1840 attempted to delegate power over railways to a government department, the Board of Trade, but it was an ineffectual statute. It required railways to give the Board of Trade notice before opening a new line, but the board lacked power to prevent operation. The board could also entertain complaints but, significantly, lacked power to pursue them. For the next 32 years, Parliament tried unsuccessfully to regulate the railroad industry.

In 1872, yet another parliamentary committee reviewed over 30 years of British rail regulation. It once again concluded that marketplace competition was unsuccessful. As to how to remedy this situation, the committee reviewed several options. It believed that judicial enforcement of competition statutes was too expensive and that the courts, in any event, lacked expertise in railway matters. Direct oversight by parliamentary committees was likewise seen as ineffective. Finally, the committee believed that oversight by a cabinet department, i.e., the Board of Trade, lacked the procedural protections of the judicial model.

So, to some extent as a default position, the committee recommended creation of a tribunal to supervise the railways, with authority to hear complaints from customers and provide remedies, and otherwise enforce laws relating to the railways. Composed of at least three members, the new commission would include “an eminent lawyer” and another “acquainted with railway management.”⁴ Parliament created the new commission on a temporary basis in 1872 and made it permanent in 1888 — nearly a half-century after regulatory efforts began.

U.S. Railroad Regulation

Railroad regulation emerged in the United States shortly after British regulation. The impetus for government oversight was the brainchild of Charles Francis Adams Jr. Between 1866 and 1878, he wrote several influential articles about the economics of railroad operation, including *Chapters of Erie, and Other Essays*, a muckraking book coauthored with his brother Henry. They argued that the railroads, if unsupervised, would become natural monopolies but that government operation of railroads or regulation would stifle efficiency and innovation. Their remedy was creation of a so-called sunshine commission, i.e., an impartial body of experts that would investigate, examine and report on railroad activities, but not have enforcement power.⁵ Some states adopted this format, including Massachusetts, where Adams served as one of its first three commissioners. Other states set up commissions with significant powers. The first was the Illinois Railroad and Warehouse Commission, established in 1871. By 1886, a year before the creation of the ICC, 30 of the 38 states then in existence had some form of railroad regulation, and 25 used the commission form.

Congress was well aware of the experience of both the British and the individual states. The statute creating the ICC⁶ intended to create a commission with a degree of expertise and independence. Commissioners were appointed by the president with the advice and consent of the Senate, and they served staggered terms that were longer than that of the president. Commissioners were somewhat insulated from direct presidential supervision by the act’s removal provision for “inefficiency, neglect of duty, or malfeasance in office,” a core element of numerous independent agency statutes today. One scholar points out that initial appointments to the ICC came mostly from the public sector rather than the railroad industry, in an effort to limit industry control.⁷ Another scholar argues that, nonetheless, those appointed were plainly sympathetic to the railroads.⁸

With little discretionary power at the outset, the ICC was weak and ineffectual until Congress passed the Hepburn Act in 1906,⁹ which gave the ICC rate-making authority. The passage of the Hepburn Act was part of the Progressive Movement. In the view of Progressives, it was essential for expert administrators with technical competence in the various areas of regulation to staff independent regulatory commissions.

Appointments: Industry Representatives Versus Neutrals

Since the Progressive Era, a range of factors other than expertise has influenced appointments to independent agencies. The National Labor Relations Board (NLRB) is an illustration. The Wagner Act created the NLRB as a statutory agency in 1935.¹⁰ The board had three members.¹¹ President Roosevelt appointed as its first three members the following: J. Warren Madden, chair, a Professor at the University of Pittsburgh School of Law; John M. Carmody, a federal government official; and Edwin S. Smith, a former commissioner of the Massachusetts Department of Labor and Industries. Some members of Congress wanted a board independent of political control, while others preferred

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a board composed of representatives of industry and labor. Congress eventually created a board that remained essentially neutral for 18 years, with members coming largely from academia or government. In 1952, however, President Eisenhower — the first Republican elected since passage of the Wagner Act — appointed management-oriented members to the board. Starting with President Nixon in 1970, members have been chosen largely for their management or union backgrounds.

By the 1960s, the “theoretical underpinnings of administrative expertise had been largely undermined.”¹² The administrative process was increasingly seen less as a forum for ascertaining the public interest and more as a forum for interest representation. As Harvard law professor Mark Tushnet explained, “[i]nter-group bargaining — a form of politics — was relocated into administrative agencies, and the Progressive claim that administrative agencies pursued science rather than politics became difficult to sustain.”¹³

The Influence of the President and Congress

Independent agencies today undertake significant regulatory and administrative roles within a broader tug and tussle of interbranch tension. The president’s constitutional appointment and removal powers have been limited by Congress, with approval from the Supreme Court.¹⁴ Nonetheless, the president retains considerable power over agency membership — and, hence, influence over agency policy direction under highly discretionary statutes — through his appointment (and re-appointment) power, especially the selection of agency chairs, who are almost always the agency’s most significant members. And, bolstered largely by custom, the president even retains influence in prodding unwanted independent agency members from office.

Congress likewise holds significant powers. As a bipartisan group of senators and congressmen reminded President Carter in 1977, “Congress,

and not the executive, controls the guidelines for independent regulatory agencies. Congress created these agencies. Congress provided for their organization. Congress adopted their statutory mandates. Congress controls their budgets and oversees their performance. Congress specifies agency procedures.”¹⁵ Indeed, some today think that Congress, perhaps more than the president, is now the primary influence on most independent agencies.

Agency Independence and the Consumer Finance Protection Bureau

A wide variety of hypotheses about agency independence exists. But practical rather than theoretical considerations motivated the creation of the first independent agency, the ICC, and practical considerations continue to dominate the structure and functioning of independent agencies.

Creation of the Consumer Finance Protection Bureau by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 is a recent illustration.¹⁶

Harvard law professor Elizabeth Warren introduced in a 2007 article the idea of an agency that would regulate consumer financial products.¹⁷ She argued that a model based on the multi-member Consumer Product Safety Commission, which had protected consumers from purchasing defective or dangerous goods through uniform safety standards and regulation, would be just as useful in the financial products market. In 2009, Chairman Barney Frank of the House Financial Services Committee introduced legislation that would set up a typical five-member independent regulatory commission.¹⁸ Later that year, he tried again with legislation that retained the independent commission concept but provided, significantly, that the new agency would be funded through the Federal Reserve Board. He proposed that 10 percent of the federal government’s budget go automatically to the new agency every year, thus depriving both Congress and the administration of their usual

appropriations oversight powers.¹⁹ In the Senate, Chairman Christopher Dodd of the Senate Banking Committee introduced in 2010 his version of financial protection legislation, which differed in certain respects from the House version. Dodd proposed an agency headed by a single director appointed to a five-year term with the usual statutory removal protection. But the agency would be a bureau of the Federal Reserve Board funded through the Federal Reserve System. To ensure the new bureau’s independence, the Federal Reserve was statutorily prohibited from exercising any control over it.²⁰ The bureau’s only connection to the federal government is the funding mechanism. President Obama signed the Dodd-Frank bill into law in 2010.²¹

Republicans were concerned that they would lose important political influence over the new agency if it had only a single individual at its head and a genuinely autonomous revenue stream. A key conceptual objection to the new agency was its lack of democratic accountability. The legislation creating it was described as an effort to “hyperdepoliticize” the agency.²²

Although it seems that the text of Dodd-Frank sought to insulate the new bureau from politics, this does not mean that the president or Congress lacks ways of influencing the bureau’s regulatory and enforcement activity. The president’s influence comes from his ability to nominate a single director to a five-year term. However, this influence can be thwarted by Congress. As an extreme response, a hostile Congress, especially if supported by a new administration, can revise the agency’s statutory mandate or even abolish the agency entirely.²³ More likely, the Senate, through its confirmation authority, can delay, if not defeat, a president’s choice of director. Indeed, that happened with Senate approval of the bureau’s first director. President Obama nominated former Ohio Attorney General Richard Cordray in July 2011, but Republican efforts to alter the agency’s structure by replacing the director with a multi-member board initially

stifled Cordray's approval. President Obama skirted Republican objection by giving Cordray a recess appointment. *NLRB v. Noel Canning* declared such recess appointments illegal (President Obama also made three to the National Labor Relations Board).²⁴ It took two years before Cordray was confirmed as part of a package deal in which Republicans agreed to vote on Cordray's nomination, and that of two NLRB members, in exchange for President Obama's agreement to withdraw two additional recess appointments to the NLRB.²⁵

Conflicting Constitutional Theories of Independent Agencies

The constitutionality of the independent agency was not an issue of considerable debate until many decades after establishment of the ICC. Now, two conflicting constitutional theories compete for dominance. Some observers believe that independent agencies must be considered as part of a unitary executive supervised at the top by the president. The president, after all, must constitutionally "take care that the Laws be faithfully executed."²⁶ The argument suggests that this duty can be discharged only if agencies performing executive functions are understood to be agents of the president and responsible to him. Any other structure would undermine accountability. Others argue for permeability among the branches. They claim that Congress may, by statute, adjust or alter a strict tripartite division of federal power as long as it does not undermine a core function of another branch or "alter the balance of authority" among the branches.²⁷ Supreme Court decisions have not consistently applied a particular approach or theory. Rather, they apply a literal or functional approach depending on circumstances.

Professor Colin Diver suggests that "the history of the administrative state is an unending contest between Congress and the President for control of the bureaucracy."²⁸ Public lawyers must operate in this environment that melds the conflicting goals of

political accountability and independent expertise. Government lawyers must continue the historic tradition of acquiring and retaining expertise based on long service and experience and bring that expertise to bear unencumbered by partisan or personal bias. At the same time, absent unusual circumstances, public lawyers must remain faithful to the elected or appointed policy makers who, by virtue of their election or appointment, are accountable to the public and thus possess legitimacy in our constitutional system. Maintaining that balance can be difficult in a regulatory regime governed by statutory texts that are often ambiguous and that can be read literally or in historical context. Upholding that balance is the responsibility of the public lawyer. ■

Endnotes

1. See PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937) (Brownlow Committee Report).
2. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 523, 547 (2009) (Breyer, J., dissenting).
3. *Id.* at 547 (citing Justice Scalia's concurring opinion in *Freytag v. Comm'r*, 501 U.S. 868, 916 (1991)).
4. C.D. FORSTER, PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY 46 (1992).
5. THOMAS K. McCRAW, PROPHETS OF REGULATION 15 (1984).
6. An Act to Regulate Commerce, 24 Stat. 379 (1887).
7. Mark F. Kightlinger, *Nihilism with a Happy Ending! The Interstate Commerce Commission and the Emergence of the Post-enlightenment Paradigm*, 113 PENN. ST. L. REV. 113, 135 (2008).
8. GABRIEL KOLKO, RAILROADS AND REGULATION 1977-1916, at 46-49 (1965).
9. 34 Stat. 584 (1906).
10. Wagner Act of 1935, 49 Stat. 449, 451 (1935).
11. The board's membership was extended to five by the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136, 139 (1947).
12. Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms*

and Refinements, 68 MINN. L. REV. 299, 316 (1983).

13. Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1567 (2011).

14. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (concluding that the president's removal power can be conditioned by Congress in certain circumstances); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (concluding that the Senate could frustrate the president's recess appointment power by holding "pro forma" sessions and that "for purposes of the recess appointments clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business." (*Id.* at 2574).

15. See Letter from Senator Abe Ribicoff to President Carter, Dec. 16, 1977, reprinted in 124 CONG. REC. S4863-4864 (1978).

16. Pub. L. 113-203, 124 Stat. 1376, 1964 (2010).

17. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. IDEAS (Summer 2007), available at www.democracyjournal.org/5pdf/5/6528.php?page=allWarren.pdf.

18. H.R. 3126, 111th Cong. (2009).

19. H.R. 4173, 111th Cong. (2009).

20. S. 3217, 111th Cong. (2010).

21. See *supra* note 16.

22. Edward Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L.J. 631, 677 (2012).

23. See generally Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 55 (2011) (suggesting these two possibilities).

24. 134 S. Ct. 2550 (2014).

25. See generally Danielle Douglas, *Senate Confirms Cordray to Head Consumer Financial Protection Bureau*, WASH. POST, July 16, 2016.

26. U.S. Const. art. II, § 1, cl. 1.

27. *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting).

28. Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 519 (1987).