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Constitutional Status of the Independent Regulatory Commissions

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THE CONSTITUTIONAL STATUS OF THE INDEPENDENT REGULATORY COMMISSIONS*

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There is an old Hindu fable, put into humorous verse by John G. Saxe, about the six men of Indostan "to learning much inclined, who went to see the Elephant (though all of them were blind)". Each in his groping touched a different part of the beast's anatomy; and the six loudly announced in turn that the elephant was like a wall, a spear, a snake, a tree, a fan, and a rope.

"And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong
Though each was partly in the right
And all were in the wrong."

The technique of the six blind men in classifying the elephant appears to have been followed by many who, at various times, have discussed the constitutional nature and status of the independent regulatory commissions. In legislative hearings and debates, in lawyers' briefs, and in court decisions there has been a readiness to state with dogmatic precision in which of the three departments of government the commissions belong, which of the three powers of government they exercise, and other similarly definite facts about their legal nature and relations. Thus one may collect at random the following labels applied to the Interstate Commerce Commission, not, it is true, by blind men, but by men whose attention was closely riveted on some particular phase of the Commission's work or procedure:

"This Commission is in essence a judicial tribunal." (Commissioner Prouty, 1907.)[1]

"The Commission is not a court. It is an administrative body." (Chairman Knapp, 1902.)[2]

"The Commission is not a part of the executive branch of this government; but is really the arm of Congress." (Report of House Committee on Interstate and Foreign Commerce, 1912.)[3]

"The Interstate Commerce Commission at the present time is an executive body." (Commissioner Prouty, 1905.)[4]

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*This article constitutes a chapter in a forthcoming book by the author dealing with the independent regulatory commissions and their problems. The second and concluding installment of the article will be published in the February issue of the *Cornell Law Quarterly.—Ed.*

[1]Quoted in *Hearings before Senate Committee on Interstate Commerce,* 65th Cong., 3rd Sess. (1919) 309-310.

[2]*Hearings before House Committee on Foreign and Interstate Commerce,* 57th Cong., 1st Sess. (1902) 269.

[3]H. R. REP. No. 472, 62d Cong., 2nd Sess. (1912) 6.

[4]*Hearings before Senate Committee on Interstate Commerce pursuant to Senate Resolution 288,* 58th Cong., 3rd Sess. (1905) Vol. IV, p. 2863.

"The Interstate Commerce Commission is a purely adminstrative body." (Supreme Court of United States, 1912.)[5]

"The function exercised by the Commission is wholly legislative." (Supreme Court of United States, 1927.)[6]

"The very able lawyers who, as members of the House of Representatives and the Senate, framed the Interstate Commerce Act of 1887, carefully avoided conferring on the Interstate Commerce Commission any kind of power except only executive power." (Senator Joseph B. Foraker, 1906.)[7]

Sound legal analysis is not likely to be aided by the process of "grasshopper exigesis" by which the statements just quoted are wrenched from their contexts; and it is very dangerous to draw important inferences from them or to try to fit them into artificial patterns. Each of the quotations given has in it an element of truth; but no one of them contains all the truth. Each statement resulted from the impact of some problem or circumstance which centered attention upon part, but not all, of the commission's work and relationships. They are not so inconsistent as they appear. Each makes a contribution to a more complete and accurate appraisal of the status and nature of the Commission. But what that contribution is can be estimated only when we know the setting in which and the purpose for which the words were uttered.

It is a rather remarkable fact that no serious attempt has thus far been made to deal in a thorough and comprehensive way with the constitutional problems involved in the nature of the independent regulatory commissions and their intricate and perplexing relationships with the three major departments of government. In the first place, the Supreme Court of the United States has, naturally, contributed nothing but piecemeal analysis of the problem. It has been obliged to answer many specific and definite questions regarding the commissions. It has, in the main, wisely refrained from unnecessary generalizations and has indulged in no essays on constitutional law in which the commissions were broadly viewed. Most of the Court's opinions bearing on the commissions are rationalizations of results deemed essential to sound national administration rather than efforts to deal philosophically with the fundamental legal relations involved. For all this we should be grateful and not critical. The regulatory commissions did not come into being full-blown; they have evolved by the process of trial and error. They have not remained static; they have taken on new forms and new functions and entered into new relationships. It would have been calamitous if the freedom of their growth and the flexibility of their structure and their

[5]Interstate Commerce Commission v. Humboldt Steamship Co., 224 U. S. 474, 484 (1911).
[6]United States v. Berwind-White Coal Mining Co., 274 U. S. 564, 583 (1927).
[7]40 CONG. REC. 3107-8 (1906).

relations with the departments of government had at an early date been frozen into a fixed pattern by judicial decisions based upon what could only have been a partial and inadequate view of the whole problem. The courts have thrown much light upon the constitutional status of the regulatory commissions but they have done so by focussing spotlights upon special points. In the second place, the same thing is true of the many valuable monographs and articles dealing with the legal and constitutional problems relating to the commissions and their work. They have dug deeply in narrow areas. They have not attempted to cover the entire ground.

This article has a broader purpose. It attempts to pull together in one place the more important facts about the commissions in their legal character and relations, to appraise more carefully the place they occupy in our constitutional system, and to consider some of the constitutional problems relating to them which remain unsolved. The discussion falls easily into two major divisions. First, the commissions will be studied in the light of the constitutional doctrine of the separation of powers, and the impact of that doctrine upon their structure, functions and relations. Second, we shall examine in some detail the constitutional and legal relationships which the commissions bear to Congress, to the President, and to the courts.

I. The Independent Regulatory Commissions and the Doctrine of the Separation of Powers

Much as legislators and administrators would at times like to forget it, the fact remains that the American constitutional system rests upon the fundamental doctrine of the separation of the three powers of government. The Constitution states (1) "All legislative powers herein granted shall be vested in a Congress of the United States";[8] (2) "The executive power shall be vested in a President of the United States of America";[9] (3) "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[10] Thus are the three major powers of government "separated", each being assigned to its own department or division, and thus does the Constitution seek to avert that threat to the liberties of the people which Montesquieu and his followers believed must result from a merger of the three powers, or any two of them, in the same hands. Furthermore, from these three so-called "distributing clauses" is derived the constitutional rule that neither the legislative, executive, or judicial power of the United States can be delegated to any government, department, officer or agency other than that in which the Constitution vests it. It is further inferred that each of the

[8] Const., Art. I, § 1, cl. 1.
[9] Const., Art. II, § 1, cl. 1.
[10] Const., Art. III, § 1, cl. 1.

three departments is fully protected in the exercise of its own peculiar powers from any interference or usurpation by any other department. In short, no one of the three departments may either (1) give up or farm out any of its own power or (2) take over or interfere with the power of any other department.

Viewed superficially the independent regulatory commissions seem to violate the doctrine of the separation of powers at every vital point. They seem to exercise simultaneously functions which are legislative, executive, and judicial, thus merging in the same hands powers which ought to be separately administered. At the same time the legislative and judicial powers of the commissions appear to have been given to them in violation of the constitutional rule that Congress may not delegate its legislative power, nor confer the judicial power of the United States upon anyone except a duly constituted federal court. Furthermore, if we assume that under the Constitution there are but three major departments of the United States government, it is not easy to fit the independent commissions into any single one of these three departments to the exclusion of the others, nor to assert that the functions which they perform are purely legislative, executive, or judicial. We may turn, therefore, to a closer analysis of the various problems arising out of the doctrine of the separation of powers which the independent commissions present.

A. THE MERGER IN THE HANDS OF THE COMMISSIONS OF LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS

Is there an unconstitutional merger in the hands of the independent regulatory commissions of legislative, executive, and judicial powers—powers which, under the doctrine of the separation of powers, must be kept separate? That such a merger of powers does exist was one of the first charges to be hurled against the proposed Interstate Commerce Commission in the Congressional debates in 1886;[11] while Senator Burke of Nebraska in a radio speech in April, 1938, urging the amendment of the Wagner Act, said of the National Labor Relations Board:

> "The Board, through its employees, acts as prosecuting attorney. Also as a judge. It has investigated the case. It prosecutes the cause. It sits in solemn judgment thereon. Investigator, prosecutor, judge, and jury, all wrapped up in one."[12]

In fact, criticism of the regulatory commissions on this score seems to grow more persistent and more virulent rather than less so.

It is natural that this charge of improper merging of powers in the com-

[11] *Infra*, p. 18.

[12] This speech was printed in the Congressional Record of April 5, 1938.

missions should be strongly urged, for the chief concrete advantage to be gained from the three-fold separation of powers is supposed to be the protection of individual liberty against the dangers resulting from the merging of legislative, executive, and judicial powers in the same hands. Montesquieu, the author of the classical doctrine, vigorously stressed this point:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[13]

Madison in *The Federalist* declared more briefly but more sharply:

> "The accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[14]

Dissenting in the *Myers* case, Mr. Justice Brandeis said:

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[15]

And in 1933, the Supreme Court, speaking through Mr. Justice Sutherland, declared:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands."[16]

It is to be expected, therefore, that any governmental agency in which legis-

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[13]MONTESQUIEU, THE SPIRIT OF THE LAWS (1748) Book XI, c. 6.
[14]THE FEDERALIST (1788) No. 47.
[15]Myers v. United States, 272 U. S. 52, 293 (1926).
[16]O'Donoghue v. United States, 289 U. S. 516, 530 (1933).

lative, executive and judicial powers appear to be merged in the same hands will be subject to the closest scrutiny to determine whether the basic doctrine of separation has in reality been violated.

Let us examine more closely the steady barrage of attack on this ground which has been directed against the independent regulatory commissions from the very beginning. It has been mentioned that the point was raised in the debates on the Interstate Commerce Act in 1886.[17] Mild as were the powers given to the Interstate Commerce Commission in that early act, Senator Morgan of Alabama charged that the statute "combined very skillfully powers from all three departments",[18] while Mr. Oates in the House declared:

> "I believe that it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps, the executive powers of the government in the same law."[19]

When Congress was considering, in 1902, a bill enlarging the regulatory powers of the Interstate Commerce Commission, Mr. Walker D. Hines, then President of the Louisville & Nashville Railroad, told a Senate Committee that the Commission

> "is supervisor, detective, prosecutor, plaintiff, attorney, and court. No tribunal charged with such functions can have the attributes which ought to characterize a judicial tribunal,"[20]

and Senator Henry Cabot Lodge spoke of the Commission as a body

> "who are to be in the operation and discharge of their functions judge, jury, and prosecuting officer resembling nothing that I can think of except the French Juge d'Instruction."[21]

In 1916, as it became apparent that even wider powers were likely to be given to the Interstate Commerce Commission, the Association of Railway Executives restated more elaborately the constitutional attack on the merger of powers in the hands of the Commission. They said:

> "The Interstate Commerce Commission is likewise clothed with different functions which are inconsistent and which violate the principle that the legislative, executive and judicial departments shall be kept separate and distinct.
>
> ". . . The foundation of our liberties is the separation of what are termed inconsistent functions of government. You have one judicial department; you have one executive department which is not judicial and not legislative; you have one legislative department which is not judicial and which is not executive. The ideal of free government is that those functions shall be kept distinct from one another. It was

[17] *Supra*, p. 16.
[18] 17 CONG. REC. 4422 (1886).
[19] 18 CONG. REC. 848 (1887).
[20] *Hearings before House Committee on Foreign and Interstate Commerce*, 57th Cong., 1st Sess. (1902) 493.
[21] 40 CONG. REC. 4104 (1906).

> thought that if a legislator should be a judge there would be no use for the judge, because he would sustain his act as legislator, and so with these other functions; in order to be useful each department must be protected from invasion by the other. And yet we find that wholesome government principle is violated in the present organization of the Interstate Commerce Commission. They are judges; they are, in a measure, legislators; and they are administrators of the system of regulation."[22]

It may be noted that some of the recent proposals looking toward a reorganization of the Commission's structure and functions call for some sort of segregation of duties which would meet this objection.

The same constitutional attack was urged with equal if not greater vigor during the debates in Congress in 1914 against the alleged merger of powers in the Federal Trade Commission. Private rights appeared to be even more seriously jeopardized here because the power of the Federal Trade Commission to issue a cease and desist order condemning an unfair competitive trade practice came much closer to being a penal or disciplinary power than the power of the Interstate Commerce Commission to determine a reasonable rate. The argument was clearly stated in the Senate by Senator Shields of Tennessee who said:

> "Mr. President, I believe that the powers of all three of the co-ordinate branches of the government are proposed to be delegated to and vested in this commission. The commission is authorized to declare what constitutes unfair competition or unfair methods of competition thus exercising legislative powers in creating offenses both civil and criminal, and it also has the power to repeal such legislation by altering or vacating any order it may make in any particular case. The worst part of the legislative power, however, is that the commission is authorized to give it a retrospective effect; in other words, the commission may, after the act is done or committed for the first time, declare that such an act constitutes unfair competition and violation of law.
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> "The commission is given judicial power by the authority to call the offender before it, to hear proof, and determine his guilt or innocence. Executive power is conferred by the authority to bring suit in the district courts of the country to enforce such orders as it may make. It is difficult for me to conceive a more pronounced and unlawful confusion and delegation of the powers of the three co-ordinate branches of our government than is here attempted to be done."[23]

Every independent commission which has exercised any substantial regulatory power has been sharply attacked on this same ground.

The Supreme Court, however, has never held void any of the statutes

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[22]Appendix, *Extension of Tenure of Government Control of Railroads. Hearings before the Committee on Interstate Commerce, U. S. Senate,* 65th Cong., 3rd Sess. (1916) Vol. II, p. 104.

[23]51 CONG. REC. 13057 (1914).

in which alleged mergers of legislative, executive, and judicial powers occur, nor has it given the slightest encouragement to those who attack the regulatory commissions on this constitutional ground. It appears, in fact, to be wholly unimpressed by the objection. And this is certainly not due to unawareness of the situation at issue. In *Federal Trade Commission v. Klesner,* Mr. Justice Brandeis observed:

> "While the Federal Trade Commission exercises under § 5 the functions of both prosecutor and judge, the scope of its authority is limited."[24]

There is no indication that this combination of executive and judicial power caused any constitutional tremors in the mind of Mr. Justice Brandeis. The present judicial attitude is clearly stated by a lower federal court in these words:

> "The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years. The Board of Tax Appeals is an outstanding example of one such successful effort. But it has never been held that such procedure denies constitutional right. On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and state Public Service Commissions may prefer complaints to be tried before themselves. If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation."[25]

By completely ignoring the whole question, the Supreme Court has left us without any judicial explanation justifying its tacit assumption that the alleged merger of the three powers of government in the hands of a single regulatory body does *not* violate the doctrine of the separation of powers. It is not difficult, however, to suggest a number of cogent reasons why the Court has not invalidated the regulatory commissions on grounds of an invalid merger of powers. These may be briefly stated. First, regulatory commissions exercising these questionable combinations of powers had been in successful operation for many years before anyone thought of urging upon the Supreme Court this particular argument against their validity. The Court had upheld the constitutionality of the regulatory commission technique before this objection was seriously felt or presented. The state railroad commission, the prototype of the later federal commission, received the Supreme Court's blessing in the *Railroad Commission Cases*[26] in 1886. When the

[24]Federal Trade Commission v. Klesner, 280 U. S. 19, 27 (1929).
[25]Brinkley v. Hassig, 83 F. (2d) 351, 356-357 (C. C. A. 10th 1936).
[26]116 U. S. 307 (1886).

validity of the Interstate Commerce Act was attacked in *Interstate Commerce Commission v. Brimson*[27] in 1894, the Court held that judicial powers had not been given to the Interstate Commerce Commission in violation of the doctrine of the separation of powers, and the broader point that legislative, executive and judicial powers were invalidly merged was neither argued nor ruled upon. And when in 1919 a lower court was asked to pass for the first time upon an order of the Federal Trade Commission it sustained the statute with the comment that "Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution";[28] while the Supreme Court merely assumed the validity of the Federal Trade Commission Act without directly commenting on it.[29] In short, the regulatory commission, with its inherent merger of powers, was a *fait accompli* long before any serious constitutional attack was made on it on the basis of that merger.

Second, the Supreme Court has always interpreted the doctrine of the separation of powers with great flexibility. The very fact that the Constitution itself contains important deviations from a strict separation of powers, deviations deemed necessary to the smooth running of the governmental machine, could hardly fail to impress on the Court that a rigid or mechanical application of the doctrine is both unnecessary and unwise. As Frankfurter and Landis put it:

> "Nor has it [the doctrine of separation of powers] been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction."[30]

It is not surprising, therefore, that it has refrained from striking down long established, successful, and necessary governmental institutions because of a supposed violation of this not very sharply defined doctrine.

Third, the powers of government which, under the doctrine of the separation of powers, must be kept separate, are the legislative, executive, and judicial powers granted by the Constitution to Congress, to the President, and to the constitutional courts. These powers, therefore, could not be invalidly merged in a regulatory commission unless, in turn, they had been granted to that commission. Now the Supreme Court, as we shall shortly see,[31] has steadily denied that either legislative or judicial power in the constitutional sense has been granted to the commissions. If the commis-

[27]154 U. S. 447 (1894).
[28]Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 311 (C. C. A. 7th 1919).
[29]See McFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION, 7-8, and cases cited.
[30]Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010.
[31]*Infra*, p. 27 ff.

sions do not enjoy the legislative and judicial powers separated by the distributing clauses of the Constitution, then obviously those powers have not been unconstitutionally merged in creating the commissions. The powers exercised by the regulatory commissions may be mixed, but they are not the powers which it is constitutionally improper to mix. Or to put it a little differently, the Constitution "separates" legislative, executive, and judicial powers; but it does not separate "quasi-legislative", "administrative", and "quasi-judicial" powers.

Fourth, the courts did not wish to find the regulatory commissions unconstitutional since they regarded them as necessary and desirable. They were not impressed, therefore, by any constitutional objections which were not inescapable. As the Supreme Court became increasingly familiar with the commissions and with the problems with which they were dealing, it came to feel that the commission technique was indispensable to the successful handling of the difficult tasks involved in the government regulation of business. Strong governmental necessity could not be lightly ignored.[32] As early as 1894 the Supreme Court, in the *Brimson* case, had pointed out that the regulatory commission was indispensable to the effective exercise of the commerce power. It said:

> "An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."[33]

The district court made the same point more sharply in commenting on the Federal Trade Commission in the *Sears-Roebuck* case. It said:

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[32]Professor Sharfman has accurately summarized this pragmatic judicial attitude: "In all probability, however, the argument of expediency proved most effective in dissolving legal doubts. Since Congress itself possessed neither the special knowledge nor the necessary time for performing the continuous technical tasks of rate-making, and since judicial control was by its very nature inadequate (involving judgments on the validity of existing adjustments, but without capacity or equipment for prescribing appropriate corrective measures in the future) there was no choice but to delegate rate-making power to an expert, continuously functioning, administrative tribunal. In other words, the very purpose—effective rate control—which Congress sought to achieve could be consummated only through such delegation of legislative authority." 1 THE INTERSTATE COMMERCE COMMISSION (1931) 46, n.

[33]Interstate Commerce Commission v. Brimson, 154 U. S. 447, 474 (1894).

"With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'Board' or 'Commission' form of legislation."[34]

This disposition of the courts to regard the independent regulatory commissions as vitally necessary parts of the mechanism of modern government tends to increase rather than diminish. With it disappears any hope of commission critics that those bodies will ever be held inherently unconstitutional because of allegedly invalid merging of powers.

Fifth, from the very heginning the work of the regulatory commissions has, in all really important particulars, been held closely subject to judicial review.[35] By this judicial review the courts have been able to set aside orders or decisions of the commissions which they regarded as *ultra vires,* unjust, or otherwise subversive of private rights. This being so, the alleged merger of powers becomes unimportant since the Court is able to see that no substantial injustice results. If the major reason for keeping the powers of government separate is to prevent the exercise of arbitrary power, and if the exercise of arbitrary power from whatever cause is effectively prevented by judicial review, then there is no reason for the Court to worry separately over the supposed merger of powers. Had we not had this close judicial scrutiny of commission work the constitutional objection we are discussing might have received more serious attention.

Finally, it has been much easier and more satisfactory to the Court to keep its constitutional scrutiny of the regulatory commissions within the broad and flexible limits of the test of due process of law than to try to work with the vague doctrine of the separation of powers. Had the due process test not been available the Court might possibly have invoked the separation of powers theory. But it has not been necessary to do that and it is obvious now that it will never be done. While the issue has not arisen squarely with respect to the powers of the regulatory agencies, the Supreme Court has held that a violation of the doctrine of the separation of powers does not *per se* amount to a denial of due process of law.[36] Any other interpretation would, of course, have imposed the orthodox doctrine of separation of powers in its entirety upon every state in the Union by the simple operation of the due process clause of the Fourteenth Amendment, a result which in some cases

[34]Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 312 (C. C. A. 7th 1919).

[35]This problem will be discussed in greater detail in the second part of this article.

[36]"Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other eannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty." Dreyer v. Illinois, 187 U. S. 71, 84 (1902).

would have been almost revolutionary in its practical effects. It is entirely possible, however, that a merger of powers might take such a form as to amount to a denial of due process. Should Congress create a regulatory agency in which legislative, executive, and judicial powers were fused in such a manner as to invite and effect arbitrary abridgement of private rights, I think we may safely assume that the Supreme Court would protect those rights by invoking the constitutional guarantee that "no person shall be deprived of life, liberty or property without due process of law" rather than by invoking the doctrine of the separation of powers. In short, if there was ever any vitality at all in the constitutional principle that the three powers of government may not validly be merged in the same hands, it has long since been assimilated to the much more flexible and practicable doctrine of due process.

Those who attack the regulatory commissions because of what they regard as an objectionable merger of powers in the same hands have not been silenced by the failure of the Supreme Court to regard the merger as a constitutional defect. They have lost their case in the courts; but they continue to train their guns on Congress in an effort to secure corrective legislation and to prevent the creation of new agencies open to the same objection. The Committee on Administrative Law of the American Bar Association has interested itself in this problem for several years. In its report in 1936[37] it made an elaborate analysis of the separation of powers doctrine as applied to the federal regulatory agencies. This is perhaps the most thorough statement of the argument, constitutional and political, against the merger of legislative, executive, and judicial powers in the hands of the independent commissions and other administrative agencies. Recognizing frankly that no help could be expected from the courts on the constitutional point, the Committee proposed the creation of an administrative court in order to tighten up the judicial review of the findings of fact and law of all federal regulatory commissions and officers. Thus, it was believed, the danger to private rights implicit in the objectionable merger of powers could be averted. In 1936 the President's Committee on Administrative Management in a report based, so far as it related to this point, upon a memorandum prepared by the writer of this article, criticized sharply the merging of legislative, executive, and judicial powers in the regulatory commissions.[38] It was urged that the commission was obliged to perform its judicial or quasi-judicial functions in the "unneutral" atmosphere created by its legislative and executive responsibilities. A plan was suggested by which it was believed the objection could be met by a segregation of the commissions' work in the

[37](1936) 61 A. B. A. REP. 720-794. The writer has made generous use of the valuable material found in this report.

[38]CUSHMAN, THE PROBLEM OF THE INDEPENDENT REGULATORY COMMISSIONS (1936).

hands of an administrative section and a judicial section. From other quarters have come proposals for such internal rearrangements of the structure and functions of the regulatory commissions as will prevent the same officials from exercising incompatible powers.[39] There may be a merger of powers in the commission; but it is proposed to prevent such merger in the hands of one man or set of men within the commission. These various proposals are mentioned to emphasize the fact that this problem of the merger of powers in the independent regulatory commissions has moved completely from the field of constitutional law into the field of public policy.

The issue has not been confined to this country. The same problem has attracted attention in England as well. In 1929 Lord Chief Justice Hewart published his *The New Despotism* in which he sharply attacked the trends in English administration and administrative law, and particularly charged that judicial powers over the rights of the citizen were being given to executive and administrative officers. The Committee on Ministers' Powers was set up to study the problems presented in Lord Hewart's attack and in 1932 they filed their valuable report. They criticized sharply the emergence of the "prosecutor-judge" combination in modern administration and declared that "The first and most fundamental principle of natural justice is that a man may not be judge in his own cause."[40] They urged Parliament to exert great care to see that judicial duties should not be conferred on administrative officers.

B. DELEGATION OF POWERS TO THE COMMISSIONS

The most important corollary of the doctrine of the separation of powers is that the powers given to the three departments may not be delegated to other departments or agencies. If the legislative power is vested in Congress, the executive power in the President, etc., then it seems logically to follow that those powers cannot be farmed out to anybody else. This doctrine of the non-delegability of legislative and judicial powers is, in fact, the phase of the separation of powers theory which has most frequently and seriously engaged the attention of the Supreme Court and been applied most often as a judicial yardstick. The problems connected with the delegation of powers have been discussed by numerous writers. It is neither necessary nor possible to explore here in any detail the results of their analyses. All that our present purpose requires is a survey of the means by which the powers given by Congress to the independent regulatory commissions have been so rationalized as to avoid conflict with the constitutional prohibition against delegation.

[39] Typical of these is the proposal made by Gerard C. Henderson with reference to the Federal Trade Commission. See his volume THE FEDERAL TRADE COMMISSION (1925) 328-333.

[40] *Report of Committee on Ministers' Powers*, 76.

In no instance has any grant or delegation of power to any commission been held by the Court to violate the rule against delegation; and yet laymen and judges alike agree that the commissions exercise legislative, administrative, and judicial powers. How has this paradoxical result been achieved?

1. *Have legislative powers been delegated to the commissions?*

Let us consider first whether Congress has delegated legislative power to the regulatory commissions. Viewed realistically, and with the refinements of a technical constitutional vocabulary left out of account, every commission appears to exercise legislative power in at least one way, and some of them in two. In the first place, every regulatory commission has the power to issue rules and regulations: the power of sub-legislation. These rules and regulations may be grouped and classified and labelled in various ways upon the basis of distinctions of one kind or another, and much careful analysis has been engaged in to discover and catalog their varying characteristics.[41] They are all, however, legislative in nature. They have in varying degrees the force of law and their violation may by Congress be made punishable as is the violation of any federal criminal statute. They are rules and regulations which Congress itself could put into statutory form if it had the time and the information, and if it was sensible to "freeze" such regulations into an act of Congress. No one who scans the voluminous regulations of the Interstate Commerce Commission in the field of safety appliance requirements or motor vehicle licensing can fail to realize that here is a body of legislation vastly more important than many of the formal statutes passed by Congress itself. The same is true of the similar legislative output of the Federal Communications Commission, the Securities and Exchange Commission, and most of the others. It is customary to refer to the important work of formulating rules and regulations in the language of Marshall as the process of "filling up the details" of legislative policy as formulated by Congress in the basic statute from which the rule-making power comes.[42] The fact remains that Congress is perfectly free to fill in these details itself, in statutory form, if it wishes to do so, and not infrequently it does. The legislative character of the job is obvious, no matter who performs it. It is unnecessary to point out that this power to issue rules and regulations has been conferred by Congress from the foundation of our government upon executive and administrative officers. It is by no means confined to the regulatory commissions.

[41]Valuable studies in this field have been made by Professor James Hart. See his THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES (1925), and his memorandum on *The Exercise of Rule Making Power* in PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT: REPORT WITH SPECIAL STUDIES (1937) 309-355.

[42]Wayman v. Southard, 10 Wheat. 1, 42 (U. S. 1825).

A second way in which legislative power is exercised by some of the regulatory commissions is more specialized and distinctive. Here Congress embodies in a statute a legislative "standard" or principle which it believes should guide business conduct or control business relations, and delegates to the regulatory commission the power to make that "standard" effective by the issuance of orders of continuing operation which apply that "standard" to concrete situations. It is this power which the Interstate Commerce Commission exercises in issuing a railroad rate order. Congress has declared by law that railroad rates shall be "just and reasonable" and has given to the Commission the job of determining in a concrete situation what a "just and reasonable" rate is, and of issuing an order establishing that rate. Acting under this grant the Commission two years ago reduced eastern passenger coach fares to two cents per mile, and a few months ago raised them to two and one-half cents per mile.

It is agreed that this rate-making function is legislative in character. The Supreme Court has so described it repeatedly.[43] Railroad rates and other public utility rates were originally fixed by the legislature itself. In some states they are still fixed on occasion by statute. There is no doubt whatever of the constitutional power of Congress to embody in a statute each individual railroad rate now established by the Interstate Commerce Commission, but there are definite reasons why it has turned over the task to the Commission. First, Congress lacks the time and technical knowledge to handle the job. Second, if rates are to be kept fair, they must be subject to frequent readjustment; there must be a flexibility in the process which is beyond the capacity of a legislative body. And finally, for the protection of the rights both of the public and the carriers it is felt necessary to fix rates by a procedure which is semi-judicial in character, a procedure which a legislative body is not equipped to follow. It is much more common for Congress to confer this type of power upon an independent board or agency than to delegate it to a single officer in the executive department. It did, however, give rate-making power to the Secretary of Agriculture in the Packers and Stockyards Act of 1921.

What has been the attitude of the courts toward these delegations of power? Briefly, that attitude has taken shape in a settled judicial determination to uphold these delegations of power as vitally necessary to the administration of government, and at the same time to avoid sacrificing the constitutional theory that legislative powers cannot be delegated. This seemingly difficult problem of eating its constitutional cake and having it too the Court has very adroitly solved. Its success is shown by the fact that in no case have the wide powers given to the independent regulatory commissions

[43]United States v. Berwind-White Coal Mining Co., 274 U. S. 564, 583 (1933); Morgan v. United States, 298 U. S. 468, 479 (1936).

been held to involve unconstitutional delegation, while at the same time the doctrine that Congress cannot constitutionally delegate its legislative power seems as hale and hearty as ever. In reaching this happy result the Court has resorted to two rather different methods which may be briefly described.

The first of these methods, and the one earliest used, is to use labels or definitions which avoid the constitutional difficulties. Much may be accomplished in an argument if one is allowed to write his own definitions. If the power which it is necessary to delegate to regulatory agencies can be called something other than "legislative power", then the constitutional rule is left intact. This may be put in the form of a syllogism as follows:

Major premise: Legislative power cannot be constitutionally delegated by Congress.
Minor premise: It is absolutely necessary that certain powers be delegated to administrative officers and regulatory commissions.
Conclusion: Therefore the powers thus delegated are not legislative powers.

The logical hiatus in this reasoning may be concealed by attaching a distinctive name to the powers thus delegated. And this is what the Court has done. In fact, it has used two names: first, "administrative", and second, "quasi-legislative".[44]

The term "administrative" was a happy term to apply to the sub-legislative powers given to administrative officers and commissions. It is not a word used in the Constitution itself, it is certainly a different word from the word "legislative", and there is no authoritative definition giving it precise and accurate meaning. Thus in the case of *United States v. Grimaud* in 1911, the power of the Secretary of Agriculture to issue regulations for grazing on public lands, regulations enforceable through criminal process, was upheld. Mr. Justice Lamar said:

> "In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."[45]

Precisely the same doctrine would, of course, apply to the delegation of similar rule-making power to an independent regulatory commission.

Perhaps even more useful to the Court has been the prefix "quasi" which

[44]This logical device is somewhat similar to that employed by Mr. Justice Iredell in the *Hylton* case in 1796 to prove that a tax on carriages is not a direct tax within the meaning of the Constitution. He said: "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution." Hylton v. United States, 3 Dall. 171, 181 (U. S. 1796).
[45]220 U. S. 506, 516 (1911).

can be attached to the terms "legislative" and "judicial". Legislative power cannot constitutionally be delegated by Congress; but there is no prohibition against the delegation of "quasi-legislative" powers. According to Mr. Justice Sutherland in the *Humphreys* case,[46] "quasi-legislative power" is what the Federal Trade Commission enjoys, along with "quasi-judicial" power. Now the term "quasi-legislative", in contrast to the term "quasi-judicial" which has achieved something approximating a settled meaning and application, does not seem to have any commonly accepted concrete significance. It means merely something "almost, but not exactly" legislative. It therefore helps save the day for the doctrine of the non-delegability of legislative power without committing the Court to any precise definition of the kind of power which has been delegated. Congress, in short, has not invalidly delegated legislative power to the regulatory commissions because the power which it has delegated turns out to be "quasi-legislative" and not legislative.

A second judicial attitude toward this problem of delegation of legislative power tends to discard this juggling of definitions and labels and deal more directly with the realities involved. It seems to be replacing in legal analysis and judicial decision the method just discussed. This second judicial theory may be put thus: Power which is essentially legislative in character is delegated to the independent regulatory commissions. It is neither necessary nor desirable to disguise the legislative nature of this power by the use of labels. But legislative power has not been delegated within the meaning of the constitutional rule if that power must be exercised by the commission within the limits of a legislative policy or "standard" blocked out with reasonable clearness in the statute by which Congress granted the power. To put it in the words of Mr. Justice Sutherland (who used both techniques as occasion arose):

> "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."[47]

The judicial and professional willingness to recoguize that legislative power bas been and must be delegated by Congress to other governmental agencies appears with increasing frequency. In his presidential address to the American Bar Association in 1916 Elihu Root asserted:

> "Before these agencies [the administrative tribunals], tlie old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not; because such agencies furnish protection to right, and obstacles to wrong-doing, which under our new social and industrial

[46]Humphreys' Executor v. United States, 295 U. S. 602 (1935).
[47]United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311, 324 (1931).

> conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."[48]

In responding to the resolutions of the Attorney-General upon the death of Chief Justice White, Chief Justice Taft, referring to White's decision holding that legislative power had not been delegated to the Interstate Commerce Commission, said:

> "The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule."[49]

So generous, in fact, was the Court's treatment of what appeared to be delegations of legislative power to regulatory commissions and administrative officers that Professor E. S. Corwin was led to remark in 1934 that

> "Congress is enabled to delegate its powers whenever it is necessary and proper to do so in order to exercise them effectively."[50]

The requirement that legislative power, if delegated, must be delegated "under the limitation of a prescribed standard" was still insisted upon by the Court, but the "standards" set up became in some cases so vague as to appear almost meaningless, so vague that they imposed small restraint upon the discretion of the commission or officer to whom the power was delegated.[51]

In two important cases, however, the Supreme Court proceeded to take up this slack and sharpen the meaning and application of its present rule regarding delegations of legislative power. In *Panama Refining Co. v. Ryan*[52] and in the *Schechter* case[53] the Court held void delegations of legislative power to the President on the ground that the National Industrial Recovery Act, in its relevant sections, set up no effective standards or criteria to serve as limitations upon the President's uncontrolled discretion. The net result seems to be, therefore, that while the "standards" limiting the delegations of legislative power may be vague, they may not be too vague, and they certainly must not be wholly lacking. A standard is too vague when it does not offer a guide which can be seen and followed by the officer or commission in exercising the delegated power. Or, stated a bit differently,

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[48](1916) 41 A. B. A. REP. 368-369.
[49]Proceedings on the Death of Chief Justice White, 257 U. S. xxv-xxvi (1922).
[50]CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934) 145.
[51]New York Central Securities Corporation v. United States, 287 U. S. 12 (1932); Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930).
[52]293 U. S. 388 (1935).
[53]Schechter v. United States, 295 U. S. 495 (1935).

the standard must be of such clearness and of such character as to be visible to the naked eye of the Court, so that that tribunal can determine whether the officer or agency is following the standard instead of exercising uncontrolled discretion.

This really reduces itself to the fact that in dealing with the delegation of legislative power the Supreme Court has essentially paralleled, though without the corresponding labels, the situation which exists with regard to federal judicial power and has recognized the existence of two grades of legislative power, one which cannot constitutionally be delegated by Congress, and one which can. By Article III of the Constitution "the judicial power of the United States" is given to the Supreme Court and the inferior federal courts created by Congress. No shred of this judicial power has been or can be given to any officer or agency save only the regularly constituted United States courts. This principle has been enforced with absolute rigidity. Practical necessity has, however, required from time to time that "judicial power" be given to agencies which are not courts created under Article III. Congress could not effectively exercise its delegated powers without making such grants. The Supreme Court solved the problem by holding that there are two categories of judicial power possible under the Constitution. There is "the judicial power of the United States" which is granted by Article III and which, as we have seen, cannot be granted except to the constitutional courts; and there is a less sacrosanct, or garden variety of judicial power which Congress, in exercising its delegated powers, may give to "legislative courts".[54] Inherently the two kinds of power are essentially the same, although they operate usually in different fields. The exercise of each has the same effect upon those within its reach. But one can be granted to other than constitutional courts, the other cannot. In much the same way the courts have actually recognized two categories of federal legislative power. There is the legislative power which, for the sake of pursuing the analogy, might plausibly be labelled "the legislative power of the United States", the unfettered legislative discretion conferred by the Constitution upon Congress. This may not be delegated. But there is in addition, a lesser variety of legislative power which Congress in the carrying out of its legislative responsibilities may delegate to independent regulatory commissions or to administrative officers. This second type of legislative power, however, is really "sub-legislative" power in the sense that it must be exercised within the limits of standards set up by Congress to block out at least the rough outlines of a primary legislative policy. Marshall, who

[54]This distinction between "constitutional" and "legislative" courts was carefully drawn by Marshall in American Insurance Co. v. Canter, 1 Peters 511, 546 (U. S. 1828). It is elaborated in the light of later decisions in Katz, *Federal Legislative Courts* (1930) 43 HARV. L. REV. 894.

was a confirmed constitutional pragmatist, virtually made this distinction in 1825 in the case of *Wayman v. Southard,* although he made no attempt to find names for the two grades of legislative power. He said:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the return of writs and processes, the filing of declarations and other pleadings, and otber things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department. . . .
>
> "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[55]

The courts have continued to use this distinction. It is hard to see why the neat and effective device whereby the courts sidestepped the problem presented by the non-grantability of "the judicial power of the United States" does not provide an equally convenient solution to the problem of the non-delegability of legislative power. We have come very close to adopting the theory without the names.

Finally, it is hard to escape the conviction that the rule against the delegation of legislative power, like the rule against the merger of the three powers of government in the same hands, is likely to be assimilated into the constitutional guarantee of due process of law. The delegations of legislative power which the courts have held bad are those in which legislative power has been given to executive or administrative officers without the accompanying protection of a guiding standard, a standard which not only serves to direct the officer exercising the power but which enables a reviewing court to decide whether he has followed that guidance. There is an important practical reason for this rule. It is for the protection of the rights of the citizen that democratic governments vest the exercise of broad and untrammeled legislative discretion in a representative legislature, and not in a single officer or agency. To permit such an officer or agency to exercise legislative power without the restraining influence of legislative "standards" is to subject the citizen to the danger of an arbitrary power against which

[55]10 Wheat. 1, 42 (1825).

he may have no very effective protection. It is but a short step from this to the position that one whose rights have been adversely affected by the exercise of unrestrained legislative discretion in the hands of an administrative officer or agency is actually being deprived of liberty or property without due process of law. In short, the effective rule against the delegation of legislative power as that rule is now construed exists not for the purpose of keeping alive an abstract principle of political philosophy but for the purpose of surrounding private rights with a protection just as easily and logically available under the due process clause. In fact the doctrine of the non-delegability of legislative power could safely be scrapped as long as due process of law remains the effective constitutional guarantee it now is.

2. *Can more legislative power be delegated to an independent regulatory commission than to an executive officer?*

The novel and interesting theory has recently been set forth that Congress may constitutionally grant more legislative and judicial power to an independent regulatory commission than to an executive officer. Or, to put it in another way, Congress could not validly delegate to an executive officer the powers which have been given to such bodies as the Interstate Commerce Commission or the Federal Trade Commission.

This is worthy of careful consideration. The clearest statement of this doctrine is to be found in the brief presented to the Supreme Court for the appellants in *Isbrandtsen-Moller Co. v. United States* in 1937.[56] The point arose in this way. The Economy Act of 1932 authorized the President in the interests of economy and efficiency to transfer or consolidate by executive order executive agencies or functions. President Roosevelt in his famous Executive Order 6166 of June 10, 1933, made extensive use of this power, and, among other changes, transferred the United States Shipping Board to the Department of Commerce where it became the United States Shipping Board Bureau. The appellant, a shipping company, attacked the validity of an order directed against it by the Shipping Board Bureau. It contended that the Economy Act did not intend to give the President power to transfer or alter the independent regulatory commissions, of which the Shipping Board was admittedly one; and that if it did seek to give such power it was, for that reason, unconstitutional. This was alleged to be true because the powers enjoyed by the Shipping Board could not validly be given to an executive officer such as the Secretary of Commerce. In the appellant's brief the argument is stated thus:

> "The functions of the United States Shipping Board were so broadly defined by Congress in the Shipping Act, 1916, and the Merchant Marine

[56] 300 U. S. 139 (1937). The brief and argument were presented by Mr. James W. Ryan of New York.

Act, 1920, and were of such a quasi-judicial and quasi-legislative character, that they obviously could not be performed properly or at all by an executive department or bureau, and it would have been a violation of the fundamental constitutional doctrine of separation of powers if Congress had intended those functions to be delegated to or exercised by an executive department or bureau. Assuming that a slight degree of legislative power may be delegated to an executive department, or rather become effective after a hearing and finding by an executive department, surely there is a limit and that is when, as in the present case, the legislative and judicial power attempted to be delegated is so great and substantial, and so inconsistent with its exercise by an executive department, that the executive department would become predominantly a legislative or judicial body rather than an executive body, so far as the exercise of those functions was concerned."[57]

The Court decided the case without ruling on this point.

The theory has received other support. It is urged that the language used in the *Schechter* case leans definitely in this direction. In that case Chief Justice Hughes declares that legislative power was invalidly delegated to the President by the provisions of the National Industrial Recovery Act which authorized him to promulgate codes of "fair competition". The term "fair competition" was an inadequate standard to guide the President's legislative discretion. To emphasize the point the Chief Justice refers with approval, by way of contrast, to the Federal Trade Commission's task in applying the legislative standard, "unfair methods of competition", and goes on to say:

"What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. . . . To make this possible Congress set up a special procedure. A commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority . . . .

"In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character."[58]

From this statement it is inferred that the delegation of power to the President in the N. I. R. A. is bad because he is an executive officer, while the delegation of power to the Federal Trade Commission is good because it is an independent "quasi-judicial" body.

In testifying before the Joint Committee of the two Houses of Congress in June, 1937, on the pending Fair Labor Standards Bill, Mr. Robert Jackson, then Assistant Attorney General of the United States, urged that the admin-

[57]Brief for appellant, 48.
[58]Schechter v. United States, 295 U. S. 495, 533 (1935).

istration of the act be given to an independent commission. He stated his opinion in these words:

> "It is important to remember that the Supreme Court very rarely finds fault with a congressional delegation of power. There is nothing in the recent decisions of the Court which would justify the Congress in casting aside a half century of legislative experience in providing for the administrative handling of modern complexities too numerous and diverse to be subjected to a single and inflexible rule directly imposed by the Congress. There is, it should be remembered, no case where congressional delegation of power has been adjudged invalid where the delegation has been made to a permanent governmental, administrative commission, independent of the executive branch of the Government. *Panama Refining Co. v. Ryan* (293 U. S. 388) involved delegation directly to the Executive; the *Schechter* case involved not only theoretical delegation to the Executive but practical delegation to substantially private code authorities. Insofar as the decision in *Carter v. Carter Coal Co.* (298 U. S. 238, 310-311) rested on the grounds of faulty delegation, the vice lay in the delegation having been made not to an official or official body but 'to private persons whose interests may be and often are adverse to the interest of others in the same business'."[59]

Mr. Jackson did not, however, suggest that this happy fate of delegations of power to independent commissions was a legitimate result of any doctrine grounded in the separation of powers.

It seems to me that this whole theory is unsound. There is no valid reason arising from the doctrine of the separation of powers why the same powers should not be delegated to an executive officer as to an independent "quasi-legislative" and "quasi-judicial" commission. In the first place, there is nothing in the doctrine of the separation of powers itself which logically supports such a contention. The rule against delegation of legislative power was designed to limit the scope and nature of the power which Congress might turn over to some one else. It was never intended to restrict the discretion of Congress in selecting the officer or agency to whom the power was to be given. If Congress can delegate the power at all there is no restriction upon its choice of a grantee. This point is effectively presented in the brief for the Government in the *Isbrandtsen-Moller* case. It is there stated:

> "The appellant contends that because the functions of the Shipping Board were of a quasi-judicial and a quasi-legislative character Congress could not transfer those functions to an executive department or officer without violating the doctrine of separation of powers (appellant's brief, p. 48). Appellant's position appears to be that, although the powers in question can properly be delegated, the Constitution permits Congress to delegate them only to a particular kind of officer or agency. This is a constitutional doctrine, novel in conception and startling in its conse-

[59] *Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor*, 75th Cong., 1st Sess. (1937) 12.

quences. Hitherto the doctrine of separation of powers has been applied to limit the scope of the authority and discretion which Congress may confer when it delegates power to an administrative body or agency. Appellant now seeks to extend the doctrine so as to limit and control the power of Congress to determine the identity or the personnel of the agency or instrumentality to which, within the prescribed limits, it may delegate power. The attempted extension is unwarranted; if a power can be delegated at all it can be delegated to any kind of officer or agency which Congress may select. If, as appellant suggests, Congress cannot delegate quasi-legislative or quasi-judicial power to an executive department or officer, it must, if it wishes to delegate such power at all, create a special commission or bureau for that purpose. Acceptance of this principle would lead inevitably to the creation of a kind of fourth grand division of the federal government consisting solely of these independent commissions or bureaus. This is a radical departure from traditional concepts of the nature of the federal government which finds no support in the language of the Constitution or in the decisions of this Court."[60]

In the second place, the Supreme Court has upheld delegations to executive officers of the same powers which the independent commissions enjoy, and has nowhere intimated that they violated the doctrine of the separation of powers. When Congress enacted the Packers and Stockyards Act of 1921, it debated at length whether to give the administration of the statute to the Federal Trade Commission or to the Secretary of Agriculture. It gave it to the Secretary. The powers conferred, including rate-making and the suppression of unfair competitive practices, are essentially the same in a more limited field as those exercised by the Interstate Commerce Commission and the Federal Trade Commission. The basic constitutionality of this act has been upheld by the Supreme Court.[61] While the Court has scrutinized with care the procedure by which the Secretary of Agriculture has exercised these "quasi-legislative" and "quasi-judicial" powers, and has found that procedure in some cases objectionable,[62] it has never questioned the right of Congress to confer upon the Secretary the powers he enjoys. It may, furthermore, be noted that the "quasi-legislative" and "quasi-judicial" powers given to the Secretary are far more extensive than those ever enjoyed by the Shipping Board.[63]

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[60]Brief for the United States, 78-79.

[61]Stafford v. Wallace, 258 U. S. 495 (1922).

[62]Morgan v. United States, 298 U. S. 468 (1936); Morgan v. United States, 304 U. S. 1 (1938).

[63]In Panama Refining Co. v. Ryan, 293 U. S. 388, 420 (1935), Chief Justice Hughes said: "While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose." While the conclusion that Congress may delegate to the President what it may to a commission does not follow from the premise that it

Finally, I believe that what this argument is groping after is in reality a due process limitation relating to procedure, and not a separation of powers point at all. It may easily be that a delegation of quasi-legislative and quasi-judicial power to an executive officer may be so loosely stated as to be bad, while a differently stated delegation of the same power to a quasi-judicial commission would be good. The crucial difference would lie, not in the nature of the grantee, but in the fairness of the procedure by which the granted power is to be exercised. This, it seems to me, is all that Chief Justice Hughes is driving at in the passage in the *Schechter* case already quoted.[64] If the National Industrial Recovery Act had granted to the Federal Trade Commission the *same powers in the same terms* in which they were given to the President, the grant would have been equally bad. The grant to the President was unaccompanied by any procedural requirements to protect against arbitrary action those subject to the power granted. The Federal Trade Commission, on the other hand, is required by statute to carry on its work in accordance with a fair procedure quasi-judicial in character. If these differences in procedure have constitutional siguificance it is because one of them denies due process of law, and not because it delegates legislative power to the wrong kind of agency. This interpretation is further strengthened by the rigorous care with which the procedure followed by the Secretary of Agriculture has been examined and the insistence of the Court that he, though an executive officer, shall administer the Packers and Stockyards Act in accordance with essentially the same quasi-judicial procedure employed by the independent regulatory commissions. In short, another separation of powers argument turns out, upon analysis, to be a due process argument.

3. *Grants of judicial power to the commissions*

It is obvious that the doctrine of the separation of powers forbids the giving to anyone except the courts of the United States the judicial power granted by the Constitution. At the same time the independent regulatory commissions exercise powers which look suspiciously like judicial powers. And yet in the case of these powers, as in the case of the legislative powers delegated to the commissions, the courts have found no violations of the constitutional doctrine of separation of powers. The explanation of this result comprises several points which may be briefly summarized.

In the first place, as already noted,[65] the Supreme Court has neatly solved the problem of any invalid granting of "the judicial power of the United States", by recognizing the existence and constitutional validity of another

may delegate to a commission what it may to the President, the language used assumes the freedom of Congress to select either as its grantee.

[64] *Supra*, p. 34.

[65] *Supra*, p. 31.

brand of federal judicial power which is not "the judicial power of the United States" within the meaning of Article III. The "judicial power of the United States" is vested in the constitutional courts created by Congress under Article III and can be given to no one else. Not only would it be unconstitutional to grant it to any other body; it would be impossible to do so. This is true because as soon as it is granted to any one except a constitutional court the power becomes *ipso facto* not the "judicial power of the United States" but the other sort of federal judicial power, the kind that can be granted to what are called "legislative courts". Suffice it to say that Congress has never sought to confer any portion of "the judicial power of the United States" upon any independent regulatory agency, and this is the only kind of federal judicial power the granting of which the doctrine of the separation of powers forbids.

In the second place, it would not violate the doctrine of the separation of powers for Congress to give federal judicial power to a regulatory commission, as long as it is not "the judicial power of the United States"; but it would violate the due process clause.[66] To make such a delegation valid Congress would have to transform the regulatory agency into the kind of body constitutionally capable of receiving and exercising judicial power. It is not necessary to discuss here the various attributes which the Court requires a body to have before it can exercise federal judicial power, but these requirements arise from the mandates of due process of law and not the separation of powers. The essential and inherent attributes of a court cannot be given to a non-judicial body, especially an administrative body. The final adjudication of private rights, the independent power to compel testimony, cannot conformably to due process be delegated to agencies like the Interstate Commerce Commission which also enjoy wide ranges of legislative and administrative discretion. It is, of course, true that not all the lines of distinction between administrative tribunals such as the independent regulatory commissions and the "legislative courts" have been sharply drawn in court decisions. But insofar as those lines of distinction are constitutional in nature they are pricked out in terms of due process of law and not the separation of powers.

In the third place, the functions of a judicial nature which have been given to the independent commissions are conveniently labelled "quasi-

[66]The Interstate Commerce Commission cannot validly be given the judicial power to compel testimony and punish recalcitrant witnesses. It is interesting to note that the reason for this is found not in the rule against the delegation of judicial power but in the due process clause. In *Interstate Commerce Commission* v. *Brimson*, Mr. Justice Harlan said: "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." 154 U. S. 447, 485 (1894).

judicial". That effectively meets any objection based on a supposed violation of the separation of powers. There can be no objection to the grant of "quasi-judicial" powers. Bodies which receive them become, to that extent, quasi-judicial bodies. Speaking merely etymologically, "quasi-judicial" means merely "not exactly judicial". In 1854 Attorney-General Caleb Cushing in his famous opinion on the powers of his own office describes as "quasi-judicial" the function of the Attorney-General in rendering opinions to the President on questions of law.[67] In recent years the term has acquired a different and more or less generally accepted meaning, although there are many writers who still strenuously object to the use of the prefix "quasi".[68] Whether it is proper to use the term or not we need not attempt to decide. Nor need we attempt to phrase a definition. When it is used, and the Supreme Court has added it to its vocabulary, it serves to describe such a function as that exercised by the Federal Trade Commission in issuing a cease and desist order against an unfair competitive trade practice. Here the legislative and administrative task of determining that a particular business practice is an unfair competitive trade practice, and that such a practice has been indulged in, is combined with the judicial application of the results to the persons concerned, in the form of a restraining order. The application by an independent commission or an administrative officer of a legislative "standard" to concrete cases involving the rights of parties and of the public is a "quasi-judicial" function. And this is perhaps the most important work of the independent regulatory commissions; certainly it is the task which most substantially justifies their separate and independent existence. But in the grant to the commissions of this "quasi-judicial" power there is no violation of the doctrine of the separation of powers.

Finally, Congress is wholly within its rights in requiring regulatory bodies, whether commissions or officers, to perform sub-legislative or administrative tasks by a procedure substantially judicial in character. The courts insist that the fixing of a rate is a legislative function.[69] Congress could itself establish railroad rates by the same procedure by which it passes any other statute. But when this rate-making power was given to the Interstate Commerce Commission, Congress required that it be exercised in accordance with a semi-judicial procedure. And the courts would require such procedure under due process of law even if Congress did not require it by statute. But

[67] 6 Attorney-General's Opinions 326 (U. S. 1854). This opinion, which bears the title "Office and Duties of Attorney-General: Exposition of the constitution of the office of Attorney-General as a branch of the executive administration of the United States", is an important and illuminating document.

[68] "I do not like that word 'quasi'. I heard a great constitutional lawyer in Maryland once ask another lawyer whether he thought a statute was constitutional. The reply was that it was 'quasi-constitutional'. I do not like that word 'quasi'." Senator Rayner in the debate on the Hepburn Bill. 40 CONG. REC. 3782 (1906).

[69] *Supra* note 43.

here quite obviously there is no grant of judicial power. The power is legislative; it is only the method of exercising it which is judicial.

By way of summary we may conclude that the doctrine of the separation of powers has not been invoked, and will not be invoked, to prevent the delegation to the independent commissions of substantial legislative and judicial powers. The doctrine of non-delegation never had much practical vitality and it has lost through the use of labels and other devices of convenience most of what little it had. But this will not result in the serious impairment of individual rights or in the exercise of arbitrary power. These will continue to be unconstitutional as deprivations of life, liberty or property without due process of law.

C. DOES THE SEPARATION OF POWERS REQUIRE THAT THE INDEPENDENT COMMISSIONS BE "IN" SOME ONE OF THE THREE DEPARTMENTS?

A third problem affecting the independent regulatory commissions which has its origin in the doctrine of the separation of powers may be stated thus: Does that doctrine require that every federal governmental agency be located *in* one of the three departments, legislative, executive, or judicial? If so, in which of the three departments do the independent regulatory commissions belong, and what practical legal consequences result from their being in one rather than another? Is it possible that an agency may constitutionally be *in* more than one department at once, or in none of them? If these last alternatives are possible do they necessarily result in the creation of a "fourth department"? Unlike the questions dealt with in the first two sections of this article, these are problems which deal with the "organizational" location of the commissions and not the nature of their powers. They are important questions because some judges and writers have assumed that every commission must be *in* some one department. They have tried to establish which department this is, although they have had difficulty in agreeing. They have then proceeded to infer, from this departmental domicile, important conclusions as to the power of Congress or of the President to control the commissions.

First, does the doctrine of the separation of powers require that every agency of the federal government be definitely and completely *in* some one of the three departments? There is some judicial dictum which leans toward an affirmative answer. In *Kilbourn v. Thompson,* decided in 1881, Mr. Justice Miller said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, legislative and the judicial, that the functions appropriated to each of these branches of government shall be vested

> in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."[70]

The point is more definitely dealt with by Mr. Justice Sutherland in *Springer v. Philippine Islands* in which the Court held void what it regarded as an exercise by the Philippine legislature of executive power. The Court held that the Organic Act under which the islands were governed established a separation of the three powers of government identical with that implicit in the Constitution of the United States. Mr. Justice Sutherland said:

> "Thus the Organic Act, following the rule established by the American Constitutions, both state and Federal, divides the government into three separate departments—the legislative, executive and judicial. . . . And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. . . . "

Then, coming to the concrete exercise of power under attack, he continued:

> "Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor-General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided."[71]

Neither of these utterances had anything to do with independent regulatory commissions, but they seem to suggest that the Constitution creates three departments, that these are mutually exclusive of each other, save as the Constitution provides otherwise, and that an agency must necessarily, therefore, be in one of the three. Applied concretely, this requires that the Interstate Commerce Commission be *in* one of the three departments. Obviously the Commission is not *in* the judicial department. It must then be either *in* the legislative department or *in* the executive department. And there are those willing to support the claims of each department. The possibility of any middle ground is completely ruled out. In a word, the Constitution in dealing with the departments established a perfect trichotomy, and left no room for any confusing and annoying fringe around the edges.

I am unable to agree with this analysis and the inferences drawn from it for three reasons. First, I do not believe that the doctrine of the separation of powers logically precludes the possibility of a governmental agency being *in,* or vitally related to, more than one of the three departments of government at the same time. Second, I think that this is the status which the

[70] 103 U. S. 168, 190 (1881).
[71] 277 U. S. 189, 201, 202 (1928).

independent regulatory commissions and certain other agencies occupy, and that current judicial doctrine and governmental practice have ratified the arrangement. Third, I believe that the effort to put a regulatory commission exclusively *in* a single department is a wholly useless and unprofitable enterprise because no practical constitutional inferences as to the powers and working relationships of that commission can be built upon the mere fact of its geographical location in the governmental system. These points I wish to elaborate.

In the first place, the doctrine of the separation of powers does not logically require that every governmental agency be snugly located wholly inside the boundary lines of a single department. It is true that most of them are so located and that the status of those which are not may seem anomalous. The three distributing clauses of the Constitution deal with governmental powers, legislative, executive, and judicial. It is *powers* not *departments* which are separated. The Constitution wisely left to Congress a great deal of discretion in establishing the governmental machinery by which these powers are to be exercised. Now under the constitutional doctrine already stated, we may say with assurance that we know the precise geographical boundary lines of the "judicial department", or the agencies entrusted with the exercise of "the judicial power of the United States", since clearly this judicial power can be given only to "the Supreme Court and such inferior courts as the Congress may from time to time ordain and establish". The "judicial department", therefore, assuming that there is such a thing, must logically comprise the constitutional courts and nothing else. But no such precise and definite rule has emerged by which to trace the boundary lines of the legislative and executive departments. The Constitution by alluding to the "heads of departments" clearly assumes that there are executive officers besides the President; but there has been no authoritative answer to the question whether the "legislative department" includes more than Congress itself, or if so just how much. Now if the doctrine of the separation of powers had always been applied with such absolute rigidity that under no circumstances could the three powers of government be either *merged* or *delegated,* we could then draw clear and mutually exclusive departmental lines and determine without difficulty in just which of the three departments every agency belongs. But we have, with full judicial approval, scrapped the theory that the three powers of government cannot be merged in a single agency; and we have practically scrapped the doctrine of the nondelegability of powers. If the doctrine of the separation of powers, as presently construed, permits a single agency to exercise two or more of the three powers of government, and permits executive or administrative officers to exercise legislative power, then by what logical compulsion must we conclude that the doctrine of the separation of powers requires us to locate

each of these multi-functional agencies in a single one of the three departments? It seems to me much sounder to recognize that we have, and must have, federal governmental agencies which are not *in* one department to the exclusion of the others but which so straddle at least two of the departments as to be in reality essential parts of each. This I believe to be the status of the independent regulatory commissions, a status which Professor Patterson seems to have had in mind in speaking of "this pluralistic universe of administrative law".[72]

In the second place it is clear that Congress has not attempted to locate every federal governmental agency entirely inside a single department. It has proceeded upon the theory that in some cases this cannot and therefore need not be done. Nor has the idea that the same agency may perhaps be in or vitally connected with more than one department seriously disturbed the courts. In short we have not in practice attempted to maintain a rigidly exclusive three-fold separation of departments. The truth of this statement may be tested by trying to name the departments in which certain important governmental agencies actually belong. One may begin with the so-called "legislative" courts, such as the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals. In which of the three departments of government are these legislative courts located? They exercise judicial power. They do not, however, exercise "the judicial power of the United States". Each of these legislative courts was set up to perform by a more sophisticated judicial procedure a job which has previously been carried on by executive officers. In the case of the Court of Claims it would be more accurate to say that the task had been handled both by executive and legislative officers, since claims against the government had previously been passed upon both by the Treasury Department and by Congress. Since these legislative courts are not "constitutional courts" they can hardly be in the judicial department in the constitutional sense. And yet Congress has made them in every practical respect so completely independent of Congress and of the President that they ean hardly be in the legislative or executive departments. It is equally difficult to allocate the United States Board of

[72] PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES, 5. The following penetrating analysis of the ubiquitous and multi-functional nature of the state insurance commissioner describes with equal accuracy many of the federal regulatory commissions: "We may as well recognize that sometimes the insurance commissioner is an official clerk, sometimes he is a judge, sometimes he is a law-giver, and sometimes he is both prosecuting attorney and hangman. He is partly executive, partly judicial, and partly legislative; and yet he is not confined within any of these categories. I defy anyone to tell me when he stops legislating and begins to judge, or where he stops judging and begins to execute. And even if I could have written a book about the legislative, the executive, and the judicial powers of the commissioner, I should not by any means have told the whole story. The insurance departments are institutions with nearly a century of growth, and institutions have a way of not fitting precisely into our categories. The only way to tell the story of the insurance commissioner is to tell what he is trying to do and how he is trying to do it." *Ibid.*

Tax Appeals. This body was set up to replace the Committee on Appeals and Review in the Treasury Department. The statute creating the Board declares it to be "an. independent agency in the executive branch of the government". The Supreme Court in the case of *Old Colony Trust Co. v. Commissioner of Internal Revenue* stated:

> "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition of review to the courts after the administrative inquiry of the board has been had and decided."[73]

For all practical purposes, however, the Board of Tax Appeals is a legislative court. Its members are called and call themselves judges (their wives enjoying social precedence as the wives of federal judges!); and while they do not have life tenure, they have no responsibility to the President or to Congress, and cannot be directed or controlled by either. The former declaration by Congress that the Board of Tax Appeals is "in the executive department" seems to have no relevance to its actual functions or relations.

It is interesting to note that Congress, in setting up two of the independent regulatory commissions, attempted in a half-hearted way to put them "in" one of the executive departments, and one of them still remains there. The Interstate Commerce Commission when established was required to send its annual report to the Secretary of the Interior who was instructed to provide the commission with offices and supplies and to approve its expense vouchers and the appointment and salaries of its employees.[74] The Secretary asked to be relieved of these responsibilities and the provisions were repealed in 1889.[75] The Guffey Act of 1935 provided:

> "There is hereby established in the Department of the Interior a National Bituminous Coal Commission,"[76]

and gave to the Secretary of the Interior control of the Commission's budget and certain other administrative "housekeeping" functions. The Bituminous Coal Commission Act of 1937[77] continued the Commission in the Department of the Interior. But where would the Bituminous Coal Commission be if it came out of the Department of the Interior? Would it remain in the executive "branch" of the government, though not in any one of the ten major "departments", or would it by some automatic process slide over into the legislative "branch"? If Congress has any definite ideas on this point it has failed to disclose them. It has not told us where it thinks the other independent regulatory commissions are located and the only reasonable inference is that it does not regard the question as important.

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[73]279 U. S. 716, 725 (1929).
[74]Act of Feb. 4, 1887, 24 STAT. 379, §§ 18, 21.
[75]Act of March 2, 1889, 25 STAT. 855, §§ 7, 8.
[76]Act of August 30, 1935, 49 STAT. 991, § 2.
[77]Act of April 26, 1937, 50 STAT. 72, § 2; 15 U. S. C. A. § 829 (Supp. 1938).

I think there is a tendency upon the part of the Supreme Court to discount the necessity for and the possibility of this rigid drawing of departmental lines. The views so clearly stated by Mr. Justice Holmes in his dissenting opinion in the *Springer* case have come to represent more accurately the present position of the Court than the dogmatic statement quoted from *Kilbourn v. Thompson*[78] or Mr. Justice Sutherland's statement in the majority opinion in the *Springer* case.[79] Mr. Justice Holmes said:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on. . . . It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi. . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."[80]

Furthermore Mr. Justice Sutherland himself in the *Humphreys* case[81] implies that the Federal Trade Commission may be in more than one department at the same time. While he emphasizes that the commission is "wholly distinct from the executive department", he declares that it is an agent both of the legislature and of the courts.

In the third place, I believe that the task of allocating governmental agencies to a single department is completely futile. Perhaps this is why neither Congress nor the Supreme Court has taken the job seriously. The important thing about any agency is the character of its job, not its geographical location in the governmental system. It does not seem to me to be possible to draw any inferences which have any meaning from the proposition that an agency is in one department rather than another. That allocation has no necessary bearing upon the powers of the agency, its working relationships, or its constitutional status. What have we accomplished if we agree that the Board of Tax Appeals is, as Congress has said, "in the executive branch", or that the Interstate Commerce Commission is "in the legislative branch"? In neither case have we thereby created any legal relationships between the agency and the department in which it is located. The position of the Secretary of Agriculture under the Packers

[78] *Supra* note 70.
[79] *Supra* note 71.
[80] 277 U. S. 189, 209-211 (1928).
[81] *Supra* note 46.

and Stockyards Act makes it clear that a purely executive officer firmly established in the executive department may be endowed with legislative powers and be an "agent of Congress". We are forced to the conclusion that the important thing is what the officer does and not where he is. There can be no objection to allocating all of the officers and agencies of government to particular departments more or less arbitrarily if we keep it clearly in mind that in doing so we are merely attaching labels. But as soon as we begin to build some constitutional or legal inferences as to the powers or responsibilities of an agency upon the fact that we have allocated that agency to a particular department, we find ourselves in very deep water. And if the designations have no practical consequences it is hard for me to conclude that there is some constitutional necessity for making them.

Does this then mean that we are recognizing, in the case of agencies which appear to sprawl over departmental division lines, a "fourth department"? I do not think this logically follows. A "fourth department" would seem to me to be established only if we were to set up agencies of government which were wholly independent of the three major departments. Possibly the legislative courts come closer to being in this category than any other existing agency. They seem to have been dropped into a sort of governmental vacuum. But the situation is very different when an agency has close and active relations with and responsibilities to both Congress and the President. It seems inaccurate to speak of it as being, or as being in, a fourth department. It seems accurate to say that it is in two of the existing departments and I see no constitutional or practical reason why it should not occupy that position. This I think is the position of the independent regulatory commissions, although their concrete relations with Congress and the President vary with the nature of the jobs they do.

D. DOES THE SEPARATION OF POWERS REQUIRE THE INDEPENDENT REGULATORY COMMISSIONS TO BE CLASSIFIED AS LEGISLATIVE, EXECUTIVE, OR JUDICIAL AGENCIES?

The attempt to locate each of the regulatory agencies in some one of the three major departments has proved to be neither very successful nor very useful. Let us examine and appraise the rather similar effort to classify these agencies as definitely legislative or executive or judicial, irrespective of their departmental location and also irrespective of the fact that they are exercising, as we saw at the outset, three kinds of power. Is it possible, and if so would it be useful, to make this sort of classification? Does the doctrine of the separation of powers require the precise and mutually exclusive labelling of governmental agencies in this way? Does it for example require us to determine that the Interstate Commerce Commission is either a legislative *or* an executive agency instead of merely determining

that it is a legislative *and* an executive agency? It would be unprofitable to pursue this inquiry were it not for the fact that here again there is a disposition in some quarters to work out this iron-clad classification, to determine that the independent regulatory commissions are either legislative or executive, and then, upon the basis of these labels, to deduce the presence or absence of Congressional or Presidential authority over them.

It is not necessary to labor the point that the doctrine of the separation of powers does not logically require the pinning of a single descriptive label upon each and every governmental agency. It does not, in other words, preclude the pinning of two or even three such labels on the same agency. We have already seen that the doctrine of the separation of powers does not forbid the merger in the hands of one agency or one officer of different kinds of power. We have seen, furthermore, that the doctrine of the non-delegability of legislative power, as judicially construed, does not prevent the giving of legislative functions to executive or administrative officers. In fact it is perfectly elear that the Interstate Commerce Commission, the Federal Trade Commission, and the other regulatory commissions do in reality exercise more than one of the three kinds of power recognized by the doctrine of the separation of powers. It would be absurd for the courts which have given that doctrine a definitely realistic interpretation in other respects to insist that it requires governmental agencies to bear what could only be regarded as false or misleading labels. To describe the Interstate Commerce Commission as a legislative agency, if we mean by this that it is exclusively legislative and nothing else, would be to conceal the truth as to its executive, administrative and quasi-judicial duties and responsibilities. The same would be true of any other independent regulatory commission.

If we are not required by the logic of the doctrine of the separation of powers to make this sort of rigid classification, certainly there is no practical reason for wishing to do it. If we look at the commissions realistically, we see that they exercise the characteristic powers of and have actual working relations with both Congress and the President, and that in certain situations their judicial or quasi-judicial attributes are conspicuous. The fact is that the Interstate Commerce Commission is a legislative agency or an administrative agency or a quasi-judicial agency depending upon what part of its particular job one happens to be looking at. It has all three attributes simultaneously, or perhaps it would be more accurate to say that it exhibits them successively at different stages of its activity. The futility of trying to pin a single label upon such a body as the Interstate Commerce Commission may be strikingly illustrated from the legislative history of the commission itself. The story runs somewhat as follows:

When the Interstate Commerce Act was being debated in the Senate in 1886, Senator Morgan of Alabama was greatly disturbed because the statute

failed to declare whether the new commission was legislative, executive or judicial in character. He said:

> "We have combined very skillfully powers derived from each of these departments of the government in the hands of these commissioners; and I merely wanted to understand whether they were executive officers or whether they were legislative officers or whether they were judicial officers."[82]

And he pleaded with the Senate to add to the statute the following amendment for the purpose of settling this point:

> "The commissioners appointed under this Act shall be considered and regarded as being executive officers, and shall not exercise either legislative or judicial powers."[83]

Senator Morgan seems to have made no impression whatever upon his colleagues. Senator Edmunds pointed out that it was quite unique in the history of legislation to confer concrete powers upon a governmental agency and then undertake to say that it shall exercise no power of one kind or another.[84] The general view of the Senate on the Morgan amendment seems to have been accurately voiced by Senator Maxey who said:

> "I only want to say that it is not a matter of the slightest consequence to me whether the powers are called executive, judicial, legislative or ministerial. We have defined on the face of the bill the powers which are to be exercised by the commissioners, and if those powers are not constitutional, that fact ought to be pointed out. Therefore I see no necessity whatever for the amendment proposed by the Senator from Alabama."[85]

In short, in the original debates, Congress refused to be interested in the attempt to classify the Interstate Commerce Commission as a legislative, executive or judicial body. When, however, in 1906 Congress reached the point of conferring upon the Interstate Commerce Commission the vitally important power to establish a railroad rate having future application, the situation changed. The opponents of the Hepburn bill vigorously attacked what they claimed would be an unconstitutional granting of both legislative and judicial powers to the commission. Throughout the entire Congressional debate, therefore, stress was laid by the Congressional leaders upon the point that the Interstate Commerce Commission was definitely and exclusively an *administrative* body and that the new legislation did not alter that status nor give it legislative or judicial powers. In 1910 Congress passed the Mann-Elkins Act enlarging in certain respects the powers of the Commission and

[82] 17 CONG. REC. 4422 (1886).
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

establishing the Commerce Court. The act provided that appeals taken from orders of the Commission should be prosecuted before the Commerce Court by the Attorney General rather than by the Commission's own legal staff. This provision evoked sharp criticism on the ground that the Attorney General was thereby given substantial discretionary authority to determine whether these cases should go to the court. This was alleged to be an improper intrusion of executive authority into the work of the Commission. In driving in this argument it was accordingly urged, in sharp contrast to the position taken in 1906, that the Interstate Commerce Commission was a *legislative* agency which must be left wholly free from any executive control. During the long discussions which culminated in the passage of the Transportation Act in 1920, it was apparent to everyone that important and far reaching managerial and supervisory powers over the railroads were destined to be conferred upon the Interstate Commerce Commission. This in turn brought out bitter protest and the constitutional basis of the protest was that the Interstate Commerce Commission is essentially a *judicial* agency and that it would therefore be constitutionally improper to confer upon it these executive and managerial duties. The moral of this story is obvious. At the outset, with nothing at stake, Congressional leaders were not interested in classifying the Commission as being legislative, executive or judicial. Later on under the pressure of various supposed assaults upon it, or modifications of it, it loomed up successively as first an administrative body, next a legislative body, and finally a judicial body.[86] The truth is, of course, to be found in the sum total of all of these classifications for, as we have already seen, the Interstate Commerce Commission is at the same time legislative, administrative, and judicial. The commission, like a chameleon, changes color and presents varying characteristics when viewed against the shifting scenery of differing circumstances and activities. I am leaving to a later point in this analysis the problem of determining exactly what the relationships are between the independent regulatory commissions and Congress, the President, and the courts. My present purpose is not to determine the precise lines of legal or political responsibility which these relationships may involve. It is merely to point out that the doctrine of the separation of powers does not require us to fit the independent commissions into a mutually exclusive three-fold classification. They have important attributes belonging to all three major departments and there is not the slightest constitutional objection to recognizing that they are legislative, executive and judicial at one and the same time. It may be that for certain purposes and in certain

[86]This bit of historical analysis has been culled from the somewhat elaborate legislative history of the Interstate Commerce Commission to be included in the volume of which this present article forms a chapter. I have therefore omitted here the detailed references to the Congressional Record.

relationships the legislative or administrative aspects of one of these bodies may be of such controlling importance that it may be useful to classify it for that particular purpose as legislative rather than administrative, or administrative rather than legislative. I believe, however, that when this is true, it will be found to be so because of the concrete jobs given to the commission rather than to any constitutional or legal inferences drawn from the nature of commissions in general. For present purposes we may accept as accurate the comment of Commissioner Joseph B. Eastman that "the cataloguing of the duties of an independent commission by tags representing the three traditional subdivisions of the government is little more than an interesting mental exercise".[87]

Nothing seems clearer from a study of this whole problem than the impossibility and the futility of applying to the vitally important administrative development of the last fifty years any rigid concepts drawn from the doctrine of the separation of powers. This can, I think, be effectively illustrated by tracing the development of and the variations in the attitude upon this point of Mr. Justice Sutherland, who had an almost dominating share in the judicial interpretation of these problems, and who may be said to have grown up with the problems as they emerged in varying forms. In pointing out that his ideas with regard to the practical application of the doctrine of the separation of powers have undergone many fluctuations over a period of twenty-five years, I am merely seeking to emphasize how hopeless and confusing it is to try to apply the abstract formula of the separation of powers to the practical problems of modern government. Mr. Justice Sutherland's thinking upon this problem seems to have run through the following phases: First, in 1914 when the Federal Trade Commission bill was being debated, Mr. Sutherland was United States Senator from Utah. He engaged actively in the debates on the bill which he bitterly opposed on constitutional grounds. His position at this time seems to have been this: Congress may properly create a Federal Trade Commission built along the lines of the existing Interstate Commerce Commission and endowed with power to investigate unfair competitive trade practices and report its findings back to Congress for appropriate action. Such a commission Senator Sutherland referred to as a "legislative commission" and he so designated the Interstate Commerce Commission. Such a commission was "legislative" because the power delegated to it was a power which Congress itself could properly exercise if it had the time and energy. When it was proposed, however, to give to the Federal Trade Commission the power to issue a cease and desist order under the procedure set up in the present statute, Senator Sutherland protested that this was a violation of the doctrine of the separation of powers

[87] 12 CONST. REVIEW 97 (April, 1928).

since it conferred upon a "legislative" commission authority which was judicial in character. He declared that this power was in reality the power to issue an injunction, that it was not a power which could be exercised directly by Congress itself, and that it was not, therefore, a power that could be given to "legislative" commissions.[88] It is not important to analyze the Senator's theory in detail, and it may be pertinently suggested that this was the argument of a man who was firmly opposed to the passage of the Federal Trade Commission Act on grounds of general policy. It seems apparent, however, that either Senator Sutherland had not in 1914 discovered the possibilities of the terms "quasi-legislative" and "quasi-judicial" as a descriptive label for the kind of job assigned to the Federal Trade Commission or, if he had, he concealed that fact in the interests of furthering his argnment. What he appears to have believed is that a legislative commission can constitutionally be given only the kind of power which Congress itself could directly exercise. This really amounts to saying that a genuinely regulatory commission would be a constitutional impossibility.

Second, Senator Sutherland became a Justice of the Supreme Court in 1922. In the important case of *Myers v. United States*[89] in 1926, he is found with the majority supporting Chief Justice Taft's conclusion that the President's power to remove federal officers appointed by him with the advice and consent of the Senate is an essential part of the inherent executive power granted to the President by Article II of the Constitution. Since Mr. Justice Sutherland concurred without qualification in this case, we may assume that he either agreed with, or did not feel it important to register disagreement with, Chief Justice Taft's important dictum sweeping the members of the independent regulatory commissions into the scope of the President's illimitable power of removal.

Third, in 1928 Mr. Justice Sutherland wrote the opinion of the Court in *Springer v. Philippine Islands*.[90] The passages already quoted from this opinion make clear the strictness with which he adhered to the orthodox doctrine of the separation of powers. He announced in that opinion not only that doctrine but also the doctrine of the separation of departments. He made it clear that in his opinion if a particular officer or agency of government is not *in* either the legislative or judicial departments, he must of necessity be in the executive department. He appears to rule out the

[88]"It seems to me there is a clear attempt to vest in this legislative commission judicial power—power that we cannot exercise ourselves, and that a legislative body cannot devolve upon a committee of itself or a commission created by it. We can only devolve upon any such commission the power which we ourselves have, and that is the legislative power." 51 CONG. REC. 12651 (1914). For Senator Sutherland's views in greater detail, see *ibid.* 11602-11603, 12651, 12652, 12806-12813, 13056.

[89]272 U. S. 52 (1926).

[90]*Supra* note 71.

constitutional possibility that an agency may straddle the dividing lines between the three departments in such a way as to be an integral part of more than one at the same time.

Fourth, in 1935 Mr. Justice Sutherland again spoke for the Court in *Humphreys v. United States*,[91] in which it was held that Congress could validly restrict by legislation the power of the President to remove members of the Federal Trade Commission. By this time he had either forgotten or discarded all of the major ideas about the Commission and its powers which he voiced in the Senate in 1914. Whether this represents an actual change in his own thinking or merely an acquiescence in the results of numerous Supreme Court decisions, we have no way of knowing. He also discards the dictum of Chief Justice Taft in the *Myers* case, already mentioned, and with which he had tacitly agreed. He states in the *Humphreys* opinion that the Federal Trade Commission is "wholly disconnected from the executive department", that it is an agent both of Congress and of the courts, and that it exercises quasi-legislative and quasi-judicial power. Such executive power as it has is exercised in addition and incidentally to these other powers. While he does not say in so many words that the commission is "in" the legislative branch, it is difficult to escape the conclusion that that is what he means.

Fifth, in 1937 Mr. Justice Sutherland was on the bench during the oral argument in the *Shipping Board* cases.[92] One who was present in Court at this time reported the following interesting colloquy which took place. Mr. James W. Ryan, counsel for the shipping company, was urging upon the Court the argument, earlier summarized, that the United States Shipping Board could not constitutionally be put by executive order or by act of Congress "in" the executive branch. The Shipping Board, he argued, was not an "executive agency" and could not be an "executive agency" because it was not *in* the executive branch of the government.

Justice Sutherland, who had been sitting back in his chair and asking occasional questions during the course of the argument, leaned forward quickly when he heard this.

"Did you say that the Shipping Board was not in the executive branch of the government?" he said—as though he did not believe he had heard correctly. Several other Justices smiled condescendingly at counsel as though he were making a far-fetched proposition.

"Yes, your Honor," Mr. Ryan replied.

"What makes you think that? Where do you find any legal basis for such a conclusion?" the Justice wished to know.

"Why in your Honor's opinion in the *Humphreys* case, this Court held

[91] *Supra* note 46.
[92] Isbrandtsen-Moller Co. v. United States, 300 U. S. 139 (1936).

that the Federal Trade Commission and similar regulatory agencies were not in the executive branch of the government. The Shipping Board fell within the same general category as the Federal Trade Commission and the Interstate Commerce Commission." Mr. Ryan then proceeded to read certain portions of that opinion.

"What branch of the Government do you think the Shipping Board was in, if it was not in the executive branch?" the Justice wanted to know.

"In the legislative branch, your Honor."

Justice Sutherland shook his head, as though he disagreed, and seemed to be thinking the question over as the discussion went on to other points. As we have seen, the Court decided the *Shipping Board* cases upon grounds which made it unnecessary to answer these interesting and important constitutional questions, and with Mr. Justice Sutherland's retirement from the bench we shall probably never know whether he has settled in his own mind the question whether an independent regulatory commission must of necessity be in one of the three departments and if so whether it is in the legislative or in the executive department.

We may snmmarize the results of our analysis thus far as follows: First, the doctrine of the separation of powers does not prevent the merging of legislative, executive, and judicial powers in the independent regulatory commissions. Second, it does not prevent substantial delegations of legislative and judicial power to these commissions. Third, it does not necessitate the crowding of a commission within the walls of a single branch of the government. And fourth, it does not require us to pin upon a commission a single label which brands it as a legislative, an executive, or a judicial body. Perhaps these results are somewhat negative in character and amount to little more than the laying of constitutional ghosts. We could hardly hope, however, to appraise with accuracy the vitally important legal relations of the commissions to Congress, to the President, and to the courts, without first knowing to what extent and in what ways those relations are dominated by the bogey of the eighteenth century doctrine of the separation of powers. The second part of this article will attempt such an appraisal.

[To Be Concluded in the February Issue]