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Robert E. Cushman

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THE CONSTITUTIONAL STATUS OF THE INDEPENDENT REGULATORY COMMISSIONS*

ROBERT E. CUSHMAN

II. RELATIONS OF THE COMMISSIONS TO CONGRESS, TO THE PRESIDENT AND TO THE COURTS

The status of the regulatory commissions cannot be charted in terms of neat categories derived from the theory of separation of powers. The commissions are hybrids; but they are not unconstitutional. There remains the task of analyzing their constitutional relations to each of the three branches of government. What kinds of control may Congress, the President and the courts exercise over them? What limits are there upon the scope and methods of that control? The doctrine of the separation of powers is a factor in answering these questions; but it is not the only factor, and it is convenient to group these practical and concrete problems together.

A. CONGRESS AND THE COMMISSIONS

1. *Power to create and to regulate functions and procedure*

Congress has the power to create independent regulatory agencies. Not only has it set up a good many but it shows signs of continuing to create them. In the 75th Congress more than a hundred bills were introduced proposing new independent establishments, of which at least a dozen were to exercise quasi-judicial power.¹ In creating an office or agency, independent or not, Congress may specify in great detail the duties to be exercised and the procedure to be followed. The statutes governing the Securities and Exchange Commission show how far this process may be pushed.

The power of Congress does not stop here. It may exercise a rather clumsy continuing control in three ways. First, it may pass statutes or resolutions directing the commissions to pursue certain policies or take certain actions in specific situations. A notable example of this was the Hoch-Smith Resolution of 1925,² which directed the Interstate Commerce Commission in

*This is the second and final installment of this article, the first having appeared in (1938) 24 CORNELL LAW QUARTERLY 13.—*Ed.*

¹DIGEST OF PUBLIC GENERAL BILLS, No. 9 and Supplement to No. 9, Legislative Reference Service, Library of Congress, 1938.

²Joint Resolution of January 30, 1925, 43 STAT. 801. For comment see 1 SHAREFMAN,

establishing a rate structure to consider the conditions in various industries and, specifically, to lower rates on agricultural commodities. In 1922 Congress, under pressure from organizations of commercial travellers, passed a statute requiring the Commission to issue interchangeable mileage books at "just and reasonable rates".³ The Commission's order complying with this statute was held void by the Supreme Court but without prejudice to the power of Congress to pass statutes directing Commission action.⁴ There are numerous cases in which Congress orders a commission to conduct some special investigation on its behalf or to recommend legislative changes, and this is one of the purposes for which the commissions were created.⁵ In the main, however, Congress has confined itself to the giving or taking away of powers, and has not tried to direct a commission how to use its powers in particular situations. Unless these congressional directions are so arbitrary or discriminatory as to deny due process of law, there is no constitutional objection to them, no matter how bad they may be on grounds of policy. The power exercised is the same as that by which the duties of the commission were originally defined. We may assume, however, in the absence of judicial precedent, that an attempt by Congress to control a commission's exercise of its quasi-judicial power in a specific case would be a violation of due process of law.

Second, Congress holds the purse strings. Approval or disapproval of a commission's work may be tangibly expressed in the congressional treatment of its budget. Mr. Brandeis, testifying before the House Committee on Interstate and Foreign Commerce in 1914, declared that Congress should control the proposed Federal Trade Commission by regulating its appropriations.⁶ It is a well known fact that almost the only scrutiny the independent commissions get as to their efficiency is by the appropriations committees, a scrutiny, incidentally, which is irregular and inadequate. That this power may be used by Congress to deal with concrete situations is shown by the rider attached to the Independent Offices Appropriation Bill in 1925 forbidding the use by the Federal Trade Commission for certain investigations

THE INTERSTATE COMMERCE COMMISSION (1931) 227 ff.; and HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936) 196.

³Act of August 18, 1922, 42 STAT. 827. 1 SHARFMAN, *op. cit. supra* note 2, at 226.

⁴United States v. New York Central R. R., 263 U. S. 603 (1924).

⁵*Cf.* the provision requiring the Federal Communications Commission in its annual report to make "such recommendations as to additional legislation . . . as the Commission may deem necessary; *Provided*, that the Commission shall make a special report not later than February 1, 1935, recommending such amendments to this Act as it deems desirable in the public interest." Act of June 19, 1934, 48 STAT. 1064, Title I, § 4 (k).

⁶"The discretionary power should be vested in the commission. Congress can exercise its control by limiting the appropriation." *Hearings before House Committee on Interstate and Foreign Commerce*, 63d Cong., 2d. Sess. (1914) 10.

of business activity of any of the funds appropriated.⁷ Here again, while Congress may abuse its power, there can be no doubt that it has it.

Third, Congress may exert control over a commission by legislating its members out of office. The Radio Commission was set up in 1927.⁸ In 1928 Congress enacted that the terms of the commissioners should expire in February, 1929. Another year's lease of life was given the commission in 1929 and later in the same year it was continued "until such time as is otherwise provided for by law".⁹ While the commissioners were carried along by reappointment they were kept year after year on probation. In 1930 Congress "reorganized" the Federal Tariff Commission by terminating by law the terms of the commissioners in office.¹⁰ A partial change in personnel was thus brought about through a new set of Presidential appointments. In the case of agencies whose members can be removed by the President only for cause, this is the only legal way to secure a complete change in personnel at one time.

2. Commission as "Arms of Congress"—Does this describe a legal relationship?

A common formula describes the independent regulatory commissions as "arms of Congress". The expression is used by members of the commissions and by members of Congress.¹¹ Mr. Justice Sutherland was apparently expressing the same idea when he referred to the Federal Trade Commission as "an agency of Congress".¹² There would be no point in discussing the use of such a term, were it not for the fact that those who use it seem to imply that it describes a peculiarly close relationship to Congress and a peculiar degree of independence from Presidential control.

We may readily agree that the commissions are "arms of Congress" in the sense that they do things which Congress itself might do had it the time and expert knowledge. We have already covered this ground. The commissions make numerous fact-finding investigations upon the basis of which Congress may legislate. Some of them have rate-making powers, which we

⁷Act of March 3, 1925, 43 STAT. 1203. See HERRING, *op. cit. supra* note 2, at 127.

⁸Act of February 23, 1927, 44 STAT. 1162.

⁹Act of March 28, 1928, 45 STAT. 373; Act of March 4, 1929, 45 STAT. 1559; Act of Dec. 18, 1929, 46 STAT. 50.

¹⁰The statute provided for a Tariff Commission (composed of six commissioners) "to be hereafter appointed by the President by and with the consent of the Senate, but each member now in office shall continue to serve until his successor (as designated by the President at the time of nomination) takes office, but in no event for longer than [to September 16, 1930]." Act of June 17, 1930, 46 STAT. 590, 696.

¹¹"The Commission is, primarily, an arm of Congress." Statement of Commissioner Joseph B. Eastman, referring to the Interstate Commerce Commission. *Hearings before the Select Committee on Government Organization*, 75th Cong., 1st. Sess. (1937) 179. See similar statement in *Report of House Committee on Interstate and Foreign Commerce* in 1912, quoted in first part of this article at p. 13.

¹²*Humphrey's Executor v. United States*, 295 U. S. 602, 628, 630 (1935).

have already seen are "legislative" in character and could be exercised directly by Congress.¹³ There is no constitutional reason why Congress itself should not by special statute issue radio station licenses or grant ship subsidies instead of giving these tasks to the Federal Communications Commission and the United States Maritime Commission.

But the regulatory commissions have functions which could not constitutionally be performed by a legislative body. Congress may define by statute an "unfair method of competition" or an "unfair labor practice", but it cannot issue a cease and desist order forbidding an individual to continue such a practice. Congress cannot do the judicial work of the Interstate Commerce Commission in reparations cases. Nor can it perform the executive work of the same commission in enforcing the Safety Appliance Acts, or the managerial work of the Maritime Commission in the handling of construction and operating subsidies for shipping. Nor can we dismiss the important judicial, quasi-judicial, and executive functions performed by most of the commissions as being "incidental" to their "quasi-legislative" duties, as Mr. Justice Sutherland dismissed the executive duties performed by the Federal Trade Commission.¹⁴ It is clear that "arms of Congress" do things which Congress could not do.

Finally, no task has ever been given to an independent regulatory commission which could not, with equal constitutional propriety, have been given to an executive officer. Extensive quasi-legislative and quasi-judicial powers have long been given to executive officers, and over forty regulatory statutes involving the use of such powers are administered in the Department of Agriculture alone.¹⁵ We have seen that under the Packers and Stockyards Act the Secretary of Agriculture fixes rates and suppresses unfair competitive practices, exercising the same power, and using virtually the same procedure, as the Interstate Commerce Commission and the Federal Trade Commission.¹⁶ Two years ago Chief Justice Hughes declared that the Secretary was performing a "legislative" function, as he was acting as "an agent of Congress".¹⁷ Presumably, then, he too is an "arm of Congress".

In short, in any common sense meaning of the term, "an arm of Congress"

¹³See first part of this article at p. 27.

¹⁴*Humphrey's Executor v. United States*, 295 U. S. 602, 628 (1935).

¹⁵These are set out in Blachly, *Working Papers on Administrative Adjudication*. Printed for Senate Committee on the Judiciary, 75th Cong. 3d Sess. (1938). This valuable document gives an exhaustive compilation and analysis of all cases in which quasi-judicial tasks have been assigned either to independent agencies or to executive officers.

¹⁶See first part of this article at p. 36.

¹⁷"The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. . . . The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan v. United States*, 298 U. S. 468, 479 (1936).

is not a distinctive designation. Every officer and agency created by Congress to carry laws into effect is an arm of Congress in a very real sense. If we confine the term to the independent commissions we must remember that it is at best an artificial description of and not a reason for their independent status. We cannot prove the commissions independent by calling them "arms of Congress" when we mean by "arms of Congress" agencies which are independent. The term may be a synonym; it is not an argument.

3. *Power of Congress to confer on commissions the status of independence*

The most important and difficult constitutional question concerning the relation of Congress to the commissions is that of the nature and extent of Congressional power to make the commissions "independent". "Independence" here means freedom from the normal control exercised by the President over his subordinates, not independence in the geographical sense of being outside the ten executive departments.¹⁸ The power of Congress to confer this status of independence is of the greatest practical importance, and the theories upon which it rests are the subject of sharp controversy.

a. *The power to confer independence on some agencies is well established*

In the first place, since we are dealing with present realities we may accept the fact that Congress may constitutionally set up agencies free from the discretionary control of the President. This was established by the unanimous holding of the Supreme Court, in the *Humphrey* case,¹⁹ that such independence had been given to the Federal Trade Commission. In exercising its authority "to make all laws necessary and proper for carrying into execution" its delegated powers, Congress enjoys wide discretion to determine

¹⁸The question whether there could properly be an agency wholly independent of the major executive departments was discussed by Secretary of State Monroe in 1812 in connection with a proposal to take the Patent Office out of the State Department and make it independent. He wrote to Dr. Seybert in the House of Representatives as follows:

"I have always thought that every institution, of what nature soever it might be, ought to be comprised within some one of the Departments of the Government, the chief of which only should be responsible to the Chief Executive Magistrate of the Nation. The establishment of inferior independent departments, the heads of which are not, and ought not to be, members of the administration, appears to me to be liable to many serious objections, which will doubtless occur to you. I will mention the following only, first, that the concerns of such inferior departments cannot be investigated and discussed with the same advantage in the meetings and deliberations of the administration, as they might be if the person charged with them was present. The second is that, to remedy this inconvenience, the President would, necessarily, become the head of that department himself, and thus be drawn into much investigation, in detail, that would take his attention from more general and important concerns, to the prejudice of the public interest." Letter, June 10, 1812; 2 AMER. STATE PAPERS. Misc., p. 192.

¹⁹*Supra* note 12.

the structure and legal relationships of the agencies set up to do its will. It may choose, within limits later to be discussed,²⁰ whether it will assign a regulatory job to an executive officer or to a commission independent of normal executive control. The anomalous situation of the Board of Tax Appeals and the Bituminous Coal Commission, already mentioned,²¹ suggests a somewhat befuddled legislative purpose to do both at the same time. The first of these is declared to be "in the executive branch", and the other "in the Department of the Interior", but the members of neither can be removed by the President except for cause. Congress had great difficulty in deciding whether to give the administration of the Packers and Stockyards Act to the Federal Trade Commission or to the Secretary of Agriculture. It created an "independent" Shipping Board in 1916; it allowed the President in 1933 to reduce that board to bureau status in the Department of Commerce and ratified the change;²² and then in 1936 it turned the bureau back into the "independent" Maritime Commission.²³ Congress may find it hard to decide what to do in these matters, but once it does decide, it has full constitutional power—subject to the limitations later discussed—to confer "independence" or not, as it wishes.

b. *Congress is not required by the Constitution to create independent agencies*

It has already been pointed out that Congress is not required to assign quasi-legislative or quasi-judicial jobs to bodies which are independent.²⁴ It may do so if it wishes, but there is no situation in which it is compelled to do so either by the doctrine of the separation of powers or by the requirements of due process of law. The complete repudiation of the idea that "independence" is ever constitutionally necessary is found in the fact that the Packers and Stockyards Act is administered by a cabinet secretary and that that act has been held valid. It is true that the Supreme Court, especially since the enactment of some of the New Deal legislation extending Presidential authority, has made no secret of its sympathetic approval of the independent regulatory commission as an instrument for the exercise of regulatory powers.²⁵ It has even been suggested that the rigid procedural

²⁰*Infra* p. 169.

²¹See first part of this article pp. 43-44.

²²By Executive Order 6166 of June 10, 1933, the Board was converted into the Shipping Board Bureau. The Merchant Marine Act of 1936 transferred the functions of the Shipping Board to the newly created United States Maritime Commission and constituted a recognition and approval by Congress of the earlier abolition of the Shipping Board and the transfer of its functions to the Department of Commerce.

²³Act of June 29, 1936, 49 STAT. 1986.

²⁴See first part of this article at p. 33 ff.

²⁵See the language of Chief Justice Hughes regarding the Federal Trade Commission in *Schechter v. United States*, 295 U. S. 495, 533 (1935).

requirements imposed on the Secretary of Agriculture in the two recent *Morgan* cases²⁶ may ultimately drive the administration of the Packers and Stockyards Act into the hands of an independent commission by rendering it impracticable for a cabinet secretary to comply with those requirements and do anything else. The fact remains that Congress need not create an "independent" commission to do any particular job.

c. *Limitations on power of Congress to make commissions
"independent"*

The really important question is whether there are any constitutional limitations on the power of Congress to make agencies independent, and, if so, what they are. There is sharp difference of opinion on these questions and there is certainly no clear answer to them in the decisions of the Supreme Court.

We may first dispose of a relatively minor point. It seems clear that Congress may constitutionally give to an officer a practical sort of independence from Presidential control by specifying in elaborate detail the nature and scope of his duties and the methods to be followed in performing them. This may be pushed to the point of giving him duties which are purely ministerial: duties in the performance of which there is no element of discretion. Such officers are not thereby made independent in the sense of being beyond the reach of the President's discretionary power of removal, but the President cannot authorize or require them to deviate from their statutory duties. This was all worked out in a persuasive dictum by Mr. Justice Thompson in the *Kendall* case in 1838.²⁷ He said:

"It by no means follows from the vesting of executive power in the President that every officer in every branch of an executive department is under the exclusive direction of the President. . . . There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character. . . . To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

²⁶*Morgan v. United States*, 298 U. S. 468 (1936); *Morgan v. United States*, 304 U. S. 1 (1938). For a penetrating comment on the practical implications of these cases see Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647, 662-664.

²⁷*Kendall v. United States ex rel. Stokes*, 12 Peters 524, 610-613 (U. S. 1838).

The weight of opinion (there being no judicial decision in point) is that the President could not validly review a quasi-judicial decision reached by one of his subordinates in pursuance of statutory authority.²⁸ It is very clear, however, that while the President could not change the decision if he did not like it, he could remove the executive officer who made it.²⁹ The knowledge of this fact may well have the practical effect of giving the President his way in the first instance. The question is also pertinent whether Congress could confer discretion in matters other than quasi-judicial, upon a subordinate executive officer and make his exercise of that discretion final. Here again there is no relevant judicial authority, but experience and opinion support the view that the officer's discretion could not be thus placed beyond the President's reach. There can be no doubt, however, of the power of Congress to limit the discretion of officers and thereby narrow the range of Presidential direction. The type of "independence" which results is established for the purpose of protecting the job rather than the officer from Presidential control.

i. The doctrine of the Myers and Humphrey cases

From a practical point of view the only way in which Congress can make the regulatory commissions "independent" is by limiting the discretionary power of the President to remove their members from office. If he can remove them at pleasure, he can control them; if he cannot remove them, he cannot control them. The only judicial answers we have to the question of how far Congress can go in restricting the President's removal power are to be found in *Myers v. United States*³⁰ and *Humphrey's Executor v. United States*.³¹ The two cases were widely, elaborately and ably discussed.³²

²⁸"William Wirt held in 1823 that the President had no power to review a decision on the settlement of an account by the accounting officer of the Treasury department. (1 Op. Att'y Gen. 625). Taney disagreed with this opinion when he became Attorney General (2 Op. Att'y Gen. 463), but later reversed himself (*ibid.* 507). Attorneys General Berien (2 Op. Att'y Gen. 625) and Crittenden (5 Op. Att'y Gen. 628) denied that the President could review the accounting officer's decision, but claimed that the Secretary of the Treasury might do so. Cushing upheld the President's power of review, but all subsequent opinions have followed the earlier view with respect to quasi-judicial decisions on the settlement of accounts (11 Op. Att'y Gen. 108; 14 Op. Att'y Gen. 65; 15 Op. Att'y Gen. 139), the determination of claims to public lands by the Secretary of the Interior (11 Op. Att'y Gen. 14; 18 Op. Att'y Gen. 31), etc." From an unpublished memorandum by John F. Miller, of Washington, D. C.

²⁹"Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." Taft, C. J., in *Myers v. United States*, 272 U. S. 52, 135 (1926).

³⁰272 U. S. 52 (1926).

³¹295 U. S. 602 (1935).

³²Particularly relevant is the able article by Donovan and Irvine, *The President's*

This is not the place to analyze them in detail. It will suffice to state what they appear to have held, to appraise their effect upon the power of Congress to set up "independent" regulatory agencies, and to draw attention to some of the problems which they left unsolved.

In the *Myers* case the Supreme Court held by a six-to-three vote that Congress could not constitutionally restrict the President's power to remove a first-class postmaster appointed by him with the advice and consent of the Senate. The attempted restriction was a requirement that the Senate concur in the removal of the officer. The Court's result was supported by two main arguments. One was historical and undertook to show that long-standing governmental practice had recognized an illimitable removal power in the President. The other argument rested on the theory that the President's power of discretionary removal is an inherent part of the executive power granted to the President by Article II of the Constitution, and is also implied from the constitutional mandate to "take care that the laws be faithfully executed". If the removal power comes from the Constitution directly, then it cannot be taken away or pruned down by Congress without violating the doctrine of the separation of powers. Chief Justice Taft had been President of the United States and from the vantage point of this administrative experience indulged in some rather sweeping dicta in the *Myers* opinion. He asserted that Congress was without authority to restrict the President's removal power, not merely in the case of postmasters and similar executive officers, but also in the case of the various quasi-judicial commissions.³³ While the point is not clearly met it seems probable that in his opinion the only officers who could be placed by Congress beyond the reach of the President's discretionary removal were judicial officers—*i.e.*, judges of territorial and legislative courts.³⁴

In *Humphrey's Executor v. United States* the Supreme Court unanimously discarded Chief Justice Taft's dictum in the *Myers* case and held that Congress could validly forbid the President to remove a member of the Federal Trade Commission except for the causes stated in the statute. Speaking for the Court, Mr. Justice Sutherland declares that the question whether the President's power of removal can be limited by Congress depends "upon the character of the office",³⁵ and the rule of the *Myers* case is held to apply only to "purely executive officers".³⁶ He recognizes that from the viewpoint of "the character of the office" there is a lot of difference between a post-

Power to Remove Members of Administrative Agencies (1936) 21 CORNELL L. Q. 215. See also HART, TENURE OF OFFICE UNDER THE CONSTITUTION (1930).

³³*Supra* note 29.

³⁴*Myers v. United States*, 272 U. S. 52, 154-158 (1926).

³⁵295 U. S. 602, 631 (1935).

³⁶*Id.* at 632.

master and a member of the Federal Trade Commission and he therefore adds:

"To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."³⁷

There are two ways of approaching the Court's decision in the *Humphrey* case. It is quite possible to regard the case as an invitation to debate all over again the issue presented by the conflicting views of Chief Justice Taft and Mr. Justice Sutherland on the removal power. There is no inescapable logic which leads surely to either position. Each opinion is a rationalization of a conclusion in policy, and one may take one's choice. A powerful argument may be built up in support of the Taft view that the President's executive responsibility and consequently his removal power extend to all officers of the United States who are not doing work which is clearly judicial. The Government's meager twenty-seven page brief supporting the President's right to remove Humphrey, a brief which pretty obviously assumed that the Court would be guided by the dictum in the *Myers* opinion, did not begin to present the full argument available.³⁸ One who agrees with the Taft position may elaborate its rationale and argue that the regulatory commission cannot be protected by Congress from the discretionary removal power of the President. This is a task well worth doing. The other approach to the *Humphrey* case is more matter of fact. For better or for worse that decision is now the law of the land. There seems small chance of converting the Court to the view that the Constitution requires that the Federal Trade Commission and the Interstate Commerce Commission be subject to the President's discretionary power of removal. On this assumption we may accept the decision as a fact and try to determine what it holds and what inferences must be drawn from it. It is from this second approach that the present discussion proceeds.

The narrow holding of the *Humphrey* case is, as we have seen, that Congress could validly protect members of the Federal Trade Commission from Presidential removal except for causes stated in the statute. The scope of

³⁷*Ibid.*

³⁸"In *Shurtleff v. United States*, 189 U. S. 311, this Court held that the Customs Administrative Act of 1890, which provided that a member of the Board of General Appraisers could be removed by the President for inefficiency, neglect of duty or malfeasance in office, did not confine the President's removal power to those causes alone. . . . In *Myers v. United States*, 272 U. S. 52, this Court was apparently agreed that the rule of construction in the *Shurtleff* case is applicable to the Federal Trade Commission Act. A departure from this construction would raise a serious constitutional question." *Brief for the United States*, p. 6, *Humphrey's Executor v. United States*, 295 U. S. 602 (1935).

the removal power depends upon the "character of the office". What characteristics does the Federal Trade Commission have which distinguish it from a postmastership? According to Mr. Justice Sutherland there appear to be four. First, the Commission "occupies no place in the executive department . . . and exercises no part of the executive power vested by the Constitution in the President".³⁹ Second, it acts "in part quasi-legislatively and in part quasi-judicially" in administering the legislative standard of "unfair methods of competition".⁴⁰ Third, it is a "legislative agency"⁴¹ in making investigations, and reports thereon to Congress. Fourth, it acts as "an agency of the judiciary" in its "master in chancery" relationship to the courts.⁴² In contrast to this, a postmaster is a "purely executive" officer and the *Myers* case therefore holds no more than that Congress cannot limit the President's power to remove an officer who is "purely executive".⁴³

The opinion is extremely unsatisfactory. It is loosely reasoned and it employs terms which are not clearly defined. The proposition that the Commission "occupies no place in the executive department . . . and exercises no part of the executive power vested by the Constitution in the President" is wholly unsupported and begs the major question at issue. The opinion does not indicate whether all four of the characteristics stated above are necessary in order to protect the Commission from discretionary removal by the President. Would the fact that it acts "quasi-legislatively and quasi-judicially" be enough, or must it also be an agency of Congress and the Courts, or either of them? When Mr. Justice Sutherland comments upon the nature of "executive officers" and "executive power" he falls into hopeless ambiguity. In speaking of the executive officer he says:

"A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and hence inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is."⁴⁴

This does not tell us whether the postmaster is an executive officer because of the nature of his job or because he is one of the "units in the executive department". Furthermore, if we assume what seems the only sound theory, that he is an executive officer because he exercises executive power, what do we mean by executive power? There is further confusion on this point.

³⁹295 U. S. 602, 628 (1935).

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²*Ibid.*

⁴³*Id.* at 627-628.

⁴⁴*Id.* at 627.

The opinion emphasizes that the Federal Trade Commission "exercises no part of the executive power vested by the Constitution in the President".⁴⁵ Later, in speaking of the duties of the Federal Trade Commission which are not quasi-legislative or quasi-judicial, it is said: "To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so"⁴⁶ as an incident to its other powers. Here is the interesting suggestion that there are two kinds of executive power—the constitutional variety given by Article II to the President, and "executive functions" which are something different. It seems to be inferred that the exercise by an officer of this second variety of "executive functions" would not be incompatible with the status of "independence", while the exercise of executive power "in the constitutional sense" would be. But neither variety of executive power is defined or explained.⁴⁷

The *Humphrey* decision left one important problem unsettled, since the issue was not involved. What is the status of the removal power in respect to a commission which not only "acts quasi-legislatively and quasi-judicially" but also has important executive powers? The problem in the *Humphrey* case was simplified because the Federal Trade Commission has no substantial executive duties which are not an integral part of its quasi-judicial work. The Interstate Commerce Commission, however, carries on the executive task of enforcing the Safety Appliance Acts, a task certainly not "incidental" to the quasi-judicial job of rate-making. The Commission is obviously not "purely executive" in the sense in which the *Humphrey* opinion uses the term; but equally clearly it is not purely quasi-legislative and quasi-judicial. This is true of most of the regulatory commissions and this means that their constitutional status was not determined by the *Humphrey* case.

In view of the confusion in which the problem has been left, one cannot predict with any assurance just where the Supreme Court will place the line dividing agencies which may be protected from discretionary removal from those which may not. It seems probable that the line will be a practical one, in the drawing of which the doctrine of the separation of powers will weigh less than considerations of policy. I venture the following conclusions as to the present status of the commissions.

First, the President's illimitable removal power is not confined by the *Humphrey* case to "purely executive" officers. To hold this would have been pure dictum. What Mr. Justice Sutherland does say is that the *Myers* decision, on its facts, could not go further than to uphold the President's

⁴⁵*Id.* at 628.

⁴⁶*Ibid.*

⁴⁷This distinction completes the picture. We now apparently have two grades of executive power just as we have two grades of legislative power and two grades of judicial power. See first part of this article p. 31.

power to remove a "purely executive" officer. He did not hold, and could not hold, either that the power stopped there or that it went beyond. To insist, however, that Congress can make independent all officers and agencies which are not "purely executive" would permit the virtual destruction of the President's effective control of the executive branch. Few officers and agencies perform duties which are "purely executive", and Congress can easily deprive a "purely executive" officer of that status by giving him some quasi-legislative or quasi-judicial task. The Post Office Department is one of the great executive departments, but it is not "purely executive" since it handles many important quasi-legislative and quasi-judicial jobs. Some forty quasi-judicial tasks are carried on in the Department of Agriculture,⁴⁸ while, as we have seen, the Secretary in administering the Packers and Stockyards Act is performing the "legislative" function of rate-making as an "agent" of Congress.⁴⁹ The sound rule would seem to be this: If the *major* or *primary* functions of an agency are executive in nature, the President retains full power of removal, even though the agency has in addition quasi-legislative and quasi-judicial powers which, taken by themselves, would justify a status of independence under the *Humphrey* rule.

Second, a fair appraisal of the *Humphrey* opinion points to the important quasi-legislative and quasi-judicial work which the Federal Trade Commission was set up to perform as the basic reason justifying its immunity from executive removal. We may conclude that Congress may validly create agencies which are thus "independent" for the purpose of doing similar quasi-legislative and quasi-judicial work. Mr. Justice Sutherland uses both the term "quasi-legislative" and the term "quasi-judicial" to describe the Commission's task of administering the legislative standard of "unfair methods of competition". The function is more commonly called merely quasi-judicial. Clearly Congress could have given the quasi-judicial work of administering the Packers and Stockyards Act to the Federal Trade Commission rather than to the Secretary of Agriculture, and it seriously debated doing it.⁵⁰ The Food and Drug Administration could, without major changes, be set up as an independent agency. It seems safe to conclude that the constitutional justification for "independence" is the performance of quasi-judicial duties, and that Congress, in its discretion, may set up independent agencies for the purpose of doing such work.

Third, I do not believe that executive tasks can constitutionally be given to "independent" agencies, unless they are clearly incidental to the quasi-judicial functions which justify independence. While there is disagreement

⁴⁸*Supra* note 15.

⁴⁹See first part of this article at p. 36.

⁵⁰HERRING, *op. cit. supra* note 2 at 120: LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 112.

about this,⁵¹ it seems to me to be clearly implied in the language of the *Humphrey*⁵² opinion and to be required by the logic of the *Myers* decision. Obviously, quasi-judicial functions can be and are given to executive officers. Congress is under no compulsion to place quasi-judicial tasks in the hands of independent agencies. But the Constitution requires that executive functions be performed under direction of the President, and the *Myers* case makes clear that Congress is not at liberty to withdraw them from that direction by limiting the President's power to remove the officers who perform them. It follows that Congress may not properly give to the independent commissions functions which, separately considered, could not validly be made the exclusive job of an independent agency. Any other rule permits the crippling of the President's executive power and loads the quasi-judicial independent bodies with constitutional contraband.

Congress has not followed this rule. It has shown no reluctance to give to the independent commissions any jobs which could be conveniently dumped upon them. The Interstate Commerce Commission has the executive task of enforcing the Safety Appliance Acts. No one claims that this work is quasi-judicial or that a separate independent body could be set up for its exclusive administration.⁵³ The fact that the Commission does this work well is, of course, irrelevant to the issue. The Maritime Commission has limited quasi-judicial duties in respect to rates and service. This task, however, is overshadowed by its important managerial and executive duties in respect to construction and operating subsidies and the leasing of government-owned vessels.⁵⁴

In my opinion the giving of these executive duties to these two commissions, each of which lies out of reach of the President's discretionary removal, is unconstitutional and should be so held. A decision to this effect would revive the President's removal power and abolish the "independence" of the two bodies. Congress could meet this situation by relieving the commissions of work which is not quasi-judicial or reasonably incidental to quasi-judicial work. The executive jobs could be given to executive officers and sound administration would be furthered thereby. If Congress did not wish

⁵¹The opposite view is taken by Donovan and Irvine, *loc. cit. supra* note 32 at 243 ff.

⁵²Mr. Justice Sutherland, as already mentioned, takes pains to indicate that such executive functions as the Federal Trade Commission possesses are "incidental to its quasi-legislative and quasi-judicial" duties. 295 U. S. 602, 628 (1935).

⁵³"In addition it [the Interstate Commerce Commission] has a few duties which may be classed with executive or judicial functions of government." Eastman, *supra* note 11, at 132.

⁵⁴The incidental nature of the regulatory duties of the Commission is indicated by the following provision: ". . . After the expiration of two years from the effective date of this Act, the President is authorized to transfer, by Executive order, to the Interstate Commerce Commission any or all regulatory powers, regulatory duties, and regulatory functions which, by this title, are vested in the United States Maritime Commission." Act of June 29, 1936, 49 STAT. 1985, Title II, § 204 (c).

to do this it might consider and experiment with the device embodied in some of the earlier drafts, but not the final provisions, of the Civil Aeronautics Bill passed in 1938.⁵⁵ The proposed Civil Aeronautics Authority was to have important executive as well as quasi-judicial powers. It was therefore provided:

"The exercise and performance of the powers and duties of the Authority which are not subject to review by courts of law shall be subject to the general direction of the President."⁵⁶

The bill did not restrict the President's power of removal, but had it done so in the usual way it is clear that the Authority's failure or refusal to follow the President's direction as required by the statute would constitute either neglect of duty or misconduct and therefore cause for removal.⁵⁷

ii. *Can Congress make a commission completely independent by taking away the President's power to remove for cause?*

Congress has never created a completely "independent" regulatory commission.⁵⁸ The independence given has consisted in immunity from the President's discretionary removal power. Always the President has been left with power to remove the members of these "independent" bodies for various causes stated in the statute. Is it constitutionally necessary to leave the President this power? Could Congress validly give to the Interstate Commerce Commission the status which the Budget and Accounting Act gives to the Comptroller General and the Assistant Comptroller General? This is described as follows:

"The Comptroller General and Assistant Comptroller General may be removed at any time by joint resolution of Congress, after notice and hearing when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment."⁵⁹

⁵⁵Act of June 23, 1938; 52 STAT. 973; 49 U. S. C. A. §§ 401 *et seq.* (Supp. 1938).

⁵⁶See tentative draft of a bill, dated January 29, 1938, under consideration by the House Committee on Interstate and Foreign Commerce.

⁵⁷The view expressed here would support the power of the President to remove the Chairman of the T. V. A. Board. In my opinion Congress could not constitutionally place the members of an agency performing the executive and managerial functions of the T. V. A. beyond the reach of discretionary removal. It is possible that the Court will not have to pass on this constitutional issue since the T. V. A. statute does not indicate a clear intention to restrict the President's removal power. See note (1938) 51 HARV. L. REV. 1246.

⁵⁸"Strictly speaking there is, of course, no such thing as an independent commission, for I have already shown that the Congress, the President, and the courts all have some measure of control over their functioning." Eastman, *The Place of the Independent Commission in the Federal Government* (1928) 12 CONSTITUTIONAL REVIEW 97.

⁵⁹31 U. S. C. A. §§ 41, 43 (1927). On June 4, 1920, President Wilson vetoed the

There is no judicial answer to this question. While judges on the legislative courts have tenure during good behavior and can be removed only by impeachment, they are judicial officers and present therefore a wholly different problem.⁶⁰ It can plausibly be argued that the President cannot be deprived of the power to remove for cause any officer not engaged in legislative or judicial work, since to do so would prevent him from taking "care that the laws be faithfully executed". Strong reasons of policy have led Congress to allow the President to remove members of the independent commissions for cause. The only alternatives are to legislate them out of office or to impeach them. Both methods are cumbersome and neither provides an effective way of enforcing even minimum standards of efficiency and honesty. The opinion in the *Humphrey* case is careful to speak of the independence of the Federal Trade Commission in terms of freedom from the President's *discretionary* removal power and assumes throughout that the power to remove for cause is a necessary and appropriate Presidential power. We shall consider this question further at a later point.⁶¹

B. THE PRESIDENT AND THE COMMISSIONS

The relations of the President to the independent regulatory commissions grow out of his power to appoint and to remove their members. These two powers will now be considered.

1. *The President's power to appoint commissioners*

The President has power to appoint members of the regulatory commissions. Such members are "officers of the United States" within the meaning of the clause of Article II which gives the President power with the advice and consent of the Senate to appoint ambassadors, judges, etc., "and all other officers of the United States, whose appointments are not herein otherwise

Budget and Accounting Bill because he believed these removal provisions were unconstitutional. He said:

"The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution to remove an officer appointed by the President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negated by section 2 of Article II. That section . . . provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. . . . Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill. . . ." H. R. Doc. No. 805, 66th Cong. 2d Sess. (1920).

⁶⁰This is true of the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals.

⁶¹*Infra* p. 181 ff.

provided for, and which shall be established". Congress may give to the President alone, to the heads of departments, or to the courts of law, the power to appoint "such inferior officers as they think proper".⁶² Conceivably, then, an independent commission could be appointed by a cabinet secretary, but this would be a curiously anomalous arrangement which would accomplish nothing in the way of freedom from Presidential influence in the selection should the President care to exert that influence.⁶³ But Congress itself cannot constitutionally appoint "an officer of the United States". The Supreme Court so held in *United States v. Ferreira* in 1852.⁶⁴

Granting that Congress may not appoint officers, may it validly specify by statute qualifications which they must have, or disqualifications which they may not have? In a letter to the Senate in 1822, President Monroe strongly contended that:

"In filling original vacancies—that is, offices newly created—it is my opinion, as a general principle, that Congress has no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow-citizens."⁶⁵

Whatever plausibility this theory may have had, it has long since passed into the discard. It seems well established that Congress may specify qualifications and disqualifications for office so long as it does not violate the provision of Article VI that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Congress has not exercised this power with any uniformity. In the case of thousands of offices Congress has set up no qualifications. There is, for instance, no law requiring the Attorney General, any federal judge, or even the justices of the Supreme Court to be learned in the law. In creating the regulatory commissions, however, Congress has set up both qualifications and disqualifications which the President must reckon with in appointing their

⁶²U. S. CONST. Art. II § 2.

⁶³Since the President may remove the Secretary if he makes an appointment objectionable to the President.

⁶⁴13 Howard 40, 51 (U. S. 1852).

⁶⁵There was disagreement on this in Monroe's Cabinet. See the following statement by John Quincy Adams, then Secretary of State:

"Received a notice from the President for a cabinet meeting at his house at 11 o'clock. President [Monroe] has concluded to send his message [see Monroe note quoted in text] only to Senate. He [Monroe] proposed to nominate again Colonel Towson and Colonel Gadsden after they had been rejected by the Senate. . . .

"Crawford makes it a constitutional question whether Congress can limit the selection of persons to whom the President's right of nomination shall be confined for appointment to office; for instance, whether a law could confine the nomination of a judge or Attorney-General to persons learned in the law; commissioners of the navy to captains in the naval service, and the like. The President entertains the same opinion, and has expressed it in the message. Mr. Thompson, the Secretary of the Navy maintained the contrary to which I also inclined." Entry in diary dated April 12, 1822, MEMOIRS OF J. Q. ADAMS, Vol. II, 488.

members.⁶⁶ A common requirement is that not more than a bare majority be members of the same political party.⁶⁷ Other requirements are those of citizenship,⁶⁸ residence in a geographical area,⁶⁹ technical or expert fitness,⁷⁰ etc. Persons having a financial interest in the business or industry to be regulated are usually barred from membership in the regulating commission.⁷¹ In one case an officer who has served one term is made ineligible to another.⁷²

It seems clear that Congress may validly set up these qualifications and disqualifications. Those which are definite in form, such as the disqualification for financial interest, or the requirement of citizenship, could probably be enforced in the courts, although there is no judicial authority on this point.⁷³ Some of the others, such as the requirement that a commissioner be appointed because of special fitness for the job, are to be regarded as pious admonitions rather than enforceable requirements. In all these cases, however, the will of Congress may be effectuated by the political check of senatorial confirmation. The Senate is very unlikely to connive with the President in appointing a commissioner who does not meet the definite requirements, or suffers from the disabilities, set out in the statutes.

These statutory qualifications, however, still leave the President the widest sort of latitude in making his appointments. It is hard to overestimate the far-reaching importance of the President's power and responsibility in this matter. Every President is sure to have the opportunity to appoint several members of each of the commissions, and a President in eight years can, if he wishes, virtually reorganize any one of them through the routine appointment of new members.⁷⁴ President Coolidge attempted to employ the rather dubious practice of using the power to appoint a commissioner, or to withhold such appointment, as currency with which to purchase a discretionary removal power denied by statute. This was done by demanding as the price of an appointment to the Federal Tariff Commission an undated letter of

⁶⁶These are set out in a chart in CUSHMAN, *THE PROBLEM OF THE INDEPENDENT REGULATORY COMMISSIONS* (1936) 35. For a more elaborate tabulation of statutory qualifications of office-holders, see dissenting opinion of Brandeis, J., in *Myers v. United States*, 272 U. S. 52, 264 ff. (1926).

⁶⁷The only exception is the Federal Reserve Board.

⁶⁸Required of Federal Communications Commission.

⁶⁹Under the Radio Act of 1927, the country was divided into five zones in each of which one member of the Radio Commission must be a resident.

⁷⁰This is required in the case of the United States Maritime Commission.

⁷¹There is no analogous restriction with respect to members of the National Labor Relations Board. In the case of the Federal Trade Commission it is provided that "no commissioner shall engage in any other business, vocation, or employment." 15 U. S. C. A. § 41 (1927).

⁷²The Federal Reserve Act makes a member of the Federal Reserve Board who serves a full fourteen year term ineligible to reappointment.

⁷³It seems to be implied, however, in *United States v. Le Baron*, 19 Howard 73, 78 (U. S. 1856).

⁷⁴Statistical evidence of this appears in HERRING, *FEDERAL COMMISSIONERS* (1936) *Appendix P.*, p. 144-5.

resignation which the President was free to use at any time without public explanation if he wished to do so. The request was refused and the appointment was withheld.⁷⁵ Whatever the general propriety of such a course may be, there is no constitutional objection to it.

2. *The President's power to remove commissioners*

We have touched upon some aspects of the President's power to remove members of independent regulatory commissions in discussing the power of Congress to limit it;⁷⁶ but there are other aspects of the President's removal power which merit attention.

In the first place, it has been settled for many years that the President has discretionary power to remove officers whom he appoints if there is no Congressional restriction upon that power. This was established in *Ex parte Hennen* in 1839.⁷⁷ The President's power to remove is implied from his power to appoint as well as from the grant of executive power in Article II, and therefore reaches, in the absence of statutory restriction, even officers not "purely executive" within the rule of the *Myers* case. Therefore, if Congress wishes to protect a regulatory commission from the President's discretionary removal power, it must do so by positive legislation. In the case of several commissions—the Federal Power Commission, the Securities and Exchange Commission, the Federal Communications Commission—there is no limitation on the removal power and the President could, accordingly, dismiss any or all members of these commissions at his pleasure.

The President is authorized to appoint the chairmen of some of the commissions.⁷⁸ In no case is there statutory limitation on his power to remove the chairman from his chairmanship, although in some cases he can remove him from his commissionership only for cause. The President may thus make changes in the chairmanship at his discretion. This power is important from the viewpoint of practical administration.⁷⁹

In the second place, it is my belief that the power to remove for causes specified by statute is a much more powerful implement in the hands of the President than is commonly realized. In the acts creating the regulatory commissions, the causes for which the President may remove members, where any are specified, are inefficiency, neglect of duty, incompetence, misconduct,

⁷⁵D. J. Lewis had been appointed to the Tariff Commission by President Wilson. The undated resignation was requested as a condition to his reappointment in 1925. See HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* (1936) 96.

⁷⁶*Supra*, p. 170 ff.

⁷⁷13 Pet. 230 (U. S. 1839).

⁷⁸This is true of the Federal Reserve Board, Federal Communications Commission, National Labor Relations Board, and United States Maritime Commission.

⁷⁹For illuminating comment on the practical importance of permanent chairmen for the commissions see LANDIS, *op. cit. supra* note 50 at 117. If appointed by the President the chairman may become a liaison officer between the President and the commission.

or malfeasance in office. The acts differ in this respect, for no logical reason.⁸⁰ The Federal Reserve Act authorizes the President to remove members of the Federal Reserve Board "for cause" without defining what "cause" is. President Wilson, under whose close scrutiny the Federal Reserve Act was drafted, assumed that the right to remove "for cause" authorized him to remove the members of the Board if they carried out a certain policy which he believed to be a usurpation of power. He was fully prepared to "reorganize" the Board had it not withdrawn from the position taken.⁸¹

The fairly typical provision that members of the Interstate Commerce Commission may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office" gives him, I believe, the following kinds of authority over the Commission. First, under penalty of removal, he may exact reasonable efficiency and absolute integrity. He can, in short, "take care that the laws be faithfully executed" by the Commission. His authority should extend to collective as well as individual inefficiency. Incompetent administrative management, negligence or tardiness in the performance of duties, susceptibility to improper pressure, laxness in the enforcement of punitive statutes, usurpation of authority, dishonesty, or official misconduct would, any one of them, justify the removal of a single commissioner or any number of commissioners to whom responsibility for such derelictions could be brought home. In short, if it becomes apparent that the Commission is not doing its job competently and honestly, the President has full power to "clean house", to "reorganize" the Commission under the authority of the removal clause quoted above.

Second, I believe that the President, under the power to remove for cause, can force an independent regulatory commission to comply with executive orders of general application unless Congress clearly indicates that such orders should not apply. These executive orders are numerous and relate to a multitude of matters, many of them trivial, which affect the general efficiency of the government. Some of them deal with matters in respect to which uniformity throughout the entire service is highly desirable, such as personnel administration, holidays, sick-leave, etc. Others relate to co-operative and coordinating activities designed to effect harmonious adjustments of joint or overlapping responsibilities. To put an extreme case, if Congress established an independent commission with no statutory direction as to the recruiting and tenure of its staff of employees, the President might by executive order under authority of the Civil Service Act extend the provisions of that Act to the commission's staff. If Congress did not wish such

⁸⁰These are tabulated in the chart referred to in note 66, *supra*.

⁸¹GLASS, AN ADVENTURE IN CONSTRUCTIVE FINANCE (1927) 270-2. The Board was planning to abolish several of the regional reserve banks created by the statute. The President and Mr. Glass regarded such action as *ultra vires*.

executive orders to be extended to the commission it could, of course, exempt it by statute. Otherwise, the refusal of the commission to obey the President's executive order would constitute neglect of duty or misconduct which would justify the removal of the commissioners from office.⁸²

Finally, an independent commission may be required by law to perform certain duties at the direction of the President. This is not very common. The Federal Trade Commission Act, however, declares it to be the duty of the Commission, "Upon the direction of the President or either house of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation."⁸³ It will hardly be questioned that a refusal by the Commission to undertake an investigation at the direction of the President would justify their removal from office for "neglect of duty".

It is highly desirable that Congress give serious attention to the exact statement of the causes for which members of the independent commissions may be removed by the President. This Congress has never done. In the legislative history of the commissions there is no record of any serious consideration of this point. There is no principle upon which one can distinguish the commissions from which members can be removed only for cause from those from which members may be removed in the President's discretion. The original Federal Reserve Act contained a clause authorizing removal of Board members for "cause". In the Banking Act of 1933⁸⁴ this was inadvertently omitted. The omission was discovered during the debates on the Act of 1935⁸⁵ and the clause was restored. Both the Senate and House bills for the creation of the Federal Communications Commission restricted the President's removal power. These restrictions were, without explanation, dropped out by the conference committee, and never restored.⁸⁶ Congress, in short, has not regarded the matter as important. It might, however, be made important. By a more careful and precise statement of causes for removal, Congress could define more sharply the President's authority, could with complete safety extend that authority into areas where it may at present be in doubt, and in this way could ensure a higher degree of administrative efficiency upon the part of the commissions without jeopardizing their independence in the performance of their quasi-judicial work.

⁸²It will be found that in the main the independent regulatory commissions comply with executive orders applicable to them. There is no case in which non-compliance has become an issue upon which the President has been willing to take action.

⁸³Act of Sept. 26, 1914, 38 STAT. 717, § 6 (d).

⁸⁴Act of June 16, 1933, 48 STAT. 31.

⁸⁵Act of Aug. 23, 1935, 49 STAT. 684. Senator Glass later remarked: "I must have been asleep when that was eliminated from the act." *Hearings before Subcommittee of Senate Committee on Banking and Currency on S. 1715 and H. R. 7617, 74th Cong. 1st Sess. (1935) 398.*

⁸⁶The writer asked a member of the commission why the clause had been omitted. The commissioner was unaware that it had been.

Finally, under what procedural limitations, if any, does the President exercise his removal power? It is obvious that there are no such restrictions on discretionary removal; and this includes removal of members of those commissions in respect to which the removal power is not limited by statute. The President need not have any reasons for such removal; if he has reasons they need not be good ones; and he need not give the officer any opportunity to be heard or to answer charges. Neither explanation nor courtesy is required. When President John Adams removed his Secretary of State, Timothy Pickering, in 1800, he accomplished the job in a four-line note: "Sir: Divers causes and considerations essential to the administration of the government, in my judgment requiring a change in the department of state, you are hereby discharged from any further service as Secretary of State. John Adams."⁸⁷

In several cases Congress has not only stated the causes for which a commissioner may be removed, but has also required notice and hearing. Thus, a member of the National Labor Relations Board "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause".⁸⁸ It is clear that if Congress can constitutionally limit removal to stated causes it can prescribe a reasonable minimum procedure to insure the observance of the limitation. It is unnecessary, however, for Congress expressly to require notice and hearing in these cases. The Supreme Court has indicated that notice and hearing are necessary in such cases even when not required by statute. This has also been the uniform holding of the state courts.⁸⁹ This requirement appears to be grounded in due process of law. In *Shurtleff v. United States*⁹⁰ the Court held that the President's removal of Shurtleff without giving him notice and hearing proved that the removal was not made for any of the causes of removal stated in the statute, since had the removal been for those causes notice and hearing would have been essential. The doctrine seems eminently sound. If the President removes an officer upon a charge of dishonesty, the officer seems clearly to be denied due process of law if he is not notified of the charge and given an opportunity to defend his character against it. Legitimate executive discretion is not impaired by compelling the President to follow this fair and reasonable procedure.

A point which remains in doubt is whether the President's removal of

⁸⁷3 PICKERING and UPHAM, LIFE OF TIMOTHY PICKERING (1875) 488.

⁸⁸29 U. S. C. A. § 153 (a) (Supp. 1938).

⁸⁹See GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905) 313 and cases cited.

⁹⁰189 U. S. 311 (1903). "Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and hearing." *Id.* at 314.

an officer for cause after notice and hearing is reviewable by the courts. Must the Supreme Court as well as the President be convinced that the charges against the officer have been substantiated? There are no cases on this point. While the state cases are in conflict, the weight of authority is against judicial review of a governor's action in similar cases.⁹¹ In my opinion there should be no judicial scrutiny of a Presidential removal for cause after notice and hearing. In removals for the causes stated in the statutes, a large element of discretion must remain in the President. What constitutes "inefficiency" or "misconduct" is a question of judgment, not a question of law. Should the President, after notice and hearing, remove a member of the Interstate Commerce Commission for cause, I believe the Supreme Court would refuse, on grounds of the separation of powers, to review this exercise of executive judgment. Due process of law does not entitle the dismissed official to such judicial review. He is not being deprived of property because he has no property right to his office. The only right at stake is his right to be informed of and to answer charges, and this is protected by notice and hearing. If a President abused this removal power, the injured officer would have no legal redress. This is only one of many situations in which the only checks upon the abuse of Presidential power are "political" in nature.

C. THE COMMISSIONS AND THE COURTS

1. *The commissions as agents of the courts*

In the *Humphrey* case, Mr. Justice Sutherland referred to the Federal Trade Commission as "an agency of the judiciary".⁹² He had in mind the section of the Federal Trade Commission Act which provides that, in suits brought under the anti-trust acts, the courts may refer to the Federal Trade Commission as a master in chancery the working out, under procedure designated by the court, of appropriate decrees of dissolution or otherwise.⁹³

⁹¹When an officer is removed for cause after notice and hearing, the sufficiency of the evidence to support the charge will *not* be reviewed by the courts. *Decker v. Bd. of Health Comm'rs of Los Angeles*, 6 Cal. App. (2d) 334 (1935); *State ex rel. Williams v. Kennelly*, 75 Conn. 704 (1903); *State ex rel. Hardie v. Coleman*, 115 Fla. 119 (1934); *Harrington v. Smith*, 114 Kans. 262 (1923); *In re Guden*, 171 N. Y. 529 (1902); *In re Rice*, 131 Misc. 220, 226 N. Y. Supp. 585 (Sup. Ct. 1928); *Contra: State ex rel. Hatton v. Jonghlin*, 103 Fla. 877 (1932); *State v. Purchase*, 57 N. D. 511 (1929).
⁹²295 U. S. 602, 628 (1935).

⁹³Section 7 reads: "That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust Acts, the court may, upon the conclusion of the testimony there, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a matter in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

This provision loomed large in the legislative debates on the Federal Trade Commission bill. It was generally believed that this "master in chancery" function would be one of the most important responsibilities of the proposed commission. It was, in fact, a major argument for creating a commission. It was widely felt that the task of "dissolving" the Standard Oil Company and the American Tobacco Company after the government had won its important suits against them in 1911 had been badly bungled. The courts were not competent to deal with these complex tasks and therefore the Federal Trade Commission, an independent and permanent body of "experts", should be called in to aid the courts in the highly technical work of formulating decrees of dissolution.

Perhaps the Commission could have rendered important and valuable service to the courts under this section, but it has not been allowed to try. In one anti-trust suit, the court ordered a plan of dissolution to be prepared by the respondent and filed with the Federal Trade Commission, which, acting as a master in chancery, was to submit a plan of dissolution to the court. Intervening litigation prevented the Commission from doing this, and the final decree was formulated by another method.⁹⁴ In two other instances matters were referred to the Commission for investigation and report, one by a circuit court of appeals⁹⁵ and one under an agreement between the Attorney-General and certain paper manufacturers.⁹⁶ These are the only cases in which the Federal Trade Commission has acted as "master in chancery".⁹⁷ No other commission has been given analogous duties. No constitutional problems appear to be involved.

2. *Judicial review of commissions*

We turn now to the important problem of the judicial review of the work of the independent regulatory commissions. To what extent is such review constitutionally required? By what methods is it exercised? What is its scope? The briefest summary of these problems will serve our purpose, since there is voluminous literature in this field,⁹⁸ and also because judicial review

⁹⁴United States v. Corn Products Refining Co., 234 Fed. 964 (S. D. N. Y. 1916). For comment on the Commission's activity and the final disposition of the case see *Statutes and Decisions pertaining to the Federal Trade Commission, 1914-1929* (1930) 791.

⁹⁵Federal Trade Commission v. Balme (C. C. A. 2d). See *Statutes and Decisions pertaining to the Federal Trade Commission*, 676.

⁹⁶Under this agreement the Commission was made an arbitrator to decide on a fair selling price for newsprint paper sold by the ten manufacturers in question. See *Annual Report of the Federal Trade Commission for the year ending June 30, 1918*, pp. 4-5, 18.

⁹⁷I am indebted to Dr. Francis Walker, Chief Economist of the Federal Trade Commission, for the information on this point.

⁹⁸McFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTER-STATE COMMERCE COMMISSION (1933); 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW, Chapter 4, *Judicial Review of Administrative Decisions* (1938); LANDIS, *op. cit. supra* note 50 at Chapter IV, *Administrative Policies and the Courts*. And see note in this issue at p. 235.

of the work of these commissions does not differ from review of the work of other administrative officers doing similar jobs.

a. *Constitutional necessity for judicial review*

Judicial review of the independent regulatory commissions is constitutionally necessary because they are "regulatory". They impinge upon private conduct and the use of private property. In this respect they differ from the numerous agencies which are not regulatory but which lend or give away public money, or dispense government privileges. An individual cannot demand on constitutional grounds a judicial scrutiny of the work of an agency which gives him or denies him something to which he has no right at all. But when the government through an independent commission or otherwise licenses a business, fixes rates or charges, polices business conduct in the interests of fair competition, or forbids "unfair labor practices", the due process clause of the Fifth Amendment guarantees basic fairness in substance and procedure. It requires further that there be an opportunity to present these questions of fairness to the courts for review. This is sometimes spoken of as "the rule of law", the time-honored principle that a man is entitled to have his legal rights determined by a court. He is entitled, to use another venerable phrase, to his "day in court" in which he may question any official conduct which he thinks impairs his legal rights. The rule of law (now assimilated to due process of law) does not require that the citizen's legal rights shall be dealt with only in the courts. Nor does it require that a court must do over again the work of the regulatory commission which fixes a rate or enjoins an unfair business practice. It does require that the courts at some point have the opportunity to determine whether the rights of parties have been fairly decided by agencies which have not exceeded their legal powers.⁹⁹ In the *Minnesota Rate Cases*¹⁰⁰ in 1890, the Supreme Court held that the question whether a rate established by a railroad commission was reasonable was a judicial question upon which due process of law required an opportunity for a judicial hearing. The courts have adhered to this doctrine, and have applied it to the quasi-judicial work of all of the federal regulatory commissions.

b. *Methods of judicial review*

Professor Stason has conveniently classified the methods of judicial review

⁹⁹"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." Brandeis, J., concurring in *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 84 (1936). On this whole problem see DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) *passim*.

¹⁰⁰*Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418 (1890).

of regulatory administrative action into three categories.¹⁰¹ First, there is review provided for by statute. Second, review may be exercised by the common law procedures of *certiorari*, *mandamus*, and prohibition. Third, it may come about through collateral attack in actions for damages against officers or suits for injunctions to restrain unlawful official conduct. This analysis is general, and comprehends both state and federal judicial review. These problems of procedure need not detain us. In the case of the federal commissions, procedure for judicial review is provided by statute.¹⁰² Where a commission has power to issue an order and put it into effect, there is always a statutory formula under which appeal lies to the courts for review. In the case of a cease and desist order issued by the Federal Trade Commission, the Commission must itself resort to the courts to enforce the order against a non-complying party.¹⁰³ Before enforcing the order the court will satisfy itself that it has not been issued in excess of the Commission's power. These statutory arrangements for judicial review are not exclusive, but it is not relevant to the purpose of this study to list all of the procedural methods of reviewing the independent commissions, or to indicate the circumstances under which one rather than another is used.

c. *Scope of judicial review*

Assuming that some judicial review of the work of the regulatory commissions is required, what is the scope of that review? Does any part of the work of a commission lie beyond the scrutiny of the courts? Can a commission decide any matters with finality? These are important problems both in constitutional law and in public administration. We may group our analysis of them into two divisions and deal first with the judicial review of commission findings or decisions; and second, with the judicial review of commission methods and procedure. The conclusions here suggested are merely rough summaries of judicial experience in a field in which the courts have developed their position by trial and error.

i. *Judicial review of commission findings or conclusions*

In the first place, the commissions make certain important decisions in the field of policy. These involve the exercise of administrative discretion, and the courts will not review them on their merits. In fact, the constitutional courts cannot review the exercise of administrative discretion, since to do so involves the exercise of non-judicial power in violation of the doctrine of the separation of powers. When the Radio Commission was created,

¹⁰¹STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS (1937) Ch. IX.

¹⁰²Blachly, *op. cit. supra* note 15, *passim*.

¹⁰³Section 5 of the Federal Trade Commission Act.

it was authorized *inter alia* to grant broadcasting station licenses and to renew them "where public convenience, interest or necessity will be served thereby". An applicant for a license or a renewal thereof could appeal to the Court of Appeals of the District of Columbia if the Commission ruled against him. This court was authorized to take additional evidence if it deemed it proper to do so and to "hear, review and determine the appeal upon said record and evidence, and [to] alter or revise the decision appealed from and enter such judgment as it may deem just".¹⁰⁴ In *Federal Radio Commission v. General Electric Company*¹⁰⁵ the Supreme Court refused to review a decision of the Court of Appeals of the District deciding an appeal from the Radio Commission. The function of the Commission in granting or renewing licenses was a "purely administrative function" and "the provision for appeals to the Court of Appeals does no more than make that court a superior or revising agency in the same field." The Court of Appeals of the District is a "legislative court" to the extent that non-judicial duties may validly be imposed upon it;¹⁰⁶ but its non-judicial duties cannot be reviewed by the Supreme Court. Congress had therefore to limit the appeal from Commission orders to questions of law in order to make possible their ultimate review in the Supreme Court.¹⁰⁷ It may be added that Congress may in its discretion provide for a review of commission findings of policy either by an appellate administrative body or by a "legislative court". Administrative review is not to be confused, however, with judicial review.

In the second place, conclusions of law made by a commission must be open to review by the courts. No administrative agency can decide finally a question of law. Any statutory attempt to permit this would deny due process of law. Of course, a commission must in the first instance interpret the statute under which it works; but that interpretation is always subject to judicial review. The questions of law on which the independent regulatory commissions rule are sometimes constitutional, sometimes statutory, sometimes a mixture of both. A notable case in which the Interstate Commerce Commission made a vitally important decision on a question of law, both constitutional and statutory, was the well known *Shreveport* case.¹⁰⁸ Acting under a statutory mandate to eliminate rate discriminations against interstate commerce, the Commission ordered a Texas railroad to cease charging

¹⁰⁴Act of February 23, 1927, 44 STAT. 1162.

¹⁰⁵281 U. S. 464 (1930).

¹⁰⁶*O'Donoghue v. United States*, 289 U. S. 516 (1933). It is, however, in other respects a constitutional court.

¹⁰⁷By Act of July 1, 1930, 46 STAT. 844, Congress limited the review by the court of appeals to "questions of law" and provided that findings of fact if supported by substantial evidence should be conclusive. In *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933), the Supreme Court held that the reviewing of commission action by the court of appeals had thereby been made judicial in nature.

¹⁰⁸*Houston, E. & W. T. Ry. v. United States*, 234 U. S. 342 (1914).

certain freight rates fixed by state authority and applicable to purely intrastate traffic. This was because these rates were so low that they resulted in serious discrimination against competing interstate traffic carried at higher rates deemed reasonable by the Commission. In issuing this order the Commission had to conclude first that the statutes permitted it, and secondly that it did not exceed the constitutional power of Congress over interstate commerce by interfering with commerce which was admittedly intrastate. Clearly these important questions of law could not be finally decided by the Commission. They were appealed first to the Commerce Court and thence to the Supreme Court. Both tribunals sustained the Commission. To allow a commission to determine questions of law with finality would permit it to determine its own jurisdiction and power and to impinge upon the legal rights of individuals without allowing them recourse to the courts in accordance with the "rule of law".

It is not always easy to draw the line between a question of law and a question of policy to be settled by administrative discretion. In close cases the courts have usually regarded the questions involved as questions of law. The Federal Trade Commission Act authorized the Commission to discover and to suppress by cease and desist orders "unfair methods of competition in commerce". The members of Congress in general thought they were giving the Commission power to develop an administrative law in this field by defining in the light of their expert knowledge and experience just what concrete acts constituted "unfair methods of competition".¹⁰⁹ Some held a narrower view of the power given. The Commission itself assumed that it had discretionary power to define unfair methods of competition and that in doing so it was acting for Congress which had originally contemplated defining a long list of such practices in the statute. The Supreme Court, however, in the *Gratz* case¹¹⁰ in 1920, put an end to this interpretation by announcing that "the words, 'unfair method of competition', are not defined by the statute. . . . It is for the courts, not the Commission, ultimately to determine as a matter of law what they include." Thus was a question of policy converted into a question of law.

In the third place, the independent regulatory commissions must make almost countless findings of "fact". These findings of fact are necessary in order that the Commission may know when and how to exercise its regulatory

¹⁰⁹"Indeed, the debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional intention to confer on the Commission, subject to Court review, the duty of giving a detailed content to the general principle embodied in the phrase [unfair competition], and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law and under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar." HENDERSON, *THE FEDERAL TRADE COMMISSION* (1925) 36.

¹¹⁰*Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920).

powers. One of the most cogent reasons for setting up a commission is to provide an expert body of officers to "find facts" in fields so extensive and so technical as to be beyond the capacity of Congress or the courts. The magnitude and the complexity of the fact-finding responsibilities of the Interstate Commerce Commission are the chief justification for its staff of some two thousand persons; similar tasks occupy nearly a thousand officers and employees of the Securities and Exchange Commission. These tasks could be assigned to the courts only at the risk of judicial paralysis. One of the most difficult problems in the field of administrative law is that of determining the extent to which administrative findings of fact may be made final—*i.e.*, the extent to which due process of law requires judicial review of such findings. The difficulties here are increased by the fact that the line between a question of law and a question of fact is often uncertain,¹¹¹ and that in their legal significance not all "facts" found by regulatory commissions are of the same variety.

There is, to begin with, what is sometimes called a "constitutional fact". This is a fact which must be determined in order to decide a constitutional issue. The simplest example is the "fact" of the value of railroad property upon which reasonable railroad rates must be based. To meet the test of due process of law a railroad rate must not be confiscatory. It is confiscatory if it does not permit the carrier to earn a "fair return" upon a "fair valuation" of the property used for the purposes of transportation.¹¹² What constitutes "fair return" is a question of law upon which the courts must have the last word. What is the "fair valuation" of the property of a railroad is a question of fact. But it is a fact the correct determination of which is essential to the protection of the respective rights of the carrier and the public. If the valuation is placed at too low a figure confiscation will result from the rate fixed on such a base. Accordingly, the courts have held that there must be judicial review of administrative findings of "constitutional facts".¹¹³ To allow the

¹¹¹"In truth the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break into matters of law. . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact', and when otherwise disposed, they say that it is a question of 'law'." DICKINSON, *op. cit. supra* note 99, at 55.

¹¹²*Smyth v. Ames*, 169 U. S. 466 (1898).

¹¹³*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920). In *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 228 (1908), Mr. Justice Holmes said: "But the determination of their [the railroads'] rights turns almost wholly upon facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They [the railroads] are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

Interstate Commerce Commission to value railroad property with finality would deny due process of law.

Then there is the category of "jurisdictional facts". These are facts upon the existence of which rests the commission's jurisdiction to act. The jurisdictional fact is illustrated by the case of *Crowell v. Benson*.¹¹⁴ Leaving out of account certain unique and complicating factors, the case was this: The United States Employees' Compensation Commission has jurisdiction under the Longshoremen's Act¹¹⁵ to award compensation for injuries arising within the limits of federal admiralty jurisdiction. In this case it was disputed whether an injured workman was actually employed at the time of injury, and the Commission decided that he was. The Court held that the fact of employment was a "jurisdictional fact". If the man was employed the Commission had jurisdiction; if he was not employed it did not. Accordingly, due process of law required a judicial review of the Commission's finding of this fact. The Court went further and held that the Court must not only review the finding on the fact, but that it must try the issue of fact *de novo*. This last appears to be out of harmony with earlier rulings on analogous points but it is not relevant to our present purpose to analyze the case in greater detail. We may conclude that provision for judicial review of commission findings of jurisdictional facts is required on constitutional grounds.¹¹⁶

We may group together without specific label all other kinds of "facts". The Interstate Commerce Commission finds as a fact that a carrier has allowed a rebate to a shipper. The Federal Trade Commission finds that a manufacturer has made a price agreement which obstructs fair competition. These appear to be mere facts, neither constitutional nor jurisdictional, and if they are determined by fair procedure and are supported by evidence they are ordinarily beyond the reach of further judicial review. The independent commissions carry on a steadily increasing volume of fact-finding which is not subject to judicial review on the merits.

Judicial review of fact-finding by the commissions has taken two forms. First, the courts, barring explicit statutory restriction, may try the issue of fact *de novo* on appeal. In the early days the courts looked with suspicion and jealousy upon the powers given to the regulatory commissions, and Congress was by no means sure of its authority to place any limits upon the judicial review of commission fact-finding. Prior to the Hepburn Act of 1906, the laborious and expert "findings" of the Interstate Commerce Com-

¹¹⁴285 U. S. 22 (1932).

¹¹⁵Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, 44 STAT. 1424.

¹¹⁶This whole problem is discussed in Dickinson, *Crowell v. Benson; Judicial Review of Administrative Determination of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055. See also Black, *The "Jurisdictional Fact" Theory and Administrative Finality* (1937) 22 CORNELL L. Q. 349, 515.

mission counted for little or nothing in the judicial review of the Commission's work. The courts did over again the Commission's job, and received any new evidence which might be presented. Carriers deliberately withheld evidence in hearings before the Commission in order to produce it as new evidence in court on review. The prestige of the Commission was destroyed by the fact that there was no point or issue upon which its decision was final.¹¹⁷ Under the Hepburn Act a second mode of review gradually emerged. By 1912 the Supreme Court was following the rule that orders of the Commission would be set aside only for mistakes of law, arbitrary action, or lack of substantial evidence in support of fact determinations.¹¹⁸ One of the major grounds of attack on the ill-fated Commerce Court set up in 1910 was its stubborn insistence upon reverting to the trial *de novo* in reviewing Commission orders.¹¹⁹ At the present time there is no regulatory commission whose findings of fact are not treated as conclusive if supported by substantial evidence, and the courts will not themselves hear new evidence upon review. Congress has in most cases required by law that this measure of respect shall be accorded to the findings of the commissions. Even in the absence of statute the courts would follow this rule in order to avoid the burdensome task of doing over again the commissions' most exacting labors.

ii. Judicial review of commission methods and procedure

Judicial scrutiny extends not merely to the conclusions of the commissions but to their methods of reaching those conclusions. Their procedure must, in the first place, meet the requirements of due process of law. Just what these are will vary in some degree with the nature of the power being exercised or the rights being regulated. In all cases there is an essential minimum comprising notice and hearing and a variety of procedural steps deemed necessary to a fair and open determination of the rights involved. It is not necessary for our purpose to catalog these elements. A commission must, in the second place, follow all statutory mandates as to procedure. These may be elaborate and may go beyond the requirements of due process of law. In many cases Congress allows the commission to formulate its own rules of procedure. In all cases, however, the commission must follow whatever statutory directions there are and the courts will review its procedure to make sure that it has done so. The recent cases involving the procedure of the Secretary of Agriculture in administering the Packers and Stockyards Act raised questions as to whether the Secretary had fully complied with

¹¹⁷MCFARLAND, *op. cit. supra* note 98, at 105-114; 1 SHARFMAN, INTERSTATE COMMERCE COMMISSION (1931) 24 ff.

¹¹⁸Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541 (1912).

¹¹⁹1 SHARFMAN, INTERSTATE COMMERCE COMMISSION (1931) 65-69.

the procedural requirements imposed by statute.¹²⁰ In the third place, where a commission has been authorized by Congress to set up its own rules of procedure, it will be required by the courts to adhere to them until they are modified in the regular way. It will not be permitted to improvise other procedure. Such rules, issued under statutory authorization, acquire the force of law.¹²¹ The commission can change the procedure, therefore, only by first changing the rules.

Judicial scrutiny of commission procedure goes beyond examination of mere compliance with technical rules. It extends to the essential fairness of the entire proceeding. As it is possible to give a person a grossly unfair trial without deviating from any of the technical requirements of criminal procedure, so a regulatory commission may act unfairly and at the same time abide by every formal procedural requirement. Unfairness may take the form of the suppression of evidence, or any mark of bias. The courts will set aside as a denial of due process of law a result reached through a procedure technically correct but nevertheless characterized by prejudice or unfairness.¹²²

3. *Unsolved problems as to the range of judicial control of independent regulatory commissions*

The range of judicial control over the commissions is not governed by a set of fixed rules. A minimum of judicial supervision is required by the Constitution, but since this is defined by the courts themselves it is by no means immutable. Beyond this there are substantial elements of flexibility in the extent of judicial control. Since this has important effects upon the administrative process, there is practical value in studying the factors which tend to enlarge or contract it.

The courts control in large measure the range of their supervisory authority by keeping flexible and in some cases vague the principles under which it is exercised. For example, the courts hold that "jurisdictional facts" must be reviewed. But close analysis discloses no precise line between jurisdictional facts and other facts which commissions must determine. In *Crowell v. Benson*¹²³ the fact of the employment relationship was held to be jurisdictional. But in the same way most of the other facts which the commission determines can be looked upon as jurisdictional if the courts wish to regard

¹²⁰*Supra* note 26. See also *Wichita R. & Light Co. v. P. U. Comm.*, 260 U. S. 48 (1922).

¹²¹*United States ex rel. Denney v. Callahan*, 54 App. D. C. 61, 294 Fed. 992 (1924), holds that the rules of the Board of Education of the District of Columbia have the force of law and must, therefore, be followed by the Board.

¹²²*Chin Yow v. United States*, 208 U. S. 8 (1908); *Kwock Jan Fat v. White*, 253 U. S. 465 (1920).

¹²³*Supra* note 114.

them so.¹²⁴ Furthermore, we have seen that the courts pass judgment upon the essential fairness of the procedure used by a commission. If the court gains an impression of good faith and scrupulous adherence to sound procedural rules, it maintains an attitude of aloofness, confining its review to the constitutional or statutory minimum. But if the subtle evidences of fairness and impartiality are lacking and the court finds that evidence has been carelessly or prejudicially handled, it may extend its supervision to the point of virtually doing over again the administrative tasks. This was the Supreme Court's attitude toward the Federal Trade Commission during its earlier years, when the Court felt that the findings of the Commission supporting its orders were not full and fair deductions from the evidence but were mere rationalizations of conclusions reached when the complaints charging unfair competition were filed.¹²⁵ The courts have not been reluctant to exercise such control as they deem essential to the full protection of the rights of those affected by the regulatory process. Their point of view is expressed in the oft-quoted comment of Mr. Justice Harlan:

"The courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by the government or by individual persons, that violated . . . justice or were hostile to the . . . principles devised for the protection of the essential rights of property."¹²⁶

The practical implications of this judicial attitude are clear. The courts will not stand by and see a job of regulation so bungled by a commission or administrative officer that private rights are inadequately protected. They will inject themselves into the picture and assume revisory and controlling power to the extent necessary to protect such rights. If we desire to confine the courts to a minimum of participation in the administrative process, we must see that that process in the hands of the commissions is so perfected as to safeguard private rights without judicial intrusion. If the commissions earn judicial respect they will be given a wide range of immunity from judicial interference. If they do not command that respect they will be "reviewed" practically to the point of being superseded by the courts.

There are two points of view as to the proper range of judicial review of commission action. Many believe that the maximum judicial supervision should be required by statute. This would mean full review by the courts of commission determinations of both law and facts. It is urged that the weakest part of the work of the commissions lies in the finding of facts and

¹²⁴Mr. Justice Brandeis emphasized this in his dissenting opinion in *Crowell v. Benson*, 285 U. S. 22, 73-4 (1932).

¹²⁵HENDERSON, *THE FEDERAL TRADE COMMISSION* (1925) Ch. III.

¹²⁶*Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195 (1910).

that unrestricted judicial review is the only way adequately to protect private rights. This position was taken by the Committee on Administrative Law of the American Bar Association in its report in 1936.¹²⁷ In contrast to this there is the view that the quasi-judicial commissions are the most efficient agencies for the handling of their complex and difficult tasks, that the courts are not qualified to make technical findings of fact, and that we should therefore strive to make commission methods so efficient and so solicitous of private rights that judicial review may be safely held to the minimum.¹²⁸ With this second viewpoint I emphatically agree.¹²⁹

CONCLUSION

This analysis of the constitutional status of the independent regulatory commissions has aimed to be factual rather than critical. It has not seemed useful to discuss here whether that status ought to be different from what it is. The doctrine of the separation of powers might convincingly have been interpreted so as to make the commissions unconstitutional. It has not been so interpreted, it is not likely to be, and this study neither urges such an interpretation nor concerns itself with inferences or consequences which might flow from it. Nor does this analysis seek to reach any major conclusions of policy regarding the commissions. The power to create a commission is one thing; the wisdom of creating one is a wholly different thing. It may be desirable to give the President more control over the commissions than Congress is required by the Constitution to allow. These questions are foreign to the present inquiry. Our constitutional findings may be summarized as follows:

¹²⁷(1936) 61 A. B. A. REP. 720-794.

¹²⁸This point of view is reflected in the provisions of the Logan bill (S. 3676, 75th Cong. 3d Sess.) providing for the establishment of a United States Circuit Court of Appeals for Administration to review final orders and decisions of federal administrative authorities and tribunals. Section 11 provides:

"The review by the court shall be limited to questions of law, and the findings of fact of the commission, administrative authority, or tribunal, if supported by substantial evidence, shall be conclusive."

¹²⁹The two divergent viewpoints as to the legitimate scope of judicial review of administrative action are clearly presented in a recent case in the Court of Appeals for the District of Columbia involving review of a Patent Office rejection of an application for patent, Carbide and Carbon Chemicals Corp. v. Coe, December 29, 1938. The majority reviewed the issue on the merits and reversed the Patent Office. This the statute clearly permitted. The able dissenting opinion of Mr. Justice Edgerton stresses the importance of according to the expert findings of the Patent Office a presumption of correctness. He said: "The rule that the Patent Office should be sustained unless it is clearly wrong is peculiarly appropriate to the question of invention. . . . Usually, as in the present case, a distinct science or technical specialty is involved; and . . . expertness in the special field is, to put it mildly, a great advantage." He quoted from Judge Mack, *Gold v. Gold*, 237 Fed. 84, 86 (C. C. A. 7th 1916): ". . . it is just such questions that the administrative tribunal is preeminently qualified to solve. Even then, of course, the court is not absolved from the duty of examination; but, unless it be perfectly clear that the final administrative body . . . erred, relief should not be granted. . . ."

First, the doctrine of the separation of powers, as judicially developed, does not prevent the creation of hybrid governmental agencies, (a) in which legislative, executive and judicial powers are merged, (b) to which legislative powers are delegated and judicial powers granted, (c) which straddle the boundary lines of the three branches of government, and (d) which cannot be classified as clearly legislative, executive or judicial.

Second, Congress may, but need not, place the performance of quasi-judicial and quasi-legislative functions beyond the reach of the President's executive control through his discretionary removal power.

Third, Congress cannot constitutionally withdraw from the President's executive control agencies to which it gives executive duties, duties which could not be made the exclusive work of an agency independent of Presidential control.

Fourth, the President retains considerable authority to "take care that the laws be faithfully executed" in the power to remove for cause the members of agencies which have been protected against his discretionary removal.

Fifth, a minimum range of judicial supervision of the independent commissions is required by the Constitution. The courts extend this control when they feel that the protection of private rights demands it, but sound commission organization and procedure tend to keep it at the minimum.