Separation of Powers and the Labor Act

II. "EXPERTISE," SEPARATION OF POWERS, and DUE PROCESS

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IT IS sometimes said that, whatever their constitutional defects, quasi-judicial administrative tribunals are vital to good government because of the complexities of the modern world. One used to hear, too, that such tribunals are necessary in order to get speedy justice and broad-minded, flexible, sophisticated decisions. Lately, with the NLRB and other administrative agencies demonstrating a truly remarkable talent for delay and for hide-bound mechanical decisions,[36] one does not hear the latter encomium of administrative agencies so much. But "expertise," one still hears, is as necessary in government as it is in the other vital aspects of advanced, intricate, delicately interdependent contemporary society.

According to this view it is unrealistic and "reactionary" to expect the regular courts either to possess, to develop, or consistently to exercise the requisite expertise in so specialized and complicated a field as, for example, labor relations. There, a tribunal manned by experts is needed. One does not ask a general handyman to build or repair a computer. In the same way, a judge of general jurisdiction cannot be expected to perform well in the complex, specialized

[36] For footnotes, see page 506.

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area of labor relations. There, a specialized expert tribunal such as the National Labor Relations Board must do the job.

It will be observed that this rationale is built around two assumptions: (1) that labor relations are a distinct, inordinately complex field; (2) that a specially qualified agency is thus required to administer them.

It is true that the employer-employee relationship is distinct from such other relationships as husband-wife, parent-child, buyer-seller, contractor-subcontractor, government-person, and teacher-student. It is not self-evident, however, that the employer-employee (or union-employee or union-employer) relationship is either more sensitive, more complicated, or more critically a matter of public interest than those and other human relationships. Society is a sensitive complex of human relationships; all human relationships are relatively subtle and complicated. It is not possible to maintain *a priori* that labor relations are more so. Such an assertion has to be *proved*. No one has ever done so – probably because it would be impossible to do so.

Complexity Requires Freedom

Even if it were conceded for the sake of argument that labor relations are exceptionally sensitive and complex, it would not follow that – the nation's *fundamental* policies being what they are – a specialized agency of government is necessary. The fundamental policies of this nation call for the administration of labor *relations* mainly by employers and employees and, to some small degree, by trade unions and arbitrators. The more complex relationships become, indeed, the more necessary does it become to leave to individuals the freedom to adjust their own relationships. The effect of thoroughgoing regulation of complex relationships is only frustration for both the regulating body and the persons regulated. Regulating an infant is relatively easy; the child grows more difficult; the teenager almost impossible – all because the relationships have grown more complex. It is the nature and supreme advantage of a free society, as distinct from a command or totalitarian society, to leave the *conduct* of all human relations essentially to the persons immediately involved, or to their agents, subject only to general rules, equally applied.

Congress has followed this policy in the Labor Act. It has never empowered the Labor Board to administer labor *relations* (although that agency has frequently had to be reminded by the Supreme Court, by the U.S. Courts

of Appeals, and by Congress of the limited reach of its commission). Congress has empowered the Labor Board and its General Counsel to administer the *National Labor Relations Act*, not the *labor relations* of the country.

No Need for Monopoly

The General Counsel's functions are mainly to decide which charges should be prosecuted and then to prosecute them. The functions of the Labor Board and its subordinates are (1) to conduct hearings; (2) to interpret and draw conclusions from written and oral evidence; (3) to apply Congress' law to the facts found in accordance with congressional intent; and (4) to issue appropriate orders.

No one has ever advanced a convincing reason for giving a prosecutional monopoly to a lawyer entitled "General Counsel of the National Labor Relations Board" as against vesting this power, say, in the Department of Justice. Moreover, no one has explained why either policy or justice in labor law is served by denying private parties – employees, employers, or union officials – the power to prosecute their own cases which private parties are accorded under the antitrust laws. No one has even attempted to justify this – again probably because it would be impossible to do so.

On the contrary, the General Counsel's prosecutional monopoly works against both policy and justice. Denying persons the right to a day in court more markedly denies justice than does a denial of due process. It is a denial of all process. This denial cannot be justified on "policy grounds," either, for its effect has been and must continue to be to inhibit and frustrate the development of labor law.

As matters now stand, only such developments occur as the General Counsel wishes; dozens of decisions could be cited to the effect that there is no appeal from a refusal by the General Counsel to issue a complaint. Without in any way impugning the good faith of the General Counsel, it remains self-evident that he and his limited personnel cannot possibly equal the range, the vigor, and the litigational fertility of the nation at large. Even if it be conceded – as I do, at least for the sake of argument – that the General Counsel's staff includes lawyers as learned and as clever as those in private practice, the fact remains that the latter are more numerous and more zealous to serve their clients. The General Counsel's prosecutional monopoly should obviously be withdrawn.

Expertise in What?

If it is difficult to understand why the General Counsel should have a prosecutional monopoly, it is at least equally unobvious that human beings who become members of the National Labor Relations Board are more qualified to perform the judicial functions which Congress created in the National Labor Relations Act than are the men who occupy the Federal bench. Conducting hearings, ruling on sufficiency of complaints and answers, admitting or excluding evidence, evaluating testimony, interpreting documents, drawing inferences, arriving at conclusions of fact and of law, fashioning appropriate orders — these are all activities requiring a certain level of competence, training, and experience. The "man in the street" is not likely to carry out these functions very well without special training and experience.

The question, however, is not whether the NLRB is more qualified than the man in the street to carry out these functions. For the purposes of this investigation into the separation of powers, the main question must be whether Congress has a reasonable basis for delegating judicial powers to an administrative agency, rather than to the judges of the Federal bench. Admitting that "expertise" is a good thing, we must then ask: expertise in *what*? If it is expertise in legal administration — in the arts and skills of *judging* — prima facie, at least, one would think that career-judges are the true experts.

In a period when principled analysis counted for more than it does in these "pragmatic" days, it would have been enough to point out that the members of the National Labor Relations Board are appointed for limited terms of office. That fact would alone serve to disqualify them for the exercise of any part, however small, of the judicial power of the United States. For the Constitution insists that the judicial power of the United States be exercised only by men appointed to the Federal bench for life.

The times being what they are, the analysis must extend beyond and behind the Constitutional standard, even though in doing so it will only confirm the acuteness and the wisdom of that standard. Two integrated inquiries suggest themselves: (1) Are Board members and their subordinates better qualified than Federal judges to carry out the judicial functions created by the Labor Act? (2) Are the Congressional policies embodied in the Labor Act likely to be accepted with better grace and more faithfully effectuated by the

Labor Board or by the Federal courts?

The Judicial Temperament

No extensive "empirical research" is necessary in order to establish that the Labor Board members and their subordinates begin their careers with no significant training or experiential advantage over the men who are appointed to the Federal bench. As a matter of fact, the only *relevant* specialist training for the functions under consideration is *legal* training. *All* Federal judges nowadays, so far as I have been able to discover, are legally trained. Most Labor Board members and personnel have likewise had legal training, although some have not. There is a stand-off here, and I doubt whether it could be resolved by reviewing the law-school records compiled by the judges and the Board people respectively.

As far as experience is concerned, it is quite probable that Labor Board personnel, if only for being younger on the whole, have had less general experience at the beginning of their Board careers than the Federal judges (who come mainly to office after years of practice) have had in the beginning of their judicial careers. On the other hand, Labor Board personnel, since their efforts are confined to the labor law field, tend to build a concentrated and extensive experience in *labor law* much more quickly than the Federal judges are ever likely to acquire.

Careless thinking might lead one to conclude from the foregoing that the Labor Board people soon *acquire* a significant advantage, even if they do not begin with one. More careful consideration leads to a different conclusion, however.

Of course, a person specializing in labor law is likely to know more about *that subject* than the person who does not specialize in it. No court of general jurisdiction will ever be able to match a specialized court in the mastery of the minute detail of the substantive law in which the latter specializes.

It is a serious mistake, however, to regard this as a significant point. What we desire primarily in judges is not exhaustive mastery of the substantive details of any particular field of law. It is the job of the opposing lawyers to bring all the relevant law and doctrine to the court's attention.

A solid grasp of basic principles of law in the various fields is more than enough such equipment for any judge. What a democratic society wants essentially from its judges, however, is a complex of

other qualities. It requires what is perhaps best comprehended within the term "judicial temperament": a strong but open mind; a habit of reserving judgment till all the facts are in and disinterestedly evaluated; a willingness to listen – really *listen* – to argument; patience; respect for the opinions of other judges; a good logical mind which will adequately distinguish the relevant from the irrelevant facts and the cogent from the illogical arguments; an inclination to start out every case believing that the facts, the law, and the arguments – not the identity of the parties – should determine the decision. There is no basis for the belief that NLRB members, trial examiners, or other Board personnel rank higher than the Federal judges on this all-important standard of judicial temperament. Quite the contrary.

In a *representative government*, there is one more supremely desirable judicial quality. If representative government is to function properly, the judges must be satisfied to leave the policy-making to the legislature; they must be committed to interpreting and applying the statutes which the legislature has passed, not to competing with the legislature as a lawmaking, policy-making organ of government. For neither judges nor administrators can ever represent the nation and its people in the way that Senators and members of the House of Representatives do. It is physically impossible for judges and administrators to constitute themselves the deliberative and consultative microcosm of the nation which the House and the Senate do without even thinking about it.

Leave Policy to Congress

When judicial officers take on a legislative role, they make a mess all around. They produce neither good legislation nor good decisions. Litigation, the courtroom, and the judicial opinion are functionally neither adapted nor adaptable to either gathering the sense of the whole community or expressing it in legislative form. On the other hand, litigation, the courtroom, and the judicial opinion are the best means thus far devised for applying established law and policy to the facts of the individual dispute which every case or controversy involves.

This is why it is good for legislatures to stick to legislating and for judges to stick to judging. It may be all right for legislatures to care little about the facts of particular cases when they are contemplating general legislation. But the judicial officer who fails to attend excruciatingly to the facts of the *particular* case he is

deciding, on the contrary, is fundamentally and dangerously untrue to his function and duty.

One of the characteristic defects of the NLRB is that it is continually forcing the facts to fit its predetermined policies. Instead of fitting Congress's law to the facts as they exist, the Board persistently manhandles the facts so that they will produce the results it wants. The Board wants every employee in the nation to wear a union label. If Congress says that employees need wear a union label only when it fits them, the Board does what it can to make a fit. If the facts don't fit, the Board will make them fit. If there are no material facts at all, the Board will frequently use adjectives to make up the deficiency. Thus in *Rivers Mfg. Co.*, the trial examiner delivered himself of the following comments: "In this setting of intensive and extensive [sic] interference, restraint and coercion, the Respondent terminated the employment of nine employees . . . known by management to be union adherents. . . . The evidence sustaining General Counsel's allegations that these October 2 discharges were designed to discourage further self-organization is overwhelming."[37]

After a painstaking examination of the entire record, Circuit Judge O'Sullivan concluded that the trial examiner's characterizations were not only exaggerations but "without foundation." "A right to *infer*," he said, "is not a right to *create*."[38]

The point is that it is unrealistic to expect patient, painstaking analysis of fact and application of existing law from committed ideologues; for they are interested more in molding the world to their desires than in doing justice in the immediate dispute. The closely related point is that such ideologues cannot be expected to subordinate their policy wishes to those of the legislature. Hence, if Congress wishes its policies to govern the country, it must insist upon judges who are willing to confine themselves to judging and to leave the policy-making to Congress.

The Representative Function

Some will perhaps challenge this view of the necessity of Congressional policy-making supremacy. We have heard a great deal of talk in recent years, for example, about the superior representative qualities of the presidency. However, disinterested analysis of the relevant facts must quickly dismiss such talk. As remarkable as the Presidents of this country have been, it is impossible for any one man — even before being elected President — to equal

Congress' representative capacity. And it is simply absurd to expect him to sustain a broadly representative character after he takes up the consuming burdens of office. No one man can even meet and know as many people in as many places as five or six hundred Congressmen and Senators can. Still less can he reconcile within himself the kind of consensus or compromise which is possible in a multitudinous consultative assembly originating in all the geographically distinct areas of which the country is composed.

If the President wished realistically to gather the consensus of the whole country on all issues, he would *as a practical matter* have available to him no better mechanism for doing so than the one already available in the House and the Senate. There is really a very peculiar meaning in the assertion that the President represents the whole country better than Congress does. Persons using such language mean that *they* have been able to convince the President of the worth of *their* proposal while Congress has remained unmoved. But when Congress remains unmoved – it being the genuine representative of the whole country – the meaning is that the whole country is not ready to endorse, as the President may be for his own reasons, the desires of the pressure group involved.

No Job for the President

Many Presidents have agonized over the "loneliness" of their position. This phenomenon, grown more frequent of late, is of potentially great significance to any study of the Separation of Powers. The lament grows out of the condition of executive power which, presumably, the person who gains the presidency has more or less actively sought. Executive responsibility must ultimately be concentrated in one person. In this country, with government grown so great, presidential responsibility absorbs as much time and energy as the incumbent is willing and able to give it. An executive decision always has to be made, one way or another, clean-cut or ambiguous. There is no way in the world for the President to share his responsibility in the way that Senators and Representatives not only can do – *but must.*

This is not to say that Senators and Congressmen do not have to make "lonely" and difficult decisions with respect to their own personal choice of action. Of course they do, as all human beings must. But it is in the nature of legislation in a representative government that the responsibility for every legislative act is a well-di-

vided and broadly shared responsibility, arrived at deliberately – with each Congressman or Senator in a position to be fairly confident that his vote either reflects the majority sentiment of his constituency or at least does not violate *that sentiment sufficiently to lose* him his office. It is physically impossible for a single person over any sustained period, however delicately tuned his antennae, to maintain such rapport with the whole nation, especially when he has heavy executive responsibilities to dispatch. He can take only one position on an issue at a time. That is the ineluctable consequence of being a single human being. Five hundred or so elected representatives can take five hundred positions, and each, theoretically, may be satisfying his duty to his own constituency.

The merit of representative government in the form established by the Constitution of the United States lies mainly in its realistic response to such practical considerations. No better way to run a country in accordance with the dominant wishes of the community has as yet been discovered.

The Labor Board Out of Order

If it is true that the President – the outstanding politician of the country (I use the word with no pejorative intent) – cannot represent the sum of the country's policy wishes as well as the Congress does overall, it would seem to go without saying that no bureaucrat, no administrative agency, no judge or body of judges can do so. This is why, in a country which prides itself upon being a representative government, it is supremely desirable that anyone exercising judicial power be content to leave the policy- and lawmaking to Congress. For the alternative involves the abandonment of representative government and a substitution in its place of rule by the one or the few. In Aristotle's terminology, the commonwealth gives way to democracy, and democracy to tyranny.

If judicial temperament and a willingness to leave policy-making to the legislature are the two basic and reciprocal requirements for a proper exercise of judicial power, it is difficult to see how Labor Board members and personnel qualify better than do Federal judges. On the contrary, a Federal judgeship is far more likely to secure those qualities than is an administrative appointment. Consideration of our second basic question will further illuminate this matter.

That question is whether the Congressional policies embodied in the Labor Act, and with them the supremacy of legislative policy-

making, are likely to be better enforced and preserved by the Labor Board or by the Federal courts.

I happen to believe that, over the years, decisions of incomparably higher quality, greater fairness, and more cogency have been produced by the United States Courts of Appeals than by the National Labor Relations Board.[39] But it is not enough simply to register the opinion that better decisions have come from the courts than from the Board. I assume that the reader is interested in looking into the question whether there is something inherent in the character of Federal judgeships or Board memberships on the basis of which a fair prediction about the future conduct of the respective incumbents can be made.

Human beings, customarily with legal training, man both the Federal courts and the NLRB. We must assume, if we are to avoid interminable and inconclusive personality comparisons, that agency members and judges begin with equal moral and intellectual characteristics. The question then focuses on the respective institutional settings and the probable effects of those settings on the performance of their judicial duties. This will be the subject of a concluding article in this series. ◈

FOOTNOTES

[36] It took the NLRB fifteen years to bring the Mastro Plastics case to a conclusion. Cf. NLRB v. Mastro Plastics Corp., 354 F. 2d 170 (2d Cir. 1965). The excuse proferred by this "expert" agency: a shortage of competent personnel.

[37] Quoted in Rivers Mfg. Co. v. NLRB, 55 CCH Lab. Cas. ¶ 11902 at pages 18977-78 (6th Cir. 1967).

[38] Ibid. at pages 18977, 18978.

[39] I have undertaken a comparison of the court decisions cited in note 12 with the NLRB decisions which they reviewed, and have been greatly impressed with the acumen, the intellectual flexibility, and the large-mindedness of the judges as compared with the contrary characteristics in the NLRB decisions or trial-examiner reports. But for the reviewing power of the Federal courts, I am convinced that we should be experiencing in labor law today a succession of travesties of justice such as has not been seen heretofore in either England or America.

THE RIGHT TO LIFE

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IS THE WAR in Vietnam the major issue confronting us here in America today? Or is it perhaps the malignant spread of crime and violence in our streets? Then again, maybe it's the race question? – or the growing concern over an urbanized society? – or birth control? – or abortion reform? – or education?

The true answer lies at the root of all these issues. For the above are merely the symptoms, the effects, the natural by-products of a deeper fundamental issue which lies at the heart of virtually every malady that faces us today. This root cause can be stated concisely in a single phrase: the deterioration of individual freedom.

Either an individual born into society has the right to his own life, or he does not.

Either he has the right to life, liberty, and the pursuit of happiness, or he does not.

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Either this fundamental right is his by nature, by the very fact of his existence, or it is an arbitrary gift which can be granted to him by society, or revoked by that society according to the whim of the moment.

Either an individual's life belongs to himself alone, or it is an object of public domain which can be manipulated by and sacrificed to any group that puts a claim upon it.

It is my assertion here that there can be no such thing as civil rights, or human rights, or economic rights, or any other kind of "rights" unless there is first and foremost an understanding of the true nature of individual rights. Unless we understand and affirm the principle that each and every individual is born a free agent into society, that this freedom is a natural right and is not granted to us by governmental decree, and that this basic right entitles the individual to use his life as he sees fit, to aim it in whatever direction his reason and ethical judgment advises him to – as long as he does not interfere with the same right of his fellow human beings – there can be no such thing as peace on earth, no such thing as respect for law, no such thing as racial justice, no such thing as harmony in our cities, no such thing as satisfactory educa-