BUREAUCRACY

The Origins of the Novice Administrative State

The earliest regulatory commissions substituted for juries, and like juries they were not supposed to be experts.

BY JUDGE GLOCK

Although researchers have offered many reasons for the rise of the administrative state in the late 19th and early 20th centuries, most have agreed that one reason was the desire of reformers and progressives to bring "experts" into government. New independent commissions would be isolated from the legislative, executive, and judicial branches and would allow experts to regulate businesses without political interference.

Yet the earliest proponents of regulatory commissions did not emphasize a desire for apolitical expertise or the need to substitute for the traditional three branches of government. Instead, lawmakers and reformers argued that regulatory commissions would substitute for another body known as the "fourth branch" of government: the jury. Unlike juries, these regulatory commissions would gain experience over time in examining factual questions in a particular area. Yet, like juries, these commissions were not supposed to be composed of preexisting experts. An examination of all the appointments to federal regulatory commissions from 1887 to 1935 shows that few commission members were experts in any modern sense and that a large number were former politicians.

By reexamining these origins, we can see that justifications for the administrative state that are based on the necessity of apolitical expertise are themselves novel. We can also see some of the constitutional structures that the administrative state upset, especially those supporting trial by jury.

FACT-FINDING COMMISSIONS

Although the British Parliament and early American legislatures often created temporary "commissions" to investigate particular subjects, such commissions could not make legally binding decisions on private individuals. In that earlier era, any legal order, fine, or action against private persons had to be pursued through the courts. In the courts, Anglo-American law maintained a sharp line between the "facts" of a case, which were determined by a jury, and the "law," which was determined by judges. The Seventh Amendment to the U.S. Constitution, and similar amendments in state constitutions, states that at common law "no fact tried by a jury shall be otherwise re-examined in any court of the United States," thereby ensuring this division.

Reformist lawyers in the 19th century, however, tended to be suspicious of the motives and capabilities of juries and tried to limit their reach. A particular issue that raised lawyers' hackles in this era was the jury's determination of "mixed questions of law and fact." In traditional jurisprudence, such mixed questions meant the application of a set of facts to the law at hand. As vague legal rules about the "reasonableness" of certain actions came to govern many common law fields such as torts and damage claims, lawyers questioned the ability of a jury to consistently evaluate such vague "mixed questions." They were also concerned that juries tended to disfavor certain large corporations such as railroads.

Railroad commissions / The earliest commission advocates in the 1870s wanted to use regulatory commissions to substitute for juries when making decisions under new railroad laws. These laws penalized "unreasonable" tariffs and rates, an issue that would usually be decided by a jury. The Illinois railroad commission, similar to subsequent ones, would blunt concerns about the vagueness of such rules by establishing a schedule of reasonable railroad rates for different lines and companies. One Illinois legislator objected that, legally, the "legislature could not fix a tariff, nor could it

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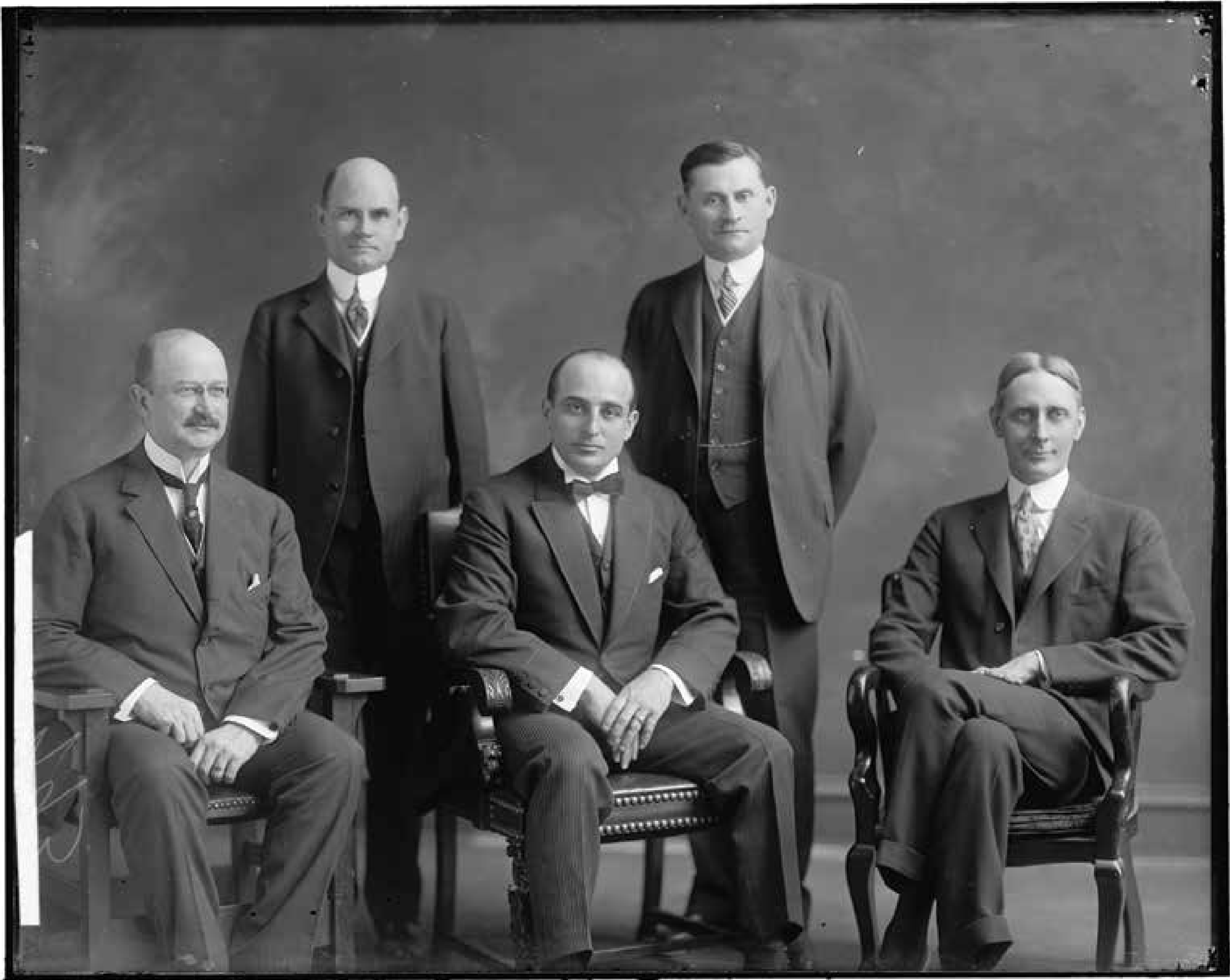
The Interstate Commerce Commission, taken between 1905 and 1945. Courtesy of the Library of Congress.

confer the power on any Commission. That was a question for a jury only," and another said that reasonable rates were "a question of fact for the jury." But the advocates for the commission had a workaround. The commission's rate schedule would not be conclusive but would constitute "prima facie" evidence of what were reasonable rates in any court case tried against the company. Thus, the commissioners' evidence and findings were brought into court with the assumption of correctness, and the burden of rebutting it was placed on the opponent of the commission's decision. To further displace the jury, many commissions had the power to issue "orders," as they were called, for changing future railroad rates, which were enforced by courts through actions of equity, in which cases there would be no jury.

Subsequent court cases show that railroad commissions' determinations of the reasonableness of railroad rates blunted accusations that the new penal railroad laws were excessively vague and unconstitutional. An Illinois Supreme Court decision upholding the constitutionality of the new commission argued that under the previous law, which had allowed juries to determine damages, "different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ.… There would be no certainty of being able to comply with the law." Yet the commission demonstrated that the legislature "did not intend to leave the railroad companies … exposed to such seeming injustice." When states passed railroad regulation laws without providing for commissions, and therefore allowed juries to assess penalties whenever they thought a rate was unreasonable, courts struck them down. The Kentucky Court of Appeals said that under that state's railroad law, where any "unreasonable



The Federal Trade Commission, taken between 1905 and 1945. Courtesy of the Library of Congress.

rate" as decided by a jury could lead to penalties, every railroad company rate would be subject to attack for its supposed unreasonable rates, "though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view."

By contrast, those states that passed railroad commission laws to provide consistent rates saw courts uphold them because they provided certainty. Supreme Court Justice David Brewer, ruling in a federal circuit court case, heard a challenge to the law forming the Iowa Railroad Commission. As was typical, the Iowa commission could bring cases for penalties against railroads before a jury whenever a railroad deviated from the commission's declared "reasonable" rate, with the commission's rate given the usual prima facie deference. The railroad argued that, under the law, it was subject to no constant standard: "no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge." Brewer agreed that "no penal law can be sustained unless its mandates are so clearly expressed than any ordinary person can determine in advance what he may and what he may not do under it." Yet the existence of the commission and its "recommendations" for reasonable rates saved the law because the recommendations gave "definiteness and certainty."

Some courts thought leaving even the ultimate decision about railroad penalties to a jury prevented the creation of a coherent standard. One court found that an 1882 Tennessee state railroad commission law, which assessed penalties against unreasonable rates first decided by a commission, still left too much discretion to the jury. As the court saw it, as long as the jury ultimately decided the amount of damages, there:

> could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury … would inevitably lead to inequalities and to injustice.

The U.S. Supreme Court was at first suspicious of state railroad laws that dispensed with the jury. Yet it soon came to the opinion that certainty was the chief desideratum of the railroad laws, which meant keeping the jury out of the process. As Chief Justice Melville Fuller stated in 1902 in upholding the Kentucky Railroad Commission Act, "The mischief to be cured [by the railroad law] … was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission," quoting the decision on the Kentucky case cited above about the problem of one jury making a reasonableness decision when "another jury may take a different view." The commissions thus had constitutional sanction and even encouragement to remove the jury from any fact-finding process.

FEDERAL FACT-FINDING COMMISSIONS

Congress created the Interstate Commerce Commission (ICC) in 1887 to ensure consistent legal standards while dispensing with variable and prejudiced juries in railroad cases, just as the state commissions had done. One senator in the debate focused on jury prejudice against railroads. He said that railroads in general suffered from "discrimination" and "juries do them injustice. A jury of citizens … frequently gives five or ten times as much damage to a citizen against a railroad company" as they would in a case not involving railroads. When Wisconsin Sen. John Spooner argued that he would not entrust decisions on important questions of fact to the new commission, Massachusetts Sen. George Hoar asked if Spooner would rather it be "settled in one place by one jury one way and in another place by another jury another way?"

Lawyers understood that the main constitutional innovation of the ICC was the displacement of traditional jury trials. The *American Law Review* published an extensive article on the act soon after its passage, and it cited two main constitutional issues with the law. First, it claimed that the commission's prima facie fact-finding overturned the Article III right to a trial before neutral parties and, second, the act overturned the right to a trial by jury under the Seventh Amendment.

The already limited powers of juries to decide on prima facie evidence of the ICC was progressively eliminated. In *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.* (1907), the Court said that

> if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness.

The ICC itself later said that by this case the "Supreme Court has erected this Commission into what has been termed 'an economic court,' or to give it a more commonplace definition, but one perhaps of stricter legal analogy, a select jury to pass upon the reasonableness" of railroad actions.

The U.S. Supreme Court, in fact, began treating the ICC's findings not only as prima facie constraints on judge and jury decisions, but as the functional equivalents of jury decisions themselves. In *ICC v. Union Pacific Railroad Company* in 1912, the Court noted that "the courts will not examine the facts [presented by the commission] further than to determine whether there was substantial evidence to sustain the order," which was the same "substantial evidence" standard used for jury trials. The *New York Times* noted that people now assumed that "the Commission's findings of facts were conclusive … so its findings could not be questioned any more than those of a jury."

The creation of the Federal Trade Commission (FTC) was also the result of a desire to blunt jury decisions in cases involving vague reasonableness standards, especially after the courts read a "rule of reason" into the antitrust act. Nevada Sen. Francis Newlands, the foremost proponent of the trade commission bill in the Senate, argued that the commission would stop the constant trials and hearings

> before grand juries and petit juries and submitting all these questions to the varying influences, passions, and prejudices of the hour. I believe that in this way a complete system of administrative law can be built up much more securely than by the eccentric action of grand juries and trial juries.

The new state and federal commissions thus displaced juries as the premier factfinders in dynamic fields such as railroads and antitrust, and eventually other fields like workmen's compensation, corporate supervision, and utilities regulation.

NOVICE COMMISSIONS

Although commission advocates wanted to displace prejudiced juries, they did not want to substitute them with experts because, first, they realized that there were few existing experts in fields such as railroad rates and antitrust and, second, they wanted commissioners to have "unprejudiced" views. They hoped instead that by ensuring long service on the commission, commissioners would acquire experience about their field. This explains one of the commissions' most distinctive aspects: their long terms and independence from removal.

Shelby Cullom, who as a U.S. senator would later introduce the bill creating the ICC, was speaker of the Illinois House when that state's railroad commission bill was introduced, and he helped to ensure its passage. As governor of the state soon after, he told the legislature that the commissioners' "work can be done only by men who can give it their whole time, and who will become students of the great subject of transportation," and such "students" were obviously supposed to come with fresh minds.

Esteemed Michigan jurist Thomas M. Cooley argued that commissioners should be

> enlightened by the special facts and uncontrolled by iron rules. In railroad questions we are, as yet, only in the morning twilight, no expert fully masters them in all their bearings, the results are often unexpected and confusing, and the highest wisdom of one year proves to be folly in the next.

As prominent Boston lawyer and reformer Charles Francis Adams Jr., who later became an experienced railroad commissioner, noted, when the first commissions were created, "the country did not contain any trained body of men competent to do the work. They had got to be found and then educated."

Promoters of the commissions believed in the statement of railroad attorney and later federal railroad official Walker Hines: "Men become good commissioners by being commissioners." In other words, the only appropriate training for the commission came on the job itself. Economist Frank Dixon, in a 1905 article on railroad regulations, likewise said:

> It must be apparent to anyone that a commissioner with a two-year term is retired at just the time that he is entering upon his period of usefulness. He becomes valuable to the state in the intricate problems of his office only after a long apprenticeship.

There was little attempt in the early years to keep commissions' work outside of politics. In 1891, of the 17 state railroad commissions with the power to regulate railroad rates, five were *elected*, two were chosen by legislatures, and two more were composed of other state officers. State regulatory commissions were prominent political plums and often led to higher office. Huey Long began his political career by winning a seat on the elective Louisiana Railroad Commission and later became chairman of the state Public Service Commission, from which position he handed out favors before being elected governor. Oscar Colquitt was a Texas state senator before he won an election to the Texas Railroad Commission, from which position he then ran for and became governor.

ICC / Some people point to the appointment of Cooley as the first ICC chair as indicative of a desire for expertise. Yet he was the exception to the general trend, and his knowledge ran to many areas far afield of railroads. In fact, Senator Cullom, a Republican, demanded President Grover Cleveland appoint Cooley only after Cleveland "had to yield to party pressure" and appoint fellow Democrat William Morrison of Illinois, an ex-congressman, to a commission position. Cullom complained to the president that "Colonel Morrison knows nothing about the subject whatever," and that Cleveland was just "appoint[ing] broken down politicians who have been defeated at home, as a sort of salve for the sores caused by their defeat." A Democratic politician had indeed just written to Cleveland that he "cannot too strongly express that the appointment of Co. Morrison" was necessary, since it "will do more than any other to bridge a chasm which must be bridged if the Democracy is to carry the next presidential election." Cleveland also tried to appoint a New York politician, W.S. Bissell, who was been the best man at Cleveland's wedding, but Bissell declined. When former Democratic New York state senator Augustus Schoonmaker accepted the position in Bissell's place, Schoonmaker told Cleveland he was surprised because "I know not widely railway issues."

The public understood the political nature of these appointments. The *New York Times* said nominee Aldace Walker was "Senator [George] Edmund's man" and represented the "Northeast."

A compilation of all ICC commissioners from 1887 to 1935, created using existing commission histories, public announcements of appointments, and obituaries, shows that outside and apolitical expertise was not important for the job. One lawyer looking back over this period noted that "although the appointment to the Commission of men inexperienced in the operation of railroads has been criticized, it will generally be conceded by most people familiar with the situation that this lack of experience has not been a real handicap to the appointees in the performance of their duties."

The following analysis evaluates whether each ICC commissioner was a lawyer, a politician, or an academic, and if they had any previous experience in railroads. Of 43 commissioners in this era, a large majority, 30, were lawyers, who usually operated across numerous fields of business, and seven were also judges. Only seven commissioners came from academia, and many of those were not specialists in railroads or regulation. This compilation defines expertise in the broadest possible sense, as anyone who either was a railroad employee or officer or had written on railroad issues. Yet even by this definition, only about half—22—of the commissioners had any substantial experience with railroads or railroad regulation before being appointed to the commission. Fourteen of the commissioners' most important railroad experience involved serving in federal or state government railroad agencies or commissions, supporting the contention that the job of these commissions was to build up knowledge, as opposed to bring it into government. Many of the rest of the commissioners with railroad experience were just former railroad employees, from brakemen to vice presidents, with no expertise separating them from the hundreds of thousands of other Americans who worked for the railroads in this period. There also seems to have been no attempt to keep the ICC separated from politics. Fifteen commissioners had previously served either in elective office, usually as a U.S. congressman or state senator, or as an employee of the Democratic or Republican party organizations. (One could count 16 political commissioners if one included the unhappy soul Claude Porter, who lost eight separate political elections before being appointed to the ICC.)

FTC / The second great Progressive Era regulatory commission, the FTC, did not intend to attract—and in practice did not attract—experts in antitrust, which in any case were limited in this period. Maryland Rep. J. Harry Covington, the commission's foremost proponent in the House, argued that decisions of the commission

would be made not from expertise but from "the ordinary good sense which the group of men composing the Federal trade commission will have." When Illinois Rep. Martin Madden wondered on the House floor why the FTC "would not be able to get any better experts under the commission plan than under the other," Covington responded that such preexisting expertise was beside the point. Covington said he wanted merely to procure "highly efficient services of men of large capacity"—capacity being the ability to grow into knowledge. Madden said, "I am willing to admit you can train men to become specialists," to which Covington replied, "That is all I intended."

The House committee's report on the final bill said it would create consistency "through the action of an administrative body of practical men." Thus, the FTC featured similar appointments as the ICC. After the first round of FTC nominees, the *New York Times* noted that "it is no sure disqualification that they are not men of national repute, and that they have no accomplishments to their credit," not to mention little to no experience in antitrust. Only two of the first commissioners were lawyers, for an agency explicitly dealing with legal issues. One commissioner, Edward Hurley, was an elementary school dropout from Illinois. Yet Illinois Sen. Hamilton Lewis had earlier written the chief White House political official, Joseph Tumulty, about the "understanding between us respecting Mr. Hurley" since "you know how little Illinois has gotten … and we have both waited upon the theory that her losses would be retired by my getting the member of the Trade Commission."

President Woodrow Wilson tended to focus on the benefits of varied and not specialized knowledge for his appointments. When one commissioner, a former newspaper editor, died, Wilson wrote that he wanted "a man of rather varied business experience." Eventually, he appointed another newspaper editor, W.B. Colver, who one politician noted had been "a powerful worker in the movement to give Cleveland as a city to the Democracy."

Overall, the FTC had a just slightly higher proportion of lawyers than the ICC, with 19 lawyers out of the 25 members appointed from 1914 to 1935. Only six members had experience in antitrust or had written anything about antitrust law and practice, and three of those were appointed after 1933. No academics were appointed until the New Deal.

Like the ICC, the FTC wasn't divorced from politics, and no one expected it to be. South Carolina Sen. Benjamin Tillman objected to the formation of the FTC by saying that "we have too many commissions now, composed largely of so-called 'lame ducks,' both Democrats and Republicans, who have been defeated at the polls." And indeed, 10 of the earliest members of the FTC were former politicians. If one includes Wilson's two newspaper editor appointments in an era when such positions were highly political, there would be 12 politicians, or almost half of all appointments.

If reformers' goal had been to bring "apolitical experts" into government, the commission form for the ICC and FTC would have been a very peculiar way to accomplish that end. The civil service, which also grew in this era, was a way to ensure unbiased expertise, and many traditional departments in this era were filled with civil service experts. Yet the advocates for commissions had them appointed by the president and confirmed by Congress, thus ensuring political involvement at all stages. Mandates that commissions have bipartisan or cross-state representation also hampered the search for pure or apolitical experts.

CONCLUSION

The late 1920s and early 1930s brought a desire for expertise into the commission form of government. The Federal Radio Commission (FRC), created in 1927, and its successor, the Federal Communications Commission (FCC), along with the Securities and Exchange Commission (SEC), created in 1934, were staffed either by Secretary of Commerce, and later President, Herbert Hoover, or his successor, President Franklin Roosevelt. Both executive appointers and congressional advocates for these commissions noted a desire for expertise. Of the 17 earliest members appointed to the FRC or FCC, 11 had experience in radio and electronics, and six were academics. Only five were lawyers and four were politicians. For the SEC, all six of the earliest appointees had backgrounds in securities and two were former academics, while only one was a former politician.

The courts changed their justifications for commissions as the president and Congress did. While the Supreme Court had often cited the "experience" of commissions, *Humphrey's Executor v. United States* (1935) had Justice George Sutherland expound on the need for "the trained judgment of a body of experts" that had to be "nonpartisan" and protected from political influence. Ironically, the case was precipitated by the dismissal of the FTC's William Humphrey, a former member of Congress who remained involved in politics up until his death.

The contemporary justification for regulatory commissions based on their apolitical expertise was not the justification for the earliest regulatory commissions, nor did their appointments demonstrate a desire for such apolitical expertise. Expertise was not, and is not, an inherent part of the administrative state. And although many writers have discussed how the administrative state has displaced the traditional three branches of government, more need to grapple with how these commissions have displaced another fundamental part of the American constitutional order, one that was also based on the importance of novice factfinders: our juries. *R*

READINGS

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