Strange Bedfellows: Judge Harold M. Stephens and the New Dealers in the Age of Administrative Law Reform

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Over a long tenure as Associate and Chief Judge (1935-1955), Harold M. Stephens gained a well-deserved reputation as an informal "lobbyist" for the D.C. Circuit. A judicial conservative and student of the common law, Stephens was perpetually suspicious of executive overreach and administrative agencies in particular. As the court's chief lobbyist, Stephens consistently sought to enlarge judicial power and minimize agency encroachment on the jurisdiction of the courts. Even so, his efforts did not always succeed.

The D.C. Circuit had long struggled to establish itself on an equal footing with its colleagues. In particular, it faced perennial understaffing, was burdened by common-law appeals from Washington's local courts, and was denied formal designation as a circuit court of appeals until 1948. By the time Stephens arrived on the bench, the then-Court of Appeals for the District of Columbia—the "D.C. Circuit" for simplicity's sake—faced a new challenge in the guise of "administrative reform."

At the outset, Anti-New Deal activists were content to challenge the New Deal in the courts. Marshalling arguments based on the Commerce Clause and nondelegation doctrine, they succeeded in defeating several of the "alphabet agencies." Notwithstanding these setbacks, Franklin D. Roosevelt won reelection in 1936, sweeping all but two states. Less than a year later, the Supreme Court decided the landmark case, *NLRB v. Jones & Laughlin Steel Corp.*, ratifying at long last the constitutionality of the New Deal.[1]

Even so, the anti-New Dealers were helped by a series of blunders by the Roosevelt Administration. FDR's disastrous Court-packing plan angered many in Congress and the judiciary. Further, his premature scaling back of recovery efforts sent the economy into recession, undoing much of the progress gained since 1933. Seizing upon these vulnerabilities, a group of congressional Republicans and Southern Democrats joined together to attempt to achieve through legislation what their conservative allies had failed to do through the courts. The result was the Walter-Logan bill. [2] The bitter political debate that ensued lasted nearly three years, culminating, ultimately, in FDR's veto in 1940.

Walter-Logan would have accomplished a variety of so-called reforms. First, all administrative rules were to be published within one year of the enactment of an agency's organic act, following full notice and public hearing. Second, it required publication in the Federal Register within ten days of an agency's approval of such rules. Third, the bill provided that "[a]ny person substantially interested in the effects of an administrative rule in force on the date of approval of this Act" could request that an agency reconsider the rule regardless of whether traditional Article III standing requirements had been satisfied. Fourth, the statute conferred special jurisdiction on the court in D.C., which will be referred to as D.C. Circuit although it wasn't called this at the time, to hear petitions filed within thirty days of a rule's publication and to "render a declaratory judgment holding such rule legal and valid or holding it contrary to law and invalid." This, however, was not designed to limit the jurisdiction of "any [other] court" to make a determination with respect to any rule or adjudicative decision. Fifth, the bill provided for the creation of intra-agency boards consisting of three members, at least one of whom was required to have legal training, in order to hear appeals from "any person . . . aggrieved by a decision of any officer or

[1] 301 U.S. 1 (1937) (upholding the NLRB's decision to require reinstatement with back pay for employees who wished to join a union).
[2] S. 915, 76th Cong. (1st Sess. 1939).

employee of any agency." This court-like body would provide "an opportunity . . . for a full and fair hearing" at which the traditional rules of evidence would apply and a written record would be generated. Within thirty days of closing arguments, the board was required to make written findings of fact and law, and remit them to the agency head "for approval, disapproval, or modification." Sixth, the bill codified the existing common-law standard of judicial review, providing that on appeal, "[a]ny decision of any agency . . . shall be set aside if . . . the findings of fact are not supported by substantial evidence."

In his veto message, FDR would maintain that Walter-Logan was the work of "great interests" intent on "strik[ing] at the heart of modern reform by sterilizing the administrative tribunal which administers them."[3] FDR was right in at least one respect: The bill was a rejection of the New Dealers' notion of government by dispassionate experts. In fact, it would have hamstrung Roosevelt's efforts. Indeed, its provisions were substantially more onerous than those of the landmark Administrative Procedure Act that followed in 1946.

It is curious, therefore, that the judges of the D.C. Circuit rejected this arrangement and petitioned legislators in secret for its defeat.[4] A devotee of the common-law tradition, Stephens was no fan of the administrative state. Nevertheless, when presented with the opportunity to circumscribe executive power and increase the visibility of his court, he refrained from doing so.

To be sure, Stephens sympathized with the reformers. His disapproval was not with their end but their means. Simply put, the Walter-Logan bill was a bad bill. For all its restrictions, the bill lacked focus. Cobbled together by the American Bar Association's Special Committee on Administrative Law, it threatened to inundate the D.C. Circuit with unmeritorious, untimely suits, just as it was attempting to rise to the level of its sister circuits.

Particularly distressing was the third section of the bill, which empowered any "substantially interested" party to seek a declaratory judgment on the lawfulness of agency rules in the D.C. Circuit. Stephens believed that such suits "would turn out to be useful in only a very academic sense." As he elaborated to his fellow Utahan, Senator William H. King,

> [A]dvisory opinions . . . purport to advise the citizen, in advance of controversy, what the law is. As a matter of actuality, however, advisory opinions have very little value because the mind of the judge in dealing with the regulation, in the absence of actual facts, cannot foresee what its application be to facts when an actual controversy arises in the future to which the regulation is applied and in respect of which it will again be reviewed.[5]

This fact, taken with the bill's requirement that agencies publish all rules within a year of enactment of their organic acts, would overwhelm both the agency and the court itself. Moreover, other circuits were free to make up their own minds when the rules came before them in the course of other litigation.

The bill's provision for intra-agency boards further threatened to inundate the court. Because the members of the boards answered to their agency chief, individuals would "lack[] confidence in [its]

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[3] Veto Message on H.R. 6324, PUB. PAPERS 616 (Dec. 18, 1940).

[4] *See, e.g.*, Letter from Judge D. Lawrence Groner to Col. O.R. McGuire, Chairman, Special Committee on Administrative Law (Mar. 3, 1937) (on file at the Library of Congress, Manuscript Division); Memorandum from Judge Harold M. Stephens to Chief Judge D. Lawrence Groner 5 (Dec. 16, 1938) (on file at the Library of Congress, Manuscript Division); Memorandum from Judge Justin Miller to Chief Judge D. Lawrence Groner 1 (Dec. 13, 1938) (on file at the Library of Congress, Manuscript Division).

[5] Memorandum from Judge Harold M. Stephens for Senator William E. King 3 (Jan. 9, 1940) (on file at the Library of Congress, Manuscript Division).

independence" and would "not be content to accept the finding[s] of the board." The resulting appeals would overburden a court already "crowded with matters of great national and local importance." In contrast, Stephens had "no objection" to the creation of an independent "board" or "court" of administrative appeals with de novo hearings and review by the federal circuit courts, because, as the Board of Tax Appeals (as the U.S. Tax Court was then called) showed, litigants would respect its judgments.[6]

On these points, Stephens had ample support from his colleagues on the court. He regularly discussed the Walter-Logan bill with Chief Judge D. Lawrence Groner and Judge Justin Miller. All agreed that some kind of independent tribunal was essential to any feasible administrative reform proposal. To conduct proper review, an appellate court needed a thorough record of the proceedings below, produced according to the law of evidence. Without this assurance, the bill was "fatally defective." Stephens also found common cause with Miller on the importance of *sound* rulemaking procedures. "It is amazing to me," Miller complained, "that lawyers committed so thoroughly to the common law method of law making should appear to be so willing to attempt wholesale mass disgorging of law" by requiring publication of *all* rules within one year of Congress enacting the agency's organic act.

New Dealers agreed. SEC Commissioner Jerome Frank told Solicitor General Robert Jackson that "it is difficult to visualize the fantastic confusion" that the flood of rules would have produced. Further, the hurriedly promulgated rules were bound to be ill-conceived because of the lack of prolonged reflection and feedback from regulated concerns.[7] When Stephens and his brethren failed to keep Congress from passing the bill, the New Dealers stepped in and persuaded FDR to veto it in December 1940.

Throughout the affair, Stephens and, to a lesser extent, his colleagues anxiously asserted the eminence of their court. Stephens cherished the place of the American judiciary in the tripartite system of government. To him, a robust system of judicial review was the only bulwark against the tyranny of what his hero Roscoe Pound dubbed "administrative absolutism."[8] On paper, the Walter-Logan bill would expand judicial review; in practice, it would so swamp the D.C. Circuit that it could not perform the job properly. Resisting the administrative state came at too great a cost if his court suffered in the process.

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[6] Letter from Judge Harold M. Stephens to Senator William E. King (Apr. 15, 1938) (on file with the Library of Congress, Manuscript Division).

[7] Memorandum from Jerome Frank, SEC Chairman, to Robert Jackson, Solicitor Gen. 4 (Jan. 3, 1939) (on file at the Library of Congress, Manuscript Division).

[8] Letter from Judge Harold M. Stephens to Roscoe Pound (Dec. 8, 1939) (on file at the Library of Congress, Manuscript Division) (Ever fearful of executive overreach, Stephens urged Pound to "continue[] to preach . . . the gospel of the common law." Like Pound, he was convinced that an effective judiciary was the only practicable antidote to administrative absolutism.).