

The Surprising Origins of the Interstate Commerce Commission

Author : Jack Beermann

Date : March 20, 2017

Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 *J.L. & Pol.* 139 (2015), available at [SSRN](#).

Many law review articles fail to live up to the promise of their titles or abstracts, leaving disappointed readers in their wake. Others have titles that hide the ball. Behind the wordy and somewhat bland title of [Jed Shugerman's](#) 2015 article—[The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance](#)—lies a fascinating new take on the origins of independent agencies.

The identification of the Interstate Commerce Commission (ICC) as the first modern independent regulatory agency is familiar to scholars of American administrative law. The ICC, created in 1887, was the first federal agency with the hallmarks of independence—multiple commissioners appointed by the President with the advice and consent of the Senate, staggered terms of specified duration (six years in this case), removal by the President only for “inefficiency, neglect of duty, or malfeasance and office,” and a requirement of bipartisan membership.

As Shugerman explains, the standard account for this innovation has been Congress’s desire to insulate the ICC from political influence, mainly from the President but also to an extent from Congress itself. Shugerman disputes this, claiming that “Congress designed the ICC to be politically accountable to the Senate, but the Commission was also envisioned to be accountable to the President.” (P. 172.) The true reason for the establishment of the ICC as a regulatory agency, as Shugerman’s research and analysis reveals, was to provide an incentive for interest groups to make campaign donations to politicians, mainly the President and Senators, as a substitute for the assessments that federal patronage employees previously paid to their political party.

In the early 1880s, the system of patronage assessments was breathing its last, and an alternative source of campaign funding was needed. At the same time, Congress repealed the Tenure of Office Act, which required Senate consent to the removal of many federal officers. The repeal is puzzling because the Senate joined in reducing its own power. Shugerman explains the repeal as a result of “the declining importance of assessments and patronage, a rise in intraparty factionalism, and the luck of personal animosities.” (P. 160.) And also about this time, “[f]armers, merchants and other shippers denounced the railroads’ predatory pricing and demanded regulation.” (P. 165.)

While this demand for regulation set the stage for the enactment of the Interstate Commerce Act, Shugerman’s thesis is that the need for a source of campaign funding heavily influenced the form of federal regulation. Railroads represented one of the most lucrative industries in the country, and their owners would eagerly use campaign contributions to procure favorable treatment by the Commission. As Shugerman colorfully puts it, while “[t]here was no smoking gun connecting the supporters of the commission to an agenda to extract railroad campaign contributions . . . , there is something of a bloody knife: the opponents of the commission made this link.” (P. 171.) As one opponent quoted by Shugerman put it, the Act would “force railroad capital into the canvass to secure the election of a man who will bend its knee to their wishes.” (P. 172.)

Shugerman’s other main piece of evidence is that the alternative offered in Congress to Commission enforcement was private enforcement through litigation in federal or state court. That alternative, however, would not provide any incentive for campaign contributions by either side, since the politically insulated courts would be where the actions is. Thus, Congress chose to create a Commission, under political influence, with enforcement powers. In fact,

independence did not come until later: The ICC was initially located within the Department of the Interior, augmenting potential presidential influence over its actions. Subsequent legislative reform, discussed by Shugerman, in 1903, 1906, 1910 and 1920, removed the ICC from Interior and granted it greater political independence, but only after the ICC proved itself a reliable reflection of Congress's policy preferences. So much for the standard account of the origins of the independent agency form.

In short, Jed Shugerman's re-telling of the story of the origins of the ICC is fascinating and eye-opening, the sort of administrative law scholarship we need more of.

Cite as: Jack Beermann, *The Surprising Origins of the Interstate Commerce Commission*, JOTWELL (March 20, 2017) (reviewing Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 *J.L. & Pol.* 139 (2015), available at SSRN), <http://adlaw.jotwell.com/the-surprising-origins-of-the-interstate-commerce-commission/>.