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Article III Courts and the Constitutional Structure

DAVID A. STRAUSS*

Anyone who reads Paul Bator's Harris Lecture[1] can understand not only what was special about his contributions to legal scholarship, but why he was an extraordinary teacher, and how he became such an exceptionally successful Supreme Court advocate. His teaching, like this lecture, combined clarity and wit with power and deep commitment. As an advocate, too, he was engaged and even emotional; he did not adopt a pose of detachment, and he did not hide behind technical formulations. He had powerful intuitions about what the law should be—what it *had* to be. And no one—I'm certain of this—has ever been as good at coming up with fresh, arresting words that were perfect for the occasion at hand.

As for those intuitions: the interpretation of article III that Paul advances in the Harris Lecture is a further development of arguments he made in his Federal Courts class at least as early as 1978, when I took the course from him. While this area of law is still confused and uncertain, there is no doubt about the trend: Paul's view may not be quite the law yet, but it is unquestionably ascendant.[2]

The essence of Paul's view is that Congress should have nearly complete power to assign federal judicial business—the adjudication of the kinds of cases enumerated in article III—to federal tribunals whose members are not article III judges. Some article III court must retain "ultimate control"—the power to correct errors of law. And if Congress were to act arbitrarily or irrationally in assigning cases to non-article III tribunals, the Supreme Court would retain a "not while this Court sits" power to disapprove Congress's action. But otherwise Congress's allocation of authority between article III courts and non-article III tribunals would stand.

It seems to me quite likely that this view will prevail in the long run, to an even greater extent than it has already. Paul explains why it will prevail, better than anyone else has. In some respects Paul's defenses of this view are right on the money; in other respects, his arguments seem to me to be vulnerable. I begin with my qualms.

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1. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III,* 65 IND. L.J. 233 (1990).

2. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-57 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589-92 (1985).

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1. *Administrative adjudication and the central purposes of article III.* Paul's argument, like many defenses of non-article III tribunals, proceeds from the premise that Congress created non-article III tribunals for what might be called "good government" reasons having to do with efficiency and expertise: to afford inexpensive and streamlined procedures for handling large numbers of cases, or because life tenure makes it too difficult to weed out incompetent or corrupt judges. This development, Paul suggests, might be in tension with the language of article III, but it is not inconsistent with any of the policies that article III is centrally concerned to promote. That is the point of Paul's "architecture" metaphor. The development of non-article III tribunals has only rearranged the rooms; it hasn't tampered with the structure of the Constitution.

Paul's argument seems to me to present an insufficiently cynical version of the genesis of the administrative state. Efficiency and expertise were part of the reason for creating non-article III tribunals. But dissatisfaction with the political orientation of article III courts also played an important role, as Paul seems to acknowledge at one point in the lectures. The National Labor Relations Board is the most notorious example; it was deliberately intended to be more pro-union than the federal judiciary. That—and not just the need for expertise—was a large part of the reason for establishing a new body and allowing the President to appoint its members frequently.

In any event, the "good government" justifications of efficiency and competence do not explain one of the most important and problematic ways in which administrative agencies do not conform to article III—the exercise of non-judicial functions. (I owe this point to Paul, who once commented in conversation that this, not the absence of tenure protections, is the most important way in which non-article III tribunals differ from article III courts.) While there is some internal separation of functions, the major administrative agencies do not just adjudicate; they oversee important executive, including prosecutorial, tasks. Arguably the Federal Trade Commission or the Securities and Exchange Commission would not look so different if its members had life tenure; it's a fair guess that many of them would be ready to move on after a half-dozen years or so anyway. But the FTC or SEC would be very different if it had only an adjudicative mission.

To give a prosecutorial mission to an adjudicative body is deeply subversive of article III. Anyone who has been an advocate for one institutional interest for an extended period will understand why this is true. An advocate begins to see issues from the point of view of her habitual client: the government, the insurance industry, criminal defendants. It takes a real effort to restore one's impartiality; sometimes it is impossible to do so. Assigning prosecutorial responsibilities to an adjudicator is an excellent way covertly to affect the adjudication.

Finally, as Paul recognizes, the efficiency and expertise justifications do not really explain why Congress created non-article III tribunals. We are

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accustomed to thinking of article III adjudication as expensive and time-consuming, but that is not the fault of article III. Article III does not enact the Federal Rules of Civil Procedure. Nothing in article III prevents Congress from providing for streamlined adjudication before article III courts in, say, workers' compensation or social security disability cases.

As for life tenure: thanks to civil service protections, many federal bureaucrats already have *de facto* life tenure. The danger of corruption or malfeasance in a large federal judicial establishment would be a real problem, but one way to deal with it is to do what Congress is attempting to do now, in addressing allegations of wrongdoing among the (already large) corps of federal district judges—streamline the procedures for removing judges.

2. *Fact-finding and ultimate judicial control.* A key premise of Paul's argument is that the central purposes of article III remain intact so long as the article III courts retain ultimate control—by which Paul means the power to decide issues of law. This conception is at the heart of *Crowell v. Benson,*[3] and it is the reason Paul celebrates that case.

One difficulty with the *Crowell* conception is that it is difficult to square with the rule that courts must defer to reasonable agency interpretations of the statute the agency is charged with administering. The degree of deference required by, for example, *NLRB v. Hearst Publications, Inc.*[4]—to say nothing of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[5]—gives the final word on questions of law, within a very wide range, to the agency not the court.

In addition, partisans of the *Crowell* conception have never fully explained why judicial control over issues of law is the core purpose of article III. Why isn't the impartial decision of specific cases the essence of the judicial function? The most natural inference from the tenure and salary protections of article III is that the Framers wanted impartial decisions in particular cases. And of course making impartial decisions in individual cases requires control over fact-finding as well as law-declaring. In the run of the mill case, the facts are everything.

In fact, *Crowell* seems to me to have set into motion a troubling tendency in separation of powers law—the development of what might be called a turf-protecting instead of an individual rights orientation. *Crowell* decided, in effect, that as long as the courts retained a certain turf—a function or array of functions that they still controlled—the separation of powers was not offended. That approach has come to dominate separation of powers law. Whenever the Supreme Court does not find an answer to a separation

3. 285 U.S. 22 (1932).
4. 322 U.S. 111, 130-31 (1944).
5. 467 U.S. 837, 864-66 (1984).

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of powers issue in the plain language of the Constitution, it resolves the issue by deciding whether a measure has invaded the prerogatives of one of the branches to an unacceptable degree.[6]

But that approach is arbitrary in a variety of ways. How does one determine what each branch's turf is? And how does one determine what constitutes an excessive invasion of a branch's turf? For example, why is it not an excessive invasion of the prerogatives of the executive branch to deprive it of most control over a class of criminal prosecutions?[7] And what degree of deference to agency discretion constitutes an invasion of the prerogatives of the judiciary?

It might be better to try to identify the ways in which various separation of powers provisions seek to protect individual rights, and interpret them in a way that maintains those protections. If one were to do that, it is by no means clear that the administrative state—with fact-finding that is responsive to political pressures and influenced by a prosecutor's orientation—can be squared with article III.

* * *

Notwithstanding these cavils, there is something fundamentally correct about Paul's view, both conceptually and historically.

1. *The indivisibility of executive and judicial functions.* This is the most powerful of Paul's arguments. What courts do when they decide a case is in principle indistinguishable from what an executive official does when she applies a legal standard in the course of executing a law. A customs inspector levying a duty, a tax collector assessing a tax, even a law enforcement officer deciding whether there is probable cause to believe that a suspect has violated the law—each is, in a sense, resolving a dispute between two parties (the government and the object of the government's action); each finds facts and interprets and applies the law. A literal reading of article III might lead to the conclusion that government employees like these are article III judges who must have tenure and salary protections. That conclusion, of course, is absurd.

Of course, executive determinations of this kind do not *look* like adjudication. Often they are *ex parte;* they are usually very informal, with no prescribed procedures; and the adjudicator makes no pretense of judicial impartiality. But what difference does that make? It would be perverse to say that article III does not apply when issues are resolved in an informal setting with few safeguards designed to ensure impartiality and regularity, but does apply to bodies that look like courts—that is, to bodies that have adopted some such safeguards.

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6. *See, e.g.,* Morrison v. Olson, 108 S. Ct. 2597 (1988); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977); Buckley v. Valeo, 424 U.S. 1, 120-28 (1976).

7. *See Morrison,* 108 S. Ct. at 2597.

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This problem—the indistinguishability of the executive and judicial function—is similar to, but worse than, the problem that has led to the *de facto* abandonment of the non-delegation doctrine. That doctrine holds that a statute is invalid if it confers such broad discretion on an official that it essentially delegates the legislative power to the official.[8] The problem is that it is difficult to prescribe a standard for determining whether a delegation is too broad. But at least one can define the paradigms of legislative and executive action in a way that distinguishes them: legislative action consists in prescribing standards; executive action in applying them. The problem with non-article III tribunals is that even in principle, one cannot define the difference between judicial action and (at least certain forms of) undoubted executive action.

There seem to be two possible ways out of this conundrum, but neither is satisfactory. One is to say that as long as courts review executive action *de novo,* there is no article III problem. The argument would be that article III speaks only of the exercise of judicial *power,* and so long as an executive official's action is reviewed *de novo* she has exercised no power. The other way out would be to say that article III's tenure and salary restrictions apply only to those who adjudicate disputes between private parties, because such adjudication has no counterpart in the executive branch. (In each of the examples of undoubted executive power I mentioned above, one of the "parties" was the government.) This latter approach actually resonates with Justice Brennan's opinion in *Northern Pipeline,*[9] at which Paul aims so many well-chosen verbal arrows.

But the *de novo* review option would sharply change the character of the administrative state and nullify many of its advantages. And confining article III protections to courts that resolve disputes between private parties is not only counter-intuitive—surely the need for tenure and salary protection is greater, not less, when the government is a party—but difficult to square with article III's specific grant of judicial power over cases involving the government.

2. *Has history "amended" the Constitution?* One of Paul's most telling points is his challenge to the opponents of his view to come up with a coherent position that they are willing to implement. As he says, no one seriously suggests that we should dismantle the administrative state and return to supposed article III purity.[10] It is possible that even by the time of *Crowell,* the development of the administrative state was so advanced

8. *See, e.g.,* Mistretta v. United States, 109 S. Ct. 647, 654-58 (1989); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

9. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

10. Bator, *supra* note 1, at 260-63.

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that a return to what Paul calls the Simple Model[11] (if "return" is the right word) was not possible.

Despite the force of his arguments, at the end of his lecture Paul seems ambivalent about whether the development of non-article III tribunals has in fact altered the constitutional architecture. I think he is right to be at least ambivalent; the unwillingness to recognize that this institutional development has altered the constitutional structure in a significant way, has the potential to lead us astray.

The proliferation of non-article III adjudication gives the executive branch great power to implement policies in a most troubling way: not by persuading Congress to enact them into law, nor even by announcing them publicly, but by quietly influencing the orientation of the adjudicators. This happened in the NLRB in the Roosevelt Administration; in a more sinister way, it happened to the Social Security disability program in the Reagan Administration. It is one thing for the executive to announce plans to restrict eligibility for certain public benefits. It is quite another to convey the message to Administrative Law Judges that they are to be more skeptical of the claims of certain categories of recipients. The latter course—which is possible only if adjudication is undertaken by non-article III tribunals—enables the executive to conceal its policy decisions from public and congressional scrutiny. We are likely to underestimate the significance of this development if we insist too strongly that the basic structure of article III remains intact.

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11. *Id.* at 234-35.

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