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# DELEGATION OF POWERS TO AND WITHIN GOVERNMENT CORPORATIONS\*

HARVEY PINNEY†

## A. THE CONSTITUTION AND THE SEPARATION OF POWERS

There is no little literature on the delegation of powers and much of it is controversial. The problem is doctrinal and practical: stemming from the doctrine of the separation of powers the general rule, a negative one, is that delegated powers cannot be redelegated. Through the Constitution the sovereign people have delegated to the congress the power to legislate, to the president the power to execute the laws, and to the courts the power to interpret and apply them. With certain constitutional and practical exceptions, each department is to confine itself to the exercise of its own powers and is neither to encroach on the preserves of the other two, nor evade its own responsibility by passing its powers on.<sup>1</sup>

Congress, having had the power to legislate placed in its hands, may not delegate this power to other agencies. Whatever may be the historical reasons for the rule, the practical one would seem to be that those elected by the voters to determine the policies of government should bear that responsibility so that there remains within easy reach of the voters a ready means by which undesired policies of government may be changed.

The significance of this is readily apparent if we keep in mind the realistic view that the constitution lies in accepted practice. Through the publicity given to their written constitution and its manipulation by the Supreme Court, Americans tend to be misled into the view that the

\* This article is a revised section of Pinney, *Federal Government Corporations as Instrumentalities of Government and of Administration* (Unpublished thesis in New York University Library).

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<sup>1</sup> The general doctrine is to be found in 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (1929) c. 88-90, pp. 1616-1681. See also 12 C. J. 802-955.

Professor Charles C. Thach suggested that the separation of powers was designed to promote efficiency through division of labor: "The adoption of the principle of separation of powers, as interpreted to mean the exercise of different functions of government by departments officered by entirely different individuals, also seemed insistently demanded as a *sine qua non* of governmental efficiency. It seemed, indeed, the only way to secure that functional distribution, that wresting of non-legislative powers from a body that ought to be entirely legislative, which was so greatly desired. It gave point and meaning to the statements of the two theorists whose influence was so great, Blackstone and Montesquieu, that confusion of powers in the same hands was tyranny." *THE CREATION OF THE PRESIDENCY, 1775-1789, A STUDY IN CONSTITUTIONAL HISTORY* (1922) 76.

workings of their government are controlled by a precise legal document. Actually, the American constitutional system, like that of Great Britain,<sup>2</sup> is institutional in nature,<sup>3</sup> and if the delegation of powers by congress to the administrative branches of government becomes a national habit acquiesced in by the courts, we shall presently become aware that a significant constitutional change has taken place and that the courts, instead of resisting such delegation, will be protecting it. Such a transformation is already under way.<sup>4</sup> The question of delegation of powers to government corporations is, therefore, but a part of a much larger problem.

Since the government is not an impartial instrument of the general welfare, but a political instrument dominated by partisan interests and administered by fallible and interested individuals, it is neither an impartial arbiter between the interests of individuals and groups in conflict, nor between itself and citizens parties to a dispute. It was this partiality of the government which gave rise to the doctrine that the centralization of law-making, law-execution, and the adjudication of conflicts in one authority was tyranny. The partial use of these combined powers was evidence of the class nature of the state.

The breakdown of tyranny so defined, that is, the monopolization of the power of government by a ruling family or class, is displayed in that long historical sequence in which the struggle between the Crown and Parliament is the most dramatic feature. The success of the new wealthy classes in wresting power from the Crown had the effect of taking legislative (policy-determining) power from the executive<sup>5</sup> and vesting it in the Parliament.

<sup>2</sup> See the realistic views presented by the youthful John Quincy Adams in his "Publicola" papers, *WRITINGS* (edited by Worthington Chauncey Ford, 1913). See MUIR, *HOW BRITAIN IS GOVERNED* (1930); WADE AND PHILLIPS, *CONSTITUTIONAL LAW* (1931). There are also the more or less standard works of ANSON, *LAW AND CUSTOM OF THE CONSTITUTION* (5th ed. 1922); BAGEHOT, *THE ENGLISH CONSTITUTION* (Rev. ed. 1872); and DICEY, *LAW OF THE CONSTITUTION* (8th ed. 1927).

<sup>3</sup> Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1. See McBAIN, *THE LIVING CONSTITUTION, A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (1927); TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890).

<sup>4</sup> DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927); ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928). Dean Roscoe Pound early recognized this tendency in the courts to retrench, and in 1907 he wrote: "A brief review of the course of judicial decision for the past fifty years will show that the judiciary has begun to fall into line, and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions." Pound, *Executive Justice* (1907) 55 AM. L. REG. 137, 139.

<sup>5</sup> FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, A COMPARATIVE SURVEY* (1928) 20: "On the whole, the course of history has been to wrest legislative power from the executive (except in the form of administrative regulations issued under delegation from the legislature) and to require for public

One phase of this conflict is represented in the demand that adjudication between individuals or groups and between citizens and the state (subjects and Crown) should be performed by an agency as disinterested in the particular controversy as possible. Thus arose the separation of powers doctrine and the intensely held Anglo-American doctrine of judicial independence from the political process and executive control. The illusory aspects of constitutionalism in the United States have long obscured the true nature of the judicial process and have led the unsuspecting citizen to a profound faith in the impartiality of judges—a faith unjustified by works, especially in the realm of judicial policy-making.

The flow of power represented in the struggle just referred to, has been reversed. Under the *physis*<sup>6</sup> of political evolution in modern states a different compulsion clothed in modified doctrines has appeared. We now have the simple division of the powers of government into politics and administration.<sup>7</sup> The expression of popular opinion, or the compromise of conflicting interest groups, culminates in the legislative expression of policy—law. Administration effectuates the policy determined upon and administrative agencies and courts share, to some degree, in both processes. The executive, directly (formally in England) or indirectly, is becoming ever more aggressive in the determination of policy. In England the formal structure of the cabinet system combined with the incapacity of parliament to legislate on modern complex problems and the subservience of members of parliament to party discipline, has made it possible to speak of the dictatorship of the cabinet.<sup>8</sup> And

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welfare enactments the same concurrence of organs of popular representation, that, at some time or other, has almost everywhere in Europe been required for changes in the law of civil and criminal justice. Instead of codes superseding unwritten law, we find, in public law, statutes superseding proclamations and decrees."

<sup>6</sup> Briefly, that natural force which compels the acorn to produce only an oak tree. See MYRES, *THE POLITICAL IDEAS OF THE GREEKS WITH SPECIAL REFERENCE TO EARLY NOTIONS ABOUT LAW, AUTHORITY, AND NATURAL ORDER IN RELATION TO HUMAN ORDINANCE* (1927).

<sup>7</sup> HART, *THE ORDINANCE POWERS OF THE PRESIDENT* (1928) 28: "Under that scheme governmental activity is said to be divisible into two and only two distinct phases. These are variously distinguished as the expression and carrying out of the will of the state; as the formation and the enforcement of the commands of the state; as the creation and the execution by the state of legal rights and duties; and as the enactment and the administration by the state of general rules of conduct." See HAINES AND HAINES, *PRINCIPLES AND PROBLEMS OF GOVERNMENT* (1934), especially c. XVIII; MUIR, *HOW BRITAIN IS GOVERNED* (1930) Part I, c. I; WADE AND PHILLIPS, *CONSTITUTIONAL LAW* (1931).

<sup>8</sup> BLACK, *THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION* (1919), quoting 1 LOWELL, *GOVERNMENT OF ENGLAND* (2d ed. 1919) 326: "To say that at present the cabinet legislates with the advice and consent of Parliament would hardly be an exaggeration; and it is only the right of private members to bring in a few motions and bills of their own, and to criticize government measures, or propose amendments to them, freely, that prevents legislation from being the work of a mere automatic majority."

the cabinet itself has found it necessary to bow to the judgment of the permanent administrator on technical, legislative, and policy problems.<sup>9</sup>

In the United States, the problem of delegation of powers has characteristically been imbedded in terminological confusion. A disposition to adhere rigidly to the separation of powers doctrine (coupled with the efforts of particularistic interests to manipulate the doctrine to their own advantage) has resulted in a plethora of definition, counter-definition and fiction. Such problems have been adequately treated by other writers.<sup>10</sup> So also, it has been well established that legislative power may constitutionally be delegated—whether under cover of the term “quasi-legislative,” or simply as a “necessary” delegation.<sup>11</sup> And Professor Hart has amply demonstrated the quantitative and substantive delegation of legislative power at past periods in our history.<sup>12</sup>

## B. THE NECESSITY FOR THE DELEGATION OF POWERS

Equally demonstrable is the necessity for the delegation of administrative discretion.<sup>13</sup> It is necessary in physical terms because of the incapacity of congress to handle the mass of detail which would otherwise be thrown upon it.<sup>14</sup> It is necessary because of the nature of the

<sup>9</sup> WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933) especially p. 34. See also BLACK, *op. cit. supra* note 8.

<sup>10</sup> HART, *op. cit. supra* note 7; COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* (1927); BLACHLY AND OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934) 20: “A rule or regulation which effects the rights, liberty, property, or conduct of citizens which is made in correct form and through the proper methods, by an authority empowered to make it, and which can be enforced by some sort of judicial authority, is an act legislative in nature.”

<sup>11</sup> HART, *op. cit. supra* note 7 at pp. 34, 56, 132; COMER, *op. cit. supra* note 10 at 33-34; Couzens, *The Delegation of Federal Legislative Powers to Executive Officials* (1935), 33 MICH. L. REV. 512, and cases cited therein. At page 538, Couzens concludes: “(1) Wherever a question has arisen as to the validity of the delegation of alleged legislative power it has been uniformly upheld, and (2) Powers which have been held non-legislative for the purpose of upholding their delegation have for other purposes in other cases (and sometimes in the same case) been held to be legislative or quasi-legislative. This is notably true of powers of regulation as applied to public utilities.”

<sup>12</sup> HART, *op. cit. supra* note 7 at 72 *et seq.*, and cases cited therein. For examples of delegation in England, see DIMOCK, *BRITISH PUBLIC UTILITIES* (1934) 29, 38, 58.

<sup>13</sup> WILLIS, *op. cit. supra* note 9 at 49: “When, however, the phrase ‘administrative discretion’ is used in contra-distinction to ‘legislative discretion’ it is supposed to mean a discretion which is of the same nature as legislative discretion, but to be exercised in matters of detail and pursuant to the general order.”

<sup>14</sup> HART, *op. cit. supra* note 7 at 127: “. . . it is easy to demonstrate the advisability if not absolute necessity of leaving at least the details of our complex social and industrial legislation to that branch of government which rubs elbows with the actual problems and can deal with them in a more direct and more flexible way than the legislature can.”

WILLIS, *op. cit. supra* note 9 at 175: “But in truth whether good or bad the development of the practice is inevitable. It is a natural reflection, in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social, and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries.” Quoting the Donoughmore Committee.

legislative process in attempting the regulation of certain complex activities. That is, neither the legislature nor the administrative agency can know what the interrelations of rule and activity will require until the process of regulation is actually under way. Then it is necessary to adapt, contract, expand, diversify the application of rules or of specific adjustments in order to "rationalize" the total regulative situation.<sup>15</sup> This process is evident in the functioning of any large administrative agency such as the Interstate Commerce Commission, Federal Trade Commission, Reconstruction Finance Corporation, Federal Home Loan Bank Board, Farm Credit Administration, and so on. When the agency, of its own judgment or because of judicial restrictions, feels the need of additional powers in making these adjustments, it makes recommendations to congress requesting the additional legislation. Thus the legislative rule arrived at becomes a generalization of administrative experience.

COUSENS, *supra* note 11 at 515-516: "There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and, must, therefore, be a subject of inquiry and determination outside the halls of legislation." Quoting *Field & Co. v. Clark*, 143 U. S. 649, 694, 12 Sup. Ct. 495, 505, 36 L. ed. 294, 310 (1892).

<sup>15</sup> Freund, *op. cit. supra* note 5 at 126: "The regulation of railroad rates entirely through administrative action, is in the first instance due to inherent difficulties of legislative specification; but it is also clear that the method chosen represents a process of rationalization. The special feature of the administrative power is that it is exclusively one of corrective intervention. The rate structure proceeds from the initiative of the carrier, and the state or its agency has no primary responsibility for the resulting system; and it is hardly conceivable that merely corrective action will produce entire reconstruction; the process of rationalization does not therefore involve standardization *de novo*; moreover, since there is no delegation for regulation but only for particular orders, administrative action is not called upon to formulate explicit rules; and theories will appear only as reasons for decisions. . . . All deferred control, operating under guaranties of procedure and subject to judicial review, is in this sense a method of rationalization, and in this the growth of administrative law reflects the effort or tendency of legislative regulation to conform to rational standards."

Professor Milton Handler has expressed a different view with regard to the Federal Trade Commission: "The definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision. The method of judicial exclusion and inclusion does not permit of a sustained, consistent, comprehensive and speedy attack upon the trade practice problem. The case by case determination takes years to cover even a narrow field; it leaves wide lacunae; false starts are difficult to correct and the erroneous decision is just as prolific as a sound ruling in begetting a progeny of subordinate rules. In a controversy between two litigants or between a Commission and a private party, the law making function is distracted by factors which are important to the contestants but irrelevant to the formulation of future policy. The fusion of law and economics, the detailed investigations and hearings, and the precise formulation of rules, all of which are so essential to a proper regulation of competition, are not feasible when law making is but a by-product of the adjustment of controversies. The combination of the two functions may have been justified when knowledge of the workings of competition was sparse and objectives ill-defined. It can no longer be justified today. It would be little short of criminal to rely upon so inefficient a method of law making when more scientific and expeditious devices are available." *Unfair Competition* (1936) 21 Iowa L. Rev. 175, 259.

From both points of view, the problem is one of division within the administrative organization rather than between congress and administration.

One might summarize the necessity for and advisability of such administrative discretion by listing its advantages:

1. Legislatures and committees cannot possibly achieve the intimate knowledge necessary to handle the problems involved.
2. Legislatures are slow in action, in adapting legislation to changed conditions or unforeseen circumstances; they meet infrequently.
3. The legislature can lay down only a rigid rule—and the more rigid, the more ministerial must administration become.
4. Permanence and continuity result from administrative effort; legislatures are notoriously fickle.
5. Administration is in a better position to employ scientific and expert help.
6. If the legislature is freed from concern with details it can devote more attention to policy.<sup>16</sup>
7. Administration can adapt government to local or regional variations.
8. Administration can make continuous adjustment to future conditions unknown to the legislature at the time it acts.
9. Detailed legislation is politically more difficult to enact.<sup>17</sup>
10. It permits an experimental approach.<sup>18</sup>

That this necessary delegation has occurred in the past and that it has been sustained by the courts is evident from numerous studies and decisions.<sup>19</sup> More recent delegations, at least in the eyes of the American Bar Association Special Committee, go much further. This committee, for its own purposes, has set up a fourfold classification:

"1. Congress enacts a rule of conduct and delegates to an administrative agency the power to determine when the rule shall go into effect or shall cease to have effect.

"2. Congress delegates to an administrative agency, already existing or definitely established by statute, the power to make rules of conduct (usually referred to as "regulations").

"3. Congress not only delegates to an administrative agency the power to make rules of conduct (regulations) but also the power to subdelegate that power, and to create, establish, determine the character of, and discontinue, agencies to exercise the subdelegated power.

"4. Congress not only delegates to an administrative agency the power to make rules of conduct (regulations) and the power to sub-

<sup>16</sup> The first six are based largely on HART, *op. cit. supra* note 7 at 275-281, who follows Freund.

<sup>17</sup> 7, 8 and 9 are suggested in COMER, *op. cit. supra* note 10 at 16, footnote.

<sup>18</sup> The Report of the Committee on Ministers' Powers to Parliament (1932) included most of the points listed, and this last one in addition.

Disadvantages include: (1) Less public control over administration; administrative action not preceded by public discussion. (2) Legislatures know better what is politically expedient. (3) Legislative acts have a higher moral authority than those of the administrative arm. (4) Executive legislation may be affected by the spoils system, inefficiency, red tape, rigidity, and the like.

FREUND, *op. cit. supra* note 5 at 220-221, finds the main difference between legislative and administrative rule-making to be that the latter, in America, is practically unregulated whereas the former must pass a series of political checks.

<sup>19</sup> See notes 11 and 12, *supra*.

delegate that power, but also the power to determine, put in force, and discontinue, the system of regulation to be used in enforcing the rules thus enacted."<sup>20</sup>

The first and second are traditional types of delegation and of those two only the second is really a delegation of legislative discretion. The third and fourth forms are, in the committee's eyes, extreme. They are the forms employed more by the New Deal than by any other administration. And such delegations have been made to federal government corporations.

### C. DELEGATIONS AFFECTING CORPORATIONS

What sort of delegation is made to the president and administrative agencies relative to government corporations?<sup>21</sup> In the first place, where such corporations have been created by congress, the basic structural outline is set down by the creating act.<sup>22</sup> But where power to create a corporation, or power to create a suitable agency including a corporation, is granted to the president, then the general form and specific powers are determined by the president's executive order.<sup>23</sup> or by the administrative agency to whom he redelegates this power.<sup>24</sup> Naturally, where an administrative agency creates a corporation by chartering it in a state, with either the formal or informal consent of the president, the form, powers and duties of such corporation are determined by the creating agency although possibly colored as to functions by the act or acts under which authority to create it is claimed.<sup>25</sup>

<sup>20</sup> 61 A. B. A. REP. 720, 774 (1936).

<sup>21</sup> On one phase of the problem see Note, *Delegation to Judicial Bodies of Power to Supervise Organization of Public Corporations* (1930) 39 YALE L. J. 413, commenting on *Searle v. Yensen*, 118 Neb. 835, 226 N. W. 464 (1929).

<sup>22</sup> Corporations such as the Reconstruction Finance Corporation, Home Owners Loan Corporation, and Federal Deposit Insurance Corporation.

<sup>23</sup> Such as the Federal Prison Industries, Inc., the United States Grain Corporation, the Export-Import Bank of Washington. Even in these cases the president may redelegate much discretion to subordinates. Executive Order No. 6581 directing the creation of the Export-Import Bank states in one paragraph: "The Secretary of State and the Secretary of Commerce are hereby authorized and directed to cause said corporation to be formed, with such certificate of incorporation and bylaws, as they shall deem requisite and necessary to define the methods by which the corporation shall conduct its business."

<sup>24</sup> As in the United States Housing Corporation, the Commodity Credit Corporation, the Public Works Emergency Housing Corporation, and others.

<sup>25</sup> For example, the Commodity Credit Corporation, while having wide charter powers, is self-limited by its bylaws to dealing in commodities indicated by the president. Many such corporations were chartered in Delaware whose general corporation laws permit the vesting of power to make and alter bylaws in the board of directors (DEL. REV. CODE (1935) §2044), and permit the corporation itself to amend its own certificate of incorporation in almost any manner it sees fit (DEL. REV. CODE (1935) §2058). The standard certificate of incorporation forms sent out by the various companies rendering incorporation services in Dover, invariably cover those two points and the charters of those government corporations incorporated in Delaware contain these clauses. In the Commodity Credit Corporation charter the provisions may be found in clauses 9 and 12.



In practically all such delegations, the administrative agency which creates the corporation and determines its powers and duties, also controls the corporation.<sup>26</sup> Even where the corporation is created by executive order, the order is prepared by subordinates—those who are to be its managers probably<sup>27</sup>—and submitted to the president for approval.

In effect, then, in a large number of cases the legislative function of creating an administrative agency which at one time would have been performed in some detail by congress, is delegated to the president, or through his discretion, to some administrative agency. The rights and duties of employees of such corporations are thus largely at the discretion of the corporation itself or those designated to manage it. Even in those corporations created by act of congress a free reign over personnel is given to the board of directors save perhaps for a limitation as to top salaries,<sup>28</sup> a requirement that a list of employees and their salaries be reported to congress,<sup>29</sup> or that certain restrictions apply to certain types of positions.<sup>30</sup>

#### D. DELEGATIONS TO CORPORATIONS

With the exception of corporations made subject to a supervisory authority, such authority bearing the burden of carrying out the substantive provisions of the acts of congress under which the corporations function,<sup>31</sup> government corporations are relatively free to determine their own procedure. This included freedom in methods of accounting and audit at first, but many corporations have been made subject to the general accounting office.<sup>32</sup> There may be special limitations on certain items such as issuing bonds,<sup>33</sup> purchasing,<sup>34</sup> disposal of property,<sup>35</sup> etc.

<sup>26</sup> This was true of many of the war-time corporations—the United States Housing Corporation, United States Grain Corporation, and others, and is true of many existing corporations such as the Federal Subsistence Homesteads Corporation, Federal Surplus Relief Corporation, Electric Home and Farm Authority, Reconstruction Finance Corporation-Mortgage Company and Warrior River Terminal Company.

<sup>27</sup> As in the case of the Federal Subsistence Homesteads Corporation. See Glick, *The Federal Subsistence Homestead Program* (1936) 44 YALE L. J. 1324.

<sup>28</sup> As, for example, in the Home Owners Loan Corporation Act, 48 STAT. 128 (1933), 12 U. S. C. A. §1463(j) (1934).

<sup>29</sup> As in the Tennessee Valley Authority Act, 48 STAT. 63 (1933), 16 U. S. C. A. §831h(a) (1934).

<sup>30</sup> Such as officers residing in the districts in which they work. See Home Owners Loan Corporation Act, 49 STAT. 296 (1935), 12 U. S. C. A. §1463(j) (1936).

<sup>31</sup> As in the Farm Credit Administration and the Federal Home Loan Bank System.

<sup>32</sup> By Executive Order No. 6540.

<sup>33</sup> Subject to the supervision of the Secretary of the Treasury in practically all cases.

<sup>34</sup> As, for example, affecting the Tennessee Valley Authority, 49 STAT. 1080 (1935), 16 U. S. C. A. §831h(b) (Supp. 1937).

<sup>35</sup> The Tennessee Valley Authority, 49 STAT. 1075, 1076, 1080 (1935), 16 U. S. C. A. §831c(k) (Supp. 1937); the Federal Deposit Insurance Corporation, 49 STAT. 684 (1935), 12 U. S. C. A. §264(n) (1) (1936).

Hence, though the substantive functions of a corporation may be limited quite definitely to certain specific operations such as making a certain type of loan to home owners, or operating a barge line over a definite inland waterway, the corporations are generally endowed with wide discretion as to how they shall organize their operations below the board of directors and as to the methods they will pursue. The greatest restrictions appear in the Farm Credit Administration and Federal Home Loan Bank Board groups. This discretion may be called "administrative discretion" though much of such activity was once performed by the congress and was thought of as a legislative function.

A fundamental aspect of legislative power is that it is used in the making of a general rule—a rule which is a legal statement of policy. The policy may be to raise revenue by this or that type of taxation, to regulate the conduct of citizens along this or that line, or to spend money in performing a service for citizens for which there may or may not be a specific charge. That is, a tariff or income tax law, a food and drug or securities and exchange act, a post office or national parks act, are all legal statements of policies which congress chooses to follow.

To what extent do government corporations have this power of policy-determination? There is in the government corporation comparatively little of the power to tell one class of citizens how they must behave toward another class of citizens in private operations. That is, a corporation would not be ordering railroads not to pay rebates to shippers such as the Interstate Commerce Commission might.

A corporation may, however, declare that those who deal with it must fulfill certain conditions. These conditions may involve anything from filling out a simple application form to submitting to an investigation as to one's moral character (Home Owners Loan Corporation), or buying a ticket (on the Panama Rail Road) to being told what management policies to pursue (Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Federal Savings Loan Insurance Corporation, *etc.*). And they may involve the persuasive regulation of the conduct of creditors and debtors toward each other (Reconstruction Finance Corporation, Home Owners Loan Corporation, Farm Credit Administration, and other credit agencies), or of buyers and sellers toward each other (Tennessee Valley Authority). It is not customarily thought that such determinations of policy are regulatory because whether or not a citizen deals with a government corporation is a matter of his own choice. If he chooses to use its service, then he must submit to its conditions.

This choice is not present, for example, to the railroad. It must submit, willy-nilly, to the Interstate Commerce Commission. If a cor-

poration chooses to go into the railroad business, it must get the consent of the Interstate Commerce Commission first. The only way for the citizen who works for or has an interest in a railroad to avoid the influence of the Interstate Commerce Commission is to get out of railroading entirely, do no travelling and no shipping on the railroads. Even then, as long as he remains a part of our economic organism, he will find it difficult to escape the influence of fundamental policies pursued by the Interstate Commerce Commission. The rate structure constructed by the Commission is universally influential. This is why any reasonably logical view must conclude that the Interstate Commerce Commission exercises legislative discretion.

How does the situation between the government corporation and the citizen differ from that of citizen and Interstate Commerce Commission? A citizen who operates a business entitled to borrow from the Reconstruction Finance Corporation is under no legal compulsion to borrow from it. Nor must a citizen ride on the Panama Rail Road, buy Tennessee Valley Authority power, ship on the Inland Waterways Corporation barges, or buy electrical equipment through the Electric Home and Farm Authority. That is, there is no legal compulsion to do these things.

If the citizen, however, finds himself in a position where he has no feasible alternative but to use the service of the government corporation, if he must borrow from it or lose his home, farm, or business, then the discretion to determine the conditions on which he may use such service is distinctly regulative. It will be remembered that in the case of *Munn v. Illinois*<sup>36</sup> the court in effect took the position that if the citizen did not like the legislature's regulation of public utilities, he could withdraw his property from such business or seek a political remedy. The courts have since undertaken to protect the citizen's property for him, but the point is pertinent.

If a citizen is in a position where he must seek a government service or suffer an injurious loss, then he must qualify under the conditions laid down or try to get those conditions altered. The more monopolistic the government service is, the more subject to the regulative effect of such conditions the citizen is. A man whose publication has been excluded from the mails may substitute a messenger service if he can afford it. But if the only thing standing between a corporation and bankruptcy, or an individual and mortgage foreclosure, is a government loan, then there is little he can do but accept the terms.

My point simply is that the power to regulate conduct is not exclusively limited to a legal rule prescribing what that conduct shall

<sup>36</sup> 94 U. S. 113, 24 L. ed. 77 (1876).

be but such regulation may be equally as effective through determining the economic conditions or alternatives under which an individual may act.<sup>37</sup> This point is of fundamental importance if we contemplate a continued expansion of the economic operations of government: if the government becomes increasingly the dominating influence in determining banking policy, if the Tennessee Valley Authority is multiplied in other valley areas, if the government enters more fully into the shipping business. For the average citizen, the fundamental sameness of the regulatory effects of a commission and a government corporation having a monopoly or near-monopoly status can be seen if we consider substituting government ownership and operation of the railroads for Interstate Commerce Commission regulation. Owners are eliminated but there will still be shippers, riders, and consumers generally (and bondholders for a long time) vitally affected by railroad rate and service policies.

#### E. EXTENT OF DELEGATION TO CORPORATIONS

The question now arises as to how much actual substantive policy-determining discretion is exercised by government corporations in their relations with the public. The discretion as to organization and personnel affects the public, of course, for it bears directly on the efficiency of the agency. But in addition to this where is the line drawn between congressional and corporate policy-determination?

In the big corporations—especially those dealing with credit—the substantive policy is largely laid down by congress. What sort of loans are to be made to what class of borrowers with what maximum interest rates and lengths of maturity, and from what funds, is prescribed by congress. It is left to the corporation to interpret the act by determining the eligibility of the potential patron and his property, the specific interest rate, the specific requirements as to collateral, the specific amount of the loan in relation to the value of the property, and so on. If it is an important legislative act for congress to say that class of individuals *A* may borrow from the agency but class *B* or other classes may not, it is also an important legislative act when the corporation in determining what “adequate security,” “moral character,” “satisfactory management,” or proper standards of appraisal are, divides class *A* into two subclasses one of which, by the corporation’s own sub-legislation, is excluded from its benefits.

<sup>37</sup> See Hale, *Force and the State: A Comparison of 'Political and Economic' Compulsion* (1935) 35 COL. L. REV. 149. Public utility rates may be likened to taxes: SWENSON, *THE NATIONAL GOVERNMENT AND BUSINESS* (1924) 164, §190. See also Justice Field’s dissent in the *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 384 (1873), and Justice Brandeis’ dissent in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 223, 38 Sup. Ct. 112, 62 L. ed. 252 (1917). See COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) 12, 296.

In the case of corporations originating in executive discretion and chartered in a state or the District of Columbia, the determination of such policies of operation as prices, interest rates, eligibility for loans, standards of security, *etc.*, depending on the nature of the corporation, lie almost completely within the power of the corporations themselves. By the terms of their corporate charters such corporations largely determine their own powers, and as an examination of their charters will show,<sup>88</sup> they have been most generous. It should, of course, be borne in mind that most of these corporations are in reality only technically corporations. The policies they pursue are determined by administrators who are direct agents of the Government subject to political appointment and the general policies pursued by the administration.

With a corporation such as the Tennessee Valley Authority, policy-determining discretion has a much wider scope, for it concerns itself with a variety of economic activities and with a social planning and activity that involves fundamental decisions of social policy. True it is that the congress has laid the general foundation of this policy—set its general direction, but its effect on the people of the valley rests largely on what policies the Authority adopts in carrying out its general objective.

It may be said, therefore, that government corporations exercise as much if not more “administrative” independence than regular bureaus and departments, and that they combine with this power over their own organization and personnel a substantial rule-making or policy-determining power affecting in varying degrees the welfare of citizens. They do not tax, but they may determine (within limits for some of them) what citizens pay for a Government service (taxes are actually that—a compulsory payment for government services) and though they do not exercise a power of legal compulsion generally, they may determine conditions which by force of economic compulsion regulate the lives of large classes of citizens.

#### F. DELEGATION OF JUDICIAL POWERS TO CORPORATIONS

Do they also exercise judicial power? That is, do they sit in judgment over rights and duties in conflict? Here also the corporations exercise an effective power which does not exactly fit the traditional categories. The Reconstruction Finance Corporation, for example, may exercise a very effective influence over the conflict of creditor interests in a railroad by the conditions it lays down before the railroad can obtain a loan either to save it from bankruptcy or to facilitate a reorgani-

<sup>88</sup> Especially the state-chartered corporations such as the Commodity Credit Corporation, the Federal Surplus Relief Corporation, the Federal Subsistence Homesteads Corporation, and others whose certificates of incorporation are reproduced in 79 CONG. REC. 1549-1561 (1935).

zation to get out of bankruptcy. As illustrated in the case of the *Minneapolis and St. Louis Railroad*,<sup>39</sup> though a railroad must gain the consent of both the Interstate Commerce Commission and the Reconstruction Finance Corporation before obtaining a Reconstruction Finance Corporation loan, what the Reconstruction Finance Corporation thinks is a proper adjustment of interests in the reorganization plan may be and frequently is the determining factor.

In all cases where the service is rendered only after proof of eligibility, the corporation exercises a judicial procedure in determining whether or not an individual applicant is eligible. It lays down, first, general rules as to standards of appraisal, management, moral character, *etc.*, and then sits in judgment on each individual applicant to see whether or not he qualifies. And his right to the service will depend on the decision rendered by the corporation or its agents.

This may be carried further. A corporation may determine whether or not the conditions on which an applicant has been given service have been violated and may suspend such service, usually after hearing, but on its own decision.<sup>40</sup> Thus, though the corporation does not exercise the power to fine or imprison, it may very effectively penalize what it considers to be a violation of its own rules, or conditions laid down in its contract with a patron.

Judgment on applications is final. The corporation may allow an appeal from a subordinate to a superior, but even this is within its discretion.<sup>41</sup> There can be no appeal to the courts. Where there has been a definite contract, abrogation by the corporation may give the citizen a right of judicial review. But even here the Tennessee Valley Authority contracts provide for unilateral abrogation by the Tennessee Valley Authority on its own judgment.<sup>42</sup> And the insured status of an institution may be abrogated by the insuring agency at its discretion if certain procedures are followed.<sup>43</sup> Other illustrations might be given. Violations of the criminal provisions with which congress has surrounded the corporations or a specific corporation, will, of course, be prosecuted in the regular courts. Such processes as mortgage foreclosure are likewise for the courts.

<sup>39</sup> *Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on the Proposed Sale of the Minneapolis and St. Louis Railroad*, 74th Cong., 2d Sess. (1936).

<sup>40</sup> As in the Federal Deposit Insurance Corporation, 49 STAT. 684 (1935), 12 U. S. C. A. §264(i) (1936), and in the Tennessee Valley Authority, 48 STAT. 64 (1933), 16 U. S. C. A. §831i (1934).

<sup>41</sup> Home Owners Loan Corporation, Field Manual, c. 7, p. 2.

<sup>42</sup> Such provisions in the contracts are authorized by the Act, 48 STAT. 64 (1933), 16 U. S. C. A. §831i (1934).

<sup>43</sup> Federal Deposit Insurance Corporation Act, 49 STAT. 684 (1935), 12 U. S. C. A. §264(i) (1936); Federal Savings and Loan Insurance Corporation, 48 STAT. 1260, 12 U. S. C. A. §1730(b) (1934).

The government corporation combines the powers of government into a single agency. It combines the function of making rules with the function of carrying them out and, to some degree, with the power to sit in judgment on their violation. A government corporation may have a board of directors functioning as a policy-determining body with a general manager and subordinates to administer its functions,<sup>44</sup> or it may combine both functions into the hands of one or two or three individuals.<sup>45</sup> The problem of a separation or division of powers within the corporation is important as a problem in administrative organization. But, as outlined above, the policies pursued by a government corporation involve rule-making, rule-execution, and a judicial process all subject, in general terms, to the controlling authority of the corporation—the board of directors or administrator.<sup>46</sup>

#### G. DELEGATIONS WITHIN CORPORATIONS

Within a corporation there must obviously be a delegation of administrative power—that is, of adapting organization and procedure to the conditions of the function being carried out by the agency. This may be a matter of interaction between the subordinate division and the board of directors. It may be provided, for example, that a local office shall hire such personnel as it needs within prescribed limits and with the approval of the next higher division—perhaps a regional office as in the case of the Home Owners Loan Corporation;<sup>47</sup> and the regional office may in turn hire its personnel with the approval of the assistant general manager and the board.<sup>48</sup> The importance of such delegation lies largely in its influence on the efficiency of the organization. It is a problem we need not deal with here.

But there is also a delegation of discretion affecting the interests of the public—especially patrons. This is particularly true in a loan-making agency such as the Reconstruction Finance Corporation, the Farm Credit Administration agencies, the Federal Home Loan Bank Board agencies. The appraisals of character, management, property, and collateral must largely be made by the personnel of local agencies

<sup>44</sup> As is true of the Home Owners Loan Corporation, Federal Savings and Loan Insurance Corporation, Federal Farm Mortgage Corporation, and others.

<sup>45</sup> As in the Inland Waterways Corporation, or in the Tennessee Valley Authority to begin with. Recently the Tennessee Valley Authority Board has been increasingly confining itself to policy-determining.

<sup>46</sup> The reader should bear in mind two things: (1) the writer is looking at the exercise of government power in its effect on the conduct of citizens whether that power appears in the form of a legal rule coercing the individual by law or a statement of economic policy under conditions which regulate the individual's conduct. (2) The court decisions affecting either of these points as regards government corporations are scant and do not define the problem in terms of judicial review.

<sup>47</sup> Home Owners Loan Corporation, Field Manual, c. 1, p. 3.

<sup>48</sup> *Id.* at 2.

who meet the applicant and inspect his property. So also is it true of agencies that must conduct examinations of financial condition involving appraisals of loans, business conditions, and management, such as the above named agencies, and in addition the Federal Deposit Insurance Corporation.

The delegation here is not so much of the nature of legislative as of judicial power. Appraisers, for the most part, follow forms and apply rules. Additional rules or modifications of existing rules may grow out of their work, but such are made by the head of the division at least if not by the board of directors itself. But it is on the work and recommendation of the appraiser that the decision to accept or reject the applicant is made by the individual or committee having that power. The process of examination and appraisal, as a process, is but little different whether it is conducted by the Comptroller of the Currency, the Securities and Exchange Commission, the Interstate Commerce Commission, or corporations such as the Federal Deposit Insurance Corporation, the Reconstruction Finance Corporation or the Home Owners Loan Corporation. Rights and duties flow from the results of such a process in all such cases. The Federal Home Loan Bank Board may suspend a member of a Home Loan Bank, the Federal Deposit Insurance Corporation may suspend an insured non-member bank, or close a member bank; the Farm Credit Administration may do likewise to members of the Banks for Co-operatives, and so on, as a result of examination and appraisal procedures.

The power of rejection usually lies with the local agency though acceptance of an applicant may require superior approval in all doubtful cases<sup>49</sup> and, in some corporations, in all cases.<sup>50</sup> And when a matter goes higher up for approval, the facts are furnished by the subordinate and his recommendations carry great weight. In fact specific knowledge is almost inevitably dependent on the local investigation.<sup>51</sup> The functions of appraisal and examination are discretionary functions. Assuming good faith in the appraiser or examiner, the only recourse a dissatisfied applicant has is to appeal to a superior—and that involves at least an implied impeachment of the examiner and of the institution which employs him. There could be no judicial review of such discretion.<sup>52</sup>

<sup>49</sup> *Id.* c. 7 at 2.

<sup>50</sup> As in the Reconstruction Finance Corporation.

<sup>51</sup> See the testimony of Jesse Jones in the Hearings on the Minneapolis & St. Louis Railroad *supra* note 39.

<sup>52</sup> Wehle, *Government-Controlled Business Corporations in America and Europe* (1935) 10 *TULANE L. REV.* 94, 95: "When, for instance, a governmentally incorporated lending body acts favorably or unfavorably upon an application for a loan, let us say, upon a highly-processed milk-powder, on the theory that it is or is not an 'agricultural product' within the meaning of a statute, that government corpora-



## H. THE CONTROL OF ADMINISTRATION—JUDICIAL

The problem of control of administrative action begins with the statute.<sup>53</sup> The vaguer the language of the statute, the less the control—or the more general the objectives and standards set by congress, the more leeway the administrator has.<sup>54</sup> The first step in enforcing a statute is interpreting or construing it.<sup>55</sup> The first to make such interpretation after the act is passed is the administrative agency delegated to carry it out. As problems arise, are met, solved, the process of interpretation goes on: it is continuous.<sup>56</sup> Likewise the subordinate must interpret the rules laid down by his superior. An examiner must, for example, interpret the standards laid down as to what is or is not a "good" loan.

This interpretation of statute and rule is of fundamental importance. It is of importance on several grounds. First, because most such administrative interpretation is accepted without question by the citizen

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tion has interpreted the statute, and has acted finally upon that interpretation, in such a way as precludes any appeal; whereas the Constitution seems to contemplate that such a decision should be made upon definite findings by a delegated administrative body whose decision will be reviewable by the Courts."

<sup>53</sup> BLACHLY AND OATMAN, *op. cit. supra* note 10 at 260, 286. "The legislature should fix the main outlines of organization, and lay down the most important norms, standards, and methods for carrying on the various functions of government."

<sup>54</sup> The Supreme Court rejected indefinite standards in two cases but did not do much toward indicating how definite a standard must be. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed. 446 (1931); *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837, 79 L. ed. 1570 (1935). See Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, (1936) 36 COL. L. REV. 871.

<sup>55</sup> An interesting controversy centering around the problem of construing an act of congress appears in *United States Sugar Equalization Board, Inc. v. P. De Ronde & Co., Inc.*, 7 F. (2d) 981, 987 (C. C. A. 3d, 1925). "It may be that President Harding thought that this resolution was permissive, but the President, like the Secretary of the Treasury, or any other executive or administrative officer, has to construe every act passed by Congress to be enforced by him. Such construction is not final, and may be judicially reviewed at the instance of those injuriously affected thereby, . . ." But most such construction never reaches the courts.

<sup>56</sup> BLACHLY AND OATMAN, *op. cit. supra* note 10 at 41: "All this means that the legislative process, as we have said above, may be a continuous process starting from the most fundamental law and continuing down to the most minute regulation or rule. It may be performed by constituent bodies, legislative bodies, administrative bodies, administrative judicial bodies, and even judicial bodies. The scope and significance of any action legislative in nature performed by each type of authority depends upon several factors: The extent and method of legislative delegation; the different methods by which the legislature permits the administrative or executive authorities to implement the law; the extent to which the administration must fill in the law in order to make it applicable, the amount of control exercised by the courts over this process; the degree to which the administration is left free to interpret the law; the extent to which the courts, in settling cases before them, must fill in the omissions or gaps of the law; the extent to which the courts make the statutory laws and regulations conform to their common law concepts; and the extent to which the courts, under the guise of interpreting the law, establish norms, rules, regulations, and classifications that are legislative or administrative in nature."

even where it is potentially reviewable by a court.<sup>57</sup> Secondly, because the spirit or philosophy of the administrators may vary widely the effect of such administration.<sup>58</sup> This is as true in a regular department,<sup>59</sup> of course, as in a corporation. Should "adequate security" be interpreted to mean highly liquid security?<sup>60</sup> Should a "good" loan be thought of only as a relatively liquid loan?<sup>61</sup> What moral factors shall determine the eligibility of an applicant for a Home Owners Loan Corporation loan?<sup>62</sup> Should the Tennessee Valley Authority drive as sharp a bargain as possible in applying eminent domain?<sup>63</sup>

<sup>57</sup> FREUND, *op. cit. supra* note 5 at 179: "Where a statute depends for its execution and enforcement upon administrative action, executive interpretation is an important factor. For, although ultimate judicial interpretation may be independent, yet much of statutory execution never goes through the courts, and in the enforcement of criminal statutes a lenient attitude of law-enforcing authorities must as a rule be conclusive. German and French legislation is overlaid by executive instruction to an extent unknown in England and America, but even in our jurisprudence the opinions of law officers advising executive departments in many cases practically determine the operation of statutes."

<sup>58</sup> WILLIS, *op. cit. supra* note 9 at 57: "Bare quotation from statutes can be oddly misleading. The words of grant are not in themselves important; it is the action taken under them which should as a practical matter decide the case for or against such delegation. But action is determined by the attitude of mind of the actor."

<sup>59</sup> COMER, *op. cit. supra* note 10 at 142-143: "An engineer, member of the technical staff of the Bureau of Internal Revenue, upon being questioned as to whether the large number of rulings on Section 214(a) of the Revenue Act of 1921 had materially changed the effect of that Section upon taxpayers, answered in the affirmative. An expert public accountant, formerly an employee of the Treasury Department and later an adviser in making the rulings that deal with amortization claims, stated before the Senate Committee that the Bureau had a progressive policy which is followed in interpreting the law, a policy of progressing from conservatism to liberalism. Regulations were harsh, he said, under the new law in order to discourage excessive claims for amortization, but later were amended to favor the taxpayer. He claimed that to interpret the law so as to favor the government and to permit modification later if the taxpayer could prove that the original interpretation was incorrect was the proper course for tax officials to follow. The taxpayer must then proceed to show the Bureau that its ruling was not the true interpretation of the intent of Congress, and eventually may ask the opinion of the Judiciary. One of the more experienced attorneys of the legal division of the Bureau was greatly pleased over the ability of his organization to exceed the collection estimates of the government actuary for 1920 by a third of a billion dollars, especially since the collections for 1919 had fallen short of the estimate for that year by over a million. He explained the 1920 excess chiefly on the basis of 'harsh' interpretative regulations in favor of the government. He even went so far as to cite specific examples which the makers felt were actual substantive changes in the law, saying that these, if they should happen to be contested, would hardly prevail in the courts." This information came from personal interview by Comer.

<sup>60</sup> Reconstruction Finance Corporation Act, 47 STAT. 6 (1932), 48 STAT. 121 (1933), 15 U. S. C. A. §§605, 605b (1934). See also HARDY AND VINER, REPORT ON THE AVAILABILITY OF BANK CREDIT IN THE SEVENTH FEDERAL RESERVE DISTRICT (1935), especially "Findings" 6 and 7, p. (vi), "Recommendations" 9-19, pp. (vii-viii), and §VII, "Loans Made by the Reconstruction Finance Corporation," pp. 39-47, wherein the authors discuss both interpretation and the delegation of discretion within the Reconstruction Finance Corporation.

<sup>61</sup> As Federal Deposit Insurance Corporation examiners must decide.

<sup>62</sup> Home Owners Loan Corporation, Field Manual, c. 4, p. 8.

<sup>63</sup> Tennessee Valley Authority Act, 48 STAT. 60, 67, 70 (1933), 16 U. S. C. A. §831 (e, g, x) (1934).

In the third place there are the interpretations which are sufficiently substantive in character to be laid alongside the language of the statute and tested as to whether or not there is a conflict between the two. Thus where the administrator can be charged with the violation of a rule or statute either by doing what it forbids or by exceeding the powers which it grants, then the citizen may submit himself to the mercies of judicial review—a process by no means free from this same element of interpretation.<sup>64</sup> And also, as in the case of review of acts of the Interstate Commerce Commission, it is a process in which frequently a set of legal experts reverse a set of economic experts in matters quite distinctly within the province of the latter.

Control of administrative action by judicial review has been mostly exercised in connection with the regulatory activities of government. Where a civil employee or official exceeds statutory authority he may be checked by appeal to the courts even though acting under orders from a superior,<sup>65</sup> and where a duty is ministerial, court action may compel performance.<sup>66</sup> Where the action on the part of the administrator involves not only interpretation of rule but determination of facts, the relation of such action to judicial review is even more difficult to define. A definite set of rules has been laid down by the Supreme Court with regard to the Interstate Commerce Commission which permits the Court to judge for itself when it may go behind the facts determined by the Commission.<sup>67</sup>

The Court resists the idea that final determination of facts may be

<sup>64</sup> FREUND, *op. cit. supra* note 5 at 95: "It is not entirely improper to speak of the hazard of judicial construction; for construction is in the nature of a sovereign act and unpredictable. . . . A full examination of cases, while valuable for practical purposes, would yield only a demonstration of the impossibility of laying down reliable rules of construction."

<sup>65</sup> WATKINS, *THE STATE AS PARTY LITIGANT* (1927) 110: "Accordingly the orders of a superior, even of the President, afford no defense to an officer if in law his act is unjustified. . . . The interpretation of law by the heads of the Departments will be of great persuasive weight before the courts, but if such interpretation is in fact erroneous, the instructions of the Department heads offer no defense to the inferior officers in a suit against them."

<sup>66</sup> A general summary of administrative actions liable to question in a court is made by HART, *op. cit. supra* note 7 at 306-308.

<sup>67</sup> ". . . in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." *Interstate Commerce Commission v. Union Pac. R. R.*, 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308, 311 (1912).

left with an administrative agency.<sup>68</sup> Part of the problem centers around the definiteness of standards set by the legislature—that is, it is a problem of interpretative discretion. How definite a standard must be to permit judicial review is not clearly evident.<sup>69</sup> The functions of the judiciary being largely self-limited in matters of fundamental policy, what the courts may do by way of limiting administrative discretion in the corporate form of administrative agency remains to be seen.<sup>70</sup> “Case law,” says Freund, “is a form of casuistry,” though perhaps legitimate casuistry;<sup>71</sup> and Professor Hart, in attempting to draw a line between what congress should do itself and what it should delegate to a commission or the president in regulating interstate commerce, suggests that the grant of power over minimum and maximum rates had suffi-

<sup>68</sup> Haines, *Review of Industrial Accident Commissions*, in *Governmental Administration Essays* (1935) 148, footnote: “In relation to ‘basic,’ ‘pivotal,’ or ‘jurisdictional’ facts, Chief Justice Hughes said: ‘It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.’” Quoting *Crowell v. Benson*, 285 U. S. 22, 56, 52 Sup. Ct. 285, 294, 76 L. ed. 598, 616 (1932).

<sup>69</sup> FREUND, *op. cit. supra* note 5 at 71: “If the law requires a structure or plan to be safe, or a food product to be wholesome, some doubt may arise; but on the whole there is in such a case an assumption that standards are sufficiently certain to be passed upon in an objective manner; and the justification of a refusal to certify will normally present a question of fact which if controverted can be decided by a court. . . . That a standard is not sufficiently definite for penal enforcement, does not necessarily mean that it is not sufficiently definite for judicial control; and if readily controllable, the standard is a legislative, not an administrative standard.”

<sup>70</sup> HART, *op. cit. supra* note 7 at 31: “The distinctive function of the judiciary is the authoritative but non-discretionary determination of jurisdiction, or, in other words, the final decision whether a given act or course of action of a private person was (or, under a system of declaratory judgments, will be) within the sphere of the legal competence of the performer or pursuer.” See also Needham, *Judicial Determination by Administrative Commissions* (1916) 10 AM. POL. SCI. REV. 235-250.

For a comparison of judicial and bureaucratic personnel and decisions see HART, *TENURE OF OFFICE UNDER THE CONSTITUTION, A STUDY IN LAW AND PUBLIC POLICY* (1930) especially pp. 57 *et seq.*

The suggestion derived from the study of government corporations is that of circumventing the courts by creating an instrument of social control which makes it unnecessary to resort to the courts in order to protect rights in conflict where major matters of policy are involved. The application of this suggestion, however, will necessitate a thorough examination of the constitution, nature, and functions of boards of directors.

<sup>71</sup> FREUND, *op. cit. supra* note 5 at 5.

ciently objective standards and that a more definite line should be left to the cumulative effect of judicial decisions.<sup>72</sup>

The control of the courts is, by accepted practice, reduced to a minimum where relating to questions of privilege as distinguished from questions of right.<sup>73</sup> This applies to the admittance of immigrants to the country, the use of federal lands, and similar "privileges." According to the Supreme Court:

"Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. . . . The head of an executive department . . . in the administration of the various . . . concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws . . . under which he is from time to time required to act. . . . Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction."<sup>74</sup>

It would seem likely that much of the corporate activity carried on by the agencies under discussion would be so considered and thus be relatively free from judicial control.

It is not necessary to go further into this particular problem here. It should be remarked, however, that constitutional rights are generally thought of in terms of freedom from regulation<sup>75</sup>—not in terms of right to an economic service. If government develops large monopolistic business services, the right of the citizen *vis-a-vis* government must include the right to impartial service as well as the right to non-discriminatory regulation.

## I. THE CONTROL OF ADMINISTRATION—POLITICAL

There is a further important control over administrative action—that commonly termed political. Such control lies in congress and the

<sup>72</sup> HART, *op. cit. supra* note 7 at 146.

<sup>73</sup> BLACHLY AND OATMAN, *op. cit. supra* note 10 at 247-249.

<sup>74</sup> United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324, 23 Sup. Ct. 698, 701, 47 L. ed. 1074, 1078 (1903).

<sup>75</sup> FREUND, *op. cit. supra* note 5 at 114: "In the first place, the courts have construed constitutional liberty as meaning (to some extent) freedom from regulation, and freedom from regulation, which elsewhere is at most a policy or principle, may therefore in America become a right. . . . In the second place, constitutional law alters the nature of the problem of freedom as a legislative problem. The legislature must accommodate itself to judicial doctrines of immunity from regulation, and difficult borderline questions in that respect require solution. . . . The nineteenth century is generally associated with economic theories opposed to regulation . . . and in America impatience of restraint antedated its judicial expression by many years; indeed, the judicial expression was a protest against legislative change, which in its turn reflected a change of public opinion favorable to regulation."

president in the form of the power of congress to reorganize, abolish, or restrict the powers or finances of any government corporation; in the pressure which may be brought through congress by this or that interest;<sup>76</sup> in the threat or actuality of investigation and publicity; in the power of the president to appoint, remove, investigate, to initiate congressional action, in some cases to reorganize or abolish the corporation, or determine the funds available for it, and in his general budgetary control where a corporation must come before congress for an appropriation.<sup>77</sup>

This political control, especially in the policy formed by the president and his administration and as relating to corporate agencies of the Government performing economic operations, is of the utmost importance. It affects personnel policies and freedom from patronage, the nature of Government competition with business, whether Government credit is used primarily to aid big business or the individual, and so on. In matters affecting citizens as a class, this is the important control. Bungling, inefficient, over-generous, or hard-boiled and parsimonious administration cannot be reached through the courts. In other words, the interest of the individual citizen will be best served (assuming major lines of policy to have been determined) by the construction of an administrative organization composed not only of capable persons, but of persons having a sense of responsibility for the function government is performing, a spirit of sympathetic understanding of the citizen's position, and an *esprit de corps* among themselves. This may be furthered by devices, probably administrative, to prevent individual administrators from abusing their power or the patience of the public.

Something of the kind is contemplated by Professor Dimock who has studied in detail the administrative organization and functioning of the Panama Rail Road Company and the Inland Waterways Corporation, and to some extent the Tennessee Valley Authority. He has also made an extensive study of British public utilities.<sup>78</sup>

<sup>76</sup> HERRING, in *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* (1936) has made a good study of this kind of pressure, but makes few if any references to government corporations.

<sup>77</sup> For a similar list see HART, *op. cit. supra* note 7 at 292-293. He also points out that judicial action is absolutely limited in relation to political discretion. pp. 164-165.

<sup>78</sup> Dimock, *Control Over Administrative Action*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (1935) 288-289: "The objects of control over administrative action may be said to be these: 1. To prevent the formation of a deepening gulf which may separate the public employees from the citizenry. 2. To carry on public administration within the letter and spirit of the law, excluding arbitrary or prejudiced action. 3. To test every action of an individual officer by its reaction upon the prestige and the integrity of the public service. 4. To obtain efficiency and *esprit de corps* as a result of positive standards and through corporate responsibility rather than by fear of the taskmaster or by means of external compulsion—in other words, progressively to supersede the necessity of external controls by developing the internal or corporate discipline.

## J. SUMMARY

In summary it may be said that:

1. Large "administrative discretion" may be delegated by congress to an administrative agency directly or through the president;
2. "Legislative discretion" may be delegated by congress to the president, or to administrative agencies, and power to redelegate may be given;
3. "Administrative adjudication" is also authorized by congress;
4. The exercise of administrative, legislative and judicial powers by departments or regulatory administrative agencies may be duplicated by government corporations in so far as the nature of their functions may lead them to do so;
5. The primary regulative effect is attained by the government corporation through the determination of economic alternatives to which economic conditions may subject the citizen;
6. The government corporation (varying in degree with the specific corporation) determines economic policy;
7. It devises rules and regulations and techniques for administering that policy;
8. It exercises a judicial function in determining the right (eligibility under conditions prescribed by the corporation, or by the corporation within the limits set by congress) of the applicant to receive the government service, or to continue receiving such service;
9. The more nearly a monopoly the service performed by the government corporation is, the more its determinations of policy and conditions have a coercive effect;
10. The nature of the discretion exercised by a government corporation results in little judicial control under traditional concepts and practices;
11. The primary control is political and lies in:
  - (a) an adequately clear determination of general policy by congress (in reality by executive leadership through congress),
  - (b) the possession by the executive of clearly formulated administrative policies as to both ends and means,

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"The methods of control over administrative action . . . are these: 1. The investigation of administrative officials by legislative committees. 2. Judicial control as effected by suits or by the application of remedies such as certiorari, habeas corpus, and mandamus. 3. Administrative hearings by higher officials and the exercise of disciplinary employees' associations as a means of guiding and regulating individual conduct. 5. The establishment of objectives and of canons of conduct for administrative officials by dictatorships, such as Italian, German, or Russian."

Professor Dimock thinks that administrative self-regulation is the coming method.

- (c) responsible and capable personnel with an *esprit de corps* founded on the ideal of their function,
- (d) properly devised administrative techniques for discovering and correcting individual errors in administrative conduct;

12. Assuming an adequate administrative organization, the real problem of control will center in policy-determining—the relation of the board of directors of the corporation to the real interests involved in the operations of the agency (consumer or patron, labor (personnel), competitors) and the general interest as represented in the national-policy-determining body, congress.<sup>79</sup>

This essay has constituted a review of the problem of delegation of powers with the idea of setting the government corporation in the currently accepted terms of that problem. It must be clear to the reader that the questions raised by this discussion cannot be answered without some consideration of the corporation as a separate entity and the extent to which its proper and successful functioning may depend on independence from, rather than subjection to, control by other governmental agencies. The problems of the independence of government corporations and their true nature as instrumentalities of government, both as now used and potentially, have been discussed elsewhere.<sup>80</sup> Suffice it to say here that such an organizational form offers definite possibilities for the functional decentralization of governmental power—possibilities which should be further explored.

<sup>79</sup> See BLACHLY AND OATMAN, *op. cit. supra* note 10 at 286-289, for their summary of recommendations for a reformed administrative system including both the problem of administrative legislation and that of administrative adjudication.

<sup>80</sup> Pinney, *Federal Government Corporations as Instrumentalities of Government and of Administration* (unpublished thesis in New York University Library) cc. XIV, XV, XVI.