FOREWORD

This volume is an exact photo-reproduction of an original copy of

GEORGETOWN
LAW JOURNAL

Volume 33

1944-1945

As an original is practically unobtainable, this reprint is offered to enable Law Libraries to fill out their collection of legal periodicals.

The reproduction follows the original in every detail, and no attempt was made to correct errors and defects in typography.

Buffalo, N. Y.
August, 1965

DENNIS & CO., INC.
# TABLE OF CONTENTS TO INDEX

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author Index to Leading Articles</td>
<td>III</td>
</tr>
<tr>
<td>Title Index to Leading Articles</td>
<td>III</td>
</tr>
<tr>
<td>Index to Administrative Law</td>
<td>III</td>
</tr>
<tr>
<td>Title Index to Federal Legislation</td>
<td>IV</td>
</tr>
<tr>
<td>Title Index to Notes</td>
<td>IV</td>
</tr>
<tr>
<td>Index to Recent Decisions</td>
<td>IV</td>
</tr>
<tr>
<td>Index to Book Reviews</td>
<td>V</td>
</tr>
<tr>
<td>Topical Index</td>
<td>VII</td>
</tr>
</tbody>
</table>

*Copyright 1944-1945

*By The Georgetown University School of Law*
INDEX TO AUTHORS OF ARTICLES

BERNHARDT, JAMES CURRY: Government Priority for Repayment of Monies Advanced to Contractors ................................................................. 279
BLACHLY, F. F. AND OATMAN, M. E.: Judicial Review of Benefactory Action .................. 1
CLAGETT, HELEN L.: The Mexican Suit of "Amparo" ..................................................... 418
MERSCH, VICTOR S.: Implied Revocation of Wills Revived in the District of Columbia 182
NEUNER, ROBERT: Broadcasts from Foreign Countries—Conflict of Laws Problems 401
REARDON, ALBERT FRANCIS: Problems Arising under the Renegotiation Act ............. 153
SELLERS, ASHLEY AND BASKETTE, JESSE E., JR.: Agricultural Marketing Agreement and Order Programs, 1933-1944 ........................................... 123
TIMBERG, SIGMUND: An International Trade Tribunal—A Step Forward Short of Surrender of Sovereignty ......................................................... 373
WILSON, HON. EMMET H.: Stare Decisis, Quo Vadis? The Orphaned Doctrine in the Supreme Court ................................................................. 251
WISE, MAURICE K.: The German Law of Requisition ...................................................... 33

TITLE INDEX TO ARTICLES

Agricultural Marketing Agreement and Order Programs, 1933-1944
Ashley Sellers and Jesse E. Baskette, Jr. 123

Broadcasts from Foreign Countries—Conflict of Laws Problems .... Robert Neuner 401
The German Law of Requisition ........................................ Maurice K. Wise 33
Government Priority for Repayment of Monies Advanced to Contractors James Curry Bernhardt 279

Implied Revocation of Wills Revived in the District of Columbia Victor S. Mersch 182
An International Trade Tribunal Sigmund Timberg 373
Judicial Review of Benefactory Action F. F. Blachly and M. E. Oatman 1
The Mexican Suit of "Amparo" Helen L. Clagett 418
The Renegotiation Act, Problems Arising under Albert Francis Reardon 153
Stare Decisis, Quo Vadis? The Orphaned Doctrine in the Supreme Court Hon. Emmet H. Wilson 251

INDEX TO ADMINISTRATIVE LAW

The Legality of Suspension Orders Issued by Federal Emergency Agencies .......... 45
Some Phases of Administrative Rule Making, Hearing Procedure and Judicial Review as Proposed in the Sumner and Smith Bills ........................................ 53
Should Prejudgment Before Hearing in a Quasi-Judicial Proceeding Disqualify an Administrative Agency? ......................................................... 311
INDEX TO FEDERAL LEGISLATION

"Accepting" the Bretton Woods Agreements ........................................... 57
Federal Criminal Laws, Revision of .................................................. 194
Insurance under the McCarran-Ferguson Act ...................................... 321
Post-War Aviation Law, Outlook for .................................................. 452

INDEX TO NOTES

Injurious Falsehood—An Expanding Tort .............................................. 213
Insurance: A Survey of State Rate Regulation ...................................... 70
Martial Law in Hawaii ........................................................................... 203
NLRB Certification Orders ................................................................... 471
The Scope of Review in the Municipal Court of Appeals for the District of Columbia ................................................................. 93
Wartime Seizure of Plant Facilities: The Montgomery Ward Case .......... 329

INDEX TO RECENT DECISIONS

ADMINISTRATIVE LAW

Administrator of Wage and Hour Division Entitled to Court Order Enforcing Subpoena Duces Tecum—Walling v. News Prtg. Co. ................................. 484

CIVIL PROCEDURE

Unincorporated Labor Union Has Capacity to Sue and Be Sued in Its Common Name in the District of Columbia—Busby v. Electric Utilities Employees Union ........................................................................... 340

CONFLICT OF LAWS

Divorce Decree in State Where Neither Spouse Had Bona Fide Domicile Not Entitled to Full Faith and Credit—Williams v. North Carolina ......................... 489

CONSTITUTIONAL LAW

Federal Prosecution under the Sherman Act Not Barred by the Twenty-first Amendment—United States v. Frankfort Distillers ........................................ 343
Full Faith and Credit to Judgment for Arrears of Alimony in Another State—Barber v. Barber ........................................................................ 231
Military Exclusion Order Against an Entire Class of Civilians Not an Unreasonable Discrimination—Korematsu v. United States ....................... 224
Requirement of State Law That Paid Labor Organizers Register Is a Previous Restraint—Thomas v. Collins ........................................................................ 227
State Personal Property Tax on Instrumentalities of Commerce—Northwest Airlines, Inc. v. Minnesota ................................................................. 105
State Taxation of Philippine Imports under the Original Package Doctrine—Hooven & Allison Co. v. Evatt .............................................................. 492

CORPORATIONS

Doctrine of "Fair and Equitable" Liquidation under Holding Company Act Permits Disregard of Charter Preferences of Stockholders—Otis & Co. v. Securities and Exchange Commission ......................................................... 346

IV
Evidence in a Denaturalization Proceeding Must Be "Clear, Unequivocal, and Convincing"—Baumgartner v. United States

Hospital Records Which Reflect Opinion or Conjecture Not Admissible under Federal Shop Book Rule—New York Life Ins. Co. v. Taylor

Habeas Corpus

Habeas Corpus Procedure to Test Whether State Court's Refusal of Aid of Counsel to One Charged with a Capital Offense under State Law Denies a Constitutional Right—Williams v. Kaiser, Tomkins v. Missouri, House v. Mayo

International Law

Vessel Owned But Not in Possession of Foreign Government When Seized Is Not Immune from Suit—Republic of Mexico v. Hoffman

Real Property

Applicability of the Rule Against Perpetuities to General Testamentary Powers of Appointment—Mondell v. Thom

Equity Enforcement of Mutual Covenants of Land Owners Excluding Negroes Except Where Change in Character of Neighborhood—Mays v. Burgess and Gospel Spreading Assoc. v. Bennett

Statutes

Federal Penal Statutes Restricting Free Speech and Press Strictly Construed—Hartzel v. United States

Interstate Transportation of Prostitutes on Vacation Trip Not Within the Mann Act—Mortensen v. United States

Torts


INDEX TO BOOK REVIEWS

Titles of books are in italics; names of authors of books are in capitals; reviewers' names are in plain face and in parentheses.

Abrahamsen, David, Crime and the Human Mind (Walter Henry Edward Jaeger) 366

Cases on Agency by Warren A. Seavey (Hugh J. Fegan) 362

Claims to Territory in International Law and Relations by Norman Hill (Fred K. Nielsen) 364

Crime and the Human Mind by David Abrahamsen (Walter Henry Edward Jaeger) 366

English Courts of Law by H. G. Hanbury (Hugh J. Fegan) 240

Fraenkel, Ernst, Military Occupation and the Rule of Law, Occupation Government in the Rhineland, 1918-1923 (Fred K. Nielsen) 245

Hanbury, H. G., English Courts of Law (Hugh J. Fegan) 240

Hill, Norman, Claims to Territory in International Law and Relations (Fred K. Nielsen) 364

Hudson, Manley O., International Tribunals (Walter Henry Edward Jaeger) 500

International Tribunals by Manley O. Hudson (Walter Henry Edward Jaeger) 500
Military Occupation and the Rule of Law, Occupation Government in the Rhineland, 1918-1923 by Ernst Fraenkel (Fred K. Nielsen) ........................................... 245
Osborn, Albert S. and Albert D., Questioned Document Problems (William J. Rowan) 248
Pepper, George Wharton, Philadelphia Lawyer (Francis E. Lucey, S.J.) .......... 238
Philadelphia Lawyer by George Wharton Pepper (Francis E. Lucey, S.J.) ......... 238
Questioned Document Problems by Albert S. Osborn and Albert D. Osborn (William J. Rowan) .......................................................... 248
Requisition in France and Italy by Maurice K. Wise (Heinrich Kronstein) .......... 122
Res Ipsa Loquitur—Presumptions and Burden of Proof by Mark Shain (Al. Philip Kane) ................................................................. 501
Seavey, Warren A., Cases on Agency (Hugh J. Fegan) ................................. 362
Shain, Mark, Res Ipsa Loquitur—Presumptions and Burden of Proof (Al. Philip Kane) ................................................................. 501
Wise, Maurice K., Requisition in France and Italy (Heinrich Kronstein) .......... 122
Administrative Law:
Administration of Federal benefactions .1
Administrative powers of a proposed international trade tribunal .391
Conclusiveness of administrative decisions
Government loans, payments and subsidies .5, 17
Government insurance, Marine .15
Old age .11
Unemployment .9
Veterans' .3, 13
War damage .14
Government retirement laws .7
Disqualification of administrative agency by previous action .311
Findings of Federal Trade Commission .444
Investigatory powers of administrator of Wage and Hour Division .484
NLRB certification orders, judicial review of .471
Suspension orders of administrative agencies .45

Administrator, Wage and Hour Division:
Investigatory powers of .484

Administrative Procedure:
Adjudication .54
In benefactor actions .1
Rule making .53
Uniform systems proposed in Congress .53

Agriculture:
Agricultural Adjustment Act .126
Marketing Agreement Act of 1937 .127
Marketing, regulation of .123
Milk marketing programs .133

“Amparo”, Mexican Suit of:
Nature and origin of .418, 420
Compared with remedies in United States .429

Anti-Trust Laws:
Federal laws applied to insurance companies .321
Intrastate activity affecting interstate commerce .343
Price discriminations under the “basing point" system .439
State laws affecting insurance companies .73

Aviation Law:
Development of .452
Air Commerce Act .456
Civil Aeronautics Act .460
Post-war outlook for .452

Bankruptcy and Insolvency Laws:
Government priority under .279

Basing Point Price Systems:
Validity under Clayton Act .439

Bias:
As applied to administrative agencies — 312

Bill of Rights:
In Mexican and United States Constitutions .418

Bretton Woods Agreements:
“Acceptance” of .57

Broadcasts, Foreign:
 Piracy of .401, 402
Playing over loud speaker .413
Rebroadcasting of .403
Use of, by news service .415

Cartels:
International .380

Civil Aeronautics, Regulation of:
Air Commerce Act of 1926 .456
Civil Aeronautics Act of 1938 .460

Civil Procedure:
Unincorporated labor union’s capacity to sue .340
Suit in federal court against vessel of foreign country .353

Clayton Act:
Price discriminations under .439

Commerce, International:
Economic stabilization of .378
Tribunal to control .373
Unfair practices in .374, 415

Commerce, Interstate:
Fair Labor Standards Act, coverage under .484
Labor relations affecting .471
Regulation of civil aeronautics .452

Communications Act of 1934:
Rebroadcasting under .403

Conflict of Laws:
Full faith and credit, as to divorce decrees .488
Problems arising under broadcasting and rebroadcasting .401, 409

Constitutional Law:
Administrative suspension orders .46
Bill of Rights, compared with Mexican .418
Conclusiveness of administrative beneficiary actions .4, 30
Conclusiveness of NLRB certification orders .479
Counsel, right to .495
Delegation of treaty-making powers .62
Doctrine of stare decisis, applied to the Constitution .251
## TOPICAL INDEX

### ALL REFERENCES ARE TO PAGE NUMBERS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Damages:</td>
<td></td>
</tr>
<tr>
<td>In relation to negligence...</td>
<td>.502</td>
</tr>
<tr>
<td>Burden of proof under...</td>
<td>.503</td>
</tr>
<tr>
<td>Hospital records as...</td>
<td>.349</td>
</tr>
<tr>
<td>Questioned documents.</td>
<td>.248</td>
</tr>
<tr>
<td>Requirements under Nationality Act of 1940..</td>
<td>.108</td>
</tr>
<tr>
<td>“Substantial evidence” rule..</td>
<td>.96</td>
</tr>
<tr>
<td>Fair Labor Standards Act:</td>
<td></td>
</tr>
<tr>
<td>Investigatory powers under...</td>
<td>.484</td>
</tr>
<tr>
<td>Federal Trade Commission:</td>
<td></td>
</tr>
<tr>
<td>Proceedings against “basing point” system..</td>
<td>.439</td>
</tr>
<tr>
<td>Free Speech and Press:</td>
<td></td>
</tr>
<tr>
<td>Under Espionage Act of 1917...</td>
<td>.111</td>
</tr>
<tr>
<td>Under statute licensing labor union organizers...</td>
<td>.227</td>
</tr>
<tr>
<td>Full Faith and Credit:</td>
<td></td>
</tr>
<tr>
<td>To alimony judgment of another state..</td>
<td>.231</td>
</tr>
<tr>
<td>To divorce decrees of another state..</td>
<td>.488</td>
</tr>
<tr>
<td>German Law of Requisition..</td>
<td>.33</td>
</tr>
<tr>
<td>Grazing Permits:</td>
<td></td>
</tr>
<tr>
<td>Administration of..</td>
<td>.25</td>
</tr>
<tr>
<td>Habees Corpus:</td>
<td></td>
</tr>
<tr>
<td>Compared with Mexican Suit of <em>amparo</em></td>
<td>.429</td>
</tr>
<tr>
<td>Procedure, where constitutional right denied..</td>
<td>.495</td>
</tr>
<tr>
<td>Hawaii:</td>
<td></td>
</tr>
<tr>
<td>Martial law in..</td>
<td>.203</td>
</tr>
<tr>
<td>Imports:</td>
<td></td>
</tr>
<tr>
<td>Immune from taxation, in original package..</td>
<td>.488</td>
</tr>
<tr>
<td>Injunction:</td>
<td></td>
</tr>
<tr>
<td>Compared with Mexican suit of <em>amparo</em></td>
<td>.429</td>
</tr>
<tr>
<td>Insurance:</td>
<td></td>
</tr>
<tr>
<td>As interstate commerce..</td>
<td>.256, 321</td>
</tr>
<tr>
<td>Combinations under state law..</td>
<td>.73</td>
</tr>
<tr>
<td>State rate regulation of..</td>
<td>.70</td>
</tr>
<tr>
<td>Insurance, Federal, Administration of:</td>
<td></td>
</tr>
<tr>
<td>Old age..</td>
<td>.11</td>
</tr>
<tr>
<td>Maritime..</td>
<td>.15</td>
</tr>
<tr>
<td>Unemployment..</td>
<td>.9</td>
</tr>
<tr>
<td>Veterans..</td>
<td>.13</td>
</tr>
<tr>
<td>War damage..</td>
<td>.14</td>
</tr>
<tr>
<td>International Affairs:</td>
<td></td>
</tr>
<tr>
<td>International bank and monetary fund..</td>
<td>.57</td>
</tr>
<tr>
<td>International cartels..</td>
<td>.380</td>
</tr>
<tr>
<td>International commerce:</td>
<td></td>
</tr>
<tr>
<td>Economic stabilization of..</td>
<td>.378</td>
</tr>
<tr>
<td>Tribunal to control..</td>
<td>.373</td>
</tr>
</tbody>
</table>

### Corporations

- Excess profits taxes, validity of..153, 173
- Executive agreements, scope of..61
- Free Speech and Press, under Espionage Act of 1917..111
- Free Speech and Press, under statute licensing labor organizers..227
- Full faith and credit
  - To alimony judgment of another state..231
  - To divorce decrees of another state..488
- Insurance as interstate commerce..256, 321
- International agreements under the Constitution..61
- Martial law in the United States and in Hawaii..205, 208
- Original package doctrine applied to imports..492
- Police power regulation..263
- Religious freedom..260
- Renegotiation statutes, validity of..153, 173
- Safeguard against the power of requisition..40
- State taxation of personal property used in commerce..105

### Copyrights

- Rebroadcasting and..406
- Playing broadcasts over loud speaker..413

### Crimes

- Psychological factors in..366

### Criminal Code

- Federal..194

### Damages

- In injurious falsehood cases..216

### Domicile

- Bona fide, in divorce cases..488

### Employees' Compensation

- Finality of administrative decisions of..5

### Equity

- Enforceability of mutual covenants of land owners..356
- Espionage Act of 1917..111

### Evidence

- "Clearly erroneous" rule..95
- Doctrine of res ipsa loquitur..501

### TOPICAL INDEX

- In relation to negligence..502
- Burden of proof under..503
- Hospital records as..349
- Questioned documents..248
- Requirements under Nationality Act of 1940..108
- "Substantial evidence" rule..96
- Fair Labor Standards Act:
  - Investigatory powers under..484
- Federal Trade Commission:
  - Proceedings against "basing point" system..439
- Free Speech and Press:
  - Under Espionage Act of 1917..111
  - Under statute licensing labor union organizers..227
- Full Faith and Credit:
  - To alimony judgment of another state..231
  - To divorce decrees of another state..488
- German Law of Requisition..33
- Grazing Permits:
  - Administration of..25
- Habees Corpus:
  - Compared with Mexican Suit of *amparo*..429
  - Procedure, where constitutional right denied..495
- Hawaii:
  - Martial law in..203
- Imports:
  - Immune from taxation, in original package..488
- Injunction:
  - Compared with Mexican suit of *amparo*..429
- Insurance:
  - As interstate commerce..256, 321
  - Combinations under state law..73
  - State rate regulation of..70
- Insurance, Federal, Administration of:
  - Old age..11
  - Maritime..15
  - Unemployment..9
  - Veterans..13
  - War damage..14
- International Affairs:
  - International bank and monetary fund..57
  - International cartels..380
  - International commerce
    - Economic stabilization of..378
    - Tribunal to control..373
TOPICAL INDEX

ALL REFERENCES ARE TO PAGE NUMBERS

Unfair practices in.374
International commodity agreements.382
International peace, trade regulation to promote.377
International trade tribunal.373
Administrative powers of.391
Judicial functioning of.386
International tribunals.500

International Law:
Development of, by proposed trade tribunal.392
Immunity from suit of foreign government vessel.353
Judicial decisions in.388
Territorial disputes in.500

Judgments:
Extraterritorial effect of.231, 488

Judicial Review of Administrative Determinations:
Evidence "substantial" or "clearly erroneous".95, 96
Justiciable "cases" or "controversies".30
Of NLRB certification orders.471
Of various types of benefactive actions.3
Proposals for, in Congress.55

Labor Unions:
Licensing of organizers of.227

League of Nations Covenant:
Freedom of trade under.377

Mann Act:
Construed.114
Mexico:
Bill of rights in constitution of.418
Judicial system of.424
Suit of amparo in.418

Municipal Court of Appeals, District of Columbia:
Appellate review in.93

Nationality Act of 1940:
Proceedings under.108

Negligence:
Doctrine of res ipsa loquitur.501
N.L.R.B.:
Certification orders, finality of.471

Office of Price Administration:
Suspension orders issued by.46

Original Package Doctrine:
Applied to imports.488

Patent Claims:
Administrative and judicial review of.24
Philadelphia Lawyer.238

Public Lands:
Administration of.26

Public Utility Holding Company Act of 1935:
Liquidation under.346

Real Property:
Mutual covenants of landowners excluding negroes.356
Rule against perpetuities in District of Columbia.234

Rebroadcasting:
Law governing.404
Under Communications Act of 1934.403
Unfair competition in.409

Religious Freedom:
Salute to flag cases.260

Renegotiation Acts:
Problems arising under.153

Requisition of Property:
German law of.33
In France and Italy.122
In the United States.40

Res Ipsa Loquitur:
Doctrine.119, 501

Retirement Laws, Federal:
Administration of.7

Robinson-Patman Act:
Price Discriminations under.441

Stare Decisis:
Doctrine of, in the Supreme Court.251

Statutes:
Agricultural Marketing Acts, construction of.123, 144
Federal criminal, revision of.194
Federal Espionage Act of 1917 strictly construed.111
Granting government priority.279
Licensing labor union organizers.227
Mann Act, construction of.114
Renegotiation Acts, validity of.153

Taxation:
Excess profits.153, 173
State, of personal property used in commerce.105
State, of imports in original packages.488

Torts:
Res ipsa loquitur.119
Publication of injurious falsehoods.213
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty-Making Power:</td>
<td></td>
</tr>
<tr>
<td>Relation to Bretton Woods Agreements</td>
<td>. . . . . . . . 59</td>
</tr>
<tr>
<td>Twenty-First Amendment:</td>
<td></td>
</tr>
<tr>
<td>Effect upon prosecution under federal law</td>
<td>. . . . . . . . 343</td>
</tr>
<tr>
<td>Unfair Competition:</td>
<td></td>
</tr>
<tr>
<td>In international commerce</td>
<td>. . . . . . . . 374</td>
</tr>
<tr>
<td>In rebroadcasting</td>
<td>. . . . . . . . 409</td>
</tr>
<tr>
<td>Use of foreign broadcasts by news service</td>
<td>. . . . . . . . 415</td>
</tr>
<tr>
<td>Veterans' Affairs:</td>
<td></td>
</tr>
<tr>
<td>Administration of benefits</td>
<td>. . . . . . . . 3</td>
</tr>
<tr>
<td>War Food Administration:</td>
<td></td>
</tr>
<tr>
<td>Marketing agreements by</td>
<td>. . . . . . . . 129</td>
</tr>
<tr>
<td>War Labor Disputes Act:</td>
<td></td>
</tr>
<tr>
<td>Seizure under</td>
<td>. . . . . . . . 329, 334</td>
</tr>
<tr>
<td>War Powers:</td>
<td></td>
</tr>
<tr>
<td>Act of 1942</td>
<td>. . . . . . . . 45, 138, 141</td>
</tr>
<tr>
<td>Civilian exclusion orders, validity of</td>
<td>. . . . . . . . 224</td>
</tr>
<tr>
<td>Espionage Act of 1917</td>
<td>. . . . . . . . 111</td>
</tr>
<tr>
<td>Government priority under war contracts</td>
<td>. . . . . . . . 303</td>
</tr>
<tr>
<td>Martial law in Hawaii</td>
<td>. . . . . . . . 203</td>
</tr>
<tr>
<td>Military occupation of Germany in 1918</td>
<td>. . . . . . . . 245</td>
</tr>
<tr>
<td>President's executive</td>
<td></td>
</tr>
<tr>
<td>To prescribe military areas</td>
<td>. . . . . . . . 224</td>
</tr>
<tr>
<td>To seize property</td>
<td>. . . . . . . . 334</td>
</tr>
<tr>
<td>Seizure of plant facilities under</td>
<td>. . . . . . . . 329</td>
</tr>
<tr>
<td>War contracts, profits under</td>
<td>. . . . . . . . 153</td>
</tr>
<tr>
<td>War criminals, prosecution of</td>
<td>. . . . . . . . 246</td>
</tr>
<tr>
<td>Wills:</td>
<td></td>
</tr>
<tr>
<td>Implied revocation of, in District of</td>
<td>. . . . . . . . 182</td>
</tr>
<tr>
<td>Columbia</td>
<td></td>
</tr>
<tr>
<td>Implied revocation of, at common law</td>
<td>. . . . . . . . 185</td>
</tr>
</tbody>
</table>
DURING recent years, federal activities of a non-regulatory and benefactory nature which immediately affect individuals have been greatly extended, until they have become of far-reaching importance. Today far more persons are directly affected by administrative determinations connected with such action than by administrative determinations connected with regulatory action; hence the problem of control over this type of action is of the greatest importance.

The general purpose of Congress in establishing benefits has been to create and develop a more effective, just, and equitable social order. This purpose is served by a variety of activities, including such fields as: assistance to war veterans and their families; federal provision for the aged and those unable to work; payments for certain injuries caused by the government in its functioning; the establishment of various kinds of insurance; the lending of money; the granting of subsidies; the granting of money to the states to help them in establishing and maintaining old-age assistance plans, unemployment compensation systems, and methods of giving aid to crippled children and the blind, and of providing

†Frederick F. Blachly, A.B., (1911) Oberlin College; Ph.D., (1916) Columbia University; Formerly, Professor of Government, University of Oklahoma; Currently, Member of the Staff of the Brookings Institution, Washington, D. C.
‡Miriam E. Oatman, A.B., (1912) Oberlin College; A.M., (1922) Columbia University, Ph.D., (1930) Brookings Institution; Formerly, Member of the Staff of the Brookings Institution, Associate Reference Librarian of the Library of Congress; Currently, Member of the Staff of the Foreign Economic Administration.

for child welfare; provision for the sale and use of the public lands and the public domain; and the granting of patents and copyrights.

In all these instances the government goes beyond its classical role of acting as a policeman, and even beyond its more recent capacity of regulator, and takes positive steps which are benefactory in nature. It is not trying to prevent or punish illegal action, nor is it issuing orders or commands, or controlling private economic activities. It is rather attempting, through legislative action, to open positive benefits to the citizen. This type of action does not, as a rule, mean that the government is undertaking work merely for the general benefit, as where it is establishing lighthouses, dredging rivers, building bridges, constructing highways, maintaining and caring for ports, and preserving wild life. The benefactory functions (which, subject to a few exceptions such as patents and veterans' pensions, are relatively new) concern activities which affect the individual directly, and which in nearly all cases involve personal claims in the nature of money or services, that can be brought before governmental agencies. These functions are generally carried out by administrative authorities, through a process which involves not only the standard types of administrative activity, but also in nearly all cases the making of quasi-judicial decisions when determinations are disputed, and in a large number of cases the hearing of administrative appeals. Hence the problem, "How are these determinations to be controlled?" presents itself.

This problem is of very great importance today, because several bills now before Congress, purporting to unify, simplify, and make more just administrative adjudicatory action, would greatly increase directly or by implication the number of subject matters over which judicial review is required, and would also greatly extend the scope of such reviews.1 By blanket review provisions, they would virtually do away with several different lines of policy that Congress has adopted in respect to the review of benefactory action.

Before any such legislation is passed, a careful examination should be made of its probable effects. The purpose of this study is to set forth the present situation in respect to the subject matter of the laws which govern benefactory action; to tell what provisions have been made by statute as to the judicial review of administrative acts performed in the execution of said laws, and what the courts have said regarding such review; to explain the general theory upon which review or the absence of review rests in each instance; and to consider whether and how far

1Admin. L. (1944) 33 Georgetown L. J. 53.
an extension of the subject matter to be received or of the scope of judicial review over the respective types of benefactory action is desirable.

A. MILITARY PENSIONS AND CLAIMS FOR BENEFITS

There are two chief statutory provisions governing the review of claims to military pensions and similar benefits, both of which provide for the finality of administrative action and prohibit the courts from taking jurisdiction.

The first of these concerns claims for benefits and provides:

"Notwithstanding any other provisions of law, except as provided in section 445 of this title, as amended, and in section 817 of this title, the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." (Footnotes supplied.)

In interpreting this provision the court has held:

"The decision of the Administrator of Veterans' Affairs, concerning a claim for benefits or payments, under any Act administered by the Veterans' Administration, is final and conclusive."

In respect to pensions to veterans, the statute provides as follows:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions of sections 701-703, 704, 705, 706, 707-715, 716-721 of this title and sections 30a, 485 of Title 5 of the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decisions."

The courts in interpreting this provision and refusing to take jurisdiction have based their decisions largely on the ground that pensions are in the nature of gratuities which Congress may change and withdraw. Perhaps the most important case in respect to pensions is that of Van Horne v. Hines. Here the Administrator charged a falsification.

---

*The exception deals with claims under a contract.
*The exception deals with National Service Life Insurance which is also covered by contract.

of a report by an applicant for retirement payments. An indictment brought under the penal laws, however, was dismissed. Despite this dismissal, the Administrator suspended payments to the applicant, who brought suit in the District Court. When this court affirmed the act of the Administrator, the case was appealed to the United States Court of Appeals for the District of Columbia, which held that the Administrator's decision was final.

The court said:

"We think the Administrator's position is correct. There can be no doubt that veterans' benefits are gratuities and establish no vested rights in the recipient. See Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434; White v. United States, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530. And this being so, such benefits may be withdrawn at any time by act of Congress, and to make the withdrawal effective, Congress may in turn withdraw jurisdiction from the courts over decisions of the Administrator in relation thereto. . . .

"And this brings us to the single question, whether the act on its face shows that Congress meant to withdraw from the jurisdiction of the courts every final decision of the Administrator in relation to benefit payments in the nature of gratuities provided for under the act. We think this unmistakable intent is shown by the language of the act, and that the plain meaning of the words used brings us necessarily to this result, for the language is that the court shall not consider or review questions of law or fact 'concerning a claim for benefits or payments'."

The court therefore held that the lower court should not have discussed the merits of the case since it lacked jurisdiction.

But although the court may under such legislation refuse to take jurisdiction over the merits of the case, may it take jurisdiction over questions of law, consider the question whether the determination was arbitrary or capricious. The courts' answer is: No. In United States v. Mroch10 the court said:

"The original and amendatory acts, however, preclude judicial review of the awards of the Veterans' Administration. While it was at one time thought that review might lie if an award were wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious, Silberschein v. United States, 266 U. S. 221, 45 S. Ct. 69, 69 L. Ed. 256, section 5 Title I of the Economy Act . . . seems to have removed the possibility of judicial relief even in such special circumstances. Lynch v. United States, 292 U. S. 571, 587, 54 S. Ct. 840, 847, 78 L. Ed. 1434."11

8Id. at 209.

1088 F. (2d) 888 (1937).

11Id. at 890; see Smith v. United States, 83 F. (2d) 631 (C. C. A. 8th, 1936) which held that the granting of pensions and compensation allowances are mere gratuities, which may be withdrawn at will; Congress may impose such limitations upon them as it wishes.
The various policies adopted by Congress, in making certain benefits subject to specific conditions or limitations, and in providing for judicial review over the relevant administrative determinations or acts in some instances, while limiting or excluding such review in other connections, will be discussed later.

B. PAYMENTS FOR INJURIES CAUSED BY THE GOVERNMENT IN ITS FUNCTIONING

Several acts have provided for the bringing of claims against the government for torts or for injuries caused by faulty functioning, in connection with which claims administrative authorities make determinations.

The Employees' Compensation Act of September 7, 1916,12 made the government liable in general for compensation to any civil employee or his dependents for disability or death, "... resulting from a personal injury sustained while in the performance of his duty...." Other laws have extended the principle of compensation to employees of the District of Columbia,13 and to employees of the Panama Railroad Company and the Alaska Railroad.14

The compensation laws governing the federal employees and those of the District of Columbia are administered by the United States Employees' Compensation Commission. The statute provides for payments from an Employees' Compensation Fund which is set up by a $500,000 appropriation with additions which Congress may from time to time establish. Congress has provided further that permanent appropriations may be made to this fund.15

In respect to review the statute provides:

"In the absence of fraud or mistake in mathematical calculation, the findings of fact in, and the decision of the commission upon, the merits of any claim presented under or authorized by this chapter if supported by competent evidence shall not be subject to review by any other administrative or accounting officer, employee, or agent of the United States."

The statute said nothing as to judicial review. The courts have re-

---

15The question may well be raised as to the "permanent" nature of this fund since one Congress cannot bind another's powers of appropriation.
fused to take jurisdiction over such claims on the ground that the suit is against the United States, basing their decisions on the doctrine of exemption of the United States from suit unless express provision has been given.\(^{17}\) In the case of *The Western Maid*\(^{18}\) Mr. Justice Holmes said: "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."\(^{19}\) In the *Dahn v. Davis case*,\(^{20}\) which involved a railroad injury received while the United States was operating the railroads during the First World War, the claimant had elected to resort to a compensation award procedure instead of bringing suit (as was also provided for) under the Federal Contracts Act.\(^{21}\) The court said:

> "The act does not contemplate or provide for suits against the Government. On the contrary, it is essentially an act of justice or of grace on the part of the United States, elaborately and carefully worked out, and designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty, in an amount, which on the average, was thought adequate and just."\(^{22}\)

In respect to claims of the employees of the Alaska Railroad, the General Manager of the railroad administers the provisions of the Act. Appeal may be made to the Employees' Compensation Commission, whose decision is as final as in cases which it handles originally itself.\(^{23}\) The payment of compensation to employees of the Panama Canal and the Panama Railroad Company is made by the Governor of the Panama Canal rather than the Compensation Commission.\(^{24}\) There appears to be no statutory provision for review, either administrative or judicial.

By the Small Tort Claims Act of 1922,\(^{25}\) the head of each department


\(^{18}\)257 U. S. 419 (1921).

\(^{19}\)Id. at 433.

\(^{20}\)258 U. S. 421 (1922).


and establishment acting on behalf of the government of the United States was given power to consider, ascertain, adjust, and determine any claims on account of damage or loss of private property where the amount of the claim does not exceed $1000 which was caused by the negligence of any officer or employee of the government when acting within the scope of his employment. The amount found due to any claimant is to be certified to Congress as a legal claim, for payment out of an appropriation that may be made by Congress therefor, together with a brief statement of the character of such claims. There is no statutory provision for an appeal from a refusal to approve such a claim.

In addition to this general law, several statutes have conferred upon specific agencies the power to adjust the particular types of claims. Statutes providing for administrative settlement of tort claims generally provide for limitations on the amount of the claim that may be entertained, restrict the payment to small sums of money, limit the claim to property damages, and provide for neither administrative nor judicial review.

The courts appear never to have taken jurisdiction of such claims. The refusal is generally based on the ground of sovereign immunity from suit. From a strictly legal standpoint, payments made by the government for its faulty functioning involve no constitutional or common law rights. Permitting a claim to be made and determined upon is involuntary derogation of the sovereign position of the federal government.

C. THE RETIREMENT OF EMPLOYEES

Two different systems of retirement now exist in the federal government: (1) The retirement system for civil service employees; and (2) the retirement system for railway employees (the first covering government employment, and the second, private employment).

1. In the retirement of civil service employees, annuities are paid from the Civil Service Retirement and Disability Fund which is built up of deductions from the pay of employees and officers, together with appropriations by Congress, and "from donations, gifts, legacies, be-

---

For a list of these see Holtzoff, 9 Law & Contemp. Prob., loc. cit. supra note 17, at 319.

Id. at 321.

The ratio of the government's contribution to the individual's varies considerably. For the lower brackets it is more than the amount paid in by the employees. The same is also true in the higher brackets until after thirty years of service, when it becomes nearly the same. See United States Civil Service Comm., Form 3020, The Civil Service Retirement Act with Annotations and Regulations, Dec. 1942.
quests or otherwise.29 Because of these circumstances, although the individual may contribute money to the system, it is not on a contractual basis. The statute does not provide for judicial review.

In speaking of these claims the Supreme Court has said that they are not claims for pensions or for deferred salaries or compensation for services, nor are they contractual in nature.30 Rather they are in the nature of legislative prescriptive rights. "The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay'.31

The fact that the money is to be paid from a retirement fund "... amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay."32 The cases are settled in a purely administrative manner with an administrative appeal to the Board of Appeals and Review in the Civil Service Commission. While there is therefore a judicially declared right of review it is seldom necessary to exercise it.

2. The Railroad Retirement Act of 193733 provides for the payment of annuities to individuals in a covered employment who meet the statutory requirements.

For the payment of these annuities, pensions and benefits a Railroad Retirement Account is set up in the Treasury to which an annual appropriation is made of an amount, with a reasonable margin for contingencies, to provide for the payment of all annuities, pensions, and death benefits.

The Carriers Taxing Act of 1937,34 which in reality if not in law furnishes the financial basis for the retirement system, provides for an income tax on employees and an excise tax on employers, which sums are not paid into the Railroad Retirement Account, however, but into the Treasury of the United States. In strict legal theory there is no relationship between the money that the carriers and employees pay in and the

31Id. at 169.
32Id. at 170.
benefits that the employees receive from the account. There is, therefore, no contractual relationship. There is merely a legislative right based upon the fulfillment of certain contingencies.

The benefits are paid out by the Railroad Retirement Board upon the meeting of the contingencies laid down by statute\(^\text{35}\) and after an administrative proceeding. Administrative appeals may be brought to an Appeals Council.

An employee or other person aggrieved may apply to the appropriate United States district court, or the District Court of the United States for the District of Columbia, to compel the Board to set aside an action or decision of the Board claimed to be in "violation of a legal right of the applicant" or "to take action or to make a decision necessary for the enforcement of a legal right of the applicant.\(^\text{36}\)

In both of these retirement plans, therefore, although in fact the employee contributes toward the retirement fund, in legal theory he does not; hence there are no contractual rights, but only contingent rights, that is, benefits which can be obtained by the individual only if he can prove that he meets certain conditions established by the statute.

D. PROVIDING FOR INSURANCE

Within the last quarter of a century, the federal government has made provision for several kinds of insurance. Part of these are established on a pure statutory right basis, and others on a contributive basis.

1. Insurance Plans Established on a Statutory Right Basis

The statutory right basis results not from contract or from common law, but entirely from legislative action. The right accrues as the result of meeting certain contingencies.

The systems established on this basis are: railway unemployment insurance,\(^\text{37}\) old-age and survivors insurance,\(^\text{38}\) and bank deposit insurance.\(^\text{39}\)

a. Railway Unemployment Insurance

Railway unemployment insurance, including employee representation insurance, which we shall discuss later, has been placed upon a statutory

---

\(^{35}\)Such as terms of service, age, combination of age and service, disability, military service, the relationship of the applicant to the employee, that is, a child, a widow, etc.


\(^{37}\)See note 41 infra.

\(^{38}\)See note 45 infra.

\(^{39}\)See note 54 infra.
contingent right basis. Here the individual has been given a statutory right to receive benefits from a fund, established by virtue of the taxing power, to which he does not contribute, and payments from which are made by administrative action under the spending power of Congress.

Upon the happening of the contingency of unemployment the Railroad Retirement Board, and its district boards which administer the Unemployment Insurance Act, act in an administrative capacity in passing upon claims. The Board may act as an appellate authority in the review of its own decisions or those of its district boards or other intermediate body.

Appeal lies to the appropriate United States district court or to the United States District Court for the District of Columbia "... only after all administrative remedies within the Board have been availed of and exhausted ...", upon a transcript of the record procedure. The findings of the Board as to facts, if supported by evidence and in the absence of fraud, shall be conclusive.

Employee representatives contribute directly to the fund from which they receive the benefits; hence there might appear to be the semblance of a contractual basis upon which they receive unemployment insurance. However, the contribution to the fund is manifestly only a tax and their rights are exactly the same as those of employees of the railroad; legislative, and not contractual rights.

[A description of the way the money to meet the unemployment payments is collected, held and paid out is necessary in order to understand the legal nature of this insurance.]

Every employer makes a contribution, with respect to having employees in his service, equal to 3% of so much of the compensation as is not in excess of $300 for any calendar month. Each employee representative also pays in respect to his income a contribution equal to 3% of so much of the contribution as is not in excess of $300 for any calendar month. 52 Stat. 1102 (1938), 45 U. S. C. § 358 (a-b) (1940).

The money is not collected by the United States Treasury Department, but by the Railroad Retirement Board. 52 Stat. 1102 (1938), 45 U. S. C. § 358 (f) (1940).

Of the money collected, 10% goes for the administrative expenses of operating the unemployment insurance and the other 90% goes to a trust fund known as the "Unemployment Trust Fund" which is held and invested by the Treasury Department. Since, however, the state unemployment funds are also deposited with this fund, the Secretary of the Treasury sets up two accounts, the state account and the railroad unemployment insurance account from which railroad unemployment insurance is paid. The decisions as to who is to receive unemployment insurance are made by the Board, which certifies its decisions to the Secretary of the Treasury for the making of payments. 52 Stat. 1104, 1105 (1938), 42 U. S. C. 1104 (1940).

b. Old-Age and Survivors' Insurance

The system of old-age and survivors' insurance provides for the payment of monthly benefits at the age of sixty-five to those who are fully insured under the Act. The Act also provides for wife, child, widow, and parent benefits under certain contingencies and for lump sum benefits under others.\(^{45}\)

Benefits under this system are in each case measured by wages paid in employment, and therefore it might appear that the system is based upon a contractual right rather than upon a legislative right placed upon a contingent basis. Such, however, is not the case, for the excise tax on employers and the income tax on employees,\(^{46}\) instead of being used directly for the payment of benefits, are placed in the General Fund. However, the law establishes a "Federal Old-Age and Survivors Trust Fund",\(^{47}\) to which are appropriated each year amounts equivalent to 100 per cent of the taxes received. The fact that the money received from employers and employees does not go directly into the trust fund, and the further fact that the payments are made by the Social Security Board from the appropriate fund, as well as the fact that Congress can change and amend the system, entirely prevent the system from being on a contractual basis.\(^{48}\) The adjudication of claims arising under this Act are entrusted to adjudicators and reviewers, with several possible administrative hearings and appeals ending with the Appeals Council.\(^{49}\)

A review of the final decision of the Board\(^{50}\) may be obtained by a civil action in a United States district court. The Board in making answer must file a transcript of the evidence. The fact findings of the Board, if supported by substantial evidence, are conclusive.\(^{61}\) Where a claim has been denied by the Board, or a decision has been rendered by


\(^{48}\)The method of handling the situation was made necessary by the decision in the \textit{Butler} case, which held in effect that Congress cannot use the taxing power in such a way as to "earmark" a tax for a specific purpose or for accomplishing a definite end. United States v. Butler, 297 U. S. 1 (1936).

Questions of policy may also enter into the picture for if the payments were placed on a contractual basis such as takes place in respect to contract insurance, Congress could not change the terms under which payments were made or abolish the system in respect to those already under it.

\(^{49}\)Federal Old-Age and Survivors Insurance, Regs. 3 as amended, 5 Fed. Reg. 4169 (1940); 20 CFR 403.701 (Supp. 1940).

\(^{50}\)53 Stat. 1368 (1939), 42 U. S. C. § 405 (g) (1940).

\(^{51}\)Ibid.
the Board after an opportunity for a hearing, which is adverse to the claimant because of failure to submit proof in conformity to regulations, the federal district court shall review only the question of conformity with such regulations and the validity of such regulations.

The case is brought up by a civil action on a certified transcript of the record of the procedure before the Board. The method outlined in the law for review is exclusive, for the statute expressly provides: that "No action against the United States, the Board, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claims arising under sections 401-409 of this title." All of this goes to show that in establishing claims against itself, Congress can both place limitations upon the review and also make the review which it establishes exclusive.

Here is an example of a contingent legislative right, with administrative process and administrative review which are so adequate that in practice judicial review, although possible, is seldom requested.55

c. Bank Deposit Insurance

Under the Federal Deposit Insurance Law the Federal Deposit Insurance Corporation insures the deposits of all banks entitled under law to insurance benefits. It pays depositors of insured banks which have been closed, when adequate provision has not been made to pay depositors' claims. The payment of depositors of failed banks, which is mandatory under the statute, is made from a Permanent Insurance Fund provided for by an annual assessment upon insured banks and also containing moneys received by the Corporation when it liquidates the assets of closed banks.

The procedure for the payment of deposit insurance is nearly automatic, since the bank's books will ordinarily show who are the depositors and what is the amount of their claims.

In case of doubt as to the rightful claimant or the amount due him, there is the possibility of judicial determination by a court of competent jurisdiction.57

56 Out of 2,136,000 claims handled by the Social Security Board up to September, 1944, there were 187,000 disallowances. Of these disallowances only 26 cases have gone to the courts.
To summarize, the judicial situation in respect to depositors whose deposits in a national bank are below $5,000 is as follows: as far as the liabilities of the bank to the depositors are concerned, the Corporation takes its place. As far as the rights of the depositors are concerned, the Corporation takes the bank's place. The bank has no liability to the depositor, and the depositor has no right against the bank. Both liabilities and rights have been subrogated to the Corporation. The only rights that the individual now has are purely statutory rights. The former contractual right against the bank has been turned by law into a statutory right against the insuring corporation.

2. Insurance Plans Established on a Contract Insurance Basis

The government has established four different systems of insurance which are governed by the principle of contract rather than that of legislative rights.

a. Veterans' Insurance

Several acts provide for the insurance of those engaged in the military services. Without going into the multitudinous provisions of these acts, it is only necessary for the present purpose to know that the insurance provided by the government is on a contractual basis. That is, the insured person pays premiums for certain definite amounts of insurance just as in private insurance. The great difference which throws such insurance schemes into the sphere of benefactory action is the fact that the government may definitely give benefits over and beyond what the money payments made by the one insured would warrant: such as assuming of all administrative expenses, assuming the added war-time risk, and perhaps charging much less than mortality tables would seem to warrant.

In connection with these claims there can be many administrative

In the case of deposits in excess of $5000 for which the Corporation is responsible, the depositor merely has a general claim against the assets of the closed bank for any uninsured portion of his deposits. 48 Stat. 168 (1933), 12 U. S. C. § 264 (1) (7) (1940).

The situation is somewhat different in respect to state banks under this system. Here the rights of depositors and other creditors are determined in accordance with the applicable state law. 48 Stat. 168 (1933), 12 U. S. C. § 264 (1) (5) (7) (1940).

These are, Veteran's Insurance, War Damage, Marine and War-Risk Insurance and Insurance of Housing Obligations.


determinations of a quasi-judicial nature based upon a wide variety of contingencies. These determinations are made primarily by two administrative units under the administrator, the Insurance Claims Council and the Life Insurance Claims Division, with administrative appeal to the Board of Veterans' Appeals, which is authorized by statute.

Veterans' Insurance Acts provide for judicial review and the courts have upheld this right. While such insurance is of a contractual nature, so that Congress cannot by legislation do away with created liabilities, the courts have recognized that there is also a benefactive aspect to this type of insurance. This finds one expression in respect to the interpretation of the evidence presented. On review the evidence must be interpreted and applied in favor of the veteran.

b. War Damage Insurance

The war damage insurance system, established by statute and Executive Order, is intended to: (1) provide through insurance, the reissue of insurance or otherwise, reasonable protection against loss or damage to property which may result from enemy attack; and (2) subject to authorization and limitations, to compensate for any loss or damage to property after November 6, 1941, without requiring a contract of insurance or the payment of premiums or other charges.

In respect to the insurance provision the statute provides for no procedure, and no controls over the decisions of the War Damage Corporation which administers the Act, either upon refusal to grant or disagreements as to payments under the contract. In case of disagreement between the individual and the Corporation in respect to payments,

---

67 See note 62 supra.
68 On appeal the United States Circuit Courts of Appeal will review the evidence in the light most favorable to the veteran. United States v. Newcomer, 78 F. (2d) 50 (C. C. A. 8th, 1935). The reviewing court must assume as established all facts tending to support the claims and there should be drawn in favor of the appellee all inferences fairly deductible from such facts. United States v. Nelson, 102 F. (2d) 515 (C. C. A. 8th, 1939). The facts in favor of the appellee should be accepted as true. United States v. Fields, 102 F. (2d) 535 (C. C. A. 8th, 1939).
a suit probably would lie to the Court of Claims.\textsuperscript{71} This, however, would be merely upon the terms of the contract.

In such insurance the government, of course, is undertaking a risk that no private insurance concern would or should take in so far as the insurance is distinctly benefactive in nature. The insurance is handled, however, on the same basis as private insurance. In the case of compensation for war damage without a contract of insurance, the govern-ment is undoubtedly acting in a purely benefactive capacity; hence manifestly the one injured has no rights unless they are expressly bestowed by statute.

c. Marine and War-Risk Insurance

An amendment to the war-risk provisions of the Merchant Marine Act of 1936\textsuperscript{72} authorized the Maritime Commission to provide marine insurance and reinsurance against loss or damage by marine risks, when deemed by the Commission to be in the interests of (1) the war effort, or (2) domestic economy; or (3) when such insurance cannot be obtained on reasonable terms from private companies; and (4) when the furnishing of such insurance at "nominal or other rate basis" would be of material benefit to the war effort, or is necessary for military or naval reasons.

To meet the payments for losses a revolving fund was established, to be composed of appropriations, moneys received from premiums, salvage or other recoveries.

Both from the conditions under which the insurance can be granted and the method of establishing the fund from which payments for losses are to be made, it is evident that although the insurance policy is based on contract, the insurance itself contains large benefactive elements.

The Commission is authorized to adjust, pay losses, arbitrate, compromise, and settle claims whether in favor of or against the government, and to pay the amount of any judgment rendered in respect to any suit or settlement agreed upon in respect to any claim.\textsuperscript{73} This appears to be purely in the nature of a business transaction. In the event of disagreement as to a claim for losses, an action on the claim may be brought and maintained against the United States in the appropriate district court of the United States sitting in Admiralty.\textsuperscript{74} Such review is based

\textsuperscript{71}The Court of Claims Act, 36 Stat. 1136 (1911), 28 U. S. C. § 250 (1940), gives the court jurisdiction upon, "any contract expressed or implied."


\textsuperscript{73}54 Stat. 691, 46 U. S. C. § 1128e (a) (1940).

\textsuperscript{74}54 Stat. 691, 46 U. S. C. § 1128e (d) (1940).
exclusively upon the contract. Nothing is said as to a right in case of refusal to insure. Again, although there is a large benefactory element in the insurance, it is placed on a contractual basis as far as control over governmental determination is concerned.

d. Housing Obligation Insurance

Under the National Housing Agency\textsuperscript{75} the Federal Housing Administration\textsuperscript{76} is authorized and empowered to insure banks, trust companies, personal finance companies, building and loan associations, installment companies, etc., against losses which they may sustain as the result of loans and advances of loans and advances of credit, purchases of obligations representing loans, etc.

The insurance is made by contract and the rules governing such a transaction are much the same as in private insurance. The statute makes no provision either for judicial review of determinations denying applications for insurance or for judicial review over the contract. However, the courts have taken jurisdiction to review the contractual factors on the ground that the ordinary law merchant is applicable.\textsuperscript{77}

Housing obligation insurance would seem to contain but a tiny tinge of benefactory action except in so far as it may be a function that is necessary to the general welfare, but which for some reason or other has not been undertaken by private underwriters. While in all the different types of contract insurance which have been examined there is always, to a greater or less degree, the element of a benefaction, yet by legislative policy the whole transaction is placed upon a business basis and takes the form of a contract. When the insurance is placed in this form, one has no more right to demand that he be insured than in dealing with a private insurance company. In case the individual deems that the government has not lived up to its contractual obligations or vice versa the ordinary law in respect to contracts applies. The only disputes that can arise are in respect to the reciprocal contractual rights.

To make a clear-cut differentiation between contingent right and contractual insurance in respect to appeal: in contingent right insurance the individual may bring a suit to contest a claimed legislative right denied by the insuring company. In contract insurance he has no right to be insured, but may bring suit to test out his rights under a contract.

E. THE GRANTING OF SUBSIDIES

At the present moment the federal government has provided for four chief kinds of subsidies: (1) construction-differential subsidies for shipbuilding; (2) operating-differential subsidies for ships; (3) air-line subsidies and (4) agricultural and miscellaneous subsidies.

1. Construction-Differential Subsidies

Any citizen may make application for a construction-differential subsidy to aid in the construction of a new vessel to be used in a service, route, or line with foreign commerce of the United States, which has been determined to be essential.78

The law lays down specific conditions under which such applications may be approved.79 The meeting of these conditions in no way, however, constitutes a contingent right. The conditions are merely in the nature of legislative instructions to those charged with passing upon an application.

The final determination as to whether a subsidy shall be granted is entirely discretionary with the Commission, and as a consequence no provision is made for judicial review upon refusal to make a grant. Nor is the subsidy, if granted, a direct money payment; on the contrary it enters into the business transaction of ship purchase which is conducted upon a contract basis. The control over such a contract is the same as for other contracts.

2. Operating-Differential Subsidies for Ships

While differing in detail, the principles of control are the same for operating-differential subsidies as for construction-differential subsidies.80

3.—Air Line Subsidies

Air line subsidies are of two kinds: (1) the indirect, consisting in the acquisition, establishment, and operation of certain air navigation facili-


79Such as: "(1) the service, route, or line requires a new vessel of modern and economical design to meet foreign-flag competition and to promote the foreign commerce of the United States; (2) the plans and specifications call for a new vessel which will meet the needs and requirements of the service, route, or line and the proposed requirements of commerce; (3) the applicant possess the ability, experience, and financial resources, and other qualifications necessary to enable it to operate and maintain the proposed new vessel. . . ." 52 Stat. 955 (1938), 46 U. S. C. § 1151 (a) (1940).

ties, and (2) those of a more direct nature, embraced in air mail rates.

In respect to the first of these no problem of administrative adjudication and its control arises, since these are in the nature of general promotional actions and do not involve any specific claims. The second case is more complex. An absolutely "direct" subsidy to air lines such as that given to shipping has never been provided for. The subsidy actually granted at present is contained in and is an almost indivisible part of air mail rates. It consists in "that portion of the carrier's mail pay which is more than compensatory for carrying the mail, and is made so that the carrier's revenues from all sources will be sufficient for it to maintain and develop its service." and so fulfill the legislative purposes.

Since subsidies are a component part of air mail rates they cannot be divorced from air mail rate-making procedures and controls.

In the fixing of air mail rates the Civil Aeronautics Board, by statute, must take into consideration many factors that are irrelevant to the mere rate, such as the fact that in connection with the rate there may be a subsidy, because of the necessity of maintaining and continuing "... the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." But these are manifestly questions of policy which involve wide discretion. In strict legal theory such determinations as to air mail rates, insofar as they involve large questions of policy, are non-justiciable. The only possible justiciable question would be whether the rates as fixed were confiscatory.

The statutory provisions governing judicial review, however, make no distinction between the fixing of commercial rates and rates paid by the government for air mail service. The statute provides that "any order, affirmative or negative", except orders in respect to any foreign air mail carrier, "... shall be subject to review by the circuit court of appeals of the United States or the United States Court of Appeals for the District of Columbia..." upon the transcript of the record procedure.

4. Agricultural Subsidies

In respect to agricultural subsidies an extremely complex situation exists, for the subsidy may be either direct or indirect, and may take the form of a contract, an implied contract, or a pure benefaction. The administrative operations in connection with the granting of the subsidy

---

83Spencer, Air Mail Payments and the Government (1941) 310.
85Spencer, Air Mail Payments and the Government (1941) 310.
84Ibid.
may conceal its real nature. The nature of the appropriation may also seemingly affect the legal situation.

The direct subsidies are granted in the form of loans based upon parity, benefit payments, purchases, the furnishing of fertilizers, etc. The indirect subsidies may occur in various forms such as placing limitations on the disposal of government-owned or controlled stocks of commodities, regulating the marketing of agricultural commodities, attempting to increase the use of agricultural commodities, etc.

Only the direct methods can be discussed here. The direct benefits consist largely of loans upon basic commodities, price support of the so called Steagall amendment commodities and certain other commodities, and payments in connection with the Soil Conservation and Domestic Allotment Act.86

Basic commodities are supported by producers' loans at 90% of the parity price in respect to corn, wheat, tobacco, rice and peanuts, and 92½% of parity in the case of cotton.86

When acreage allotments and marketing quotas are in effect, under the Agricultural Adjustment Act of 1938, these loans are available only to cooperating farmers, that is, farmers who conform to acreage allotments and marketing quotas. Non-cooperating farmers are entitled to loans only on that part of their production in excess of the quota and at only 60% of the rates applicable to cooperators. The law provides that loans are mandatory where there has been a favorable referendum among the farmers in respect to the agricultural program, but also provides that none of the loans are required to be made if the Secretary of Agriculture proclaims marketing quotas but they are opposed by more than one-third of the farmers voting in the producers' referendum.87

Those receiving the loans may, of course, as in any other lending transaction, get the benefit of increased prices, but they do not take the losses in case the prices go below the amount of the loan.88 The subsidy in respect to loans may be of a twofold nature; the 90% of the parity price, and the difference between what is owed and the deficiency arising from the sale of the collateral.

87No producer shall be personally liable for any deficiency arising from the sale of collateral securing any loan under this section unless such loan was obtained through fraudulent representations of the producer. Ibid.
While the statute provides for judicial review as to the acreage allotments, it does not provide for appeal from decisions not to grant the benefit. The statute provides that the facts constituting the basis for any parity payment or loan, or the amount thereof, when officially determined in conformity with the applicable regulations, shall be final and conclusive and shall not be reviewable by any other officer or agency of the government.

In respect to these loans three different legal situations exist. Where the loan has been made applicable to cooperators in the agricultural program after a referendum has been held, there would seem to be at least an implied right to the loan. Since the loan is made mandatory, logically speaking the denial of the loan would be the cause for a suit.

Where the Secretary of Agriculture proclaims marketing quotas and they are opposed by one-third of the farmers, there is no mandatory duty to make the loan and it would appear to be on the open offer basis.

In respect to loans to non-cooperating farmers, there are no rights to the loan involved. The granting of the loan would appear to be merely an act of favor.

In respect to so-called Steagall commodities, when the administrative authorities believe that the expansion of commodities is necessary in order to further the war effort they make a public announcement of the fact, and state that they will through loans, purchase, or other operations support prices at certain rates for a given period. "Generally announced in advance of the time when farmers must plant their crops or plan their livestock production, they assure specified returns and are the farmers' equivalent of the contract prices which cover the operations of the producers of guns, ammunitions, ships, tanks, airplanes, clothing, and other war materials."

The law seems to contemplate that the basis for the loan or the guaranteed payment will be increased crop production. However, in practice, loans and payments are made irrespective of such increased production. Recent announcements have made use of the word "eligible", in connection with loans and payments. If the Department of Agriculture in the future lays down conditions as to eligibility and farmers increase pro-

---

90The allotments are made by local committees. Any farmer dissatisfied by the quota fixed by the committee may have his quota reversed by a local committee and if still dissatisfied, by the courts. 52 Stat. 63 (1938), 7 U. S. C. §§ 1363-1366 (1940).
93DEPT. OF AGRIC., War Food Administration, War Food Program for 1944, Feb., 1944, 23.
duction as a result so that they may receive the benefits, an implied contractual situation may well develop.

Under the Soil Conservation and Domestic Allotment Act of 1935, money was to be given to the states to carry out soil conservation plans. Amendments permit the Secretary of Agriculture to carry out the functions in respect to soil conservation given to the states until the states have had a reasonable opportunity for legislative action, by making payments or other grants of aid to agricultural producers in amounts determined to be "fair and reasonable." These payments are measured by:

(1) Treatment or use of land for soil restoration, soil conservation, or the prevention of erosion; (2) changes in the use of land; (3) a producer's equitable share, as determined by the Secretary, of the normal production, of any commodity or commodities required for domestic consumption; or (4) his equitable share, as determined by the Secretary, of the national production of any commodity or commodities required for domestic consumption and export, adjusted to reflect the extent to which his utilization of cropland on the farm conforms to farming practices which the Secretary determines will best effectuate the purpose of the law. The payments are handled by local committees who also make acreage allotments.

The statutes make no provision for judicial review. There has been wide difference of opinion among the lower courts as to the reviewability of these payments.

F. THE LENDING OF MONEY

During the past 25 years a large number of federal lending authorities have been established. Unlike loans made by private business primarily for profit, those made by the government are usually made for the purpose of furthering certain general social, economic or political ends such as the prevention of economic collapse, furthering the export trade, providing money at a low rate of interest, lending money where private business might not take the risk, establishing tailored credit or fitting

96 See note 94 supra.
97 In Moore v. United States, 45 F. Supp. 656 (S. D. Iowa 1942) a right of review was denied. However, in two recent cases, not as yet reported, Bank of Wilson v. Miller (D. Ark. 1944) and Fenile v. United States (D. Ark. 1944), the United States District Court for Arkansas held that there can be a right of review in these instances by the courts.
98 It is impossible here to analyze in detail either the circumstances under which the loans are made or the agencies making them.
the type of loan to the individual borrower,99 furthering the purchase of homes or farms, helping small business to get established, assisting veterans, etc.

While such action, in its purpose and end result, may be benefactorial so far as the individual is concerned as well as serving the public welfare, it has been placed on a contractual business basis. By congressional policy the individual is free to apply for a loan or not apply: the administrative authority has wide discretion as to the granting of the loan. There are no public hearings with a quasi-judicial procedure. Congress has provided for no judicial appeals from decisions of the administrative authority; nor have the courts assumed jurisdiction over the question of whether a loan should be granted. Where questions involving contractual rights are concerned, they will take jurisdiction as they will in respect to any contract.100

G. THE GRANT OF MONEY TO THE STATES

The federal government has undertaken the task of furnishing money to the states to enable them to carry out a variety of functions including the furnishing of agricultural and domestic science education,101 highway102 improvement, and development of social security programs especially old-age assistance, to dependent children, and to the blind, and unemployment relief.103

99Butz, The Production Credit System for Farmers (1944) 47-49.
100As a rule these loans are made by corporations which are capable of suing and being sued. Also as a rule all disputes are settled by a process of administrative adjustment. As a result, for instance, there have been no suits in respect to the denial of loans by the Reconstruction Finance Corporation. In respect to subsidies, benefit payments and loans, the subject is not only extremely complex because of the great number of agencies and methods involved, but also because of methods of administration which at times obscure the real judicial situation. For instance, a local agricultural committee may send to a farmer a sheet listing the benefits he may receive under various agricultural programs and asking him if he has met with any of the requirements set forth to entitle him to receive any of the enumerated benefits. There is no procedure such as takes place in regulatory action, and no formal decision. Because of the fact that the action is benefactorial, there is little attempt to contest the statements made by the farmer.
The general principle of these grants is much the same. The money is
given to the states on a more or less contingent basis, i.e., the state must
conform to certain requirements in order to obtain the grant. Whether
the conditions have been complied with is placed in the hands of adminis-
trative authorities which do not as a rule hold hearings but pass upon
the grant in a purely administrative way. In case of the withdrawal of
the grant for failure to conform to the requirements of law, there may
be administrative hearings, but they are administrative adjudicatory in
the sense that there must be a fact-finding and the decision must be based
upon the facts. There is no judicial appeal.

The grant of aid to a state for certain social security payments may
be taken as a good example of the process.

The Social Security Board is charged with the task of passing upon
certain basic elements which the state must establish in its old-age
assistance program, and to dependent children and the blind, in order to
be entitled to federal aid. It is also charged with subsequent review of
state plans and their administration in order to insure that there is com-
pliance with the Social Security Act.104

Since the procedures in respect to these different activities are much
alike, only that in respect to old-age assistance will be given here.

Before making payments to the states, the law provides that the Board
must take certain factors of the state plan into consideration.105 The
Board may deny payments on the ground that statutory conditions have
not been met, or it may likewise deny a payment on the ground that the
state has made certain requirements which are forbidden by statute.106
There is no administrative adjudicatory process in connection with his
device, nor is there any provision for judicial review.

When the state plan has been put into effect "after a reasonable notice
and an opportunity for hearing" to the state agency administering the
plan, if the Board finds that there have been changes in the plan that
are contrary to law, or that the administration is faulty as to the federal
requirements, it may notify the state agency that no further payments
will be made to the state until the Board is satisfied that the prohibited
requirements are no longer imposed and that there is no longer failure


§§ 604, 701-703 (1940); 49 Stat. 631 (1935), 42 U. S. C. § 705 (1940); 49 Stat. 633 (1935),


to comply.\textsuperscript{107} There is no judicial appeal.

The state therefore is given a legislative right to the payments upon the meeting of certain conditions, and upon maintaining a system in harmony with federal requirements. In respect to these payments to the state the federal government does not merely give gifts but attaches conditions to them. The determinations as to whether the statutory conditions have been fulfilled are made by administrative procedure. Although opportunity for a hearing is provided for in respect to the faulty administration of the plan, it is in no sense a real administrative adjudicatory procedure. Since no rights of the states are involved, other than those established by Congress, it can in connection with such rights establish the type of procedure which it wishes.

H. Patent Claims

The patent law of the United States provides: "Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant . . . not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publications in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefore."\textsuperscript{108}

The statute provides for two different types of appeal from the decisions of primary examiners rejecting patent applications: (1) appeal to the Board of Appeals and then to the Court of Customs and Patent Appeals; and (2) a bill in equity from the decision of the Board of Appeals.

In the first case the Court of Customs and Patent Appeals acts as a higher administrative authority to correct the determination of the Board of Appeals.\textsuperscript{109} It considers only the evidence produced before the Commissioner of Patents.\textsuperscript{110} The decision of the court is final and conclusive upon the Commissioner of Patents and is not reviewable by the Supreme

---

\textsuperscript{109}In re Hamilton, 37 F. (2d) 758 (C. C. P. A. 1930); on rehearing, 38 F. (2d) 889 (C. C. P. A. 1930).
Court. The decision is not, however, binding upon the individual for it does not preclude any person interested from having the right to contest the validity of the patent in any court where it may be called into question.

Upon refusal by the Board of Appeals to grant an application for a patent, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, may have a remedy by a bill of equity. Here again rights have been established which accrue upon the proof of the presence of the circumstances laid down by statute. The denial that such rights are available to the individual constitutes the case or controversy. Congress can make administrative appellate action final and conclusive upon its administrative agent, can also provide that it is not conclusive upon an individual and further can also provide for a judicial appeal in which the court exercises an independent original jurisdiction. Since the rights are legislative and of a benefactory nature, Congress can itself determine what kind of appeals should be permitted, as a matter of policy.

I. Grazing Permits

By the Taylor Grazing Act of 1934, the Secretary of the Interior was empowered to establish grazing districts, and to make provision for their protection, improvement, and administration. He was authorized, upon the payment of an annual fee, to issue permits to bona fide settlers, residents and other stock owners to graze livestock upon these districts.

Applications for permits are considered in the first instance by an advisory board which makes recommendations to the district grazer. If the recommendation is favorable, the district grazer notifies the applicant. If not, the applicant is sent a notice setting forth the reasons for refusal to grant the permit and naming the date and place where a protest may be heard.

At the hearing any party in interest may appeal or file a protest with the advisory board, which thereupon reconsiders its previous recommendation. When it reaches a new decision, approved by the district

---

111 Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693 (1927).
grazer, notice is sent to the applicant. If the decision is adverse, a notice with reasons is sent. Such notice constitutes a district grazer’s final decision for purposes of appeal.\textsuperscript{118} The district grazer may then issue or refuse to issue a grazing license or permit. An appeal lies from this decision to an examiner of the Grazing Service.\textsuperscript{119} A further appeal lies to the Secretary of the Interior\textsuperscript{120} which is final. The statutes provide for no judicial review.

No cases seem to have arisen in the courts directly involving the question whether there is a right of judicial appeal from the determination of the Secretary of the Interior denying a grazing permit.\textsuperscript{121} Here the government is dealing with its own property and in strict legal theory can handle it as it pleases. Because, however, the range interests under the Grazing Act are so intimately tied up with farm interests, and the injury to the former may work disaster to the latter, an adequate system of administrative appeals has been created, sufficient, it may seem, to guarantee them.

J. PUBLIC LANDS

Administrative action with respect to federal lands are covered by a great number of statutes governing such items as interests in homesteads, timber and stone lands, desert lands, grants of lands to the states: reservations, the sale of town sites or public lands, grants to railroad sales of swamp and overflowed lands, oil and gas leases, etc. Conflicting claims may develop in respect to each of these situations, which with rare exceptions are settled by the General Land Office. While there are variations of procedure in the handling of these matters, the contest procedure in respect to them is practically uniform. Although the procedure in making a grant may involve some activities that appear quasi-judicial in nature, by-and-large they are purely administrative, merely providing methods by which the requirements of the laws and regulations may be complied with. It is only when there is a rejection of a claim and an appeal is brought, or where there are conflicting claims, as a rule, that any real adjudicatory procedure comes into play.\textsuperscript{122}

\textsuperscript{118}Id. at § 501.9(b).
\textsuperscript{119}Id. at § 501.9(c).
\textsuperscript{120}Id. at § 501.9 (j-l), 7690.
\textsuperscript{121}In the \textit{Red Canyon Sheep Co. case}, the court intimated that there might be a right which would be protected by equity, but the case really turned on the question of a proposed exchange of lands and not on the question of denying a permit. 98 F. (2d) 308 (App. D. C. 1938).
\textsuperscript{122}The Rules of Procedure of the General Land Office are applicable only to contests and do not apply to the procedure in the making of grants. For an example of the pro-
Without going into detail as to procedure it is sufficient to say that contests in respect to land claims pass through an administrative hierarchy composed, as a rule of the registers or cadastral engineers in the first instance, the Commissioner of the General Land Office in the second, and the Secretary of the Interior as the final administrative appellate authority, who is assisted by a Board of Appeals. In all steps there is provision for adequate hearings. While there are two types of contests, those between the government and the individual and those between private individuals as to the same lands, since in either case the government still has control of the lands, it makes little difference in respect to the nature of the review.

The statute provides for no judicial review from the decisions of the General Land Office or those of the Secretary of the Interior in respect to government lands. The courts take the viewpoint that: "In disposing of public lands to private individuals, the government is in effect dispensing a bounty, and, while the distribution must of course be made in accordance with statutory requirements, the would-be beneficiary has no standing to object to a fairly wide latitude of discretion on the part of land officials."

A better reason might be that until a patent has been issued, the land belongs to the government and no one has any right to it. The right can only accrue as the result of a Land Office determination.

The fact that the Land Department is itself a quasi-judicial authority, the fact that it is exercising discretionary power, and the fact that the government in respect to public lands is a granter of a privilege or bounty, have all contributed to prevent judicial control over land determinations. In the case of the United States ex rel. Riverside Oil Co. v. Hitchcock the Supreme Court held that Congress has constituted the Land Department as a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and use and disposition of the public lands. "Neither an injunction nor mandamus will lie against an officer of the Land Department to control the procedure utilized in the making of grants see Sen. Doc. No. 10, 77th Cong. 1st Sess. (1941) Pt. 7, 20-27.

For the details of the procedure see Rules of Practice for cases before the United States District Land Officers, the General Land Office and the Department of Interior, 43 CFR 220.1-222.14 (1939).


The name Land Department may be used to denote the General Land Office and its agents, plus the Secretary of Interior as an appellate tribunal.

90 U. S. 316, 324 (1902).
him in discharging an official duty which requires the exercise of his judgment and discretion.”127 The Secretary having jurisdiction to decide at all, has necessarily jurisdiction to decide as he thinks the law is, and it is his duty so to do, “... and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.”128

The courts will, however, take jurisdiction in case of fraud, abuse of power or lack of jurisdiction, as where the claim is that the title to the land no longer is in the United States.129 After the patent has been issued, of course, the Land Department has no more jurisdiction over the land, so that contests over its ownership may be brought in the regular state courts.

SUMMARY AND CONCLUSIONS

From this brief survey of judicial review of benefactory action, it can be seen that the courts have been asked to intervene in controversies based on the execution of laws that represent a wide variety of social and economic action on the part of Congress. In taking such action, Congress has adopted different solutions of the question of judicial review of administrative determinations and other administrative acts performed in execution of the various statutes. With respect to pensions and benefits to veterans and their dependents, it has expressly prohibited judicial review. With respect to a variety of tort claims, it has remained silent as to review. The same thing is true with respect to controversies arising in connection with administrative action in the fields of grants in aid to the states, public land claims, grazing licenses, various types of insurance, governmental loans, agricultural payments of various sorts and subsidies. On the other hand, Congress has expressly provided for judicial review of cases involving railway unemployment insurance, old-age and survivors’ insurance, bank deposit insurance and patents. Provision for review also applies to the non-fulfillment of insurance contracts and certain private employee compensation claims.

The courts have followed Congress wherever it has taken a definite position in respect to judicial review, by expressly prohibiting it, pro-

127Id. at 325; for a long list of cases as to lack of jurisdiction to entertain a suit to determine the rights of parties in land the title of which remains in the United States, see 43 U. S. C. A. § 2, Note 46 (1943).


viding for it, or placing limitations upon it. Where Congress has remained silent, in some instances the courts have permitted review; but in the majority of such instances, either cases have not arisen, or the courts have denied review. It is hardly necessary to add that questions of abuse of power or lack of jurisdiction to act at all may always be raised. However, to raise such questions is quite a different matter from asking the courts to review an administrative act.

The question may well be asked: why have Congress and the courts adopted such a variety of solutions to the problem of judicial review in the field of benefactory action?

A part of the answer is based upon the fact that in this field Congress is dealing, on the whole, with a subject matter over which it can exercise complete control. In most instances when Congress decides whether or not benefactions are to be given certain classes of persons, it is acting under the spending power and therefore has very great freedom. In other circumstances, as in respect to public lands and grazing permits, it is giving a privilege regarding which it can prescribe conditions. Again when Congress is deciding whether to provide for the judicial review of certain benefactory action, it obviously considers many factors of policy. With respect to a great majority of the claims, the amounts involved are small, time is of the essence of the settlement, and the cost of review by a court would be prohibitive. Where possible, Congress may wish to discourage the bringing of suits before the courts, because of the enormous number that might arise, and may prefer to rely largely upon administrative appeals. On the other hand, in some instances Congress has not only permitted the bringing of suits before the courts, but has provided for the individual seeking review special advantages, such as equalization of the financial burden, choice of venue, exemption from payment of costs, or recovery of attorney's fees. In at least one instance judicial review may take place only upon the attempt to enforce the decision.

Another part of the answer lies in the form of the benefit. Several different forms have been devised by Congress for the granting of benefactions. A benefit may be established as a contingent right, may depend upon a contract, may be granted on a welfare basis, may be in the form of a subsidy or similar benefit, may be given in connection with a rate for a service which the government is receiving, or may take some other form, such as a land patent or a patent grant.

When Congress uses the contingent right form, it has complete power to say under what conditions the right shall be established. There is no common law or constitutional basis for an appeal to the courts, if
Congress does not wish to provide for such an appeal. It can expressly prohibit judicial appeal in case a claim or petition for a contingent right is denied by the administrative authority, it can provide for an administrative appeal alone, or it can provide for both an administrative and a judicial appeal. When Congress prohibits judicial appeal, as it does in respect to veterans' pensions, the courts cannot intervene, since Congress has complete discretion in the matter. If Congress provides that there shall be judicial review, as in the case of Federal old-age and survivors' insurance, the courts will take jurisdiction. When Congress is silent upon the point, the question must be asked, whether it has so framed the benefit that disputes arising with respect to it constitute "cases" or "controversies", since the regular constitutional courts cannot take jurisdiction otherwise. When Congress so provides, the courts accept as "cases" or "controversies" appeals based upon the fact the Congress has given a right and the administrative authorities have denied it. In other words, the denial of a legislative right which is made contingent upon the fulfillment of certain conditions may constitute a "case" or "controversy." Of course, legislative courts may be required to take jurisdiction even though a case or controversy does not exist in a constitutional sense.

If a legislative benefit is to be given in contractual form as is the case with war damage insurance, marine and war risk insurance, housing obligation insurance, ship subsidies and certain government loans, there is no right under the common law or the Constitution of the United States to have judicial review of an administrative act which refuses to grant the benefit. When no statutory provisions authorize review, the courts will not accept appeals from such an act, since to grant or to deny the benefit is wholly a matter of administrative discretion. The situation is different when the benefit has already been granted in contractual form, and a dispute arises over some point connected with the interpretation or enforcement of the terms of the contract. Here although no common law or constitutional right can be invoked as the basis of an appeal to the courts, there is the possibility of review (as by the Court of Claims or a district court), for here the regular statutory provisions regarding contracts govern.

Where benefits are bestowed by means of implied contracts, the case is not so clear. It would appear, however, that (a) when the law provides that persons who cooperate with the agricultural program or the soil conservation program shall be given specific benefits, such as loans on basic agricultural commodities and loans and price support of other commodities, or direct cash payments, (b) when the individual has
conformed with a program in order to receive the benefit, and (c) when the circumstances are present which make the benefit mandatory, failure of the governmental agents to authorize the benefit would constitute a cause of action.

Sometimes Congress choses to use the form of a grant which creates a general benefit, as by providing air transportation facilities, or by authorizing agricultural price support without any contractual element or quid pro quo basis. In this case, although the benefit may primarily affect particular persons, no claims are created upon which the individual may bring a suit.

On the other hand, if a subsidy is hidden in a rate, as in respect to air mail subsidies, there may be a judicial appeal; since the constitutional question of confiscation (although perhaps very remote) may possibly enter in.

In connection with each of these various types of benefits, Congress has exercised its discretion regarding the form used. Examination shows that every decision as to form is based upon considerations of constitutionality, policy, and expediency. Any attempt to simplify and unify the methods of judicial control over benefactory administrative action by adopting a single system of appeal to the constitutional courts, applicable to all benefactory situations, would be unenforceable in many instances for constitutional reasons, would nevertheless place an intolerable burden upon the courts, and would destroy many of the policies carefully worked out by Congress as the best means of enforcing its will to bestow certain benefits. For example, the policy of helping those who need help, and of doing so when they need it most, would be completely frustrated by such a system. There is no doubt that Congress, when wrestling with the subject of judicial review, will consider carefully the probable effect of placing all beneficiary action within one framework. There is reason to hope that it will not sacrifice substance to form by deciding to unify and simplify at the expense of its own social policies; or in other words, that it will refuse to pass blanket legislation providing for judicial control over all administrative acts.

Several bills\(^{130}\) now before Congress seek to extend judicial review far beyond its present scope. One bill, for example, would make it applicable to every administrative act "... denying in whole or in part claimed rights, remedies, privileges, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land, except to the extent that any matter of fact is both substantially in dispute and ex-

\(^{130}\) H.R. 5327, 78th Cong., 2nd Sess. (1943) § 9 (d).
pressly committed by law to absolute executive discretion. . . ." Any such extension of judicial review as is contemplated by this and the other similar bills would practically make several branches of public administration impossible, and would deal a death blow to the carrying out of benefactory legislation.

131 See note 129 supra.
WITH the repudiation by Hitler of the Treaty of Versailles, in March 1935, and the enactment1 that year of a new Army Service Law (Wehrgesetz) for the Third German Reich,2 the National Socialist regime found it necessary to set up new legislation as to requisitions for the needs of the army. Until that time the obligations to render services upon the demand of military authorities was provided for only in special legislation, particularly the law of June 25, 1868, which related to billeting (Quartierleistungsgesetz),3 and the law of April 6, 1925, which provided for the furnishing of provisions (Naturleistungsgesetz).4 This legislation dealt with peacetime requirements. The basic law concerned with wartime services was that of June 13, 1873 (Gesetz über die Kriegsleistungen).5 This is the law which regulated requisitioning in Germany during the war of 1914-1918. It was repealed in fulfillment of the requirements of the Treaty of Versailles, on March 19, 1924.6

These laws, since they were enacted during a liberal period, required of the citizens only specified and indispensable services. The National Socialist government found this legislation inadequate, and regulated the subject of requisition in a comprehensive manner by the law of July 13, 1938, concerning services for the armed forces (Wehrleistungs-

---

1Ph.D., Columbia University; Member of the New York Bar; Author: REQUISITION IN FRANCE AND ITALY (1944).

2The German laws referred to in the course of the discussion which were enacted subsequent to March 30, 1933 are not in any sense true parliamentary statutes, since under the Law of March 30, 1933, 1933 REICHSGESETZBLATT §§ 1-4 the German Reichstag unconstitutionally delegated its legislative power, including certain powers to amend the German Constitution to the new Reichregierung.


5Germany: Law of April 6, 1925, 1925 REICHSGESETZBLATT 1-8. As to Austria, see Austria: Law of June 11, 1879, 1879 ÖSTERREICHISCHES BUNDESGESETZBLATT 93, art. 1 et seq., concerning billeting (Einquartierungsgesetz); and the Law of March 21, 1935, 1935 ÖSTERREICHISCHES BUNDESGESETZBLATT 94, art. 1 et seq., regarding the furnishing of draught horses (Militärvorspanngesetz).


7Germany: Law of March 19, 1924, 1924 REICHSGESETZBLATT § 1. Similarly the Austrian Statute of Dec. 26, 1912, 1912 ÖSTERREICHISCHES BUNDESGESETZBLATT 237, art. 1 et seq., concerning war services was repealed on April 30, 1921, 1921 ÖSTERREICHISCHES BUNDESGESETZBLATT 244, as a consequence of the Treaty of St. Germain.
This new legislation, according to the official statement accompanying it, was drawn up in the spirit of National Socialism and was based on the party program which states that the common interest is to be placed above the interests of the individual (Gemeinnutz vor Eigennutz).\(^7\)

I.

The law of 1938 was in force for a period of little more than a year. It was replaced by the law of September 1, 1939, which is still in force, regarding services that may be demanded to meet the requirements of the Reich (Reichsleistungsgesetz).\(^8\) Whereas the law of 1938 had regulated the obligation to render services only for the needs of the army, this limitation has been abandoned and services now may be required for all purposes of the Reich whatsoever. It should be noted that the concept of services which may be requisitioned includes the supplying of goods.

The comprehensiveness of the statute of 1939, as supplemented by two decrees for its execution, one of October 23, 1939,\(^9\) the other of March 31, 1941,\(^10\) indicates the systematic approach of the legislator to the problems involved. The act is divided into seven chapters treating the following subjects:

1. The Duty to Render Services.
2. The Services.
3. The Special Obligation of the Communities to Render Services.
5. Compensation, Damages and Recourse.

The group obliged to render services is made as large as possible by the statute. According to Section 1, Par. 1, services must be rendered by all inhabitants of the territory of the Reich, regardless of their nationality; by other persons having property within the Reich,

\(^7\)Germany: Law of July 13, 1938, 1938 Reichsgesetzblatt §§ 1-36, see Pabst, "Das Wehrleistungsgesetz, (1938) 15 Deutsche Verwaltung 423; Röder, Kommentar zum Wehrleistungsgesetz (1939).

\(^8\)Reprinted in I Pfundner-Neubert, Das Neue Deutsche Reichsrecht (g) 11 (1938).


with reference to this property; and by German nationals on board German vessels. By Section 1, Par. 2, all legal persons (corporations, etc.) under public and private law, are also required to render services.

The law makes a special provision for the obligations of communities in connection with requisitions. The services may be demanded from a community rather than from the individuals who compose it. In such case, the community is obliged to render services in the same manner and under same conditions as the individuals. Whenever a community is called upon to render services it may make the same requirements of the individuals as the latter would have been obliged to fulfill in the case of direct requisition. This method of indirect requisitioning was, under former laws, the normal and preferred procedure. The new law, while continuing this procedural possibility, has placed the primary duty to render services upon the individual.

A series of exemption provisions narrow down the general duty of rendering services. These provisions are of three kinds: Under Section 28, foreign nationals are exempted from the requirement of rendering services, insofar as there may be in existence treaties and recognized rules of international law providing for exemptions on their behalf. The reference to international law seems to provide adequate protection for persons enjoying diplomatic immunity. A list of particular exemptions under which specified persons, organizations or institutions are freed from certain duties, is found in Section 29 of the law. For example, all the Reichsministers and certain other high officials are exempted from the duty of supplying quarters in residences provided for them by the government. Churches enjoy exemption with regard to the use of their buildings, with the reservation, however, that church structures may be used as observation posts.12 Finally, the following classes of persons are exempted from manual work or services connected with requisitions: minors, mothers of infants, pregnant women, the infirm, and persons over seventy years of age.13

II.

The services which may be required are grouped under three categories. A comprehensive part (Sections 4-19) deals with "Special Services." These are services which are demanded comparatively often, especially in connection with manoeuvres; and which therefore were subjected to detailed regulation. They include: providing quarters and food,

13Id. at § 3 (4).
making available private sources of water supply, providing fodder, and supplying fuel for motor vehicles. Provision is also made for using land and buildings, and for requisitioning materials and implements necessary to camping and bivouac, or to road and bridge construction. In this last respect the owner or possessor of property, and those in his employ, may be required to assist in the work. Further provisions as to special services deal with the use of telephones, telegraph and radio. The requisitioning authorities are given the right to use repair shops and to compel assistance in repair work, as well as to use electricity and gas. Additional installations may be required for power and lighting.

The following objects may be requisitioned under Section 15 of the law: Saddle and draught animals and animals of burden; dogs, carrier-pigeons; means of communication, including the material necessary for their use; and such other chattels as may be needed. Any persons who possess means of transportation may be required to transport persons or goods; and all persons connected with the work of transportation may be ordered to render any necessary services in that connection. Airport personnel may be called upon to render assistance to aircraft. The master of a vessel may be required to render the same services as if he were the owner. The owner or possessor of a vessel, or the shipbuilder, may be required to carry out such orders as to the construction and the equipment of vessels as may be issued.

The services above-described may be called for, according to Section 4, by procurement offices of the army and procurement agencies of the other governmental departments, for the execution of their respective functions. Such services may also be required by the armed forces for their needs while on the march. In the latter case requisitions may, in general, be made only by troops away from their base.

"Services for Special Economic Purposes" (Section 3b), must be furnished by owners of enterprises in the fields of industry, agriculture and forestry, and transportation. These persons may be required to contract, with regard to movables and personal property which they own or hold, in any manner which may be prescribed. They may also be required to use or dispose of movable and immovable property in a prescribed way. Finally, they may have to procure, store, produce or manufacture articles of a prescribed kind.

"Services in General" are considered in Section 3a. All persons who are obliged by the law to render services may be required to place at the disposal of the authorities all kinds of things in their possession, to transfer rights to movable property, and to allow the use of other rights. On the other hand, they may be required to refrain from the use of
such rights. This clause, it seems, would cover every contingency as to the kinds of goods and services subjected to requisitioning, except for the rights to real estate.¹⁴

Whenever a service is within the scope of the law on requisitioning, the authorities may demand preliminary action of an organizational nature with respect to such service. This provision seems to enable the authorities, particularly the army, to require the drafting of industrial and similar plans to meet any anticipated contingencies.

With respect to the extent of the requisitioned services, the law requires proper performance. It specifies that orders as to preparation for and execution of the services must be fulfilled, information and documents supplied, inventories furnished and surveys prepared. An individual may be required to give a hand, to run errands, to act as guide, and to render similar services of short duration. All these duties also devolve upon those in the employ of the person required to furnish services.

III.

As to the agencies authorized to requisition, the law provides only that services may be required by Offices of Supplies (Bedarfsstellen) designated for such purpose. Command Offices (Dienststellen) of the army, and other governmental offices or offices entrusted with governmental tasks, may serve as Offices of Supplies. The Army High Command and the Commissioners General designated by the Fuehrer for the Reich Administration and for the National Economy determine, by mutual agreement, the Offices of Supplies within their respective jurisdictions and the services which these may require. For other administrative bodies, such designation is made by the executive head, upon agreement with the Army High Command and the Commissioners General above-mentioned.

The powers assigned to the Offices of Supplies are subject to the conditions specified at the time of authorization. In order that only a limited number of Offices of Supplies may be established and permitted to make direct requisitions, it is provided that these Offices may also require services on behalf of other agencies.

The Offices of Supplies have been designated in a series of ordinances of the Reich Minister of the Interior. Two of these ordinances relate

¹⁴As to the transfer of title to immovable property for purposes of the army, see Germany: Law of March 29, 1935, 1935 REICHSGESETZBLATT §§ 1-10 regarding the acquisition of land for the army and the general German law of expropriation.
to the army,\textsuperscript{15} and two others concern the civilian administration.\textsuperscript{16} In each group of ordinances, one designates the Offices empowered to make all requisitions authorized by law, whereas the other designates the Offices empowered to requisition only certain services provided for in the law. A fifth ordinance relates to party and police formations.\textsuperscript{17}

The Offices authorized to requisition are of higher or lower grade, depending upon the importance of the services which they may require. Services for the army which are frequently the object of requisitions, although not of great importance, are within the jurisdiction of an inferior grade of Office, reaching down to battalion and company. As to Offices of Supplies not within the army, the power of requisition has been delegated to such lower administrative agencies as the chief administrator of the county (\textit{Landrat}), the lord mayor (\textit{Oberbürgermeister}), and the state police administrators (\textit{Staatliche Polizeiverwalter}). Services of very slight monetary value, such as the use of private water supply or a private telephone, or access to repair shops, may be requisitioned even by members of the rank and file of the army, the police, the labor formations, the customs service and the air-raid service, when on duty. On the other hand, the power to requisition goods and services of greater economic importance has been retained within the jurisdiction of Offices upon a higher administrative level. Thus, the authority to requisition "Special Economic Services," under Section 3b of the law, has been reserved to the Armaments Control Units and to the executive heads of the economic departments of Reich, state, or provincial governments. Such authority, however, may be delegated by them.

With respect to the general power of requisition, as provided for in Section 3a, there has been no designation of Offices authorized to

\textsuperscript{15} Germany: Ordinance of July 15, 1938, 1938 \textit{Reichsgesetzblatt} §§ 3-18, designating the Offices of Supplies of the Army, authorized to requisition, which were amended by the Ordinance of June 13, 1940, 1940 \textit{Reichsgesetzblatt}, which amended §§ 5, 6, 8, 9, 10 and 11 of the Law of Sept. 1, 1939, see note 9 \textit{supra}: concerning the designation of the Offices of Supplies of the Army authorized to requisition services under the Ordinance of Oct. 20, 1939, 1939 \textit{Reichsgesetzblatt} §§ 3 (b), 5, 10, 15 (1) (5) amending §§ 3 (b), 5, 10, 15 (1) of the Law of Sept. 1, 1939, see note 9 \textit{supra}.

\textsuperscript{16} Germany: Ordinance of Aug. 30, 1939, 1939 \textit{Reichsgesetzblatt} §§ 5-13, 15 (1, 2, 4), 16, 17, designating Offices of Supplies not within the army authorized to requisition. Ordinance of Oct. 13, 1939, 1939 \textit{Reichsgesetzblatt} §§ 3 (b), 14, and 15 (1) amended by Ordinance of Sept. 30, 1940, 1940 \textit{Reichsgesetzblatt} designating Offices of Supplies not within the army authorized to requisition under these Sections of the law.

\textsuperscript{17} Germany: Ordinance of Dec. 2, 1939, 1939 \textit{Reichsgesetzblatt} §§ 5, 6, 8, 9, 10, 11, 16, designating Offices of Supplies, SS Troops Available for Special Missions, SS Deaths Head Formations and Police Divisions, authorized to requisition.
require services. The Army High Command and the Commissioners for
the Reich Administration and the National Economy have reserved
to themselves the right of making designations in particular cases.

IV.

The procedure of requisitioning is dealt with in Part IV of the Reichs-leistungsgesetz. The Office of Supplies has the option of calling for
services directly from the person obliged to render such services, or of
requiring them through local agencies or officers of the public adminis-
tration, such as the mayor or the head of the county administration. For
certain types of requisitions specified in the law, the Office of Supplies
must always act through these agencies or officers, except in cases of
urgent need of comparatively insignificant objects. When a service is
required from a community of smaller size, the Office of Supplies is
expected to address itself to the authority which, in the administrative
organization of the Reich, has the power of control over the affairs of
the community. The requisition must normally be in writing; it may
be made by means of public notice. In an emergency the notice may
be given orally. A written receipt for the services must be given by
the Office of Supplies, except in the case of trifling services for which
no compensation will be required. Forceful means may be employed,
if necessary, to secure the services. The Office of Supplies may resort
to the special machinery of summary enforcement available to the public
administration. Provisional measures, such as seizure of the objects to
be requisitioned, may also be taken to assure the carrying out of the
services.

V.

The Office of Supplies must pay a proper compensation for the services
requisitioned in accordance with the provisions of the statute. When
it is reasonable to require that a service be rendered without remunera-
tion, the law excludes the possibility of compensation.

Reimbursement for expenditures may be denied, in whole or in part,
if such expenditures were made in connection with the procurement,
storage, production or manufacture of goods by one deemed to be eco-
coderately in a position to assume the burden himself. This provision

38Generally, the chief administrator of the county, (Landrat); Germany: Decree of
1935 Reichsgesetzblatt § 107, the German Communities Code (Deutsche Gemeindeord-
nung).
is in keeping with National Socialist doctrine, which does not demand an equalized distribution of public burdens.

Thus, it seems that a large concern may be required to store excessively large stocks of specified goods without reimbursement for the expenses incurred in so doing.

Fair compensation is to be awarded by the Office of Supplies for damages to property, personal injuries, extraordinary wear and tear, and loss or risk incurred by the person rendering the services, without gross negligence on his part, because of or in connection with the rendition of the services.

Claims for compensation may be filed within a month after they have arisen, either directly with the Office of Supplies which was responsible for the requisitioning, or with the mayor of the community where the services were rendered, who transmits the claim to the Office of Supplies. In case no agreement is reached between the claimant and the Office of Supplies, as regards either the amount claimed or the question of whether the service is subject to compensation under the law, either party may petition an administrative authority to determine the compensation due. The administrative authorities on the lower level (head of the county administration, mayors) have been given jurisdiction to determine proper compensation for most types of possible requisitions. The determination of compensation regarding services involving large sums has been left to the administrative authorities on the higher level (District President and officials of similar rank). Appeal may be had from the decision of the lower administrative authority to the authority on the higher level, the latter deciding in last resort. If the administrative authority on the higher level has decided in the first instance, an appeal is admissible to the Administrative Tribunal of the Reich,\(^{19}\) when the claim is greater than \(R. M. 100,000\). The parties must be heard, and testimony is to be taken so far as necessary. Recourse to the ordinary courts is excluded.

VI.

For purposes of comparison, a very brief outline may be given of requisitioning in the United States. Here property may be taken for public use by right of eminent domain or by means of requisition. The exercise of such power is controlled by constitutional and statutory law. Requisition is resorted to as an exercise of the war power of the national government.\(^{20}\) This power, distributed between Congress and the Presi-

---

\(^{19}\)Germany: Law of April 3, 1941, 1941 Reichsgesetzblatt §§ 1-11.

dent, "... is not created by the emergency of war, but it is a power given to meet that emergency... But even the war power does not remove constitutional limitations safeguarding essential liberties."21

Requisition in the United States, as contrasted with the institution in the Third German Reich, is largely the development of a process closely tied to constitutional safeguards. As with the power of eminent domain,22 there is the requirement of payment of compensation; legislation relating to requisition has made explicit provision for applicability of the provisions of the Fifth Amendment.

In contrast to the institutional character of the requisitory power in Germany, requisition in the United States is employed as an extraordinary process to meet specific wartime or defense needs. The right to determine public use, and public necessity for taking specific property, is a legislative rather than a judicial question; but whether, in carrying out the purposes of Congress, the officer has acted arbitrarily is a judicial question.23

The power of requisition in the United States has been exercised for a variety of purposes. Comprehensive statutory authority to requisition property is found in several measures enacted during the present war and the state of emergency immediately preceding it. As a part of the National Defense program, the Act of October 10, 1940, as amended, authorized the President to requisition, in the interest of national defense, military or naval equipment, munitions, machinery, tools or materials which had been manufactured or held for export purposes, the exportation thereof having been prohibited by law.24 A Compensation Board was established for the purpose of considering the fair and just compensation to be paid for articles or materials requisitioned under the Act.25 With the enactment of the law of October 16, 1941,26 the

---

21 Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 426 (1934). See opinion by Mr. Justice Story in Martin v. Mott, 12 Wheat. 19, 30 (U. S. 1827) where the war power was recognized in this language: "The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union."

22 The distinction, if any, between the power of taking property for public use under eminent domain and under requisition lies largely in the fact that while in condemnation under eminent domain there is the requirement of payment of just compensation simultaneous with the transfer of title, in the exercise of the requisitory power payment may be effected subsequent to the taking of title to property.


authority of requisition was no longer restricted to articles in export trade. This more recent act authorized the President to requisition military or naval equipment, machinery, tools, or materials necessary for the manufacture or operation of such equipment, on his determination that it is needed for the defense of the United States. The authorization to requisition such property is conditioned also on his determining that: "(2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, . . ."27

The statute also provides that the determination of the fair and just compensation to be paid for any property requisitioned under the law is to be made as of the time of the requisition or the return of it to the owner, in case it is agreed to return it, "... in accordance with the provision for just compensation in the Fifth Amendment to the Constitution of the United States."28

The owner who is unwilling to accept the amount determined as fair and just compensation is paid fifty per centum of the amount and the right is reserved to him to sue the United States in the Court of Claims or a district court for the additional amount sought.29 Furthermore, the President, not less frequently than once every six months, is required to transmit to the Congress a report of operations under the Act.30

The legislation just described preserves the constitutional right of the former owner to just compensation for his property taken for the public use. It has been implemented by a comprehensive method of valuation which again reserves the right of recourse to the courts for a determination of the actual fair and just compensation.31

27Ibid.
28Ibid.
30Stat. 743, 50 U. S. C. § 723 (Supp. 1943); see also 53 Stat. 1255 (1939), 46 U. S. C. § 1242 (1940) authorizing the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes.
VII.

The analysis of the recent German legislation regarding requisition shows the thoroughness with which the National Socialist regime proceeded to place at its disposal a vast store of power for all eventualities. This power no longer was limited to the purpose of satisfying the needs of the armed forces but was extended to the utilization of all personal and material resources "for the purposes of the Reich". These purposes are well known. For their attainment an increased emphasis was laid on the "social duties" inherent in the right of private property. The individual as well, was subjected to these "social duties", to the ends of the state.

The requisitory institution as developed in Germany, now, as in the past, has had a part in affecting profoundly the peace and security of the family of nations. Once before Germany was compelled to repeal requisitory legislation. The legislation of 1939 may well meet the same fate.
THEGEORGETOWN LAW JOURNAL
Volume 33
NOVEMBER, 1944
THE BOARD OF EDITORS
IRVING M. WOLFF, of New York..........................Editor in Chief
JAMES FAY HALL, Jr., of Mississippi.....................Associate Editor
S. WALTER SHINE, of New York..........................Associate Editor
JAMES C. TOOMEY, of the District of Columbia........Administrative Law Editor
RAY E. BAKER, of Montana.................................Federal Legislation Editor
LEO A. HUARD, of New Hampshire.........................Note Editor
EDWIN R. FISCHER, of New York.........................Recent Decision Editor
R. VERNON RADCLIFFE, of Maryland....................Recent Decision Editor
GUIDO DE ROSSI, of Lima, Peru.............................Book Review Editor
JACOB D. HORNSTEIN, of Maryland........................Secretary

STAFF
MANSARD BULLOCH
Mississippi
LOUIS C. CHAPPELL
Michigan
LORENZO A. CHAVEZ
New Mexico
STANLEY CONROY
Montana
JAMES E. COTTER
Alabama
B. B. COYNE
District of Columbia
GERALD L. ENRIGHT
Washington

PHILIP FELDMAN
Massachusetts
ROBERT L. HEALD
Ohio
WILLIAM A. KEHOE, Jr.
District of Columbia
JOHN F. REILLY
Massachusetts
GEORGE E. ROSDEN
District of Columbia
LEON SOLIS-COHEN
Pennsylvania
MAURICE E. WRIGHT
Texas

ROBERT A. MAURER, Faculty Advisor

44
A SUSPENSION order is an order issued by an administrative agency revoking allotments, allocations, or permits to deal in or use commodities and suspending the future grant of similar permits for a definite period. Suspension orders are being issued in cases where an applicant has violated allocation, allotment, rationing, or manufacturing limitations. The issuance of these orders has been regulated by detailed directives which were promulgated by the War Production Board, the Office of Price Administration, and other agencies which issue suspension orders. The directives provide for hearings of a quasi-judicial nature before appointed hearing commissioners.

The exercise of the power to issue suspension orders is based on the Second War Powers Act of 1942, Title III, Sec. 2(a)(2)\(^1\) which provides in part as follows:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

And Sec. 2(a)(8):

> "The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

The President delegated these powers to the Office of Production Management by Executive Order 8875.\(^2\) After abolition of the Office of Production Management, the President delegated the powers by Executive Order 9040\(^3\) to the War Production Board. Concurrently, the powers were also delegated to the Office of Price Administration.\(^4\)

The right to conduct a lawfully established business can be impaired only by such restrictions as properly may be placed upon this right by valid exercise of power.\(^5\) If such legislation were to be enacted by states,
the basis for it probably would be found in police power. This legislation enacted by Congress stems from the general powers which are recognized as necessary for the maintenance of national existence,6 and in its operation must be analogous to police power regulations enacted for public safety.

Validity of Suspension Orders

The question whether administrative agencies are authorized to issue suspension orders has been the subject of heated controversy. Four United States District Courts have ruled against the validity of suspension orders as issued by the Office of Price Administration or the War Production Board, one of which was overruled.7 An article by Dean Pound in the American Bar Association Journal also contends that they are invalid.8 To this article there was a reply by the General Counsel of the Office of Price Administration.9 Affirming the constitutionality were a number of District Court decisions10 and several decisions of Circuit Courts of Appeals.11 The United States Supreme Court, in Steuart v. Bowles,12 also held valid a suspension order issued by the Office of Price Administration.

It would be erroneous to conclude that the United States Supreme Court by virtue of this decision has validated the issuance of each and every suspension order that is issued under powers derived from the Second War Powers Act13 by the Office of Price Administration or the War Production Board, for it must be noted that the opinion is carefully qualified in several respects. Thus, the Supreme Court said:14

6Freund, Police Power (1904) 3.
13Supra note 1.
"Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether suspension orders could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record." (Italics supplied.)

The Court thereby made relevant the question whether a suspension order is a penal or a remedial measure; but it clearly indicated that on this particular record the necessity for remedial action was evident. The Court said:

“If petitioner established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented. But we can make no such assumption here. The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation.”

The Supreme Court first found that the measure taken would have a remedial effect, and then determined that the intent was directed towards effecting such a remedy. This is shown by the following:

“None of the findings is challenged here. Taken at their face value, as they must be, they refute the suggestion that the order was based on considerations not relevant to the problem of allocation. They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a community against distribution which measured by rationing standards was inequitable, unfair, and inefficient.”

Remedial vs. Punitive Orders

To gain a clear understanding of the decision and to be able to apply its meaning to other cases, two thoughts should be clarified:

1. Why is the question whether suspension orders issued under the Second War Powers Act are remedial or penal the hub of the problem?
2. How can it be determined whether a suspension order is remedial or penal?

To answer the first question, the nature of suspension orders generally should be determined.

The legal nature of permits to deal in, purchase, use or sell controlled materials is controversial. At first sight, they appear to be licenses, for a license is a permit to do something that otherwise would be forbidden.

As distinguished from the Price Control Act,15 the Second War Powers Act does not specifically give the President authorization to establish a licensing system, and neither the administrative agencies nor the President have used the word "license". Nevertheless, allocations could be licenses without being called such. However, the Supreme Court, in the Steuart case,16 decided that the licensing system had not been invoked:

"Congress, however, did not adopt the licensing system when it came to rationing."

Although the Court does not consider the rationing regulations issued under the Second War Powers Act as a licensing system, the system used is similar in essence to licensing. Decisions and rules developed in regard to licenses and their revocation may therefore well find analogous application, provided further considerations support such an analogy.

There are many kinds of licenses.17 Licenses with regard to businesses or occupations which might be considered socially undesirable, such as gambling establishments, pool rooms, public houses, and similar trades, are called "mere licenses".18 When such businesses are thus regulated, they are in effect created by a license. There is no inherent right to conduct a business of this kind.19 The distinction is clearly made in Crumpton v. Montgomery:20

"It is universally recognized that the act of engaging in the sale of intoxicants may be wholly forbidden, and that a license to engage in the traffic in liquors is a privilege merely, revocable at the will of the superior granting power; that there is in it no element of property right or vested interest of any kind."

and in Reedhead v. Olympia:21

"... business so fraught with injurious results that it could not be classified as a nonprohibitable business, and that it is one of those businesses the allowing of which is a privilege, and not a right."

A different kind of license concerns the conduct of one of the ordi-

---

17It is obvious that one kind of license has nothing in common with the allocations here in question, namely licenses as to real property. Therefore, cases dealing with the grant of licenses for the use of navigable rivers have no bearing on this question, although they have been cited to support revocability of allocations. Sanitary District v. United States, 266 U. S. 405 (1925); Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251 (1915).
20177 Ala. 212, 59 So. 294, 301 (1912).
21122 Wash. 239, 210 Pac. 371 (1922).
nary businesses that have been established lawfully and in right-
ful exercise of the freedom of occupation. The right to conduct such
a business is a vested property right. As Freund expresses it:

"An established business or profession is in essential respects like a right of
property."

This has been recognized in the decision of the Supreme Court in the
case of Dent v. West Virginia:

"The interest, or, as it is sometimes termed, the estate acquired in them, that
is, the right to continue their prosecution, is often of great value to the pos-
sessors, and cannot be arbitrarily taken from them, any more than their real
or personal property can be thus taken."

We can conclude that the only kind of license which is akin to the
permits and allocations, which are the main subject under consideration
here, is the license of the kind which is issued with regard to the conduct
of a lawful business. This license is not revocable at will and the licensee
acquires a vested right in it. Such vested right can be taken in the
legitimate exercise of a police power by the States and war power by
the United States.

Should this form of license find an analogous application to the sus-
pension order here involved, the sole question would be whether the
power to "revoke" or "suspend" has been granted to the President by
Congress. This is a problem of statutory construction. The Second War
Powers Act limits long-established property rights, conveys broad ad-
ministrative powers and also restrains normal trade. All these criteria
point towards restrictive interpretation. On the other hand, emergency
war legislation must be construed liberally. A reasonable result must
be found.

Most decisions, and seemingly also that of the Supreme Court in the
Stewart case use as a criterion the question whether the power

State Board of Medical Examiners, 109 Minn. 360, 23 N. W. 1074 (1909).
23Freund, op. cit. supra note 6.
24129 U. S. 114 (1889).
25Interference with long-established property rights: MacMillan v. Railroad Commission,
51 F. (2d) 400 (W. D. Tex. 1931); conveyance of administrative powers: Woodruff v.
Beeland, 220 Ala. 652, 127 So. 235 (1930); 3 SUTHERLAND, STATUTORY CONSTRUCTION
(Horack ed. 1943) §§ 5503, 6603.
26Yakus v. United States, 321 U. S. 414 (1944); Roxford Knitting Co. v. Moore &
27Pound, Spurious Interpretation (1907) 7 Col. L. Rev. 379.
28See notes 7 and 10 supra.
29See note 12 supra.
which is to be implied is penal or remedial. A power to penalize will not be implied, 30 while a remedial power may be implied.

If the analogy to revocation of licenses is proper, the sole question for the courts would be whether the power exercised is remedial or penal. That the proper criterion is the remedial or penal nature of suspension orders, is strongly supported by a comparison with the principles governing the issuance of injunctions.

A suspension order is very much like an administrative action in the nature of an injunction, which is a typical example of a remedial measure. 31

An injunction can never issue as a penalty for past injury. 32 The United States Supreme Court has said: 33

"The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already."

The same stand has been taken recently by the Supreme Court in Hecht Co. v. Bowles, 34 in which case injunctive relief, sought by the Administrator against the Hecht Company, was denied. The United States Supreme Court in National Labor Relations Board v. Express Publishing Company 35 clearly expounded the same principles, and held that a violation does not justify the issuance of a blanket order restraining an employer from all unfair labor practices merely because the violation of one had been found. The same rule was recognized in Bowles v. May Hardwood Company. 36

Both the analogy to revocation of licenses and the principles governing the issuance of injunctions indicate the same solution. Remedial powers can be implied, but penal powers must be expressly given. Applying this result to the problem here treated, we must find that the Second War Powers Act grants by implication the power to issue remedial suspension orders. It does not grant the power to issue a penal suspension order.

Criteria

This leads us to the second question above stated, namely, "How can it be determined whether a suspension order is remedial or penal?"

3128 AM. JUR. Injunctions §§ 3, 5.
33Lacassagne v. Chapuia, 144 U. S. 119, 124 (1892).
34321 U. S. 321 (1944).
35312 U. S. 426 (1941).
36140 F. (2d) 914 (C. C. A. 6th, 1944).
It has been said that a suspension order is not penal because it takes no substantive rights. So in *Brown v. Wilemon*:\(^{37}\)

"Punishment or penalty in America consists in taking life, liberty, or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasoline, and to service cars."\(^{38}\)

But this decision should be contrasted to the United States Supreme Court decision in *Cummings v. Missouri*,\(^{38}\) where the Supreme Court said:

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined." (Italics supplied.)\(^{38}\)

A measure, in order to be recognized as remedial, must occur under certain "attending circumstances" and by virtue of certain "causes". It is suggested that it must also comply with three criteria:

1. It must be intended to achieve the purpose of the legislation.
2. It must be capable of achieving such purpose.
3. It must be a reasonable measure towards that end.

The purpose of the legislation here involved is the preservation of scarce materials. A suspension order is always capable of estopping waste of scarce materials in the suspended channel of merchandise. The question that will present itself most often will be whether, in the particular case, a suspension order is a reasonable means toward preservation of materials.

In *Farmers' State Bank v. Board*\(^{39}\) it was held that injunctions should never be granted except in a clear case of impending irreparable injury, which can only be averted by such injunction, and mere apprehension about future acts does not warrant injunction. The Supreme Court applied this principle in the *Hecht case*,\(^{40}\) in which nothing was shown to indicate that future violations might occur.

Just as much as this principle governs the issuance of injunctions, so does it apply to suspension orders. A suspension order cannot be a reasonable measure directed towards preservation of raw materials if the channel of trade which is to be suspended is not likely to be wasteful. This theory is the point of distinction between the two suspension order


\(^{38}\) *Wall*. 277, 320, 322 (U. S. 1867).


cases which were decided by Justice Bailey of the United States District Court for the District of Columbia. In the Simon Hardware case, Judge Bailey declared a suspension order unconstitutional because:

"[It] was not an allotment but a penalty imposed upon the plaintiffs for a violation of the regulations issued by the War Production Board."

In its memorandum upon motion for rehearing of the case, the court said:

"It is true that the power given to allocate and to reallocate materials may frequently bring about a like result, but where this power is used expressly for the purpose of imposing a penalty, I think that there is no justification for such action under the Act of Congress."

A short while later, however, Judge Bailey decided the Steuart case in the trial court and there held a suspension order valid; there, the order was not punishment for past conduct but a measure to prevent further violations. The difference in the two cases was based on the fact that there was a host of violations in the Steuart case and a clear finding that the suspended dealer would be unlikely to comply with the regulations in the future. When that case reached the Supreme Court, the Court laid much emphasis on the record because it showed innumerable violations of not one, but a number of regulations. Moreover, the record indicated incapacity to handle the volume of business in accordance with administrative regulations. These are the reasons why, in that case, the suspension order was considered to be remedial rather than penal.

Conclusion

We therefore conclude that the Steuart case does not give a blanket authority to issue suspension orders, but that such orders are only permissible where they are remedial; and that suspension orders are to be considered remedial only if they are intended to achieve the legislative purpose, namely—the preservation of scarce materials; are capable of doing so, and constitute a reasonable measure toward the achievement of that end.

GEORGE ERIC ROSDEN

---

42Ibid.
THE intent of the two bills is to all practical purposes identical—that is, improvement in federal administrative rule-making, the affordance of a more just and equitable hearing in connection with all procedures, and the widening of judicial review. It is noteworthy that in both bills these objectives are to be accomplished by a rather sweeping extension of the right to present evidence and to be fully heard in the disposition of cases or where a party or parties are or may be affected by rule-making. The right to be heard and to present evidence in an administrative proceeding, which may result in the issuance of administrative rules or orders, is now to be extended to all “interested parties”.

Rule-Making

Both of these bills clearly aim to secure a greater participation of the interested public in the processes of rule-making, except when United States military, naval or diplomatic functions are directly involved in the formulation of a rule.

General notice of proposed rule-making is required by the two bills, and such notice shall state the time, place, and nature of rule-making procedures, and provide a description of the subject and issues involved, as well as citation to the authority for a proposed rule. It should be noted, however, that these requirements shall apply only to substantive rules and not to mere statements of policy, or to rules of interpretation, organization, or administrative procedure. It is interesting to note, also, that no notice is required when it is impractical due to an unavoidable lack of time or other emergency, and full discretion is vested in the agency for a determination as to the existence of such emergency.

An interesting feature of both bills is the provision that “interested parties” shall be permitted to participate in rule-making, through “submission of written data or views, attendance at conferences, or consultations, or presentation of facts or arguments at informal hearings.” Agencies are to be authorized to adopt additional procedures, including the issuance of tentative rules in advance of their adoption in order to permit fuller criticism by interested parties.


\(^2\) 78th Cong., 2d Sess. (1944).
A very significant and far-reaching provision identical in both bills is that which requires that, in all cases where existing statutes provide that rules shall be issued only after a hearing, the "full hearing" requirements governing adjudication must be strictly observed. The full significance of these requirements can be appreciated only by a study of adjudicative procedures which are set forth in Sections 6 and 7 of both bills.

**Adjudication**

The Sumners Bill and the Smith Bill both require that prior to formal adjudication of cases, each agency shall afford all interested parties the right and benefit of informal procedure looking to settlement of issues, by consent, through argument or adjustments. Failing that, then formal and full hearing and decision are required.

In general, the formal provisions which are to govern administrative adjudication, as proposed in these bills, are made to apply whenever a statute provides that "the rights, duties, obligations, privileges, benefits or other legal relations of any person" are to be determined only after opportunity is given for an administrative hearing. These proposed formal procedures seem therefore not to be intended to apply when neither the Constitution nor the statutes of Congress require a hearing.

Both bills have provisions governing officers who preside at hearings, though they vary somewhat as to the names, status and tenure to be given to such officers. However, the hearing powers conferred on such officers are substantially the same, set out in great detail.

The proposed provisions governing evidence before administrative agencies, in these procedures, are interesting and important. Both bills provide that:

"No sanction, prohibition, or requirement shall be imposed or grant, permission, or benefit withheld in whole or in part, except upon relevant evidence which on the whole record the agency shall find competent, credible, and substantial."

In substance, the rules of evidence which prevail in equity proceedings, are made requisite as to matters of proof, decision, and review of all questions of fact. The bills further specify that "every party shall have the right of cross-examination and the submission of rebuttal evidence."

Both bills state that the transcript of testimony, together with the various pleadings, exceptions, motions, exhibits admitted, requests and papers filed by both parties (excluding separately presented briefs and arguments of law), "shall constitute the complete and exclusive record and be made available to all the parties." These items are readily recognized
as appropriate to administrative adjudicative procedure. However, their application to rule-making procedure, and even to hearings in such procedure, are quite novel and furnish grounds for much speculation as to their effect. This observation is equally applicable to the requirements of both bills (Section 7 (a) ) that the parties shall be afforded adequate opportunity for the submission of briefs, proposed findings and conclusions, and oral argument. The bills further provide that “all issues of fact shall be considered and determined exclusively upon the record required to be made in conformity with Section 6.” Finally, both bills require that “all final decisions and determinations”, whether made initially or upon review by the ultimate authority within the agency, “shall be stated in writing and accompanied by a statement of reasons, findings of fact, and conclusions of law upon all relevant issues raised including matters of administrative discretion as well as of law or fact.”

In one of the concluding sections of each bill (Section 10), there is a specific requirement that has important bearing upon internal administrative organization. In all formal hearing procedures there shall be a clear separation of all investigative and prosecuting functions from those of decision or review of cases. The agency involved is required to delegate the investigative and prosecuting functions to designated responsible officers or members, and they shall have no part in the decision or review of such cases. However, these provisions are not to be taken as disqualifying hearing and decision officers for duty in respect to informal settlement or adjustment, which may precede formal hearing procedure.

Judicial Review

Both of the bills under consideration here open discussion of judicial review with generalizations. Administrative rules are made reviewable when applied to any person, situation, or subject, and also to their threatened application. Any administrative act or order is made reviewable, whether declaratory or negative in form or substance. When such act or order directs action, assesses penalties, prohibits conduct, affects rights or property, or denies any right, remedy, privilege, permission, money, or benefit claimed under the Constitution, or under the statutes or under other law; it is made judicially reviewable, provided the act or order is final. To this generalization there is an important exception. The Sumners Bill excepts any matter “expressly committed by law to absolute executive discretion”. The Smith Bill provides that the above-listed acts or orders shall be subject to review, “except to the extent
that any matter of fact is both substantially in dispute and expressly committed by law to absolute executive discretion."

It is notable that both bills would guarantee the right of review to any party adversely affected by any administrative rule as well as by any final order, and the reviewing court is vested with plenary authority "to render such decision and grant such relief as right and justice may demand." (Section 9)

The Smith Bill and the Sumners Bill are in complete accord in the recognition of existing relevant statutory forms of action, including declaratory judgment procedure.

Provisions are incorporated in both bills for the disposition of cases by the courts in instances where there has been mistake as to the proper remedy for the specific relief sought, or as to the court which has competent jurisdiction. The bills provide that timely amendments shall be permitted and that speedy transmittal of the case shall be made to the court having competent jurisdiction.

The possible significance of these legislative proposals for judicial review are further emphasized by a provision which is found under the heading "Scope of Review" and which follows an enumeration of the well recognized grounds such as arbitrary and capricious action, violation of constitutional rights, excess of statutory authority, et cetera. That provision in both bills is as follows: "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which administrative hearing", and to this the Smith Bill adds "and in any case such court shall try and determine de novo the facts as to the failure of any agency or agent thereof to comply with the provisions of this Act."

As a general conclusion, one can readily recognize in these various proposed rules of uniformity governing rule-making procedure, adjudicative procedure, and judicial review, the effect of the Supreme Court's decisions in Morgan v. United States, Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, and other cases of a similar nature. How significant these legislative proposals may prove to be in their extension to many types of administrative procedure in which they are not now essential requisites, only their actual operation can make clear. This is particularly true as to the making of rules, when, by statute they may be issued only after a hearing.

JAMES C. TOOMEY
JAMES E. COTTER

---

*298 U. S. 468 (1936), 304 U. S. 1, rehearing denied 304 U. S. 23 (1938).*
*301 U. S. 292 (1937).*
FEDERAL LEGISLATION

"ACCEPTING" THE BRETON WOODS AGREEMENTS

FORTY-FOUR United and Associated Nations, through their representatives, met at Bretton Woods, New Hampshire, in July of this year at a United Nations Monetary and Financial Conference. The Conference, meeting at the invitation of President Roosevelt, was "... to formulate definite proposals for an International Monetary Fund

The term "accepting" rather than "ratifying" or "adopting" is used because that is the term used in the text of U. S. Treas., "INTERNATIONAL MONETARY FUND AND INTERNATIONAL RECONSTRUCTION AND DEVELOPMENT", Articles of Agreement, United Nations Monetary and Financial Conference, July 1944. The Fund Agreement in Article II, Section 1, designates as original members of the Fund those countries who "accept membership" in a certain manner; in Article XX, Section 2(a) of the Fund Agreement provision is made for each government to indicate "that it has accepted this Agreement". Identical language is contained in Article II, Section 1(a) and Article XI, Section 2(a) of the Bank Agreement.

This article is limited to a consideration of possible media for accepting the Agreements, excluding all opinion as to political or economic desirability of their acceptance.

There are two Bretton Woods Agreements: (1) THE INTERNATIONAL MONETARY FUND and (2) THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT. It is not required that a country accept both Agreements (Bank Agreement, Art. II, § 1(a)). Membership in the Fund alone is possible, but it is a prerequisite as a member of the Bank to be a member of the Fund. However, the two institutions are so closely related as to be interdependent. "The Bank and the Fund are closely related to each other both in their concept and in their organization. ... It is ... notable in Article I [of both Agreements] that the purposes are closely related and, in fact, somewhat overlapping. More important than these interconnections, however, is the fact that the Bank is to a considerable extent dependent on the Fund, and the Fund on the Bank, from the point of view of the economic usefulness of either." Dulles, Bretton Woods Monetary Conference—Plans and Achievements, (1944) 20 FOREIGN POLICY REP. 138, 146. It therefore seems so unlikely that the United States would become a member of the Fund without also becoming a member of the Bank, that discussion here will be limited to a consideration of the acceptance of the two Agreements as one—i.e., by the same media and at the same time. It is conceded that there may be the legal possibility of accepting one Agreement by one media and the other Agreement by a different media.

Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Columbia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, the French Delegation, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Poland, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, and Yugoslavia. In addition, the Danish Minister to the United States was present in his personal capacity: INTERNATIONAL MONETARY FUND AND INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, cited supra, note 1 at 86.
and an International Bank for Reconstruction and Development."4

Such proposals, in the form of Agreements, were drawn up and adopted by the Conference. They "... have been submitted by the Conference for consideration by the participating governments."5

The purposes of the Fund are: "(1) To promote international monetary cooperation ... (2) To facilitate the expansion and balanced growth of international trade ... (3) To promote exchange stability; (4) To assist in the establishment of a multilateral system of payments ... (5) To give confidence to members by making the Fund's resources available to them ... (6) To shorten the duration and lessen the degree of disequilibrium in the international balances of payments ..."6 The purposes of the Bank are: (1) to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes; (2) to promote private foreign investment by means of guarantees or participation, and, when private capital is not available on reasonable terms, to supplement it by providing from its own and other resources; (3) to promote the long-range balanced growth of international trade; (4) to arrange for loans so that the more urgent projects will be dealt with first; (5) to conduct its operations with due regard to assisting transition from war to peacetime economy.7

"Reduced to the simplest terms, the Fund project tries to knit together nations much as states or provinces within a country are bound together by a single price structure and a money which is freely interchangeable. The Bank project is a carefully guarded plan to permit a limited amount of pooling of capital resources so that production may revive throughout member nations."8

The terms of the Fund Agreement9 which provide for its entering into force, i.e., taking effect, are contained in:

U.S. Treasury, Articles of Agreement, International Monetary Fund and International Bank for Reconstruction and Development (1944) II.

Ibid.

Ibid. at 1.

Ibid. at 51.

Dulles, cited supra, note 2 at 139. For more elaborate treatment as to the purposes and operations of the Agreements; 90 Cong. Rec., Sept. 13, 1944, at 7845-8; Dulles, cited supra note 2; Goldenweiser and Bourneuf, Bretton Woods Agreements (Sept. 1944) Federal Reserve Bulletin 1.

Fund Agreements, op. cit. supra note 4 at 36. The language in the comparable provision of the Bank Agreement (Art. XI, Sec. 1) ap. cit. supra note 4 at 81, is identical with that of the Fund Agreement, except that in the Fund Agreement the words "whose minimum subscriptions comprise not less than sixty-five percent of the total subscriptions ..." are substituted for the words "having sixty-five percent of the total of the quotas ...": Fund and Bank Agreements, supra.
"Article XX Final Provisions

"Section 1. Entry into force.—This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

"Sec. 2. Signature.—(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."

From indications other than the text of the Agreements themselves it is evident that, in the United States, acceptance is to be accomplished by legislative approval. But since the Agreements do not, in terms, require such approval the question of competency of possible media for acceptance arises. The form the legislative approval will take also requires consideration.

It has by now become well established that the United States may, by the medium of the "treaty-making power" or the medium of the executive agreement, become a party to, and therefore bound by, an international agreement. Either form of agreement, in its proper sphere, is competent to bind the United States. But it does not necessarily follow that the two may be used interchangeably, or that, in a particular instance, the medium employed may be selected solely


The term "executive agreement" is often employed to connote international agreements concluded by the President alone; it is also employed to include, in addition to those agreements concluded by the President alone, agreements entered into pursuant to Congressional authority, but which are not submitted for the approval of two-thirds of a quorum of the Senate. The term is used in this article in the latter sense and includes both types. For a more detailed classification of executive agreements see 5 Hackworth, Digest of International Law (1940) 390; Catudal, Executive Agreements: A Supplement to the Treaty-Making Procedure (1942), 10 Geo. Wash. L. Rev. 653.

28Wallace McClure says there are "well over 1,250 separate" executive agreements to which the United States has become a party (by Feb. 22, 1941). McClure, International Executive Agreements (1941) xii.
because of its political or practical desirability.\textsuperscript{14}

The Bretton Woods Agreements will "enter into force" only when signed by a certain number of governments and only when each of those governments certifies, by means of an instrument, "... that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."\textsuperscript{15} And no government may become a member of the Agreement until it deposits the certifying instrument.\textsuperscript{16} It would seem, then, that the United States could accept the Agreement by a medium competent to bind the United States in so far as its constitutional and municipal law are concerned, but incompetent to make it a member of the Fund, in the terms of the Agreement. It could accept the Agreement but fail to take the "steps" necessary to enable it to carry out the obligations incurred by acceptance.\textsuperscript{17} Hence, the problem of acceptance is two-fold: how is the United States to accept the Agreements "in accordance with its law"; and what steps must be taken to enable it to carry out its obligations? Narrowing the points still further by conceding the obvious (\textit{i.e.}, a treaty would be competent for acceptance,

\textsuperscript{14}Henry S. Fraser has written, "... if the subject matter of the executive agreement corresponds with or is analogous to that which was ordinarily cast in treaty form by the nations of the world when the Constitution was adopted, it must still be cast in treaty form. If this be not so, the clause of the Constitution relating to the making of treaties would cease to have any force, and the President would have complete discretion to employ either a treaty or an executive agreement, whichever would be more pleasing. ..." Sen. Doc. No. 244, 78th Cong., 2nd Sess. (1944) 22.

\textsuperscript{15}\textsc{Fund Agreement}, Art. XX, § 2(a) \textit{op. cit. supra}, note 4 at 36; \textsc{Bank Agreement}, Art. XI, § 2(a) \textit{op. cit. supra}, note 4 at 81. From this point on, throughout the text and footnotes of this article, when reference is made to language which appears in both Agreements the text will mention only the word "Fund". Citations to such language in both Agreements will be supplied in the footnotes.

\textsuperscript{16}\textit{Ibid.}

\textsuperscript{17}The greatest obligation incurred is that of paying the subscription (Fund Agreement, Art. III, § 3 \textit{op. cit. supra}, note 4 at 3; Bank Agreement, Art. II, § 5 \textit{op. cit. supra}, note 4 at 53). For the United States, the "steps" to be taken would therefore be an appropriation of money by Congress. U. S. Const., Art. I, § 9. There are other obligations: to furnish information (Fund Agreement, \textit{supra}; Art. VIII, § 5 \textit{op. cit. supra}, note 4 at 17); general obligations (Fund Agreement, Art. VIII \textit{supra} and throughout both Agreements); pay a share of administrative costs [Fund Agreement, Art. XX, § 2(d) \textit{op. cit. supra}, note 4 at 37; Bank Agreement, Art. XI, § 2(d) \textit{op. cit. supra}, note 4 at 82]. These obligations, however, are self-executing. \textit{See} Henry, \textit{When is a Treaty Self-Executing?} (1929) 27 Mich. L. Rev. 776. Most of them, in fact, are not susceptible to any action by the Members prior to the time the Agreements enter into force. Hence, "steps to be taken", in accordance with the terms of the Agreements, and on which depends the entering into force of the Agreements, consist of paying money.
and payment may be made only by congressional appropriation), the questions become: may the Agreements be accepted by executive agreement; and, regardless of how they are accepted, what would be the legal effect of accepting the Agreements but failing to make the implementing appropriation?

Accepting “in accordance with its law”

It is conceded that a treaty would be a competent medium for accepting the Agreements. “Except with respect to subjects expressly or impliedly excluded by the Constitution, the Executive and the Senate can make treaties relating to all those matters with respect to which nations may deem it to be proper to contract.” Usage through the years would show that nations may contract in regard to “international monetary cooperation”, “international trade”, “exchange stability”, “reconstruction and development of territories”, “private foreign investment” and “international loans”. The “supreme law of the land” and “necessary and proper” clauses of the Constitution would indicate that, since these are considered proper subjects of international agreements, they may be the bases for the exercise of the treaty-making power.

The competency of the executive agreement, however, is not so clear. The determination of its competency as a medium for accepting the Bretton Woods Agreements is made difficult by the sparsity of judicial pronouncements as to the scope of that type of agreement. Consequently, it seems appropriate, in addition to reviewing the decisions, to con-

But see Divan and Feidler, Extent of the Treaty-Making Power (1939) 28 GEORGETOWN L. J. 184, 192, for suggestion that treaties should be competent to appropriate money.

Nielson, Our Methods of Giving Effect to International Law and Treaties (1934) 20 A. B. A. J. 503, 509. This language succinctly expresses the law as laid down by the Supreme Court. See Missouri v. Holland, 252 U. S. 416 (1920); De Geofroy v. Riggs, 133 U. S. 258 (1890); Holmes v. Jennison, 14 PET. 540 (U. S. 1840).

“From 1789 to 1939 the United States entered into nearly two thousand international instruments. . . .” Wright, The United States and International Agreements (1944) 38 AM. J. INT. L. 341, 344.

Terms employed in Article I, Fund Agreement, to indicate the purposes of the Agreement.

Terms employed in Article I, Bank Agreement, to indicate the purposes of the Agreement.

U. S. Const. Art. VI.


For discussion of treaty-making power, see Hyde, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1921); Boyd, The Expanding Treaty Power (1928) 6 N. C. L. REV. 428; Divan and Feidler, cited supra, note 18 at 184; Fraser, cited supra, note 14 at 1; Potter, Inhibitions Upon the Treaty-Making Power of the United States (1934) 28 AM. J. INT. L. 456; Wright, cited supra, note 20.
Consider the uses that have been made of the executive agreement with a view to (1) finding the authority for such agreements, (2) subject matter involved, (3) effect—i.e., whether internal or external in its operation.

The Supreme Court, in Field v. Clark,\textsuperscript{26} upheld the Tariff Act of 1890 as a "not unconstitutional" delegation of treaty-making power.\textsuperscript{27} An agreement entered into under the authority of the Tariff Act of 1897 was upheld as "a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President".\textsuperscript{28} But the Act of 1890\textsuperscript{29} merely authorized the President, upon finding of appropriate facts, to suspend the operation of the tariff rates established by the Act. The Act of 1897\textsuperscript{30} authorized the President to conclude reciprocal trade agreements with other countries and, upon doing so, to suspend the operation of the tariff rates established by the Act. But in upholding the agreement, the Court was only holding it reviewable within the meaning of Section 5 of the Circuit Court of Appeals Act of 1891.\textsuperscript{31} These decisions, then, validate congressionally authorized executive agreements. But only a limited scope is spelled out: upon a finding of fact the President may enter into "international compacts" on matters falling within statutory limits.

In United States v. Curtiss-Wright Corp.,\textsuperscript{32} the Court, in upholding the delegation of certain foreign relations powers to the President, held "the power to make such international agreements as do not constitute treaties in the constitutional sense" to be a power "inherently inseparable from the conception of nationality".\textsuperscript{33} Thus the power seems limited to matters "inherently inseparable from the conception of nationality".\textsuperscript{34} It must be conceded that no decision has specifically ruled on any executive agreement which might be considered similar to the Bretton Woods Agreements.

In United States v. Belmont\textsuperscript{35} and United States v. Pink,\textsuperscript{36} the Court

---

\textsuperscript{26}143 U. S. 649 (1892).
\textsuperscript{27}Id. at 694.
\textsuperscript{28}Altman and Co. v. United States, 224 U. S. 583, 601 (1912).
\textsuperscript{29}26 Stat. 612 (1890).
\textsuperscript{30}30 Stat. 203 (1897).
\textsuperscript{31}26 Stat. 826 (1891).
\textsuperscript{32}299 U. S. 304 (1936).
\textsuperscript{33}Id. at 318.
\textsuperscript{34}But see Quarles, The Federal Government As to Foreign Affairs, Are Its Powers Inherent as Distinguished From Delegated? (1944) 32 GEORGETOWN L. J. 375.
\textsuperscript{35}301 U. S. 324 (1937).
ruled on the validity of agreements entered into without congressional authority. In both cases the Litvinov Agreement\textsuperscript{37} of 1933 was upheld. Mr. Justice Sutherland, speaking for the Court in the \textit{Belmont} case, held the President’s power in his position as the government’s sole organ in external affairs to be sufficient to authorize him to enter into such agreements:

“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . Governmental power over external affairs is not disturbed, but is rested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.”\textsuperscript{38}

In the \textit{Pink} case, the Court held that the political department of the government has the power to recognize other governments and to determine how recognition may be accomplished. Therefore, its (the political department’s) choice of recognizing Soviet Russia and accepting assignment in one agreement was beyond the review by the Court:

“It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.”\textsuperscript{39}

Mr. Justice Frankfurter, in a concurring opinion, declined to attach the legality of the assignment to the legality of the political recognition: “That the President’s control of foreign relations includes the settlement of claims is indisputable.”\textsuperscript{40} “That the power to establish

\textsuperscript{37}United States v. Belmont, 301 U. S. 324, 330 (1937).
\textsuperscript{38}United States v. Pink, 315 U. S. 203, 230 (1942).
\textsuperscript{39}Id. at 240.
such normal relations with a foreign country belongs to the President is equally indisputable."\(^{41}\)

Thus, the Court declined to extend the scope of the executive agreement beyond matters inherent in the President's power as representative in foreign affairs—i.e., recognition of a country and settlement of claims. The Bretton Woods Agreements unquestionably do not fall within such limits.

Authority to enter into executive agreements derives from the Constitution: (1) in that the Constitution does not specifically recite that all international agreements must be made by the President by and with the consent and advice of the Senate,\(^{42}\) but merely recites that the President "\textit{shall have power ... to make treaties ...}" (Italics supplied);\(^ {43} \) (2) in that the Constitution grants the President powers over foreign affairs,\(^{44}\) the treaty-making power,\(^{45}\) and powers as commander-in-chief;\(^ {46} \) (3) in so far as the subject matters of those agreements constitute matters within the President's powers as granted by the Constitution.\(^ {47} \) The authority for agreements concluded in accordance with congressional authority\(^{48}\) derives from the powers of Congress as provided by the Constitution\(^ {49} \) and as delegated by Congress, and are inhibited only by those provisions.

\(^{41}\) Id. at 241.

\(^{42}\) Catudal, supra, note 12, discusses the view.


\(^{44}\) U. S. Const. Art. II, § 2, 3.

\(^{45}\) U. S. Const. Art. II, § 2. The argument that authority of the President to enter into executive agreements derives from these Constitutional powers is made by: Barnett, \textit{International Agreements Without the Advice and Consent of the Senate -II-} (1905) 15 \textit{Yale} L. J. 63; Catudal, cited supra, note 12 at 653; Fraser, cited supra, note 14; Wright, cited supra, note 20; Note, \textit{Executive Agreements and the Treaty Power} (1942) 42 \textit{Col. L. Rev.} 831, 835, arguing partially from \textit{United States v. Curtiss Wright Corp.}, 299 U. S. 304, 319-20, cited supra, note 32, where Mr. Justice Sutherland, speaking for the Court, said, "... we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations ... the President alone has the power to speak or listen as a representative of the nation ... he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'"

\(^{46}\) U. S. Const. Art. II.

\(^{47}\) See Catudal, cited supra, note 12, for discussion of types of congressional authority.

\(^{48}\) U. S. Const. Art. I.
It is submitted that none of the powers under which the President without congressional authority enters into executive agreements is the paramount power under which acceptance of the Bretton Woods Agreements would be effected. However, the Agreements do seem to involve the exercise of powers granted to Congress—i.e., the power to regulate foreign commerce and money,50 the power to pass "... laws ... necessary and proper for carrying into execution ... all ... powers vested ... in the government of the United States ...",50 and to make appropriations.51

It is difficult to identify an executive agreement by the subject matter involved. It has been said that as to the subject matter the two (treaties and executive agreements) are indistinguishable.52 Nevertheless, the subject matter which has been handled by executive agreement may be indicated.53 They include "commercial and tariff relations, consular relations, the protection of patents, trade marks and copyrights, postal arrangements, navigation, radio and aviation agreements",54 agreements pertaining to the quarantine inspection of vessels, exemption of pleasure yachts from navigation dues, loadline certificates, issuance of licenses to pilots, admission of civil aircraft, waiver of visa fees, debt funding, exchange of information concerning narcotic drugs, trade marks, and copyrights.55

In 1936, under the authority of the Gold Reserve Act of 1934,56 Secretary Morgenthau concluded an agreement with Great Britain and France (later Belgium, Switzerland, and the Netherlands

---

52 Mathews, The Joint Resolution Method (1938) 32 Am. J. INT. L. 349, 350. "It may be pointed out ... that the instances in which the purposes of international negotiation have been accomplished by means of executive agreements, indicate that it is not always easy to distinguish them from treaties in respect to the nature and importance of their subject matter. From this fact also it is deducible that these two forms of international agreement may, on occasion, constitute alternative methods of arriving at the same object."
53 For a full discussion of uses made of executive agreements see: 5 Hackworth, op. cit. supra note 12 at 391-433; Fraser, cited supra note 14; McClure contends: "... the President, acting with Congress, where simple majorities prevail, can, in the matter of international acts, legally accomplish under the Constitution anything that can be legally accomplished by the treaty-making power as specifically defined in the Constitution." McClure, op. cit. supra note 13, at 694. However, his position has been attacked as too all-inclusive.
54 Fraser, supra; Borchard, Book Review (1942) 42 Col. L. REV. 887, 889; Nielson, Book Review (1941) 35 Am. J. INT. L. 576.
55 Catudal, cited supra note 12 at 665.
their adherence) "with respect to international monetary relations."67

It was hoped that the Agreement would bring about "exchange equalization and stabilization".68 The Agreement is related in purpose and subject matter to the Bretton Woods Agreements and would constitute precedent for accepting those Agreements under congressional authority.

It has been contended69 that a further distinction between the two types of agreements may be drawn on the basis of the type of operation that the agreement effects (i.e., that executive agreements are limited to external relations which have a minimum of internal operations).

"Under both of these theories [first, that prior to the Constitution the states wielded the compact power as a unit, that the Constitution conveyed only the powers held by the states, that in the President, by virtue of his being the sole organ of foreign affairs, reclined this power; second, that all nations, to be sovereign, must have a compact power and that the President received it as part of his powers over foreign affairs], it is arguable that the compact power is limited to external relations which have a minimum of internal operation. This is so under the first theory because all internal control was distributed by the Constitution, and could not come from outside that document. This would also appear to be true under the second theory, which implies the compact power from the Constitution. As a matter of construction that power must be reconciled with the elaborate system of checks and balances which prevents the President from legislating on domestic matters by himself, and with the specific clauses governing the treaty power. The only function which remains for a compact power is its use to regulate relations which are wholly external. . . ."

"Strong support also is lent to the view that the compact power is so limited by the consideration that without such a limitation the President solely by an agreement with a foreign state could make laws over a broad field, not even limited by the federal-state division of power. The Chief Executive, in making such agreements has alone, or along with the courts if the subject matter is not political, the responsibility and obligation of examining the extent of the internal operation of his agreement."70

Though this distinction is difficult to apply in advance to agreements as technical as those concluded at Bretton Woods, it would seem to follow that by virtue of their being highly technical and complicated, their effects cannot be categorically confined to being either internal or external in their operations.

The time sequence of congressionally authorized agreements—i.e., whether drawn up in consequence of existing statutory approval or drawn

68. Ibid.
69. Note, Executive Agreements and the Treaty Power (1942) Col. L Rev. 836. The contention is confined to agreements entered into by the executive without Congressional authority.
70. Id. at 838-9.
up prior to statutory approval—is not without significance. The more frequent sequence is that agreements are entered into in accordance with an existing statutory mandate. But there are precedents for the reverse sequence. The Reciprocity Agreement of 1911 with Canada,\(^6\) which failed of passage because the Canadian Parliament failed to enact implementing legislation, provided that it was to be made effective by legislation of the Congress and the Canadian Parliament. Similarly, the agreement with Canada for the development of the St. Lawrence Seaway Project\(^6\) provides that it shall become effective by the passage of concurrent legislation by the legislatures of the two countries. The limited use of this type of agreement indicates a desire to use it only for those agreements which, by their nature, require implementing legislation.

There are other suggestions as to the proper use of the executive agreement. Treaties deal with "more permanent matters";\(^6\) executive agreements (protocols, provisional agreements, *modi vivendi*) deal with more "transitory affairs". There seems to be no objection to acceptance by executive agreement because of its being multilateral rather than bilateral, the United States having accepted membership in the International Hydrographic Bureau,\(^6\) the International Statistical Bureau\(^6\) and the International Labor Organization\(^6\) by that method.\(^6\)

Summarizing, the Court has validated executive agreements, but has not defined their limits. Executive agreements have been entered into by the President, acting alone, by virtue of his treaty-making, for-

---

\(^6\)For an account of this attempt to conclude an agreement see U. S. TARIFF COMM. Reciprocity and Commercial Treaties 1919 at 363.

\(^6\)The text of the agreement is printed in 4 U. S. DEPT. OF STATE BULLETIN (March 22, 1941) 307. Bills to effectuate it have been introduced in the seventy-seventh [H. R. 5993, 77th Cong., 1st Sess. (1941)] and seventy-eighth [S. 1385, 78th Cong., 1st Sess. (1943)] Congresses. A subcommittee of the Senate Commerce Committee is currently conducting hearings in order to determine whether this matter should be handled as a treaty or as an executive agreement.


\(^6\)It has been urged that the United States gain membership in the League of Nations and the Permanent Court of International Justice by congressionally authorized agreement. Mathews, cited supra note 52, at 351.
eign affairs, or commander-in-chief powers. Those powers do not authorize acceptance of the Bretton Woods Agreements by the President alone. Congress’ powers would seem to justify an agreement entered into with congressional authority. Subject matter is inconclusive, but there is precedent for monetary agreements. The Agreements are not susceptible to acceptance by the President since their effect may not be classified as wholly external. The multilateral character of the Agreements constitutes no barrier to their acceptance by executive agreement. In specific answer to the first of the original questions: (1) there is no legal power or authority for accepting the Bretton Woods Agreement by the President acting alone; (2) but acceptance in pursuance of congressional authority would constitute a valid exercise of congressional powers:

Taking “all steps necessary to ... carry out its obligations.”

The second question, “regardless of how they are accepted, what would be the legal effect of accepting the Agreements but failing to make the implementing appropriation,” is less difficult. Since it has been seen that acceptance may be made in accordance with congressional authority we need only consider the effect of acceptance by treaty and failure to appropriate money. This is so because if Congress may and does authorize acceptance it may be assumed appropriations will be forthcoming. The question thus hinges on the effect of a non-self-executing treaty in the absence of implementing legislation. Is the treaty binding upon acceptance “in accordance with its (United States) law” or is it operative only if and when the steps are taken? The answer would seem to lie in the famous opinion by Chief Justice Marshall:68

“A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is intra-territorial (sic); but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.”

The opinion has been cited many times and is considered a classic.

In view of the power of Congress to “make all laws which shall be necessary and proper for carrying into execution ... all ... powers vested by this Constitution in the Government of the United States” (Italics supplied) this opinion would seem to remove all doubt. An opinion in a lower federal court applies even more specifically to agreements calling for appropriations:

“A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such.” (Italics supplied)

This opinion, though not binding, is persuasive and has often been cited with approval. The law of Great Britain, also suggestive, is in accord: “When the fulfillment of the treaty involves an actual or contingent charge upon the public funds, the consent of Parliament is necessary to sanction the payment of public money.” It seems indisputable that “all steps necessary to enable it to carry out all its obligations” is not a self-executing provision, but requires congressional appropriation.

**Conclusion**

Applying both acceptance provisions ("accepting" and taking the "steps") it may be concluded that acceptance of the Bretton Woods Agreements may be accomplished (1) by treaty, or (2) by executive agreement entered into in accordance with congressional authority; and that, in either event, failure to make appropriations would be fatal to the Agreements.

RICHARD H. LANSDALE, JR.

---

NOTES

INSURANCE: A SURVEY OF STATE RATE REGULATION

THE Supreme Court has recently decided that the business of insurance is interstate commerce.¹ Since Paul v. Virginia² in 1869, an unbroken line of insurance cases³ have supported the proposition that insurance is not commerce, either intrastate or interstate; therefore, it is not surprising that the recent action of the Court has stimulated vigorous debate in the House of Representatives and the Senate. Members of the Bar and all those connected with the business of insurance have contributed to the widespread discussion of the case; sensational articles in the daily press have brought the matter to the confused attention of the public. Insurance is a matter of vital interest to the entire nation, intimately affecting the life of most of our population; and any decision having the effect of placing it under federal control should therefore be carefully examined, as should any legislation designed to nullify such a decision.

The case of United States v. South-Eastern Underwriters Association et al.⁴ arose in November 1942 when a grand jury in the Northern District of Georgia returned an indictment against 198 corporations and 27 individuals, charging these corporations and individuals with violation of Sections 1 and 2 of the Sherman Antitrust Act.⁵ The defend-

³Wall. 168 (U. S. 1869).
⁵See note 1 supra.
⁶"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1940).
The Supreme Court, realizing the importance of the insurance business to the economy of the United States, deliberated nearly five months before reaching a decision. The majority opinion held the business of insurance to be commerce, subject to the provisions of the Sherman Act and within the jurisdiction of the district court. Attention was focused on the commanding position that insurance occupies in the commercial affairs of the United States, and great stress was laid on the tremendous growth of insurance during the past 75 years.

The opinion further demonstrates that, in Paul v. Virginia and all cases following it, the point at issue was the determination of the validity and applicability of a state statute in the absence of any federal regulation. Mr. Justice Black, speaking for the majority, states: "In all cases in which the Court has relied upon the proposition that 'the business of insurance is not commerce,' its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business."

All these prior cases show the insurance companies clamoring for federal protection from unreasonable state laws, pleading the interstate character of the insurance business as grounds for federal jurisdiction and control. It is evident to all people possessed of a modicum of common sense that the business of insurance as it exists today is in fact interstate commerce.

There were, therefore, strong grounds for the belief that the present...
Court would take cognizance of this situation and declare insurance to be within the term "commerce" as included in the commerce clause. Action intended to forestall and nullify this decision was then initiated in both branches of Congress. While the appeal in the South-Eastern case was pending, three bills\textsuperscript{13} were introduced to the effect "That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States." This is the form of the bill which now stands an excellent chance of becoming law, since it has already been passed by the House and reported favorably by the Committee on the Judiciary of the Senate.\textsuperscript{14} This legislation has already been the subject of an article in this Journal.\textsuperscript{15} The position was taken then that this bill was unjustifiable since it gave the insurance business a blanket exemption from the anti-trust laws. This position is still adhered to, perhaps even more strongly than before.

The testimony at the joint hearings before the subcommittees of the Committees on the Judiciary clearly indicates two lines of argument relied upon by the advocates of the bill.\textsuperscript{16} These are: (1) the business of insurance has always been regulated by the states; (2) this regulation has been complete and effective. The first position is acceptable, although it would be more nearly true if restated in this fashion: the only control ever exercised over the insurance business has been exercised by the states. The second proposition is, however, susceptible of investigation; and it is the purpose of this note to conduct such an investigation. The following pages are devoted to a determination of the quantum of control exercised by the states over the rate-making aspect of insurance. Particular attention is devoted to fire insurance rate-making since this is the basis of the problem and forms the cornerstone of the objections to federal regulation raised by the insurance companies. This determination is based on an examination and evaluation of the appropriate statutes of the various states and of the cases decided under them.

The process of making fire insurance rates is controlled by means of

\textsuperscript{14}U. S. House of Rep. Legislative Calendar (Committee on the Judiciary) 78th Cong., 2d Sess. No. 33 (1944) 49.
\textsuperscript{15}Note (1943) 32 Georgetown L. J. 66.
\textsuperscript{16}Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, and H. R. 3270, 78th Cong., 1st Sess. (1943) 2, 111, 151. In subsequent footnotes this hearing will be referred to as Joint Hearing.
two widely different types of statutes. The first type is the anti-combination statute designed to prohibit cooperation and to provide free competition among the companies. The second type is the rate-regulating statute which establishes a uniform rate throughout the state and permits or requires cooperation and combination by the companies. At first glance, these two categories of statutory enactments appear to be mutually exclusive, but they can and frequently do exist together. In such cases, the inherent contradictions are reconciled by specific exceptions in one or the other of the statutes.

In an effort to present this analysis systematically, the states have been grouped according to the type of legislation they employ to control the making of insurance rates. All the states can be placed in one of the four following groups:

I. States having anti-combination statutes only.
   a. Anti-combination statutes directed at insurance.
   b. General antitrust provision.
II. States having anti-combination statutes and rate-regulating statutes.
   a. Anti-combination statutes directed at insurance.
   b. General antitrust provision.
III. States having rate-regulating statutes only.
IV. States having neither anti-combination nor rate-making statutes.

I. STATES HAVING ANTI-COMBINATION STATUTES ONLY

a. Anti-combination statutes directed at insurance

Four states have anti-combination, more properly called anti-compact, legislation aimed specifically at the business of insurance. These are: Arizona, Georgia, Iowa, and Nebraska. A typical provision is the one found in the Arizona Code defining and prohibiting trusts in the following terms: "A trust is a combination . . . to control cost or rates of insurance."¹⁷ The corresponding laws in the other three states are to the same effect.¹⁸ In addition to this express provision, Arizona and Georgia have also broad anti-monopoly provisions incorporated in the state constitutions.¹⁹ Nebraska and Iowa are deprived of this double

---

guarantee since they have no anti-monopoly provision in their constitutions.

An examination of the case material produces the following results: one case in Georgia, one in Nebraska, and none in Arizona and Iowa. The Georgia case\(^{20}\) deals mostly with the problem of "separation" but indicates that the Georgia courts frown on insurance combinations. The Nebraska case\(^{21}\) is strong and directly concerned with rate-making combinations; and since this case has not been reversed, it presumably expresses the law of Nebraska on this point.

The insurance laws in the various states being under the supervision of the state departments of insurance, it follows that the enforcement of these laws is dependent upon the efficiency of these departments.

Arizona has no separate and distinct department of insurance, the laws respecting insurance being under the authority of the corporation commission.\(^{22}\) This commission also enforces the laws regarding all other corporations in the state of Arizona. As regards insurance, it has the power of visitation and examination over all companies and rating bureaus\(^{23}\) and "may employ such experts, engineers, statisticians, accountants, inspectors and employees, as may be necessary to perform the duties and exercise the powers of the commission. . . ."\(^{24}\) The corporation commission charged with these many duties is composed of three members chosen by election.\(^{25}\)

In Georgia, the comptroller general, an elected officer,\(^{26}\) is also the insurance commissioner. However, the actual administrator is the deputy insurance commissioner,\(^{27}\) "who shall be a man of actuarial experience"\(^{28}\) appointed by the comptroller general.\(^{29}\) The powers of this insurance department\(^{30}\) are similar to those of the corresponding department in Arizona.


\(^{24}\)Id. § 53-101.


\(^{28}\)Id. § 56-102.

\(^{29}\)See note 27 supra.

\(^{30}\)The powers of the insurance department are defined in Ga. Code Ann. (1933) §§ 56-103-56-115.
Substantially the same situation obtains in Iowa, except that here the commissioner of insurance is a gubernatorial appointee.\textsuperscript{31} This official \textit{may} examine insurance companies as frequently as he pleases and \textit{must} perform such an examination once every two years.\textsuperscript{32} He is authorized to appoint two insurance examiners, one an experienced actuary and the other an experienced and competent fire insurance accountant. He may also appoint assistants to make examinations.\textsuperscript{33}

In Nebraska, the department of trade and commerce supervises insurance, the secretary of that department being the actual superintendent or commissioner of insurance.\textsuperscript{34} He has essentially the same powers as the commissioners of Arizona, Georgia, and Iowa, \textit{i.e.}, he too may examine the insurance companies and rating bureaus.\textsuperscript{35}

All this, of course, tells us nothing concerning the efficiency with which the insurance laws are enforced; but it does develop a few pertinent facts. For instance, the enforcement of the insurance laws in these four states lies largely at the discretion of one individual, and in only two of these states is this man an elected officer.\textsuperscript{36} Also, in three states\textsuperscript{37} the department of insurance is headed by a person who has some other duty, \textit{e.g.}, in Georgia, the comptroller general.

\textbf{b. General antitrust provision}

The states of Alabama, Connecticut, Maine, Maryland, Montana, New Mexico, Rhode Island, and Utah regulate the making of insurance rates through anti-monopoly provisions in their constitutions or general laws.\textsuperscript{38} There is no legislation aimed at the prevention of rate-making combinations by insurance companies, nor is there any rating law of any kind.

\textsuperscript{31}Iowa Code (1939) \S\ 8605.
\textsuperscript{32}Id. \S\ 8626.
\textsuperscript{33}Id. \S\ 8628.
\textsuperscript{34}Neb. Comp. Stat. (1929) \S\ 44-201.
\textsuperscript{35}Ibid.
\textsuperscript{36}Arizona, see note 25 \textit{supra}; Georgia, see note 26 \textit{supra}.
\textsuperscript{37}Arizona, see note 23 \textit{supra}; Georgia, see note 27 \textit{supra}; Nebraska, Neb. Comp. Stat. (1929) \S\ 81-3401.
\textsuperscript{38}Ala. Const. Art. IV, \S\ 103; Ala. Code Ann. (1940) tit. 14, \S\ 54; id. tit. 57, \S\S\ 105-108; Conn. Const. Art. I, \S\ 1; Conn. Gen. Stat. (1930) \S\ 6352; Me. Rev. Stat. (1930) c. 56, \S\ 60; id. c. 138, \S\S\ 28, 29; Md. Const. Declaration of Rights, Art. 41; Mont. Const. Art. XV, \S\ 20; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) \S\ 10901; Mont. Rev. Codes Ann. (Supp. 1939) \S\ 10915.1; N. M. Const. Art. 4, \S\S\ 26, 38; N. M. Stat. Ann. (1941) \S\S\ 51-1101—51-1103; R. I. Gen. Laws (1938) c. 621, \S\ 1; Utah Const. Art. XII, \S\ 20; Utah Code Ann. (1943) \S\S\ 73-1-1—73-1-10, 103-11-1.
Alabama has an anti-monopoly provision in its constitution as well as several such provisions in its general statutes. The Alabama cases do not turn on the question of rate-making, but they indicate that the Alabama courts are alert in enforcing the state's anti-monopoly statutes.

Apparently, insurance rates are satisfactory to all in the other seven states of this group, for no litigation concerning rate-making has arisen in any of these states. Possibly this may be interpreted as a tribute to the angelic fairness of the insurance companies, or it may be due to the nature of the statutes involved. The Maryland constitution, for instance, states "That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." Again, in the General Laws of Rhode Island, "Every act and omission which is an offense at common law, and for which no punishment is prescribed by this title, may be prosecuted and punished as an offense at common law..." A coal monopoly has been punished under this statute as an offense at common law in Rhode Island. The case supporting this viewpoint leaves grave doubt whether an insurance monopoly could also be punished in the same fashion. In any event, breaking up an insurance rate-making combination by prosecution under such statutes would seem to be very difficult—so difficult, in fact, that many states' attorneys might hesitate to try.

II. STATES HAVING ANTI-COMBINATION STATUTES AND RATE-REGULATING STATUTES

a. Anti-combination statutes directed at insurance

A large number of states deal with their rate-making problem by means of both direct anti-compact statutes and rate-regulatory measures. In this group we find Arkansas, Colorado, Kansas, Louisiana, Michigan, Missouri, New Hampshire, Ohio, Oregon, South Carolina, South Dakota, Texas, Washington, and Wisconsin. The anti-compact measures in these states are substantially the same as those we have con-

41 Md. Const. Declaration of Rights, Art. 41.
44 Note (1943) 32 Georgetown L. J. 66.
sidered in the preceding group, the one exception being that they usually forbid combinations "except in compliance with" the rate-making statutes. Colorado, for instance, has the following law:

"No fire insurance company or any other insurer, and no rating bureau, or any representative of any fire insurance company or other insurer or rating bureau, shall enter into or act upon any agreement with regard to the making, fixing or collecting of any rate for fire insurance upon property within this state except in compliance with this article." (Italics supplied.)

Where such a proviso is not expressly set out in the statute, it is a necessary implication in order to give the law maximum effect. These anti-compact laws sometimes extend beyond prohibition of rate-making compacts and cover other types of insurance combinations. An example of this is found in the Oregon anti-compact law, which states:

"It shall be unlawful for any insurance company authorized to transact business in this state, or any manager or any agent or representative thereof, to, either within or outside of this state, directly or indirectly, enter into any contract, understanding or combination, with any other insurance company, or any manager, or any agent or representative thereof, or to jointly or severally do any act or engage in any practice or practices for the purpose of controlling the rate to be charged, or commissions or other compensations to be paid, for insuring any risk or class or classes of risks, in this state, or for the purpose of discriminating against or differentiating from any company, manager or agent, by reason of its or his plan or method of transacting business or its or his affiliation or non-affiliation with any board or association of insurance companies, managers, agents or representatives, or for any purpose detrimental to free competition in the business or injurious to the insuring public. . . ."47

This type of legislation would seem to block any "separation"48 tactics on the part of insurance associations in order to eliminate non-conformist companies, brokers, or agents.


49 "Separation" is the name given to a policy of exclusion exercised by insurance organizations. It operates to expel all members who do not obey the rules and to exclude all applicants who do not comply with the requirements for membership. The causes of expulsion and exclusion are many, one of them being failure to adhere to the rates promulgated by the organization.
The real control of insurance rates in all of these states rests in the rate-regulatory laws and not in the anti-compact statutes. These rate laws reveal a striking similarity from state to state, and a few random examples will be sufficient to demonstrate their structure and modus operandi, e.g., the Wisconsin law:

"Every insurer . . . shall be a member of an actuarial bureau. No such insurer shall be a member of more than one actuarial bureau for the purpose of writing insurance on the same class of risks. . . ."

"Actuarial bureaus may be organized by 5 or more insurers for the purpose of inspection, rating risks, making underwriting rules, fire prevention rules, rate protection rules, auditing rates and forms, tabulating experience and such other duties and activities as are usually performed by actuarial or inspection bureaus. . . ."

"A copy of all rating schedules, forms and underwriting rules promulgated or used by any actuarial bureau shall be filed with the commissioner of insurance. . . ."

"All schedules of rates . . . promulgated or used by any actuarial bureau, shall be reasonable, fair to the insured and the insuring public. . . ."

"The commissioner of insurance upon verified complaint of any person having a direct financial interest or any political subdivision of the state, shall, or upon his own motion, may review any rate, underwriting rule or form, and he shall, after a hearing, order a change in any rate or disapprove any underwriting rule if he finds such rate or rule to be unreasonable, unfair to the insured or the insuring public, or unfairly discriminatory. . . ."

"The commissioner shall have power, upon the written complaint of any policyholder having a direct financial interest, or upon his own motion, to order the re-rating of any risk or class of risk at any time. . . ."

and also the Ohio statute:


\[\text{\textsuperscript{60}Wis. Stat. (1943) § 203.33.}\]

\[\text{\textsuperscript{61}Id. § 203.34.}\]

\[\text{\textsuperscript{62}Id. § 203.36.}\]

\[\text{\textsuperscript{63}Id. § 203.37.}\]

\[\text{\textsuperscript{64}Id. § 203.39.}\]

\[\text{\textsuperscript{65}Id. § 203.40.}\]
"Every fire insurance company . . . shall maintain or be a member of a rating bureau. . ."56

"A rating bureau may consist of one or more insurers, and when consisting of two or more insurers, shall admit to membership any authorized insurer applying therefor. . ."57

*    *    *

"The superintendent of insurance shall have power to examine any such rating bureau as often as he deems it expedient to do so, and shall do so not less than once every three years. A report thereof shall be filed in his office. The superintendent of insurance may waive such examination upon the filing with him of a report of such examination made by some other insurance department or proper supervising officer within such three years. A statement with regard to such examination shall be made in the annual report of the superintendent of insurance."58

These laws are typical of rate-regulatory statutes.

It will be noted that these laws provide only for the supervision of the rates by the state. The power to make rates remains with rating bureaus established by the companies.59 As in the other states, the enforcement of these laws is entrusted to some special department, known by a variety of names but whose raison d'être is the supervision of the insurance business. The head of this department is sometimes an elected officer, sometimes an appointee of the governor.60 His duties are many. He is required to demand a schedule of rates from the insurance companies and to approve or disapprove of these rates, to order reductions in rates if necessary, to prevent discrimination among risks of the same class, to control re-insurance practices, and in general to investigate, examine, and control all phases of insurance transactions.

Unfortunately, the laws leave entirely too much of the enforcement to the discretion of the chief of the insurance department. Only too often the insurance department or its chief "may" do all the things mentioned above. There is no command by statutory fiat to do them. Occasionally

56Ohio Code Ann. (Baldwin, 1940) § 9592-1.
57Id. § 9592-2.
58Id. § 9592-7.
59E.g., Wisconsin (see notes 50, 51, 52, 54 supra) and Ohio (see notes 56, 57, 58 supra).
a positive command to "examine" or "investigate" every two years or every three years is found, but these are too few and the period between required examinations is too long. An examination of rates or rating bureaus every three years cannot possibly keep the state well informed as to the status of its insurance companies. This is true even though experience for five years is generally recognized as necessary before any adjustment in rates can be made, any shorter period of time tending to give an inaccurate picture of the rate situation.

It is vitally important for the state to possess accurate information as to its rates and types of risk, even though changes in the rates may not be made for five or ten-year intervals. Only in this way can violations of the established rates be detected. In these times when so much property is covered by insurance, it seems unnecessary to say that the states should take steps to keep informed as to current rates and risks. An examination every two or three years falls far short of the "current information" needed for enlightened application of the insurance laws.

Two states of this group merit special attention; one because it illustrates the difficulties a state may have in attempting to control a business whose character is essentially interstate, the other because of its very effective system of control. The first, Missouri, is especially interesting at this time because the South-Eastern case was initiated at the instigation of the attorney general of that state. The Antitrust Division of the Department of Justice became interested in the monopolistic activities of insurance companies when Mr. McKittrick, the attorney general of Missouri, called the problem to its attention. He demonstrated the difficulties he has experienced in trying to enforce Missouri's insurance laws and appealed for help from the Federal Government. At his urging, the Antitrust Division started an investigation of the fire insurance business, which eventually culminated in a suit by the United States against the South-Eastern Underwriters Association et al.

---

61E.g., Ohio (see note 58 supra).
62E. L. Williams, president of the Insurance Executives Association, has said in speaking of rates, "... insurance aims at expectancy and expectancy cannot always be established in even the period of 10 years". Joint Hearing, note 16 supra at 339. Later Mr. Williams objected to the following statement made by Mr. Comer, an economist for the Department of Justice, "... I took a 5-year average because less than that would probably be too short and more than that would run back into a previous and different kind of a period than the depression in the thirties". Id. at 345. This exchange shows that both the proponents and opponents of federal regulation agree that fire insurance rates should be based on several years experience.
63Joint Hearing, note 16 supra at 25, 26.
64See note 1 supra.
The constitution of Missouri has no provision against monopolies; however, there are extensive and comprehensive sections of the state statutes definitely prohibiting combination or cooperation by insurance companies for the purpose of regulating the prices or premiums of insurance.65 The insurance laws of Missouri are supervised by a superintendent, who must be a person "experienced in matters of insurance".66 The superintendent may appoint a deputy, an actuary, and a chief examiner.67 The latter two must have five years' experience in the insurance business.68 These provisions are much more definite than those of most states which have thus far been examined.69

The State of Missouri has attempted, since 1899, to prevent the insurance companies doing business in Missouri from cooperating in the establishment of uniform rates. Many actions at law have been commenced by a succession of attorneys general to enforce the antitrust laws of the state, but they have all failed.

A regulatory measure was passed in 1913, which so displeased the insurance companies that they served notice to the state of Missouri that they would cancel all policies and withdraw from the state. This concerted action was halted when the court enjoined the insurance companies from carrying out their threats. In the heat of this litigation, enforcement of the antitrust laws seems to have been temporarily forgotten. At all events, a lull ensued which lasted till 1922. In that historic year the superintendent of insurance ordered a reduction of 10 per cent in the rates the companies were charging the policyholders. The companies attacked the order; and their success is attested to by the fact that they were able to raise the rate by 16 2/3 per cent and by the fact that although twenty-three actions have been instituted in the courts of Missouri on either the decrease order or the raised rates, these cases have failed to settle Missouri's right to regulate rates.70

When the laws of Missouri are compared with those of the other states of the union, they are seen to be just as complete and comprehensive. The totally futile efforts of the State of Missouri to regulate insurance

67Id. §§ 5783, 5784.
68Id. § 5784.
69Part I-a and Part II-a (Wisconsin and Ohio) of the text in particular discuss the powers given to the insurance departments of various states.
70Joint Hearing, note 16 supra, at 82, 83. The unsettled cases are listed on page 110 of the same hearing.
rates under these laws strongly supports the proposition that rate regulation by anti-combination laws is completely inadequate if the insurance companies choose to put up a fight.

It is important to note here that there has been no failure by state officials to attempt regulation. Strong—even desperate—efforts were made by a succession of attorneys general to regulate rates in Missouri. The present attorney general of Missouri, who tried for four years, has reached the conclusion that the problem cannot be handled by the states. In view of the inability to regulate in Missouri, the only state where regulation has been hotly contested, one is tempted to agree with Mr. McKittrick.

A happy contrast to the Missouri situation is afforded by Texas. This state has a stringent anti-compact law, supplemented by a complete state control of rates. In Texas, rate-making is a governmental function. The rates are established by the insurance commission, and any company desiring to do business in Texas must adhere to these rates. The insurance commission consists of three members, the fire insurance commissioner, the life insurance commissioner, and the casualty insurance commissioner; all three are appointed by the governor with the advice and consent of the state senate for six-year terms. In supervising and enforcing the laws, the commission has the authority to employ clerical help, inspectors, experts, and any other assistants it may need, provided the expenses do not exceed one hundred thirty thousand dollars for any fiscal year.

It is not surprising that, with this organization, Texas succeeds in controlling its rates with a minimum of litigation. The laws are clear, and they cover all phases of the insurance business. There is no room for litigation. Infractions of the insurance laws are discouraged by revocation and cancellation of the right to insure in Texas.

b. General antitrust provision

The states of this group depend on general antitrust provisions coupled with rate laws to control their insurance rates. The ineffectiveness of

---

"Id. at 81.
"Id. Arts. 4878, 4879.
"Id. Art. 4880.
"Id. Art. 4679a.
"Id. Arts. 4690b, 4878.
"Id. Arts. 4900, 4901.
general antitrust provisions in prosecuting insurance combinations has been discussed before in connection with another group of states. The observations made at that time hold good for the states and statutes presently under consideration. The antitrust provisions of Maryland and Rhode Island could easily be substituted for those of most of these states since the language is almost identical. For the same reason, a lengthy discussion of the rating laws can be omitted here. A reference to the laws of Wisconsin and Ohio will give the reader a fair idea of the tenor of all rating laws. Insurance commissions and commissioners and the legislative acts under which they operate have already been discussed at some length in other parts of this note, and therefore they will not be considered here.

Suffice it to say that once more we find a great deal of reliance being placed on the soundness of the commissioner's discretion. And again, in many states, the only positive requirement imposed on that officer is one calling for an examination of companies and rating bureaus every three years. Conscientious, hardworking officials, properly paid and ably assisted, would undoubtedly implement these statutory suggestions and

78 See Part I-b, this note.
79 Ibid.
80 See Part II-a, this note.
81 The discussion of rate laws in Part II-a of this note also involved consideration of the laws establishing the insurance commissions.
82 E.g., N. Y. Insurance Law § 28(2) and Ohio Code Ann. (Baldwin, 1940) § 9592-7.
produce efficient regulation. That most commissioners are hardworking and conscientious is undeniable; that they are properly paid and ably assisted is questionable.

An outstanding example of sound, efficient regulation is provided by New York. In this state the insurance department operates under a set of well-written statutes. Provision is made for the employment of deputies, clerks, examiners, and other persons experienced in the estimation of risks, in order to determine whether the rates filed by the company-supported rating bureaus are fair. Any rate deemed unfair by the commission is ordered withdrawn. If not modified, fines are levied, continued infraction bringing prompt cancellation of license.

It is seen, then, that some thirty states control the making of insurance rates by means of specific rate legislation, supported to some extent by anti-combination laws. Experience in these states seems to indicate that rate legislation provides a better means of control than anti-combination laws. However, the efficiency of control provided by these measures is quite frequently impaired by the weak powers of the commissions, e.g., in Massachusetts, where the findings of the insurance department are only advisory.

III. STATES HAVING RATE-REGULATING STATUTES ONLY

The states of Nevada, Pennsylvania, and West Virginia have no anti-compact or anti-monopoly measures in either their state constitutions or general statutes which could be deemed applicable to the business of insurance. These states rely exclusively on rate-regulatory statutes to control the rates charged for insurance sold within their boundaries.

---

84 The laws pertaining to the organization, duties, and powers of the department of insurance will be found in N. Y. INSURANCE LAW §§ 10-19. The laws controlling rating organizations are in the same volume, §§ 180-188.

85 N. Y. INSURANCE LAW § 11(1).

86 Id. § 16.

87 Id. § 29.

88 Id. § 181.

89 Id. § 184(4).

90 Id. § 187(2).

91 Id. § 40(6).


The Nevada statutes merely require that the rates be approved by the insurance commissioner, the state itself taking no hand in establishing the rate. There is no statutory requirement for membership in or maintenance of a rating bureau.95 There have been no rate cases presented to the courts for determination, so there is no judicial interpretation of the effect of these laws.

The state controller96 is charged with the administration of the insurance laws, and he is "empowered to do and perform all necessary and proper acts and things in connection therewith".97 It is to be hoped that it is "necessary and proper" for him to hire examiners, engineers, and actuaries. Once again the enforcement of the law is left to the discretion of one man, for the controller, as insurance commissioner, is authorized to examine the insurance companies whenever he shall deem it necessary.98

The insurance laws of Pennsylvania require all insurance companies in that state to maintain or be members of a rating bureau.99 These rating bureaus are under the supervision of the insurance commissioner, who may require them to file rates, schedules, forms, etc. This commissioner further has the power to examine all rating bureaus. He is obliged by law to conduct such an examination every three years, but he may waive it on the filing of a report of an examination made by the insurance department of another state.100 These vague, rather ambiguous provisions constitute the only restrictions placed on the rate-making activities of the insurance companies. This seems to be far from the complete and effective state regulation so highly touted by the opponents of federal regulation.

This legislation is not only ineffective but also dangerous. Such a statute is dangerous because, in the hands of a venal commissioner, the insured of Pennsylvania may be forced to pay exorbitant rates. This may just as easily happen if the commissioner is merely lazy. On the other hand, it is equally unfair to the insurance companies in that it

Jersey, although it has no anti-monopoly laws, now has a very comprehensive body of recently enacted rate legislation. N. J. STAT. ANN. (Cum. Supp. 1944) §§ 17:29A-1—17:29A-28. These new laws are more specific than the usual rate laws and compare favorably with the laws of New York. N. Y. INSURANCE LAW §§ 180-188.

95NEV. COMP. LAWS (Supp. 1931-1941) § 3656.121.
96Id. § 3648.01.
97Ibid.
98NEV. COMP. LAWS (Supp. 1931-1941) § 3656.35.
99PA. STAT. (Purdon, 1936) tit. 40, §§ 691, 692.
100Id. §§ 53, 54.
places them at the mercy of an uninformed or malevolent commissioner.

West Virginia frequently has been referred to as an “exploited” state—exploited not only by the insurance business but by other businesses as well. For the control of trusts, combinations, and monopolies, this state is entirely dependent upon the common law as judicially interpreted. It has, however, rate-regulatory legislation putting all rating bureaus under the supervision of the insurance commissioner, requiring all such bureaus to file schedules, rates, etc., with the commissioner and giving him investigatory powers over the companies. The state auditor, an elected officer, is also the insurance commissioner. He has the power to appoint a staff including clerks, investigators and actuaries.

In the absence of any anti-combination legislation, these staff officials have had to rely almost entirely upon the rate-regulatory provisions for the regulation of insurance.

While the regulation of the intrastate aspects of the business has been entirely satisfactory, it has been impossible to cope with the interstate effects. In this state, where so much of the business is owned and controlled by foreign capital, it has been found that, although vested with investigatory powers, the state cannot control the rates fixed in interstate commerce. Of course West Virginia, like Texas, has the alternative of denying licenses to companies that circumvent its insurance laws. But West Virginia, unlike Texas, is a state where most of the industrial capital is foreign, and if, as they did in Texas, the insurance companies should withdraw their business from the state in concerted opposition to the state laws, the people of the state, not having the required native capital, would be left without insurance.

Efficient and effective control of the intrastate aspects of a business which is essentially interstate, while highly commendable, can be of little benefit since the interstate rates will eventually be reflected upon the

101 Joint Hearing, note 16 supra at 476.
103 Id. § 39.
104 Id. § 3274.
105 Ibid.
106 Joint Hearing, note 16 supra at 476, 479.
107 Joint Hearing, note 16 supra at 481.
108 It may be well to remember at this time that West Virginia is not the only state where the businesses of the state are largely owned and controlled by out-of-state interests.
109 Joint Hearing, note 16 supra at 481.
intrastate rates, resulting, as is the case in West Virginia, in the payment of the differential in rates by the few local businesses.110

IV. States Having Neither Anti-Combination Nor Rate-Regulating Statutes

Finally we arrive at an apparently carefree group of states; namely, California, Delaware, and Florida. In Delaware we find no anti-compact nor antitrust statutes, except one provision against discrimination in trade.111 The applicability of this measure to the business of insurance is very doubtful. A diligent search of the judicial reports fails to disclose any pertinent case on insurance.

A slightly different situation obtains in California, where the Cartwright Anti-Trust Law,112 an excellent example of an anti-monopoly statute, is in effect. However, The Spectator, an authoritative publication in the field of insurance, states:

"It seems to be the general opinion among attorneys conversant with the insurance laws of California, that this Act does not apply to insurance companies."113

The California reports fail to disclose any rate cases.

The statutes of Florida contain several sections which could be interpreted as prohibitions of rate-making combinations.114 Unfortunately, judicial interpretation in the case of Brock v. Hardie115 has nullified these laws. This case held that the antitrust statute forbidding combinations restricting trade or commerce in pursuit of any business was inapplicable to fire insurance companies so as to prevent them from agreeing upon classification of fire hazards for rate-making purposes. The court stated that insurance was a mere contract of indemnity.

There is not a shred of rate-regulatory requirements on the statute books of any of these states.

It is unjust to say that these states have no insurance regulations. They all have, to a certain extent, measures designed to prevent discrimination, to regulate investments, to control re-insurance, etc.; but since this note is an investigation of those statutes which affect rates, no other insurance laws have been considered.

110 Joint Hearing, note 16 supra at 477.
115 114 Fla. 670, 154 So. 690 (1934).
California, Delaware, and Florida place supervision of their insurance laws under departments of insurance, which are essentially similar to those of the majority of the states, i.e., the commissioner and commission have a great deal of discretionary power.116

Unless these states have some metaphysical means of control not apparent on their statute books or in their case reports, it would seem to be no exaggeration to say that the business of rate-making in California, Delaware, and Florida is completely within the power of the insurance companies.

CONCLUSION

This survey has revealed a huge, multi-faceted business, criss-crossing state lines and controlling large amounts of capital. Regulation of this business varies from state to state, and many laws are necessary for its control. One small segment of the insurance laws, namely, rate laws, is the subject of discussion here. From the standpoint of the insured this segment is the most important, because it directly concerns the amount of money he must pay for protecting himself from monetary loss when accidents damage or destroy his property. The importance of the rate question to the insurance companies is reflected by their anxiety now to avoid federal regulation and by their anxiety in the past to avoid state regulation. Rates are important to the insurance companies, because they are a determining factor in calculating the amount of money which each company can invest and, consequently, the profit it can realize.

An effort has been made to discover all the statutes which pertain to rate control in all the states. State by state, this small portion of the insurance laws has been examined with an eye to the effective amount of control exercised thereunder. In the course of the examination certain basic facts have been revealed, and an attempt has been made to coordinate these facts and assess their importance.

The various state statutes reveal that in three states117 there is no visible governmental control of rate-making, that in twelve other states118 the only possible controls are general anti-monopoly provisions, and that in the remaining thirty-three states119 there is some specific legislation

117California, Delaware and Florida.
118Alabama, Arizona, Connecticut, Georgia, Iowa, Maine, Maryland, Montana, Nebraska, New Mexico, Rhode Island, Utah.
119Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachu-
directed at rate-making. Control, in the latter group, is exercised by a variety of measures ranging from anti-compact laws, preventing rate-making combinations, to statutes which permit or require such combinations. Only one state, Texas, establishes its own rates and imposes them on insurance companies. It is true that in most of the states there is a great body of insurance laws, but by far the largest number of these laws are directed at phases of the insurance business which are in no way connected with rates or rate-making.

It has been shown that these laws are supervised by special departments, and the particular laws creating these departments and defining the powers of their executives have been evaluated. It is submitted that these laws fail to support the contention that state regulation of rate-making is either effective or complete, as it exists in most of the states today.

The Bar is fully cognizant of the difficulty involved in bringing an action under the common law doctrines of restraint of trade and conspiracy, or of halting insurance rate-making combinations under general antitrust provisions. In the latter case, the provision has sometimes been weakened by judicial interpretation, or the measure of proof required automatically excludes prosecution of insurance combinations. It is a fallacy to assume that the states which rely on this type of legislation actually exercise any control of rate-making. The falsity of this assumption is emphasized when one scrutinizes the effectiveness of direct anti-compact legislation. In Missouri, provisions directly aimed at destroying rate-making combinations have failed to do so; and Missouri’s laws compare favorably in clarity and scope with those of other states. The only result of strenuous efforts to enforce these laws has been prolonged, “no-decision” litigation. If direct legislation fails, how can general antitrust provisions succeed?

The majority of the states have some anti-combination provisions and also rate-regulating statutes. In these states the rate-regulatory measures encompass the anti-compact laws, since the rate laws require compacts and cooperation; and therefore these states can be regarded as rate-regulatory states. In fact, the insurance commissioner of New York has stated that regulating the business of insurance by means of anti-compact statutes is a “blunder”.120


120 Joint Hearing, note 16 supra at 609. Statement by Mr. Robert E. Dineen, superintendent of the insurance department, State of New York.
Very few cases have been decided under the rate laws. This might have been due to the formidable efficiency of the law, to inertia on the part of enforcement officials, or to good behavior by the insurance companies. That the first and last of the above alternatives are untrue is easily shown; to disprove the first, reference need only be made to the legal "stalemate" now existing in Missouri. To say that fairness or good behavior on the part of insurance companies has created a situation where enforcement and consequent litigation are unnecessary is to attribute supernatural qualities to insurance corporations. These corporations are no better, nor worse, than other corporations or individuals. If there are any laws, they will occasionally transgress. Where there are no laws, there are no transgressions.

The remaining alternative is probably the one which contributes most to the lack of case material concerning rates or rate-making. The insurance business has many aspects, all subject to the supervision of an insurance commission. To dignify the acts creating these commissions by calling them "regulations" or "controls" is absurd. In most cases they require absolutely nothing from the commissioner, and in very many cases their requirements are infinitesimal. They simply have the effect of creating a few offices whose duty it will be to supervise the insurance business in general; they fail to provide positive measures designed to keep the state informed of the rates currently charged within its boundaries.

This, then, is the situation: with the exception of New York and Texas, the insurance companies regulate rates as they see fit. The Federal Government projected itself into this situation when it commenced the case of United States v. South-Eastern Underwriters Association et al.\textsuperscript{121} In that case the Supreme Court decided that insurance is interstate commerce and subject to the federal antitrust laws. But if insurance is interstate commerce, then it is subject to all federal laws and not only to the antitrust laws. This presents a perplexing problem, because enforcement of federal antitrust laws will infringe on all state laws, requiring cooperation; on the other hand, regulation of some sort is necessary since state regulation is incomplete and inadequate. Federal regulation partially fulfills this need.

Congressional action as expressed by H. R. 3269, H. R. 3270, and S. 1362 fails dismally to solve this problem. True, it exempts insurance companies from the application of the Sherman\textsuperscript{122} and Clayton\textsuperscript{123} Acts

\textsuperscript{121}See note 1 supra.
\textsuperscript{122}See note 5 supra.
—but insurance still remains interstate commerce and subject to other federal laws, e.g., the Federal Trade Commission Act.\textsuperscript{124}

Unquestionably, the several states have the theoretical power to regulate insurance rates within their territorial limits. The discussions pertaining to Missouri and West Virginia clearly show that such regulation may be negated by the essentially interstate character of the insurance business. The state governments are powerless when faced by an interstate question, because no state law can have extra-territorial effect.

Assuming that rates could be effectively regulated by state legislation, such action would fatally injure the insurance business as it exists today. Operating costs would be prohibitively increased if insurance companies had to consider each state individually in making rates. Clearly, state-by-state regulation of insurance is not feasible.

The only possible solution seems to rest in some measure of federal control, not in removing existing control as the proposed legislation would do. Opponents of federal control fear the power which would be wielded by a federal department of insurance. These fears may be justified, because such a department would be able to influence the entire trade and commerce of the United States, insurance being so intimately connected with all our industries.

However, it seems probable that a federal department of insurance could be established without giving it such broad powers.

The proposed department would have the power to establish a uniform rate, applicable throughout the nation. This rate would be a variable one in that it would provide for any deviation which might be necessary because of extraordinary risks or new risks, and it would be established on the basis of reports from the insurance commissioners of each state. Deviations would be allowed on the motion of the insurance companies but only with the endorsement of the state insurance commissioner or commissioners of the state or states involved. Insurance companies would still be established by the states, and the officers thereof would still be elected or appointed by the state. The only function of the federal department would be to establish the standard rate and to enforce any deviation having an interstate effect. Matters of local enforcement would remain in the hands of the several states.

An organization of this type would require close cooperation between the states and the Federal Government. In order to accurately define and limit the power of the Federal Government on the one hand and that of the states on the other, the organic statute would have to be

drafted with extreme care. Many difficulties would arise, such as the question of arbitration, *i.e.*, who would settle disputes between the states, or between the states and the Federal Government. This and other like questions would be within the province of Congress; and although such legislation is not probable, it certainly does not present insuperable difficulties. In the event that such legislation takes place, many states would have to enact new insurance laws in order to carry a fair share of the national burden. And even if this situation does not develop, it behooves the states to investigate the status of their rates and promptly enact effective legislation.

However, in the absence of a more definitely prescribed system of legislation, a bill recently introduced in Congress deserves careful consideration. H. R. 4444,\(^{128}\) the bill referred to, states:

"To express the intent of the Congress with reference to the regulation of the business of insurance.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or in the Act of October 15, 1914, as amended, known as the Clayton Act, shall be deemed to abridge or impair the right of any State, Territory, or possession of the United States to regulate the business of insurance with respect to licensing, discrimination, risks, rates, premiums, commissions, policies, investments, reinsurance, capital requirements, or other acts, transactions, or matters relating to the conduct of said business within said State, Territory, or possession: Provided, however, That nothing herein shall prevent the application of said Sherman and Clay
ton Acts to any contract, combination, agreement, or understanding between two or more insurance companies for making, establishing, or maintaining rates, premiums, rating methods, commissions, or regulations affecting the cost or premium of insurance where said rates, premiums, rating methods, commissions, or regulations may or are to be effective, charged, applied, promulgated, or enforced before having been filed with and expressly approved by State officials pursuant to State Law."

This bill permits the Federal Government to intervene whenever a state has not acted to regulate insurance rates. Naturally this would prevent the Government from prosecuting the insurance companies for combinations organized pursuant to the requirements of state rating laws. It would leave the Government free to prosecute where no state law authorizes the combination, or where the combination is directly in violation of state law but the state is helpless to prosecute.

Since the states do not completely or adequately regulate insurance, 
at least in regard to rate-making, federal legislation on the lines of 
H. R. 4444126 should be encouraged.

LEO A. HUARD
LORENZO A. CHAVEZ

THE SCOPE OF REVIEW IN THE MUNICIPAL COURT OF 
APPEALS FOR THE DISTRICT OF COLUMBIA

IN RESPONSE to the continued demands of the bar of the District 
of Columbia1 Congress in 1942 effected a consolidation of the Police 
Court and the Municipal Court for the District of Columbia, creating 
the single court now known by the latter name.2 Prior thereto appeals 
were taken to the United States Court of Appeals for the District of 
Columbia as a matter of privilege only.3 That court’s docket was so 
crowded with cases being appealed from the United States District 
Court for the District of Columbia that the privilege was granted on 
rare occasions.4 The “Consolidation Act” rectified the situation by 
creating an intermediate appellate court—the Municipal Court of Appeals 
for the District of Columbia—to which parties may appeal as a matter 
of right from orders and judgments of the Municipal Court and the 
Juvenile Court.5

At the date of this writing the Municipal Court of Appeals has ren- 
dered opinions in almost 200 cases. In none of these has the court felt 
itself impelled to interpret explicitly that portion of the “Consolidation 
Act” which defines its scope of review. The pertinent section of the 
District Code reads as follows:

"The Municipal Court of Appeals for the District of Columbia . . . shall review 
the record on appeal and shall affirm, reverse, or modify the order or judgment 
in accordance with law. If the issues of fact shall have been tried by jury, The 
Municipal Court of Appeals for the District of Columbia shall review the case

126Ibid.

1st Sess. (1941) 1.


3D. C. Code (1940) § 17-104.


the small claims and conciliation branch of the Municipal Court and review of judgments 
in the criminal branch where the penalty imposed is less than $50 may be granted on appli- 
cation.
only as to matters of law. If the case shall have been tried without a jury, The Municipal Court of Appeals for the District of Columbia shall have the power to review both as to the facts and the law, but in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it." (Italics supplied).6

When a court exercises power vested in it by a statute which is clear and explicit, it is reasonable to expect that some reference to the limits of that power will find its way into an early opinion of the court. When, however, the statute is ambiguous and unhappily phrased so that the power is vaguely defined, it would seem imperative that its limitations be at once explained. It is submitted, and the following discussion is intended to demonstrate, that the statute quoted above is something less than a perfect example of legislative draftsmanship and compels interpretation by the Municipal Court of Appeals.

**Classes of Appellate Review**

Appellate review has developed from four general classes of litigation—cases at law with a jury, cases at law without a jury, cases in equity, and appeals from administrative tribunals.

Proceedings in classical equity were entirely in writing, *i.e.*, by deposition.7 The trial court therefore had no better opportunity to weigh the evidence than did the reviewing judge or tribunal. The case on appeal amounted to a trial *de novo*.8 The judgment of the appellate body could be substituted for that of the trial court as to the facts.

Modern developments have changed equity practice from "trial by depositions to trial by witnesses in open court"9 and the tendency is to treat the findings of the equity judge with considerably more respect than formerly. It is recognized that the cold print of the appellate record is not a complete reproduction of the proceedings and therefore due regard should be given the opportunity of the trial court to judge the credibility of witnesses. This recognition resulted in the modern equity rule,10 now incorporated into the Federal Rules of Civil Procedure, that: "Findings of fact shall not be set aside unless clearly erroneous".11

6D. C. Code (Supp. 1943) § 11-772 (c).
7Scott & Simpson, Cases and Other Materials on Judicial Remedies (1938) 733.
9Scott & Simpson, op. cit. supra note 7, at 737.
10Holtzoff, New Federal Procedure and the Courts (1940) 133.
The Clearly Erroneous Rule

"Clearly erroneous" is not a term of art. There is no particular unanimity in the interpretation of its meaning. But the draftsmen of the Rules expressly declared their intention to have the rule accord "with the decisions on the scope of the review in modern federal equity practice." It was further explained that the rule simply means that findings may not be set aside unless they are "against the clear weight of the evidence". This is the accepted rule in most Federal Circuit Courts of Appeals.

Of course the rule is not one which permits the reviewing court lightly to set aside the trial court’s finding and substitute its own—it applies only when the evidence in the "counter-pans of the legal scale" supporting the trial court’s finding is clearly outweighed by the opposing evidence. Such a scope of review is broad in practice, and although a lower court’s finding might be a reasonable one (in the sense that it is supported by substantial evidence), the appellate court may deem it an erroneous finding.

Confusion has resulted from judicial statements of the rule in language not technically correct. Many phrases have been used to connote the same meaning: "manifestly wrong", "plainly erroneous", "clearly in error", "plainly wrong", and others.

It is to be noted that since equity trials so closely approximate law trials without a jury, with respect to the presence of the witnesses and ability of the trial court to judge their credibility, the scope of review under the Federal Rules is the same ("clearly erroneous rule") for both.

---

15 The holdings in the various circuits are collected in 2 Fed. Rules Serv. 672, 674.
16 See note 14 supra.
17 Scott & Simpson, op. cit. supra note 7, at 737.
19 Id. at 997, where Judge Learned Hand has collected many other phrases in addition to those here listed.
Creation of administrative tribunals to assist with the functions of the legislature has seen an expansion of the use of the narrow rule which has existed for the review of findings by a jury at law—the "substantial evidence" rule.21

Recognizing that findings of fact in administrative proceedings are more properly matters for the trained practical expert than for the occupant of the bench, Congress has given a compromise review to the judiciary. It sought, on the one hand, to prevent arbitrary or capricious action of an administrative body from being conclusive, and, on the other, to avoid the easy substitution of the judicial opinion for the judgment of the skilled technician and experienced commissioner.

Typical of the statutes defining this compromise review is that included in the Communications Act of 1934. It reads:

"... findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." (Italics supplied).22

There are numerous statutes incorporating language identical to that italicized.23 Even where the adjective "substantial" is omitted,24 the Supreme Court has held that no change in meaning results.25 It has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Italics supplied).26

A comparison of the rules will show that "substantial evidence" supporting an administrative finding will preclude a reversal by an appel-

26Ibid.
late court, whereas such evidence supporting a finding by a Federal District Court may be insufficient to bar a Circuit Court of Appeals from holding the District Court’s finding “clearly erroneous”. A finding may thus be based on “substantial evidence” and yet be “clearly erroneous”.

The former term relates to the nature, probative value, and relevancy of evidence, while the latter indicates a finding against the clear weight or preponderance of the substantial evidence on record.

Accordingly, it follows that a court bound by the “clearly erroneous” rule is obligated to “weigh” the evidence in the sense that it must examine both sides of the record and overrule only when it finds the vastly greater weight supporting a contrary finding.27

To make the contrast more obvious it is suggested that a court bound by the narrow substantial evidence rule need examine the respondent’s case alone and overrule the finding only in the event his case is found to be wholly barren of any substantial evidence. This is seldom done by the appellate court, but it would seem the permissible practice.28

The “Consolidation Act” Conflict

To revert to the scope of review given the Municipal Court of Appeals for the District of Columbia: The judgment of the trial court is not to be set aside unless it is plainly wrong [the “clearly erroneous” rule] or without evidence29 to support it30 [the “substantial evidence” rule].

The conflict is obvious. So obvious that it would seem to have required the court immediately to resolve it. It has not done so.


27See notes 14, 21 supra; 3 Am. Jur., Appeal and Error, § 912 n. 16.
The first opportunity for discussion of the court's scope of review came when it wrote its tenth opinion. This was the result:

"A preliminary question for us to decide is whether the trial court's findings of fact were plainly wrong or without evidence to support them. We rule that its findings were supported by substantial evidence."

[Could the findings nonetheless be "plainly wrong"?]

The next opportunity of the court came shortly afterward in the case of Werth v. Nolan, and the opinion indicated use of a contrary rule. The question at issue was whether the defendant personally, or a corporation which he represented, was liable for a rent claim. On appeal the court examined the evidence on both sides and found that the evidence supporting personal liability far outweighed that indicating corporate responsibility. The trial court's finding was overruled.

The next case, involving defective construction of a building, included the following language:

"... Plaintiffs appeal and assign two errors: (1) That the ruling was contrary to and unsupported by the weight of the evidence... The first of these we cannot consider because it is no part of our function to inquire into weight of evidence..."

[How then may the court decide if a finding is "plainly wrong"]

Again the rule seemed changed.

This was followed by Brooks v. District of Columbia, a criminal case in which the jury was waived. The court again adopted the "substantial evidence rule". It stated:

"There was substantial evidence to support the findings of the trial court and under such circumstances this court has no power to substitute its judgment for that of the trial court."

These cases and nine others which followed seemed to bind the court
to the "substantial evidence" rule, the "plainly wrong" phrase being ignored. Yet in four others there was some indication that perhaps the review was somewhat a "weighing" task. Two other cases were susceptible of either interpretation.

Perhaps the most confusing statement of the scope of the appellate court's review was that used in the American Heating case:

"Looking to the record, we are satisfied that this finding not only was not 'plainly wrong', which would be necessary to justify a reversal, but was clearly supported by substantial evidence. That being so, we see no basis for reversal on the ground assigned since it concerns mere weight of evidence."

It should be noted that this suggests that a finding need not be "plainly wrong" even though it is wholly lacking in substantial evidence. In other words, the language would indicate that the court apparently looked upon the term "plainly wrong" as requiring a lesser quantum of evidence to support the finding than does the term "without (substantial) evidence". But if "plainly wrong" has the same meaning as "clearly erroneous", then the scope of review is wider under that term than under the "substantial evidence" rule, and certainly a greater quantum of evidence would be necessary to sustain the finding under the "plainly wrong" rule. There is no dispute among the authorities that a finding which is wholly lacking in substantial evidence must a fortiori be plainly wrong.

By the time almost 150 opinions had been written by the Municipal Court of Appeals for the District of Columbia, the United States Court of Appeals for the District of Columbia reviewed Werth v. Nolan, dis-


cussed above,⁴⁰ "for the purpose of setting at rest the question of appellate jurisdiction . . . ."⁴¹ In a short opinion the court reversed the Municipal Court of Appeals, using the following language:

"... In short, the evidence was such that either one of two different conclusions might reasonably have been drawn from it, and in such a case we have said time and again the decision is for the trial court; that its judgment must stand and that the appellate court may not reweigh the evidence or override the findings, except where it clearly appears they are manifestly wrong. In the case we have here it is enough to say, as the Supreme Court said in Lawson v. United States Mining Co., 207 U. S. 1-12, ... that if the testimony is not sufficient to show that the trial court's decision is necessarily right, it wholly fails to show that it is necessarily wrong, from which it follows that the appellate court was incorrect in substituting its own findings. Hearst Radio v. Good et al., 67 App. D. C. 250, 91 F. 2d 555; United States v. Ingalls, 72 App. D. C. 383, 114 F. 2d 839; Lawson v. United States M. Co., supra; McCaughn, Collector v. Real Estate Land Title & Trust Co., 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879."

In the cases which have followed that opinion it is clear that the Municipal Court of Appeals believes the case binds it to the "substantial evidence" rule.⁴²

Perhaps the United States Court of Appeals so intended. But it is submitted that (a) the decision does not require that interpretation, and (b) if it does so require, it was not so intended by Congress.

The Holding in Nolan v. Werth

An examination of Nolan v. Werth⁴³ indicates that the reversal was based on the higher appellate court's belief that the evidence was fairly well balanced (so that "either one of two different conclusions might reasonably have been drawn from it") and that the circumstances were not such that it could be said that the lower court's findings were "manifestly wrong". In other words, to the United States Court of Appeals the trial court's finding did not seem to be against the "clear weight" of the evidence. But it should be at once evident that the reversal is based on a different view of the evidence and not of the scope of review. There is nothing in the language of Nolan v. Werth which suggests adoption

⁴⁰See note 32 supra.
of the “substantial evidence” rule, except for a somewhat needless statement that “the appellate court may not reweigh the evidence”.

Moreover, the four cases cited by the court in Nolan v. Worth do not compel the adoption of the “substantial evidence” rule.

(1) Hearst Radio v. Good shows again that the United States Court of Appeals after examining the evidence itself, decided that one side did not clearly outweigh the other. It was not a holding that because there was some substantial evidence the trial court’s finding would be affirmed but that there was “ample evidence to sustain that conclusion”. (Italics supplied).

(2) United States v. Ingalls is clearly distinguishable. There, no evidence was submitted by the government to oppose the plaintiff’s claim. Any substantial evidence found by the appellate court would therefore outweigh the opposition.

(3) Lawson v. United States Mining Co. is certainly no authority for the “substantial evidence” rule. The opinion (affirming a reversal by the Circuit Court of Appeals of the trial court’s finding) states: “It is our duty to accept a finding of fact, unless clearly and manifestly wrong.”

(4) Finally, the McCaughn case is obviously not good authority for application in the fact situation of the Nolan case since the former was a case at law, with a jury waived, and was tried in 1936 (before the adoption of the Federal Rules of Civil Procedure) when the finding of the trial court at law had the same effect as the verdict of a jury.

Therefore, there seems no necessity for the Municipal Court of Appeals to conclude that it is bound to the “substantial evidence” rule by the Nolan case.

Congressional Intent

There are three important reasons why the scope of review in the Municipal Court of Appeals should be broad rather than narrow. These reasons are tied in with the purpose and language of Congress in creating the court.

First, the court was created because of (in Senator McCarran’s words) “a much needed and long felt want in the District of Columbia

---

44When a reference is made to the “inability” of the appellate court to “re-weigh the evidence” it may well be understood to mean that no attempt will be made to determine the credibility of the witnesses. See Pollock v. Jameson, 70 F. (2d) 756, 758 (App. D. C. 1934).
46This is what the court normally does. See Pollock v. Jameson, 70 F. (2d) 756, 758 (App. D. C. 1934).
48207 U. S. 1 (1907).
49Id. at 12.
50McCaughn, Collector v. Real Estate Land Title & Trust Co., 297 U. S. 606 (1936).
—to handle the congestion of cases in the upper courts, which has been referred to as next to a scandal". It is hardly to be supposed that a court of review under such circumstances would be created with a lesser scope of review than already existed in the United States Court of Appeals. Especially should this be true where the "intermediate" court in effect has become the "court of last resort" because of the reluctance of the higher court to grant petitions to allow appeals from the former. Only four of approximately forty petitions have been granted and decided since the creation of the Municipal Court of Appeals.

This new court was given a review in non-jury cases on the facts as well as the law, and a narrow review such as required by the "substantial evidence" rule would amount to a "delusion and a snare".

Second, the Consolidation Act directs the Municipal Court of Appeals to prescribe rules for forms, practicable, and procedure which "shall conform as nearly as may be practical to the forms, practice and procedure now obtaining under the Federal Rules of Civil Procedure."

These words need little supplementation to permit the conclusion that rule 52(a) of the Federal Rules, incorporating the "clearly erroneous" concept, should receive much consideration by the Municipal Court of Appeals in the determination of its proper scope of review.

Third, the United States Court of Appeals in Klepinger v. Rhodes has held that Congress in the Consolidation Act gave to the Municipal Court exclusive jurisdiction of certain kinds of equity cases involving amounts up to $3000. Certainly where the Municipal Court of Appeals reviews the findings in an equity case its review should be consistent with the procedure which has generally prevailed in such cases, i.e., a broad review. And it is recognized that it is wholly desirable to give the same value to the findings of a trial court, where it sits without a jury, whether it be in cases originally cognizable at law or in equity.

It is submitted that the foregoing demonstrates that if the Munici-
pal Court of Appeals has adopted the substantial evidence rule, as the cases indicate, it has not adopted the rule intended for it by Congress.

Practical Considerations

In all fairness it must be stated that the rules discussed are by no means susceptible of categorical delineation. A fair statement of the problem is found in a report prepared for the Attorney General:

"Both the judicial and the statutory standards as to the scope of judicial review leave with the courts considerable opportunity for choice and self-restraint in applying the standards to specific cases. The standards are not objective. They relate in large measure to matters of opinion and require the exercise of judgment where differences of opinion are common and frequently reasonable. It is no matter of surprise, therefore, that judges of the same court or of separate courts differ as to whether in a given case the . . . [lower tribunal's finding] . . . was supported by substantial evidence . . . or was arbitrary and capricious, without substantial support and, hence, without the scope of authority."

And the report later states:

". . . 'Substantial evidence' may well be equivalent to the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided."

Courts may differ as to whether specific testimony is or is not sufficient to constitute "substantial evidence", or whether the agreed "substantial evidence" constitutes the mere "weight of the evidence". Yet it is difficult indeed to see how a court would be unable to distinguish a rule which permits it merely to determine whether there is any substantial evidence to support a finding, from one which permits the determination of whether, on the whole record, the evidence clearly preponderates on one side.

That this problem is no mere academic discussion, was affirmed by the United States Supreme Court in the recent case of District of Columbia v. Pace. The statute involved suggests a conflict strikingly similar to that of the Consolidation Act:

---

56See note 42 supra.
58Id. at 90.
59Id. at 91.
60320 U. S. 698 (1944).
6152 Stat. 371 (1938), D. C. Code (1940) § 47-2404(a) providing for a review by the United States Court of Appeals for the District of Columbia of decisions of the Board of Tax Appeals for the District of Columbia.
"The findings of fact by the Board shall have the same effect as a finding of fact by an equity court or a verdict of a jury."

The United States Supreme Court stated:

". . . Since findings of fact by an equity court and the verdict of a jury have from time immemorial been subject to different rules of finality it is puzzling to know what the draftsman of this section meant by including both in the one rule. . . ."65

The Court's subsequent discussion lends support to the point of the discussion herein, and it is especially significant that the rule adopted in this situation ("where a local statute contained a conflict on its face as patent and as irreconcilable as this") was the "clearly erroneous" rule.

Conclusion

It is urged that the Municipal Court of Appeals for the District of Columbia reconsider the statutory conflict and proceed according to the broader scope of review. It is submitted, too, that an amendment by Congress striking out the words "or without evidence to support it" from Section 7 (c)66 of the Consolidation Act would accomplish the worthwhile purpose of resolving the present "irreconcilable conflict" in the language of that section.

S. WALTER SHINE

65 320 U. S. 698, 701 (1944).
RECENT DECISIONS

CONSTITUTIONAL LAW—The Domiciliary State Has the Constitutional Power To Levy a Personal Property Tax Based on the Full Value of Instrumentalities Used in Interstate Air Traffic.

The State of Minnesota sought to recover a delinquent personal property tax for the year 1939 on the entire fleet of airplanes owned and operated in interstate commerce by the Northwest Airlines, Inc. The tax assessed by Minnesota was upon "... all personal property of persons residing therein, including the property of corporations ... except such as is by law exempt from taxation." MINN. STAT. (1941) § 272.01. The Airlines, incorporated in Minnesota, had its main office, major repair base, and "home port" in that state. Flying over an interstate route prescribed by the Civil Aeronautics Authority, with landing fields and minor repair bases in six states other than Minnesota, the Airlines had fourteen per cent of its route mileage and sixteen per cent of its plane mileage in Minnesota. All of the Airlines' planes were in Minnesota at one time or another during the year, but at the date of the personal property valuation, only a small percentage of its planes was in the state. Held, the state of incorporation which is also the operational base of an airline engaged in interstate commerce may constitutionally use as a measure of taxation the full value of the instrumentalities used in interstate commerce. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944).

The Court, split five to four on this case, handed down four opinions—one majority, two concurring, and one dissenting. The majority, speaking through Mr. Justice Frankfurter, at the outset recognized the well-established right of the states to tax, incidentally, instrumentalities used in interstate commerce. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194 (1897); In re *The Delaware Railroad Tax*, 18 Wall. 206, 232 (U. S. 1873). The commerce clause was not intended to prevent those engaged in the field of interstate commerce from carrying an equitable proportion of state taxes. *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530 (1888). Great reliance was placed on *New York Central & H. R. R. R. v. Miller*, 202 U. S. 584 (1906), which upheld a New York tax on all the railroad cars of the petitioner despite their constant use in interstate commerce because "... it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there." *The Miller* case involved a state franchise tax on corporations, to be computed upon the basis of the amount of its capital stock employed within the state, which was in turn to be measured by the amount of capital employed within the state in proportion to the entire capital of the corporation. This was a tax on intangible property values.

In the eyes of the majority, Minnesota, the domiciliary state and the operational headquarters of the Airlines, conferred sufficient benefits to have the
right to tax the Airlines, State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 180 (1942), since it was not shown "... that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere." Northwest Airlines Inc. v. Minnesota, supra at 295. The casual, "occasional excursions to foreign parts", New York Central & H. R. R. v. Miller, supra at 597, do not diminish the domiciliary state's power to tax all of the instrumentalities used in interstate commerce. The inference is that the decision is based in part on the doctrine of the Steamship Cases. Morgan v. Parham, 16 Wall. 471 (U. S. 1872); St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1870); Hays v. Pacific Mail S. S. Co., 17 How. 596 (U. S. 1854). The doctrine of the Steamship Cases gives the domiciliary state the right to assess a tax on the entire value of the vessels used in interstate or foreign commerce and correspondingly denies to any state other than the domiciliary state the right to tax the ships. This theory prevents the vessels from evading taxation altogether, and still precludes multiple taxation. The variable nature of the routes, the temporary, transitory character of a ship's docking at a particular port, are not such as to give the ship a tax situs in any port of call other than the domiciliary state.

The Minnesota tax did not single out air traffic and was not a charge for the privilege of engaging in interstate commerce; hence the state tax was non-discriminatory. The majority, quoting from the Miller case, understood the tax as not directed against planes "continuously without the State during the whole tax year." New York Central & H. R. R. v. Miller, supra at 594. "On the basis of rights which only Minnesota originated and Minnesota continues to safeguard, she alone can tax the personality which is permanently attributable to Minnesota and to no other State." Northwest Airlines, Inc. v. Minnesota, supra at 295.

It is significant that the majority specifically reserved the question as to the taxability of any portion of the planes by states other than Minnesota. Northwest Airlines, Inc. v. Minnesota, supra at 295. In separate concurring opinions, Mr. Justice Black inferred the other states had a right to tax the planes in some measure, whereas Mr. Justice Jackson maintained that the right of Minnesota to tax the fleet was exclusive.

The Court held inapplicable the rule of apportionment, used in the Rolling Stock cases. Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158 (1933); Union Tank Line Co. v. Comptroller General of Georgia, 249 U. S. 275 (1919); Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217 (1908); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); American Refrigerator Transit Co. v. Lynch, 177 U. S. 149 (1900); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891). This rule holds that the various states (including the domiciliary state) may tax the instrumentalities used in interstate commerce only to the extent that the instrumentalities, on the average, are in the respective states. The resulting apportionment among the various states of the tax payments of those engaged in interstate commerce
need not be mathematically precise, if only it has a reasonable basis. In the principal case the Court held the factual situation (i.e., Minnesota, the domiciliary state, contained the "home port", the major repair base and the main office of the Airlines) to be one in which "... the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *New York Central & H. R. R. R. v. Miller*, supra at 597.

The minority objected on the ground that to permit Minnesota to tax the planes in full and to allow other states to tax the same subject matter would subject the Airlines to multiple taxation—an unlawful discrimination resulting solely from the interstate character of the Airlines' business. This multiple tax burden was viewed as a direct interference by the states with interstate commerce, contrary to U. S. Const. Art. I, § 8, and as a deprivation of the Airlines' property without the due process of law required by the Fourteenth Amendment.

Following the rule of apportionment, the minority felt that the domiciliary state, Minnesota, should be permitted to tax only to the extent that the planes were, on the average, in Minnesota. The minority contended: "... the only basis for the taxation of tangibles is their physical presence in the taxing jurisdiction." *Northwest Airlines, Inc. v. Minnesota*, supra at 318 (dissenting opinion); and the dissent cited as precedent for this contention the following: *Johnson Oil Refining Co. v. Oklahoma*, supra; *Union Refrigerator Transit Co. v. Kentucky* supra; *Coe v. Town of Errol*, 116 U. S. 517 (1886); *Brown v. Houston*, 114 U. S. 622 (1885). The minority stressed the fact that the fleet of planes was tangible personal property; and consequently the rule of the taxability of intangibles at the domicile of the owner, whether or not the intangibles were taxed elsewhere, was clearly inapplicable. Because of the substantial benefits enjoyed by the planes in their regular, scheduled flights on determined routes, the personality acquired a tax situs in states other than Minnesota. The domiciliary state and the other states through which the planes passed, then, could each tax only to the extent that the planes were, on the average, in the respective states. The significance of the place of incorporation and of the relatively arbitrary selection of a "home port" for the fleet was minimized and the benefits provided by Minnesota were deemed no more substantial than those given by the other states.

The majority's stand permitting the domiciliary state to levy a tax on the Airlines based on its full value would seem to be unsatisfactory for either of two reasons: (a) if the right of the domiciliary state to tax is subsequently deemed exclusive, states other than the domiciliary state will be unjustly deprived of a source of revenue; (b) if Minnesota's right to tax the fleet is not held to be exclusive, the Airlines will be penalized merely because of its interstate character. States other than the domiciliary state contribute benefits sufficiently material to justify their taxing, to some degree, the fleet of planes. The rule of apportionment of the *Rolling Stock cases* would appear to be more applicable than the theory of the *Steamship cases*. A fleet of planes with regu-
lar, planned, fixed flight schedules and routes logically resembles railroad rolling stock rather than steamships. The right of the domiciliary state to tax the fleet ought not to be exclusive. To allow the domiciliary state to levy a tax on the full value of the planes and to permit other states to tax partially, would clearly penalize the Airlines merely because of its interstate character.

All the opinions grant the constitutional ability of Congress, by its control over interstate commerce, to effect order out of this multiple state taxation chaos. Already, in fact, Congress has authorized the Civil Aeronautics Board to consult with state taxing boards with the aim to minimize multiple taxation of persons engaged in interstate air traffic. Pub. L. No. 416, 78th Cong., 2d Sess. (July 3, 1944). The Board is directed to report within six months from July 3, 1944, recommendations for congressional legislation if such appears desirable. Quite possibly future court decisions, cooperation among the states involved, or congressional action, will, in effect, nullify the holding of this case.

EDWIN R. FISCHER

EVIDENCE—(1) A Finding of Fact in a Denaturalization Proceeding Is Reviewable by the Supreme Court. (2) Proof in a Denaturalization Proceeding Brought on the Grounds of Fraud in the Oath of Allegiance Must Be “Clear, Unequivocal, and Convincing.”

Baumgartner, a native of Germany, came to the United States in 1927 and was naturalized in September 1932. Suit was brought by the Government almost 10 years later, under § 338 of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. § 738 (1940), to cancel the certificate of naturalization on the grounds of fraud and illegal procurement of the certificate. The Government alleged that expressions over a period of years by Baumgartner, in conversations with others, in public speeches, and in the entries of a diary, in which he extolled the achievements of the German people and the virtues of the Hitler Government, showed that he consciously withheld complete allegiance to this country, its Constitution, and its laws. The district court found from the evidence that Baumgartner fraudulently procured the order admitting him to citizenship and the certificate of citizenship. This was done “by means of an oath falsely made, that he had renounced all fidelity to the German Reich and that he would bear true faith and allegiance to the Constitution and laws of the United States.” The Court, therefore, entered a decree for the Government, 47 F. Supp. 622 (W. D. Mo. 1942), which the circuit court of appeals affirmed, one judge dissenting, 138 F. (2d) 29 (C. C. A. 8th, 1943). Certiorari was granted by the Supreme Court. Held: (1) Findings of fact in denaturalization proceedings are open for review in the Supreme Court to determine whether the evidence satisfies the standard of “clear, unequivocal, and con-
vincing” proof. (2) The evidence presented did not meet the standard of “clear, unequivocal, and convincing” proof. Baumgartner v. United States, 64 Sup. Ct. 1240 (1944).

The general principles governing naturalization and denaturalization proceedings are well established. Congress has been entrusted by the Constitution to give or to withhold naturalization. U. S. Const. Art. I, § 8, and has exercised this power by authorizing the courts to grant citizenship to those aliens who have satisfied the conditions imposed by law. Among the earliest requirements for citizenship was the one that the alien applicant renounce his foreign allegiance and swear allegiance to this country and its Constitution. Act of January 29, 1795, 1 Stat. 414 (1795). There is no “... right to naturalization unless all statutory requirements are complied with” United States v. Ginsberg, 243 U. S. 472, 475 (1917); and a certificate of naturalization procured when the prescribed qualifications have no existence in fact may be canceled by suit. Tutun v. United States, 270 U. S. 568, 578 (1926).

The proceedings in the instant case were instituted under § 338 of the Nationality Act of 1940, supra, which was designed “to afford cumulative protection against fraudulent or illegal naturalization”. Baumgartner v. United States, supra at 1245. Such a proceeding presents a problem very different from a hearing on an application for citizenship. “Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency” Luria v. United States, 231 U. S. 9, 22 (1913). “He becomes a member of the society, possessing all the rights of a native citizen, ...: The Constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.” Osborn v. United States Bank, 9 Wheat. 737, 827 (U. S. 1823). The rights, privileges, and immunities bestowed upon a naturalized citizen should not be taken away unless the proof is compelling that they were secured in defiance of congressional authority. The Supreme Court in Schneiderman v. United States, 320 U. S. 118 (1943) considered the measure of proof requisite to denaturalize a citizen and held that the proof must be “clear, unequivocal, and convincing.”

It was argued that the finding of fact by the lower court that this standard of proof had been met was conclusive upon the Supreme Court. But the Court pointed out that while non-fulfilment of specific conditions, like time of residence, Johannessen v. United States, 225 U. S. 227 (1912), absence of certificate of arrival in this country, United States v. Ness, supra, or failure to hold the naturalization hearing in open court, United States v. Ginsberg, supra, is easily established and leaves no area of judicial discretion, this case is different and involves issues of belief or fraud where objective judgment is difficult and proof is treacherous. Moreover, the fact of a false or fraudulent oath must be inferred largely from opinions expressed after the naturalization proceedings and argumentatively projected to the earlier year
when qualifications for citizenship were claimed, tested, and adjudicated. For these reasons, and because the decision involves judgments "lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship", the Court rejected the contention that the lower court's findings were conclusive and held that it would examine the whole record to determine whether the exacting standard of proof set forth in the Schneiderman case had been satisfied.

The Court, on reviewing the record, found that the only evidence introduced to show that the petitioner, when naturalized in 1932, had reservations in foreshewing allegiance to his native Germany, was views attributed to him and alleged to have been expressed between 1933 and 1941 as to the superiority of the German people, the achievements of the Hitler Government, and the justice of Germany's invasions. On the other hand, Baumgartner, at the trial, professed loyalty and willingness to bear arms against Germany. The evidence was not enough, the Court said, to meet the requirement of "clear, unequivocal, and convincing" proof.

This case strengthens, by application, the force of the rule announced in the Schneiderman case. No doubt can remain as to whether the rule is generally applicable to all denaturalization cases brought on the grounds of fraud in the oath of allegiance to this country and its Constitution. The requirement places a difficult burden of proof on the Government in such cases. But strong reasons of law and public policy exist for the rule. Legal precedents for the rule were developed by the Court in the Schneiderman case by analogies with the proof required to attack and set aside a claim, grant, or prior judgment because of fraud. An equally important consideration was the protection of the civil liberties of the naturalized citizen. Said Mr. Justice Rutledge, concurring in the Schneiderman case: "No citizen with such a threat hanging over his head could be free. If he belonged to 'off-color' organizations or held too radical or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show 'continuity' of belief from the day of his admission or 'concealment' at that time." Schneiderman v. United States, supra, at 167. Similar expressions of concern for the rights of naturalized citizens may be found in the majority opinion of the Schneiderman case and in both the majority and concurring opinions in the instant case.

In time of war feelings of nationalism are heightened, and prejudices against persons and ideas alien in origin parade under the colors of patriotism. This decision should bring renewed assurance to all that our courts, even in time of war, are zealous guardians of the rights of the individual citizen, whether native or naturalized. No stronger reason of public policy could be found to justify a procedural rule than the concern for the civil liberties of the naturalized citizen which motivated the court in these two cases.

MAURICE E. WRIGHT
STATUTES—Federal Penal Statutes Restricting Freedom of Speech and Press Will Be Narrowly Construed and the Statutory Language Interpreted In Its “Strict and Accurate Sense”.

With the United States at war, petitioner distributed anonymously copies of three pamphlets to prominent persons and associations. Army officers and employees (registrants under the Selective Training and Service Act of 1940, 54 Stat. 885 (1940), 50 U. S. C. § 301 (1940) of associations to which one or more of the pamphlets were mailed, read the pamphlets in the ordinary course of their duties. In substance, these pamphlets opposed the war; denounced our English allies and the Jews; assailed in reckless terms the integrity and patriotism of the President of the United States; and called for an abandonment of our allies and a conversion of the war into a racial conflict. Petitioner stated that he intended to create sentiment against war among the white races and to unite them against the yellow races. Petitioner and two others were indicted for violating clauses 2 and 3 of § 3 of the Espionage Act of June 15, 1917, 40 Stat. 219 (1917), 50 U. S. C. § 33 (1940), charging that, in time of war, they willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States. The Circuit Court of Appeals affirmed the conviction of the accused by the district court. Hartzel v. United States, 138 F. (2d) 169 (C. C. A. 7th, 1944). The United States Supreme Court, granting certiorari to the case, reversed the conviction. Held: that, in order to sustain a conviction, there must be sufficient evidence from which a jury could infer beyond a reasonable doubt that the accused intended to bring about the specific consequences prohibited by the Espionage Act of 1917. Hartzel v. United States, 64 Sup. Ct. 1233 (1944).

The Court held the following evidence insufficient to prove the narrow intent requisite to a violation of the Espionage Act:

a. Language consisting of “vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President”. Hartzel v. United States, supra at 1237.

b. Inclusion of the names of Army officers in a mailing list of prominent persons and associations which indicated an intention to influence public opinion generally rather than to influence military personnel or persons of draft age in the manner forbidden by the statute.

c. Thoughtlessness, carelessness, and even recklessness, which the Court held were “not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime”. Hartzel v. United States, supra at 1237.

The specific intent or evil purpose, which the Court held to be “an essential ingredient of the crime”, is derived from the construction which the Court placed on the statute generally and on the use of the word, “willfully”, in particular.
Strict construction, as applied to penal statutes generally, means that their penalties will not be extended to cases not plainly within their language and that the words of such statutes should be fairly and reasonably construed. United States v. Resnick, 299 U. S. 207 (1936). See United States v. Olster, 15 F. Supp. 623, 624 (M. D. Pa., 1936); Mitchell v. State, 115 Md. 360, 364, 80 Atl. 1020, 1021-2 (1911). Such statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes generally, including the rule of giving effect to intent of the Legislature. See: United States v. Bowman, 260 U. S. 94, 102 (1922); Snitkin v. United States, 265 Fed. 489, 494 (C. C. A. 7th, 1920); Abbott v. Western Union Telegraph Co., 210 S. W. 769, 770 (1919); In re Merrill, 88 N. J. Eq. 261, 274 (1917).

The Court, speaking through Mr. Justice Murphy, held that the Espionage Act, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense". Hartzel v. United States, supra at 1236. See Mr. Justice Holmes dissenting in Abrams v. United States, 250 U. S. 616, 627 (1919).

The First Amendment of the Federal Constitution prohibiting Congress from making any law "abridging the freedom of speech, or of the press", has been liberally construed. The Court in Bridges v. State of California, 314 U. S. 252, 263 (1941) stated: "It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." See: West Virginia State Board of Education v. Barnette, 319 U. S. 624, 641 (1942); Baxley v. United States, 134 F. (2d) 937, 938 (C. C. A. 4th, 1943); Graham v. Jones, 200 La. 137, 158, 7 So. (2d) 688, 694 (1924); State v. Butterworth, 104 N. J. L. 579, 582, 142 Atl. 57, 58 (1928).

In view of the liberal interpretation placed on the First Amendment, the Court in the present case appears to have applied a stricter construction of penal statutes restrictive of the right to speak and write freely than is the case of penal statutes generally. The Court held that such a statute must be construed narrowly, and, in addition, "must be taken to use its words in a strict and accurate sense". Hartzel v. United States, supra at 1236. When words are used in this sense, "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed." See Mr. Justice Holmes dissenting in Abrams v. United States, 250 U. S. 616, 627.

Generally, the meaning of the word, "willfully", is determined from the context in which it is used. See: Spies v. United States, 317 U. S. 492, 497 (1943), Broder v. United States, 312 U. S. 335, 341 (1941), United States v. Illinois Central R. R., 303 U. S. 239, 242 (1938), United States v. Murdock, 290 U. S. 389, 394 (1933). The Court in the Hartzel case held that the word, "willfully", "when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress." Supra at 1236.

In deciding the issue as to whether or not the evidence in the present case was sufficient, the Court divided on the question whether the words should
be used in a "strict and accurate" sense, or in the sense used in penal statutes generally, i.e., in a "clear and reasonable" sense. Mr. Justice Reed, dissenting in the instant case, stated: "It does not commend itself to us to hold that thereby Congress was merely concerned with crude attempts to undermine the war effort but gave free play to less obvious and more skillful ways of bringing about the same mischievous results. . . . If circulated for the purpose of undermining military discipline, scurrilous articles, attacking an ally, a minority of our citizens and the President, may contain, without words of solicitation, indications of purpose sufficient, if accepted as true, from which to draw an intent to accomplish the unlawful results." Hartzel v. United States, supra at 1238 (dissenting opinion).

The view of the dissenting opinion is supported by earlier decisions of the Court in Abrams v. United States, 250 U. S. 616 (1919) and Pierce v. United States, 252 U. S. 239 (1920). The Court in Abrams v. United States, supra, stated that notwithstanding the ultimate purpose of the accused may have been to prevent interference with the Russian Revolution, if attempts to effectuate such a purpose necessarily involved the defeat of the plans of the United States for the conduct of the war with Germany, the accused would be held to have intended that result. "It will not do to say that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." Abrams v. United States, supra at 621.

Pierce v. United States, supra, in sustaining the conviction of the defendants for distribution of a controversial pamphlet entitled, "The Price We Pay", stated that the fact that defendants distributed such pamphlets with a full understanding of their contents furnished of itself a ground for attributing to them an intent, and for finding that they attempted to bring about any and all such consequences as reasonably might be anticipated from their distribution. Even in the case where such a pamphlet was circulated recklessly without effort to ascertain the truth, it was held equivalent to circulating the pamphlet with knowledge of its falsity. Consequently, such reckless action would be a ground for attributing to the defendant the requisite intent.

The Court has held that the guarantee of freedom of speech and of the press under the First Amendment is not an unlimited one. Schenck v. United States, 249 U. S. 47 (1919). But the Court has never definitely limited the scope of that Amendment. In fact, recent decisions of the Court, including the present case, have constantly broadened the area within which free expression will be protected. West Virginia State Board of Education v. Barnette, supra; Bridges v. State of California, supra; Schenck v. United States, supra.

Schenck v. United States, supra, broadened this area of protected freedom by laying down the rule that it was only the clear and present danger of immediate evil that warranted Congress to restrict the freedom of speech and press guaranteed by the First Amendment. Also see Mr. Justice Holmes, dissenting in Abrams v. United States, supra.
In the instant case, the Court has broadened this area still further by applying "the strict and accurate" rule to the interpretation of statutes in derogation of the First Amendment. The intent of Congress apparently is subordinate to the scope of that Amendment. The clause prohibiting laws by Congress abridging freedom of speech and of the press is a "command of broadest scope" which requires that statutes restrictive of the right to speak and write freely be given this very limited construction.

MANSARD BULLOCH.

STATUTES—Interstate Transportation of Prostitutes on a Purely Vacation Trip, Unconnected with Their Profession, Is Not Transportation with Such a Purpose as to Be Criminal within the Meaning of the Mann Act, Construed in the Light of Legislative Intent.

Petitioners were indicted on January 28, 1941, in the United States District Court for the District of Nebraska on two counts charging violations of § 2 of the White Slave Traffic Act, 36 Stat. 825 (1910), 18 U. S. C. § 398 (1940) in that they transported and caused to be transported two girls from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery and with intent to induce, entice, and compel the girls to give themselves up to debauchery and to engage in immoral practices.

The Mortensens, man and wife, operated a brothel in Grand Island, and the two girls worked for them as prostitutes. They had planned a trip to Salt Lake City to visit relatives, but as the girls asked to be taken along for a vacation, the petitioners agreed to their request. The trip was entirely for vacation purposes, and no immoralities occurred thereon. Upon the return to Grand Island, the girls resumed their work as prostitutes. Petitioners were found guilty in the district court, and this conviction was affirmed in the district court, and this conviction was affirmed in the circuit court of appeals by a divided court. The United States Supreme Court granted certiorari and reversed the lower courts. Held, the interstate transportation of prostitutes on a purely vacation trip, unconnected with their profession, is not transportation with such a purpose as to be criminal within the meaning of the White Slave Traffic Act, popularly known as the Mann Act. Mortensen v. United States, 322 U. S. 369 (1944).

The principal question presented to the Supreme Court was whether or not the interstate transportation of prostitutes on the return portion of a vacation trip, after which they resumed prostitution, is a violation of § 2 of the White Slave Traffic Act. The pertinent section of this statute provides in part:

"That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate ... commerce ... or in the District of Columbia, any woman or girl for the pur-
pose of prostitution or debauchery . . . shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

Mr. Justice Murphy, delivering the majority opinion, emphasized that the Act seeks to penalize only those who use interstate commerce as a calculated means for effectuating sexual immorality. To say that, because people of immoral character travel, "they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance." Hansen v. Haff, 291 U. S. 559, 563 (1934). But to include as a violation of the Act the transportation of a prostitute on an innocent vacation trip in no way connected with her commercial vice, "is consistent neither with the purpose nor with the language of the Act." Mortensen v. United States, supra at 377. The original intent of the legislative framers was to eliminate the "white slave" business in interstate commerce, and to prevent panderers and procurers from compelling girls into a life of prostitution against their will. H. R. Rep. No. 47, 61st Cong. 2d Sess. (1910) 10; Sen. Rep. No. 886, 61st Cong., 2d Sess. (1910) 10; See also 45 Cong. Rec. 805, 821, 1035, 1037 (1910). To accomplish its purpose, the statute uses broad language capable of including situations not within the original intent; but "even such broad language is conditioned upon the use of interstate transportation for the purpose of, or as means of effecting or facilitating, the commission of the illegal acts." Mortensen v. United States, supra at 377. The trip of petitioners had no such purpose and was not related to subsequent immoralities in Grand Island.

The interpretation of statutes by reference to the legislative intent has been a frequent procedure of the American courts in order to determine whether or not a specific set of facts constitutes a violation of a statute. This doctrine was announced as early as 1829 by Judge Story in Wilkinson v. Leland, 2 Pet. 627 (U. S. 1829). He pointed out that the Court was interpreting an act of the legislature, and that it should be so construed as to carry out the legislative intent, although such an interpretation might seem contrary to technical rules of construction.

The basic and generally accepted rule of statutory construction was clearly expressed in United States v. Kirby 7 Wall. 482 (U. S. 1867). In that case a Kentucky sheriff arrested a United States mail carrier in obedience to a warrant charging the latter with murder. The sheriff was indicted under a federal statute making it a violation of law to knowingly and willfully obstruct and retard the United States mail. Mr. Justice Field, in delivering the opinion of the Court, said that such an arrest did not constitute a violation of the statute. He pointed out that all laws should receive a sensible construction; that general terms should be limited in their use so as not to lead to injustice, oppression, or absurd consequences; and that the reason of the law should prevail over its letter. Historically, the rule was referred to as the "doctrine of
equitable construction”, and even today courts still speak of the “equity” and the “spirit” of a statute. 3 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed., Horack, 1943) §§ 6001-6007; CRAWFORD, STATUTORY CONSTRUCTION (1940) § 179.

In another case, Mr. Justice Stone, speaking for the Court, emphasized the same rule of statutory construction as follows: “All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose.” United States v Katz, 271 U. S. 354, 357 (1926); cf. Carlisle v. United States, 16 Wall. 147, 153 (U. S. 1872); Heydenjeldt v. Daney Gold and Silver Mining Co., 93 U. S. 634, 638 (1876); Law Ow Bow v. United States, 144 U. S. 47, 59 (1892).

The dispute concerning the use of legislative intent and its control over the literal meaning of the statute arises from an extension beyond this basic rule. The American courts have on occasion implied that the legislative intent can be used to extend the scope of a statute so as to include cases not within the letter, but within the intention of the framers. Hawaii v. Mankichi, 190 U. S. 197 (1903); Smythe v. Fiske, 23 Wall. 374 (U. S. 1884); But in other instances the courts have restricted the scope of a statute so as to exclude a case within its literal meaning but not within the intention of the legislature. United States v. Aetna Explosives Co., 256 U. S. 402 (1921). The under-lying theory in each case is that the intention of the law-maker constitutes the law and should not be defeated by a too rigid adherence to the letter of the statute. Barrett v. Van Pelt, 268 U. S. 85 (1925). There is no specific authority rejecting the first interpretation; but as a practical matter, it may be noted that the decision under discussion, and most of the cases examined are examples of the Court’s restricting statutes to exclude cases within the literal meaning but not within the legislative intent.

But the division largely stems from the further extension of the use of legislative intent for statutory construction where the literal application produces neither absurd nor unjust results. One of the cases enlarging the rule of United States v. Kirby, supra, was Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 472 (1892). The Holy Trinity Church contracted with a minister residing in England to come to the United States and assume the pulpit of the church. It was claimed by the United States that this contract was a violation of a federal statute which made it illegal for any person to assist or encourage the importation of any alien into the United States to perform labor or services of any kind. The Supreme Court, in deciding that the contract for the immigration of a minister of religion did not come within the provision of the Act, as the intent of Congress was simply to stay the influx of cheap, unskilled labor, said that, “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers”, and further that, “It is the duty of the courts, under these circumstances, to say that, however
broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

The Court's construction of the White Slave Traffic Act by reference to the legislative intent in Mortensen v. United States found complete acceptance in the recent case of Carmen Beach v. United States, 144 F. (2d) 533 (1944). Appellant in that case was indicted for violation of § 2 of the White Slave Traffic Act, in that she transported a woman within the District of Columbia for the purposes of prostitution. In reversing the conviction, the appellate court, speaking through Mr. Chief Justice Groner, admitted that the literal language of the Act justified the conviction below but quoted Mr. Justice Frankfurter's statement in United States v. Monia, 317 U. S. 424, 431 (1943) (dissenting opinion) as follows: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification", and this, said Justice Frankfurter, is true because:

"... A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning."

The court pointed out clearly that there are adequate municipal ordinances prohibiting prostitution in the District of Columbia and that the application of the White Slave Traffic Act to the District of Columbia would be a duplication of effort. He cited the Congressional Record to show that the original intent of Congress was to have the law apply only to interstate transportation and not to transportation within the District of Columbia. 45 Cong. Rec., 3138 (1910); 45 Cong. Rev., 1040 (1910). Any other view would "convict Congress of doing the wholly useless and unnecessary thing of repeatedly giving thought and attention to the passage of local laws parallelling in every essential aspect the provisions of the Mann Act, and in many respects going well beyond its provisions." Carmen Beach v. United States, supra at 535. To emphasize this view, the following dictum of the Supreme Court in Mortensen v. United States, supra at 376 was cited:

"We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions are liable to furnish..."
boundless opportunity to hold up and blackmail and make unnecessary trouble, without any corresponding benefits to society."

In contrast to the doctrine of equitable construction is the rule of literalness. The latter rule is limited to situations wherein the language of the statute is free from any ambiguity or obscurity. If the meaning is clear from the words of the statute itself, and neither contradiction nor ambiguity is present, then the meaning of the statute, apparent on its face, must be considered as controlling upon the court. Board of County Commissioners of the County of Lake v. Rollins, 130 U. S. 662 (1889). In cases of doubtful interpretation the courts have always felt themselves free to consider the reports and records of Congress to explain what meaning the framers intended the words of the statute to convey. But when the literal meaning of the statute is clear, and the results are neither unjust nor absurd, the two doctrines appear irreconcilable. When these two conditions are present, the rule of literalness precludes any examination of the legislative records. Mackenzie v. Hare, 239 U. S. 299, 308 (1915). On the contrary, the doctrine of legislative intent, especially as expressed by Mr. Justice Frankfurter, advocates that courts must be controlled by the intent of the framers, whether or not the meaning of the statute is clear and the literal construction would not produce unjust results.

One of the leading cases enunciating the "rule of literalness" is Caminetti v. United States, 242 U. S. 470 (1917). Petitioner was indicted for violation of the White Slave Traffic Act in that he transported a woman in interstate commerce for the purpose of becoming his concubine. Petitioner argued in his brief that the intent of Congress was only to penalize "commercialized vice" and not immoral conduct alone. Mr. Justice Day, in expressing the majority opinion, stated that the language of the statute, in its normal meaning, included interstate transportation for any immoral purpose, and was not to be limited to commercial vice. Resort to reports of Congress is to be made by the courts only in cases of doubtful interpretation. "... when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or substracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." Caminetti v. United States, supra at 490.

In Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 89 (1935), the Court again emphasized that the duty of courts is to apply the clear, literal meaning of the statute despite any contrary intent of the framers as shown by legislative records. "We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used."

The Supreme Court in Mortensen v. United States has logically developed
the doctrine of *Church of the Holy Trinity v. United States, supra*, and discarded the familiar landmarks of "injustice," "oppression" and "absurd consequences" as the limitation on the use of the doctrine of legislative intent or "equitable construction." By excepting the situation in this case from the operation of the White Slave Traffic Act, the Court gave relief from a result which, though perhaps harsh, was neither absurd nor wholly impracticable, solely on the basis that it was not within the legislative intent. It is an indication that the Supreme Court has deliberately moved further toward the doctrine enunciated by Mr. Justice Frankfurter in his dissent in *United States v. Monia*. While it does not specifically overrule *Caminetti v. United States*, there is an intimation that the Court may do so and thereby limit the application of the White Slave Traffic Act to commercialized or compulsory prostitution, in conformity with the original Congressional intention.

The Government has indicated it plans to appeal the decision in *Carmen Beach v. United States*. If so, an opportunity will be offered the Court to continue the development of the doctrine of legislative intent, and to delcare flatly that despite unmistakable clearness of language, and results that are neither unjust nor absurd, the intent of the legislative framers shall be controlling upon the courts even if contrary to the letter of the statute.

ROBERT L. HEALD

TORTS—*Res Ipsa Loquitur* May be Applied to a Common Carrier When a Passenger is Injured As a Result of a Collision Between the Common Carrier and a Motor Vehicle Owned and Operated by an Independent Party.

The plaintiff, a passenger on the street car of one of the defendants, a transit company incorporated in the District of Columbia, was injured as a result of collision between the street car and a truck of the co-defendant, a local laundry. The plaintiff alleged general negligence on the part of both defendants. Upon proving that she was a passenger, that a collision took place, and that she was injured as a result, the plaintiff rested her case. In the answers, the defendants charged each other with being negligent and urged that the doctrine of *res ipsa loquitur* is inapplicable where it appears that two or more instrumentalities may have contributed to the injury, only one of which was under the control of the defendant. Demurrers were upheld and directed verdicts were given for both defendants in two trials conducted in the Municipal Court for the District of Columbia. Appeal was taken to the Municipal Court of Appeals for the District of Columbia. *Held,* a passenger of a common carrier who is injured as a result of a collision with an independent motor vehicle need only prove the occurrence of the accident and the resulting injuries. Then, under the doctrine of *res ipsa loquitur*, the carrier must rebut the inference of negligence, and if such inference and rebuttal present an issue of fact the case must go to the jury. The doctrine does not apply to the owner and

While holding that the laundry was liable only for breach of ordinary care, the court pointed out that the carrier had a different and greater duty. An earlier case was referred to in which it was said, "Out of special solicitude for the safety of human cargo has grown the rule that a common carrier must exercise the highest degree of care in transporting passengers for hire. This means that proof of even slight negligence creates liability on its part." *Birchall v. Capital Transit Co.*, 71 W. L. R. 1279, 1280 (D. C. Mun. App.), 34 A. (2d) 624, 625 (1943).

In its opinion the court relied heavily upon *Sullivan v. Capital Traction Co.* 34 App. D. C. 358, 367 (1910), in which the court stated: "It is true that where, by the failure of appliances of transportation, or by collision, an accident happens whereby a passenger is injured, and the circumstances of the accident are peculiarly within the knowledge of the carrier, such passenger may, in his declaration and proof, content himself with establishing his right to recovery by proving that he was a passenger and sustained injury while such. This is sufficient under such circumstances to establish a prima facie case, which, in the absence of any explanation on the part of the defendant, would entitle the plaintiff to recover; but even this does not relieve the plaintiff from establishing his case by the preponderance of the evidence. It merely raises an inference of negligence which calls for rebuttal or explanation on the part of the defendant, and which, in the absence of such explanation, will authorize the plaintiff to recover."

Quoting from *Gleason v. Virginia Midland R. Co.*, 140 U. S. 435, 444 (1891), the court said, "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing if the plaintiff be a passenger, that the accident occurred. If that act was in fact the result of causes beyond the defendant's responsibility or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case."

In *Pistero v. Washington Railway and Electric Co.*, 46 App. D. C. 479 (1917) it was held the plaintiff may make out a prima facie case by merely proving the existence of the passenger-carrier relationship, the collision and the injury resulting therefrom. It was said that, in such a case, an inference of negligence arises which calls for rebuttal or explanation and is sufficient to send the case to the jury and support a verdict for the plaintiff if such rebuttal or explanation is not sufficient to overcome the inference of negligence.

There is considerable diversity of opinion and confusion among the courts as to whether the doctrine of res ipsa loquitur is applicable to the situation where a passenger on a common carrier is injured as a result of a collision between the carrier and another vehicle. While it is almost uniformly held that the doctrine does not apply to the other vehicle, the courts are about evenly
split as to the applicability of the doctrine in a suit between the passenger and the carrier.


The apparent conflict in the holdings of various courts is due to a tendency of some courts to hold fast to the strict interpretation of the doctrine requiring that the instrumentality causing the injury be in the exclusive control of the defendant, *Yellow Cab Co. v. Hodgson*, 91 Colo. 365, 374, 14 P. (2d) 1081, 1084 (1932).

On the other hand, other courts have interpreted the doctrine so as to exclude this technical requirement when it is applied to a common carrier. These courts place a special responsibility upon the carrier by requiring them to exercise a high degree of care and by granting the plaintiff a procedural advantage. That a passenger is entitled to such a procedural advantage arises from the holding that a common carrier is required to exercise "the utmost caution characteristic of very prudent men for the safety of its passengers." *Pennsylvania Co. v. Roy*, 12 Otto 451, 456 (U. S. 1880).

In holding that the doctrine applies under such circumstances as described, it is the writer's view that the Municipal Court of Appeals has followed the preferable rule. As has been suggested by one writer, it is common experience that in traffic accidents it is highly probable that both drivers are negligent. It therefore would not be unreasonable to presume negligence on the part of both. Prosser, *Collision of Carriers with Other Vehicles* (1936) 30 ILL. L. REV. 980, 992. At least, it seems only just that the passenger should be entitled to a satisfactory explanation of the collision by the carrier who was entrusted with her safety. That the burden of overcoming the inference of negligence should be placed upon the carrier is further supported by the fact that the carrier is in a much better position to show that the proper degree of care could not have avoided the collision than is the passenger to show that the proper degree of care was not exercised.

LOUIS C. CHAPPELL
BOOK REVIEWS


The book analyzes and compares the laws of Italy and France on requisition as existing in 1940. The material used by the writer is basically material of the last war. Every lawyer working in this or similar fields finds himself at the present time more than ever engaged in examination of the legal practices developed during the last war or in the transitory period between the last war and the present one. We like to learn from former experiences, as certainly we can.

As far as the Italian law is concerned however, the writer considers the Italian provisions too much with the eyes of a lawyer studying the method of the last war. The organization of the Fascist state makes "requisition" a much less important factor, since the government, through the channels of the Fascist organizations, have the power to make any industrial plant work in accordance with the aims of the government. Formal requisition is not necessary to accomplish that. The reader of the book may get the impression, even if contrary to the author's intention, that the interference of Fascist legislation with private property actually did not go beyond the general principles embodied in the legislation of liberal countries such as France. That is true as far as the language of the statutes on requisition are concerned, but it is certainly not true if the influence of the government on the use of property is considered in its entirety.

The development after 1940 in France and in Italy showed very well what the trend was before the organizations in which every industrialist, as well as any working man, was joined, and which made the entire industrial and human apparatus of France and Italy work for what was "government" at that time.

Within the indicated limitations the book is an excellent and very careful analysis of the pertinent statutes and decisions, for the period of the first World War and the intervening period, which proves much additional research is necessary, especially a comparison between administrative law of the European continent and of the United States.

HEINRICH KRONSTEIN*

*Professor of Law, Georgetown University School of Law.