PROPERTY AND WAR
IN PARTICULAR, THE SWISS-AMERICAN-GERMAN CONDITIONS

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I. Property Restrictions in the National Interest

To what extent private property is restricted in the national interest is an issue of positive law. It can be answered, therefore, only on the basis of the law in force, which may differ from country to country. If we are asked, for instance, what are the conditions for carrying out an expropriation in Switzerland, the answer can be given only on the basis of the Swiss federal law of June 20, 1930, concerning expropriation. This law, in conformity with the philosophical tenet that private property, as a private law institution, is to be admitted and respected, has a conspicuous regard for the owner. The right of expropriation can be claimed only for works which involve the interests of the Swiss Confederation or of the greater part of the country, and in so far as it is necessary to achieve the purpose. Expropriation may only be ordered and carried out against full compensation. Inasmuch as expropriation should be based on mutual understanding, i.e., should imply the voluntary agreement of all parties concerned, the Legislature endeavors to strike a balance between the interests of the individual and those of the community.

Restrictions on property may vary not only from country to country, but also from time to time. We can even go so far as to say that the law must be changed as circumstances alter. Could we, for instance,

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imagine that in normal times, and when we enjoy a general prosperity, the same provisions would apply as in a period of external distress and peril? Property would then, in respect of the external circumstances, be either too fettered or not sufficiently serving the community. Law must be changeable, because the circumstances of life which it regulates are not immutable.

It is in times of war, when public utility comes before private interests, that the emphasis shifts to a greater extent from the individual to the general interest. And yet if we examine, for example, the Decree of the Swiss Federal Council of October 25, 1940, concerning seizure, expropriation, and compulsory delivery, it is remarkable with what consideration private property is called upon for the common cause, whereas its owner, like all citizens in the same circumstances, is expected to risk his life. Only those objects which are indispensable to cover the requirements of the people and the army may be seized. Between the possibilities of taking private property by compulsion or by mutual understanding, the latter alternative is preferred. If it proves unavoidable to order seizure—of course against just compensation—the seizure will have to be effected with the greatest consideration for the party concerned. An inequitable treatment as regards possible competitors for the future has to be avoided as far as possible.

For international law, restrictions which are not aimed at the person of the owner but which can, in the national interest, and without discrimination, affect citizens and foreigners alike, do not constitute any particular problem. It is the prevailing opinion that each state is allowed in the public interest to take private property which lies within its territory. In so far as treaties cover this field, they seldom provide more than that the citizens of one of the contracting parties and their property in the territory of the other party are to be treated on the same footing as its own citizens; at any rate, not less favorably. Private property of foreigners, therefore, cannot be expected to receive special treatment. The sole reservation is that it can only be taken against equitable compensation. The American Constitution explicitly grants the owners of property in the United States a claim for just compensation in case of seizure. The international duty to grant compensation, however, exists also if the local law contains other or no provisions.

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56-B Eidgenoessische Gesetzessammlung 1683 (1940).
7 Hackworth, Digest of International Law (1943) 529.
8 Id. at 540; 2 Whiteman, Damages in International Law (1937) 900.
92 Whiteman, op. cit. supra note 4, at 1386.
There exists among civilized states an international standard which prescribes legal protection to be ensured by the respective governments. If a country's system of laws and administration does not conform to that standard, although the people of that country may be content or compelled to live under it, no other country can be compelled to accept such standard as furnishing a satisfactory measure of treatment to its citizens.6

II. INTERFERENCE WITH PROPERTY FOR THE PURPOSE OF WEAKENING THE ENEMY

The issue of how to deal with enemy property pertains exclusively to international law. It can therefore not be answered for one State in one sense and for another State in another, according to the different domestic laws, but only uniformly according to a supranational law which applies to all of them.7 The respective opinions, however, materially differ to an extraordinary degree from time to time. Ancient times hardly made any distinction between combatants and noncombatants or private and other property. As a logical consequence of the practice by which whole populations might be destroyed or enslaved, confiscation i.e., seizure without compensation, was the rule.8 Thanks to the development of international trade, this practice constantly declined. Especially in State treaties concluded in the 18th century is a tendency towards inviolability apparent.

The first treaty which the United States9 concluded with France in 1778 provided that should war break out between the two nations, a period of six months after the proclamation of war was to be allowed to the merchants in the cities and towns where they lived for selling and transporting their goods and merchandise. The Continental Congress, in a resolution of 1784, declared that it would be advantageous to conclude treaties of amity and commerce with the principal commercial powers of Europe, and directed that in the formation of these treaties it be proposed that if war should occur, the merchants of either party then residing in the other were to be allowed to remain nine months

6 Hackworth, op. cit. supra note 3, at 472.
7 Burckhardt, Die Völkerrechtliche Verantwortlichkeit der Staaten (Switzerland, 1924).
9 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements (1910) 468, 475.
to collect their debts and settle their affairs and might depart freely carrying off all their effects without molestation or hindrance. In this spirit the United States concluded a long series of treaties, particularly in 1799, with Prussia. This treaty was strengthened by the additional clause that neither the pretense that war resolves all treaties, nor any other whatever, shall be considered as annulling or suspending said clause; but, on the contrary, that the state of war is precisely that for which the treaties are provided. For the exceptional seizure of property which was deemed necessary for the Army, the contracting parties promised the payment of a reasonable price.

The Hague Convention Respecting the Laws and Customs of War on Land, in Article 46, explicitly prohibits confiscation of private property. This naturally means, above all, the property of enemy citizens in the territory in which war is waged. It is obvious that a belligerent hardly ever depends more on enemy property than when its troops are advancing. Expressly for this case, however, Article 52 of the Convention confines the right of belligerents to requisition, but only of things required for the needs of the army of occupation. The conclusion is self-evident that, within the meaning of the Convention, enemy property beyond the zone of operations or occupied territory should even less be confiscated, but only requisitioned against equitable compensation. If enemy private property—on a reciprocal basis—is as a matter of principle to be respected, there is no need for lengthy explanation that neutral property may not be confiscated in any circumstances; for it is to be borne in mind that neutral States, also, respect the property within their territory belonging to citizens of belligerent countries.

With this backward glance, the two extremes—confiscation, i.e., outlawing, on the one hand, and the respect of private property on the other—are clearly pictured. Now, as hostilities have come to an end, different opinions clash anew in America as to how to deal with the tremendous amount of enemy property taken over by the Alien Property Custodian. In its Review, Law and Contemporary Problems, Duke University Law School recently issued a special number about "Enemy Property" in which, among others, personalities of the American Administration and Members of Congress were given an opportunity to express their views. However, a common line cannot be traced. On the contrary, the opinions expressed are diametrically opposed.

Switzerland, like all neutral countries, is greatly interested in a solu-

383 Secret Journals of the Continental Congress (1823) 484.
31 Malloy, op. cit. supra note 9, at 1484.
tion of the problem, because the notion of "enemy" property embraces the fortunes of the Swiss citizens who were residents of countries with which America was at war, or which were occupied by Germany, and furthermore of Swiss citizens who are on the proclaimed list.

III. AMERICAN ENEMY LEGISLATION

The basic law concerning intercourse with the enemy and the treatment of enemy property is the "Trading with the Enemy Act," enacted October 6, 1917.12 It has been repeatedly amended without, however, Congress having declared explicitly which previous provisions remained in force and which ones became obsolete. An uncertainty has thus been created, which, when a Committee of the House of Representatives was reporting after Pearl Harbor on the most important amendment, was admitted by the statement: "Some sections of that Act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections."13

In view of this situation we abstain from dwelling too long on surmises as to the significance of the Act, but concentrate on the most important provisions which are also of special interest from the Swiss standpoint.

As has been intimated, the notion of "enemy" is a very extended one, not only embracing the enemy government and the citizens of the respective State, but all corporations and individuals domiciled in an enemy or an enemy-occupied territory. Thus also neutrals and even Americans may be considered as enemies. Furthermore, persons in neutral countries placed on the black list are treated as enemies. Theoretically the Act opens the possibility of declaring any commercial subject outside the United States an enemy. The German decree of January 15, 1940, concerning the treatment of enemy property is, as to the definition of the term "enemy," also based on the principle of domicile, but does not take cognizance of the black list which covers the territory of neutrals.

In its original wording, section 7(c) of the Act empowered the President of the United States, or the Alien Property Custodian designated by him, to request the transfer of enemy property to the United States

1240 STAT. 411 (1917), 50 U. S. C. App. §§ 1-31 (1940), 50 U. S. C. App. §§ 616-618 (Supp. 1941-1945). This Act is referred to throughout this article and to avoid a superfluity of footnotes it will be cited here only.

Government. On November 4, 1918, the provision was clarified to the effect that the Alien Property Custodian had the authority to seize the respective property.

The enemy property taken by the Alien Property Custodian must be safely held and administered. He had the powers of a common law trustee and could make any disposition thereof if and when necessary to prevent waste and to protect such property. The Alien Property Custodian was thereby obligated to keep in mind the interests of the United States in such property and the rights of such persons as might ultimately become entitled thereto.

On March 28, 1918, the competence of the Alien Property Custodian, still designated "common law trustee," was widely enlarged. Thenceforth, he had the power to make any disposition of enemy property, by sale or otherwise, in like manner as though he were the absolute owner thereof.

Section 12 of the Act furthermore provides that after the end of the war any claim of an enemy to any seized property shall be settled as Congress shall direct. As to persons not enemies, on whose property the Alien Property Custodian had erroneously laid hands, section 9 (a) gives administrative and judicial recourse.

Section 5 (b) is also relevant in that it originally enabled the President of the United States to investigate, regulate, or prohibit all transactions in foreign exchange, export of gold or silver as well as the enemy property under his jurisdiction.

In view of the bank and financial crisis of 1933, section 5 (b) was altered to the effect that beginning March 9, 1933, section 5 (b) could not only be invoked during war but also during any other period of national emergency with a purpose then of executing monetary control.

The amendment of section 5 (b) of May 7, 1940, again emphasized more the international than the domestic character of that provision. The controlling powers of the President, which particularly emerged in connection with the freezing orders, were extended to all transactions in which any foreign State or person in its territory had any interest.

The final alteration of section 5 (b) by the First War Powers Act came on December 18, 1941,\footnote{55 STAT. 838, 1941, 50 U. S. C. App. §§ 601-622 (Supp. 1941-1945).} shortly after the United States, through the Japanese attack on Pearl Harbor, had become a belligerent country. The President or the Alien Property Custodian was given the unrestricted, absolute competence to seize any property or interest of any
foreign country or national thereof in order to hold, use, liquidate, sell, or otherwise deal with the said property, in the interest of and for the benefit of the United States.

Interpretation and application of the above-mentioned provisions of the Trading with the Enemy Act constitute the object of vigorous controversy. The advocates of the radical opinion suggest the confiscation of "enemy" property, including actual and mere technical enemies, whereas the representatives of the moderate tendency, who feel bound by justice and not by power, stand for an objective interpretation.

Instead of following the consideration of many authors, let us turn to the findings of John Foster Dulles,15 who not only is considered outstanding in legal circles but who also has acquired a reputation in the political and international field since he was assigned as an adviser to the American Delegation at San Francisco. Dulles begins with the statement that the Act is a patchwork which had to serve various purposes. The main emphasis rests on the goal of weakening the enemy, which purpose originally was sought to be attained by severing the traffic with the enemy and the sequestration of enemy property. The amendment of section 5 (b) of May 7, 1940—the United States was still neutral at that time—was aimed at the exclusion of the control which Germany might have been able to exert over Danish, Norwegian, Dutch, and Belgian property in the United States after having invaded these countries.

From the development of section 12 of the Act, it can be unmistakably deduced that the task of the Alien Property Custodian was that of a conservator. He was obligated to hold seized property safely and to administer it and to have regard for the rights of the owners who—a fact which deserves to be stressed anew—can be not only true enemies but also neutrals and even American citizens.

Opinions are particularly divergent with respect to the question of whether section 12, which, according to the wording of March 28, 1918, gave the Alien Property Custodian the authority of an absolute owner, is only applicable to seized enemy property in the sense of section 7 (c) or also with respect to property of any foreign state or the respective persons domiciled therein, according to section 5 (b) of December 18, 1941. Dulles voiced the opinion that Congress might perhaps confiscate true enemy property; there would, however, be no indication that Congress wanted the confiscation of the fortunes of Allied or neutral nations.

or victims of German aggression, who for technical reasons alone, namely, because of their domicile in enemy or enemy-occupied countries, have been proclaimed "enemies" of America. That section 5 (b) is not of confiscatory character is hardly questionable, since the provision is explicitly not only applicable in times of war but also to meet other national emergencies. Whichever sense might be given to section 7 (c) and 5 (b) in connection with section 12, the dilemma proves insurmountable in the cases where the Alien Property Custodian did not state in his vesting orders whether they were based on section 7 (c) or 5 (b).

Dulles endeavors to bring about understanding of the uncertainty by pointing out that the United States was exposed to a ruthless and unexpected attack (Pearl Harbor) and was compelled to move quickly if not precipitately. In its original phraseology, the Trading with the Enemy Act could not suffice for modern war requirements, since war was waged from camouflaged political and economic cells and strongholds scattered over the entire globe. The amendment of section 5 (b) of December 18, 1941, therefore, provisionally covered, perhaps in too far-reaching a manner, not only the property of enemies in the true sense of the word, but also of prisoners, victims of the enemy, allies, and neutrals. "Mistakes against our friends could be corrected, but mistakes in favor of our enemies might be fatal."16 In this respect, the Act was an indispensable tool. However, the time has come to differentiate between technical and real enemy private property.

IV. INTERNATIONAL LAW AND DOMESTIC LAW

It has already been stated that the question of how to deal with "enemy" property is primarily one of international law. What the settlement is, therefore, in accordance with international law, cannot be decided by the American Trading with the Enemy Act or any other domestic law, but should be based on the rules of the existing law of nations.

In the American discussion in which certain authors attribute absolute power to Congress with regard to enemy property, that fundamental factor has been overlooked. The Trading with the Enemy Act and new legislative decisions to be expected from Congress must be submitted to an examination in order to establish whether they are in conformity with international law. Should they prove to be incon-

16Id. at 259.
sistent with international law, the American Government, upon foreign representations, could not justify itself by arguing that said regulations are its national law; for it will itself have enacted the law.\textsuperscript{17} International behavior cannot be justified by basing one's actions on domestic law.\textsuperscript{18} International responsibility is not governed by domestic law but, on the contrary, the scope of domestic law, including the Constitution, is limited by the rules of international law. But what are such rules of international law? In fact, there is no strict international principle at hand which would regulate the treatment of enemy property. This does not mean that there are no \textit{general} principles of international law applicable.\textsuperscript{19} The last source of all law is justice, which implies equity and good faith,\textsuperscript{20} if the notion of justice is not taken in the absolute sense.

To demonstrate conclusively, and to secure recognition of, that which is just, is the art of the people entrusted with the care of relations between States.\textsuperscript{21} This task is not an easy one in times when the objective independence of the parties to the discussion is dimmed by passion. We are now in a situation analogous to the one after the War of 1914-18, about which the former American Secretary of State, Cordell Hull, declared:

"The nation in control of the seas, before the war ended dominated almost every dollar's worth of commerce between neutrals and any part of Europe. That was . . . through curtailing other rights of neutrals. In other words, nearly all of what had theretofore been the ordinary rules of . . . neutral rights were more or less set aside, so that when the war ended there was in several respects virtual chaos so far as neutral rights were concerned."\textsuperscript{22}

This perception might have caused the following statement of September 14, 1939, also made by Cordell Hull:

"The principles of international law as regards neutrals and belligerents have been evolved through the centuries. While belligerents have frequently departed from these principles on one pretext or another, and have endeavored to justify their action on various grounds, the principles still subsist."\textsuperscript{23}

It is our main goal now to search for the rules concerning the treat-

\textsuperscript{17}Burckhardt, \textit{op. cit. supra} note 7, at 16.
\textsuperscript{18}ID. at 648.
\textsuperscript{19}Hackworth, \textit{op. cit. supra} note 3, at 194.
\textsuperscript{20}1 ID. at 42, 43.
\textsuperscript{21}Id. at 12-14.
\textsuperscript{22}Schneeberger, \textit{Diplomatie und Recht} (Switzerland, May 1945) Neue Schweizer Rundschau.
\textsuperscript{23}Hackworth, \textit{op. cit. supra} note 3, at 5, 6.
\textsuperscript{24}ID. at 648.
ment of "enemy" property, i.e., for principles of international law which, naturally, are the same for all members of the family of nations.

V. THE LEGAL STATUS OF PERSONS IN ENEMY TERRITORY

The legislation of the United States gives the Alien Property Custodian the authority to seize property in America belonging to Germans, neutrals, citizens of invaded countries, and even Americans, as well as corporations, on the mere ground that they are or were domiciled in an enemy or an enemy-occupied country.

Those circles which not only advocate the confiscation of property of actual enemies, but also of technical enemies, consider any person not residing in his homeland as a renegade who, through his presence in an enemy country, helps the adversary in some manner. This conception is reflected in the American provisions regarding citizenship according to which certain categories of citizens, after a short time of residence in a foreign country, lose American citizenship. Analogous precautions are provided by the passport regulations. This conception, however, is in its principle obsolete. Thus the United States Department of State says:

"In modern times there has been a vast improvement in facilities for a communication and transportation between the various nations of the earth, and a corresponding increase in international travel and trade and it has become a not unusual practice for citizens of one country to establish themselves in another country for purposes of business without any intention of renouncing their original allegiance. Therefore it is the department's opinion that the acquisition of permanent foreign residence by a native citizen has not the same significance which it had in former years. It is considered that an American citizen may now have a permanent foreign residence and yet contribute, indirectly if not directly, to the wealth and strength, the prestige, and general welfare of his country..."

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"Frequently they can do much more for the United States through their residence abroad than they could by remaining at home."

Thanks to this broadminded statement of the State Department, there is no room for the arguments which seek to put on the same level the Germans on the one hand, and, on the other, the Poles, French, English, Americans and Swiss living in Germany or German-occupied territory. If the question of how to deal with the property of those persons seized in the United States has to be solved, then it obviously makes some

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3 id. at 280.

28 Id. at 282.
crucial difference whether the property of a German or of a neutral, or of a citizen of one of the United Nations is at stake.

In H. R. 4571 of December 4, 1945 amending the First War Powers Act of 1941, it is proposed to refuse the return of seized property to persons who have resided voluntarily in enemy territory, at any time since December 7, 1941. According to this bill—which represents a first departure from stiff formalism in favor of a more reasonable treatment—property seized in the United States would be restored to allied prisoners of war, persons who were interned in Germany, as well as diplomatic and consular personnel. With respect to Swiss citizens who held out in enemy territory in order to protect their interests on the spot against interference by the enemy of America, it cannot be contended that their decision was made of their own free will. It was dictated by the force of circumstances, especially by German foreign exchange legislation preventing foreigners from selling their interests and transferring the proceeds abroad.

It would not have been a legally tenable proposition, nor could it have been expected that Swiss citizens for reasons of economic warfare should have given up their interests in belligerent countries.

It is clear that there are a few renegades of neutral or other descent, who supported one or the other of the belligerents. Their behavior, however, as far as Switzerland is concerned, has been taken into consideration since the Swiss Federal Council ousted some of them by depriving them of their Swiss nationality. We can leave it to them to worry about the possible disposition of any property belonging to them which may have been seized in the United States.

If the behavior of others did not have the extreme consequence, i.e., the deprivation of Swiss citizenship, this cannot be construed as meaning that they can claim the diplomatic protection of the Swiss Federal Council. The Swiss Federal Supreme Court has ruled in a fundamental judgment, that the weighing of the factors to be taken into consideration with respect to the extension of diplomatic protection is left to the free and final appreciation of the Federal Political Administration entrusted with the international relations of Switzerland. 26 This decision and the practice of the authorities are in full harmony with the American opinion. It denies to the citizen an absolute right to diplomatic protection. The State, i.e., the foreign administration, determines by itself

whether, when, and in which way it will espouse a claim with a foreign government.27

Since, in the light of the aforesaid, seizure of property in America cannot, as a matter of principle, be motivated by the penal consideration that the owner is, or was, domiciled in enemy territory, another conception must be found.

The most recent American publications agree that Germany, before having launched the military conflict, waged a systematic economic war. Through infiltration into American key economic positions, Germany is said to have succeeded in thwarting the development of certain American industries important to the war, and in keeping secret technical "know-how" so that the American efforts to meet requirements of the war were sabotaged for some time.28 Switzerland also has been affected by the German economic warfare, if we remember the foreign exchange restrictions introduced by Germany at the beginning of the Thirties. At first, the Swiss Federal Supreme Court branded the German prohibitions and restrictions covering foreign exchange as a spoliative measure affecting the rights of Swiss creditors.29 Later on, the Supreme Court took a more clear-cut stand against the deliberate and willful injury to foreign creditors in favor of the German economy and the German State, and it defined the function of the "Ordre Public" (public policy), as an economic defense which emerged from times of distress against selfish, rigorous measures of a foreign state by means of which, ex parte and ruthlessly, at the expense of other countries, its economic interests should be enforced.30

In view of the experience gained with respect to Germany, the Swiss Federal Council was well advised when, by its decree of July 6, 1940, concerning the provisional regulation of financial intercourse between Switzerland and different countries,31 it prohibited direct or indirect payments to persons in German-occupied territory or disposition of property in Switzerland without permission of the Swiss Compensation Office.

27 HACKWORTH, op. cit. supra note 3, at 491; WHITEMAN, op. cit. supra note 4, at 275. See also the Final Report of H. H. Martin, Acting Agent of the United States before the Mixed Claims Commission, United States and Germany (1941) 129: "Whoever is entrusted finally to determine what government must or must not do in a dispute between nations is the ultimate arbiter of momentous questions of public policies affecting this nation's relations with the other countries of the world."

BERGE, CARTELS—CHALLENGE TO A FREE WORLD (1944).

61 DECISIONS OF SWISS FED. SUP. CT., Part II, 246.

64 id. Part II, at 98.

56-B EIDGENOESSISCHE GESETZESSAMMLUNG 1173 (1940).
One of the primary purposes of the decree was that nationals of the German-occupied countries could not, in contradiction of the Swiss "Ordre Public," be compelled under duress to report and deliver their foreign assets to Germany in so far as they lay in Switzerland. Also, the Swiss debtors who might have been deceived as to the identity of the true creditor should be protected against later claims.

In this light, the provisions of the Trading with the Enemy Act, rendering possible the blocking of all property belonging to enemy, neutral, or allied persons in German or German-occupied territory, are justified. Outstanding American testimony from World War I leaves no doubt that neutral and friendly property which might have been taken by Germany was actually vested by the Alien Property Custodian for the purpose of safeguarding the rights of the respective persons and not for depriving them of their property. When, in the course of the first World War, the Alien Property Custodian seized French property belonging to persons in German-occupied territory, the Department of State informed the French Ambassador that the Attorney General would be authorized to free French property taken as soon as the owner left the enemy-occupied territory or the enemy withdrew from there. These assets would not be sold or made the subject of other disposals, but would be safely held. The French Government, invited to state its opinion, replied that it had no positive objection to the contemplated measure, but that it explicitly anticipated that this sequestration should entail no cost or expense for the owner and that the return would take place without delay and in the most benevolent spirit.

There are other official indications at hand as to how "enemy" property might be dealt with. In a report to the competent Senate Committee, published June 27, 1945, the Alien Property Custodian recommended that the property in the United States seized from "German nationals" should not be returned. According to Executive Order No. 8389, as amended, June 14, 1941, the definition of a "German national," contrary to the definition of a "German citizen," covers as a matter of principle all individuals (thus, also, non-Germans) who, since April 10, 1940, were domiciled in Germany. Moreover—no matter what interests are involved—all juridical persons and corporations should be included in so far as their domicile or their commercial center of activity was in Germany, or as they were controlled from there.

The report of the Alien Property Custodian continued that not only the

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6 Hackworth, op. cit. supra note 3, at 206.
property of German nationals but *any* "enemy" property, also by implication, that of persons on the black list, should not be restored. Among all interested administrative agencies it would be understood that vested patents should definitely be taken away from their former owners.

In the hearings of September 12, 1945 regarding H. R. 3750, the Department of State, the Attorney General and also the Alien Property Custodian correspondingly advocated the necessity of returning sequestered property belonging to citizens of liberated nations and other friendly countries. H. R. 4571 of December 1945, however, only provides for the return of property to friendly foreigners having resided in former enemy-occupied territory but not to those in enemy territory or on the proclaimed list.34

The Alien Property Custodian himself asserted as early as 1943 that he had a great measure of responsibility toward non-Germans in enemy-occupied territory and also, naturally, in enemy territory. These persons would be exposed to the ever-present danger of disposing of their property, under duress, in favor of the enemy. America's broader responsibilities charged her with the duty of ensuring the protection of those rights.35 China's property in the United States, of which Japan might have disposed due to the military situation, was frozen at the request of China itself.36

After the defeat of Germany, the withholding of non-German property in the United States can no longer be construed as a measure of protection for the owners, or as a measure for weakening the enemy, but affects the owners exclusively and therefore is incompatible with the law of nations.

VI. THE LEGAL STATUS OF PERSONS ON THE BLACK LIST

On July 17, 1941, President Roosevelt ordered the establishment of a proclaimed list of certain blocked nationals, the so-called "black list." In this instrument are listed those corporations and individuals of neutral countries who, from the American point of view, directly or indirectly helped the enemy or were enemy-controlled.

He who figures on the black list is considered an enemy of the United States. At the beginning of 1945 there were about 15,000 cor-

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34This bill was enacted as law on March 8, 1946 to amend the First War Powers Act. Pub. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946).
35Patents at Work (U. S. Alien Property Custodian 1943.)
porations and individuals registered, nearly one-tenth of which concerned Switzerland. As a rule, their plants and places of business in America, as well as patents and copyrights, were seized by the Alien Property Custodian.

The legal nature of the black list under international law is controversial, a fact which is reflected in the question of how to deal with property which has been seized from persons on the black list.

For clarity’s sake, it is desirable to state that the Swiss authorities have to withhold their protection from German citizens as well as from all other foreigners in Switzerland included in the black list, because according to theory and practice only their home government is qualified to grant diplomatic protection. Neither is Switzerland competent to give protection in cases of juridical persons and corporations with domicile in Switzerland, the beneficial owners of which are Germans or other foreigners. This limitation is the logical consequence of the fact that the Swiss Federal authorities, similarly with the American opinion, may claim the right to protect the interests of Swiss enterprises domiciled in foreign countries. This practice has nothing to do with the principle of “hostile infection”. Diplomatic protection to German-owned firms in Switzerland is not denied because they have been stigmatized by the United States, but for the reason that they are non-Swiss interest representations, and that the Swiss Federal Council is only empowered to safeguard Swiss interests, wherever they may be found. Steps in connection with the blacklisting of foreign-controlled enterprises were taken as an exception. Such steps, however, were not taken in the interest of the particular enterprise, but in the general Swiss interest if, for instance, the foreign enterprise was of paramount importance to the Swiss war economic organization. America followed the practice of vesting or controlling German-owned enterprises within her jurisdiction, thereupon using them in the American interest. On the other hand, attempts were made to strangle German-owned factories in Switzerland, of no immediate value to the German war effort, regardless of the disrupting repercussions on Swiss economic life.

5 Hackworth, op. cit. supra note 3, at 802, 812; 1 Whiteman, op. cit. supra note 4, at 94; 2 id. at 1359.

5 Hackworth, op. cit. supra note 3, at 829, 839 et seq.; 1 Whiteman, op. cit. supra note 4, at 129; Schneeberger, Anonymitaeit und Nationalitaet der Aktiengesellschaft, Zeitschrift des Bernischen Juristenvereins, Heft 6 (Berne, Switzerland, 1944).

For a parallel opinion see Final Report of H. H. Martin, supra note 27, at 80: “The business of the [Canadian-owned, American-domiciled] company was of a character that would fill a vital need of the United States in a national emergency.”
Our attention is therefore focused on Swiss citizens and firms which are Swiss, as to their capital stock, management, and workers, and which loyalty followed the Swiss provisions and were declared enemies of the United States only on account of their exports to Germany or because they dealt with firms already blacklisted.

Great Britain introduced a black list during the war of 1914-18. Upon American representations, the British Government declared that it was aware of the inconveniences brought about for the trade of neutrals by the black list, and that every possible safeguard would be taken. The black list, i.e., the prohibition of trade with persons figuring thereon, would only embrace persons under British jurisdiction. His Majesty's Government would readily admit the right of persons of any nationality resident in the United States to engage in legitimate commercial transactions with any other persons. It could, however, not admit that this right could in any way limit the right to restrict the commercial activities of the nationals within the jurisdiction by the imposition of prohibitions and penalties. Actually, the black list, i.e., the prohibition to have intercourse with registered persons, was applied not only to firms under British jurisdiction, but to everyone who entered into relations with a person already thus stigmatized.

The American Government on July 26, 1916, had a formal note delivered to the British Government wherein it most emphatically protested against the black list. The note reminded the British Government of the Hague Convention concerning the rights and duties of the neutral powers, according to which the neutrals are even allowed to export war material. Moreover, it mentioned the unquestionable remedies with which Great Britain might meet breaches of blockade for trade in contraband and other unneutral acts. The American Government, however, was opposed to seeing these remedies and penalties altered or extended at the will of a single power or group of powers to the injury of its own citizens or in derogation of its own rights, and His Britannic Majesty's Government could not expect the Government of the United States to consent to seeing its citizens placed on an ex parte black list without calling the attention of His Majesty's Government to the many serious consequences to neutral right and neutral relations which such an act must necessarily involve.

The burden of proof, that it had no intercourse with an enemy or that it is not enemy-controlled, is placed upon a corporation itself. Mere suspicion is sufficient ground for blacklisting.

*6 Hackworth, op. cit. supra note 3, at 335.
The British answer to the American representation that the black list inevitably and essentially is inconsistent with the rights of the citizens of all nations not involved in the war, was unsatisfactory. It disregarded the actual situation by confining itself to the confirmation that the black list would only apply to British merchants, and that Great Britain had the right to deny to neutral firms trading with the enemy the facilities introduced by the blockade authorities. The United States, in 1917, after having fought the British black list as a violation of international law, availed itself of this instrument.

If the black list, on the one hand, would actually have had to be observed by persons under British jurisdiction and if, on the other, only German economic strongholds in neutral countries as well as breaches of blockade and dealers in contraband had been put on the list, there might have been room for discussion as to the legality of this instrument. However, all persons beyond British jurisdiction, in the sense of a chain boycott, were flung under the proclaimed list for having upheld traditional relations with already stigmatized firms or persons who, for instance, based on articles 271 and 273 of the Swiss Criminal Code, refused to give information about their business secrets, such as customers, suppliers, shareholders, etc. The black list not only affected foreign trade but also seriously disrupted the internal Swiss economic life, and, therefore, constituted—and still constitutes—an interference with Swiss sovereignty. The decree of the Swiss Federal Council of November 4, 1943, concerning the prohibition of obligations entered into with foreign authorities with respect to trade,41 is an eloquent testimonial of how economic warfare sometimes overlooks the enemy’s and the neutral’s sphere.

The American Government in 1915 explained to the British Government unequivocally that economic warfare, in so far as it affected the rights of neutrals, was against international law.42 Great Britain—also in 193943—attempted to motivate the economic warfare it waged as retaliation for the German submarine and mine operations. America made its deduction from the statement that retaliatory measures are by their nature illegal; in so far as they affect the rights of neutrals, they are actually illegal. In other words, the retaliatory measures have to be arranged in such a manner that they leave the neutral unmolested.

Another tenet of international law invoked by the American Govern-

459 Eidgenössische Gesetzessammlung 872 (1943).
47 Hackworth, op. cit. supra note 3, at 143.
4Id. at 138.
ment in connection with economic warfare is that any change in the laws of a neutral state during the progress of war, which would affect the belligerents unequally would be an unjustifiable departure from the principle of strict neutrality.  

At the beginning of the first World War the United States did not subject the export of war material to any restrictions, and in consequence of the blockade Great Britain exerted over Germany, only the former country benefited from American war material. The German Ambassador in Washington made representations against this situation, and stated that it could in no event be in accordance with the spirit of true neutrality. The theoretical willingness to supply Germany, also, if a shipment thither were possible, did not alter the case. The American Government rejected the reproof by arguing that it would be a direct violation of the neutrality of the United States if it were to place an embargo on the trade in arms at present affecting Great Britain alone.

In analogy to the foregoing American motivation, the Swiss Federal Council after the collapse of France in 1940 was even less able to bar the export of war materials from which only Germany could benefit. Because of an article in a reliable, widely-circulated American daily paper, the American people may know that the Swiss Federal Council when war broke out in 1939 was about to ban the export of war material. It, however, abstained from carrying out this plan, not in the last instance because of steps taken by the Western Powers. More than 85 per cent of exported Swiss material is said to have gone to France and Great Britain. Due to the collapse of France and the encirclement of Switzerland by the Axis Powers, which created a situation without precedent in history, the exports to the Western Allies were suddenly stopped. Switzerland, however, could not deny to Germany what it had granted the Western Powers, without, in the light of the American viewpoint with regard to the German protest in the last war, committing a flat breach of international law. In spite of having been completely surrounded by the Axis Powers, Switzerland did not favor Germany with its exports but successfully insisted on the principle of "give and take" in carrying on war-time trade with Germany. Naturally, Switzerland could not offer St. Gall embroideries in exchange for raw materials and products which were short in Germany itself. It was all the more burden-

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44 Id. at 617.
some to Swiss firms that they were put on the British and American black list for exporting to Germany within the framework of trade agreements, because of the fact that Switzerland received vital imports from Germany such as coal, iron, mineral alloys, seeds, and other commodities. If the blacklisting of the respective firms, in the light of the foregoing American testimony, appears to be against international law, then the confiscation of those firms’ property in the United States on the ground that they were included in the black list, is still less justifiable.

VII. THE LEGAL STATUS OF ACTUAL ENEMY PERSONS

The term actual enemies of the United States embraces all German citizens inside and outside Germany, including juridical persons controlled by Germans. Assimilated with enemy persons could be those neutrals who committed hostile acts in the sense of Article 17 of the Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. On the other hand, German refugees and German inmates of German concentration camps, whether they were detained for political or racial reasons, should not be considered as actual enemies of the United States. Germans abroad who remained loyal to their country of residence constitute a special category; an act of Congress provided with regard to these latter persons that they should be treated according to the dictates of humanity and national hospitality.\(^47\)

It is proof of a traditional respect for legality that even in the United States opinions differ as to the final disposition which should be made of actual enemy private property. Those who would uphold the absolute inviolability of private property argue that the State, if it grants permission to foreigners to acquire property, is logically bound to provide for its protection under all circumstances. The confiscation of private property is said to violate good faith, to destroy confidence and, moreover, to injure the interests of international trade.\(^48\)

Every progressive and farsighted person—statesmen as well as scientists, economists or judges—naturally favors a development towards inviolability of private property. This trend is apparent in written international law, where the principle is explicitly established that private property must be respected and that it cannot be confiscated.\(^49\) What,

\(^{47}\) 1 Stat. 577 (1798).

\(^{48}\) See sources cited by Sommerich, A Brief Against Confiscation (1945) 11 Law & Contemp. Prob. 152 passim.

\(^{48}\) Hague Convention Respecting the Laws and Customs of War on Land, Annex to the Convention, Art. XLVI (1907).
however, are the consequences if a belligerent breaks this rule and dispossesses the citizens of its enemy State?\textsuperscript{56} Doesn't such an act destroy the basis for the rule that private property should not be affected by war? Quite evidently, he who spurns the rule cannot be surprised if others subsequently revise their obligations. Or, can the wrongdoer expect that his illegal acts remain without consequences to himself? Because of the failure of one party, the attempted positive reciprocity is transformed into a negative reciprocity.

The importance of the principle of reciprocity in international law justifies a closer study of its meaning.\textsuperscript{61} The Hague Convention, for instance, prohibits the utilization of the labor of prisoners of war in connection with the operations of war.\textsuperscript{52} It is understandable, however, that a belligerent feels bound only so long as its enemy also abides by this rule. Another example: enemy property may only be destroyed or seized if such destruction or seizure is imperatively demanded by the necessities of war.\textsuperscript{53} The attack or bombardment of towns, villages or buildings which are undefended is prohibited. Nevertheless, Germany wiped out recklessly numerous enemy localities. Is it surprising, and does it amount to a violation of the law, if the Allies subsequently adopted emergency defense and attack methods of a similar nature and, obeying exigencies of the situation, were in their turn compelled to destroy property and dwellings beyond the strict necessities of warfare?

This interpretation of reciprocity is also supported by international Conventions. For instance, capitulations when once settled must be scrupulously observed by both parties.\textsuperscript{54} As self-evident as the rule that mutual agreements must be kept by both sides are the consequences of their breach: any serious violation of an armistice by one of the parties gives the other party the right of recommencing hostilities immediately.\textsuperscript{55} In this sense of a negative reciprocity the use of enemy private property for the compensation of damages sustained by the citizens of the power effecting the compensatory seizure might be justified. This would in


\textsuperscript{61}This point seems to have been overlooked by Southworth, \textit{Shall Enemy Property Be Returned? A Long-term View} (1946) 40 AM. POL. SCI. REV. 101.

\textsuperscript{52}Hague Convention Respecting the Laws and Customs of War on Land, Annex to the Convention, Art. VI (1907).

\textsuperscript{53}\textit{Id.} at Arts. XXIII g, XXV.

\textsuperscript{54}\textit{Id.} at Art. XXXV.

\textsuperscript{55}\textit{Id.} at Art. XL.
fact correspond to the situation which obtains with regard to enemy private property at sea: if captured it is deemed lawful prize. Nobody would seriously expect that a belligerent would unilaterally respect enemy private property at sea. Why should different rules apply with regard to property on land? The principle that enemy property should be respected without exception rests on the recognition of the fact that mutual seizure, *i.e.*, negative reciprocity, is destructive. *Progress* depends, however, on the development of *positive reciprocity*.

To state the issue in more fundamental and realistic terms: the ultimate aim is not the elimination of certain military or economic means with which war is waged, but the elimination of war itself. However, nobody would accuse a State of a breach of international law for defending itself against an aggressor. Yet if a country immediately surrendered when it was attacked, this undoubtedly would "mitigate the severity [of war] as far as possible." Just as war can be countered by war, a belligerent, according to negative reciprocity, may logically employ the same means as the enemy.

There are, it is true, norms of international law which any civilized belligerent obeys, even if they are violated by the enemy. As is well known, one group of belligerents mistreated, displaced, and killed individuals belonging to the enemy population or army in violation of positive law. It is also alleged that the same coalition misused the Red Cross emblem as a military ruse. Fortunately, the adversary did not adopt similar measures; these could not have been justified under the pretext of reprisal. For these actions belong to a different plane. They do not involve a settlement of commercial and property claims, but constitute a violation of "the laws of humanity and the dictates of the public conscience."

Despite the fact that World War II, as well as the first World War, was undoubtedly a conflict between *peoples* and not merely between governments or, as used to be the case earlier, between princes, attempts are nevertheless being made to deny the liability of the German people. Using an analogy to corporation law, the German citizen is

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*Preamble, Hague Convention Respecting the Laws and Customs of War on Land (1907).*

*Hague Convention Respecting the Laws and Customs of War on Land, Annex to the Convention, Art. XXIII b, (1907).*


*Lansing, Some Legal Questions of the Peace Conference (1919) 44 A. B. A. REP. 238, 245.*

*Die gesperrten deutschen Guthaben in der Schweiz (Switzerland, 1945) Neue Zuercher Zeitung, August 4, 1945, No. 1184.*
said to be no more liable with his private property for the bankrupt German State than a stockholder is liable with regard to his corporation. This analogy is arbitrary and deliberately misleading. Or can the bonds between citizen and state really be compared to the relationship between stockholder and corporation, which can be joined or jilted at the stock exchange according to purely financial and profit considerations? If a parallel is to be construed in order to compare the relationship of citizen and state with any institution of corporation law, then the closest analogy would be the "Kollektivgesellschaft" (corresponding to an American partnership) where the subsidiary liability of each associate is unlimited and extends to all his assets in the sense of a community of fate.

One final consideration: States, not individuals, are the subjects of international law. Only States have obligations under international law. These duties, however, can only be violated by individuals; but it is again the State which is responsible for such violations. Otherwise it could not be said that the State is obligated. Therefore, is it not in contradiction with the law of nations if the United States uses German private assets to compensate legal wrongs for which the German State is responsible? This is a contradiction only in appearance. With the statement that only a State is responsible nothing is said as to the substantive nature and degree of that responsibility, which is of a peculiar character. One cannot fail to recognize that the liability of the community must necessarily take a different form from the liability of the individual wrongdoer. For instance, if a foreign diplomat is murdered or if he is robbed, the State which has to answer for this action can neither be liable nor punished in the same way as a murderer or a robber. It has only to answer for the fact of the murder or the robbery, and has only to make amends to the extent which the injured State can require of it as a State, i.e., as the guardian of the legal order which is

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61 Eidgenoessische Gesetzessammlung 185 (1937).
62 Feher, Deutsche Rechtsgeschichte (Germany, 1943) 337: "In der Mitte steht das deutsche Volk in seiner Gesamtheit. . . . Die volkliche Gemeinschaft in ihrer schicksalshaften Verbundenheit stellt die naturgegebene Groesse dar."

the mission of every State. As to the degree of liability, it will depend on the relationship between the totality of the citizens and the particular illegal act. This connection cannot be determined by legal norms but depends on the evaluation of facts. The liability of the community will be less in case of violation of the international law by an isolated act of an individual, than it would be in cases where public opinion or even the Government approved of or supported the particular violation. It depends, for instance, on the circumstances in which an infringement of foreign property rights occurred whether the total national wealth, including public and private property, has to serve to meet the liability. The extent of the liability under international law cannot be determined in abstract formulas of general validity. It is always a question of equitable and just evaluation of circumstances.63

Summary

(1) Property situated in a foreign country is, as a matter of principle, subject to taking only if such taking
   (a) is done to serve public interest;
   (b) is necessary to achieve that purpose;
   (c) is under the same circumstances also ordered by the State against its own citizens;
   (d) is carried out against just compensation;

(2) If beneficially owned Swiss or other neutral property is taken by a belligerent in the interest of the owner or for other reasons, this property independently of the domicile of the owner is to be held safely and preserved, and to be given back when the war has ended, at the latest.

(3) In conformity with the sense and the spirit pervading the Hague Convention Respecting the Laws and Customs of War on Land, enemy private property, as a matter of principle, is on a reciprocal basis also to be respected. Nevertheless, it may be withheld as a guarantee for claims against the enemy States and eventually used as a means of compensation.

63Burkhardt, op. cit. supra note 7, at 24.
THE WANING POWER OF THE STATES

Hon. Julian P. Alexander*

OUR nation has been declared by our Supreme Court to be an indestructible Union, composed of indestructible states.

How indestructible is an "indestructible state"?

By the Treaty of September 3, 1783,1 the states achieved independence. For a century and a half upon the embattled fields of judicial review and in the entrenched aisles of popular forums the struggle to retain independence goes on apace.

The lines were formed early in our political history. Our independence was declared in language that was then an accepted truism, "That these United Colonies are, and of Right ought to be Free and Independent States".2 What followed has tended to subtract from both their freedom and their independence as states.

This Declaration also gave to the colonies the power of sovereign states.3 The powers granted to the central Government were painstakingly restricted to those of national concern. The Constitution was the product largely of economic crises although its purpose was political unity for the administration and the common defense. To this end its functions were related to national integrity and administration. The most ardent advocate of states' rights conceded jurisdiction over such functions as international relations, copyrights, national defense, taxation, coinage, war, the postal service and interstate commerce. However, sensitive souls viewed with alarm the last named power when seen in the light of Section 8 of Article I which empowered the Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."4

*Associate Justice, Mississippi Supreme Court.

18 Stat. 80, 81.

2Declaration of Independence, 1776.

3The use of "sovereignty" and even of "states' rights" have been deprecated as now inapt and ambiguous. Corwin, The Twilight of the Supreme Court (1934) 196; Holcombe, State Government in the United States (1929) 31. Yet the terms connote well understood assertions of reserved state power. Exactly eighty-four years after the Declaration of Independence, Lincoln stated in his special session message to Congress of July 4, 1861, that "The Union is older than any of the States, and, in fact, it created them as States." 6 Richardson, A Compilation of the Messages and Papers of the Presidents (1897) 27. "Sovereignty" and "power" are not identical. 1 Tucker, The Constitution of the United States (1899) 60.

All governmental authority and prerogative belonged to the people of the states, and whatever they had not delegated to the United States or prohibited to the states, they reserved to themselves as states respectively or to the people. They were content with the implications of their Constitution and its Bill of Rights which began and ended with "the people". They were to discover that power began and ended with the Union and that the burden of showing explicit powers was upon the states.

The body which alone had authority to roam the shadowy no-man's land of dispute and to make effective its views was the Supreme Court. At the first opportunity, this tribunal showed that it did not have to put its identifying finger upon a definite provision to justify the assertion of national power. The moving finger of the Court could not only point but could write, and having writ, moved on to expanding opportunities for enlargement.

John Quincy Adams satisfied both parties when he said in his first annual message to the Congress, "the exercise of delegated powers is a duty as sacred and indispensable as the usurpation of powers not granted is criminal and odious." Yet he saw to it that Marshall, the able high priest of federalism, was named to be Chief Justice. It requires slight draft upon the imagination to make dramatic the inauguration of the democratic Jefferson as he stood before the Chief Justice with hand upraised, being sworn to support the Constitution as he saw it, while Marshall was intoning to him the oath to support a quite different Constitution.

Adams had said in the aforementioned message:

"... if these [delegated] powers and others enumerated in the Constitution may be effectually brought into action by laws promoting the improvement of agriculture, commerce, and manufactures, the cultivation and encouragement of the mechanic aid and of the elegant arts, the advancement of literature and the progress of the sciences, ornamental and profound, to refrain from exercising them for the benefit of the people themselves would be to hide in the earth the talent committed to our charge—would be treachery to the most sacred of trusts."

This was a traffic light at the cross-roads which showed red or green, depending upon the respective angles from which it was viewed.

4U. S. Const. Amend. X. The Confederate Constitution was clearer. The powers not delegated were "reserved to the states respectively, or to the people thereof." (Italics supplied).

2 Richardson, A Compilation of the Messages and Papers of the Presidents (1912) 877.

7Id. at 882.
The analyses of state powers by Bryce and De Tocqueville seem now archaic, not because they did not reflect the original status of state powers correctly, but because in the intervening years their estimate of the stability of such powers has been found over-optimistic. Thus has been fulfilled the claim of the former to the effect that the Americans have more than once bent their Constitution in order that they may not be found to break it. It is as if the courts in applying principles of legal construction have conceded that the states drew up the compact for themselves and therefore must submit in doubtful cases to a construction most strongly against them.

There are many, of course, who assert that the Supreme Court has not added any new powers to the Union. It may save the personal integrity of the Court, although not the political integrity of the states, to phrase it that if the Court has not added new powers to the Union it has purported to discover many that the states did not know had been delegated. It has increased its own powers of discernment in detecting stowaways on the “Ship of State” and in pressing them into useful service. Truly Jefferson “planted”, Hamilton “watered”, but the Supreme Court “gave the increase”.

The “horse and buggy days” have been used to symbolize a construction which has now become as archaic as the means of transportation itself. It is apposite that in those bucolic days the highways followed an easy meandering course along the contours of the hills, whereas a modern judicial system cuts its direct and open way across obstructing ridges, borrowing prerogative from them to fill in the limited vales of delegated powers. An emergency of the nation has put the buggy again upon our highways. An appreciation of state emergency may serve to restore theories which left the highways along with the horse. The horse-drawn barouche which conveyed Andrew Jackson from Nashville to Washington after his election in 1828 carried in its compartments a copy of the Constitution to which he was to swear allegiance. No doubt it reached the Capitol intact. Its modern housing in zippered brief-cases need work no magic transformation in its spirit or body. It is only by interpretation that it can change its spirit. This is done not so much in the light of the times as by the inner lights which brighten the corners of judicial minds.

The reasons for these accessions of power cannot be simply stated.

"For a discussion of this problem, see 1 Bryce, The American Commonwealth (1931) passim."

"Bates and Field, State Government (1939) 15."
As safe a judgment as any is that the Union has expanded its powers because the states have spoken too often of states' rights when they should have been pondering states' duties. Usurpation of power by the national Government has developed because (1) it has recognized new duties, and (2) because the states have ignored old duties. The Union has simply picked up a lot of loose powers which the states had left lying around.

The multiplication of national activities, bewailed as harbingers of dictatorship or heeded by sensitive ears as the rumble of the distant drum of advancing state socialism, must be diagnosed as to their causes before we seek panaceas. The bureaucrat is not implausible when he pleads in his defense both laches and estoppel against the states. It is increasingly difficult to accuse with vehemence those who have reclaimed fields abandoned by the states and who have occupied them for the general welfare beyond a reasonable prescriptive period.

The inch of indifference has lengthened into an uphill mile which the states can with difficulty retrace. The accusation that the states, as reaction against this tendency, are engaged in a new "secession" indicates merely that they are marching on Washington to seek their lost powers. Viewed so long as family members who should be seen and not heard, their belated demands have assumed the aspect of a bonus march.

When Justice Day said, "... there is no place in our constitutional system for the exercise of arbitrary powers ..." he retained his own idea as to when the exercise of power became arbitrary. The rising tide of bureaucracy engulfs us with a system whereby the states have been denied due process by the law of the United States. Appointees not responsible to the people are given almost dictatorial powers, often without right of appeal from their decisions.

Between the admitted sectors of powers granted and powers reserved lay a disputed area of "implied powers" and of powers deemed "necessary and proper". Into this penumbra, the judiciary guided the steps of the executive and legislative branches with a flickering light which, while sufficient to locate and stake its claims of preemption, unfortunately cast foreboding shadows.

The Interstate Commerce Clause has been a golden gate of opportunity through which have poured the forces of federal usurpation under the aegis of "implied powers". Practically every activity is seen as being

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“affected with a public interest”. I need not trace the history of a tendency that has been given repeated impulses and only token setbacks throughout the intervening years.

By 1935, a federal court had asserted boldly that the states had virtually surrendered all powers they could not efficiently exercise. Thus, the news of the pending culmination seven years later was broken frankly, if not gently, by a significant decision which could but soothe the troubled spirit of Hamilton. It was held in June 1942 that Congress can regulate the wages and hours of anyone engaged in any occupation necessary to the production of goods not in, but for, interstate commerce. The sudden drop in temperature in the “solid south” was unquestionably the aggregate of chills which beset the spines of haggard farmers employing cotton pickers in the production of a fleecy product destined ultimately, as they hoped, for interstate marketing.

No one need question the integrity and open frankness of the Supreme Court in pronouncing, without circumlocution, that legislation must be construed “in the context of the history of federal absorption of governmental authority over industrial enterprise” and the admission, nay the assertion, that the Act is one of those which “radically readjusts the balance of state and national authority”. To press these disclosures to a consistent though thought-provoking climax, I quote further: “To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States”. Whence this “new federal authority”? Were such powers reserved not to the states, but to the Union, after all? Have they sprung full armed from these judicial brows? Bryce was right—the Constitution has not been broken—but its elasticity has met every requirement of the Federal Bureau of Standards. Well may the states bewail the disclosure that the Union is more indestructible than they. These observations upon judicial trends are not criticism but comment. For the moment I am not concerned with theories but conditions.

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17Id. at 523.
18Id. at 522.
19Id. at 520.
20A lone dissent by Justice Roberts protests logically that, since every local activity somehow affects interstate commerce, the Government has preempted the field of labor and industry. Or does the controlling opinion mean that labor and industry have in turn taken over the Government? Id. at 527.
21For a compilation of decisions indicating the trend, see A. B. Kirschbaum Co. v. Walling, supra note 15, at 522, note 2.
Bureaucracy cannot be destroyed simply by railing at it; nor is it justly accused by those who refuse to trace its paternity. Those who would cast the first stone would be wiser to use their own legislatures as practice targets. In this manner, they may at least develop an offensive technique and perhaps get the range.

When social and economic needs become acute, the benefactor, i.e., the Federal Government, and its objects—the people, are apt to talk over the heads of the states. The latter have developed a false modesty which has made of them political wall-flowers when functions are involved. The states are distinctly in the grasp of an inferiority complex. They have allowed themselves to become short-circuited so long and so often that the people have begun to lift their eyes unto the hills of Washington, whence cometh their help. This has developed in the citizens a sort of chronic farsightedness which has thrown out of focus their own state capitols.\(^\text{20}\) There are already those realists who seriously advocate the abolition of the states as such.\(^\text{21}\) Others have proposed a reduction of the number of states to only a few provinces. Regardless of whether these are mere straw men set up to be spectacularly knocked down, or as scarecrows to warn the states, it is unquestionably true that their vagrant straws, loosened in the process, have served to indicate the trend of political winds.

Dispassionate opinion will discern in the retaliatory anti-lynching measures a gratuitous gesture of interference which signals help to the citizen behind the backs of the states. The states in turn are denied due process of their own laws under the Federal Government's guise of assuring due process to its citizens. Although technicalities are being groomed for use in pending cases, too controversial for discussion here, it is relevant to note that federal control or discipline in such matters will have to involve the concession that the states as such have the primary duty to act because they have the primary right.\(^\text{22}\)

\(^{20}\)Prof. J. W. Burgess sees the nation and the people as the only natural elements in our system. The states are ground between the upper and lower millstones. Cf. Holcombe, The States as Agents of the Nation (1921) 1 Southwestern Pol. Sci. Quart. 307.

\(^{21}\)The suggestion was first made, however, in the debates on the adoption of the Constitution. 5 Elliot's Debates 182, 194, 211, 256. See also Wallace, Our Obsolete Constitution (1932) 185. See Graves, The Future of the American States (1936) 30 Am. Pol. Sci. Rev. 24.

\(^{22}\)In February, 1943, a Federal Grand Jury indicted certain citizens and officials in Mississippi for causing a prisoner to be taken from jail and lynched. The prosecution, instigated by the Government, will, of course, have to be sustained, if at all, as being an act of the State through its agents. Inaction was held equally culpable in the parallel case of Catlette v. United States, 132 F. (2d) 902 (C. C. A. 4th, 1943).
The conventional function of the states under the Constitution involved such administrative cooperation as tended to preserve the integrity of the Union as a political entity. They were to elect the representatives to the Congress; to furnish their quota of presidential electors; to remain distinct factors in amending the Constitution. They were to constitute available aids in quelling local disorder through the militia and, by enlarging these functions, to be direct aids to the Union for national defense. National conventions for party nominations furnish an opportunity, eagerly grasped and vigorously exercised, to raise their state banners and be both seen and heard as such. Some duties the Constitution left open to the states, merely by not prohibiting their exercise by the states. It is in this area that absorption by the Federal Government was first manifested. These included, for example, state jurisdiction in matters of naturalization, bankruptcy, patents, weights and measures, postal service and interstate commerce.

There are, however, inherent functions which the states must perform if they would preserve their sovereignty. I do not refer to measures which are designed to foster a formal adherence to a sentimental concept of states' rights. I refer to functions which are a part of the duty of the states to their own citizens, the performance of which increases the weight of power upon the scales in favor of state authority. Indeed, the purpose of the Constitutional Convention was to devise a plan whereby the states could be held to their duties, while at the same time restraining Congress.23 The tendency of Congress has been to restrain the states by assuming their duties. For appearances, it keeps some of these powers in the states' name.

The Union ought not to deprive the states of their life as they choose to develop it, their liberty as it was in the beginning, and their pursuit of happiness according to the temper and ethos of their own people. The problems of labor, including wages, hours, collective bargaining and picketing, and the social economic needs, including relief, old age pensions, child labor, housing, compensation and social security, are of national concern only in the sense that they are of universal interest. It was repeated with the regular insistence of a refrain during the debates on the Constitution that government of the people was to be left to the states as far as possible.24

The mores of the people, the diversity of climate, industrial conditions, traditions and religion not only gave to each state an individuality

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23 Hart, Formation of the Union, 1750-1829 (1925) 133.
which is at once its heritage and its destiny, but suggested the inadvisability of adjusting these diversities to a common pattern. They were to be left free to work out their own salvation, albeit in the occasional fear and trembling of their sister states.26

It was not contemplated that there should be a complete separation of federal and state administration. On the contrary, it was the view of Madison that the central Government would avail itself of the states in administering its affairs. Charles Pinckney, who was one of the signers of the Constitution, felt that the states would be “the instruments upon which the Union must frequently depend for the support and execution of its power.” Even Hamilton thought that the states would be “rendered auxiliary” to enforce the laws of the Union.28

Federal aid to the states has contributed much to the states financially and has purchased much from them in dignity and sovereignty. The fields preempted are no longer those involving a national concern. The peculiar function of the state was to administer its police powers for the welfare of its own people. Such powers comprise every activity and every avenue along which the citizen may proceed in his pursuit of happiness, which indeed is the end of all government.

Charity, which reputedly should begin at home, begins in Washington. If all our roads do not lead to this eternal city, they at least originate there. The immediate personal needs of our people are ministered to, not by their natural parens patriae, the state, but, by their uncle on the Union’s side. The benefactions, placed in outstretched hands, which should have been attending to their own business, are marked “Made in Washington”. Highways are federal highways; federal aid and federal loans are freely given, regardless of how much the states have contributed.

The fact outweighs the propriety of its analysis here. Let it suffice that the attitude of the central Government, aware of the growing atrophy of state government with respect to the general welfare of its citizens, has “first endured, then pitied, then embraced” them. Its attitude has progressed from presumption to prerogative, seen successively as expediency, then need, and finally as a right. One should not hastily

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26It is not the job of the Federal Government to protect the people from the sins of their state government. Cf. 1 Bryce, The American Commonwealth (1931a) 332.

28The prescience of both Madison and Hamilton broke down in forecasting that the Union would utilize state officers in the execution of federal powers, and that the number of federal employees would be small compared to those of the state. Cf. Holcombe, op. cit. supra note 21, at 309, 310.
criticize the National Government for taking over these functions. The point is that we should criticize the states for allowing it to become necessary. Concededly, there are fields of assistance that are national in scope and beyond state ability to administer. However, these fields are fewer than the states today seem willing to admit. Theodore Roosevelt once stated:

"... both jurisdictions (state and federal) together composed only one uniform and comprehensive system of government and laws; that is, whenever the States cannot act, because the need to be met is not one of merely a single locality, then the National Government, representing all the people, should have complete power to act."  

He further stated that "it was in the same spirit that Marshall construed the law".

Federal spending for non-federal causes received its accolade in *Massachusetts v. Mellon*, 28 and the Federal Government left unbolted the gates of its treasury. There is no doubt that the absorption of new federal powers, to the extent that it attests the inexorable metabolism of a republic coming of age, must be seen as evolutionary rather than revolutionary. As elemental needs grew into community needs, the forum for their solution was transferred from the hearth to the town meeting. It has followed federal highways to Washington. So with education, agriculture, industry and health. The bother of it is that the eager, outstretched hands of the states have been tied with federal purse strings. It is a difficult and embarrassing feat for a mendicant state to reach for largesse and draw the sword of states' rights at the same time. 29

Is the error one of Hamilton's foresight, or is it in the functioning of the states that the calls for help in law-enforcement come to and do not emanate from Washington? When the Federal Bureau of Investigation brushed aside local gendarmerie to effect the capture of the murderous Touhy gang, it required much resourcefulness in preparation and execution, but less to find the small peg of draft evasion upon which to hang federal authority. The incongruity was great enough to force a smile from its chief. Whether it caused a frown of concern upon the local authorities depends upon the extent of their appreciation of the

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28 262 U. S. 447 (1923).
29 For a full discussion, see Harris, *The Future of Federal Grants-in-Aid* (1940) 207 Annals 14.
fact that the Federal Government doesn't create new power; it borrows it from the states.

There are many reasons, impossible of discussion here, why the question of poll taxes as a qualification for suffrage, and in turn a qualification for jury service, is so essentially of local concern. By insisting upon administering this domestic matter, the states are merely taking the Constitution at its word.\(^{80}\)

Wages, hours of labor, prices and the like can, under normal conditions, adjust themselves pursuant to economic laws which, if not higher than the Constitution, are at least self-executing. Even as the citizen's home is his castle, where even the king may not trespass, so the states should be his domain sacrosanct against federal intrusions.

The growing acceptance of regional compacts between states having common problems is to be commended, not only as an efficient method for administering regional interests, but as a means whereby mere geographical lines can be ignored without losing autonomy or invoking federal aid and its consequent control. Such compacts were known to the colonists\(^{81}\) and are not only practical but form regional pill-boxes against federal invasion.

The adoption of uniform laws to effectuate a common procedure demonstrates that there is a fundamental distinction between unanimity and unity. Such laws standardize practices, and rather than subtracting from state power, stress that they must be established by the states as such to enforce powers which belong to them.\(^{82}\)

The states must not neglect the opportunity and responsibility to serve as policy-forming units. Public opinion, the free expression of which is the functioning of popular sovereignty, is closely bound up with the pursuit of happiness. While our national leaders are apt to be cast in the mold of their constituents, this is not necessarily the case; nor is there any assurance of requirement that they stand hitched by party lines to their campaign platforms. The citizen may stand in

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\(^{80}\) U. S. Const. Amend. XVII. "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." The letter of this provision should kill the agitation, but a new and vindictive spirit has sought to give it new life. The issue is controversial. But the poll tax states may be encouraged by the concession of power implicit in the charge that they are "encroaching" upon the power of the Federal Government to control them in this local function. See The Jim Crow Bloc, 108 The New Republic 240.

\(^{81}\) Elliot's Debates 114, 208. For modern trends, see Routt, Interstate Compacts and Administrative Co-operation (1940) 207 Annals 93.

\(^{82}\) Mott, Uniform Legislation in the United States (1940) 207 Annals 79.
vociferous independence in the market place and point his own finger in pride, or view with boisterous alarm all sinister portents. Yet he may follow the successful candidate enthroned in Washington only so far as the wailing wall. I do not discount the pressure of popular disfavor subject to release biennially against his representative, but rather emphasize that the true victory gardens for the cultivation of the popular will are the states themselves.

National legislation is apt to represent a composite national sentiment to which the states, through their representatives, have made mutual concessions. What the individual state needs and wants, it can get without this discount if it acts independently. There is no reason why the states should not, by the appointment of special commissions, study their own problems. Abuses and graft may be nationwide in their ramifications but they have a locale in their origin. Corporations domiciled in a state are subject to its protection and supervision. Likewise, each state has the duty and thereby the right to protect its own citizens against monopolies, both of capital and labor.33

The states lose no dignity nor prerogative in lending themselves as laboratories in what Justice Holmes called their "insulated chambers" for worthy social experimentation. Yet they should do so as states; not as a prelude to national regimentation, but as a means of qualifying their leaders for greater independence as political experts. It should be recognized that the Union becomes stronger when the states themselves become stronger. But there must be kept in mind the difference between the power of forty-eight horses and forty-eight horse-power.

The conferences of the governors of the several states are harbingers of a growing unanimity of sentiment which tends to the solution of problems which are not confined within state borders and which can be solved without impairment of but rather in the recognition of, state sovereignty.

I have spoken of the functions of the states as something distinct from their powers. Normally, they should be coextensive. But duty is an element of function and remains constant, while power can be impaired. There is no reason why the reserved and inherent rights of the states should not be kept adequate by the invocation of powers "necessary and proper" to their exercise. It was never contemplated that inalienable rights (and the power to assert and guarantee them) were being

delegated. The Constitution did not seek to create state power, but sought rather to restrain the states from denying such rights to the citizen. To assure full sovereignty to the states to this end, the Constitution guarantees to them a republican form of government.\footnote{U. S. Const. Art. IV, § 4; Corwin, The Constitution and What It Means Today (7th ed. 1941) 140, 141.} The time is ripe for the states to sue upon the guaranty.

The states must foster a spirit resistant to the tendencies of centralization, not in deference to a sentimental regard for the rubrics of a political ritual, but because of the simple truth that, though the National Government is the head of the body politic, the state is its heart. Its political disease is not organic but functional, and this body has as yet no disorder that a resumption of power and responsibility by the states won’t cure. The states should not allow a system to be set up whereby they are apt to become mere dues-paying members of a benevolent or fraternal organization.

This is why the states must examine themselves not to locate new powers but new power. Their rights are no greater than their power to enforce or utilize them. It is time for the states to examine, not what the Government cannot do, but what they can do.

Let us distinguish between federal assistance to the states and state assistance to the Federal Government. The states lose neither dignity nor integrity in the latter function. Rather their identity is emphasized. The advantages were mutual when the states as such served national causes in administering the Selective Service Act\footnote{54 Stat. 885, 50 U. S. C. § 301 (1940).} and in the rationing and nationwide registrations. But, in too many matters, the Federal Government has stepped in because the local official angels feared to tread their own paths of duty.

The exceptional powers needed in great national emergencies must be isolated from the problem. The safety of the people must remain the supreme law. Yet it is in such emergencies that centralized power has so successfully consolidated its gains. Peace often leaves the Government with a lot of surplus laws along with war materiel. Somehow the tendency has been to redistribute the cannon to the lawns of the state capitols, but to retain the new laws in Washington. Power, like wages, turns on a ratchet; it follows a one-way course. The loss of state power in 1865, 1898 and 1918 was one of the casualties of those wars, even as it is destined to be at the end of World War II.

Last, but not least, there is a field in which the states have a pecu-
liar propriety, both as to the ends and the means thereto. The standards least susceptible of national regulation or standardization are those which involve conduct, not as a creed or cult, but as morals. This potent force was recognized, not only in the purposes and ideals of the discoverers of our shores, but throughout the days of our national adolescence. Its seasoning is detected in the documents, coins and symbols of our Nation and is belittled only by those who fear its power to thwart unrighteous purposes. The jurisdictions of church and state ought to be kept separate and independent. Yet, those who blandly insist that the products of religion be isolated from political formulae usually advocate a quality of politics which good conscience may not condone. In this field are hidden the most valuable of the undeveloped resources of the states. Such references, justified by the history of our people and their laws, need never be apologetic.

That there is a law higher than the Constitution need but be understood in order to guarantee the truism against attack. Freedom of the press, of speech and of religion are not indeed the highest law. Even these sacred freedoms are circumscribed by the requirements that they be not so exercised as to imperil the morals, peace and welfare of the people. Justice Cardozo said of social welfare, "... its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind."36

In an age when novelty is acclaimed as wisdom it is no wonder that in the realm of government, political heresies should masquerade beneath the formulae of freedom. In these latter days when change is confused with progress, and license is confounded with liberty, the problem becomes one peculiarly for solution by home rule. This means, of course, by those units of government which alone are capable of moral consciousness. Such units are primarily the people themselves, and the farther away the control of morals is placed, the less assured is its success.

The big controversial questions of child labor, disease, poverty, wages, and the problems of capital and labor, are too completely integrated with morals and the ethos of the people to be separated. It is fanatic to insist that the salus populi, which is the supreme law, is lacking in

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36Cardozo, The Nature of the Judicial Process (1921) 72. "The moral, social and spiritual truths as taught by our religions are the dynamic power that guides the leadership and shapes the opinions that result in the establishment of our legal standards of right and wrong and direct the course of our American public life." Simmons, A New Need for an Old Declaration, The Lawyer, Feb. 1943, pp. 11, 15.
the ingredient of plain justice of which morals is the core. It is here that we must maneuver our thoughts behind the calm breakwaters of impartial judgment, secure against the disturbing tempests of prejudice and those piracies which cruise beneath the borrowed banners of personal liberty.

It is the undoubted function of the states in this field to employ as much of their administrative machinery as the Constitution and the laws will vouchsafe to their police powers.

The states must reexamine both their rights and their duties. These will be found correlative. The states have the right to discharge all their duties. They have equally the duty to assert all their rights.

Those symbols in the blue field of our national banner are stars. They are not mere planets blinking with a borrowed light. They lose neither brilliance nor identity by acknowledging obeisance to a central sun, about which they revolve and which should be content to exert no greater control than necessary to keep them in their ordained and glorious orbit.

Blackstone declared that no human laws were valid if contrary to the laws of God. 1 Bl. Comm. 41. For view of Supreme Court that Christianity is integrated into national purposes and laws, see Church of the Holy Trinity v. United States, 143 U. S. 457 (1892). Ethics and morals are of course inherent in equity principles. Malone, A Re-examination of Our Legal Rights (1935) 7 Miss. L. J. 351.

"The standards or patterns of utility and morals will be found by the judge in the life of the community." Cardozo, op. cit. supra note 37, at 105.

Many state constitutions contain provisions correlating good morals with good government. For example, Miss. Const. (1832) Art. 7, §§ 5, 14: "... religion, morals and knowledge, being necessary to good government, the preservation of liberty and the happiness of mankind, schools and the means of education shall forever be encouraged in this State." See also Del. Const. (1776) Art. 22; Mass. Const. (1780) Part 1, Arts. II, III; Chance v. Mississippi State Textbook R. & P. Board, 190 Miss. 453, 200 So. 706 (1941). The characterization of World War II as a war to preserve Decency is unchallenged even by the most iconoclastic.
CONFUSION, UNLIMITED

ROBERT W. ENGLEHART*

WHILE perhaps America, Unlimited represents America's future to a part of the American public, Confusion, Unlimited represents the state of mind of the thousands of patent owners in the United States. The insurance people are doubtless shaken by the overruling of seventy-five years of precedent in the case of United States v. South-Eastern Underwriter's Ass'n.1 in which the Chief Justice stated:

"Its action in now overturning the precedents of seventy-five years . . . cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system."2

They may have what consolation they can get out of considering the plight of patent owners and inventors. Perhaps no field of the law is in such a state of confusion. While it is impossible in a short article of this kind more than to scratch the surface of such a subject, the writer hopes the scratch will be deep enough to provoke some thought on a subject in which confused thinking seems to reign supreme.

WHAT IS INVENTION?

The question of what constitutes invention,3 subject of so many judicial utterances, was probably not made any clearer by the so-called "flash of genius" doctrine enunciated in the case of Cuno Engineering Corp. v. Automatic Devices Corp., wherein the court said:

"That is to say the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling."4

Does this doctrine mean that long painstaking efficiently planned research culminating in a discovery such as Edison's incandescent lamp

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1322 U. S. 533 (1944).

2Id. at 583 (dissenting opinion).

3"It is a trite saying that invention defies definition.,” Pyrene Mfg. Co. v. Boyce, 292 Fed. 480, 481 (C. C. A. 3d, 1923); “. . . what it is so easy to name and so difficult to ascertain, invention.,” Kurtz v. Belle Hat Lining Co., 280 Fed. 277, 278 (C. C. A. 2d, 1922). For compilation of authorities on legal tests of invention, see 1 Walker on Patents (Deller's ed. 1937) 109.

4314 U. S. 84, 91 (1941).
could not amount to invention?\textsuperscript{6} In the search for a filament for his lamp, Edison piled experiment upon experiment until he arrived at the carbon filament,\textsuperscript{6} and the electric light was born. This could hardly be called a flash of genius since the result was attained by perspiration rather than by inspiration. Whether such a discovery would rise to the dignity of patentable invention under the \textit{Cuno case} is doubtful. When a Marconi patent\textsuperscript{7} came before it in June, 1943, the Supreme Court held that Marconi who, through the invention covered by the patent (an improvement on his basic patent), astounded the world by transmitting sound across the Atlantic Ocean without wires, had not thereby developed a patentable invention.\textsuperscript{8} This holding called forth dissenting opinions from Justices Frankfurter and Rutledge:

"To find in 1943 that what Marconi did really did not promote the progress of science because it had been anticipated is more than a mirage of hindsight. Wireless is so unconscious a part of us, like the automobile to the modern child, that it is almost impossible to imagine ourselves back into the time when Marconi gave to the world what for us is part of the order of our universe. . . . For all I know the basic assumption of our patent law may be false, and inventors and their financial backers do not need the incentive of a limited monopoly to stimulate invention. But whatever revamping our patent laws may need, it is the business of Congress to do the revamping. We have neither constitutional authority nor scientific competence for the task."\textsuperscript{9}

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"Until now law has united with almost universal repute in acknowledging Marconi as the first to establish wireless telegraphy on a commercial basis. Before his invention, now in issue, ether-borne communication traveled some eighty miles. He lengthened the arc to 6000. Whether or not this was 'inventive' legally, it was a great and beneficial achievement. Today, forty years after the event, the Court's decision reduces it to an electrical mechanic's application of mere skill in the art."\textsuperscript{10}

Do these decisions mean that a plumber can make an invention in the automotive field, whereas an automotive engineer cannot? A plumber could claim to have had a "flash of genius" if he could arrive at such an invention—where an automotive engineer could not; his contribu-

\textsuperscript{6}Edison Electric Light Co. v. United States Electric Lighting Co., 52 Fed. 300 (C. C. A. 2d, 1892).
\textsuperscript{7}For good discussion of the theory of the finding of invention, see 1 Walker on Patents (Deller's ed. 1937) 188, 189.
\textsuperscript{8}United States Patent No. 763,772.
\textsuperscript{9}Marconi Wireless Telegraph Co. v. United States, 320 U. S. 1 (1943).
\textsuperscript{10}Id. at 63, 64 (dissenting opinion of Mr. Justice Frankfurter).
\textsuperscript{11}Id. at 64 (dissenting opinion of Mr. Justice Rutledge).
tion could be held to be the "application of mere skill in the art".\(^{11}\)
Surely to the lay-mind the achievements of Edison and Marconi are classic examples of true inventions—even though they were arrived at through hard labor and the exercise of skill that one would expect such men to possess. Then too, many inventions are made by accident where the scientist is searching for something else. Are these ruled out? Apparently not, since they certainly seem to be under the "flash of genius" doctrine. Edison stumbled onto the phonograph while working on another invention (if the movie version of Edison's life is accurate), yet no one doubts that that was a discovery entitled to patent protection.

The United States Court of Appeals for the District of Columbia recently handed down a decision which seems to hold that a discovery arrived at by organized research cannot amount to patentable invention—that if a problem is worked on by a number of research scientists in accordance with an organized plan, the man who solves it cannot claim to have done more than the other searchers and is therefore not entitled to a patent:

"The corporate research laboratory of today has given us the greatest invention of modern times, the knowledge of how to invent. Under a disorganized system of invention a hundred men would hunt for the needle in the haystack, the prize going to the successful finder while the efforts of the others served only to scatter the hay in all directions. Organized invention has changed the entire process. Each man is given a section of the hay to search. The man who finds the needle shows no more 'genius' and no more ability than the others who are searching different portions of the haystack."\(^{12}\)

Does this mean that disorganized inefficient effort is to be rewarded and efficient research penalized? Does it not overlook the fact that the progress of the arts and sciences\(^{13}\) is best promoted by finding the needle in the quickest way possible? A fundamental which is entirely overlooked is the fact that searching on a problem is not identical to looking for a needle in a haystack. It is not that easy. Perhaps there is no needle in the particular haystack being searched, and some other solution must be found. The solution to the problem may not even

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\(^{11}\) The double standard of invention suggested is expressly adhered to in *Potts v. Coe*, 78 U. S. App. D. C. 297, 140 F. (2d) 470 (1944), where the court ruled that an inventor in a corporate research laboratory should be held to a higher standard of invention than an individual worker.


\(^{13}\) U. S. *Const. Art. I* § 8.
resemble a needle. It may be a particular piece of hay which would be entirely overlooked by most everyone but the particular man who stumbled on it.

It is respectfully submitted that the result of this decision, if it stands, will make the title of this article a reality—and one wonders whether the National Patent Planning Commission appointed by the President could have envisioned such a decision when it said in its report:

"The American patent system established by the Constitution giving Congress the 'power to promote the progress of science and useful arts', is over 150 years old. The system has accomplished all that the framers of the Constitution intended. It is the only provision of the government for the promotion of invention and discovery and is the basis upon which our entire civilization rests."15

The state of the law as to what constitutes invention is now unknown and unknowable. Some courts see invention in nothing, others believe that the Cuno case did not change the law. The following excerpt from In re Shortell decided by the Court of Customs and Patent Appeals illustrates the confusion existing on this point:

"In the case of Picard v. United Aircraft Corp., 2 Cir., 128 F. 2d 632, 636, 53 U.S.P.Q. 563, the court said: 'We cannot, moreover ignore the fact that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent. In this we recognize a pronounced new doctrinal trend which it is our duty, cautiously to be sure, to follow, not to resist.'

"While recognizing, of course, that it is the duty of this court to follow the law as declared by the Supreme Court, we do not conceive it to be our duty to change our basis of decision merely because some courts assume that there is a 'new doctrinal trend' with regard to the standards required for invention.

"In our opinion it is not within the province of the courts to establish new standards by which invention is to be determined. It seems clear to us that the creation of new standards for the determination of what constitutes invention would be judicial legislation and not judicial interpretation.

"It follows, from the foregoing, that until Congress shall otherwise legislate, or the Supreme Court shall otherwise specifically hold, this court will continue to hold that if a process or thing constitutes patentable subject matter, is new and useful, and the process performed or thing produced would not be obvious to one skilled in the art, invention should be presumed and a patent may properly issue therefor.


127 J. Pat. Off. Soc. 579 (1945); the Commission has been succeeded by the President's Committee on the Patent System.

Ibid.

See note 4 supra.
"Inasmuch as in the case at bar we have found that appellant's improvement in hack saws as claimed is not anticipated by the cited prior art and such improvement would not be obvious to one skilled in the art, the decision appealed from is reversed."18

DOING BUSINESS UNDER PATENTS

Infringers have been made very happy by recent trends in judicial decisions which enable them to go into court and argue that a patent owner is misusing his patent and therefore cannot prevail even though validity and infringement are present. The argument usually is that the patent owner is extending the monopoly of his patent to cover unpatented materials that are used in the invention covered by the patent, and that he is not entitled to be free from competition in unpatented materials.

The Carbice decision19 in 1931 held in effect that an owner of a patent on a transportation package, one of the components of which was solid carbon dioxide, could not exploit his patent by simply selling solid carbon dioxide and allowing the use of his patent only to those who bought this unpatented material from him. Since the suit there was against a supplier of the "dry ice", patent attorneys were prone to believe that its holding would not extend to a suit against the man who actually without license made the patented article. Later cases20 however, made it clear that suit was also barred against the man who actually infringed the patent by combining the unpatented materials into the patented product. The ratio decidendi was first thought to be based on the "unclean hands" maxim of equity, but later decisions were founded squarely on the ground of the existence in such a situation of an attempted unlawful monopoly. Result of these holdings is that by judicial decision patent owners are forced to grant licenses whether they want to or not, and this in spite of the fact that Congress has repeatedly refused to enact legislation providing for compulsory licensing under patents.21 One district court has even held that a patent owner must choose between being in the business of supplying an unpatented article used in his patented combination, and keeping his patent alive:

18"Id. at 296.
"... it would appear that the only effective method of purging the effects of the illegal practices would be to separate entirely the sale of the bands from the payment of royalties ... nothing short of a choice between the band business and the patent business can be fully effective."22

The Supreme Court has held that it makes no difference whether the method employed by the patent owner is the most convenient for him and the trade or not:

"It is without significance that, as petitioner contends, it is not practicable to exploit the patent rights by granting licenses because of the preferences of manufacturers and of the methods by which petitioner has found it convenient to conduct its business."23

What compelling reason exists to force patent owners to grant licenses under patents, or to force the trade into an inconvenient or impractical method of doing business with a result sometimes of possibly forcing the patent owner out of business? The writer submits that not only is there no compelling reason, but there is no reason at all, and that we have arrived where we are because of confusion of thought. The fact is that there is in these cases no extension of the patent monopoly.

The suppression of trade argument on which these cases are founded collapses completely when subjected to the glare of clear and logical thinking. What is the trade which is claimed to be suppressed? It can only be the trade in materials that go into the manufacture of the patented article, or in the case of a process patent, the materials that are used in the process. But a patent is a right to exclude24 everyone from the thing patented. The suppliers of such materials can sell their material for every use except the patented use; and the buyers can use it for every purpose except that covered by the patent. That was exactly the position of these parties before the invention. How then have they been deprived of anything, except what the Constitution and laws of the United States gave the patent owner the right to exclude them from? One would expect the patents could at least be enforced against suppliers who deliberately make materials for infringing use—especially where

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24Bloomer v. McQuewan, 14 How. 539, 548 (U. S. 1852); "A patent is not a grant of a right to make, use, or sell. It does not directly or indirectly imply any such right. It grants only the right to exclude others." Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358, 360 (C. C. A. 2d, 1922).
the only use for which the material is suitable is the infringing use. But even here the courts have denied recovery.25

People who are not familiar with patents and their exploitation do not realize that the public not only can get along without any particular invention, but is frequently entirely willing to do so. Thousands of meritorious inventions of great potential value have gone begging and have bankrupted thousands of promoters due to the inability to sell the public something new. Finally, after some courageous soul has gambled his and his friends' fortunes to get a business started under a patent and has created a market and a demand for the invention, commercial wolves who want to capitalize on this pioneer work immediately attempt to infringe on the now profitable venture.26 A doctrine of patent law such as the one discussed above is like manna from heaven to unscrupulous businessmen who seek to profit from the hard work of others.

The Confusion, Unlimited which surrounds patents for inventions is probably due to the failure to distinguish such patents from patents of the kind granted by the old English kings.27 For example, the king would grant a patent on salt to one of his favorites. Such a patent on a commodity used in the everyday life of all the people took away something from the public which they had previously enjoyed. It was an actual taking away from the public domain. On the other hand, a patent on an invention does not deprive the public from anything which it had previously enjoyed.28 It is a new thing which the public never had and is not entitled to until the expiration of the patent. Since the public got along without it for ten thousand years, it creates no hardship to keep it from the public for another seventeen.

It would appear that the decisions which have been discussed under this heading present the following situation: The inventor is enticed to disclose his invention to the public, in return for a promise of a right of exclusion for seventeen years.29 The inventor carries out his part

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26The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think." Kurtz v. Belle Hat Lining Co., 280 F. 277, 281 (C. C. A. 2d, 1922).
271 Walker on Patents (Deller's ed. 1937) 1, 2.
28"Invention " . . . is the creation of something which did not exist before." Id. at 110.
29The patent as a contract between the individual and the government: "In England a patent is granted as a favour, on such terms as the king thinks proper to impose. . . . Here a patent is a matter of right, on complying with the conditions prescribed by the law."

of the bargain and gets his patent. He picks the most practicable way of benefiting from his patent, a method which is also preferred by the manufacturers with whom he does business. He attempts to enforce this patent against an infringer, and the infringer prevails on the argument that the patent owner has extended the monopoly of his patent.

All the patent owner has done is engage in the sale of unpatented materials for use in his invention, which he certainly has a perfectly legal right to do, and to seek to exclude others from using his invention, which right he is promised by the laws of the United States in return for disclosure of his invention. Somehow, legal legerdemain contrives to make, out of the exercise of these two legal rights, a logically incomprehensible wrong.

It is submitted that this state of facts shows but one thing—that the Government has broken its promise to the inventor.

Whitney v. Emmett, 29 Fed. Cas. 1074, 1081, Fed. Cas. No. 17,585 (C. C. E. D. Pa., 1831); "Tersely stated, an American patent is a written contract between an inventor and the government. This contract consists of mutual, interrelated considerations moving from each party to the other for such contract. The consideration given on the part of the inventor to the government is the disclosure of his invention in such plain and full terms that any one skilled in the art to which it appertains may practice it. The consideration on the part of the government given to the patentee for such disclosure is a monopoly for 17 years of the invention disclosed to the extent of the claims allowed in the patent." Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 F. 588, 594 (C. C. A. 3rd, 1911).
LEGISLATIVE SUPREMACY AND CONGRESSIONAL REORGANIZATION

KURT BORCHARDT*

"... a grave constitutional crisis exists in which the fate of representative government itself is at stake ... Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress ... Under these conditions ... the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures."

The role of representative government in the era of modern mass production industries and the beginning evolution of a new world order is a vital subject for all believers in that form of government. What are the circumstances that are challenging the institution of representative government and that have finally impelled the Congress to analyze itself with a view to strengthening representative government? An individualistic economy in which workers, farmers and businessmen were able within reasonable limits to work out their own economic destinies has given way to an industrial society characterized by large scale organizations both on the capital and the labor side. Internationally the United States has come to realize that two oceans no longer assure its national security and has begun to treat in collective organizations with other nations.

These changes in the domestic and international scene have placed upon our National Government demands for action in a degree undreamed of in the earlier days of the Republic. If representative government is to survive as a mode of living and is not to degenerate to a mere form, Congress must be able to meet these demands for action. The Executive Branch responded reasonably promptly to these developments because it was organizationally better equipped to meet present day needs for government action. Furthermore, changes in the political scene, such as the development of the party system and the popular election of the President, and technological developments such as the radio and means of speedy transportation, have enabled the President and other members

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of the Executive Branch to establish more direct contacts with the people, thereby tremendously increasing the power and influence of that branch of our government.

This has led some members of Congress to demand the weakening of the Executive Branch in order to assure Congressional predominance. Others have countered quite rightly that the Nation, as a matter of self-preservation, needs a strong National Government, and that the question is how the supremacy of Congress can be maintained while at the same time we have a strong Executive. There is widespread belief that, in order to maintain vigorous representative government, Congressional machinery must be overhauled to meet our present day needs and to control the execution of national legislation by the Executive Branch.

Towards this end, the Joint Committee on the Organization of Congress has recommended in its final report\(^2\) to the Congress the adoption of thirty-seven specific reorganization measures. Since it is the purpose of the Joint Committee to strengthen the institution of representative government, it is appropriate to review the Committee’s recommendations with a view to determining whether they go far enough to enable Congress to regain the position of supremacy in the Nation’s affairs which the framers of the Constitution and the members of the Joint Committee intend it to occupy. Since the foremost function of the Congress is to determine top national policies and programs designed to meet the needs of the Nation, and to check the execution of such policies, Congress will regain its place in the sun only if it discharges effectively these responsibilities in the present domestic and international scene.

The Committee’s recommendations cover a wide area, including the modification of the Committee structure; the creation of Majority and Minority Policy Committees; making available adequate research and staff facilities; the strengthening of fiscal control; registration of pressure groups; increasing Congressional pay; establishing a retirement system for members of Congress; \textit{etc}.

Several of the operational problems with which the recommendations are concerned, as for example providing adequate staffing and initiating a uniform personnel policy, are not peculiar to legislative bodies. Similar problems exist in the Executive Branch, or in any large business organization. That matters of this nature are being considered major problems in this connection, only tends to underline the fact that Congress far too long has neglected to avail itself of up-to-date operating

\(^2\)\textit{Ibid.}
techniques and facilities which other bodies inside and outside of the Federal Government have come to look upon as indispensable. The solution of these problems is important, however, to the extent that any improvements made will aid in the creation of adequate machinery for the determination by Congress of top national policies and programs. In what degree that is the case is a separate problem which has to be left to a future inquiry.

There are among the thirty-seven recommended reorganization measures at least three that deal with problems which are inherent in the process of determining over-all national policies. The first two are concerned with the formulation of general over-all policies and the third with the strengthening of Congressional budgetary policy machinery.

The report recommends: (1) The creation of Majority and Minority Policy Committees in both Houses;8 (2) The formation of a Joint Legislative and Executive Council;4 and (3) Joint action (in a manner detailed below) on annual federal budgets by the Revenue and Appropriations Committees of the two Houses.5

The first two proposals are closely tied together. The Majority and Minority Policy Committees, each composed of seven members, would be appointed at the opening of each new Congress by the Majority and Minority Conference in both Houses. It would be the function of the Policy Committees to formulate the over-all legislative policy of the two parties. Wherever party programs or pledges are involved, the decisions of the Policy Committees would be announced formally and records of such decisions would be kept. No member of either party, however, would be required to follow the announced party policy. He would remain free to vote as he saw fit. Yet, so the report states, "... the record of his action would be available to the public as a means of holding both the party and the individual accountable."9

In this manner, the Committee hopes to strengthen party accountability to the voter for the carrying out of party programs and pledges, and to achieve party discipline required to enact such programs into law, avoiding, however, at the same time, any serious curtailment of freedom of action of individual members of Congress.

In proposing this innovation, the report of the Joint Committee

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8See note 1 supra, at 12-14.
9Ibid.
10Id. at 18-24.
11Id. at 13.
properly emphasizes the crucial part which parties and party government play in the formulation and the carrying out of national programs:

"No one would claim that representative democracy as we know it today could exist without majority and minority parties. The 435 voices of the House and the 96 of the Senate would be a confused babel of conflicting tongues without party machinery. Instead of unorganized mob rule where the strength of varying viewpoints cannot be measured or determined, party government furnishes a tug-of-war in which the direction and strength of opposing viewpoints can be more or less accurately measured and weighed."7

Under the second recommendation, the Senate and House Majority Committees would serve on a formal Joint Legislative-Executive Council to meet at regular intervals with the Chief Executive and such members of his Cabinet as may be desirable, to consult and collaborate in the formulation and carrying out of national policy. Better cooperation between the two branches of Government, so the Joint Committee suggests, can be obtained if Congressional leaders are given a part in the formulation of policy instead of being called upon to enact programs prepared without their participation.

The important question on the basis of which the two proposals should be evaluated, is: Is the proposed Congressional policy formulating machinery adequate to meet modern domestic and international needs?

At one time, national policies could, without undue risk to the Nation, be determined without relation to each other. The Congress could even afford not to have any specific national policy on a particular subject. To quote Representative Jerry Voorhis' testimony before the Joint Committee: "The fundamental fact is that 60 or 70 years ago Congress substantially passed tariff and tax legislation. The other problems of the country solved themselves very much."8

Unfortunately, this happy situation no longer prevails today. The advent of our modern industrial society and the atomic bomb have placed entirely different demands on Congress, both in the domestic and in the international scene. Circumstances such as these are compelling a change "from a conception of government where government was a combination of soldier, policeman, and umpire, into a conception of government where it has a real managerial function in the social and economic life of millions of people."9 No longer can Congress expect

7Id. at 12.
8Hearings before the Joint Committee on the Organization of Congress pursuant to H. Con. Res. 18, 79th Cong., 1st Sess. (1945) 42.
9Id. at 498.
properly to play its part in the management of the Nation's affairs, unless it is prepared to discharge its share of the responsibilities which go with management. Today few national problems, if any, solve themselves.

A mere reading of the Congressional Record over even a short period of time will easily demonstrate that Congress, to an increasing degree, has been called upon to discharge a broad, positive policy determination responsibility as contrasted with the restricted and primarily negative function of a soldier, policeman or umpire.

If Congress can properly discharge this function through the adoption of a number of mutually independent and improvised national policies, the mechanism recommended by the Joint Committee might be adequate. If, however, domestic and international over-all policies are mutually interdependent, if they must be determined in the light of their anticipated impact on each other, and if, in order to be effective both in the short and in the long run, they must be properly balanced and coordinated, then Congressional policy formulating machinery may have to be designed to consider programs as a whole rather than running the risk of enacting conflicting national policies or failing to provide any national policy in particular fields. In short, Congressional policy formulating machinery must be able to achieve what one of the witnesses appearing before the Joint Committee has called "programmatic responsibility". Dr. William Y. Elliott, then Vice Chairman of the War Production Board, stated:

"Democratic responsibility demands more than ever what I would call programmatic responsibility, responsibility for a whole program. It is not enough to be right on a single issue . . . You cannot judge a party or a man or anything else just on one issue. You just must judge him on the total record. You must judge a party that way and democracy must have a mechanism for doing it . . . Government must have power to put through a program and do so by consistent policy . . ."\(^{10}\)

At one point the report of the Joint Committee describes Congress as supervising the world's largest enterprise.\(^{11}\) This might have been intended merely as a figure of speech. However, a look at management techniques employed by modern commercial and industrial organizations ought to persuade Congressional reorganizers that Congress, in order to exercise effective policy control over the affairs of the Nation, must, like industrial top management, abandon participation in the decision-

\(^{10}\)Id. at 956, 957.
\(^{11}\)See note 1 supra, at 19.
making process on a day-to-day, and frequently improvised, basis and must substitute therefor responsibility for the formulation of plans and programs designed to meet predetermined long-range goals. In formulating such programs, Congress, like industrial managers, must be able to consider and coordinate a multitude of factors, and towards that end special machinery is required.

At least three factors render difficult the formulation of over-all national programs and the creation of adequate machinery towards that end. In the first place, there is a relative absence of agreement as to the national goals to be reached, and particularly as to the part which the Federal Government is to play in attempting to accomplish them. Secondly, there is, except in times of war or severe crisis, a constitutional unwillingness on the part of the Legislative and Executive Branches of our Government to engage in teamwork towards the achievement of such goals. Finally, as one of the prominent Washington correspondents of a metropolitan newspaper observed, "The trade of politics in the United States puts emphasis on instinct, resourcefulness and improvisation." Naturally such approach is not conducive to thinking in terms of long-range goals and national programs.

If, however, agreement can be reached that inaction or improvised action on the part of Congress no longer meets modern domestic and international demands, then it should be possible to create Congressional machinery which would facilitate the fixing of national goals, and the formulation of national programs and teamwork between the Legislative and the Executive Branch, to achieve such goals. In order to be able to achieve these objectives, the mechanism recommended by the Joint Committee—Majority and Minority Policy Committees and a Joint Legislative-Executive Council—requires substantial strengthening. In the first place, the area in which these bodies would be expected to formulate top policies is too wide to give reasonable hope of concrete results in the form of a coordinated over-all program covering all angles of the Nation's domestic and foreign affairs. Such an over-all program can be developed only by coordinating specific, carefully developed, subsidiary programs. Secondly, these bodies are unlikely to produce coherent policies and to bring about legislative-executive cooperation unless their efforts are directed towards specific program proposals submitted to them for their consideration. Therefore, the policy machinery recommended by the Joint Committee needs the support of subsidiary

policy committees which, within their respective jurisdictions, would formulate the several pieces of the over-all program.

Fortunately, Congress has already provided in the "Employment Act of 1946" machinery which would help to meet the necessary requirements in the field of domestic economic policy. It is probably no coincidence that similar machinery as that provided for in the Employment Act is recommended by the Joint Committee for the formulation of over-all budgetary policy, which is referred to above as the third proposal made by the Joint Committee designed to facilitate the formulation of national policies.

In both instances the President submits annually to the Congress over-all programs—the Economic Report and the Budget message, respectively. In the case of the Employment Act, the program is to be designed to achieve the objectives of that Act—to promote maximum employment, production and purchasing power by coordinating and utilizing all of the plans, functions and resources of the Federal Government in a manner calculated to foster and promote free, competitive enterprise. In the case of the Budget message, the program is to contain recommendations for the ensuing fiscal year for federal income and expenditures.

The next step in both cases is the consideration by Congressional committees of the programs as a whole thus submitted to Congress. In the case of the Employment Act, a special Joint Committee is established to study the Economic Report, and the legislative recommendations contained therein, and to file annually, not later than May 1, with the Senate and the House, a report with respect to each of the main recommendations made by the President. The report of this Joint Committee is then supposed to constitute "a guide to the several committees of the Congress dealing with legislation relating to the Economic Report. . . ."

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14The report contemplates no change in the status of the Joint Committee on the Economic Report created by the Employment Act of 1946. However, no attempt has been made to integrate in any way the functions of this Joint Committee with the functions of the Majority and Minority Policy Committees and the Joint Legislative-Executive Council.
15See note 1 supra, at 18-24. This portion of the report is entitled "Strengthening Fiscal Control". However, since it deals only with some aspects of fiscal control, leaving out such important facets as money, banking and credit, it should be more properly described as strengthening of budgetary control.
16See note 13 supra, at § 5(b(3).
In the case of the federal budget, joint action by the revenue and appropriations Committees of both Houses is called for to submit to the Congress, within sixty days after each session opens (or by April 15), a concurrent resolution setting forth over-all federal receipts and expenditures (estimated) for the coming fiscal year. If the resolution recommends expenditures in excess of estimated income, the two Houses of Congress will then be called upon to authorize creation of additional federal debt. If Congress fails to pass such resolution, all appropriations, except certain fixed obligations, would be reduced by a uniform percentage. 17

Thus, both under the Employment Act and the proposal of the Joint Committee, Congress would, at least in the two areas of domestic economic and budgetary policy, attempt to act in relation to over-all coordinated programs rather than to formulate conflicting national policies for the several fields included within such programs.

The two broad areas not covered by the aforementioned programs are those of international relations and national security. The need for coordination between these two fields—and for machinery in Congress to effect such coordination—has become increasingly obvious. In a recent book entitled “World Politics Faces Economics,” the author pointed out that all aspects of foreign policy and the common defense culminate in the single problem of how we can strengthen institutions of collective action and at the same time maintain a power position that offers security for the Nation should collective institutions break down. 18

The singleness of the problem was recognized also by a subcommittee of the Senate Committee on Military Affairs which had under study the problem of the unification of our Armed Forces. In its report, 19 the subcommittee recommended the creation in the Executive Branch of a Council of Common Defense consisting, among others, of the Secretary of State and the Secretary of the Common Defense (representing the Army, the Navy and the Air Forces). The function of the Council would be, among others, “to coordinate over-all policies of the United

17The desirability of these latter recommendations requires further scrutiny. The adoption of a procedure calling for the mechanical reduction of expenditures might prove to be impractical for various reasons. However, this detail of the Joint Committee’s recommendation does not affect the validity of the general proposition of having Congressional committees scrutinize federal income and expenditures from an over-all point of view. An adjustment should be made of the date on which the concurrent resolution has to be submitted to the Congress.

18Lasswell, World Politics Faces Economics (1946) 11.

States in the international and military fields; to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of our common defense. . . .”

In making this suggestion the subcommittee had the following to say:

“Our Government cannot meet its obligations in a new world through slavish adherence to forms which conditions have proven to be inadequate or even wholly antiquated. Necessarily, therefore, our recommendations introduce new organizational concepts into the executive branch. We have given this phase of the matter most careful thought and have concluded that we must, in the interest of our national safety, establish new mechanisms based on the tragic lessons of weakness of the past and geared to the patent needs of the future.”

What is imperative for the Executive Branch should be equally indispensable for the Congress. In order properly to discharge its responsibilities in the American political scene, Congress must be able to deal with problems of international relations and national security on a coordinated and programmatic basis. The machinery required for such approach might be similar to the mechanism adopted by Congress in the Employment Act for the development of a cohesive program dealing with our domestic economic problems, and the machinery recommended in the Joint Committee report for the formulation of an over-all national budgetary policy. The machinery would operate about as follows. After a coordinated international relations and national security program has been developed by the President assisted by the Council of Common Defense, whose creation was recommended by the Senate Military Affairs subcommittee, the program with legislative recommendations would be submitted annually by the President to the Congress, at or shortly after the opening of each session. Thereupon, the Foreign Affairs Committees and the committees dealing with the Armed Services of the two Houses acting jointly would be required to submit to each House, not later than on a date to be specified, a report with respect to the principal recommendations contained in the President’s foreign relations and national security program. The report then would guide the several committees of Congress in the consideration of legislation relating to the program.

Before any of the aforementioned policy reports or resolutions would be submitted to the Congress, it would then be the function of the Majority Policy Committees of both Houses acting jointly, on the

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20Id. at 7.
21Id. at 3.
one hand, and the Minority Policy Committees, on the other hand, to consider such reports and resolutions with a view to eliminating any existing conflicts. For example, if our commitments abroad in accordance with the national security program approved by the Foreign Affairs and Armed Forces Committees require additional expenditures, which would unbalance the budget approved by the Revenue and Appropriations Committees, it would have to be determined whether and how the required additional funds are to be raised or whether and how our commitments abroad can be modified to keep the Committee-approved budget in balance. Such procedure would require an adjustment in the dates on which the aforementioned reports and resolutions are to be submitted to the two Houses of Congress in order to assure that each report and resolution has been considered by the Majority and Minority Policy Committees in the light of such other reports and resolutions.

In this manner the Congress would be enabled to act on programs for each of the major fields of legislative activity—(1) the domestic economy; (2) foreign relations and the national security; and (3) budgetary affairs. The programs and recommendations contained therein would probably include most of the controversial legislation to come before the Congress during that year. Nothing would prevent individual committees or committee members from voting favorably on bills which do not conform to the guiding reports or resolutions. However, the mere existence of well-considered over-all programs approved, with or without modification, by the policy committees of Congress will have strong persuasive force in favor of the enactment of the several legislative measures which make up these programs.

The minority members of the three groups would have the vital function of formulating alternative programs which would constitute a guide to individual minority members in voting upon legislation when it reaches the floor and which could be submitted to the voters of the country for their approval in ensuing Congressional elections.

To the Majority and Minority Policy Committees provided for in the Joint Committee report would further fall the important function of coordinating the activities of the majority and minority members of Congress with respect to specific legislation affecting the three integrated programs. Where fundamental disagreement develops among members of the majority party with respect to the adoption of legislation designed to carry out any of the three programs, the Majority Policy Committees and the Joint Legislative-Executive Council would have
the exceedingly important function of either expressing in a formally announced decision their adherence to the particular program in question or going on record in favor of changing such program in one or more of its aspects.

The case for the establishment of Majority and Minority Policy Committees supported by subsidiary policy committees appears to the author to be a strong one. In advocating the creation of such a policy committee structure, however, one should not be blind to certain complications inherent in these proposed changes.

In order to be effective, the policy committees should consist of the chairmen and ranking majority and minority members of the standing committees which will consider the various bills that make up the overall program. Only in this way would there be reasonable assurance that general policies will be translated expeditiously into appropriate action on individual legislative measures which are referred to the standing committees. If the membership is selected on this basis, the policy committees will constitute a tremendous concentration of power, especially if the chairmanship of standing committees continues to be awarded on the basis of seniority. If, on the other hand, members of Congress who do not occupy prominent positions on standing committees, were appointed to the policy committees, the latter are apt to remain ineffectual and frictions are likely to develop between them and the standing committees.

The report of the La Follette-Monroney Committee does not specify who shall be appointed to the Majority and Minority Policy Committees. It merely provides that the membership shall be appointed by the respective majority and minority conferences.22 Neither does the Employment Act of 1946 provide who shall be appointed to the Joint Committee on the Economic Report.

The problem of making the policy and subsidiary policy committees responsible bodies and preventing arbitrary use of their power is substantially the same as in the case of standing committees, including particularly the powerful Rules Committee in the House of Representatives. Appropriate procedural devices, limitations on tenure, etc., which cannot be discussed within the framework of this article, can properly circumscribe the abuse of such power. Primarily, however, the remedy lies outside of the sphere of Congressional organization and within the area of party responsibility and voters' vigilance. These are the two

22See note 1 supra, at 13.
factors upon which in the end depend not only the failure or success of Congressional reorganization but the role which representative democracy will play in the future.

ADDENDUM

Delay in publication of the present issue, affords an opportunity to review briefly the actions with respect to Congressional reorganization taken by the Congress subsequent to the preparation of this article. Following submission to Congress of the report of the Joint Committee on the Organization of Congress, Senator LaFollette, the Chairman of the Committee, introduced S. 2177 "A Bill To provide for increased efficiency in the legislative branch of the Government". The bill, which carries out the recommendations of the Joint Committee, was reported favorably with only minor amendments on May 31 by the Special Committee on the Organization of Congress. On June 10, the Senate passed the bill by a vote of 48-16.

The amendments adopted by the Senate do not materially change the policy committee structure recommended by the Joint Committee. The bill as passed by the Senate fails to specify the functions and responsibilities of the Majority and Minority Policy Committees. Considerable discussion took place on the floor of the Senate as to what the proper relationship should be between the report of the Joint Committee on the Economic Report under the Employment Act and the over-all budget report of the revenue and appropriation committees under the Congressional reorganization bill. Several executive agencies whose views were sought by Senator Murray expressed apprehension that the two reports would come into conflict with each other and thus hamper the development of an economic program designed to achieve the objectives of the Employment Act of 1946.

The bill as passed by the Senate does not provide any committee machinery for the purpose of considering the issues involved and reporting thereon to the two Houses of Congress, if the two reports contain conflicting recommendations. Since both of these reports will undoubtedly deal with the broad area of social and economic legislation involving the expenditure of Federal funds, it will be exceedingly difficult, if not impossible, for the two chambers to choose intelligently between any conflicting recommendations unless floor action is preceded

2392 Cong. Rec. 6659 (June 8, 1946).
2492 Cong. Rec. 6700 (June 10, 1946).
by committee deliberation of the issues involved. Therefore, the Majority and Minority Policy Committees should be specifically charged with the responsibility of considering and reporting on the conflicting recommendations which may be contained in the two reports. Otherwise, Congress will still find itself without the proper machinery with which to meet the steadily increasing need for programmatic legislative action with respect to the many foreign and domestic problems which are besetting the nation.
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ADMINISTRATIVE LAW

COMMENTS ON THE ADMINISTRATION OF SECTION 124
OF THE INTERNAL REVENUE CODE

The comments which follow are segregated into the following groupings: (a) the national policy resulting in the passage of (b) the statute, (c) the rules and regulations issued thereon, and (d) policies of the several administrative authorities under the rules and regulations.

Section 124 of the Internal Revenue Code1 was passed by Congress as part of the Second Revenue Act of 1940. Its purpose was to encourage the investment of private capital in the acquisition and construction of facilities required in the interest of national defense. At hearings before the Senate Finance Committee, Mr. Knudsen testified:

"On July 10, 1940, an announcement was made from the White House that the principle of rapid depreciation or amortization of new emergency facilities had been approved by the President, the Secretary of the Treasury, the leaders of the Senate Finance Committee, and the House Ways and Means Committee and also the Advisory Commission.

"The statement in general terms was that required new facilities should be depreciated for tax purposes over a period of five years.

"The Advisory Commission informed a subcommittee of the Committee on Ways and Means that substantial amounts of private capital would not in the Commission's opinion be invested in the construction of such facilities unless corporations were assured that they would be permitted to amortize the cost thereof over a shorter period than would be permitted under the present depreciation provisions. . . ."2

The Act provided for the issuance of Necessity Certificates which certified to the Commissioner of Internal Revenue that the facilities described in the appendix attached to the certificate had been constructed or acquired in the interest of national defense. This certification to the Commissioner put the latter on notice that the holder of the certificate was entitled to write off the cost of the specified facilities over a period of sixty months or the emergency period, whichever was shorter, for purposes of determining its taxable income.

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2Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940) 158.
NATIONAL POLICY

It is necessary to review briefly both the history of the legislation and the time, since both are pertinent to the comments which are to be made on the administration of the statute.

The beginning of hostilities in Europe in the latter part of 1939 found this country in a disunited frame of mind as to what direction the nation’s policy should take with regard to the war in Europe. After long and bitter debate, the national defense program was initiated. It became the avowed purpose of the Government to organize an Army and Navy capable of defending the nation against any invader. The military procurement program which resulted from such action unquestionably indicated that the country was not geared for any sizable production of “defense” goods and, further, that manufacturers were loathe to convert to, or expand facilities for, such production. The usual peacetime markets for consumers’ goods were unrestricted and many manufacturers were enjoying their most prosperous sales in a decade. This, coupled with the uncertainty and bitterness expressed by many groups in the country as to the judiciousness of the defense program, resulted in production for the defense program lagging dangerously. Further, there were the restraining factors of profit limitations on defense work, which of necessity required the risking of capital in expansions, the length of whose productive usefulness was a big question. Meanwhile, contracts for the production of Army and Navy materiel went begging.

After innumerable arguments, conferences, proposals and counter-proposals, Section 124 of the Internal Revenue Code was enacted for the purpose of “getting the ball rolling.” Subsequently, the stress and restrictions of actual war brought about the same result to a much larger degree. But at the time Section 124 was enacted, this country was not at war and inducement was necessary to attract manufacturers from more certain and lucrative peacetime production.

One of the most difficult tasks facing the creators of the legislation was the elimination of the “pitfalls” resulting from accelerated depreciation experiences of World War I. At that time, too, industry demanded assurance that the investment in plant facilities necessary to carry on the war would not be lost at the cessation of hostilities. Special amortization privileges were regarded as the answer.

The Revenue Act of 1918\(^8\) allowed a reasonable deduction for the

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\(^8\)Revenue Act of 1918, § 234 (a) (8).
amortization of such part of the cost of facilities constructed, erected, installed, or acquired on or after April 6, 1917, for the production of articles contributing to the prosecution of the war, as was borne by the taxpayer. At any time before a specified date, the Commissioner of Internal Revenue, either on his own motion or at the request of a taxpayer, was to reexamine the taxpayer's return and if he then found, as a result of an appraisal or from other evidence, that the deduction originally allowed was incorrect, a recomputation of the tax over the war years was to be made.

In this way the decision as to what should be the proper amortization allowance during the war years was postponed until the end of the war. This would seem sound since a much better determination of the value of facilities at some date in the future could be made after that date than by guessing before. But the problems that were raised by the Revenue Act of 1918 proved impossible of solution. Every case meant delays, endless litigation, bitterness, and charges of maladministration. Only in 1940 was the final case under the amortization provisions of the Revenue Act of 1918 settled.

The Regulations promulgated under the Revenue Act of 1918 laid down vague general standards for determining proper postwar amortization allowances. The amount of the allowance was to be the difference between the original cost of the facilities, less any amounts already deducted for depreciation, and their value at the end of the war. If the facilities were sold or discarded, their "value" was to be the actual sale price or estimated fair market value. If the facilities were retained in use, their value was to be the "estimated value" to the taxpayer in terms of its actual use or employment in his going business but not less than the sale or salvage value of the property and not greater than the estimated cost of replacements under normal postwar conditions, less depreciation.

The greatest difficulties were met in valuing facilities in use. First, the Bureau of Internal Revenue had to determine what the reduced replacement cost of the facilities was and allow this amount to be amortized over the war years. Then it had to determine the "estimated value" of the facilities to the taxpayer in terms of its actual use or employment in his going business. If this value was less than the cost of replacement, as in practically all cases it was determined to be, an additional amortization allowance was granted. "Value in use" was un-

workable. And the Couzens Report\textsuperscript{5} establishes that fact. As of April 30, 1925, it reports amortization allowances were granted in 3,334 cases in amounts aggregating $596,934,812.26. One-hundred seventy-eight claims, aggregating $75,171,169.87, were still pending as of that date. The Couzens Committee reviewed all cases involving more than $500,000 and found that improper allowances had been made to the extent of $210,665,360.40!

Serious charges of maladministration were made against the Bureau. But the fact remains that the Bureau had been saddled with an impossible task. Even the Couzens Committee reported that "it is an economic impossibility to measure value in terms of use as the regulations require." The Nye Committee concurred, saying that "The fundamental difficulty with amortization provisions . . . is the impossibility of valuing the loss of usefulness in a plant constructed in wartime which a return to peacetime conditions will involve."\textsuperscript{6}

In an address before the Practicing Law Institute, the Legal Adviser of the Office for Emergency Management expressed the intent of the framers of the 1940 legislation when he stated:

"We were also determined not to support any law which would require post-emergency determinations and recomputations of the tax. We felt that it was necessary to offer some tax saving to industry to stimulate investment of private capital in the defense program. But we were firm in our opinion that the tax saving should be made definite and certain, at the outset, with no post-emergency recalculations, involving complicated problems of valuation. A five-year amortization deduction, with provision for acceleration if the emergency terminated sooner, seemed to be the least undesirable solution."\textsuperscript{7}

**The Statute**

The present statute did not grant a privilege in the usual sense of the word,\textsuperscript{8} e.g., the privilege or license to operate a motion picture theatre, a liquor store, a pool parlor, etc. Title III of the Act is:

\begin{itemize}
  \item \textsuperscript{5}Sen. Ref. No. 27, 69th Cong., 1st Sess. (1926).
  \item \textsuperscript{7}Address of David Ginsburg, Legal Adviser, Price Stabilization Division, Office of Emergency Management, before Practicing Law Institute, New York City, March 24, 1941, p. 22.
  \item \textsuperscript{8}Crowley v. Christensen, 137 U. S. 86 (1895); Lane v. Whitaker, 275 Fed. 476 (D. Conn. 1921); Bank of Italy v. Johnsen, 200 Calif. 1, 251 Pac. 784 (1926); Port Royal Mining Co. v. Hagood, 30 S. C. 519, 9 S. E. 686 (1888); State v. The City of Olympia, 122 Wash. 239, 210 Pac. 371 (1922); Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882 (1914).
\end{itemize}
“Amortization Deduction”, not “Amortization Privilege” as it has been improperly labeled by administrative personnel. Nor was it a relief measure in the usual sense of tax relief such as provided by Section 722 of the Internal Revenue Code. The history of the times and the congressional reports indicate that the Act was a means adopted by the Congress to effectuate the goal of channeling private capital into facilities necessary for the production of goods required for the national defense program.

Section 124 of the Internal Revenue Code was enacted because the Congress had determined that it was more prudent to have the necessary production expansion, required for the defense program, financed by private capital rather than by Government funds.

When, as in this type of legislation, the Congress thus indirectly accomplishes its objectives through exercise of the taxing power, it, in effect, puts itself on the basis of an individual dealing with an individual, and the relationship which it creates is in its nature contractual. When the Congress thus makes a general offer, it can, as can any offeror, state exactly of what its offer consists, include as many limitations or requirements as it sees fit, make standards of performance as thorough or as general as it wishes. It may provide for judicial review or it may limit the individual to administrative remedies. And no one, who having accepted such offer, can be heard to say that he was mistreated if he receives only what was offered. It must also be remembered that: “The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.”

It can readily be appreciated that the relationship was not one wherein the Congress in its magnanimity permitted the doing of an act, the granting or withholding of which permission or privilege was wholly within its discretion. Rather it was something which the Congress was, by circumstance, forced to ask to be done, and which it did not have power to accomplish by compulsion, and for which it had to offer special inducements.

In granting the amortization deduction allowed by the statute, Congress was exercising its constitutional power “to lay and collect taxes.”

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The allowed deduction created a special right in those taxpayers who, having complied with the procedural requirements of the statute, were able to get the Secretary of War or the Secretary of the Navy to certify that their construction, reconstruction, erection, installation, or acquisition of facilities was "necessary in the interest of national defense during the Emergency Period."

Section 124 was divided into several subsections which described how the amortization deduction was to be computed; for what it was a substitute; when it was to commence and end; the procedural requirements re filing and electing; how taxes were to be recomputed, if necessary; definitions, etc. It performed three purposes: (a) It informed the taxpayers of the general offer but did not specify the conditions and limitations thereof except as to the time within which an application had to be filed; (b) it put the Commissioner of Internal Revenue on notice that the specified deduction was to be allowed in determining taxable income; and (c) it delegated to its agent(s), the certifying authority(ies), the task of effecting the purpose of the Act within the specified boundaries, and by means of regulations which were to specify the conditions, limitations, etc., of the offer.

A review of the decisions leads to the inevitable conclusion that the courts will declare a statute invalid for an unconstitutional delegation of legislative power or a grant of arbitrary discretion only in the rarest of circumstances. There has been a marked tendency on the part of the courts to avoid the question wherever possible, and when faced with it, to read into the statute many considerations which give to it the requisites of a valid delegation.

This point is emphasized by the fact that of the myriad legislation enacted during the past fourteen years, the Supreme Court has declared only three statutes invalid for granting an unconstitutional delegation of legislative authority. Therefore, the discussion of the statute which follows is not made with the thought that this theory could possibly be the basis for attacking the statute itself.

Those parts of the statute which address themselves to the certifying authority are:

Subsection (a). "Every person, at his election, shall be entitled to a deduction with respect to the amortization... of any emergency facility... based on a period of sixty months."

Subsection (e) (1). "... the term ‘emergency facility’ means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Subsection (f). "In determining . . . the adjusted basis of an emergency facility—[Sec. 124 (f) (1)]

"(1) There shall be included only so much of the amount . . . as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Subsection (e) (2). "... the term ‘emergency period’ means the period beginning January 1, 1940, and ending on the date on which the President proclaims that the utilization of a substantial portion of the emergency facilities . . . is no longer required in the interest of national defense."

The Supreme Court has stated that the Constitution has never been regarded as denying Congress the necessary resources of flexibility and practicability which will enable it to perform its functions of (1) laying down policies and (2) establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy of the legislature is to apply.

Generally speaking, legislative powers are of two types: That which is exclusively legislative in nature and which is the power to determine basic policy, and which cannot be delegated; and that which is not exclusively legislative, and which may be delegated. In State ex rel Wisconsin Inspection Bureau v. Whitman the court said:

"The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. . . ."

Examining the statute from the viewpoint of the foregoing specifi-

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14See note 1, supra.
15State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 505, 220 N. W. 929 (1928).
ocations, it can be seen that the Congress has complied with the minimum requirements for a valid statute. The laying down of policy was accomplished by the passing of the Act. The purpose for which the Act was passed cannot be gleaned from the statute itself, but the committee reports\(^\text{16}\) and the congressional hearings\(^\text{17}\) demonstrate it, as previously outlined. The Act specifically defines “Emergency Facility” and “Emergency Period.” The definitions are broad and general but they provide the limitations or boundaries of the field of the administrator's permissible actions and prescribe the confines within which the regulations may operate.

There is only one phrase in this statute (subsection (f)) which is not elucidated by definition, \textit{viz.}, “necessary in the interest of national defense.” The exact meaning thereof, along with the detailing of the definition of “Emergency Facility”, was delegated to the Certifying Authority(ies).

In this connection, all that is required for a valid statute is that there are definitions, broad and general as they may be, and standards which provide but a skeleton within which the delegated authority is to operate. “Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”\(^\text{18}\) Nor can it be said that the standard “necessary in the interest of national defense” is so vague and indefinite that, if construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. In dealing with the phrase “public interest”, the Supreme Court said:

“It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. \textit{The purpose of the Act, the requirements it imposes}, and the context of the provision in question show the contrary.”\(^\text{19}\) (Italics supplied.)

The foregoing considerations seem to lead to the definite conclusions that:

“Congress enacted the . . . Act in pursuance of a defined policy and required that . . . the Administrator should further that policy and conform to the standards prescribed by the Act. The boundaries of the field of the


\(^{17}\)See note 2, \textit{supra}.


\(^{19}\)National Broadcasting Co. v. United States, 319 U. S. 190, 226 (1943), \textit{quoting from New York Central Securities Corp. v. United States, 287 U. S. 12, 24 (1932).}
Administrator's permissible action are marked by the statute . . . the purposes of the Act . . . denote the objective to be sought by the Administrator.20

Hence, since the Congress has laid down by legislative act "an intelligible principle" to which the person or body authorized to act must conform, "such legislative action is not a forbidden delegation of legislative power."21

Insofar as the grant of an arbitrary discretionary power is concerned, there has been an increasing tendency on the part of the courts to read into the substance of every statute the implied guide of reasonableness.22 Once such a construction has been placed upon a statute there can be no question as to its validity under the Fifth or Fourteenth Amendments, nor does its validity depend upon whether the degree of discretion is necessary. The theory upon which the courts proceed is that the administrative agency is given only a reasonable discretion. It cannot be presumed that the discretion will be exercised arbitrarily, and if ever it should be, the person discriminated against would have his appropriate remedy in the courts.23 It is, then, not until the discretion has been abused that any rights under the Fifth or Fourteenth Amendments are involved. The federal rule in this matter is laid down in New York ex rel Lieberman v. Van de Carr.24

While there is little doubt as to the power of the Congress to pass an act granting a broad sweeping discretionary power, the wisdom of such a gesture can be seriously questioned when the legislation is of the type of Section 124. When the matter is broad, technical, and time-consuming, such as the setting of rates, or the regulation of communications, there can be no other way to solve properly the particular problem than by the delegation to an administrative officer or body of "ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative com-

See note 18, supra at 423.


United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932); Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230 (1915); Monongahela Bridge Co. v. United States, 216 U. S. 177 (1910); Ex parte Holmes, 187 Calif. 640, 203 Pac. 398 (1921).


mand. In such cases the Congress generally exercises its legislative power directly. However, in the type of legislation here under consideration the Congress asked that a specified thing be done. It did not ask particular persons to do the desired act. It solicited everyone to engage and offered an inducement to encourage broad participation, without stating specifically who should or should not be entitled to the benefits of the inducement, or under what circumstances.

This broad delegation has had a double impact. It redounded unfavorably on the designated administrative authorities for the reason that they were not given adequate indication of the exact intent of Congress, as will be demonstrated later, and for the further reason that past history made them apprehensive of proceeding on their own uncertain interpretation of the intent of Congress. In later efforts to re-mold the statute to fit changed conditions and to supply the intent which the Congress no doubt would have had if the Act were passed at that later time, legislative power was assumed by the administrator and probable delegated authority was exceeded.

It was pointed out above that Congress granted a somewhat similar discretionary power during World War I. It will likewise be remembered that the Nye Committee and the Couzens Committee criticized the administrator in the subsequent period of peace for the manner in which he administered the act which was, in itself, incapable of proper or satisfactory administration. Lastly, it redounded to the disadvantage of the taxpayer who, because of the above described attitude of administrative personnel, was confronted, in the latter part of this war, with the same doubts which were present in the last war and which the Congress had intended to eliminate by passage of the present Act.

The net effect of a statute as broad as the one in this case is that Congress accomplished its goal without having to accept the full consequences of its general offer; it caused innumerable and unnecessary hardships to the appointed administrators; and it worked injustices to taxpayers, leaving the Congress free to attack and castigate both at a subsequent time, when the “blood, sweat and tears” have become but a faint memory.

^See note 18, supra at 425.

^See note 6, supra.

^See note 5, supra.
The Regulations

The Second Revenue Act of 1940 became law on October 8, 1940. The first set of regulations, which the statute prescribed were "to be issued . . . from time to time with the approval of the President", were issued on May 22, 1942.

The regulations set no hard and fast rules except as to purely procedural matters, such as the time within which an application had to be filed. Briefly, the necessity of a facility was determined in accordance with whether or not its production was required in the interest of the national defense. A supply might be so required if essential to the armed forces; to any foreign nation being furnished supplies under an Act of Congress; or under certain circumstances, even if it had only civilian use. Ordinarily, to justify an expansion, it had to be shown that there was a shortage of facilities within an industry for a particular production.

On October 5, 1943, the rules and regulations were amended with the approval of the President, to provide that no facility would be considered for certification unless the Secretary of War or the Secretary of the Navy had determined, prior to beginning of construction or acquisition of a facility, that there was a shortage of facilities for a supply required for military or naval use, and then only after consideration of the relative advantage of government financing as against private financing with amortization.

The ostensible reason for this amendment was that in a press release May 12, 1943, the War Production Board announced:

"With the exception of certain special programs, some special machinery, and further expansion of raw materials products, the United States at last has the machine tools and the capital equipment it needs to build products to defeat the Axis. For the first time in its history the nation now has a physical plant adequate to make the maximum use of its resources in men, skill, and materials."

In addition to the foregoing, there was the fact that the field of amortization had become so broad that it covered too many types of expansions over the production of which the War Department and the Navy Department had no control and, in most instances, little knowledge. Ever conscious of the probability of a peacetime congressional

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28See note 1, supra.
29Amendment to Rules & Regulations governing the issuance of Necessity Certificates under Sec. 124 of the Internal Revenue Code, 8 Fed. Reg. 13824 (1943).
"witch-burning", both departments were desirous of obtaining congressional approval of all acts accomplished up to that time, or of "getting out from under" completely. Prior to the amendment of October 5, 1943, the certifying authorities first considered recommending to the Congress that Section 124 be repealed. For reasons unknown, the Director of the Office of War Mobilization is said to have recommended the alternative that the regulations be amended as outlined above.

The ultimate effect of the amendment was that the power to certify was transferred from the Secretaries of War and Navy to the Chairman of the War Production Board. The October 5th amendment attempted to establish that the only facilities which could be considered as "necessary in the interests of national defense" were those that produced guns, bullets, uniforms, i.e., facilities that produced something for which the Army and Navy could contract directly. Such facilities as those required by railroads, utilities, the chemical industry, etc., and the myriad subcontractors who produced goods that went into goods which in turn went to the War or Navy Departments, were not, under the October 5th amendment, entitled to the amortization deduction.

By Executive Order\(^{30}\) the power to certify under the statute was transferred, on December 17, 1943, to the Chairman of the War Production Board. The rules and regulations issued by the latter, with the approval of the President,\(^{31}\) contained the requirement that:

> "Application must be filed before construction is begun or date of acquisition. The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."\(^{32}\)

Thus, in addition to continuing the War and Navy Department requirement of a predetermination of necessity prior to the date of construction or acquisition, there was the further stipulation that the "application must be filed before construction is begun or date of acquisition."

The requirement was emphasized by repetition:

> "Applications for certification of certain facilities must be filed with request for priority assistance or specific authorization. The issuance of a Necessity

\(^{32}\)Id. at Sec. (4).
Certificate will not be considered . . . unless the application for a certificate is filed together with the application for priority assistance. . . .”^{33}

The two foregoing sections of the regulations are particularly significant when contrasted with the statute, which provides that:

“The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation, or the date of such acquisition. . . .”^{34}

In relation to the foregoing, a brief review of the history of the Act and its administration discloses that the Act as passed on October 8, 1940, provided that Necessity Certificates should not be issued unless they were issued before the beginning of construction or the date of acquisition except that, in the case of facilities already started or acquired when the law was passed, the Certificate had to be issued before February 6, 1941. The time limitation placed on the issuance of a Certificate proved impossible of administration. As a consequence, the certifying authorities presented their problem to the Congress. On January 31, 1941,^{35} the Act was amended so as to eliminate the fixed date and to provide instead that an application for a Necessity Certificate must be filed within sixty days of the beginning of construction or of the date of acquisition, or before February 6, 1941.

Subsequently, experience indicated that, although the sixty-day filing period was administrable, it did not provide sufficient time to take into consideration the continually growing demand for war materiel, which caused frequent changes in plans for facilities. Hence, again the certifying authorities presented their problem to Congress. On October 30, 1941,^{36} the Act was again amended to provide that an application for a Necessity Certificate could be filed within six months of the date of beginning construction or the date of acquisition.

The administrative authorities had on these previous occasions considered the statutory amendments necessary to effect a change in the statutory procedural requirement relative to the time of filing. Under what authority, then, was it permissible for the certifying authority to effect a statutory change by the December 17, 1943, amendment to the regulations?

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^{33}Id. at Sec. (3) (a) (v).
^{34}Section 124 (f) (3).
^{35}55 Stat. 4 (1941).
^{36}55 Stat. 757 (1941).
The propriety of this action may be surmised from what the courts have said under similar circumstances. In the case of Manhattan General Equipment Co. v. Commissioner of Internal Revenue, the Supreme Court stated that:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."37

And In re Mellea where the Federal District Court said:

"It is settled law that while an executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of a statute, so long as such regulations are merely administrative in character and relate only to the enforcement of the statute, yet such an executive tribunal or official cannot, constitutionally, either with or without the sanction of Congress, make any rule or regulation the effect of which would be to add to, take from, or otherwise change such statute, for that would be to permit the executive department to encroach upon and usurp the function of the legislative department, to which alone belongs the power to legislate."38

Except for the foregoing, the rules and regulations adopted by the Chairman of the War Production Board were similar to those which had previously been used by the Secretary of War and the Secretary of the Navy.

**Policy**

Besides the regulations which the statute required, there were the unwritten and unpublished regulations which were known generally as "policy." Thus, for example, the Secretary of the Navy decided "as a matter of policy" that office furniture and fixtures would under no circumstances be entitled to the amortization deduction. The Secretary of War "as a matter of policy" decided that no facility necessary for the production of food would be entitled to the amortization deduction. This latter decision was adopted for the reason that the number of applications which would have been submitted by farmers would have


38In re Mellea, 5 F. (2d) 687, 689 (E. D. Mich. 1925); see also United States v. United Verde Copper Co., 196 U. S. 207 (1905); Morrill v. Jones, 106 U. S. 466, 467 (1882).
entailed too much work. Its adoption eliminated from consideration the equivalent of an entire industry. As thus indicated, "policy" adopted by either the Secretary of War or the Secretary of the Navy was not necessarily "policy" of both.

The practice of adopting unwritten regulations in the form of "policy" was continued by the Chairman of the War Production Board. For example, regardless of whether or not a particular facility fell within the statutory definition of an emergency facility and at the same time had satisfied all the requirements of the regulations as to shortage, essentiality, etc., it was decided that unless an Industry Division in the War Production Board formally recommended approval of a particular expansion, a Necessity Certificate would not issue. This "policy" was based on the reasoning that if the Industry Division, which was responsible for the production of the particular industry did not see fit to recommend the issuance of a Necessity Certificate, the Certifying Authority would not override the recommendation even in the presence of all findings necessary for a proper determination. If all applications had been considered objectively, the "policy" could readily be justified. Suffice it to say that where the status quo in an industry or the relative position of a particular corporation in an industry was maintained during the war, it was accomplished by one of the War Production Board Industry Divisions which were, to a large degree, staffed by "duration" representatives from the particular industry.

One of the outstanding reasons for the October 5, 1943, amendment to the regulations was that both the Secretary of War and the Secretary of the Navy were very uneasy as to whether or not Congress had intended that they should go as far as they had in granting the amortization deduction; and whether or not the changed economic condition of the country had eliminated the necessity for the legislation.

When the War Production Board assumed the authority to certify, it at first adopted the statute-interpretation of the former certifying authorities by granting a one-hundred per cent amortization deduction whenever it determined that facilities were necessary in the interest of national defense. However, a short time later the administrative uneasiness which had preoccupied the former certifying authorities infected its thinking to a more pronounced degree. This uneasiness coupled with its own previous statement to the effect that the greater part of industrial expansion required for the war effort had been completed, culminated in the adoption of the "policy" that where it was
reasonable to believe that emergency facilities would have postwar value, such facilities would not be entitled to certification in excess of thirty-five per cent of their cost. Thirty-five per cent certification was stated by its authors to be a liberal allowance to compensate manufacturers for the increase in price levels at the time of the expansion over those existing prior to the war.

Consideration of the foregoing policy is indeed interesting. The statute provides that "the amortization deduction . . . shall . . . be in lieu of the deduction . . . provided by Section 23(1), relating to exhaustion, wear and tear, and obsolescence." It does not provide that it shall be partially in lieu of the depreciation deduction. The postwar consideration adopted by the War Production Board necessitated the interpretation: in lieu of the depreciation deduction to the extent that such part of the cost is covered by the amortization deduction. This is very different from saying that a facility is necessary in the interest of national defense, and hence entitled to the amortization deduction or that it is not so necessary, and hence entitled to only the depreciation deduction: or that, of two facilities, one is necessary and one is not. It is equivalent to saying that 65 per cent of the facility is not necessary in the interest of national defense while 35 per cent is necessary, i.e., 35 per cent of the cost was made for the war effort, 65 per cent was not. Yet, the War Production Board Division charged with the issuance of priorities would be the first to deny that it had approved the use of 65 per cent more critical material than was necessary. May it not be appropriately asked which 35 per cent of a specified drill press was necessary and which 65 per cent of it was not necessary?

But perhaps this approach is facetious. There is a more serious side to the problem. The decision to take postwar value into consideration in granting the amortization deduction was of necessity either of two things: (1) a proper interpretation of the statute and the intent of Congress, or (2) a misinterpretation of the statute and the assumption of authority beyond that delegated.

If the "policy" was a proper interpretation of the statute, it represented an addition to the regulations promulgated under the statute. As such, in order to comply with the statute, it should have been issued with the approval of the President. Furthermore, it should have

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38 Section 124 (a).
been published in the Federal Register. But the regulations issued by the Chairman of the War Production Board were never amended to stipulate that the postwar value of a facility was to be taken into consideration in granting the amortization deduction. Consequently there was no presidential approval and no publication in the Federal Register.

Since the statute is silent on the point as to whether postwar value was to be considered as a limiting factor in granting the amortization deduction, it will be necessary, in accordance with accepted practice, to determine, if possible, the intent of Congress from the basic data of the legislation, viz., congressional hearings, committee reports, etc.

The Act as first passed by the House incorporated certain subsections which were designed to insure that certified facilities would be available for possible further use in national defense at a later time. It was thus provided that, under penalty of an increased tax liability, facilities on which an amortization deduction had been taken were not to be destroyed or substantially altered without the consent, in writing, of the Secretary of War or the Secretary of the Navy. These subsections are referred to at this time for the reason that they evoked the criticisms of the Council of National Defense, part of which is reflected in the words of Mr. Knudsen:

"After most careful considerations, the Advisory Commission to the Council of National Defense has unanimously voted to recommend to your committee that there not be included in the bill any provision limiting or restricting the use which a taxpayer may make of the facilities against which amortization or accelerated depreciation has been charged pursuant to the terms of the bill.

* * *

"If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes."

Mr. John D. Biggers, Chairman of the Committee on Taxation and Finance, The Advisory Commission to the Council of National Defense, testified:

43 *See note 2, supra at 159.
"The sole purpose in recommending this amortization section, which is now a part of the tax bill, was to encourage the use of private capital in the construction of defense facilities... Now that we hope will cover a very important segment of the defense program, particularly those companies that make articles that have some future potential use in normal industry, such as a turbine for a ship, and many other similar articles."44

The following excerpts from the hearings are indicative:

"Senator Connally. Well now, you are not going to give them 20 per cent on the existing plant and 20 per cent on the new plant too?
"Mr. Biggers. Not at all, Sir... They would be permitted, as I understand it, under the provisions of this amortization feature of the tax bill, to deduct 20 per cent of the cost of these newly created facilities from their total taxable income. In other words, if they built a million-dollar plant, they would be able to deduct $200,000 a year from taxable income.

* * *

"Senator Barkley. If it turns out in the future the million-dollar investment is worth nothing for the production of normal products not needed by the Government, the company may stand to lose that extra investment unless it may utilize it for some future peace purpose, as I understand.

"Mr. Biggers. Yes.

"Senator Barkley. Is that a fair picture of the situation?

"Mr. Biggers. That is a very fair picture of the situation. In that case if that company were able to adopt its facilities to peacetime use and went on operating them, it would be able to charge no further depreciation against its taxable income, and if the tax rate is advanced that company would be out of luck."45

Do the foregoing quotations leave any doubt as to what the purpose of the sponsors of the legislation was? Do they leave any doubt that that purpose was made known to the Congress and that Congress adopted such purpose as its own when it passed the legislation? Is the point not emphasized by the fact that the objectionable subsections against which the testimony was given, were eliminated from the Act as passed? Is it not clear that Congress not only realized but expected that a substantial portion of the emergency facilities would have postwar value? Does not the foregoing testimony clearly demonstrate that despite the fact that many facilities would have postwar value, they were nonetheless to be written off for tax purposes at the rate of 20 per cent per year—that they were to be certified to the extent of 100 per cent of their cost?

JAMES P. DURKIN

44See note 43, supra at 166-167.
45See note 43, supra at 168.
THE secret of orderly, economical and efficient administration of government lies in the establishment of an organization capable of producing such administration.

The American people are reputedly a nation of organizers. The success of our great manufacturing concerns and business houses is generally attributed to operational efficiency stemming from a sound, smooth-running organization. It is indeed strange that such widespread "organizing" genius has failed to produce a system of Government administration satisfactory to the American people. Indeed in the field of government we might be more aptly termed a nation of "reorganizers".

Any proposal for reorganization, *per se*, connotes dissatisfaction with the operation and management of the thing to be reorganized, be it Congress, a Government agency, or an industrial plant. If dissatisfaction is a criterion, there can be no question of the appropriateness of an immediate reorganization of our federal governmental structure. The problem is presently being considered by Congress from a twofold aspect, (1) reorganization of Congress itself, (2) reorganization of Federal Government agencies. The two aspects of the problem are the subjects of separate legislation, and it is the purpose of this paper to deal only with that directed at reorganizing the myriad agencies of the Federal Government.¹

The reorganization fever had its inception in the administration of President Theodore Roosevelt² and it has been recurrent ever since that time. Full fledged Reorganization Acts were promulgated in 1932, 1933 and 1939.³ Moreover, statutes permitting or directing transfers of various bureaus, redistribution and consolidation of certain functions, *etc.*, have been inaugurated at irregular intervals since 1903.⁴ Since that year a total of seventeen statutes and a much larger number of Execu-

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¹For a discussion of the reorganization of Congress, see Note (1946) 34 *Georgetown L. J.* 201.

²Congressional committees have studied the reorganization problem, with the accent on reduction of expenditures, sporadically since 1822. Since Theodore Roosevelt, however, every President has proposed governmental reorganization. *Sen. Rep.* No. 638, 79th Cong., 1st Sess. (1945) 10, 11.


⁴See note 2 supra, at 17-26.
tive Orders have been aimed at reforming the functional aspects of the administrative agencies of the Federal Government.

It would be unprofitable and inconclusive, at this time, to debate the wisdom of this prior legislation. However, it may be said with some degree of assurance that these reorganizations were not unqualified successes. If the present top-heavy structure by which we are governed is the fruition of a series of successful reorganizations, all further attempts should immediately be abandoned as being a menace to the public welfare.

Whatever considerations may have brought about the prior legislation and whatever justification there may have been for such legislation in the past, it is apparent that drastic steps must be taken to correct the current abuses. The complexities of the federal structure as well as the constantly increasing control exercised by a legion of federal agencies over the habits and movements of the individual citizens make reorganization imperative. ⁵

It is true that internal reform in each agency would alleviate much of the confusion now existing, but to create a lasting effect something more than this must be done. Government reorganization should produce a more desirable, more efficient form of Government. A real advance in the science of government must be made. An analysis of the latest Reorganization Act may be helpful in determining whether such an advance in the science of government has been provided for, or whether once again Congress has seen fit only to provide for a limited shifting of agencies and the destruction of one or two bureaus.

THE REORGANIZATION ACT OF 1945

The Act⁶ comprises only eighteen sections set out in two separate titles. Title I devotes eleven sections to reorganization proper and Title II, in seven sections, delineates the procedure under which the

⁵Alan Johnstone, General Counsel of the Federal Works Agency, testifying before the Subcommittee of the Committee on the Judiciary of the Senate said: "Increase in Government of course was inevitable during the depression, I think, and always during a war. The depression of the 30's is passed and the war is won but the bureaus tend to survive and grow, and that has been so since the Government was established.

"I think I agree, as everybody else does, that we have too much Government. . . . "The size and expense of the Government in Washington and in the States must be brought to manageable and supportable proportions."

Hearings before a Subcommittee of the Committee on the Judiciary on S. 1120, 79th Cong., 1st Sess. (1945) 78. This publication will hereinafter be cited as Hearings.

Senate and House of Representatives will consider the reorganization plans provided for in the first title.

The purpose of the Act is stated to be:

“(1) to facilitate orderly transition from war to peace;
(2) to reduce expenditures and promote economy, to the fullest extent consistent with the efficient operation of the Government;
(3) to increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;
(4) to group, coordinate, and consolidate agencies and functions of the Government as nearly as may be, according to major purposes;
(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
(6) to eliminate overlapping and duplication of effort.”

These laudable purposes are followed by a congressional declaration that they are in the public interest, and by a pious hope that an over-all reduction of 25 per centum will be effected in the operating costs of the agencies subject to the Act.8

It will be noted that the propositions numbered (1), (2), (3) and (6) are statements of the ends desired. The propositions numbered (4) and (5) are the means provided for achieving the desired results. As such they deserve careful consideration, and reduced to non-technical language we find that they provide for, (a) grouping of agencies according to major purposes, (b) grouping of agencies according to similarity of functions, and (c) abolishing of unnecessary agencies and functions. There can be no quarrel with the last named proposition. However, criticism can be leveled at the other two provisions in that they fail to provide for certain important contingencies.

For instance, grouping “agencies and functions” according to major purposes may very easily result in forming a monster bureau with widely dissimilar functions under the control of a single agency head. Section 2(a)(4) of the bill fails to recognize that similarity or even identity of function does not necessarily mean that these functions are directed to the same major purposes. Two agencies may, as important functions, collect certain statistics and their major purposes may be widely different.9 Conversely, an even less desirable result may be reached by grouping according to similar functions. Due to the difficulty

7*Id. at § 2 (a).
8*Id. at §§ 2 (b), (c).
9MERIAM AND SCHMECKEBIER, REORGANIZATION OF THE NATIONAL GOVERNMENT (1939) 51-54.
of defining the term "function" with any degree of exactitude,10 and because of the astronomical number of recognizable "functions" now exercised by the Federal Government, perplexed reorganizers may be forced to group agencies into unifunctional and bifunctional units. The evils of this course need no further elaboration.

Since the bill is silent as to a method of solving this dilemma, and since responsibility for all reorganization plans is placed on the President,11 it must be presumed that Congress looks to him for a solution. Obviously, if the President is to produce a plan embodying the best features of a grouping according to major purposes, and a grouping according to similarity of functions, he must have at his command complete and impartial information concerning all Government agencies. Such information could best be collected by a central Government clearing-house, able to evaluate self-serving declarations from certain agencies, and extract information from the more recalcitrant bureaus. The Act nowhere provides for the creation of such a clearing-house; on the contrary limitations placed on presidential reorganization plans by later sections of the Act would seem to preclude the establishment of such an agency.12

Apparently Congress believes the President already has such a clearing-house in the Bureau of the Budget.13 The lack of success of prior reorganizations casts considerable doubt on this proposition. The Act nowhere provides for the expansion of the Bureau of the Budget, and development of this agency into a more efficient informational aid to the President can only be sought through separate legislation.14

It appears, therefore, that Congress has given the President express directions as to the manner of reorganization without providing him with the special expert help necessary intelligently to effectuate these directions. This is an impressive "vote of confidence" in the genius of the present, and future incumbents of the presidential office. It does not, however, seem to be the most efficient method of procedure, in order to ensure success.

10Hearings, supra note 5, at 47, 48, 60-68; cf. Meriam and Schmeckebier, supra note 9, at 87-94.
11See note 6 supra, at §§ 2, 3.
12Id. at § 5. This section is more fully discussed later in the text.
14However, it has been said that authority for such expansion is contained within the framework of the Bureau of the Budget Act. In any event, the present Bureau of the Budget is not equipped to produce the kind of information which the Chief Executive needs in order to plan an effective reorganization. Meriam and Schmeckebier, supra note 9, at 153-155.
During the course of the hearings and debates on the present Act a very peculiar situation was brought to light. On the one hand there was the almost unanimous agreement that reorganization was a legislative problem. On the other hand there was the bald, uncontradicted declaration that Congress could not satisfactorily cope with this problem and that it must be placed in the hands of the Executive. 16

Once Congress had reached this decision it had to decide how much power it would give the President in order that he might effectuate a reorganization. Legislatures are naturally jealous of their powers and rightfully proud of their important place in our scheme of Government. A Congress which has just admitted its inability to solve a problem properly within its sphere is very likely to be inordinately sensitive on this point. Such a Congress will not be prone to give large powers to the Chief Executive, rather it will be inclined to grant powers grudgingly and to hedge the powers granted with many limitations and restrictions.

This attitude on the part of the lawmakers has been a major factor in the failure of prior reorganization bills and, in this instance, has led to the enactment of Section 5 of the Reorganization Act of 1945. This section sets out the limitations on the powers of the President with respect to reorganization, and part (a) is sufficiently important to be set out in full:

"(a) No reorganization plan shall provide for, and no reorganization under this Act shall have the effect of—

(1) abolishing or transferring an executive department or all the functions thereof or establishing any new executive department; or

(2) changing the name of any executive department or the title of its head, or designating any agency as 'Department' or its head as 'Secretary'; or

(3) continuing any agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made; or

(4) continuing any function beyond the period authorized by law for its exercise, or beyond the time when it would have been terminated if the reorganization had not been made, or beyond the time when the agency in which it was vested before the reorganization would have terminated if the reorganization had not been made; or

(5) authorizing any agency to exercise any function which is not expressly authorized by law at the time the plan is transmitted to the Congress; or

(6) imposing, in connection with the exercise of any quasi-judicial or quasi-legislative function possessed by an independent agency, any greater limitation upon the exercise of independent judgment and discretion, to the full extent

authorized by law, in the carrying out of such function, than existed with respect to the exercise of such function by the agency in which it was vested prior to the taking effect of such reorganization; except that this prohibition shall not prevent the abolition of any such function; or (7) increasing the term of any office beyond that provided by law."

It will be seen that this provision effectively prevents the President from touching the ten existing Executive Departments, even to the extent of changing the title of the head of such a Department. He is reduced with respect to these "sacred cows" to the ministerial operation of shuffling a few functions from one department to another. He may, by virtue of the unbounded Congressional generosity, abolish some but not all of the functions of these agencies. The serious nature of this limitation is apparent when one considers the fact that roughly 80 per cent of the peacetime expenditures and a correspondingly large share of the personnel of government administration are involved in the operation of the ten Executive Departments.16 By this provision alone reorganization is limited in large measure to 20 per cent of the Government agencies. An incidental effect is that the much-discussed Army-Navy merger can never, thanks to these limitations, be included in a reorganization plan under this Act.

The sweeping limitation just discussed covers only the first two clauses of Section 5(a); let it never be said that a presidential reorganization plan can deal freely with the 20 per cent remaining after this legislative surgery. A careful reading of clauses (3) to (7) inclusive will serve to dispel any such notion. These clauses provide that no agency or function may be continued beyond the period authorized by law for its existence or exercise; nor can any agency be permitted to exercise any function not expressly authorized by law at the time the reorganization plan is transmitted to Congress; nor can the term of any office be increased beyond that provided by law for such office.

Congress, however, has seen fit to spare the quasi-judicial and quasi-legislative agencies, at least as to their functional aspects. A reorganization plan may abolish such function, but it may not impose greater restraint in its exercise than heretofore allowed by law. These limitations, therefore, allow the President to completely abolish the 20 per cent of the Government agencies not under the aegis of Cabinet members. He cannot, however, take affirmative action with respect to these agencies except under the restrictions just noted.

16Hearings, supra note 5, at 79-82; Meriam and Schmeckebier, supra note 9, at 31-46, which shows distribution of personnel during a peacetime year.
Even this small measure of authority is further curtailed by parts (b) through (d) of Section 5, which exempt from any reorganization plan the following agencies: Interstate Commerce Commission, Federal Trade Commission, Securities and Exchange Commission, National Mediation Board, National Railroad Adjustment Board, Railroad Retirement Board, Federal Communications Commission, Federal Deposit Insurance Corporation, United States Tariff Commission, Veterans' Administration and any civil function of the Corps of Engineers of the United States Army.\(^7\) The General Accounting Office is, of course, an arm of the legislature and as such is automatically exempt from the provisions of this Act.\(^8\)

It is apparent that by virtue of these limitations the bulk of the administrative agencies will lie outside any reorganization plan. Obviously this Act falls far short of providing the means of accomplishing a real advance in the science of government. It permits the abolition of a relatively insignificant number of agencies, chiefly wartime agencies, many of which would vanish in short time anyway, due to the expiration of statutory authority. It is based entirely on the idea that "abolishing" of agencies and functions is the Alpha and Omega of reorganization.\(^9\) Fearful that the Executive may create another agency or another function, it succeeds only in laboring mightily without even producing the proverbial mouse. It is not a measure designed to add stature to the present Congress.

Thus far the discussion has involved what the plan prohibits rather than what it permits, encourages or directs. Two reasons may be ascribed to this, (1) because the Congress itself was more concerned with what should not be done than in what should be done—the limitations section is the longest and most detailed in the bill, and (2) there are few clauses directing any affirmative action by the Executive.

\(^7\)See note 6 supra, at §5 (b)-(d).
\(^8\)See note 6 supra, at §7; Hearings, supra note 5, at 18. The present Comptroller General was one of the most vociferous advocates of reorganization. Hearings, supra note 5, at 9 et seq. This is very interesting since the General Accounting Office is not generally recognized as one of the more efficient or economical of the Government agencies. Pritchett, The Tennessee Valley Authority, A Study in Public Administration (1943) 258-263, and authorities and publications there cited, demonstrate the extraordinary nature of some General Accounting Office procedures from the standpoint of efficient business administration.
\(^9\)The Hearings cited supra note 5, the Senate Report supra note 2, and the tenor of the Act itself testify to the truth of this statement.
Section 3\textsuperscript{20} and 4\textsuperscript{21} set out the contents of the plans to be drafted by the President. The language of Section 3 directs the Chief Executive, whenever he finds it necessary to accomplish the purposes of Section 2,\textsuperscript{22} to transfer, abolish, consolidate and coordinate agencies and functions. Just how circumscribed this authority really is has already been demonstrated.

Under Section 4, a reorganization plan may provide for the changing of the name of an agency and the title of its head, and the designation of the name of an agency resulting from a Section 3 reorganization and the title of its head. The plan may include provisions for the appointment and compensation of agency heads, be they individuals or commissions, the maximum term of office being fixed at four years and the salary at $10,000 per annum. A further caution—if such an appointment is not under the classified civil service, the President must secure the advice and consent of the Senate. Appropriate authority is bestowed for the disposal of records, property, personnel, and unexpended funds of any agency transferred, consolidated, coordinated or abolished.\textsuperscript{23}

This language, especially Section 3, would appear well-adapted to a successful reorganization, if one had not already read the binding limitations applicable by virtue of the other sections. Congress has not granted the President any powers which it has not later completely retracted, or so seriously restricted as to make the grant ineffectual.

This fact is especially unfortunate in the light of the procedures and safeguards outlined in Title II of the Act. These iron-clad regulations appear sufficient to preserve the ancient prerogative of the legislature to make the law.\textsuperscript{24} The details of these provisions make most of the limitations of Section 5, Title I, unnecessary and ungenerous.

**Conclusion**

No successful reorganization plan can be drafted under the Reorganization Act of 1945. By a successful plan, we mean one which will bring about a real reformation in the administration of the Federal Government and provide an “orderly, economical and efficient administration”. The present bill so limits the authority of the Executive that virtually nothing constructive can be accomplished.

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\textsuperscript{20}See note 6 supra, at § 3.
\textsuperscript{21}Id. at § 4.
\textsuperscript{22}Id. at § 2.
\textsuperscript{23}Id. at § 4 (4).
\textsuperscript{24}Id. at §§ 201-207.
The bill places undue stress on "abolishing" as if Congress really believed that efficiency can only be promoted by a process of elimination. Too many departments, bureaus and commissions have been exempted, leaving only a skeleton to work on.

Another vital omission is that of failing to provide for the establishment of proper machinery to conduct the reorganization. The belief that the already hard-pressed Bureau of the Budget can adequately guide the President is somewhat ludicrous. The alternative that the President and his small executive staff can do it alone is even more so, especially when the magnitude of the undertaking is considered.

It is suggested that since this is admittedly a legislative duty, Congress should establish its own machinery and proceed to reorganize the Government agencies. If this is unsatisfactory, then the President should be given more help and more power and allowed to proceed. Any fear that such action would place undue power in the hands of the Executive could be eliminated by statutory provisions similar to Title II of this bill.

Commentators in this field have pointed out that concepts of reorganization may take four different forms: (1) Structural Reorganization, (2) Curtailment of Function and Activities, (3) Greater Executive Control, (4) Continuous Reorganization.25

The present bill is essentially one involving structural reorganization and curtailment of functions—with a hesitant gesture toward greater executive control. Reorganization of the anatomy of an individual agency, or of a group of agencies possesses undoubted value. So also does the curtailment and elimination of unnecessary or outmoded functions. However, these very things were the bases for prior reorganizations and failed to produce anything of lasting satisfaction. Is there any reason to believe that a plan which has failed time and again will now succeed merely by virtue of reenactment?

As a constructive gesture we would like to suggest a reorganization act or a series of such acts bottomed on the concept of continuous reorganization. Since it has never been tried, it has at least the merit of never having failed. Continuous reorganization presupposes a strong Executive with a permanent coordinating agency to aid him, and a Con-

25Meriam and Schmeckebier, supra note 9, at 11-21. These items are not, of course, the only workable basis for governmental reorganization. The Senate Report on the present bill, for instance, gives a list of "factors" to be considered in a reorganization. See note 2, supra at 2. A consideration of these "factors" in a more liberal spirit would have led Congress to enact a bill just as effective as any based on the concepts listed here.
gress similarly implemented to enable it to secure the necessary facts for the exercise of its powers. It looks to reorganization effected by the cooperation of the Executive and Legislative branches; one which keeps pace with the Government through the years.\textsuperscript{26}

Each new President and each successive Congress would have at hand the machinery to keep them informed of needful changes in the governmental organization.

A program of this nature should over period of years prevent unnecessary duplication of functions, overlapping of activities, \textit{etc.}, and achieve the economies that the instant bill hopes to achieve.\textsuperscript{27}

\textsc{Leo A. Huard}

\textsuperscript{26}Meriam and Schmeckebier, \textit{supra} note 9, at 143-168. The authors make a very powerful plea for this type of reorganization, a plea which is all the more impressive because of its common sense.

\textsuperscript{27}Newspaper reports reaching us prior to publication indicate that President Truman is about to submit to Congress a reorganization plan which includes the creation of a new Department of Public Welfare and new Department of Transportation. In view of the prohibitions of the Section 5 (a) it would seem that the creation of these departments could only be accomplished by separate legislation, \textit{dehors} any plan drafted under this Act. Washington Daily News, April 9, 1946, p. 3, col. 4, 5; Id. May 6, 1946, p. 2, col. 2, 3.

\textit{Editor's Note:} The President has recently submitted three reorganization plans to the Congress. \textsc{92 Cong. Rec.}, May 16, 1946, at 5245 \textit{et seq.}
CONCILIATION IN THE MUNICIPAL COURT FOR THE
DISTRICT OF COLUMBIA

In 1938, the District of Columbia joined the ranks of American jurisdictions providing small claims courts for the convenience of litigants whose claims amount to $50 or less. After failure of an effort to accomplish this salutary result by rule of court, Congress provided the required authority in the form of an Act "Establishing a small claims and conciliation branch in the municipal court of the District of Columbia for improving the administration of justice in small cases and providing assistance to needy litigants, and for other purposes." Among the important features of this legislation are the provisions requiring conciliation to be attempted in each case arising in the Small Claims and Conciliation Branch, as well as provisions permitting conciliation to be undertaken by the judges of that branch upon application of one or more of the parties concerned, or upon certification of a case to the Small Claims and Conciliation Branch from another branch of the Municipal Court. As such an organized program of conciliation was an innovation in the District of Columbia and has now been in effect for nearly eight years, it is considered worthy of retrospective scrutiny for the purpose of analyzing its operation, determining its value, detecting its flaws, and inviting attention to modifications which may improve the functioning of the conciliation procedure.

Conciliation in General

Conciliation is variously defined as "the act of restoring good will, or of banishing anger or hostility," or the act of rendering accordant or compatible. In a legal application, the term is used to describe the process of bringing about a voluntary agreement between intending litigants without the necessity of a formal suit at law. The conciliation process possesses its principal advantage in the psychological effect on

1 Cayton, Small Claims and Conciliation Courts (1939) 205 Annals 60.
2 52 Stat. 103 (1938).
4 52 Stat. 103 (1938), D. C. Code (1940) tit. 11, § 804.
5 52 Stat. 106 (1938), D. C. Code (1940) tit. 11, § 810.
6 The Winston Dictionary (College ed. 1942) 198.
7 Webster's New International Dictionary of the English Language (2d ed. 1945) 553.
the parties concerned. The culmination of the conciliation procedure in an agreement satisfactory to both parties usually leaves both of them content with the result and with the administration of justice. In a lawsuit carried through trial to judgment, however, at least one of the parties is completely dissatisfied with the outcome of the case, and in many instances neither party feels fully rewarded for the effort of his suit at law. Judgment is imposed upon the parties, and an antagonistic and uncooperative attitude is often raised toward attempted execution, toward the judge, and toward courts in general. A disappointed litigant frequently leaves the courtroom ready to appeal the case if possible, firmly convinced of the right of his cause, and with a feeling of hostility toward the prevailing party and the officers of the court who opposed his theory of the case. Parties to a successful conciliation proceeding, on the other hand, even though not legally bound by the terms of the conciliation agreement, seldom show an inclination to break the agreement once made. In the situation existing in the Municipal Court for the District of Columbia, a party to a successful conciliation could walk out of the hearing with the terms of the agreement ringing in his ears, cross the corridor to the office of the clerk, and file a claim against the other party on the basis of the very matter under consideration. It is significant that this has not occurred in the recent years of the court's existence. The experience with conciliation in the Municipal Court for the District of Columbia argues well for its more extensive use as a means toward a happier community. The various procedures which may lead to an effective conciliation in the Municipal Court are individually treated below.

Original Proceedings of Conciliation on Application of One Party

Section 4(b) of the Act of March 5, 1938, which established the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia, is quoted in part as follows:

"In order to effect the speedy settlement of controversies said branch shall also have authority with the consent of all parties to settle cases, irrespective of the amount involved, by the methods of arbitration and conciliation."\(^8\)

This provision forms the basis for Rule 1 of the Rules for Conciliation adopted by the judges of the Municipal Court in 1938 pursuant to the Act of March 5, 1938.\(^9\) Rule 1 is quoted in part as follows:

\(^{8}\)See note 4 supra.

\(^{9}\)52 Stat. 106 (1938), D. C. Code (1940) tit. 11, § 815.
The judge sitting in this Branch shall hold himself ready to conciliate the differences of the parties to any dispute or controversy, whether pending in a Court or not, irrespective of the amount involved, and including actions or disputes concerning the recovery of the possession of real estate, arrears of rent, and recovery of personality.10

Rule 2 of the Rules for Conciliation provides that any person who has a claim which he believes might be adjusted without resort to court action may apply to the judge of the Small Claims and Conciliation Branch for issuance of a Notice of Conciliation.11 If the judge agrees that the claim might lend itself to conciliation, he may cause the Clerk of the Small Claims and Conciliation Branch to send to the adverse party named by the applicant, by ordinary or registered mail, a notice reading:

"You are hereby notified that John Doe has requested the Judge of this Branch to act as Conciliator, in order to avoid formal suit and trial in court, in connection with his alleged claim against you, which he states as follows:

[Statement of Claim]

You are invited to call at this branch on __________, 19__, at ____ o'clock __M, to state your version of this transaction. The purpose of this notice is to lend our assistance in conciliating or effecting a voluntary adjustment of the dispute, in order to avoid the formality, expense, and delay of a court trial. We hope you will cooperate by communicating with the Clerk at once."

It is particularly noteworthy that the formality of a summons is avoided in this notice, and that the adverse party is merely invited to attend the hearing. At least three days' notice is given,12 but the adverse party is under no obligation to appear at the time specified. Nevertheless, this form of notice has been effective in securing the attendance of adverse parties. (Table 1).

If the parties are both present at the time set for the conciliation hearing, the judge proceeds to hear the dispute informally. He is not bound by formal rules of evidence at this hearing, but attempts "... to search out the right of the matter and to guide the parties to an amicable and equitable settlement of the controversy."13 The conciliation hearing may be held in the courtroom, or the judge may arrange for the parties to discuss the case in the privacy of his chambers or of a conference room. Because of the informality of the hearing, particularly if it is

11Id. at 13, 14.
12Id. at 14.
13Ibid.
held elsewhere than in the courtroom, the judge has the advantage of being able to discuss the matter with the parties under favorable circumstances, when they are not afflicted with the tenseness so often engendered in laymen by the very thought of a courtroom and a judge. Either or both of the parties may be represented by counsel at the conciliation hearing, or either may speak in his own behalf, as is the practice in the trial of small claims cases. When the judge has elicited from the parties enough facts to enable him to form a true picture of the justice of the matter, he may endeavor to guide them to an equitable settlement through persuasive psychology. He may sometimes even find it necessary to talk to the parties in the manner of the proverbial Dutch uncle in order to tear them away from single-minded obsession with their own selfish interests and to bring them to appreciate other aspects of the controversy. If the judge succeeds in escorting the parties to a meeting on the middle ground of their difference, the conciliation is considered effective. The Clerk of the Small Claims and Conciliation Branch is required to keep a record of the proceedings in each case, and to record the amount of the settlement or other terms of the conciliation agreement. The fee for issuing the notice of conciliation, conducting the hearing, and recording the final conciliation agreement is one dollar, although even this slight cost may be waived in the discretion of the court.

It will be noted that the use of this type of conciliation procedure has been nearly negligible since shortly after its inception. (Table I). Of the 59 hearings of this type held prior to January 1, 1946, 78 per cent resulted in conciliation agreements. The initiative rests with the claiming party in conciliation of this type, but the Clerk of the Small Claims and Conciliation Branch may exercise a considerable influence toward the use of the conciliation process by inviting the attention of prospective litigants to the procedure when they appear in his office to file their claims. The initial volume of this type of conciliation in 1938, 1939 and 1940, though small at best, may have been due to the work of the clerk in directing attention to the procedure and urging its use, or possibly to the extensive publicity the court received in its infancy.

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34Ibid.
35Ibid.
TABLE I
YEARLY VOLUME AND EFFECTIVENESS OF ORIGINAL CONCILIATION PROCEEDINGS INSTITUTED ON APPLICATION OF ONE PARTY FROM 1938 TO 1945

<table>
<thead>
<tr>
<th></th>
<th>1938*</th>
<th>1939</th>
<th>1940</th>
<th>1941</th>
<th>1942</th>
<th>1943</th>
<th>1944</th>
<th>1945</th>
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<tbody>
<tr>
<td>Notices of Conciliation sent on application of one party</td>
<td>35</td>
<td>22</td>
<td>12</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>Notices responded to by adverse party</td>
<td>26</td>
<td>13</td>
<td>10</td>
<td>2</td>
<td>.2</td>
<td>1</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Conciliation hearings held</td>
<td>24</td>
<td>10</td>
<td>9</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Conciliations effected</td>
<td>20</td>
<td>5</td>
<td>6</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Percentage of hearings resulting in conciliation</td>
<td>83</td>
<td>50</td>
<td>67</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>75</td>
<td>100</td>
</tr>
</tbody>
</table>

*April 4 through December 31

Many of the conciliation proceedings in this category have been undertaken by the court on reference from the Public Assistance and Children's Services Division of the Board of Public Welfare of the District of Columbia. In the majority of these cases, the prepayment of costs has been waived and assistance has been rendered, "not as a matter of charity, but as a public and social right." In a typical case, a legal battle between an eighty-year-old father and his son was avoided by a conciliation agreement involving the surrender of life insurance policies in which the son had an equitable interest. A friendly compromise was reached in a hearing lasting less than 15 minutes, avoiding the necessity of an expensive suit in equity and operating to render substantial justice to both parties. In another case of this nature, an elderly person applied to the Board of Public Welfare for support. The board was unable to provide assistance because the applicant had four children engaged in remunerative occupations. On reference to the Small Claims and Conciliation Branch of the Municipal Court, notices of conciliation were sent out to the children and a hearing was held. The judge who conducted the hearing, considering the needs of the parent and the earnings and responsibilities of the various children, arrived at a recommended contribution to be made by each child toward

18Compiled from monthly reports prepared by the Clerk of the Small Claims and Conciliation Branch for submission to the Attorney General of the United States.
20Ibid.
the parent's support. A daughter who worked as a domestic servant was asked to contribute $8 per month and to continue to supply lodging for the parent; a son earning $1200 per year in the War Department was asked to contribute $10 monthly; another son earning $1300 per year in the Government Printing Office was also asked to contribute $10 per month; and the fourth child, earning approximately $3120 per year as a machinist at the Washington Navy Yard, was requested to contribute $15 per month. The children agreed to abide by the judge's recommendations, and the case was marked "Conciliation effected." 21

Original Proceedings of Conciliation on Voluntary Application of All Parties

Rule 3 of the Rules for Conciliation provides that parties to any controversy may appear together voluntarily and submit their dispute to the judge of the Small Claims and Conciliation Branch for conciliation without the issue of notice. 22 In cases of this type, the subsequent procedure is identical to that followed by the court in holding a conciliation hearing on application of one party.

Only three conciliations have been attempted on the application of all parties appearing voluntarily since the Small Claims and Conciliation Branch was established. A case which occurred in 1938 is recorded as unsuccessful; and two recent cases were successfully conciliated. In December, 1945, two motorists who had suffered a collision at a street intersection in Washington, D. C., appeared together in the clerk's office to request a decision concerning liability for the resulting damages in the amount of $35. A hearing was scheduled, the judge sitting in the Small Claims and Conciliation Branch heard the facts, and the case closed with an agreement to share the damages equally between the parties. 23 In January, 1946, a laundryman and one of his customers appeared together to settle a dispute over unreturned laundry claimed to be valued at $86.55. A hearing was held six days later, and a conciliation agreement was reached providing for a $50 settlement. 24

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would appear to be no way in which the court could foster the use of this type of proceeding except through public education concerning the facilities available for the peaceable settlement of controversies without the necessity of formal suits at law.

**Conciliation by the Clerk of the Small Claims and Conciliation Branch**

An aspect of conciliation which is not embraced by any specific provision of the Act of March 5, 1938, is the conciliation effected by the Clerk of the Small Claims and Conciliation Branch as a result of his initial discussion with prospective litigants in preparation for filing claims. The clerk is required to make a preliminary evaluation of a plaintiff's claim and to assist the applicant in its preparation if he is requested to do so. He is therefore in an advantageous position to

<table>
<thead>
<tr>
<th>TABLE II</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MONTHLY VOLUME AND YEARLY TOTAL OF CONCILIATIONS EFFECTED IN 1945 BY THE CLERK OF THE SMALL CLAIMS AND CONCILIATION BRANCH WITHOUT FILING OF FORMAL CLAIMS</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Month</th>
<th>Conciliations Effected</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>41</td>
</tr>
<tr>
<td>February</td>
<td>39</td>
</tr>
<tr>
<td>March</td>
<td>33</td>
</tr>
<tr>
<td>April</td>
<td>29</td>
</tr>
<tr>
<td>May</td>
<td>53</td>
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<tr>
<td>June</td>
<td>57</td>
</tr>
<tr>
<td>July</td>
<td>54</td>
</tr>
<tr>
<td>August</td>
<td>57</td>
</tr>
<tr>
<td>September</td>
<td>68</td>
</tr>
<tr>
<td>October</td>
<td>97</td>
</tr>
<tr>
<td>November</td>
<td>83</td>
</tr>
<tr>
<td>December</td>
<td>74</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>675</strong></td>
</tr>
</tbody>
</table>

*See note 2 supra.*

*The judge may "... place a reasonable limitation upon the number of cases in which the clerk shall perform such service for any individual during a given period of time. The services of the clerk shall not be available to any corporation, partnership or association in the preparation of such statements or other papers. Nor shall the clerk perform such service for any individual suing as the assignee of any such corporation, partnership or association." Rules for the Small Claims and Conciliation Branch of the Munic. Ct. for the District of Columbia (1944) 2. (Rule 4).*

*See note 18 supra.*
observe a possibility of effecting conciliation; and he may, in the interest
of carrying out the spirit of the statute, make a personal endeavor to
bring the parties to an agreement before the claim is filed. The con-
ciliation procedure followed by the clerk usually takes the form of a
telephone call to the prospective defendant. The circumstances of the
proposed claim are explained, and inquiry is made concerning the possi-
bility of the parties' reaching an agreement without the necessity of a
formal suit at law. In many cases it has been found that the prospective
defendant, in passion, has denied, opposed or violated a legal right of
the claimant. Upon a detached reconsideration of the matter, the party
who has transcended the rights of the other is often willing to do what
is equitable in the premises and save the inconvenience and expense
of a lawsuit. Several amicable settlements of this nature are reached
daily as a result of the efforts of the clerk. Statistical records concern-
ing this phase of conciliation, maintained since January, 1945, indicate
the value of such a preliminary conciliatory effort by the clerk.

Conciliation Immediately Prior to Trial of Contested Cases

Section 8(a) of the Act of March 5, 1938, is quoted in part as follows:

"Immediately prior to the trial of any case, the judge shall make an earnest
effort to settle the controversy by conciliation. If the judge fails to induce the
parties to settle their differences without a trial, he shall proceed with the
hearing on the merits. . . ."²⁸

Rule 13(c) of the Rules for the Small Claims and Conciliation Branch
adopted by the judges of the Municipal Court in 1938 pursuant to the
Act of March 5, 1938,²⁹ provides in part:

"Immediately prior to the trial of any case, the judge shall elicit from the
defendant or his attorney a statement as to the nature of the defense, and shall
make an earnest effort to settle the controversy by conciliation."³⁰

In practice, the judge sitting in the Small Claims and Conciliation
Branch questions the litigants, as they appear for the trial of their case,
concerning the possibility of their reaching an agreement satisfactory
to both parties without the necessity of proceeding further with the
litigation. If the parties are adamant in their demand for trial, the
point is pressed no further and trial commences. If, however, the par-

²⁸See note 3 supra.
²⁹See note 9 supra.
³⁰Rules for the Small Claims and Conciliation Branch of the Munic. Ct. for the
District of Columbia (1944) 7.
ties demonstrate their willingness to attempt to reach such an agreement, the judge may immediately hold a conciliation hearing in the courtroom, or elsewhere in private. The hearing is conducted in the same manner as a hearing held on voluntary application of one or more parties. Should the conciliation be effected, an entry to that effect is made in the docket and the parties are dismissed to carry out their agreement. If, on the other hand, no progress is made toward a settlement, the judge may discontinue the hearing of his own accord or at the request of either party, and the case may be brought to trial as originally planned. Should the judge find it necessary to delve more than superficially into the matter in his efforts toward conciliation, and should no agreement be reached by the parties, the case is brought to trial before another judge of the court in order that the rights of the parties may not be prejudiced.

Between 10 and 15 per cent of the cases contested to the point of trial are conciliated each year, and the percentage of successful hearings has ranged from 87.3 to 100. (Table III).

**TABLE III**

**YEARLY VOLUME AND EFFECTIVENESS OF CONCILIATION HEARINGS HELD ON CASES CONTESTED TO THE POINT OF TRIAL FROM 1938 TO 1945**

<table>
<thead>
<tr>
<th></th>
<th>1938*</th>
<th>1939</th>
<th>1940</th>
<th>1941</th>
<th>1942</th>
<th>1943</th>
<th>1944</th>
<th>1945</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases contested to the point of trial</td>
<td>1591</td>
<td>2155</td>
<td>2112</td>
<td>2210</td>
<td>1708</td>
<td>1281</td>
<td>1185</td>
<td>1295</td>
</tr>
<tr>
<td>Conciliation hearings held on cases contested to the point of trial</td>
<td>276</td>
<td>247</td>
<td>296</td>
<td>290</td>
<td>241</td>
<td>126</td>
<td>139</td>
<td>151</td>
</tr>
<tr>
<td>Conciliations effected</td>
<td>241</td>
<td>241</td>
<td>286</td>
<td>290</td>
<td>241</td>
<td>122</td>
<td>135</td>
<td>151</td>
</tr>
<tr>
<td>Percentage of contested cases in which conciliations were effected</td>
<td>15.1</td>
<td>11.2</td>
<td>13.5</td>
<td>13.1</td>
<td>14.1</td>
<td>9.5</td>
<td>11.4</td>
<td>11.7</td>
</tr>
<tr>
<td>Percentage of hearings resulting in conciliation</td>
<td>87.3</td>
<td>97.6</td>
<td>96.6</td>
<td>100</td>
<td>100</td>
<td>96.8</td>
<td>97.1</td>
<td>100</td>
</tr>
</tbody>
</table>

*April 4 through December 31

A detailed monthly analysis of the same factors reveals an extreme variation from month to month in the number of conciliation hearings held and the number of conciliations effected. In eight different months during the period covered, no conciliation hearings of contested cases coming up for trial were recorded. In the month of October, 1940, only

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**Footnotes:**

1. *Id. at 14.*
2. *See note 18 supra.*
one conciliation hearing of this type was held and effected; while in the immediately succeeding month of November, 1940, 123 hearings were held, resulting in 116 conciliations. The average number of conciliation hearings of this type conducted per month over the entire period was 19, with an average of 96.7 per cent effected. The variation in the monthly volume of conciliation shows a decided systematic tendency, depending upon the judge sitting in the Small Claims and Conciliation Branch during the month. Certain judges were quite evidently enthusiastic with regard to the value and use of conciliation proceedings, while others were either less earnest in their efforts toward its application or were not so adept at leading the parties to attempt conciliation in preference to trial. For example, in the year 1940 one judge of the Municipal Court sat in the Small Claims and Conciliation Branch in the months of April, July and November, holding 253 conciliation hearings and effecting 246 conciliation agreements. The four other judges who sat in that branch during the remaining nine months of the year held a total of 43 conciliation hearings, of which 40 were effective. A great deal of the success of the conciliation procedure, at least in this class of cases, would seem to rest with the personality and convictions of the judge concerned. It is to be noted, however, that none of the judges effected less than 94 per cent of the conciliations he heard, and that the chief variation lay in the number of hearings conducted. The fact that 96.7 per cent of all conciliations heard were effected, coupled with the fact that in one month as many as 45 per cent of the contested cases were conciliated, would seem to indicate that many more of the contested cases coming before the court are susceptible to conciliation if the parties are approached in the proper manner by a judge who himself sincerely believes in the efficacy and value of the conciliation procedure.

The Municipal Court of Appeals for the District of Columbia, in a forceful opinion by Judge Cayton in Potomac Small Loan Co. v. Myles,38 stressed the mandatory nature of the requirement that conciliation be attempted in each case arising in the Small Claims and Conciliation Branch:

"The Congressional edict is mandatory; so is the rule. The judge is required in every case to do two things before ordering any case for trial: (a) To elicit from the defendant the nature of his defense; and (b) to make a real, not perfunctory, effort to compose the differences of the parties and if possible to bring them together in a mutually satisfactory settlement. In this the judge is more than a mere presiding umpire. He is the 'guiding spirit and the controlling

38 A. (2d) 609 (1943).
mind\textsuperscript{34} of the proceeding. He is charged with the positive duty of maintaining a conciliatory influence, and of inducing and arranging settlements whenever possible. From even a casual reading of the Act and the rules, it is apparent that \textit{no exception was intended in this regard}. Conciliation procedure was made mandatory in \textit{every} case, and the judge had no right to order the case tried without first making a real, 'earnest' effort to settle the matter on a friendly basis. Only when he had failed in his role as conciliator was he authorized to order a trial.\textsuperscript{35}

\textbf{Proceedings of Conciliation on Certification of Cases from Other Branches of the Municipal Court}

Section 10 of the Act of March 5, 1938, is quoted as follows:

"Whenever the interests of justice shall seem to require it, and all parties consent thereto, any judge of the municipal court may certify any case to said branch for conciliation, or to endeavor to obtain a complete or partial agreed statement of facts or stipulation, which will simplify and expedite the ultimate trial of the case. The trial of any such case if all parties consent may be completed in said branch or in the absence of such consent shall be recertified to another judge of the court for trial."\textsuperscript{36}

The essence of this provision is incorporated in Rule 4(a) of the Rules for Conciliation.\textsuperscript{37} Rule 4(b) of the Rules for Conciliation further provides that the judge sitting in the Small Claims and Conciliation Branch shall, in recertifying a case to another judge of the court for trial,

"... report whether the conciliation or pretrial proceeding has succeeded, and if so to what extent; and to what extent the issues have been narrowed or reduced; what facts have been conceded; what documents have been admitted, and what stipulations have been agreed upon by the parties or their counsel."\textsuperscript{38}

Certification of cases from other branches of the Municipal Court for complete or partial conciliation in the Small Claims and Conciliation Branch has not been extensively practiced. (Table IV).

A case beyond the jurisdiction of the Small Claims and Conciliation Branch can be certified to that branch only if all parties to the suit consent to have their cause handled by a court free from "statutory provisions or rules of practice, procedure, pleading, or evidence, except

\footnotesize{\textsuperscript{34}Goldman v. Ashkins, 266 Mass. 374, 380, 165 N. E. 513, 516 (1929).}

\footnotesize{\textsuperscript{35}Potomac Small Loan Co. v. Myles, 34 A. (2d) 609, 611, 612 (1943).}

\footnotesize{\textsuperscript{37}See note 5 supra.}

\footnotesize{\textsuperscript{36}Rules for the Small Claims and Conciliation Branch of the Munic. Ct. for the District of Columbia (1944) 15.}

\footnotesize{\textsuperscript{37}Ibid.}
such provisions relating to privileged communications.\textsuperscript{37} The cases which have recently trickled into the Small Claims and Conciliation Branch on certification have been so certified primarily to join companion cases within the jurisdiction of the small claims court and avoid a duality of suits arising from the same transaction. These cases have seldom required recertification to other judges of the court for trial. Judges hearing cases other than those within the jurisdiction of the Small Claims and Conciliation and Landlord and Tenant Branches are not required to essay conciliation, and it is doubtful if appreciable numbers of litigants would be willing to rely on nonbinding agreements in cases of the magnitude of Class "A"\textsuperscript{42} or Class "B"\textsuperscript{43} actions. Further-

\begin{table}
\centering
\begin{tabular}{lcccccccc}
\textbf{Conciliation proceedings undertaken on certification from other branches of the Municipal Court} & 31 & 18 & 19 & 43 & 34 & 2 & 12 & 2 \\
\textbf{Conciliation hearings conducted} & 27 & 17 & 19 & 41 & 34 & 2 & 11 & 2 \\
\textbf{Conciliations effected}\textsuperscript{40} & 5 & 17 & 16 & 41 & 34 & 2 & 1 & 0 \\
\textbf{Hearings conducted, resulting in trial and finding} & 26 & 16 & 17 & 39 & 34 & 2 & 10 & 2 \\
\hline
\end{tabular}
\caption{Yearly Volume and Effectiveness of Conciliation Proceedings Undertaken on Certification from Other Branches of the Municipal Court from 1938 to 1945\textsuperscript{36}}
\end{table}

\textsuperscript{36}See note 18 supra.
\textsuperscript{40}There appears to be an inconsistency in the method of recording "Conciliation effected" and "Hearing conducted, resulting in trial and finding" under "Conciliation upon certification from a Judge of the Municipal Court" in the monthly reports to the Attorney General of the United States. The figures presented in the text are taken directly from a tabulation of those reports. In the years 1939, 1941, 1942 and 1943 the numbers of hearings conducted, resulting in trial and finding, were apparently also included as conciliations effected. In 1938 and 1940, the inconsistency is not so easily resolved. The figures for 1944 and 1945 are consistent. By reason of this apparent anomaly, no attempt has been made to present significant percentages of effectiveness of the conciliation hearings held. The tabulation is, however, a valid representation of the volume of cases certified to the Small Claims and Conciliation Branch from other branches of the Municipal Court.
\textsuperscript{42}Rules for the Small Claims and Conciliation Branch of the Municipal Court of the District of Columbia (1944) 7.
\textsuperscript{43}All actions [within the $3000 jurisdiction of the Civil Division of the Municipal Court] in which the amount claimed or the value of the property in controversy is more than
more, since the establishment of compulsory pretrial procedure in all Class "A" and Class "B" jury actions, and permissive pretrial procedure in all other Class "A" and "B" actions, there is little need for certification of cases to the Small Claims and Conciliation Branch for arrival at a complete or partial agreed statement of facts.

**Conciliation in the Landlord and Tenant Branch**

The Rules for the Landlord and Tenant Branch of the Municipal Court for the District of Columbia, like those for the Small Claims and Conciliation Branch, contain a requirement that the judge shall make an earnest effort to effect conciliation between the parties immediately prior to the trial of each case. The rules also provide that a complete record of conciliations effected in the Landlord and Tenant Branch shall be maintained and submitted monthly to the Attorney General of the United States. These requirements established by rule of court for the purpose of fostering conciliation have not been so religiously followed as those established by Congress for the operation of the Small Claims and Conciliation Branch. Conciliation agreements which may have been effected in landlord and tenant cases have been recorded as consent judgments or otherwise, therefore significant official data regarding the use and value of the conciliation procedure in that branch are lacking. It is to be regretted that these data are not available to complete the story of conciliation in the Municipal Court.

**Conclusions**

Conciliation is a desirable feature of a system of courts, and if used to advantage it can be an important factor in the promotion of the happiness and welfare of the community.


"All actions in which . . . the amount claimed or the value of the property in controversy exceeds the jurisdiction of the Small Claims Branch [$50] but is not more than $500. . ." *Id.* at 2.


See note 30 *supra*.


"*Id.* at 5.
Conciliation proceedings may be instituted in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia through (1) an application by one party for a conciliation hearing in any controversy, resulting in an invitation to the adverse party to appear; (2) an application by all parties to any controversy appearing voluntarily with a request for conciliation; (3) the efforts of the Clerk of the Small Claims and Conciliation Branch to persuade the parties to conciliate their differences prior to the filing of a small claim; (4) the efforts of the judge to persuade the parties to conciliate their differences as a contested small claims case comes to trial; and (5) certification of a case from another branch of the Municipal Court, with the consent of the parties concerned, for conciliation or for arrival at a complete or partial agreed stipulation of facts prior to trial.

The public has not taken full advantage of its own opportunities to initiate conciliation. The clerk of the court is in the best position to promote the use of conciliation on application of one party, and it is possible that more effective use could be made of this phase of the system if a concentrated effort were made to induce prospective plaintiffs first to request notices of conciliation in preference to the immediate filing of claims. Popular publicity given to successfully conciliated disputes could further serve to direct the attention of the public to the possibility of obtaining the assistance of an experienced judge in the settlement of a controversy without the unpleasantness of a formal suit at law and without the possibility of having a judgment recorded against either of the parties.

The Clerk of the Small Claims and Conciliation Branch has, at least since January, 1945, taken advantage of his opportunities to effect conciliation and circumvent the filing of claims. The increasing frequency of conciliations effected at this stage of the proceedings indicates a possibility of further development if sufficient effort and attention are given to each prospective claim. An established screening procedure in the clerk's office, with every intended claim subjected to scrutiny by personnel whose sole interest is conciliation, should be worthy of experiment in the interest of reducing the calendar of the court and promoting the benefits to be gained through conciliation. Should such an experiment prove successful in increasing the number of conciliations effected in the clerk's office, consideration might well be given to the perpetuation of the procedure by rule of court.

The parties to many contested cases which come up for trial are amenable to conciliation if properly approached by the judge of the
court. The eminent success of conciliation hearings undertaken imme-
mediately prior to trial in the Small Claims and Conciliation Branch indi-
cates that many more cases could be submitted to conciliation before 
reaching a point of diminishing returns for the effort expended. The 
attitude of the individual judge toward the value and desirability of 
the conciliation procedure is a major determinant of the success of his 
earnest effort to conciliate cases coming before him for trial. Although 
no appreciable saving of the court's time is effected by conciliation at 
this stage of the proceedings, a more extensive application of the system 
by the judges would benefit the community through the happier psycho-
logical effect on parties litigant.

Since the establishment of pretrial procedure in the Municipal Court, 
there is little need for the services of the Small Claims and Conciliation 
Branch in effecting complete or partial conciliation of Class "A" and 
Class "B" actions on certification from other judges of the court. The 
authorization for the certification of cases to the Small Claims and 
Conciliation Branch is valuable only because it facilitates the simul-
taneous trial of a Class "A" or Class "B" action with a corresponding 
small claims action arising from the same transaction, if the parties to 
the Class "A" or Class "B" action consent.

The prescience of the drafters of the Act of March 5, 1938, in pro-
viding for a complete monthly statistical record of all proceedings in 
the Small Claims and Conciliation Branch, has been borne out by the 
value of that record in the preparation of this analysis. The monthly 
reports prepared for submission to the Attorney General of the United 
States will lend themselves equally well to the analysis of other phases 
of the operation of the Small Claims and Conciliation Branch.

The conciliation process constitutes an important part of the Con-
gressional effort toward "... improving the administration of justice 
in small cases and providing assistance to needy litigants..." The 
basic worth of the procedure has been adequately demonstrated despite 
its limited use during the first eight years of the existence of the Small 
Claims and Conciliation Branch of the Municipal Court. It is now time 
for conciliation to quit its role as a neglected stepchild and to assume 
its rightful place as an established and integral part of the court's 
activities.

MERLIN H. STARING

48See note 2 supra.
RECENT DECISIONS

AGENCY—Seaman Injured through Negligence of His Superiors Aboard a Ship Owned by the United States and Operated for the United States by a General Agent Is Not Entitled to Recover Damages from the General Agent under Section 33 of the Merchant Marine Act of 1920 Unless in Fact an Employee of the General Agent.

The plaintiff, a seaman aboard the S. S. Mark Hanna, a “liberty ship” owned by the United States and operated by the defendant under a general agency agreement, was injured in the performance of his duties as a result of the negligent failure of his superior officers to maintain proper light and safety devices in a working area. Suit was brought in the Circuit Court, Multnomah County, Oregon, the defendant corporation having offices in Portland, Oregon, and judgment was given for the plaintiff. Assigning as error rulings of the court denying the defendant’s motions for a directed verdict and for judgment non obstante veredicto, the defendant appealed to the Supreme Court of Oregon. Held, that a seaman injured in the discharge of his duties aboard a ship owned by the United States and operated for and on behalf of the United States by a general agent under a written service agreement is not entitled to recover damages from the general agent under Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1940), unless is can be shown that the seaman was in fact an employee of the general agent. Hust v. Moore-McCormack Lines, — Ore. —, 158 P. (2d) 275 (1945).

The S. S. Mark Hanna had been torpedoed in the Atlantic Ocean and was being towed to port. The boatswain ordered the plaintiff to go to the ship’s locker in the forepeak and bring out a mooring line. The electric light bulb which usually illuminated the locker had burned out or had been removed a short time before the plaintiff was sent to the locker, and he was therefore compelled to carry on his work in darkness. A guard chain used to protect an open hatchway in the locker had been removed a day or two before by order of the master of the vessel. The plaintiff, searching in the darkness for the line, fell through the open and unguarded hatch to a lower deck, sustaining the injuries which form the basis of the suit. He brought suit against the defendant corporation under Section 33 of the Merchant Marine Act of June 5, 1920, otherwise known as the Jones Act. The defendant corporation was a general agent of the United States under a service agreement designated GAA 4-4-42. It was alleged by the plaintiff that the defendant was operating the vessel at the time of the accident, that the plaintiff was in the employ of the defendant at the time, and that his injury was caused by the defendant’s negligence in allowing the hazardous conditions to exist. The defendant moved for a directed verdict on the grounds that the evidence showed that the plaintiff was not an employee of the defendant and had not been injured through neg-
ligence of the defendant. The trial court denied this motion and charged the jury to determine as a question of fact whether the relationship of employer and employee existed between the parties. The jury rendered a verdict for the plaintiff in the amount of $35,000. The defendant moved for judgment non obstante veredicto, the court denied the motion, and the case was appealed to the Supreme Court of Oregon.

In support of its contention that the plaintiff was not its employee and was therefore not entitled to bring suit under the Jones Act, the defendant cited portions of its service agreement with the United States, acting by and through the administrator, War Shipping Administration. By the terms of the agreement, dated October 19, 1941, the defendant was appointed an agent "to manage and conduct the business of vessels assigned to it by the United States". It agreed to maintain the vessels in such trade or service as the United States might direct, subject to its order as to voyages; to equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States might from time to time prescribe; and to procure the master of each vessel operated thereunder, subject to the approval of the United States. The master was to be an agent and employee of the United States, and was to "have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." The defendant was also to "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." The officers and members of the crew were to be subject only to the orders of the master, and all were to be paid in the customary manner with funds provided by the United States. The defendant was to be reimbursed for all expenditures in connection with the agreement, including wages, maintenance, cure and damages or compensation for death or personal injury. Insurance was to be carried by the government, and the agent was to comply fully with all instructions issued regarding claims or damages. The defendant was further required, unless otherwise instructed, to "arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, . . . equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States". The United States agreed to indemnify the general agent against any and all claims and demands for injury to persons or property arising out of or connected with the operation or use of the vessel. Hust v. Moore-McCormack Lines, supra, —, 158 P. (2d) 275, 276-277 (1945). It did not appear from the evidence that the defendant did anything not contemplated by the terms of the agreement, or that it exercised any control over the master or crew. The members of the crew were procured by the defendant and sent to the vessel to be accepted or rejected by the master. Although the defendant might have been obligated under the terms of the agreement to arrange for repairs to the vessel, it was never required to do so. The repairs were undertaken by the War Shipping Administration.
In further support of the defendant's position, collective bargaining agreements between the plaintiff's union and the defendant, with statements of policy by the War Shipping Administration to its general agent, indicate union recognition of the United States as the employer of seamen on United States vessels operating under the particular service agreement under consideration. The court considered that the approval of the plaintiff, implied from the approval of his duly constituted representatives, the union officials, had been given to the stipulation that "the Master shall be an agent and employee of the United States".

By the general body of maritime law, administered by courts of admiralty, a seaman injured in the course of his employment was entitled to maintenance, cure and wages at least so long as the voyage continued. The Osceola, 189 U. S. 158 (1903). He was also entitled to a further indemnity for injuries received in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the appliances appurtenant thereto. The Osceola, supra. These rights were implied in the contract of the seaman with the owners of the vessel, Rainey v. New York & P. S. S. Co., 216 Fed. 449 (C. C. A. 9th, 1914); Harden v. Gordon, 11 Fed. Cas. 480, No. 6,047 (C. C. Me. 1823), and were enforceable in admiralty courts by libel in personam against the owners of the ship, or in rem against the vessel herself, or both. A seaman could not, however, recover indemnity from the owner for injuries sustained as a result of negligence of the master, particularly where the owner had used due care in selecting the master, Phillips v. United States, 286 Fed. 631 (D. Md. 1923); nor could he recover indemnity for injuries sustained as a result of negligence of another member of the crew, for all members of the crew were fellow servants, and the fellow-servant doctrine applied in defense of the owner. The Osceola, supra.

In Section 9 of the Judiciary Act of 1789, the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 73, 77 (1789), 28 U. S. C. §§ 41, 371 (1940). This provision has been held to give a libelant no recourse to the substantive principles of the common law, but only to the enforcement of his rights as recognized by the law of the sea through any appropriate remedy recognized at common law. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372 (1918). By "An Act To promote the welfare of American seamen" enacted in 1915, Congress provided "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1164, 1185 (1915). This provision was held by the Supreme Court to be irrelevant to change the general maritime law and did not accomplish the purpose intended. Chelentis v. Luckenbach S. S. Co., supra. Effect was finally given to the congressional desire to expand
the rights of injured seamen by the enactment of the Jones Act in 1920, reading in part as follows:

“That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.” 41 Stat. 988, 1007 (1920), 46 U. S. C. § 688 (1940).

This legislation, incorporating by reference the current statutes extending or modifying the rights and remedies of railway employees—namely, the applicable sections of The Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U. S. C. §§51-59 (1940), and its amendments—abolished the defense of fellow servant as it had been applied under the general maritime law and gave an injured seaman the right to sue his employer for negligent acts of the master or fellow crew members, or for negligence resulting in any defect or insufficiency of the vessel or its equipment. The Act is limited to seamen employed on vessels privately owned or operated, and an employer-employee relationship must exist. Nolan v. General Seafoods Corporation, 112 F. (2d) 515 (C. C. A. 1st, 1940); The Norland, 101 F. (2d) 967 (C. C. A. 9th, 1939). Where the ship is owned by the United States or operated by or for the United States, and is a merchant vessel or a tugboat, the rights given the seaman by the Jones Act are enforceable against the United States by a libel in personam under the Suits in Admiralty Act, 41 Stat. 525 (1920), 46 U. S. C. §§ 741-752 (1940), without subversion of the sovereignty of the nation. In this state of the law, the plaintiff proceeded against the defendant under the provisions of the Jones Act, supra.

At common law, the well-established test of the true nature of an alleged employer-employee relationship involves a determination of the right of the alleged employer to order, direct and control the alleged employee in the performance of his work. Elements to be considered in this connection are the selection and engagement of the servant, the payment of wages, and the power of dismissal. Journal Publishing Co. v. State Unemployment Compensation Comm., — Ore. —, 155 P. (2d) 570 (1945). The court was guided by these principles in its determination of the plaintiff's right to sue the defendant under the Jones Act. It concluded that the language of the service agreement could brook no interpretation other than exclusive employment and control of the master and crew by the United States, and not by the defendant, particularly
in view of the fact that the vessel was being operated in time of war. The
court took judicial notice of the fact that vessels operated under such service
agreements in time of war are "practically in the military service of the United
States". The action of the trial court in submitting the question of the employer-
employee relationship to the jury as a question of fact was not defended by
the court on appeal. The construction and effect of the service agreement
were conceded to be matters for the court, not the jury. The appellate court
concluded that the defendant was not authorized to employ the master or
crew of the vessel, nor to exercise any authority over them, nor to assume
any control over the vessel at sea. The court recognized that a general agent
such as the defendant might be liable to an injured seaman when the agent
had violated a particular duty assumed toward the seaman, but found no
such basis for liability in this case.

The plaintiff, by selecting certain isolated provisions of the service agree-
ment, attempted to show the power of management and control to be in the
defendant. Specifically, it was contended that the plaintiff, in going to the
unlighted locker to get a mooring line to replace a broken one, was aiding in
making a replacement, thereby performing a duty of the defendant under the
maintenance, repair and replacement clause of the service agreement. The
court held this deduction inadmissible, as the defendant had no representatives
aboard the ship and could not have undertaken voyage repairs. Said the court:
"The intention of the parties to the agreement must be derived from a con-
sideration of its terms as a whole", citing Grimberg v. Columbia Packers'
Assoc., 47 Ore. 257, 83 Pac. 194 (1905), and Warner Quinlan Asphalt Co.
v. The King, (1924) Can. Sup. Ct. 236. The court further stated: "... the
only conclusion consistent with fundamental principles governing the interpre-
tation of contracts is that the duties stipulated for in those sections relied
on by the plaintiff were only such as could be performed by the defendant
while the vessel is in port."

The plaintiff contended that certain evidence beyond the terms of the agree-
ment showed an employer-employee relationship to exist between himself and
the defendant, citing (1) the use of pay envelopes bearing the defendant's
name, (2) the use of a crew pass and muster card bearing the defendant's
name, (3) the issuance of withholding tax receipts bearing the name of the
defendant as the "employer by whom paid", and (4) the handling of correspon-
dence concerning the plaintiff's claim in connection with the agreement of
the United States to indemnify the general agent against claims asserted for
injuries arising from the operation of the vessel. The court found satisfactory
explanations for this evidence in that (1) the pay envelopes were used as a
matter of economy; (2) the crew pass and muster card was signed by the
chief mate of the vessel, not by the defendant; (3) the defendant made pay-
ment to the crew under the terms of the service agreement, and was deemed
the employer for the purposes of the withholding tax under the Internal Rev-
venue Code, 57 Stat. 126 (1943), 26 U. S. C. § 1621 (Supp. IV 1944-1945); and (4) the defendant was required to follow the instructions of the War Shipping Administration in the matter of claims and could not be held to have recognized the validity of the claim merely from its handling and consideration in a routine manner.

The plaintiff also attempted to construe the War Shipping Administration Clarification Act of March 24, 1943, 57 Stat. 45, 50 U. S. C. § 1291 (Supp. IV 1944-1945), as giving seamen on vessels of the United States the same rights against the general agent of the United States as they would have against a private owner. The court gave full consideration to this contention and concluded that the only effect of the section relied on by the plaintiff "was to create and declare in favor of the seamen employed by the United States rights and remedies against the United States", not to create an employer-employee relationship between seamen and a general agent of the United States where such a relationship would not otherwise exist.

The principal case upon which the plaintiff relied, Brady v. Roosevelt S. S. Co., 317 U. S. 575 (1943), was well distinguished by the court on the basis of a variance in the terms of the service agreement. The agreement in Quinn v. Southgate Nelson Corporation, 121 F. (2d) 190 (C. C. A. 2d, 1941), was similar to that in the Brady case and provided: "... any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner." Hust v. Moore-McCormack Lines, supra, —, 158 P. (2d) 275, 286 (1945). Furthermore, the question in the instant case was not raised in Brady v. Roosevelt S. S. Co., supra. That decision rested on other grounds and was therefore not considered to be controlling by this court.

The court disagreed with the implications of the decision in Gay v. Pope & Talbot, 183 Misc. 162, 47 N. Y. S. (2d) 16 (Sup. Ct., 1944), wherein a seaman plaintiff was allowed to recover under the Jones Act from a general agent operating under the same form of contract as that involved in this case. The defendant in that case failed to raise the question of the existence of an employer-employee relationship. The court further refused to be controlled by the decision for a seaman plaintiff in Schaller v. Matson Nav. Co., 43 N. Y. S. (2d) 566 (N. Y. City Ct., 1943), as that decision was based on Brady v. Roosevelt S. S. Co., supra, and on a concession that the defendant was the owner of the vessel, operating it on behalf of the United States, and was subject to suit under the Jones Act. McCormick v. Moore-McCormack Lines, 54 F. Supp. 399 (E. D. Pa. 1943), and Carroll v. United States, 133 F. (2d) 690 (C. C. A. 2d, 1943), were also distinguished as being founded on the Brady case, with no attention having been given to the terms of the service agreements involved. Lewis v. United States Nav. Co., 57 F. Supp. 652 (S. D. N. Y. 1944), was distinguished by the court as having been decided on the basis of the agent's liability under the doctrine of undisclosed principal.
In support of the defendant's position, *Murray v. American Export Lines*, 53 F. Supp. 861 (S. D. N. Y. 1943), held that an agent under a similar agreement to that of the defendant was not liable for the injury of a seaman plaintiff by a fellow servant. The court in that case studied the provisions of the service agreement, pointed out its variance from the service agreements in the *Brady case* and *Quinn v. Southgate Nelson Corp.*, both supra, and stated:

"... the contract between principal and agent may show who is in control of the operation of the vessel, whose orders the members of the crew are required to obey and who is their employer. From all this it is possible to conclude who is liable if a member of the crew negligently injures a fellow crew member.

* * *

"The negligence alleged is that of a fellow member of the crew, over whom the defendant exercised no direction or control. It is clear that the negligence of the crew member, if any, is chargeable to the United States." *Murray v. American Export Lines*, supra, 863, 864.


The courts which have sustained the liability of the general agent in circumstances similar to those in the principal case were deemed by the court "... to have attached unwarranted implications to the decision in the Brady Case. The opinion in that case is carefully guarded, and the decision limited to the question whether a private operator may be sued 'under the circumstances of this [the Brady] case.'” *Hust v. Moore-McCormack Lines*, supra, —, 158 P. (2d) 275, 287 (1945).

Although the court in the instant case concluded that there was no decided weight of authority on the question presented, there would appear to be little doubt that the Supreme Court, when and if it is called upon to decide the question, will follow the line of *Murray v. American Export Lines* and *Hust v. Moore-McCormack Lines*, both supra. As Justice Lusk pointed out in his opinion in the latter case, the decisions to the contrary are not based on an examination of the general agency agreements involved, but appear to proceed "... upon the theory that, because the Supreme Court has held that an agent may be liable for its own torts, notwithstanding the provisions of the Suits in Admiralty Act, every agent, irrespective of the terms of the agency agreement and of the relationship between the agent and the crew of a vessel of the United States, is liable for personal injury to a seaman sustained aboard the vessel and caused by the negligence of someone.” *Hust v. Moore-Mc-
Cormack Lines, supra, —, 158 P. (2d) 275, 286 (1945). It is gratifying to find another court lending its weight to the abatement of the line of decisions which appear to have applied the Brady case to hold general agents of the United States liable under the Jones Act without consideration of the existence of the necessary employer-employee relationship.

MERLIN H. STARING

CONSTITUTIONAL LAW—New York Statute Extending Moratorium on Mortgage Foreclosure for Another Year Is Not an Impairment of the Obligations of Contract.

Appellant desired to foreclose a mortgage for non-payment of principal which became due in 1924. The trial court held, 182 Misc. 863, 51 N. Y. S. (2d) 496 (1944), that the foreclosure proceeding was barred by the amended New York Moratorium Law. N. Y. Laws 1943, c. 93. This decision was affirmed by the New York Court of Appeals, 293 N. Y. 622, 59 N. E. (2d) 625 (1944). The appellant asserted that this New York statute violated the contract clause of the Federal Constitution. U. S. Const. Art. I, § 10. Held: The New York Moratorium Law is a valid exercise of the police power of the state in preserving and protecting the general welfare and is not a violation of the obligations of contracts. East New York Savings Bank v. Hahn, 66 Sup. Ct. 69 (1945).

The particular state statute involved in this decision was an extension of a statute originally enacted in 1933 and renewed each year thereafter until the present. The original statute was modified through the years to conform to the legislature’s views as to the changing times. Thus, the original statute required payment of taxes, insurance and interest. In 1941, the state legislature added the requirement of amortization at the rate of one per cent per annum. In 1944, this amortization rate was changed to two per cent per annum. N. Y. Laws 1944, c. 562. In 1945 it was changed to three per cent per annum. N. Y. Laws 1945, c. 378.

The appellant, holder of a mortgage on property owned by appellee, brought suit to foreclose. The trial court maintained that a foreclosure proceeding was barred by the above-mentioned state statutes. 182 Misc. 863, 51 N. Y. S. (2d) 496 (1944). The appellate court of the state affirmed the decision of the lower court on the same grounds. 293 N. Y. 622, 59 N. E. (2d) 625 (1944). The appellate court added that the statute was a valid exercise of the police power.

On appeal to the United States Supreme Court, the appellant claimed that the state moratorium statute was an impairment of the obligations of contract prohibited by the United States Constitution. The appellant did not expressly deny the validity of such a moratorium statute during times of emergency but claimed that the conditions which induced the original passage of the act no
longer existed. The Court, speaking through Mr. Justice Frankfurter, maintained in regard to this latter contention, that the legislative determination deciding that other factors had arisen calling for the continuation of the statute was a reasonable one and a valid exercise of legislative discretion in matters involving the police power. The Court here is never in doubt in regard to the right of the state legislature to pass emergency legislation under its police power which may have the effect of postponing the execution of contracts. *East New York Savings Bank v. Hahn, supra.*

The keystone case on the subject of the constitutional validity of temporary moratory legislation is the now famous case of *Home Building & Loan Association v. Blaisdell,* 290 U. S. 398 (1934). This case was the most advanced crystallization of the expanding policy of the Supreme Court on the subject of the proper exercise of state police power. It was pointed out by Mr. Chief Justice Hughes that while emergency does not create power, emergency may furnish the occasion for the exercise of power. *Home Building & Loan Assoc. v. Blaisdell, supra* at 426. This was a doctrine previously developed in *Wilson v. New,* 243 U. S. 332, 348 (1917). It was also pointed out by Mr. Chief Justice Hughes in the *Blaisdell case* that Article I, Section 10 of the United States Constitution was not to be applied with literal exactness but is one of the broad clauses of the Constitution which requires judicial interpretation and construction. *Home Building & Loan Assoc. v. Blaisdell, supra* at 426, 428.

The development which is expressed by the *Blaisdell case* was the result of a series of increasingly liberal decisions which the court used in substantiation of its position. Thus the necessity of the existence of the contract clause was first stated by Mr. Justice Marshall in *Ogden v. Saunders,* 12 Wheat. 212 (U. S. 1827). However, it has always been recognized that the state retains the authority to safeguard the vital interests of its people, even though legislation enacted to that end has the effect of modifying or abrogating contracts already in effect. *Stephenson v. Binford,* 287 U. S. 251 (1932); *Sproles v. Binford,* 286 U. S. 374 (1932); *Texas & N. O. R. R. v. Miller,* 221 U. S. 408 (1911); *Stone v. Mississippi,* 101 U. S. 814 (1880).

The power of the state to temporarily and conditionally restrain the immediate enforcement of contracts where vital public interests would otherwise suffer was affirmed by such decisions as *Edgar A. Levy Leasing Co. v. Siegel,* 258 U. S. 242 (1922); *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170 (1921); *Block v. Hirsch,* 256 U. S. 135 (1921). All of the above cases concerned the suspensions of lease provisions during and following World War I. Their constitutionality was sustained as a valid exercise of the police power during an emergency. However, the question of whether the emergency justifying the statute still exists, is one always open to judicial inquiry. *Chastleton Corp. v. Sinclair,* 264 U. S. 543 (1924).

With all the above as a background the Court in the *Blaisdell case* could justify its decision as a logical outgrowth of what had already gone before.
The relief afforded by the Minnesota statute was temporary in operation and limited to the emergency. The obligation of a contract was not impaired by a law which modified the remedy for its enforcement but did not impair substantial rights secured by the same contract. *Home Building & Loan Assoc. v. Blaisdell*, supra at 430. The remedy and temporary relief provided by the Minnesota statute is to be distinguished from an Arkansas statute of the same period, in which the nature of the remedy provided by the statute was much more sweeping and final. The relief was not temporary or conditional and the Supreme Court declared the statute unconstitutional. *W. B. Worthen Co. v. Thomas*, 292 U. S. 426 (1934). The Court went on to say in a later decision that the statute showed a "... studied indifference to the interests of the mortgagee or to his appropriate protection. ..." *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60 (1935).

In the cases decided by the Supreme Court since *Home Building & Loan Assoc. v. Blaisdell*, supra, where state statutes have met the standards set up by that case, they have been sustained as constitutional. Thus a New Jersey statute which called for the adjustment or composition of claims of creditors of an insolvent municipality under certain stated conditions was held to be constitutional. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U. S. 502 (1942). A New York State statute which denied the mortgagee a deficiency judgment where the value of the property foreclosed equaled the amount of the debt was held constitutional and not an impairment of the contract. *Gelfert v. National City Bank*, 313 U. S. 221 (1941); *Honeyman v. Jacobs*, 306 U. S. 539 (1939).

In New York, the power of the state to pass legislation of a temporary and conditional nature in regard to postponing the enforcement of contracts during a period of emergency has long been recognized. *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934); *Matter of People (Title & Mortgage Guarantee Co.)*, 264 N. Y. 69, 190 N. E. 153 (1934). With these precedents in mind it is not surprising to find the New York Court of Appeals upholding the validity of the state mortgage moratorium statute in the instant case. *East New York Savings Bank v. Hahn*, 293 N. Y. 622, 59 N. E. (2d) 625 (1944).

The state court apparently felt that the appellant had not sustained the burden of proof as against: (1) the legislative finding that conditions existed which warranted the continuance of mortgage protection, and (2) the presumption of constitutionality. *Home Building & Loan Assoc. v. Blaisdell*, 290 U. S. 398 (1934); *Chastleton v. Sinclair*, 264 U. S. 543 (1924); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914).

A legislative finding that a public emergency threatens is not conclusive, but upon judicial inquiry that finding is entitled to great weight, *East New York Savings Bank v. Hahn*, 293 N. Y. 622, 627, 59 N. E. (2d) 625, 626 (1944). The accumulation of past-due mortgages resulting from the ten-year-old ban might itself justify a statute reasonably calculated to stem the
mass of foreclosures. The court held that the statute met the test of a reason-
able and legitimate remedy adopted by the state in a situation calling for the
exercise of the state's reserved police power.

The Supreme Court, in sustaining the decisions of the New York Court of
Appeals, declared through Mr. Justice Frankfurter: "... when a widely diffused
public interest has become enmeshed in a network of multitudinous private
arrangements, the authority of the State 'to safeguard the vital interests of
its people', ... is not to be gainsaid by abstracting one such arrangement
from its public context and treating it as though it were an isolated private
contract constitutionally immune from impairment". *East New York Savings
Bank v. Hahn*, *supra* at 70. In that one sentence we have the essence of the
present Court's viewpoint on the extent to which the police power can be
invoked. It is a rather broad statement but lays down a reasonably definite
guiding principle. The Court affirms the principles laid down by the New
York Court of Appeals in regard to the extent of the protective power of the
state, the discretionary power of the state legislature and the meaning and
proper position of the police power. The opinion first laid down in the original
mortgage moratorium case, *Home Building & Loan Assoc. v. Blaisdell*, *supra*,
is not expanded in the present opinion. Rather it is crystallized into the above-
cited principle which is admittedly loose but adequately serves the purpose.

There is no longer much room for doubt as to the position of the Court
regarding the application of the state police power in alleviating temporary
conditions of general economic stress even though there be an appearance
of contract impairment. Limitations upon the doctrine, however, are not absent.
In general, moratory legislation will not be sustained as constitutional by the
courts unless it is justified by a serious emergency of a temporary nature
which necessitates the utilization of this remedy, which though once considered
drastic, is now looked upon as one of the concomitant features of a fluid
economic society subject to frequent and violent changes.

**HAROLD H. FISCHER**

**NEGLIGENCE**—Ultimate Consumer May Recover in Tort from Perfume
Manufacturer for Injuries Resulting from Negligently Compounded
Perfume Purchased from Retailer Despite Lack of Privity.

Plaintiff purchased a bottle of perfume at a retailer's shop. On application
of the product to her skin, she sustained second-degree burns. In the Su-
perior Court, the burden of proving negligence was carried by the plaintiff
by introducing the evidence of three other persons who sustained similar
burns on the application of perfume from the same bottle to their skins.
Full control of the manufacture of the compound was in the hands of the
defendant; and no examination of the contents was practicable by the re-
tailer. In answer to written interrogatories, the defendant company admitted that it did not know all the contents or their respective proportions. The trial jury gave verdict for the plaintiff; but the judge directed the jury to find for the defendant. The case arose on appeal to the Massachusetts Supreme Judicial Court on the main question "... whether the plaintiff is to be denied relief in this action in tort for negligence merely because she has no contractual relation to or privity of contract with the defendant". Carter v. Yardley & Co., 64 N. E. (2d) 693, 695 (Mass. 1946). Held: Ultimate consumer may recover in tort for injuries sustained as a result of a negligently compounded perfume though there be lack of privity of contract with the manufacturer.

In the instant case the Massachusetts court traced the origin of the general rule, that the manufacturer was not liable to a remote vendee in negligence unless there was privity of contract, to the old English case of Winterbottom v. Wright, 10 M. & W. 109 (1842), where a demurrer was sustained to a suit in contract by an injured coachman against the furnishers of a defective coach because of lack of privity. The rule of law in the United States was stated in Huset v. J. I. Case Threshing Machinery Co., 120 Fed. 865, 870, 871 (C. C. A. 8th, 1903), which after stating the general rule made the following exceptions:

(1) "... an act of negligence of a manufacturer or vendee which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from negligence.

(3) "... one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not."

Still wider inroads on the general rule were made by Justice Cardozo in MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916), which allowed recovery where a carelessly made article, while not imminently dangerous, was nevertheless an undue or unreasonable risk of harm to those who might lawfully use it for the purpose for which it was manufactured. The Massachusetts court in the instant case, cited another New York Court of Appeals case, Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932), where a waitress recovered against a manufacturer for an injury caused by an exploding pop bottle. In Hoenig v. Central Stamping Co., 273 N. Y. 485, 6 N. E. (2d) 415 (1936), the same New York court allowed recovery against a manufacturer for damages resulting from the breaking of the handle of a large coffee urn.
In Massachusetts, this tendency evidenced in the New York decisions saw the widening of the exception to include those things which were dangerous only in combination with other anticipated forces. *Farley v. E. E. Tower Co.*, 271 Mass. 230, 171 N. E. 639 (1930). The *MacPherson* case has been the basis of recovery in many varied factual situations. Recovery was allowed against the motor car manufacturer, not in privity, based on the breaking of a windshield supposed to be shatterproof glass; holding it to be a material, inherently dangerous, which should have been subjected to tests. *Bird v. Ford Motor Co.*, 15 F. Supp. 590 (W. D. N. Y. 1936). A tenant recovered against the manufacturer for an injury due to a defect in the construction of its "door bed", which defect could have easily been detected by a proper test and inspection. *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N. E. (2d) 714 (1937). Recovery was allowed for the wrongful death of a four-year-old child caused by a dosage of alleged bicarbonate of soda from a container which was sealed when purchased and designated for internal use, even though there was a possibility that the the poison (sodium fluoride) may have been introduced while the package was on its way to the consumer. *David v. McKesson & Robbins*, 278 N. Y. 622, 16 N. E. (2d) 127 (1938).

As the Massachusetts court points out, all dangerous things are now embraced in the class called "inherently dangerous". *Carter v. Yardley & Co.*, *supra* at 700. There, too, is a tacit repudiation of the Massachusetts cases which held "... a thing could not be called 'inherently' dangerous when it was dangerous only if negligently made, prepared, or used." *Carter v. Yardley & Co.*, *supra* at 699. See *Berman v. Greenburg*, 314 Mass. 540, 543, 50 N. E. (2d) 773 (1943).

The duty of the manufacturer to inspect, and thereby to prevent foreseeable danger to the ultimate consumer, is of a high degree. Care must be taken proportional to the danger that is reasonably foreseeable from a defect in manufacture. This view was taken in the early Massachusetts case of *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682 (1867), where Justice Gray said:

"By the well settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured, who is not himself in fault. The liability does not rest on privity of contract between the parties to the action, but on the duty of every man so to use his own property as not to injure the person or property of others."

Justice Lummus of the Massachusetts Supreme Judicial Court, in the instant case, *Carter v. Yardley & Co.*, *supra* at 700, citing the *MacPherson*
case, supra, said, "Wherever that case is accepted, that rule [i.e., the "so-called general rule"] is abolished, and ceases to be part of the law. . . . The time has come for us to recognize that the asserted rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

However, the Massachusetts court, Carter v. Yardley & Co., supra at 697, adopted the generally recognized limitations to this doctrine by holding that there exists no duty to a trespasser or mere licensee, short of maintaining a nuisance, even though the person's presence may have been foreseen, Scott v. Boston Elevated Railway, 318 Mass. 31, 60 N. E. (2d) 5 (1945); Marengo v. Roy, 63 N. E. (2d) 893 (1945), and that the doctrine does not apply where there is reliance on the middleman's inspection, In re New York Dock Co., 61 F. (2d) 777 (C. C. A. 2d, 1932), or where there is an intervening or superseding cause, Huset v. J. I. Case Threshing Machinery Co., supra. However, even the negligence of another may not constitute an intervening cause if it is foreseeable. Bannon v. Peerless Weighing & Vending Mach. Corp., 318 Mass. 607, 63 N. E. (2d) 335 (1945).

The Carter case, supra, cites the Restatement, Torts (1934) §§ 394-402, and many authoritative commentators on the subject. In § 395 of the Restatement, it is said:

"A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."

The future decisions of the Massachusetts court will probably crystallize about this principle of law as laid down in the Restatement. The Carter case, supra, is important as the first explicit holding by the Supreme Judicial Court of Massachusetts that the rule in the MacPherson case, supra, applies in the Commonwealth; thus, this case brings Massachusetts into line with what is now the general rule in the United States.

WILLIAM J. MCCARTHY
BOOK REVIEWS


Mr. K. V. Krishnaswami Aiyar, a leading member of the Madras Bar, has herein compiled a thoroughly revised and substantially enlarged edition of a series of lectures on professional conduct and advocacy which he first delivered to the apprentices of the Madras Bar in 1940. These lectures are presented in a book form, couched in a clear and scholarly style, and demonstrate an earnestness of purpose and a loftiness of aim. The book is easy and interesting reading and difficult to lay aside until completed.

The author starts his book by dealing with the legal profession and its responsibilities, describes the equipment needed by a lawyer, and the many things that a student of the law may do to better qualify himself for his profession. He then advises in turn on such interesting subjects as the meeting of clients, the preparation of a case, drafting of pleadings, examination of witnesses, conduct in court, the duty of a lawyer to the court, to his profession, to his opponents, to his client, to himself and to the public. He does not fail to call to his reader's attention some of the privileges and advantages of the lawyer. Finally he discusses some of the problems which new lawyers are encountering upon entering their profession, and then suggests some interesting and practical solutions for such problems.

This book is so well saturated with wisdom and advice that it will continue to return dividends upon a second and third reading.

The author is a man of wide professional experience and sound learning who has a happy faculty of suggesting new ideas and thoughts about a very old and learned profession.

The book of course has been written from a background of experience and practice in India where conditions and customs are somewhat different than in this country, but by that very fact, it is made more interesting and stimulating when it is observed how identical are the problems of a lawyer in India with the problems of the lawyer in the United States. The lawyer or the student of law in the United States reading the book cannot help but be impressed with the size of the brotherhood with which he has identified himself as a lawyer or a student of the law. This book can be read with profit and pleasure by all

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students of the law, whether they be neophytes or practitioners of many years' experience.

WILLIAM J. ROWAN*


The client of the American attorney has always turned to him for more than just an interpretation of the law. The attorney has acted as a personal counselor rather than merely a counsel-at-law. It is not surprising, therefore, to find that our returning servicemen and servicewomen are turning to their attorneys as friends and guides to help them through the maze of benefactory legislation which has been enacted in their favor by Congress and the various state governments. It has been extremely difficult in the past for the attorneys to perform this advisory function due to the lack of effective codification of veterans' legislation and benefits. To effectively advise his client, the attorney very often had to wade through books of laws and regulations. More often than not, the material he needed was unpublished, or at the very best, accessible only to a favored few. It was, therefore, with great interest that the writer approached the reviewing of American Law of Veterans.

An attempt has been made in this volume to collect and index all legislation and regulations affecting veterans of World War II. Close examination of the volume from the standpoint of both a one volume reference library and an operational tool reveals that the authors have been unusually successful in this attempt. The work is arranged in a plainly written and logical sequence. It is broken down into nineteen sections, four appendices, and an index. By far the greatest value of this work lies in the ease with which complete answers to the various questions which arise out of veterans' laws can be found. This is due primarily to an extensive and complete indexing (114 pages) with references and cross-references to the many sections of the book.

The book opens with a chapter on "General Provisions and Principles Governing Veterans' Benefits." Careful study of this chapter will of itself serve to eliminate many existing misconceptions regarding the

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entitlement of veterans and their dependents to benefits. The very next chapter will be of particular value to the attorney in interpreting to his client the so-called "red-tape" involved in filing his claims. Entitled "Administration of Benefits by Veterans Administration; Claims, Practice and Procedure", this chapter gives the functions, jurisdiction and procedures of the Veterans Administration in the most complete form yet seen by the reviewer. Section F of this chapter, dealing with attorneys, agents, and representatives, should be of special value to the practitioner. In the two following chapters, discharge, private and federal employment rights, and unemployment benefits are reported. In each case, the nature and background of the benefits conferred are first discussed generally. Then follows a more specific detailing of the aspects of the benefits and the procedures used to obtain them.

The veterans of World War II have shown deep interest in the provisions of the "G. I. Bill". Chapter 7 deals with the most important of these provisions, namely: education, training, and rehabilitation. Since in this field the attorney will function primarily as an advisor, the careful manner in which this chapter is organized should be invaluable. The attorney should also carefully examine Chapter 8, entitled "Loans". The loan provisions of the "G. I. Bill" have already brought forth a multitude of regulations and it is in this field that the veteran will particularly need legal assistance. Chapter 9, on insurance, covers the entire field of National Service Life Insurance, including premium rates, death benefits, etc. It is well to point out at this time that no action by the Administrator of Veterans Affairs involving a gratuity is subject to court review. This, however, does not apply to insurance benefits which are in the nature of contracts. The procedure involved is covered in Chapter 9, Section A, Parts 19 and 20.

The next and possibly most important chapter from the viewpoint of disabled veterans is a chapter entitled "Pensions and Compensations". The United States Government, since its inception, has believed in compensating its veterans for any disability incurred while in the military or naval services. This chapter covers the subject thoroughly and makes readily available the principles behind, and the essential provisions of, existing pension legislation. The many facets of this problem are clearly and concisely outlined. An understanding of this chapter will enable an attorney to insure for his client the maximum possible entitlement

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1For a more extensive discussion of this topic, see Blachly and Oatman, Judicial Review of Benefactory Legislation (1944) 33 Georgetown L. J. 1, 3, 13.
to benefits. A smaller but none the less important class of veterans is affected by the laws relating to retirement pay, covered in Chapter 14. Chapter 15 covers the medical care available to veterans. Chapters 16 and 17, relating to taxes and protection against legal proceedings, are also of great importance to an attorney advising his client on his special rights as a veteran. The rights of a veteran in legal proceedings have received a variety of statutory protections and the attorney would be wise to examine this chapter carefully. The last two chapters are devoted to miscellaneous benefits and the penalties suffered for fraudulent representations, etc.

A feature of *American Law of Veterans* is the inclusion at the end of each chapter of the forms used in applying for the benefits discussed in that chapter. This should serve to eliminate a good deal of the procedural confusion occasionally encountered in dealing with the Federal Government. Appendix A gives the actual federal statutes under which veterans' benefits are granted and administered. Appendix B gives the Veterans' Regulations promulgated pursuant to applicable laws. Appendix C gives a summary of the state veterans' laws arranged by jurisdictions. Appendix D gives the addresses of the offices and agencies dealing with veterans.

The foregoing can scarcely outline the completeness of the book under discussion. While the book was under study, the writer had many opportunities to refer to it and found his work facilitated by its use. As has already been pointed out, the answers to the questions which 15 million or more veterans will be asking about their rights and benefits as veterans are available with a minimum of research in this one volume. All statements made are carefully documented and extensively annotated. If any aspect of veterans' rights has been omitted, the reviewer has not, after considerable use of the volume, been able to discover it. *American Law of Veterans* should be a welcome addition to the bookshelves of attorneys and all others interested in this great body of law affecting such a large segment of our population.

HAROLD H. FISCHER*

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*Supervising Contact Representative, Washington Regional Office, Veterans Administration. This review does not necessarily constitute an endorsement by the Veterans Administration of the views expressed therein.

Mr. Bickford subtitles his book, "An Interpretation of Section 722 of the Internal Revenue Code". The subtitle is probably more accurate than the main title because, as the author makes clear, there has been very little relief granted taxpayers by the Bureau under Section 722.

Mr. Bickford's work is a contribution to a subject which has been beset by confusion and misunderstanding since its enactment. The original edition of the book appeared in 1944 and received wide acceptance among the members of the bar as a clear analysis of the intent and proper functioning of the section. It was, of necessity, limited to the author's opinions as to purpose and procedure since no authoritative rulings had yet been issued. The Revised Edition is more than a mechanical amendment of annotations. It is, in fact, a new work since the author has ably studied and analyzed the Bureau's complex "Bulletin on Section 722" and has blended his analysis and criticisms into his original text.

The reader of Excess Profits Tax Relief must be warned as to the approach he must take toward the book. It is not a compilation of authorities on the subject, nor is the book an authority itself. It is, to the contrary, as the author states, "An Interpretation". It is a study, an analysis, an attempt at simplification. More than that it is a critical survey of the approach of the Bureau. Many of the opinions of the author may be accepted by the Bureau as the subject crystallizes; many more are foredoomed to rejection. These factors, however, do not detract from the usefulness of the book and its value to the attorney who expects to handle any Section 722 matters. The Section is neither simple nor self-defining, and a knowledge of the background, the legislative history, and the several approaches to each avenue of relief is necessary. Mr. Bickford supplies this material and other valuable compilations with a generosity which would make his book valuable even without his detailed discussion of the provisions of the Section.

Mr. Bickford charitably gives the reader, at the beginning, a simple statement of Section 722 and its scope. He next traces the history of excess profits taxes in this country, dating from the War Profits Tax Act of 1917, and in England and Canada. The history of excess profits tax relief and the particular history of Section 722 are then sketched with deceptive ease. Well into the second chapter the reader has the feeling that he has mastered the meaning and operation of the Section.
Indeed, the reader has by then begun to wonder why anyone has found the Section either confusing or complex. But the tranquillity is soon shattered with explosive force when Mr. Bickford gives the reader a three-page quotation from the Bulletin. Fifteen pages are then devoted to the manner of computing relief. It is this phase of the Section which, in all probability, will furnish the most trouble for the attorney. Indeed, at this point (if not long before) the attorney will realize that a well prepared claim under Section 722 cannot be the work of the attorney alone. He must have associated with him outside assistance. Depending on the particular case, the assistance will be accounting, statistical, economic or business analysis and research, or a combination thereof.

Section 722(b) provides that, as to corporations entitled to use the income method of computing excess profits credit, relief shall be granted if earnings during the base period were an "inadequate standard of normal earnings" because of five specifically defined causes. The author summarizes the five grounds,

1. If "unusual and peculiar events" interrupted or diminished normal production, output or operations.
2. If "temporary economic circumstances" depressed the business or industry of the taxpayer.
3. If both the taxpayer and his industry
   (a) had a depressive "profit cycle" materially different from the general business cycle, or
   (b) had "sporadic or intermittent" periods of high profits and such profits are inadequately represented in the base period.
4. The taxpayer commenced business or changed the character of its business during, or immediately before, the base period.
5. If "any other factor" resulted in inadequate earnings.

This summary sets the pattern for the balance of Mr. Bickford's discussion. A separate chapter is devoted to each of the five grounds wherein the specific language of the code, the Bulletin, and the reports are critically analyzed in the light of different fact situations. For those corporations which must use the invested capital method of computing excess profits credit, (corporations newly formed after December 31, 1939, which are not successor or acquiring corporations under Section 740(a), and foreign corporations engaged in trade or business in the United States after December 31, 1939) that approach is discussed. The author points out that, except for the two classes of corporations just mentioned, the taxpayer may select whichever method of computation gives the most beneficial credit.
The final 350 pages of the book contain a carefully compiled set of appendices including a Bibliography of Sources of Statistical Data, Published Statistics of Income, the Statutes, Regulations and Reports of the Congressional Committees, and the recent Bureau Bulletin on Section 722 which is reproduced in full.

JOSEPH A. HOSKINS*

*Member of the Bars of the District of Columbia and the State of Missouri.
BOOKS RECEIVED


