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COOPERATION OR CONFLICT? — THE PRESIDENT’S RELATIONSHIPS WITH AN OPPOSITION CONGRESS

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IN THE last days of its first session the 80th Congress passed and sent to the President S. 526, a Bill to Establish a National Science Foundation. Its purpose was to give direct governmental support to basic scientific research and education in the government, industry and the universities and to increase the number of trained scientists. By its terms the powers of the Foundation were vested in twenty-four part-time members, who would be appointed by the President with the advice and consent of the Senate. On August 6, 1947, President Truman exercised his constitutional right of “pocket veto” against S. 526.

There were complicated administrative provisions in the Bill. The twenty-four members, required to meet only once each year, would select every two years an executive committee of nine members from among the twenty-four. This executive committee would in turn meet only six times a year. The Director of the Foundation would be appointed by the nine-member executive committee which would also prescribe his powers and duties. The Foundation was further empowered to establish the number of divisions, exercising such duties and performing such functions as it determined. And each Division would have a committee. For example, the Committee for the Division of National Defense would have thirty-six members, half to be appointed by the Foundation and half to be representatives of the Armed Forces. These part-time committees would not only furnish advice and make recom-

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1 Cong. Rec. 9789 (July 21, 1947).
mendations concerning the Government's scientific research program but would also "exercise and perform the powers and duties of its division". The Bill also empowered the Foundation to appoint commissions in various fields of research, consisting of six scientists and five members of the general public. Each commission would recommend a research program within its field and review the manner in which that program was carried out.

The Bill also provided for an Interdepartmental Committee on Science, the members of which would be representatives of departments and agencies of the executive branch of the Government; its chairman, however, would be the Director of the Foundation. The duty of this committee would be to correlate data on all federal scientific research agencies and to make recommendations to the President, the Foundation, and the other departments and agencies concerning the performance of their functions. The Foundation would also be empowered to make grants of federal funds to support scientific research, the recipients to be determined at its discretion. The qualifications in the Bill for members of the Foundation would insure that most of them were individuals employed by organizations eligible for such grants.

The President had previously urged the Congress on several occasions to pass legislation to establish such a Foundation. In his "Memorandum of Disapproval" on S. 526 he said:

"However, this bill contains provisions which represent such a marked departure from sound principles for the administration of public affairs that I cannot give it my approval. It would, in effect, vest the determination of vital national policies, the expenditure of large public funds, and the administration of important governmental functions in a group of individuals who would be essentially private citizens. The proposed National Science Foundation would be divorced from control by the people to an extent that implies a distinct lack of faith in democratic processes."

The President specifically objected to the method of selection of the Director because, among other objections, he would be Chairman of the Interdepartmental Committee. In that case, "an officer who is not appointed by the President, and not responsible to him, would be the man primarily charged with performance of functions which are peculiarly within the scope of the President's duties—that is, the coordination of the work of executive agencies". He said further:

"... I believe that this bill raises basic issues of public policy. There would be no means for insuring responsible administration of the law. If the

*Section 8(e), 93 Cong. Rec. 9790 (July 21, 1947).*
principles of this bill were extended throughout the Government, the result
would be utter chaos."

On June 22, 1947, the House, and one day later the Senate, passed
the "Labor-Management Relations Act of 1947" (the Taft-Hartley
Act) over President Truman's veto.4 Title IV of that Act establishes
the "Joint Committee on Labor-Management Relations", composed of
seven members of the Senate Committee on Labor and Public Welfare
and seven members of the House Committee on Education and Labor.
This Committee is directed by the Act to conduct a thorough investiga-
tion of labor-management relations, including "the administration and
operation of existing Federal laws relating to labor relations"5 and
to report the results of its study to the Senate and the House.

Soon after adjournment of the Congress this Joint Committee met,
according to accounts in the press, with the members and the new and
as yet unconfirmed General Counsel of the National Labor Relations
Board, who are charged with the Administration of the new Act. Al-
though the hearing was not public and there is no record of the pro-
ceedings, the press stated that Senator Joseph Ball, Republican of
Minnesota, a member of the Joint Committee and co-author of the
Act, informed the Board Members and the General Counsel that he
expected them to consult the Committee on interpretation of the pro-
visions of the new law. A few days later (again according to the press),
President Truman summoned the Members and General Counsel and
told them "that the Board is responsible to him" and that they were
to do their own interpreting of the law.6

This incident and his veto of S. 526 show a President jealous of his
prerogatives and powers under Article II of the Constitution and alert

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6Stark, N. Y. Times, Aug. 12, 1947, p. 16, col. 1: "Directing the NLRB members
ever to forget that we're part of the Executive branch, the President said that there
could be no objection to the board keeping Congress and the public informed on its
activities and procedures. But the board could not permit itself to be told by anyone
what it should do or how to make any rulings on any phases of the new law." According
to other press accounts, Representative Fred A. Hartley, Republican, of New Jersey,
co-author of the Taft-Hartley Act, and co-chairman of the Joint Committee, in a
letter to the Board demanded that it "compel all unions to file both non-Communist
affidavits and financial statements or face dismissal of complaints in 195 unfair labor
practice cases pending when the Taft-Hartley Act was enacted." The Board had "not
yet decided whether unions involved in the pending unfair labor practice complaints
to what he at least regards as attempted Congressional invasions of these powers. The perennial question of a President’s relationship to the Congress appears to be rising anew.

The constitutional aspects of this question, the doctrine of “Separation of Powers”, have from our earliest days given concern to the students of American government and law. The political problems it creates—more predominant when, as today, the President and the Congressional majority are of opposite parties—usually find no more than temporary solution on Election Day. They rise to plague both branches of the Government again in a few years time. But it is in the field of public administration (or administrative management whichever term is preferred) that more than ephemeral damage may result if some mutually acceptable method of resolving this question is not found.

Men make laws, but they also administer them. And politicians, like other people, tend to think of issues in terms of men. So it is that the struggle for control of the Government, and over the policies to be administered by that Government, is always sharply drawn over who controls the administrator. This has always been an important area of conflict between President and Congress. If there is to be any real degree of cooperation, which in this age is a necessity, and no longer a luxury, public opinion and public understanding must be marshalled to the effort of determining the “ground rules” for both President and the Congress.

The effort will not be a new one. Since Montesquieu made his argument for the “Separation of Powers”,7 and the Founding Fathers accepted his theory of mutual independence of the three branches as the essential base of a free government by creating the elaborate “checks and balances” of the Constitution, the particulars of this doctrine have been a source of agitation and debate. Certainly the Constitutional draughtsmen were more concerned with the “check” of power by power than with the efficiency of government operations. They were properly suspicious of the executive after a distasteful round of Royal Governors furnished by an English King.8 But they had enough of powerful legislatures too after their experiences under the Articles of Confederation and were watchful of the Congress.9

8Binkley, President and Congress, 3–25 (Knopf 1947).
9There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. . . . But however inclined we might be to insist upon an unbounded com-
Whatever the view of the Founding Fathers about governmental functions in what was then a comparatively simple agrarian economy, it is clear that the nature of those functions has broadened in the United States just as in the rest of the world in the almost two centuries since, and particularly in the last fifty years. The regulation of business through tariffs, by the control of currency and credit, by legislation aimed at trusts and monopolies, and the control of public utilities, to enumerate only a few; the regulation of labor in such diverse fields as collective bargaining, wages, hours and working conditions, social security, and industrial accident legislation; the development of direct government economic enterprise such as T. V. A. or the Inland Waterways Corporation; the application of science to agriculture, public health and other social services; and the conservation of natural resources are today generally accepted governmental functions. And the scale of this growth in importance of governmental action makes it imperative, if these functions are to be carried on with any measure of success, that there be a large degree of coordination between the legislative and executive.\textsuperscript{10} It is no longer enough in the modern age that they should "check and balance" each other; the nation expects them to work together as a team.

II

Neither the third great branch of government nor the Document with which it is preoccupied is of much pragmatic help with this problem of conflict or cooperation. Perhaps this is proper since its essence is political. But when one considers the constant refining and restating by the courts of the meaning of the Commerce Clause or the extent of the taxing power, it may not be the happiest of accidents that the judicial pronouncements on the separation of powers of the two branches

have had to depend upon such procedural caprice as the removal from office of an Oregon postmaster; 11 or suit for compensation by the executor of a deceased Federal Trade Commissioner; 12 or an amendment to an urgent deficiency appropriation bill providing that the assistant of an American colonial governor not be paid. 13 Yet aside from these three cases dealing only with the right of the President and the Congress to remove certain individuals from Government office, the rest of our knowledge of the separation of powers consists of history and political theory.

Although we know from these cases that a President can probably remove anyone from an "executive" position for whatever reasons may happen to suit him we also know that the Congress can probably put whatever conditions may happen to please it upon the terms of that office, and at least as to the "quasi-judicial" or "quasi-legislative" agencies, it can limit the reasons a President may use to remove anyone employed therein. And we also know that the Congress cannot remove an individual from an office in the executive branch except through the process of impeachment, but we must admit that it can abolish the office. Beyond these boundaries, however, we do not dare to go very far —nor does the President of the United States. 14

Although these cases have cleared away some of the underbrush around the power of removal, and although it is itself on the periphery of the appointing power, there is not much doubt that its legislative powers allow the Congress wide sway in setting the terms and conditions of executive functions or offices. No one argues that Congress could

14This article does not intend or pretend to discuss the constitutional debate which led to them, the political theory which preceded them or the political precedents and controversies which have followed. It does not even purpose to make any more than perfunctory comment on the three cases mentioned. Many books have been written on all of these matters. The two hundred-odd pages of the Myers case, with its majority, concurring, and dissenting opinions treated the constitutional questions exhaustively; yet (as Mr. Justice Frankfurter noted in his concurring opinion in the Lovett case) only nine years later the Humphrey's case narrowed the Myers case considerably and cast doubt on the rest of it.

Although the Supreme Court and the Court of Claims were both chary of the subject and reached their decisions on other grounds, there is an excellent and quick review of the "power of removal" in the Plaintiffs' brief filed with the Court of Claims in the Lovett case, 59-147.
not abolish any agency or any part of an agency or department. It can reduce the compensation of Federal employees by any amount it might wish. It may delineate, and does, the qualifications for office as the Humphrey's case showed.

The Congress is, then, not a personnel office; it cannot hire and fire. But, at least so far as its constitutional powers are concerned, it can do almost anything else.

It can, if it distrusts the Chief Executive, so legislate that although it may not control appointments the President will be unable as a practicable administrative matter to control his subordinates either. The Constitution may place the responsibility upon him but at the same time the Congress may constitutionally refuse him the authority.

III

If the Congress wishes to exert these undoubted powers it may. So the real question, in view of the complexities of modern civilization which require a strong executive, is whether it should.

The nature and methods of Presidential functioning, as contrasted with the methods by which the Congress functions, may point the way to an answer.

The American President, as his office has evolved over the years particularly since the Civil War, has become the leader of all the people and the sole spokesman of all the people. But he is also the leader of his party—a fact which is almost as important because of the two-party system. The two roles are often contradictory and conflict between them may lead to the partisan suspicions which force Congress to attempt to tie him down in his role as leader of the nation.) Presidential leadership, if it means anything, means no more than how to lead the people only as fast as they will follow. The history of every administration shows that in the final analysis, a Presidency has but one weapon—public opinion. Because he is the President, the symbol of our

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16The real source, the patronage apart, of presidential power lies, ultimately, in the appeal to public opinion. This power has a twofold source. On the one hand, it derives from the fact of the president's position: being the one element in the government which derives from the nation as a whole, it is natural for it, especially in times of crisis, to look to him for leadership. On the other, the public is naturally interested in the process of government; and a president of dominant personality can utilize that interest to his advantage." Laski, The American Presidency, 144ff (Harper 1940); Binkley, op. cit. 283 ff.
state, there is a spotlight on his every action. This merciless glare while personally annoying is politically invaluable. His slightest com-
ment on national policy affects and molds the public opinion upon which he must rely if he is to function at all. Because of this spotlight of attention practically everything he says becomes "a matter of record". When he makes a statement he in effect makes a commitment. If he is not extremely careful he creates for himself a potential source of public embarrassment, if later events or a more careful study of the facts require him to reverse himself. The essential fact about Presidental functioning is that its extremely public nature leaves no room whatever for the secrecy and anonymity of bargaining or compromise.

This is the basic reason why cooperation, which politically is another word for compromise, between the executive and the legislative is so difficult. Not only do the checks and balances of the Constitution tend to force a rigid independence of the executive and legislative but American custom, usage and tradition have so focused attention on the actions and words of the President that whatever he says binds him.

Even if he tries, the probability is he will find cooperation is a one-way thoroughfare. The nature of the Congressional function makes it clear that there is no possibility of any one, including its leaders, binding the Congress. When one talks about "the Congress", he is pretty much talking in a vacuum. The Constitution and American political development make it apparent that there is really no such thing as "the Congress." It is not even an entity. There are instead 531 individuals, 96 Senators and 435 Representatives, who form among themselves temporary and shifting coalitions upon specific issues. These temporary groups normally function sectionally.17 But one issue may find two sections of the country in collaboration and the next issue may find the same two opposed. A problem affecting agriculture, for instance, often coalesces the West and South against the East; but labor reform will ally the Middle West and the South against the North and the Far West. There is nothing intrinsically wrong in this section-
alism—the Constitution made it inevitable and the years since have demonstrated its vitality. The United States is huge, it is complex and it is diversified. This sectionalism gives full play to all the con-
fllicting interests. It has been suggested that it is for this reason alone that this nation, unlike others, has never divided into a group of irreconcilable minorities. But the end result is that Congressmen are

17LASK, op. cit. 114-123; CORR, op. cit. 238-241.
not representatives of all the people; they are primarily representatives only of their own districts and the particular interests within those sections which are vital to them. No Congressional leader, no matter how hard he may try, can bind his party because no commitments and no loyalties are binding upon the members except those they may personally make to their own sections.

And because the nature of the two branches is so dissimilar American history has only rarely shown a period of coordination. In the past there has been either Presidential dominance or "Congressional government." In fact the pendulum has swung between the two with such regularity as to suggest that this rather than domination by the alternating political parties is the real feature of American politics. When there has been coordination it has been short-lived. Invariably it has been brought about by conditions such as war or depression. Soon the mood for united action has passed and Presidential leadership vanishes.

But the result of dominance by the Congress in actuality means the dominance by congressional committees, (or in many cases the appropriations sub-committees). Because the members of these committees represent sectional interests it is difficult for them to have the national or over-all point of view. They are necessarily concerned with the point of view of a special interest—that of an organization or economic group which happens to be powerful in their own section of the country.

This is always true when the Presidency has lost its dominance. But the situation is more acute when the President is of one party and the majority in one or both Houses is of the other. This of course is far from rare in our history. It is in fact the more usual situation: As President Truman pointed out in his "State of Union" message to the First Session of the 80th Congress, the majority of American Presidents have had to face it at one time or another during their incumbency.

IV

If the Congress can, as a practical matter, effectively remove the control of his subordinates from the President should it wish, and if Congressional dominance usually means a sectional or group dominance rather than a national one as represented by Presidential leadership,—

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18 Corry, op. cit. 239.
19 93 Cong. Rec. 135 (Jan. 6, 1947).
what are the pressures in these groups leading the Congress to exercise its power? Policies and programs are of course rarely initiated either by the executive or the Congress. A particular economic or social problem arises. Various solutions are put forward, almost always by the groups primarily affected by the problem. These solutions are argued out informally among the spokesmen for the affected groups, the trained specialists in the field, the government experts, and the industries or organizations concerned. Out of this interchange of ideas emerges finally one or several solutions. The alternatives are taken to Congressional spokesmen, put in the form of bills and one or the other group finally emerges as the winner after debate and roll call. This is the life blood of the law-making process in every country, in national as well as state legislatures.

If for instance a group of scientists are concerned, and properly so, with the future of scientific research in this country and aware that in this modern age Federal funds should play a large part, since among other things government will be a leading beneficiary, they finally suggest a government agency of some kind. After much debate within the profession, with the interested government bureaus and among the universities and industries in which research is vital, a bill such as the National Science Foundation Bill emerges.

It is not at all surprising—though it is still somewhat new—that those who are most active in the problem also happen to become convinced they are the only ones properly equipped to administer such a program, nor surprising that they try to translate this conviction into the language of the bill itself. This can happen as well to the problems of citrus fruit or the medical profession as it does to science foundations.

Throughout this entire process the question of how the program fits into and is related to the general needs of the nation has not been considered at all. Even the officials of the executive departments are specialists. They too have their own vested interest. So, unless the President who represents all the people can give this specific program its proper proportion in the complex and conflicting maze of the many other specific interests, it will not be done at all.

But he is unable to do this unless his authority is commensurate with his responsibility. He must have managerial responsibility, he must have real control of the tools of management over his subordinates in the executive branch if he is to function effectively. This need is stronger as modern government grows more complex.

But when he has lost his leadership to the Congress, particularly
suspicious when the managers of the executive are of a different political faith than the majority of the Congress, and when the individuals who put through a specific program wish to control it themselves, the legislation is designed to tie the President’s hands.

V

This state of affairs may be all right, or at worst bearable, in terms of any given specific program. But it becomes intolerable when one looks at the over-all administrative chaos which a modern American President faces when the Congress insists on tying his hands in the supervision of the executive branch.

It is not too much today to say that the real problem of our Constitutional system is not fear of a deadlock between a disciplined Congress of one party and a tightly-knit executive of another; it is not to reconcile the President’s program with that of the Congress. It is how to get a consistent national program developed for consideration at all by anybody. The special interests which work through a particular Congressional committee, and together with the agency specialists, do not really want to be responsible to either Presidential or legislative leadership.

So they are asking, today more constantly than ever before, that the Congress exercise its undoubted constitutional power to put conditions and qualifications on the offices in the executive branch.

The Congress has been suspicious even of the President’s own staff assistance. It was not until the “Reorganization Act of 1939”\(^{20}\) that the President had a functional staff. The Bureau of the Budget, until then part of Treasury, was transferred and an Executive Office of the President was created. Under the “Budget and Accounting Act of 1921”\(^{21}\), its Director does not require Senate confirmation; the President there has a free choice of his advisor on the financial aspects of his overall program. He was not given that same choice however in his economic advisors. The three-member Council of Economic Advisors, also part of the Executive Office, and whose functions are also solely advisory, do require confirmation.\(^{22}\)

His constitutional power to recommend legislation also has its strings. The President cannot prevent the Congress from asking for and receiving a department’s views on any legislation. All he can do, as a

\(^{22}\)60 Stat. 23 (1946).
practical matter, is to direct the head of that department to tell the committee that his views "are not in accord with the program of the President."

Possibly students of the Federal government and of constitutional law have too long been preoccupied with the legal and historical aspects of the doctrine of "Separation of Powers". It is, perhaps, time for lawyers and legislators, as well as the administrators, to concentrate on some of the effects which are resulting in practice, despite that doctrine.

The regulatory agency, although nominally within the executive branch has for many years been independent in actuality. The President can remove his subordinates in such agencies only for cause. Removal for cause is an extremely difficult administrative process, and a dangerously political one, as is amply proved by the fact that there has been no removal for cause in the past sixty years—excepting the abortive attempt of the Humphrey's case.23

But the latest technique is the part-time specialists board of private citizens supervising public functions. It seems to have superseded, temporarily at least, the "quasi-judicial" agency in Congressional popularity. Its use caused the veto of the National Science Foundation Bill. An existing advisory committee of this nature is the Board created by the "Hospital Construction Act of 1946."24 Several of its members are in the hospital business or in the medical profession. This advisory board can and does give orders to the Surgeon General of the Public Health Service, although he is theoretically subject to the President and the Federal Security Administration.

23It is not within the scope of this article to comment on the wisdom of making regulatory agencies actually, even if not theoretically, independent of the President. Certainly that issue is settled for some time under the Humphrey's case. The lawyer in and out of government would be somewhat startled if he were aware of the skeptical attitude of the administrative management technicians toward the "quasi-judicial" agency. They are fond of pointing out that many functions, which they cannot differentiate from the duties of the Securities and Exchange Commission, for instance, were performed for years in many of the departments without the removal-for-cause safeguard or other "fol-de-rol" (as they describe it), of the regulatory agencies, without undue damage to the rights of the citizen; the Administrative Procedures Act, they claim, was aimed at the "quasi-judicial" agencies as much and probably more than at the functions in the several departments. They mention Davis-Bacon Act and Walsh-Healey Act determinations in the Department of Labor, immigration determinations within the Department of Justice, customs and revenue in Treasury, and countless others in Agriculture and elsewhere. The Administrative Procedures Act has of course narrowed these differences.

An ambitious attempt (and one potentially more dangerous than any other to the democratic process) which failed was the May-Johnson Bill; this would have made the Atomic Energy Commission a board of nine part-time members with nine-year overlapping terms, again with specialist qualifications and subject to removal only for specific gross offenses.\textsuperscript{25} Only an alert Presidential incumbent prevented its passage.

Senator Wayne Morse, Republican, of Oregon, has introduced a bill to place all educational activities of the government under a typical part-time unpaid board of educators. The Director of the Office of Education would be "supervised" by this board which by the terms of the bill itself, is allowed to meet no more than four times a year.\textsuperscript{26} This bill will be considered in the next session.

Harassed by such techniques, the President can have no control over the executive branch. In some cases, he may be given a power to remove with cause, but as a pragmatic political matter he can rarely if at all afford the luxury of public rows which inevitably follow his exercise of that power.

Another new device striking directly at the jugular of Presidential responsibility is the \textit{statutory} interdepartmental committee. Certainly coordination of the several departments is a Presidential duty, even if nothing else is; and particularly today a departmental policy of any importance affects the policies of other departments. The use of interdepartmental committees without any powers at all started long ago as an informal and comparatively quick means of settling departmental conflicts; it was among other things an acceptable technique for presenting all the views in such conflicts to the President for decision.

But once such a committee is given a statutory floor with defined powers and separate staff, it too begins to look toward its creator, the Congress, for sustenance; it tends to look upon itself as an independent agency. For instance, the Air Coordinating Committee, originally a loose group of Assistant Secretaries for Air from the interested departments, is to be made a statutory body with a full-time chairman if the Hinshaw bill is passed.\textsuperscript{27}

One such body already set up by law is the National Advisory Council on International Monetary and Financial Problems.\textsuperscript{28} It was created two years ago to pass on policy questions raised by American participation in the World Bank and the World Fund.

\textsuperscript{25}H. R. 4566, 79th Cong., 1st Sess., Section 2 (a).
\textsuperscript{26}S. 1239, 80th Cong., 1st Sess.
\textsuperscript{27}H. R. 2220, 80th Cong., 1st Sess.
VI
Conclusions

The trend of Congressional thought is to limit Presidential authority over the Executive Branch more and more, despite the Constitutional generality of Article II. This trend is always accentuated in a period when the President’s party has lost control of the Congress. But since there is no such thing as a national Congressional leadership in the sense that it puts forward a rounded program “for the greater good of the greater number”, but concentrates instead on the desires of the various sections and the specific groups within those sections, there is no nationwide leadership of any kind.

When the Congress is in opposition, these limitations on the President often arise from the suspicion and political conflicts inherent in our two-party system. These conflicts are temporary; they solve themselves by the cleansing process of victory for one party or the other in the next Presidential election. But the danger is that the harm done is more permanent than the quarrel. Such limitations raise havoc with the management of the government; the inability to manage and thus the techniques to determine policy are never changed back again when one party gains control of both branches. The corrosion of habit and custom is too powerful, and the administrative evils caused by political conflict continue to live on after that conflict is in history.

There is no panacea; there never is. But in a complex world where “crisis”, rather than calm, is the pattern of our daily lives, and where government is expected to “do something” about crises, it may be suicidal to tie the hands of the one person provided by the Constitution to give national leadership.

The Congress has its own duties and obligations. It knows too well it cannot legislate with the pious hope that an administrator will automatically follow its intent rather than his own. Of course, it has “watch-dog” functions. But these responsibilities are hindered, and not advanced, by resort to devices which take responsibility over executive personnel away from the President and place it at worst outside of government, and at best in the hands of an individual high-ranking member of the Congress. It has the best control of all, as every administrator knows full well—the “power of the purse”. Congress needs a far larger staff, a newer approach to its control by appropriation—but it does not need these devices of “control by qualifications”, no matter how “constitutional” they may be.
There is always hope for an enlightened conservativism. The Congress is concerned, for the very good reason that the people are so concerned, with an ever-expanding government "bureaucracy". It is disturbed about the cost of government and worried even more by its growing suspicion that the Executive Branch appears to be subject to no workable control, not that of the Congress nor of public opinion.

It may not be amiss then to suggest that the only person who would be able to bring order out of this chaos, to "discipline the bureaucrats", is the President of the United States; and to point out also that one of the most impelling reasons he does not is because such actions as these of the Congress make sure that he cannot.
ADMINISTRATIVE PROCEDURE ACT: JUDICIAL REVIEW "HOTCHPOT"?

S. WALTER SHINE*

DESPITE repeated false starts and many side journeys, proponents of a uniform administrative procedure act succeeded during the next to the last session of Congress in reaching their goal of ten years standing—the passage of the Administrative Procedure Act. One of the features of this statute upon which the fire of the opposition had concentrated was the provision for judicial review of administrative acts. Although the problem of judicial review might be regarded at first impression as extraneous to that of uniform administrative procedure, reflection will help toward the conclusion that judicial review is a safeguard—underscored each and every act done in conformity with the APA. The influence of judicial review upon administrative action has been deprecated by E. Barrett Prettyman (now Justice), who suggests that "The best that judicial review can do is to check gross abuses and posit general principles." Others argue that it can more realistically be considered as the unexpressed major premise governing administrative action and cloistering it within statutory limits. "It stands there as a sentinel" and "has a very salutary effect". Yet there are those who differ on even more fundamental grounds. Frederick Beutel, for example, has expressed the view that nothing has been shown to prove "that judicial review adds anything to substantial justice".

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The Senate Report on the Act recognizes this: "While a short title has been deemed preferable, it may be noted that the bill actually provides for both administrative procedure and judicial review". Sen. Rep. No. 752, 79th Cong., 1st Sess. 9 (1945).


House Hearings on Federal Administrative Procedure, 79th Cong., 1st Sess. 37, (1945) Sen. Doc. No. 248, 79th Cong., 2d Sess. 83 (1946). (This Senate Document compiles the legislative history of the entire Act. It will be cited hereafter as "Leg. Hist"). Cf. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 47-48 (1946), Leg. Hist. 281-282: "Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted. Yet, in the vast majority of cases the agency concerned usually speaks the first and last word. For that reason the agencies must make the first, primary, and most far-reaching effort to comply with the terms and the spirit of this bill". See also 92 Cong. Rec. 2159 (1946).

Supra, note 3, at 251.

16
What basically lay at the bottom of the vehement opposition to the consolidation of judicial review provisions within a single act was perhaps best stated by Mr. Justice Frankfurter speaking in dissent in *Stark v. Wickard*: 6

"Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts. The procedural provisions in more than a score of these regulatory measures prove that the manner in which Congress has distributed responsibility for the enforcement of its laws between courts and administrative agencies runs a gamut all the way from authorizing a judicial trial de novo of a claim determined by the administrative agency to denying all judicial review and making administrative action definitive.

"Congress has not only devised different schemes of enforcement for different Acts. It has from time to time modified and restricted the scope of review under the same Act... Were this list of illustrations extended and the various regulatory schemes thrown into a hotchpot, the result would be hopeless discord. And to do so would be to treat these legislative schemes as though they were part of a single body of law instead of each being a self-contained scheme."

Thus was expressed the idea that a general administrative act, which would throw established schemes of review "into a hotchpot", would work changes in existing approaches and existing methods of judicial review so that no longer would each continue as a "self-contained scheme".

Are these fears now justified? What changes were intended? Which have been made? Is the result desirable? These questions provide the backdrop for the following analysis of Section 10 of the APA.

Except for a few discords, the dominant theme of the legislative history of the APA—repeatedly played—was that of legislative disinclination to change the existing procedure and scope of judicial review of administrative action. 7 With so much harmony among its legislative composers, it may seem strange to hear the harsh terms of criticism from those who have heard only the preliminary tunings up. 8 Are the few sour

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notes being confused with the basic theme or is this new and strange melody largely identified by these notes?

Right of Review—General Exceptions

We meet at the outset of Section 10 two express restrictions on the right of review: (1) where "statutes preclude judicial review" and (2) where "agency action is by law committed to agency discretion".9

These phrases are among the most puzzling found in the entire Act. Turning to the House Committee Report explaining the purpose of this section we find this:10

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. . . . To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

This seems to be an express recognition that statutes on occasion do withhold all judicial review and although certain members of Congress have voiced criticism of such restrictions the Act does adopt them.

What statutes do expressly preclude judicial review? Was the Congress aware of them? One of the forerunners of the APA was the bill drafted by the American Bar Association in 1944.11 Section 9(h) of that bill included the following:

"All provisions or additional requirements of law applicable to the judicial review of acts, rules, or orders . . . shall remain valid and binding as shall all statutory provisions precluding judicial review. . . ."12

The comment on this subsection explained that "Judicial review has been forbidden by Congress in few instances including and perhaps limited to, decisions of the Administrator of Veterans' Affairs (48 Stat. 9, 38 U.S.C. 705; 54 Stat. 1193)."13

8Pub. L. No. 404, 79th Cong., 2d Sess. § 10 (June 11, 1946). Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—"


10A. B. A. LEGISLATIVE PROPOSAL ON FEDERAL ADMINISTRATIVE PROCEDURE (1944).

11This provision was included in H. R. 339 and H. R. 1117, 79th Cong., 1st Sess. (1945), two of the numerous bills introduced during that session providing for an administrative code.

12A. B. A., supra note 11, at 40.
Similarly, the Attorney General’s Statement, appended to the Senate Report on the bill, said:\textsuperscript{14}

"A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: \textit{Switchmen's Union of North America v. National Mediation Board} (320 U. S. 297); \textit{American Federation of Labor v. National Labor Relations Board} (308 U. S. 401); \textit{Butte, Anaconda and Pacific Railway Co. v. United States} (290 U. S. 127).”

There is no manner of doubt, therefore, that Congress was aware that certain statutes removed administrative matters completely from the Courts. That it accepted this status of the law is clear from the very plain language with which Section 10 commences. Moreover, the Senate Judiciary Committee Print of June 1945 expressly referred to this single instance of express prohibition:\textsuperscript{15}

"Where Congress has desired to place pension or benefit cases beyond court review, it has—as in the case of the Veteran’s Administration—done so by express statute which is specifically preserved by the introductory clause of this section.”

Certain decided cases deal with the statute—apparently the only one—in which this express prohibition is found. \textit{Silberschein v. United States}\textsuperscript{16} and \textit{Lynch v. United States}\textsuperscript{17} stated, in broad dicta, the complete discretion which Congress had to limit review of the decisions of the Administrator of Veterans Affairs. It remained for \textit{United States v. Mroch}\textsuperscript{18} and \textit{Van Horne v. Hines}\textsuperscript{19} to decide the precise question that jurisdiction is withdrawn from the courts even where action is alleged to be wholly arbitrary and capricious.

This absolute restriction which governs military pensions and claims for veterans’ benefits likewise extends to payments for injuries caused by the Government,\textsuperscript{20} and might well include any and all claims—arising out of tort, contract, or otherwise—in which it is necessary to sue the sovereign, for sovereign immunity from suit is all embracing.\textsuperscript{21}

\textsuperscript{15}Leg. Hist. 36. Compare the remarks of Senators McCarran, McKellar and Barkley, 92 Cong. Rec. 2157 (1946).
\textsuperscript{16}266 U. S. 221 (1924).
\textsuperscript{17}292 U. S. 571 (1934).
\textsuperscript{18}88 F. 2d 888 (C. C. A. 6th, 1937).
\textsuperscript{19}122 F. 2d 207 (App. D. C., 1941).
\textsuperscript{20}Holtzoff, \textit{The Handling of Tort Claims Against the Federal Government}, 9 LAW & CONTEMP. PROB. 311 (1942); Blachly and Oatman, \textit{Judicial Review of Beneficiary Action}, 33 GEO. L. J. 1, 5 (1946).
In general, restrictions on judicial review may constitutionally be imposed where the rights involved are non-constitutional, that is, created by federal statute and benefactory in either a broad or narrow sense. Some of the more obvious examples, in addition to the veterans’ benefits cases and those involving tort claims against the sovereign, concern the disposition or use of public lands and the use of subsidies to individuals or states. A comprehensive survey of the entire pattern of judicial review is found in the article by Drs. Blachly and Oatman.22

It would therefore appear that where an express prohibition is spelled out in the statute the Congressional right to do so in certain types of action is unquestioned, but—from the foregoing few instances—it is clear that this exception of Section 10 is of scant importance in the vast body of administrative law. Of far greater significance are those cases in which the prohibition is unexpressed but determined by the courts to be implicit in the entire scheme of the particular statute. The instances in which this is so have perhaps increased in recent years, especially in the field of labor legislation.23

In the Switchmen’s Union case, the Court held that the National Mediation Board’s certification of representatives for collective bargaining was beyond the jurisdiction of the Federal Courts. Mr. Justice Douglas’ opinion casts important highlights on the whole problem. We are told that since it is “a considerable question” whether rights created by Congress are more adequately protected by the “imposition of judicial review on top of the administrative interpretation” it therefore becomes a matter “all Constitutional questions aside, . . . for Congress to determine how [those] rights . . . shall be enforced.”24 Where judicial review is not expressly authorized “the type of problem involved and the history of the statute” determine whether such review may be supplied. The determination of complicated questions of fact and of law have long been delegated to executive agencies and even when the latter type of question was involved the Supreme Court has refused to provide judicial review where Congress itself failed to make such provision.

22See note 17 supra.
24320 U. S. 297, 300 (1943).
It is with respect to the type of statute involved in the *Switchmen's Union* case that the fears of Blachly and Oatman and others may have some basis. If it is only the *express* statutory prohibition which the APA recognizes then it becomes of great importance to determine whether the Act intended to effect changes where such prohibitions are *implied*. Thus in fields where the rule had already been judicially settled a vast potential area of debate is opened. Even if no change was intended it makes possible continued and needless litigation to test the question anew. Unless—and this is crucial—it was intended by the second exceptive provision of Section 10 to preserve the status quo with the phrase "or by law committed to agency discretion".

Again Blachly and Oatman have posed the basic question as to the meaning of this phrase:25

"Does it mean that the agency is to use discretion only where there is an express statutory statement, as sometimes occurs? Or does it mean that discretion is implied from the nature of the action?"

They conclude—with some justification, although probably contrary to the Congressional intent—that "it means only the former, and invites the courts to depart from their rule of non-interference with administrative discretion in other instances."26 The Committee explanation of this provision is of little aid.27 It states the proposition that "Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning." However, the qualification is added at once,

"But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

This seems to be a confusion of the two fundamental ideas which are the basis of judicial review: the *area* of judicial review and the *scope*

25Blachly and Oatman, *op. cit. supra* note 8, at 427.


of that review.

The area of judicial review, namely, with respect to what administrative acts judicial review is available must first be determined in every case. The propriety or correctness of the administrative action will then be tested by the court according to certain statutory or judicial standards. This latter is what is meant by the scope of review.

Chief Justice Hughes, many years ago recognized that there are "questions of administration—questions which lie close to the public interest, and in regard to which the people are going to insist on having administration by officers directly accountable to them." This in another way is a statement of the principle expressed in Section 10, which leaves unaffected matters of law which are by law left to the discretion of an agency. But is it clear that these matters are not subject to review? The last sentence of the quoted passage in the Committee Report seems to be somewhat of a contradiction in terms. One is hardly to be comforted by his day in court if the decision against him is a foregone conclusion. If, on the other hand, it is intended to restate the principle that agency action may not be arbitrary, or outside the scope of its jurisdiction, or that findings be not made on facts outside the administrative record, or without substantial evidence to support them, or without opportunity being provided to present rebuttal evidence—if, in other words, it is intended to state the principle that the agency may not abuse its discretion then it seems clear that it has expanded the area of review in thus outlining the scope of review.

For we have already seen that these

31Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938).
33One of the examples of the confusion which lay in the mind of one of the craftsmen of the Act may be found in the following interchange. Resort to legislative materials as self-contradictory as these might well drive the judicial mind to despair. 92 Cong. Rec. 2153 (1946):

"MR. DONNELL: . . . It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

MR. McCARRAN. Mr. President, let me say, in answer to the able Senator, that
matters may constitutionally be removed absolutely from the judicial eye—and to thus explain the manner in which it may scan agency action is to return these matters to the review of the courts.

However, a full reading of all the pertinent materials leads to the conclusion that no change was intended but that this expression in the Committee Report is simply a confusion between the "scope" and "area" problems. In this view the two exceptions may be understood as qualifying all the remaining sub-sections of Section 10 and that if review there-tofore has been precluded the Act confers no broader rights upon interested parties.

Section 10(a)—Right of Review

The important phrases in this sub-section are "legal wrong," "agency action," and "adversely affected or aggrieved."

As to the first, it is submitted that one cannot possibly know what the term means by reading the explanation which its chief proponent, the

the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review. But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

MR. DONNELL. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

MR. McCARRAN. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

MR. DONNELL. I thank the Senator.

MR. AUSTIN. Mr. President, will the Senator yield to me once more?

MR. McCARRAN. Yes; I yield.

MR. AUSTIN. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?

MR. McCARRAN. That is correct.

MR. AUSTIN. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

MR. McCARRAN. That is true; the Senator is entirely correct in his statement."

\footnote{~(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Pub. L. No. 404, 79th Cong., 2nd Sess. § 10(a) (June 11, 1946).}
chairman of the Senate Committee, offered on the floor of Congress. Queried at length by Senator Austin as to whether a change was intended from the more usual expression "legal injury" as found in Bouvier's Law Dictionary and Words and Phrases Senator McCarran's response was as follows:

"Taking Bouvier and Words and Phrases combined, and taking the decision of the courts of last resort, to whose language we have access, I should answer the Senator "yes." That is, I take into consideration all the definitions which apply to define that term, and I respectfully refer to the committee report, which I read a moment ago. It means that something more than mere adverse personal effect must be shown; that is, that the adverse effect must be an illegal effect. So, to Bouvier, to Words and Phrases, and to the decisions to which the able Senator refers, I also add the expression contained in the committee report."

Apparently the APA is "all things to all men." However, since the Committee Reports tell us that "legal wrong means such a wrong as is specified in Section 10(e)," this discussion will be deferred until sub-section (e) is reached.

"Agency action," we are told in Section 2(g), "includes the whole or part of every agency rule, order, sanction, relief, or the equivalent or denial thereof, or failure to act". This is an extraordinary provision since it seems to subject to review any and all administrative action whether it be procedural or substantive, legislative or judicial, internal or external. It is this type of extravagant language which justifies some of the criticism already voiced against the Act. The failure to grant a petition under Section 4(d), for example, might be construed to be capricious and therefore reviewable. This, although the Attorney General had already voiced his belief that failure to grant petitions under Section 4(d) is not reviewable. Regardless of the particular application, however, it is obvious that the use of such excessively broad language can do nothing but lead to unnecessary litigation.

"Adversely affected or aggrieved" is another term which either means nothing or too much. The Attorney General's Committee Final Report (page 85) long before had warned:

Proposals to define the class of persons who can attack acts of administrative agencies in general are either futile or dangerous: Futile because they can hardly go beyond the present generality of persons "aggrieved" or "adversely affected"

92 Cong. Rec. 2153 (1946).
See note 14 supra.
or otherwise having "legal standing"; dangerous if they go beyond it, unless the redefinition is based on detailed consideration of the specific judicial determinations made in the particular situation.

In this disregard of the recommendation, perhaps more than any other place within the Act, there is evidenced the inherent vice of this form of code-making. The expressed aim of those who favored this legislation was to establish minimum standards. In the attempt to do so they soon realized that the standards were already established in all but the most unimportant of details. And so they switched aims and began to codify rather than create. In so doing it must have become apparent at a very early stage that, to encompass all administrative action, they would have to rest content with accepting in each rule or standard the lowest common denominator in order not to effect changes. And it must be realized after but the least bit of reflection that such a codification is properly described as "futile". Futile, since the lowest common denominator must necessarily be the most general and least effective of all standards governing a particular situation.

Section 10(b)—Form of Action and Venue

This section scarcely requires comment. Its very terms clearly show that nothing was intended by the APA which would modify the form or forum in which judicial review would be sought. The rules for such matters already "specified by statute" or made "applicable" by court decisions are to continue unaffected. One is almost tempted to suggest the appropriateness of the old fable:

The mountain groaned in pangs of birth:
Great expectation filled the earth;
And lo! a mouse was born!

Section 10(c)—Reviewable Acts

This section provides for review of "final agency action for which

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25 (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.” Pub. L. 404, 79th Cong., 2nd Sess. § 10(b) (June 11, 1946).

25 (c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall
there is no other adequate judicial remedy” and “in addition, preliminary or procedural matters not directly subject to review are reviewable upon the review of final actions.”

In this section it would seem that the Act has gone to the other end of the pendulum.40 It has adopted not a vague generality but a broad sweeping standard having definite imperious meaning. Note especially the requirement that there be adequate judicial remedies. No require-
ment in this context is mentioned that the matter be justiciable, i.e., that there be a “case” or “controversy”. And these remedies must ex-
tend not only to substantive questions but to “preliminary and procedural matters as well”. This, again, is in the teeth of the Final Report of the Attorney General’s Committee (p. 119) to the extent that it would per-
mit, for example, review of regulations of general applicability. And, even more significantly it seems to show a complete lack of understand-
ing of the different areas of operation which are the particular province of court and administrator. This fallacy of insistence on judicial review —even though complete administrative review may be had—fails to recognize that courts and administrative agencies are not “business rivals”.41

The recent decision in Land v. Dollar42 points up this very problem. An attempt to recover certain collateral bonds from the United States Maritime Commission was defended on the ground that it was a suit against the United States and could not be maintained be-
cause the sovereign had not consented to be sued. The plaintiff argued that if it were a suit against the United States such consent had been given by the APA. Cited in support of this argument was section 10(a) (which, as seen, gives judicial review to any person “suffering legal wrong” or “adversely affected” by “agency action”—and, as just dis-
cussed, this encompasses the entire definition in section 2(g) including

be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been pre-
sented or determined any application for a declaratory order, for any form of reconsider-
ation, or (unless the agency otherwise requires by rule and provides that the action mean-
while shall be inoperative) for an appeal to superior agency authority.” Id. at § 10(c).

40This subsection is hardly the innocent thing it would appear to be from the statement in Reich, The Federal Administrative Procedure Act, supra note 19, where all that is said is that “Subsection 10(c) preserves the doctrine of exhaustion of administrative remedies”.
"withholding property") and section 10(c) which makes reviewable all "final agency action" for which there is no other remedy. From these two generalities it is concluded that Congress had drastically curtailed the sovereign immunity of the United States. One may venture to predict that this argument will be rejected as being manifestly beyond the scope of the Act and therefore not contemplated by Congress. [However, the Court found it unnecessary to decide the question.] But it is in just this type of situation that the incompetence of the draftsmen of the Act is starkly displayed. For a reading of the legislative history leads to little if anything to support the defense suggested and it may well be that the extravagant language used here and elsewhere in the Act will eventually lead to a result as absurd as that demanded by the plaintiffs in the Dollar case.

Section 10(d)—Interim Relief

Here at last we find a provision which, in plain words, was intended to and does make a substantial change in the present state of the law. It gives the courts the power

to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Quite frankly the House Committee Report admits that "statutes authorizing agency action are to be construed to extend rights pending judicial review and the exclusiveness of the administrative remedy is diminished so far as this section operates. . . . [The section] provides intermediate judicial relief for every . . . situation in order to make judicial review effective."145

This section arouses the particular ire of Blachly and Oatman who point out that "not even the President would be beyond the reach of such provision".46 The effective dates of quarantine orders, cease and

143(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.” Pub. L. 404, 79th Cong., 2nd Sess. § 10(d) (June 11, 1946).


"Save one, the granting of a license.

"Supra, note 8, at 422
desist orders of the S. E. C. or the Federal Trade Commission, orders to seize and/or destroy harmful drugs or poisons, and allocation orders, may all be postponed where the judge’s view of the immediate public need differs on a paper showing from the views of experienced administrators. Perhaps under this section even the long standing rule against the issuance of injunctions preventing the immediate collection of taxes may be destroyed.47

The Supreme Court in Yakus v. United States48 made quite plain the principle that it requires no judicial power to issue stay orders to meet constitutional requirements. Such requirements, if they exist in this respect at all, are satisfied by giving to the administrative body the power to stay its own orders. Wisely the Court thus points out that the public interest may demand the immediate execution of an order and a court of equity, to protect that interest, could bar postponements. And—"what the courts could do Congress can do as the guardian of the public interest. . . ."49 The significance of this statement is great. For it expresses the contrary approach to these problems from that adopted by the APA. Congress has in many instances, some of which are enumerated in the Yakus case,50 expressed the desire that preliminary injunctions and stay orders of courts be not used to control administrative action. Yet the APA departs materially from that view and returns to the oft-times discarded view that only with the judiciary do adequate safeguards lie. But—as has been pointed out before—"Even courts have been known to make ‘erroneous determinations’."51

It is, therefore, a matter for some pessimism that Section 10(d) makes this departure from the status quo. Happily, however, it may be that judicial forebearance to exercise the power except in extreme cases may prevent the change from working adversely to the public interest.

Section 10(e)—Scope of Review52

The scope of review as found in this section is stated in terms so well

47 See e.g., Phillips v. Commissioner, 283 U. S. 589, 595-7 (1931) and cases cited.
49 Id. at 441-442.
50 Id. at 442, n. 8.
52 10(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to
known as to obviate the need for extended discussion. In effect the several different standards amount to paraphrases of each other. Findings and conclusions which are "unsupported by substantial evidence"—(B)(5)—are, ipso facto, "arbitrary"—(B)(1). So, too, those which are found to be "in excess of statutory jurisdiction"—(B)(3)—or "without observance of procedure required by law"—(B)(4)—are clearly "not in accordance with law"—(B)(1). The whole problem of the scope of judicial review of administrative action has been extensively analyzed\(^5\) and a reading of the legislative history seems to demonstrate that the Act fails to make any substantive change.\(^5\)

However, there is at last one leading authority to the contrary.\(^5\) Professor Dickinson contends\(^6\) that the new statute broadens the "scope and measure [sic] of the review" of questions of fact as well as law. This conclusion is based on the first and last sentences of Section 10(e). However, close analysis of Professor Dickinson's article shows (1) that he ignores almost completely\(^7\) the exceptive clause with which Section 10 commences; (2) that the so-called change in the review of fact questions is based on the highly debatable conclusion that the Supreme Court

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\(^5\)See note 7 supra.


\(^7\)Id. at 516.
has abandoned the substantial evidence rule in favor of a "modified scintilla" rule; and (3) that the conclusion that review of questions of law has been broadened is based on an erroneous interpretation of two sentences of Dobson v. Commissioner. As to (1) it seems to this writer that many of the instances in which Professor Dickinson might deem the scope of review to have been unduly limited by the courts would probably be found to be cases where "agency action is by law committed to agency discretion"; as to (2) it can only be asked whether in view of the statements cited in footnote seven supra, it is fair to conclude anything but that the substantial evidence rule of Consolidated Edison v. NLRB has been reaffirmed. Moreover, it seems an unwarranted conclusion that the courts—and particularly the Supreme Court—have been applying a "modified scintilla" rule, in view of their constant reference to Consolidated Edison as their guidepost. Certainly the two Supreme Court cases which Professor Dickinson cites must be very strangely read to justify his conclusion that the Supreme Court has failed "to look at the evidence on both sides". Although he disclaims the intention to define the substantial evidence rule as one which permits the reviewing court to weigh the evidence, it is difficult to see how else his criticism of the cited cases may be interpreted. Finally, as to (3) his conclusion fails to recognize that the language which is extracted from the Dobson case has been re-examined and clarified by the Supreme Court so that

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58See note 49 supra at 517-518.
59Id.
60320 U. S. 489 (1944).
61For example, to demonstrate the Supreme Court's failure to examine the whole record he cites Justice Black's comment in NLRB v. Waterman S.S. Co., 309 U. S. 206, 226 that the act of quoting from part of the record by the Court was "... not to say that much of what has been related was uncontradicted and denied by evidence offered by the Company and by the testimony of its officers". Professor Dickinson apparently discounts the next sentence which is: "We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings, far from resting on mere suspicion, are supported by evidence which is substantial". What would Professor Dickinson have the Court do, reject all testimony favorable to the employee whenever contradicted by the employer? The other case cited to prove the point is NLRB v. Bradford Dyeing Assn., 310 U. S. 318. Mr. Justice Black's opinion on page 343 explicitly includes the statement that "... we have carefully scrutinized this entire record". How is it possible fairly to conclude from the Court's language in these cases that it failed to examine the whole record? Is some form of judicial affidavit necessary?
it cannot be understood as being a judicial refusal to consider independently so-called "technical" questions of law; nor, furthermore, can it be said that the Dobson opinion was intended to express a rule of general administrative law; and lastly the Dickinson analysis begs the very question which begets the difficulty—namely, when is a question one of law rather than of fact? The language on which he relies ("the reviewing Court shall decide all relevant questions of law") simply returns one to the starting point from which Dobson attempted to proceed.

A last word may be offered with respect to this section. The standards of review are, no matter how phrased, necessarily subjective. As a result, considerable room is left to the courts to exercise their choice and self-restraint in the application of the standards to specific instances. It comes not as a surprise, therefore, to find judges differing in a particular case as to whether or not the administrative action is supported by evidence or was arbitrary and capricious. The real solution to the problem lies in the direction pointed out by the Attorney General's Committee. That is, if the administrative machinery for the determination of facts inspires confidence, the need for judicial review is less. If the APA is sound in its procedural requirements then it may well be that less and less reliance will needs be placed on the curative process of judicial review.

CONCLUSION

Whatever its advantages and however great its faults it must be concluded that only to the extent that its provisions are interpreted and applied with reason and common sense and in accord with the spirit of the draftsmen can the APA serve any worthwhile purpose. If it is to be considered as carrying out a blanket indictment of administrative agencies, of imposing restrictions and handicaps, then it must of necessity fail to serve as intended. If, on the other hand, it is construed in the proper perspective, with fair understanding of the basic needs which administrative bodies are established to satisfy, then there need be little fear that any changes which are embodied in the Act will injure the public interest.

Perhaps the most recent expression in this field might serve as the touch-stone of interpretation and the conclusion of this paper. Mr. Justice Frankfurter, speaking for the Court in United States v. Ruzicka, in meeting the contention that an administrative order of the Secre-

63 See note 47 supra at 92.
64 329 U. S. 287, 294 (1946).
tary of Agriculture need not be complied with nor challenged in an administrative proceeding as provided by the statute because it was not "in accordance with law" stated:

It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law". The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry.

The Agricultural Marketing Agreement Act is one of many enactments by which Congress in regulating economic enterprise has divided the duty of enforcement between courts and administrative agencies. But there is the greatest variety in the manner in which Congress has distributed this responsibility. Those who are entitled to speak tell us that the development of the natural sciences has often suffered from premature generalization. Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant. Both courts and administrative bodies are law-enforcing agencies, utilized by Congress as such. In construing the enforcement provisions of legislation like the marketing acts it is important to remember that courts and administrative agencies are collaborative "instrumentalities of justice", and not business rivals.
THE ROLE OF CONGRESS IN SHAPING FISCAL POLICY—THE LEGISLATIVE BUDGET

IT IS a fundamental principle of constitutional government that appropriations are made and expenditures are controlled by the representatives of the people.\(^1\) In effecting this cardinal principle and following the long established English practice, the framers of the Constitution provided for fiscal control by the Congress. Listed among the enumerated powers of Congress are the powers to lay and collect taxes, duties, imposts and excises; to borrow money on the credit of the United States; and to coin money and regulate the value thereof.\(^2\) Still more conclusive of the intent to provide for Congressional supervision of the purse strings is the provision that no money shall be drawn from the Treasury but in consequence of appropriations made by law.\(^3\) Origination of revenue bills is restricted to the more numerous branch of the Congress.\(^4\) In writing of the financial authority vested in the House of Representatives, Madison declared: “This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress for every grievance and for carrying into effect every just and salutary measure.”\(^5\)

THE SEPARATION OF POWERS AND THE RECENT GROWTH OF EXECUTIVE POWER

The Government of the United States embodies Montesquieu’s doctrine of the separation of powers. This separation is not expressly provided for but results from the constitutional grant of various prerogatives to the legislative, executive, and judicial departments. The separation was never intended to be\(^6\) and never has been regarded as complete. As between the President and Congress, the extent the one is able to influence and control the other depends largely upon the individual charac-

\(^5\)The Federalist, No. 57 (Madison). Some editions attribute No. 57 to Hamilton, but a majority present Madison as the author.
\(^6\)See The Federalist, Nos. 42 and 47.
teristics of the Executive and the character of the times. The period from 1932 to 1946 was an era in which the President gained in popular appeal at the expense of the legislative department. Probably at no other time in our history had the Chief Executive been in such definite command of our government. The period witnessed a great expansion in the size of the executive department, and stimulated by years of economic depression and total war, the scope of the executive functions reached novel proportions. To the more cautious, this trend toward executive preéminence in all governmental fields posed a definite threat to our constitutional government. Their concern was lent credence by the fate of parliamentary institutions throughout the world. It is the purpose of this article to determine to what extent, if any, the executive department has preéempted the fiscal powers of the Congress; to what extent the legislative arm of our government actually exercises the financial powers conferred by the Constitution; and to consider the attempts by Congress to reassert its control in fiscal matters. As a part of this attempt, the appropriate sections of the Legislative Reorganization Act of 1946 and particularly its provision for a legislative budget will be discussed.

Character Of The Appropriations Power As Affected By Increased Scope Of Government

Attention should be given to the change in the very nature and character of the appropriations power which has resulted from the increased size and complexity of the governmental structure, with a corresponding increase in the cost of administration. Members of the very early Congresses could with very little difficulty have examined and audited every expenditure, even to the salary of the humblest federal employee. It goes without saying that no Congressman today, no matter how capable, could command the time or ability to survey every one of the thousands of appropriations items. The inevitable result has been a greater reliance on the estimates and requests of the various executive departments. The Congress has been ill equipped to check accurately and to require justification for even the major appropriations items. As early as 1910, political writers and economists began to experience anxiety because the cost of government was increasing faster than the population of the United States. Certainly there was cause to examine carefully the fiscal


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8Ford, op. cit. supra, note 1, at 11.
soundness of the country in 1945. It was urged that financial solvency was an essential to our national security, and that the public debt should be reduced, the tax load lightened at the earliest appropriate moment and the budget balanced.

Constitutional responsibility for meeting these problems rested primarily on Congress, yet it was generally recognized that the Congressional facilities for dealing with them had lagged far behind those of the executive. In recognition of this, a joint resolution was passed, under which a committee representing both chambers began a consideration of the reorganization of Congress. The aim of the legislature was to modernize its machinery, coordinate its various parts, and establish the research facilities that could provide it with the knowledge that is power.

**Legislative Reorganization Act Of 1946**

Thus was passed the Legislative Reorganization Act of 1946, one of the most interesting and important measures to be promulgated in years. The provisions embrace the entire procedure of Congress, but a substantial part of the act is pertinent to fiscal matters. The most noteworthy provision relevant to this study is the introduction of a legislative budget. The statute provides for the creation of the Joint Committee on the Legislative Budget consisting of the membership of the Senate Appropriations and Finance Committees and the House Appropriations and Ways and Means Committees. Following are the requirements imposed on the Joint Committee:

1. Due consideration of the budget recommendations of the President.
2. Recommendation of a legislative budget for the ensuing fiscal year which shall include—
   (a) An estimate of over-all federal receipts.
   (b) An estimate of expenditures.

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9 The peak national debt reached 279.2 billion dollars. See 93 Cong. Rec. 1261 (Feb. 20, 1947). This may be compared with a figure of 19.5 billion dollars in 1933. Id. at 1263. Yearly expenditures have grown from 690 million dollars in 1912 to 3.8 billion in 1922, 4.9 billion in 1932, and 100.4 billion dollars in 1945. See Sokolsky, *These Days*, Washington Times Herald, Feb. 28, 1947, p. 23, col. 1; 93 Cong. Rec. A834 (Feb. 28, 1947).
13 Id. at 138(a).
(3) A recommendation for the maximum amount to be appropriated for expenditures in such year, including a reserve for deficiencies.

(4) A recommendation for a reduction in the public debt if estimated receipts exceed estimated expenditures.

(5) A recommendation to be included in a concurrent resolution which shall accompany the Committee's report, expressing the sense of Congress that the public debt be increased by the amount of the excess if the estimated expenditures exceed the estimated receipts.\(^{14}\)

The legislative budget represents the first attempt by Congress to adopt each year an integrated over-all fiscal policy based on a consideration of both the income and the expenditures of government. Heretofore Congress has attempted to supervise the world's largest enterprise without proper coordination between its revenue raising and appropriating committees. Only through the determination each session of a definite policy on fiscal matters, limiting the amount to be appropriated, can aggregate income and expenditures be properly related.\(^{15}\)

THE LEGISLATIVE BUDGET AND THE EXECUTIVE BUDGET

What did Congress seek to accomplish by instituting a legislative budget? It is first necessary to analyze and understand the difference between this budget and the executive budget prepared by the Bureau of the Budget.\(^{16}\) The President is required to submit his budget message to the Congress at the beginning of each session. The preparation of the executive budget is pyramidal in nature in that each department or agency presents its requests for money to the Bureau of the Budget, and this only after each section or office within that agency has presented its requirements and these latter figures have been totaled and coordinated. These myriad figures serve as the basis for the preparation of the executive budget by the President and his budget officers. The legislative budget is essentially different in purpose and in preparation and it was not intended to duplicate the functions of or to replace the budget presented by the executive. The Joint Committee on the Legislative Budget is concerned only with arriving at two over-all totals, one respecting receipts and the other expenditures.

\(^{14}\)Proceedings of the Joint Committee of the Legislative Budget, 80th Cong., 1st Sess. 3 (1947).


\(^{16}\)The Bureau of the Budget was established by the Budgeting and Accounting Act of 1921, 42 Stat. 20 (1921), 31 U. S. C. § 1 (1940).
Influence Of The Executive On Appropriations

Let us turn to an examination of several of the procedures and devices by which the executive branch influences Congress in the exercise of fiscal powers. The President's budget message submitted to the Congress at the beginning of each session and the recommendations contained therein are the primary basis upon which the Congressional Appropriations Committees begin their consideration of money bills. Perhaps an even more potent influence has been exerted by executive officers in their testimony before appropriations subcommittees in regard to appropriations for their respective departments. Congress is not adequately equipped to resist the pressure of the various departments and agencies in behalf of larger expenditures; it has provided these agencies with ample funds to collect and present evidence to support their appeals, but has failed to arm its own appropriations committees with adequate facilities for scrutinizing these justifications. Consequently, Congress in making appropriations has had to rely almost exclusively on the efforts of its own members to develop the facts to determine the desirability of voting funds. The result has been that the over-burdened and over-worked Congressmen have had to depend too heavily on the exhortations of the executive departments. All too frequently their efforts have been concerned with spot checking the requests of the executive, and until the advent of the legislative budget there has been little attention given to the over-all evaluation of federal financing.

There are other practices by which Congress itself has relinquished its dominant status. A prerequisite to the effective discharge by Congress of its Constitutional function of making appropriations is the annual review of all needs for public funds. There are two notable instances in which annual review has been omitted. First is the practice of making permanent appropriations. A permanent appropriation is one which makes money available for an indefinite period without further action by Congress. Such appropriations in 1944 totaled almost 4 billion dollars.

Conditions may so change within a short period of years that the amount of the permanent appropriation substantially exceeds the amount needed, or the need for an appropriation may entirely disappear.

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19 Id. at 895.
20 Id. at 774.
The usual result is that public funds are expended munificently or the money is transferred to other funds at the discretion of some administrator rather than by the authority of the elected representatives of the people. Congress also has failed annually to review appropriations in regard to the operations of government owned corporations. There are approximately forty wholly owned government corporations having at their disposal several billion dollars. A large proportion of the expenditures and financial operations of these corporations has escaped annual Congressional analysis.21 However, these corporations were brought under the scrutiny of a sub-committee of the House Appropriations Committee by the Government Corporations Control Act of 1945.22 Another practice involving certain of these corporations should also be noted. Several of their number, notably the Reconstruction Finance Corporation, have extensive lending authority and have been permitted to make advances and loans to other governmental agencies and corporations. This device has served to make recipients of such advances less dependent upon the appropriations power of Congress.

Still another questionable practice by Congress is the reappropriation of unexpended balances. The reappropriation is a legislative method for making public funds available after the expiration of the period for which they were authorized, or for transferring to a given appropriation an unused portion of another appropriation.23 This practice not only results in the presentation of misleading budgetary figures, but there is no real assurance that an appropriations sub-committee adequately reviews the balance before reappropriation. All unexpended balances should revert to the Treasury and be made the subject of appropriate annual study by Congress. Again, wide discretion has been permitted executive departments in the transfer of funds between appropriations accounts and organization units.24 Appropriation bills should be definite and specific but not so detailed as to hinder administration. Detailed itemization will not yield expenditure control. Congress should write reasonably broad appropriation bills and should then place proper limits upon the discretion of administrative officers to make inter-divisional transfers of funds.

Similar in effect to the reappropriation of unexpended balances is the

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21Ibid.
23Hearings Before the Joint Committee on the Organization of Congress, supra note 18, at 893.
method of dealing with governmental receipts. As an alternative to paying the receipts from the sales of government property and services into the Treasury to become part of the public revenue, administrative agencies have been permitted to retain such revenue in diminution of expenditures. Large sums are thereby withdrawn from the direct supervision of Congress, and the departments are left with undue financial discretion.

**HOW CONGRESS DISCHARGES ITS FISCAL POWERS**

Some mention should be made of the procedures by which Congress operates in the fiscal field. Mention has been made previously of the preëminent position occupied by the lower house. The Constitution provides that all bills for raising revenue shall originate in the House of Representatives, but permits the Senate to propose or concur with amendments as on other bills. The phrase “raising revenue” is equivalent to “Raising money and appropriating the same”. Thus the House has the primary duty both in regards to tax bills and appropriations measures. These two types of bills are handled separately; in the lower chamber the Ways and Means Committee exercises jurisdiction with respect to revenue raising resolutions and the House Appropriations Committee over supply bills. There is the same bifurcation in authority between the Senate Finance and Appropriations Committees. The House Appropriations Committee is generally recognized to be the most important in either chamber. Its members are assigned to one or more of twelve sub-committees. In practice, careful consideration of appropriations measures is limited to the members of the sub-committee in charge, upon whose judgment the full Committee confidently relies. There is no evidence that the full Committee ever considers the annual appropriation bills in their over-all aspect. Frequent criticism led to a requirement in the Legislative Reorganization Act that reports of hearings before these sub-committees be made available in printed form at least three calendar days before consideration of their bill. Previous to this mandate these reports were usually distributed the day the bill was presented and voted on. Such hearings were generally quite comprehensive and members were required to vote before having a sufficient opportunity

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25 *Hearings Before the Joint Committee on the Organization of Congress, supra note 18, at 978.*


28 *Report of the Joint Committee on the Organization of Congress, supra note 15, at 21*

to inform themselves as to the advisability of the various appropriations items. It is readily apparent then that the degree of wisdom with which billions of dollars in public funds are appropriated is largely dependent on the ability and intellectual competency of a number of seven or eight man sub-committees, none having adequate facilities for investigating requests for expenditures by executive bureaus.

Contributing to this same control by a few men is the practice of having closed hearings before appropriations committees. There is a great contrariety of opinion as to the propriety of closed committee meetings as distinguished from open hearings. Most hearings conducted by Congressional Committees are open to the public and the press, but Appropriations Committee meetings have been the notable example of an exclusive procedure whereby even other members of Congress are barred. Proponents of this secretive policy insist that open hearings would subject members to more pressure from special interest groups, and would prolong hearings and impede the efficiency of the Committee's work. Admittedly, much of the testimony in regard to War and Navy appropriations is necessarily secret. On the other hand, many members of Congress have been extremely critical of what one has referred to as "legislation by a back-room cabal".30 Partisans of open hearings contend that their policy would enable the public and more especially members of Congress to keep themselves competently apprised throughout so as to cast an informed vote whenever the measure is presented on the floor. Furthermore, daily scrutiny by the press would subject every request for money to the attention of the voters of the nation and as a consequence only appropriations which are very substantially justified would be approved and presented by the Committee. Without weighing the merits of these arguments further, it is proper to note that the Legislative Reorganization Act requires all hearings conducted by standing committees to be open to the public, except executive sessions.31 The House Appropriations Committee of the Eightieth Congress countered by declaring all Committee meetings to be executive sessions and it has been accused of violating the spirit if not the letter of the act.32

The Reorganization Act also provides that no appropriations bill or amendment may prescribe the reappropriating of unexpended balances,
with but one exception.33 The appropriations committees are directed to develop a standard appropriations classification schedule so as to make supply bills more intelligible.34 The same committees are authorized to make a study of existing permanent appropriations with a view to discontinuing as many as possible, and to make a similar study into the disposition of funds from the sale of government property and services with a purpose of adopting a uniform system of control of such funds.35 Section 202(b) of the act authorizes the more adequate staffing of appropriations committees to assist in the investigation of expenditures and requests for appropriations by the executive departments. It is apparent that the Congress is attempting to reassert its dominant position in the fiscal field. It remains to be seen whether or not it can institute careful, modern budgetary methods which will permit a carefully planned financial policy to replace the present practice of unrelated taxing and spending, with total expenditures still in doubt until the final appropriation bill is passed.

LIMITATIONS OF A BUDGET PROGRAM

The legislative budget shares some of the inherent limitations which can upset any budget program. Firstly, governmental receipts cannot always be too accurately prophesied. Decreases in public revenue will naturally result from a lower national income. If an estimate of over-all receipts is based on an expected national income of 160 billion dollars and it turns out instead that the national income actually amounts to only 150 billion, governmental receipts from excise taxes alone will be 2.5 billion less than anticipated.36 Secondly, the requirements for public expenditures are no more subject to accurate prediction than are governmental receipts. Unforeseen events may necessitate greater appropriations than could have been reasonably anticipated, especially during periods when world conditions are unstable. The third difficulty results from the piecemeal method of reporting and passing appropriations. There are presented each session eleven general appropriation bills plus

33Pub. L. No. 601, 79th Cong., 2d Sess., § 139(c). "No general appropriation bill or amendment thereto shall be received or considered in either House if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuation of appropriations for public works on which work has commenced." (Aug. 2, 1946).
34Id. § 139(a).
35Id. § 139(d).
a small number of deficiency and supplemental appropriations, and these measures are reported at frequent intervals throughout the session. Early in the year money may be voted for projects which are not too essential, or important programs may be too generously provided for; later in the session it suddenly becomes apparent that annual appropriations are going to be greater than expected and rigid economy is then practiced on later appropriations, rather than making proportional reductions throughout. This piecemeal procedure makes it very difficult to confine appropriations to a definite over-all limit as established by the Budget Committee, or even to know when such a limit is reached. Senators Byrd and Butler have submitted to the Eightieth Congress a concurrent resolution\(^{37}\) amending the Legislative Reorganization Act which would require all general appropriations for each fiscal year to be consolidated in one appropriations bill. No final action was taken at the First Session, but the resolution remains on the Senate calendar. The purpose of the bill dovetails closely with the fixing of a ceiling on expenditures, because by examining all of the principal appropriations at one time it would be much easier to conform to a budget ceiling. If the appropriations committees recommend sums exceeding the proposed limit, the whole Congress in its wisdom could reduce funds for all programs proportionately. The original version of the Reorganization Act as debated in the Senate gave the President the authority to reduce certain of the appropriation bills proportionately in order to make the total conform to the ceiling.\(^{38}\) This provision was rejected by the House of Representatives and was not enacted into law.\(^{39}\)

**The Legislative Budget and The Eightieth Congress**

We now come to an examination of the legislative budget in operation and the attitude of the Eightieth Congress. The Congress convened on Jan. 3, 1947 and on Jan. 6th the President in his annual budget message estimated that over-all receipts would be 38.9 billion dollars and coun-

\(^{37}\)S. Con. Res. 6, 80th Cong., 1st Sess. (1947).

\(^{38}\)Section 208(a) provided: "If on December 31st in any fiscal year and after the resolution specified in section 130(b) of title I of this act has been agreed to by both Houses, the President is of the opinion that the aggregate amount of expenditures for such fiscal year will exceed the receipts in an amount greater than the excess specified in such resolution, the President shall so proclaim; and on the date of such proclamation all appropriations (except permanent appropriations for servicing the public debt, for veterans' pensions and benefits, and to trust funds) shall be reduced by a uniform percentage. . . ." See 92 Cong. Rec. 6564 (June 7, 1946).

selected expenditures amounting to 37.5 billion. The Legislative Reorganization Act requires the report of the Joint Budget Committee to be made by Feb. 15th of each year. Consequently, the Budget Committee held only four short hearings, invited the testimony of only two witnesses and submitted its report on Feb. 14th. The committee estimated over-all receipts at 39.1 billion dollars and recommended a ceiling on expenditures of 31.5 billion, or 6 billion less than that proposed by the executive budget. The House of Representatives adopted the ceiling recommended by the Committee, this action being taken on Feb. 20th. The Senate voted a limit of 33 billion dollars, this figure being 4.5 billion less than that advised by the executive, but 1.5 billion more than that approved by the lower house. The Conference Committee appointed to resolve the difference met several times without effecting any compromise. The Congress then proceeded to pass the appropriations for the current year without adopting the joint resolution required by the Act. A comparison of the budget estimates for 1948 and the appropriations actually made showed that some cuts were made but the amounts were the subject of great controversy. The total savings were estimated from 1.5 billion dollars to almost 4.5 billion.

But this résumé does not properly picture the problems and questions that arose. It certainly could have been anticipated that the legislative budget would find rough running the first time out. The situation was complicated in that the executive and a majority of the Congress represented different political parties. With the international situation still unsettled, many members were reluctant to vote for any ceiling which might lead to the reduction of military appropriations. Decision on the budget ceiling was delayed by debate on the amount of the excess to be used on tax reduction and the sum which should be applied to the national debt.

The Joint Budget Committee began operating under a serious time

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*Proceedings of the Joint Committee of the Legislative Budget, supra note 14, at 5.
*See 93 Cong. Rec. A961 and 1335 (Feb. 21, 1947).
*See Proceedings of the Joint Committee of the Legislative Budget, supra note 14, at 1.
*Id. at 3.
*93 Cong. Rec. 1300 (Feb. 20, 1947).
*See 93 Cong. Rec. 1491 (Feb. 26, 1947).
handicap. When Congress convened in January no machinery for establishing a legislative budget had been set up and the act required their report by Feb. 15th. From the very beginning there was a disagreement on just how detailed the recommendations of the Committee should be. Some advocates of expenditure reduction wanted to set up arbitrary ceilings, then bring the President's recommendation under those limits. Others insisted on a thorough examination of spending estimates to determine where cuts could be made before deciding on the Budget Committee's report. The majority of the Committee proceeded on the theory that the Legislative Reorganization Act only required the report to establish an over-all objective and that to present any detailed suggestions as to where cuts should be made would prejudice the subsequent work of the appropriations committees.50 Other members of Congress were equally adamant and refused to go all out for the six billion dollar reduction of the executive budget unless and until some facts were given as to where the cuts were to be made. Consequently, the Congressional Record is dotted with picturesque quotes describing the figure presented by the Committee as on "a gigantic speculation",51 "pious hope", "loose expectation",52 "intelligent guess",53 "a snare and a delusion",54 "New Year's Resolution",55 or akin to "the fumblings of blind hogs in a bowling alley".56 Certainly the members responsible for the Budget Committee's report must face charges that its budget estimates were made without knowing what was to be cut, how much was to be cut, and where the cuts were to be made.57 What was expected to be a ceiling on appropriations turned out to be only an objective. The Reorganization Act was intended to provide a well considered, reliable, and responsible budget estimate.

There has been much discussion and debate in regard to the extent to which a ceiling on appropriations would bind the legislature. What Congress can do, it can generally undo. It would be unthinkable to require Congress to obligate itself not to appropriate beyond a certain amount for a future period of time. Therefore, any ceiling approved is

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50 Cong. Rec. 1337 (Feb. 21, 1947).
51 Id. at 1315.
52 Id. at 1323.
53 Id. at 1327.
54 Id. at 1328.
55 Id. at 1335.
not an irrevocable action, but can be modified in either direction as the need may arise. But certainly it was contemplated that the limit recommended should be carefully considered so that the figure would not be disturbed except as a consequence of completely unusual and unforeseeable circumstances, and that any maximum set would at least be a very strong moral obligation on the Congress. The irresponsible use of this valuable mechanism in the conduct of fiscal affairs will not only discredit the mechanism when estimates prove too unreliable, but will discredit Congress itself.

The failure of the first attempt by Congress to institute budgetary control indicates clearly that the problem is largely one of information. To make the budget effective, a skilled expert staff should confer with the agency budget officers while their needs are being determined, and then follow through with careful observation until the sums are fixed by the officers of the Bureau of the Budget. The committee responsible for presenting the budget resolution must determine which governmental expenditures and services are essential and those which can be limited or abolished. The legislative budget can either become little more than a propaganda device to publicize political promises to reduce government spending, or it can be made a responsible instrument to correlate governmental receipts and expenditures and to institute responsible fiscal planning.

ROLE OF CONGRESS AFTER THE APPROPRIATION IS MADE

It remains to consider the ability of Congress to control expenditures after money has once been appropriated. The spending power of Congress is practically unlimited, but how can the legislature be sure that funds are spent in accord with its directions? Effective control by Congress after an appropriation is made offers certain serious constitutional and practical problems. Under the doctrine of the separation of powers, Congress has no dominion over executive activities, and in the practical sense, neither Congress nor its committees can act as administrators to pass upon specific projects or methods of operation.58 But certainly Congress should be informed as to the current expenditures of the various departments and agencies. The legislative body has attempted to accomplish this end in several ways, and there are two provisions in the Reorganization Act which will enable it to determine whether or not ad-

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58Hearings Before the Joint Committee on the Organization of Congress, supra note 18, at 892.
ministrators are spending appropriated monies in accordance with the expressed will of Congress.

The Budgeting and Accounting Act of 1921§ established the General Accounting Office, headed by the Comptroller General, with the duty to check the spending of the executive departments and report to Congress in regard thereto. The Comptroller General now audits expenditures and disallows all payments contrary to law. However, this audit embraces only the legality of the expenditure and does not control ill advised and wasteful spending. To meet this latter need, Congress heretofore has had to rely on the Department of Justice and its own inadequate staff of investigators to check extravagant and exorbitant payments of public funds. Sections 205 and 206 of the Reorganization Act direct the Comptroller General to institute studies directed toward developing that office as a more efficient aid to Congress in determining whether public funds have been economically administered and expended. The provision for better staffing of committees in the Reorganization Act also will enable appropriations committees to better evaluate the operations of the executive branch.

SUMMARY

We have examined the measures by which Congress seeks to reassert its control over the public purse. The appropriations power represents what is perhaps the most vital responsibility of the legislative branch under our Constitution. We submit that the provisions of the Legislative Reorganization Act, together with other recent legislation reviewed in this article, furnish adequate machinery to enable Congress to retain its fundamental constitutional authority over federal finances. But no matter how complete and adequate the machinery, accomplishment of the desired end depends on the skill and adroitness of the guiding hands. The measure of success will be proportionate to the vigilance and competence of our elected representatives in Congress.

WILLIAM P. SIMS, JR.


*Hearings Before the Joint Committee on the Organization of Congress, supra note 18. at 892.
NOTES
CONGRESSIONAL REACTION TO RECENT SUPREME COURT DECISIONS IN TAXATION AND CRIMINAL LAW

THE separation of powers between the legislative and the judicial branches of the Federal Government is not susceptible of a clear definition, and there are occasions when the powers of one department will be exercised by the other. The line of demarcation is not absolute. Essentially, the judicial branch "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist". On the other hand, the legislature "looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

Neither the Supreme Court nor the Congress may encroach upon the powers conferred by the Constitution upon the other, because each branch was established for the purpose of executing delegated and enumerated functions. Each acquires its duties from that Constitution, and neither may confer additional jurisdiction upon the other. The advisability of legislation to promote the general welfare is a matter for the determination of Congress, and its discretion cannot be interfered with by the courts unless clearly unconstitutional. So also, the interpretation of the Constitution and the validity of the laws made pursuant thereto are within the sound judgment of the judiciary, unhampered by legislative control. Merely because Congress has failed to act in a given situation does not authorize judicial legislation, for the Supreme Court is limited to ascertaining the intention of Congress as expressed in legislation already enacted.

However well established the theory of separation and independence may be, it does not preclude cooperation between the legislative and judicial branches to carry out the objects entrusted to the government. Mr. Justice Sutherland made the observation that:

"If it is important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a

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2Ibid.
3Brandeis, J., in Ebert v. Poston, 266 U. S. 548, 554 (1925), remarked: "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A casus omissus does not justify judicial legislation."
logical corollary, equally important, that each department should be kept completely independent of the others—*independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution*, but in the sense that the acts of each shall never be controlled by, or subjected directly or indirectly to, the coercive influence of either of the other departments.⁴ (Italics supplied)

Both departments are essentially complementary, and they must necessarily harmonize their functions towards the promotion of efficient administration and justice under the laws of the country. By the joint efforts of the judiciary and the legislature, the liberty of the people must be preserved under adequate safeguards consistent with the general welfare of the whole nation.

It must be remembered that our Constitution possesses a remarkable capacity for growth. With a rapidly changing civilization, the courts must frequently step in to insure private and public rights by expanding the recognized principles of law to meet varied situations. Originally, when the problems confronting the courts were relatively simple, and only private interests were involved, this process generally proved sufficient. But industry, society and business have made such phenomenal strides that the complexity of government has increased. To satisfy the demands of justice today requires more and more legislative action. Quite naturally then, the attitude of the courts with respect to "judicial legislation" has changed. Mr. Justice Brandeis, in a dissenting opinion in 1918,⁵ indicated the future policy as follows:

"But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency."⁶

Still further in the opinion he explained that:

"Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required

⁴O'Donoghue v. United States, 289 U. S. 516, 530 (1933).
⁵International News Service v. Associated Press, 248 U. S. 215 (1918.)
⁶Id. at 262.
for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.7

Since 1936 the Supreme Court with increased frequency has turned back to Congress many problems of national importance, refusing to interfere without legislative sanction. Many of these “turn-backs” have involved matters of federal taxation and criminal offenses under federal laws. It is the purpose of this article to indicate the character and the extent of these judicial decisions, and to investigate congressional reaction to them. The scope of the examination is not exhaustive, but principal decisions have been selected in each field to demonstrate the trend of judicial-legislative cooperation.

Federal Taxation

Of all the powers of the Federal Government, the most pervading is the power of taxation, which extends directly or indirectly to every class of people. It has frequently been observed that “the power to tax involves the power to destroy”.8 If there are no implied limitations to the exercise of this power, Congress might well employ it against a particular group, and at the same time give unrestricted prosperity to another. However, by the provisions of the Constitution, Congress shall exercise this power only “to pay the debts and provide for the common defense and general welfare of the United States”9. Even such a limitation is but a generality, not susceptible of concise definition within any sphere of settled boundaries. It is for Congress to determine what the “general welfare” requires, and courts refuse to interfere with its discretion in this regard. As Chief Justice Marshall said in McCulloch v. Maryland:10

“. . . the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.”11

7Id. at 267.
8Marshall, Ch. J., in McCulloch v. Maryland, 4 Wheat. 316, 431 (1819).
104 Wheat. 316 (1819).
11Id. at 428. See also, Massachusetts v. Mellon and Frothingham v. Mellon, 262 U. S. 447 (1923); Florida v. Mellon, 273 U. S. 12, (1927), wherein it held that neither a
In any discussion, therefore, of the relations existing between Congress and the Supreme Court, the subject of taxation occupies a significant position. During the last ten years government operations have required enormous expenditures of money, and the appropriations for national defense and post-war reconstruction have demanded ever-increasing federal revenues. To maintain a proper balance between government requirements and moderate taxation is the obligation of the legislature and the judiciary, working under a coordinated effort. The following analysis indicates the extent to which Congress has cooperated with the courts in achieving efficient revenue legislation.

In *White v. United States*, Mr. Justice Stone rendered a decision interpreting §§ 23 and 101 of the Revenue Act of 1928. Upon liquidation of a corporation, the losses of stockholders from their stock investments, held for more than two years, did not constitute ordinary losses which are deductible in full from gross income, but rather are considered as capital losses, only a percentage of which is deductible from the tax as computed without regard to such losses. They were to be taxed on the same basis as gains or losses upon sales and exchanges of property. Petitioner argued that this conclusion would lead to the "harsh and absurd consequence that a small liquidating dividend is more disadvantageous to the taxpayer than no distribution at all in the case where the stock has become worthless." The Court indicated, however, that such an argument should more properly be addressed to Congress. The statute should have gone further by providing that the loss in the case of worthless securities should be treated as a loss upon their sale. The matter was brought to the attention of Congress even before the decision was given, and under § 23 (g) (2) of the Revenue Act of 1938, Congress made an express provision incorporating this construction:

"If any securities . . . become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this title, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets."
Helvering v. Ohio Leather Co.\textsuperscript{17} involved § 26 (c) (2) of the Revenue Act of 1936, which relieves from the tax on undistributed profits, any profits which may not be distributed because of a contract requiring that a portion of earnings of the taxable year be paid or irrevocably set aside within the taxable year for the discharge of a debt. In this case, taxpayer corporation had contracted by written agreement to apply a percentage of its net earnings of a particular calendar year to an indebtedness of the corporation. The percentage was actually paid during the taxable year, although the contracts provided for payment in the year following the calendar year during which the net earnings arose. When the taxpayer sought to avail itself of this credit, the Commissioner rejected the theory of petitioner on the ground that its contract did not require profits to be set aside \textit{irrevocably} within the taxable year. The anticipatory payments in discharge of the debt did not comply \textit{literally} with the statute.

During the argument before the Court, the Ohio Leather Co. contended that many corporations were unable to determine their earnings until after the close of their fiscal year, and consequently their contracts disposing of earnings to satisfy a debt customarily allow a short period after the close of the year for payment. In pointing out that the legislative history of the Act shows that Congress was aware of this situation and yet declined to act,\textsuperscript{18} Mr. Justice Murphy said that, "arguments urging the broadening of a tax deduction statute beyond its plain meaning to avoid harsh results are more properly addressed to Congress than to the courts."\textsuperscript{19} However, in 1938, five years prior to this decision, appeals to Congress because of the limited scope of this section were successful. Section 27 (a) (4) of the Revenue Act of 1938\textsuperscript{20} allowed a credit without reference to the particular terms or requirements of the indebtedness.

Mr. Justice Murphy, in \textit{F. W. Fitch Co. v. United States},\textsuperscript{21} again called the attention of Congress to an inequality appearing in § 603 of the Revenue Act of 1932,\textsuperscript{22} which imposed on toilet preparations sold by manufacturers or producers an excise tax equivalent to stated

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\textsuperscript{17}317 U. S. 102 (1942).
\textsuperscript{18}Id. at 110.
\textsuperscript{19}Ibid.
\textsuperscript{21}323 U. S. 582 (1945).
\textsuperscript{22}47 Stat. 169, 261 (1932), 26 U. S. C. 3401 (1940).
percentages of the selling price. Petitioner sought a refund on the ground that its selling and advertising expenses should have been excluded from the selling prices of the articles in computing the tax. When the Court held that § 619 (a) made provision for the inclusion and exclusion of certain items in computing the selling price for tax purposes, and that advertising expenses could not by implication be included,\textsuperscript{23} the Fitch Co. argued that the Court's ruling, "results in a discrimination against a manufacturer who indulges in his own advertising and selling campaigns in favor of one whose products are advertised by his customers and that Congress could not have intended such a discrimination."\textsuperscript{24} The Court replied that where:

\begin{quote}
"... a flat tax is placed on the wholesale selling prices and no statutory provisions are made for relief from the resulting natural tax inequalities, courts are powerless to supply it themselves by imputing to Congress an unexpressed intent to achieve tax uniformity among manufacturers selling at wholesale."
\textsuperscript{25}
\end{quote}

Realizing that the excise tax on the wholesale selling price created inequalities, Congress substituted a retail excise tax on toilet preparations in § 552 of the Revenue Act of 1941.\textsuperscript{26} The reasons which the legislature assigned for the change were that under the earlier law, "evasion is substantial and inequitable competitive situations are created."\textsuperscript{27}

Although Congress amended the Internal Revenue Code prior to the Supreme Court decisions in these cases, the changes indicate the quick reaction of the legislature to inconsistencies apparent in tax measures. Despite technicalities in tax laws, Congress responds almost immediately to every appeal recommending variations.

\textit{Helvering v. Clifford}\textsuperscript{28} was one of the outstanding opinions of the Court in the tax field since 1936. Prior to 1940, a favorite method of reducing taxes was the creation of a trust, usually for the benefit of members of a family, so that the income could be reported either by the trust or the beneficiaries in the lower surtax brackets. An irrevocable trust would be created for a short period of years, with a re-

\textsuperscript{23}Section 3 (a) of the Revenue Act of 1939, 53 Stat. 862, 863, 26 U. S. C. § 3401 (1940), amended this section to include the "wholesaler's salesmen's commissions and costs and expenses of advertising and selling."

\textsuperscript{24}323 U. S. 582, 586 (1945).

\textsuperscript{25}Id. at 587.


\textsuperscript{28}309 U. S. 331 (1940).
version to the grantor at the expiration of the period. The income was not paid to the grantor nor did it accumulate for him. The *Clifford* case involved a similar trust. Interpreting § 22 (a) of the Revenue Act of 1934,29 the Court held the income taxable to the grantor. Considering the intimacy of the family relationship, retention by grantor of control over the principal, and the benefits flowing indirectly to him, Mr. Justice Douglas declared that the grantor was substantially the owner of the income.

"The bundle of rights which he (grantor) retained was so substantial that respondent cannot be heard to complain that he is the victim of despotic power when for the purpose of taxation he is treated as owner altogether."30

Mr. Justice Roberts, dissenting, reasserted the doctrine that the Court should not attempt to legislate where Congress had refused to do so. "Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer".31 However, the majority offered this explanation for the decision:

"In view of the broad and sweeping language of sec. 22 (a), a specific provision covering short term trusts might well do no more than to carve out of sec. 22 (a) a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of sec. 22 (a)."32

A few years after this decision new regulations were promulgated by the Treasury Department33 to clarify and expand this construction of the Revenue Code. These regulations furnished precise guides for the application of the principle enunciated in the *Clifford* case.34 While the Court held the grantor taxable because of a combination of factors, stating that no one of them was decisive, the regulations segregate

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30*309 U. S.* 331, 337 (1940).
31*Id.* at 342.
32*Id.* at 337.
33*T. D.* 5488 (1945).
34Under the Treasury regulations, trust income is taxable to the grantor if: 1) the trust term is relatively short and there is a reversion to the grantor (within 10 or 15 years of the trust’s creation depending on the particular trust); or 2) grantor or any person not having a substantial adverse interest, may subject to certain exceptions, alter the beneficial enjoyment of the corpus or income; or 3) the corpus or income is subject to administrative control exercisable primarily for the grantor’s benefit.
the different factors, such as relatively short term, administrative control, and intimate family relationship, and apply each as a separate test in determining the taxability of trust income to the grantor. The full effect of these Treasury rulings is yet to be appreciated.

In Helvering v. Stuart, trusts had been created by the taxpayer, directing and empowering trustees to devote so much of the net income, as to them should seem advisable, to the education, support and maintenance of the donor's minor children. Only a portion of the income was so devoted. Still, under §§ 22 (a) and 167 of the Revenue Act of 1934, the Court held the entire income of the trust taxable to the grantor. Despite the observation of Mr. Justice Reed that under a number of Board of Tax Appeals decisions, the Board had "restricted the tax liability of a grantor of a trust for the support and maintenance of an infant and other purposes to such sums as, actually or by presumption, have been expended to relieve the settlor of his obligations", the Court rejected this view. The mere possibility of the use of the income to relieve the grantor, pro tanto, of his parental obligations was sufficient to cause the entire net income to be taxable to him. Accepting the challenge of this decision, Congress amended the Code by Act of February 25, 1944, inserting subsection 167 (c) as follows:

"Income of a trust shall not be considered taxable to the grantor . . . merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed." (Italics supplied.)

This section nullifies the Stuart decision and restores the rule adopted by the Board of Tax Appeals prior thereto.

Two other decisions in the tax field inspired no congressional reaction. Riley Investment Co. v. Commissioner involved § 114 (b)

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60 Ibid.
61 311 U. S. 55 (1940).
(4) of the Revenue Act of 1934. In the computation of net income in the case of mines, that section permits deductions for depletion on a percentage basis provided that the taxpayer in making his "first return" elects to avail himself of that basis. Petitioner was unaware of this provision, and was not advised by the Collector when his "first return" was filed. When he later filed an amended return seeking a refund, the Commissioner denied him the opportunity of taking advantage of this percentage depletion, alleging that the statutory period for amended returns had expired. Mr. Justice Douglas delivered an opinion affirming the action of the Commissioner. Since the Revenue Act permitted an election only in the original return or in a timely amendment, the taxpayer, by filing his amendment after the expiration of this period, did not comply with the statutory provision. "To extend the time beyond the limits prescribed in the Act is a legislative, not a judicial, function." Though the petitioner urged extreme hardship, the Court answered:

"That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided." (Italics supplied)

Appeals were carried to Congress, but this section has remained unaltered. Other court decisions have followed the construction of the Riley case.

The Supreme Court in McClinton v. Commissioner decided that losses sustained from the surrender of bonds to the obligors for a money payment less than cost may not, under the Revenue Act of 1934, be deducted from gross income in ascertaining the taxable income, as a bad debt under § 23 (k). Rather, it must be treated as a capital loss within § 117 (f), which provides that for the purposes of the title dealing with capital gains and losses, "amounts received by the holder upon the retirement" of such securities "shall be considered as amounts received in exchange therefor". The taxpayer requested relief, urging that if he had refused to surrender his debentures for the

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43 Id. at 59.
44 Tonopah Mining Co. v. Commissioner, 127 F. 2d 239 (C. C. A. 3d 1942); Degnan v. Commissioner, 136 F. 2d 891 (C. C. A. 9th 1943), certiorari denied 320 U. S. 778 (1943).
45 Id. U. S. 527 (1941).
trifling consideration offered, he could have charged off their whole cost as a bad debt under § 23 (k). The Court, through Mr. Justice Roberts, said that "we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation." Appeals for legislative remedy found Congress unwilling to alter the statute. These sections remain unmodified in the Revenue Code.

In all of these decisions, the Supreme Court has continually asserted that it has no concern with the wisdom or the policy of the taxing measures, the political motives behind the revenue laws, the amount of revenue acquired, nor the persons or property to be taxed. It may not determine whether congressional power has or has not been discretely exercised. Remedies for oppressive or unequal taxation are secured only by appeals to Congress, and the primary check in that body is the responsibility of the members to their constituents. However, these decisions indicate that the legislature, for the most part, has accorded satisfactory response to the problems presented by the Court in the tax field. Undoubtedly, the influential money-spending power of the Federal Government accounts for a great deal of such rapid congressional action. It should be observed that four of the modifications in the Revenue Code have been for the benefit of the taxpayer, whereas the only two instances of negative reaction by Congress were both favorable to the government.

**Federal Criminal Statutes**

Although one purpose of the Constitution was to insure individual liberty, reasonable restraints had to be imposed upon the freedom of the people to safeguard the peace and prosperity of the whole nation. The legislature has from time to time defined certain practices as criminal offenses, punishable by fine or imprisonment or both. To maintain tranquility among the people consistent with individual liberty, the Supreme Court and Congress must cooperate in the interpretation and application of these statutes.

It is a well recognized requirement that the terms of any penal statute should be explicit enough to inform those persons accused of the nature and cause of the accusation against them, and to show to them what particular conduct on their part will constitute a violation thereof. In

*311 U. S. 527, 530 (1941).*
United States v. Capital Traction Co., the Court of Appeals for the District of Columbia said:

"The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

Within the last ten years, the interpretation of criminal statutes has caused great concern to the courts. Due to the complexity of our society today and the increasing importance of the "public interest" as contrasted with guaranties of individual liberty, it becomes imperative that legislation establishing these offenses be distinct and clear in its application. Since the Supreme Court has resurrected many vital problems in this field necessitating legislative solutions, it would be profitable to investigate the extent of congressional cooperation in recent years.

Section 32 of the Criminal Code formerly provided:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined . . . or imprisoned . . . or both."

One Pierce was indicted for a violation of this section by falsely pretending to be an officer of the United States, namely, a representative of the Tennessee Valley Authority, and by defrauding certain persons in obtaining money from them for the purchase of T. V. A. Units. At

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35 Id. at 598. See also, Conally v. General Construction Co., 269 U. S. 385 (1926); United States v. Cohen Grocery Co., 255 U. S. 81 (1921); and Lanzetta v. New Jersey, 306 U. S. 451 (1939), wherein the Supreme Court has held that a statute employing vague and indefinite terms might well amount to a violation of the "first essentials of due process of law".
that time, the statute did not mention pretenses of acting under the authority of corporations owned or controlled by the United States because there were none in existence. Mr. Justice Reed delivered the opinion in *Pierce v. United States* ordering the indictment to be quashed. He said that "... judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."  

Many years before this decision was rendered, it became apparent to Congress that the growing importance of the administrative corporations required legislative extensions to this statute. As early as 1918 amendments to the Criminal Code to meet this new development appeared. By Act of February 28, 1938, this section was finally amended to include impersonation of an officer or employee "of any corporation owned or controlled by the United States".

In *Nye v. United States*, petitioner were adjudged guilty of contempt under § 268 of the Judicial Code for their efforts in obtaining a dismissal of a suit brought by one Elmore in a federal district court of North Carolina for wrongful death. They were charged with inducing Elmore to terminate the action, "through the use of liquor and persuasion". The lower court found that the petitioners had induced the administrator, Elmore, to file a final account and obtain his discharge, and to send letters to his attorney and the district judge asking for dismissal. These events occurred more than 100 miles from the court. The section under which they were charged with contempt reads:

"The said courts shall have power ... to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. ..." (Italics supplied)

There was undoubtedly an actual obstruction to the "administration of justice". But the Supreme Court, in the majority opinion, interpreted the words "so near thereto" as meaning *physical proximity*, not re-

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314 U. S. 306 (1941).
315 Id. at 311.
318 313 U. S. 33 (1941).
320 Ibid.
levancy to the court’s activities. They applied a geographical connotation to the statute, and held that a distance of 100 miles would not be within the “vicinity of the court”. Mr. Justice Douglas said:

“The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.”

The Court refused to adopt the “reasonable tendency” rule of Toledo Newspaper Co. v. United States, in which it was held that any misbehavior reasonably tending to interfere with and obstruct the court in the discharge of its duties in a matter then pending before it came within the terms of the statute. The construction of the Toledo case, followed for 23 years, was abandoned.

Justice Stone, with the Chief Justice and Justice Roberts concurring, dissented on the ground that the construction of the statute, which had stood unamended for 110 years, should not be modified. They adhered to the “casual connection” theory of the Toledo case and decisions subsequent to it. Speaking for the minority, Mr. Justice Stone said:

“In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop, summarily, obstructions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government, to which it rightfully belongs.”

However, as yet, Congress has failed to take the initiative in the clarification of this statute. The sudden change in construction by the Court certainly should merit the attention of the legislature. It remains to be seen whether congressional reaction will be positive or negative.

The interesting question confronting the Court in United States v. Monia was:

“... one who, in obedience to a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act, and gives testimony under oath substantially touching the alleged offense, obtains immunity from prosecution for that offense, pursuant to the terms of the Sherman Act, although he does not claim his privilege against self-incrimination.”

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313 U. S. 33, 52 (1941).
3247 U. S. 402 (1918).
313 U. S. 33, 57 (1941).
3317 U. S. 424 (1943).
3Id. at 425.
The Sherman Act\textsuperscript{65} provides, in part, that:

"... no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."\textsuperscript{66}

The statute was supplemented by Act of June 30, 1906,\textsuperscript{67} to include the following provision:

"... under the immunity provisions ... immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."\textsuperscript{68}

In this particular case, there had been an indictment charging violations of the Sherman Act, and Monia was subpoenaed to testify before the grand jury respecting these transactions. Before giving his testimony, he failed to assert his constitutional claim against self-incrimination. In a subsequent prosecution against him, Monia relied upon the absolute immunity clause and argued that it was unnecessary for him to assert his privilege. The Supreme Court sustained his contention.

Mr. Justice Roberts indicated that under the earlier provision the legislation had opened the door to a practice whereby witnesses could take advantage of the immunity provision by volunteering testimony, even though the Government did not intend to confer such blanket immunity. The amendment of 1906 was adopted, in the opinion of the majority of the Court, to protect the Government's interests by preventing immunity unless the attendance of the witness was compelled by subpoena.\textsuperscript{69} It was further pointed out that between 1934 and 1940 Congress had inserted express provisions in fourteen regulatory statutes\textsuperscript{70} requiring the witness to claim his constitutional privilege, but

\textsuperscript{66}Ibid.
\textsuperscript{68}Ibid.
\textsuperscript{69}40 Cong. Rec. 5500, 7657-8 (1906).
that the Sherman Act was permitted to stand as originally enacted and amended. Therefore, the majority concluded that they could not add to the legislation what Congress omitted.

Justices Frankfurter and Douglas dissented, claiming that the amendment of 1906 did not abrogate the necessity of asserting the constitutional privilege. In their judgment, the sole purpose was to make clear that the immunity granted did not inure to the benefit of corporations, and that a natural person could not claim the immunity unless his testimony was given in reply to a subpoena. Citing numerous federal authorities sustaining their interpretation, they said:

"If the difference in language [between the Sherman Act and the measures cited in footnote 70] reflected a difference in the scope of the immunity given, or in the nature of the considerations that moved Congress to make a differentiation, there would surely be some indication, however faint, somewhere in the legislative history of these enactments that some legislator was aware that the difference in language had significance. But there is none."72

Despite the need for legislative clarification of these immunity provisions, there has been no indication that Congress expects to take them under consideration. Perhaps the failure of Congress to step in amounts to acquiescence in the majority opinion. Nevertheless, there can be no doubt of the advisability of a settled construction by the legislature.

The Federal Kidnapping Act73 came before the Court in Robinson v. United States.74 Robinson was indicted and convicted for a violation of the Act by transporting in interstate commerce a person whom he kidnapped and held for reward. The Act provides that "the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed." During the trial in the lower court, the evidence showed that petitioner twice violently struck the victim on the head with an iron bar, and that the latter's lips

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73317 U. S. 424, 443 (1943). According to the dissenting opinion, the variations in the phraseology of the different statutes is due to the manner in which Congress usually acts in drafting regulatory legislation. Since the Acts are drawn by specialists in the various fields, and not by a single draftsman, uniformity cannot be expected in the language.


75324 U. S. 282 (1945).
were abraded by repeated applications of tape. The kidnapped person was liberated after 6 days of captivity, and had recovered from her injuries at the time of the trial below. The questions confronting the Supreme Court were whether the injuries inflicted must be permanent, and whether they must be in existence at the time of sentence in order to authorize the infliction of the death penalty.

Mr. Justice Black delivered the opinion rejecting both of these contentions. It was held that any injury at the time of liberation is a basis for invoking the death sentence. The severity of the injuries and the length of time they endured were immaterial. Since it was the purpose of Congress to deter kidnapping and to force the release of victims, the majority did not feel that the uncertainty of the term "liberated unharmed" was controlling. Sustaining a strict interpretation, they said:

"This purpose to authorize a death penalty is clear even though Congress did not unmistakably mark some boundary between a pin prick and a permanently mutilated body. It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all." 75

The dissenting opinion of Justices Rutledge and Murphy squarely presented the difficulty to Congress. There was no indication in the legislative history of the Act of any definition of terms. 76 When the death penalty provision was inserted in the present Act, there was no discussion in Congress with reference to the interpretation of the words "liberated unharmed". The dissenting justices added:

"The words used here, for its imposition, are too general and unprecise, the purposes Congress had in using them too obscure and contradictory, the consequences of applying them are too capricious, whether for the victim or for the kidnapper, to permit their giving foundation for the exercise of the power of life and death over the citizen, though he be a convicted criminal." 77

The observation was made that to maintain the death penalty for all cases would not be conducive in securing the victim's safety, because

75Id. at 286.
76H. R. REP. No. 1595, 73d Cong., 2d Sess. (1932); 78 Cong. Rec. 8?75, 8856-7 (1934). It is interesting to note that when the debate took place on the Kidnapping Act of 1932, Representative Celler was influential in bringing about the omission of the death penalty. He observed that "the person kidnapped is the witness who, even when rescued, can always point the accusing finger at the guilty. Doing away with the victim would save the life of the guilty." 75 Cong. Rec. 13285 (1932). See also, 75 Cong. Rec. 13282-13304 (1932), for statements of other congressmen opposing the extreme penalty.
the kidnapper might feel that a release of the victim would be more damaging than his death. Under these circumstances, they argued that only judicial legislation could remedy the defect. Although it was more properly a matter for Congress, they felt that the lack of clarity in the Congressional mandates warranted judicial intervention.

It is significant that Congress has not undertaken to establish any recognized construction of the statute. The Kidnapping Act certainly deserves clarification because many problems remain unsettled. Must the kidnapper both refrain from injuring his victim and also liberate him? Or must the kidnapper merely desist from inflicting harm, however the liberation may occur? Must the injuries be slight or substantial? Must they be temporary or permanent? Only a settled interpretation by Congress can remedy existing doubts.

Congressional failure to act upon these Court decisions is surprising. Constitutional guaranties of liberty and security should not be permitted to rest upon such uncertain and equivocal foundations. Although it is within the province of the courts to interpret statutory provisions, it is still the obligation of Congress to define criminal offenses with some degree of clarity. Leaving the scope of such statutes open to the widest conceivable inquiry of the courts is not the safest way of protecting the citizens against capricious convictions. Resolving the serious doubts arising from the generality of the language in criminal statutes is a matter requiring the unending cooperation of both judiciary and legislature.

**Conclusions**

Although in 1921 the late Justice Cardozo, commenting upon the relations between Congress and the Judiciary, said that "courts and legislature work in separation and aloofness" and "move on in proud and silent isolation",78 our Supreme Court today has discovered that isolation of the two departments cannot secure the quality of administration required to balance the private and public interests which are bound to conflict in an expanding industrial economy and a society

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78 *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921). Cardozo further described the scene: "On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the token of the strain. On the other side, the Legislature informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mends often when it would mend."
of increasing complexity. Courts have refused recently to engage in "judicial legislation", especially where the public interest becomes so prevalent that individual liberties must often be curtailed. The judiciary has come to realize, more than ever before, that coordination with Congress is the practical solution for insuring the effective administration of justice and for protecting personal rights from excessive government encroachment.

Since 1936 the Supreme Court has frequently indicated to Congress specific fields for legislative action, such as the taxation measures and criminal statutes examined in this survey. The field of greatest affirmative action by Congress was taxation, which must inevitably be associated with the powerful money spending authority of the Government. While Congress revised legislation in this field to remedy 71% of the issues requiring modification, only 25% of the decisions respecting criminal laws were accorded enough consideration to warrant statutory clarification.

What reasons can be assigned for the apparent contrast between the reaction of Congress to taxation problems and its comparative inertia in regard to the criminal offenses? Perhaps the legislature considered some of these matters so affected with a public interest that protection against restraints might not always be feasible. On the other hand, Congress might have concluded that it was impossible to end the injustice involved without opening the door to evils greater than those sought to be remedied. There remains the possibility that adequate machinery does not exist to coordinate the efforts of both departments. Justice Cardozo once proposed that it might be profitable to organize a "Ministry of Justice" or a legislative reference division to bring these decisions to the immediate attention of Congress. Whether such a proposal is practicable, is not within the scope of this survey.

These decisions in the fields of taxation and criminal laws deserve serious consideration because they present a factual picture bearing upon the relations between the judiciary and the legislature. Any attempted justification or explanation of the lack of cooperation between these two departments would require an exhaustive study, but, as this survey indicates, consistent failure of coordination between these government branches might at some future time adversely affect the balance of power so necessary to safeguard our constitutional heritage.

BADDIA J. RASHID

79Ibid.
NEWS-GATHERING MONOPOLIES AND THE ANTITRUST ACT

“FREEDOM of the press is essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest. It is appropriate that freedom of speech and freedom of the press are contained in the first of those constitutional enactments which are the American Bill of Rights.”

The Founding Fathers were fully aware that any government, however benign and democratic at its inception, tended toward self-perpetuation. Self-perpetuation requires control, perhaps annihilation, of resistance to the established order. One of the best means of controlling such resistance is to block the highways of communication so that the dissension will not spread so readily. To safeguard against such an intellectual road block, the First Amendment was incorporated in our fundamental law. Political tyranny was and still is a threat to freedom of the press, but in addition, economic tyranny today in the guise of national news-gathering monopolies could stifle competition of ideas by stifling competition between the individual organs of public opinion. Without this competition a democracy cannot survive.

The Constitution is not a guarantee of any particular economic system, but the guarantee of a free press postulates a freely competitive system at least within one section of the public information industries. In this field the Sherman Anti-Trust Act should be considered, as Cordell Hull once said, as a part of our Constitution. The freedom of the press is meaningless if it is extended only to an economically protected channel of expression dominated by a few tycoons. It matters not how responsibly conducted are the affairs of this protected instrument; the essential need is a free press, and secondarily, a responsible one. Responsibility is desirable, but it will evolve from the conscious will

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of a society where facts and ideas may be freely expressed and freely chosen.

In a determination under the Sherman Act, the Supreme Court applied a new, but not revolutionary, interpretation to its scope, and found that the activities of a news-gathering agency fell within the prohibitions of the statute.\(^4\)

The Associated Press\(^5\) (hereinafter referred to as AP) is a gigantic news-gathering agency preeminent in its field. It is the successor of a corporation of the same name founded in Illinois in 1892. In 1900, to avoid a decision of the Supreme Court of that State declaring that it was impressed with a public interest, and that it was required to admit any newspaper applying,\(^6\) AP reorganized under the Membership Corporation Law of the State of New York. It operates as a central agency of its members for the distribution and exchange of news which the respective members furnish, and it supplies member newspapers with news supplied by its own staff.

AP affairs were managed by a relatively static board of directors elected by its members, but new membership, since its founding, has been restricted by one or another limiting provision in its by-laws, especially where the applicant is a potential competitor of an already existing member. These by-laws ranged from the right of veto by a member corporation to a right of protest which could only be overridden by a four-fifths of the members vote of acceptance. An alternative and less burdensome arrangement provided for a simple vote of the board of directors for the application of a newspaper not likely to be a competing organ.\(^7\) The stormy applications of Marshall Fields\(^8\)

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\(^5\)It served 1247 newspapers, constituting 81% of the morning newspapers, and 59% of the evening newspapers, which was 96% of the total circulation of morning newspapers, and 77% of that of the evening newspapers. It expends $12,000,000 on its annual budget, employs over 100,000 persons in gathering news.

\(^6\)Its nearest competitors United Press and International News Service were exceeded in the domestic field by AP in: (1) Number of newspaper subscribers, (2) Expenditures for collecting and transmitting news reports, (3) Physical facilities utilized, (4) Size of staff, (5) Number and distribution of news bureaus, (6) Number and distribution of newspapers supplying it with news of their localities. Page 37, Brief for the United States.

\(^7\)Inter-Ocean Publishing Company v. Associated Press, 184 III, 438, 56 N. E. 822 (1900).

\(^8\)Between the period 1900 to 1942, 95% of all applicants involving competition for member newspapers and requiring election by the membership were rejected. Contrast
Chicago Sun, in September 1941, and Eleanor Patterson's Washington Times-Herald, in November of that year, with their anti-trust threats, caused a change—but not for the better. The right of protest of member newspapers was abolished, and the necessary vote for admission reduced from four-fifths to a simple majority. However, the provisions of the new amendment, which required the payment of assessment values by those applicants fortunate enough to obtain a majority vote, still made membership prohibitory for a potential competitor in the same city and field as an AP member. This assessment value was a sum equal to ten percent of the total regular assessments paid since October 1, 1900, by the member in his city and field. This was a clear indication of AP's own idea of what a competition-free field was worth.

These prohibitions, together with the further by-law regulation forbidding member newspapers to furnish news to any but members, put a non-member newspaper under a considerable handicap. The restrictions of the AP in conjunction with similar but less stringent regulations of the United Press and International News Service made this with the situation during the period 1932 to 1942 where there was no direct competition involved, or where the member newspaper waived its protest right and the directors elected 95% of the applicants.

*The application of the Chicago Sun was actively opposed by Robert R. McCormick's Chicago Tribune. Protest rights were not waived by The Washington Evening Star and The Washington Post.

*Just how prohibitory these assessment values were, is shown by the following chart prepared by the Justice Dept. showing the amounts payable in the 11 largest cities of the United States:

<table>
<thead>
<tr>
<th>City</th>
<th>Morning</th>
<th>Evening</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>$1,432,142.73</td>
<td>$1,095,003.21</td>
</tr>
<tr>
<td>Chicago</td>
<td>416,631.90</td>
<td>595,772.31</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>391,173.12</td>
<td>427,918.20</td>
</tr>
<tr>
<td>Detroit</td>
<td>273,929.91</td>
<td>300,702.16</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>493,266.24</td>
<td>156,652.37</td>
</tr>
<tr>
<td>Cleveland</td>
<td>200,721.33</td>
<td>204,561.66</td>
</tr>
<tr>
<td>Baltimore</td>
<td>209,199.75</td>
<td>203,484.83</td>
</tr>
<tr>
<td>St. Louis</td>
<td>233,932.29</td>
<td>271,802.49</td>
</tr>
<tr>
<td>Boston</td>
<td>336,759.45</td>
<td>310,025.82</td>
</tr>
<tr>
<td>Pittsburgh</td>
<td>191,703.24</td>
<td>185,195.79</td>
</tr>
<tr>
<td>Washington, D. C.</td>
<td>184,421.49</td>
<td>182,974.50</td>
</tr>
</tbody>
</table>

*Associated Press v. United States, 326 U. S. 1, 13 (1945). "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for the restrictions, might be published in the future."
a venture into the newspaper business almost dependent on a "Midas touch".

Concurrently, with the raising of the minimal amount of capital necessary to launch a successful news publication, there has been a steady decline in the number of newspapers in the United States and an increase in circulation of the remaining few. This dangerous trend was noted and decried in the report, "A Free and Responsible Press". Their findings present an alarming picture to those who feel the need for competitive discussion:

"For a considerable period (since 1909) the number of daily English-language newspapers has fallen at a fairly constant rate. At the same time there has been growth in literacy, in total population, and in total circulation. The peak of 2,600 dailies reached in 1909 has been steadily reduced to the present 1,750. Dr. R. B. Nixon, who has done the most recent research on the subject, reported in the Journalism Quarterly for June, 1945, that only 117 (approximately one out of twelve) of the cities in which daily newspapers are published now have competing dailies. He also found that in ten states of the Union no cities have competing Sunday newspapers. Altogether 40% of the estimated total daily newspaper circulation of 48 million is non-competitive. Rival newspapers exist only in the larger cities.\(^{11}\)"

"Twenty-five hundred of the 16,000 and more weekly newspapers of the nation disappeared between 1910 and 1920, another 1,300 between 1920 and 1930, and 1,750 more in the next decade. Fewer than 10,000 now survive."

It was on the basis of these facts that the United States filed a civil suit, charging AP and its members and directors with being parties to a conspiracy to restrain interstate commerce and to monopolize a part of such commerce in violation of Sections 1 and 2 of the Sherman Act.\(^{12}\)

After the defendants had answered,\(^{13}\) the Government filed, pursuant to Rule 56 of the rules of Civil Procedure, a motion for summary judgment.\(^{14}\) The three-judge court, consisting of Judges Learned Hand,

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\(^{11}\)Notes 69


\(^{13}\)26 Stat. 209 (1890), 15 U. S. C., §§ 1-2 (1940). Section 1 declares, "Every contract . . . in restraint of trade or commerce . . . is hereby declared to be illegal. . . ." Section 2 declares, "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

\(^{14}\)The Government served on the defendants two requests for admissions, and served interrogations, addressed to AP, to the defendants Tribune Company and McCormick, and to the defendants Bulletin Company and McLean. AP served upon the government a request for admission. Affidavits and opposing affidavits and counter affidavits by the government, were filed before submission for decision on the motion for summary judgment.

\(^{26}\)Commission on Freedom of the Press, op. cit. supra, at 37.
Augustus Hand and Swan, held, among other things, that the execution of AP's by-laws should be enjoined until they affirmatively declare that the effect of admission upon the ability of an applicant to compete with members in the same "field" should not be a factor in determining whether to accept or reject his application. The court also held that the agreements which forbade both communication of news by AP to non-members, and the communication of spontaneous news by members to non-members, were parts of an unlawful combination, and that such acts would be enjoined until the restrictive by-laws affecting membership were remedied. The findings of the courts in both instances were subject to the "rule of reason", and the advantages of the combination procured by the restraints were to be weighed against the injury done to the public whom the combination will deprive "of the advantages which they derive from free competition". The interests of the newspaper industry were not conclusive, "for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

The "rule of reason", when applied to the by-law sections which forbid communication by the agency and by the members to non-members, balanced in favor of AP. The provisions were necessary to the protection of their property right in the news; nevertheless, they were enjoined because they were incident to the restraining by-laws.

The lower court's decree was affirmed by the Supreme Court, but evidently on a different basis. The rule of reason was not invoked by the majority, but their opinion adopted in effect the strict con-

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29Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911); American Tobacco Co. v. United States, 221 U. S. 106 (1911).
30Apex Hosiery Co. v. Leader, 310 U. S. 469, 501 (1940).
struction of the Sherman Act. The restraints on trade were no different than the restraint on sales of tiles or lumber. And it mattered not that the object of sale was the product of man's ingenuity. Also effectively disposed of in the majority opinion was the defense that such a decree would be a forbidden abridgement of the freedom of the press. The First Amendment did forbid interference by the Government, but did not simultaneously permit a repression by private interest of that freedom. "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

In a concurring opinion, Justice Frankfurter substantiated the reasons given in the lower court by Justice L. Hand. However, an unguarded sentence has drawn the fire that he acquiesces in the public utility doctrine. "The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of 'public utility'." Perhaps it was these words that led to Justice Roberts' vigorous attack on legislation by the majority, and an unfounded epithet that it constituted "government-by-injunction with a vengeance".

The decision in the Supreme Court was handed down on December 8, 1945 after argument on December 5th and 6th, 1944. On November 13, 1945, Mr. Noah M. Mason, a member of the House of Representa
tives from Illinois, and a ready protector of the freedom of the press introduced a bill exempting the news-gathering agencies from the action of the Sherman Act by reason of the very activities for which it was then being prosecuted. It read in part:

"The ordinary and usual operations and activities of mutual news-gathering cooperatives shall not be considered to be in restraint of, or to monopolize, any part of trade or commerce."

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25Id. at 29.
26Id. at 46.
A more polished version, but having substantially the same effect, was introduced in the second session of the 79th Congress and reintroduced in the 80th Congress this year. The mills of Congress grind slowly and at the present time the 1947 attempt is being reheard by the Judiciary Subcommittee.

So far the tremendous power in the press as a whole has not been unloosed in support of the measure. That they will attempt to foister this legitamitized monopoly is apparent, since it is a protection of their own economic advantage. The shibboleth, whose fallaciousness is fundamental, will probably be, "freedom of the press". The Supreme Court has rejected the contention that the decision is in conflict with the guarantee of the First Amendment.

"The business of the Associated Press is not immune from regulations because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws."31

Passage would in fact only accentuate the evils found to be existent in the press of America today. By increasing concentration of ownership and the scope of the owners' power we come nearer to the precipice of totalitarianism of ideas. We bring closer the day when one man or a group of men can determine what fact or version of the facts shall be dispensed to the public. And all this will be brought about as a result of a special group trying to escape the effect of a decision of the courts through pressure in the legislative Chamber. A decision where the relief granted was in furtherance of that basic freedom, and not in its diminution. The bill will destroy the goal of the constitutional provision, "to preserve an untrammeled press as a vital source of public information".

JAMES S. BUTLER

30H. R. 6301, 79th Cong., 2d Sess. (1946); H. R. 110, 80th Cong., 1st Sess. 2, 3, (1947). The new version read, "The anti-trust laws shall not be construed to prohibit any press service company from exercising its own discretion in the selection of its customers or from furnishing its press services on the express or implied condition, agreement, or understanding not to furnish the press services which it is furnishing to a customer to any other newspaper or newspapers in the community of the customer."


32For an opening gun, see N. Y. Times, April 22, 1947, p. 14, col. 1, a speech by Robert Rutherford McCormick.


SOME LEGAL ASPECTS OF THE ATOMIC ENERGY ACT

The development of atomic energy in the United States, with its attendant benefits and dangers, may be said to have begun on August 2, 1939. On that date Professor Albert Einstein wrote a letter to the late President Franklin D. Roosevelt in which he stated it was his belief that atomic energy could be developed for military application; and in self defense—if nothing more—since European countries were working on the problem, he recommended the United States turn to a intensive development of this possible source of military power.¹

From the small, informal "Advisory Committee on Uranium,"² appointed by the President and granted a $6000 budget, grew the Manhattan Engineer District, established by the Army Engineer Corps on August 13, 1942, which, by its own estimate, expended over $2,000,000,000 in finally producing an atomic bomb. From such a small beginning grew the organization and effort which harnessed the energy of the atom. We are now attempting to control this basic source of energy under the provisions of the Atomic Energy Act of 1946.³

The first test of the atomic bomb was conducted at Alamogordo, New Mexico, on July 16, 1945. The test showed that there was no longer any doubt as to the possibility of harnessing atomic energy as a military weapon. The result "could well be called unprecedented, magnificent, beautiful, stupendous, and terrifying. No man-made phenomenon of such tremendous power had ever occurred before."⁴

Two atomic bombs were exploded during the last stages of the war with Japan: one on August 5, 1945, over Hiroshima; the other over Nagasaki on August 9, 1945. The military results obtained from the use of these two bombs demonstrated beyond question that here was a ready means of mass suicide for mankind. The United States found itself in the doubtful position of holding, for the time being at least, the secret of how to produce an atomic weapon coupled with the realization that if we turned over the secret to the world we would have no guarantee that this knowledge would not, at a future date, be used against us. At the same time we knew that even if we kept this knowl-

¹See Hearings before the Special Committee on Atomic Energy on Sen. Res. 179, 79th Cong., 2d Sess. 553-573 (1946) for a verbose but interesting historical background of the development of atomic energy in the United States.
edge to ourselves, it would be only a matter of a few years before other countries would have the secret.

With the knowledge that the United States had developed an atomic bomb, and the destructive force of this weapon apparent, there was insistent public demand for legislation to control this dangerous source of energy. Since the secrecy surrounding the bomb had been largely destroyed when the bomb had been exploded, public opinion demanded that national control and effective international safeguards be formulated immediately.

**Legislative History of the Atomic Energy Act**

On October 3, 1945, President Truman transmitted to Congress his message recommending the initiation of legislation to control the use and development of atomic energy. This message recommended legislation be enacted covering both national and international aspects of control. On the same day, Representative Andrew J. May, Chairman of the Committee on Military Affairs, introduced a bill which had been drawn up by an interim committee headed by Secretary of War, Henry L. Stimson. This bill was designated H. R. 4280; the Senate companion bill was S. 1463, introduced by Senator Edwin C. Johnson. The Committee on Military Affairs of the House of Representatives held hearings on H. R. 4280 on October 9 and 18, 1945, but it was S. 1717, introduced by Senator Brien McMahon on December 20, 1945, which became the Atomic Energy Act of 1946. This bill was passed by the Senate on June 1, 1946; it passed the House with amendments on July 20, 1946; the Conference reports were agreed to and approved on July 26, 1946; and the bill was signed by the President on August 1, 1946.

During the hearings held on S. 1717, testimony was received on all phases of the bill, but most of the testimony revolved around such considerations as:

"...Government versus private ownership and operation of plants producing fissionable materials, ownership and custody of fissionable materials, organiza-

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*Hearings before the Committee on Military Affairs on H. R. 4280, 79th Cong., 1st Sess. (1945).

*92 Cong. Rec. 6098 (1945).

*92 Cong. Rec. 9563 (1945).

*92 Cong. Rec. 10168, 10199 (1946).*
tional structure to assure maximum operating efficiency, ... controlling source materials for the production of fissionable materials, ... effective means of developing and controlling atomic energy power plants and other devices utilizing this energy ... framing patent procedures, ... the preservation of incentive, the vigorous and fruitful development of atomic energy in all its phases."

No attempt will be made to analyze in turn each provision of the Atomic Energy Act in the further discussion, but rather, the general questions raised in relation to the extraordinary provisions of the bill will be outlined.

Powers of the Commission

The powers given the Atomic Energy Commission are, without question, unprecedented. Briefly, the Commission is authorized to conduct research, or by contract or loan to make arrangements for conducting research; to take ownership of all facilities for the production of fissionable materials, i.e., materials which can be converted to use in atomic bombs; produce fissionable materials; take ownership of all fissionable materials; distribute fissionable materials to suitable applicants; license source material after it has been mined, (title being vested in the Commission as soon as it is mined); make atomic bombs; license manufacturers to use any fissionable material, or atomic energy; purchase or otherwise acquire fissionable material outside the United States; control the release of information both scientific and technical, and industrial; declare any patent useful solely in the production of fissionable materials to be vested in the Commission; and hold all patents useful in production of fissionable material. All patents now existing are revoked, with compensation determined administratively by a Patent Compensation Board designated by the Commission, whose action is subject to the usual judicial review.

It was of course recognized that the enormous grant of powers given the Commission was not out of line with the tremendous potential of the forces the Commission was established to control.

The President's message on October 3, 1945, stated:

"The measures which I have suggested may seem drastic and far-reaching but the discovery with which we are dealing involves forces of nature too dangerous to fit into any of our usual concepts."

In the hearings on S. 1717 before the Special Committee on Atomic

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\[12\]

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Energy, Dr. Robert M. Hutchins, Chancellor of the University of Chicago, stated:

"We believe that the importance and danger of the discovery justify an unusual measure of governmental control.\textsuperscript{13} . . . . the provisions in the McMahon bill for governmental control are very broad, and yet it would appear no broader than the situation demands."\textsuperscript{14}

\textbf{Congressional Control of the Commission}

Yet the desire of Congress, at least to envelop the ground, was not without hesitancy on the part of those who could foresee an independent commission divorced from all Congressional restraint except that of appropriations.

Senator Johnson expressed these doubts as follows:

"What I am driving at is this: Ever since this whole question of controlling atomic energy was dumped in the lap of the Congress, I have been trying to figure out some way of setting up Congressional controls, having in view the same objectives that you men have, of providing against private monopoly and all of those things in this new field. But, unfortunately I haven't been able to figure out in my mind, and no one has been able to help me, how we can set up Congressional controls.

"It does seem to me that one approach might be a sort of temporary procedure, maybe to last a year, two years, or three years, and then force it to come back for a further conclusion.

"... but it seems to me, if Congress enacts the McMahon bill, outside of receiving reports, it loses complete control. . . .

"... The trouble is that when Congress enacts a law, and then Congress attempts to amend that law, it runs up against a Presidential veto or the possibility of a Presidential veto, and the requirement that you have a two-thirds majority to override that veto."\textsuperscript{15}

The Chairman of the Committee, Senator McMahon, set out the problem of Congressional control when he said:

"Now, there has also been some discussion about Congressional control. I am one who is very sympathetic in having the most Congressional control that can possibly be had within the traditional framework of our government. We have the executive, the judicial, and the legislative; and the legislative, as I see it, may only lay down a plan or program which the executive has to execute.

"Now, in this bill I think you will find, will you not, several things that the Congress must do in the field of Atomic Energy that it does in no other

\textsuperscript{13}Hearings before the Special Committee on Atomic Energy on S. 1717, 79th Cong., 2d Sess. 111 (1946).
\textsuperscript{14}Id. at 112.
\textsuperscript{15}Id. at 117, 118.
field? For instance, it prohibits the Commission from introducing into our industrial life any application of atomic energy without reporting to the Congress and getting Congress' approval."

It also calls upon the Congress for its appropriations.

"... It must report quarterly—the Commission must report quarterly—to the Congress for everything that it plans to do; so it does have some congressional control into the bill.

"Senator Johnson: I would say, if you permit me to, Mr. Chairman, that reports are very unsatisfactory controls."

General Groves was realistic about Congressional control when he said:

"I feel that the Congress has a very definite responsibility, and certainly those of us who have appeared before Congressional committees are fully aware of that, particularly when we come seeking money.

"I feel that the best control the Congress has on any executive activity really is the power of the purse strings."

In addition to the congressional checks on the powers of the Commission by requiring reports in January and July of each year,\(^1\) and the appropriation control, the biggest check on the Commission may turn out to be the Joint Committee on Atomic Energy set up by Section 15 of the Act. This Committee, composed of nine members of the Senate and nine members of the House of Representatives, is empowered to make continuing studies of the activities of the Atomic Energy Commission and of problems involving the use and development of atomic energy. The Joint Committee is empowered to hire consultants, experts, and technicians to accomplish such studies.

**President's Powers Under the Act**

The President's position in regard to the Atomic Energy Act is unique. He is given great powers in some respects, and extremely limited powers over other phases of the Commission. In addition to nominating the members of the Commission, and the other key positions created, he is given power to determine "... at least once each year the quantities of fissionable material to be produced under this paragraph." The paragraph in question is entitled, "Operation of the Commission's Production Facilities", and provides for the production of fissionable materials only

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\(^1\)Id. at 130.
\(^2\)Id. at 481.
in the Commission's production facilities, except materials for use in research. So the President shall determine whether any more fissionable materials will be made. Also, the production of atomic bombs is subject to the President's consent and direction, which must be obtained at least once each year, and is limited to production in the Commission's facilities only. The President may also direct the Commission to deliver such quantities of fissionable material to the armed forces as he deems necessary in the interest of national defense or as a military weapon. But, as far as the President's power goes in directing what industrial use shall be made of new discoveries in this field, all he can do is to send, with the Commission's report on any industrial, commercial or non-military use of fissionable material or atomic energy which has a practical value, his recommendations to Congress on the licensing of such processes and industrial use by private firms. Congress has reserved to itself the power to approve or disapprove the issuance of licenses. The President may exempt any act of the Commission from compliance with laws relating to government contracts. But it seems that the Congress does not intend to subject the problem of international control of atomic energy to the ill defined power of the President to act by executive agreements. Section 8, entitled "International Arrangements," provides in effect that until Congress has approved "international arrangements," defined as, "any treaty approved by the Senate or international agreement hereafter approved by the Congress . . ." the Commission shall be bound strictly by the terms of the Atomic Energy Act. But after Congress has approved an international arrangement, the terms of this Act shall give way to the provisions of such international arrangement. This certainly is intended to limit the President's power to act in international fields without consulting Congress, for no provisions of the Act are to be relaxed except by an international arrangement which will be approved by Congress.

**Freedom of Speech and Press**

The Atomic Energy Act places stringent restrictions on our traditional concept of freedom of speech and of the press by rigidly controlling dissemination of information. The Act breaks down information into two main fields, scientific and technical, and industrial, and declares the policy of the Commission to be to control the dissemination of "restricted data" in such a manner as to assure national defense and security. The policy also states that free exchange of scientific and technical information is to be encouraged. There is no doubt that
all data pertaining to both "scientific and technical", and "industrial" information is intended to be included in the term "restricted data". The term is defined as, "... All data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security."\(^{19}\)

The dividing line between scientific and technical, and industrial information, fades away by definition, and the only conclusion to be drawn is that control of all information is within the power of the Commission, subject to its determination as to what shall or shall not be "restricted data". But the differences arising over what could be kept secret and what should be kept secret were the main sources of contention in the hearings on the Act. It was agreed by the scientists who testified before the Senate Committee that basic science should be left unfettered by any requirement of secrecy, because it was impossible to conceal basic science, and to attempt to do so would put a straightjacket on our own scientific developments. The Senate Committee reported on its attempt to reconcile a free exchange of purely scientific information with the censorship necessary until efficient international safeguards were established, in these words:

"... The common defense and security require control over information which might help other nations to build atomic weapons or power plants (until effective international safeguards are established) and, at the same time, sufficient freedom of interchange between scientists to assure the Nation of continued scientific progress."\(^{20}\)

The President's views on the subject of secrecy of basic research are found in his message to Congress on October 3, 1945, where he states:

"Scientific opinion appears to be practically unanimous that the essential theoretical knowledge upon which the discovery is based is already widely known. There is also substantial agreement that foreign research can come abreast of our present theoretical knowledge in time."\(^{21}\)

Gen. Groves testified on secrecy and what secrets we still had by stating:

"The big secret was really something that we could not keep quiet, and that was the fact that the thing went off . . . .

"The secrets, . . . are divided properly, I think, into about three classes. One class of these secrets consists of established scientific facts which were not secret at all. They were well known to the best scientists of the world. . . .

"The extent of that information which, in fact, was public knowledge to the scientists of the world, is the limit of the Smyth report which you have heard so much about. In other words, nothing in that report discloses any secrets to the world. 22

"The second classification of secrets is the scientific development which went beyond this, and most of those developments were not basic . . . the purification of metals . . . handling of certain products. . . .

"The other class of secret, which is the biggest field, is the ingenuity and the skill of the American workers, and the American management. . . .

"This is really the secret. In other words, we are ahead." 23

It would seem that no requirement controlling the free exchange of scientific knowledge is either necessary or wise, in the opinion of the scientists. Yet the Act specifically places on the Commission the problem of determining in each case what shall be classified as "restricted data", and what shall be allowed to circulate freely. The hearings brought out this problem when Dr. Harlow Shapley, Director of Harvard Observatory, was asked:

"The Chairman (Sen. McMahon): Now, the Commission, as it is created, has to make the determination of what is basic scientific information, does it not?

"Mr. Shapley: That is right.

"The Chairman: And it might be that they would not classify immediately something as basic scientific information if at that time its release at that particular moment might be highly prejudicial.

"Now, the discretion is within the Commission, is it not, under the bill?" 24

Conceivably, here is a major source of potential litigation which could arise from the provisions of the Act.

It is doubtful, in view of the extreme delicacy of the problem, and its close relationship to national defense and security, that the courts

Smyth, H. D., Atomic Energy for Military Purposes (1945). To the unscientific mind, this report seems to disclose all possible theoretical secrets on how the United States made the atomic bomb. If such a collection of scientific facts is not deemed secret by the persons in charge of security of the Manhattan Engineer District, this may tend to show how far courts might go in determining, under Sec. 10 of the Act, what is "scientific and technical", and what is "industrial" information, and whether the Commission has exceeded its authority in determining what is "restricted data", and subject to penalty if disclosed.

Hearings before the Committee on Military Affairs on H. R. 4280, 79th Cong., 1st Sess. 13 (1945).

Hearings before the Special Committee on Atomic Energy on S. 1717, 79th Cong., 2d Sess. 166, 167 (1946).
would often hold arbitrary the Commission's determinations as to what is "restricted data".

** Patent Control**

The provisions in the Atomic Energy Act respecting patents show the greatest departure from our traditional system of free enterprise and private ownership. The Act provides that there shall be no private patents for "any invention or discovery . . . useful solely in the production of fissionable material or in the utilization of fissionable material or atomic energy for a military weapon." All existing patents in this field are revoked. Also, if any new invention or discovery useful in producing fissionable material or in its utilization is invented or discovered, a report must be filed with the Commission on that subject matter within 60 days from the discovery or invention, or within 60 days after the inventor "first discovers or first has reason to believe that such invention or discovery is useful in such production or utilization." In addition, all patents which may be granted, and which can be used in research, are to be revoked to the extent that the patent can be so used with just compensation.

The Commission may declare any patent useful in non-military purposes to be affected with the public interest, and after so declaring the patent may be used by the Commission, or its licensees for a reasonable royalty fee to be paid the owner of the patent.

The Commission is also authorized "to purchase, or to take, requisition or condemn . . ." all inventions or discoveries useful in producing fissionable material, or in utilizing fissionable material. So the Commission is to be the sole owner of all prior, present and future discoveries, inventions and patents which use or may be useful in using fissionable material. If there be any loophole by which any inventor of any process useful in the field of atomic energy may claim that his invention is not covered by the all-embracing terms of the Act, it is difficult to find.

The President, in a letter to Senator McMahon, on February 6, 1946, stated that in regard to patents:

"It follows that there should be no private patents in this field of exclusive Government activity." 25

The attitude of the President is in general reflected by most of the witnesses who testified before both the Senate and the House on the hearings on S. 1717 and H. R. 4280.

Dr. Vannevar Bush, Director of the Office of Scientific Research and Development, stated his views on patent control by saying:

"... this bill provides very definitely that the Commission can take over any patent in this field. I think that that is a wise provision. It would be very unfortunate, I think, if we had a race among industrial organizations in this country on a patent basis for control of a process of this magnitude and importance."^{26}

The opposite view to government ownership of all patents in the field of atomic energy was expressed by Mr. George E. Folk, Patent Advisor to the National Association of Manufacturers, when he stated that the bill:

"... provides that any patent already issued to private individuals covering any process or device utilizing or peculiarly necessary to the utilization of fissionable materials is subject to compulsory licensing. This, of course, amounts to confiscation of private property. It is not the taking of private property by due process of law or for public use with the safeguard provided in Article V of the Amendments to the Constitution. It should suffice that the Government take, for governmental uses only, a nonexclusive license with just compensation therefor. Compulsory licensing of patents already issued has generally been regarded as unconstitutional confiscation of vested private property.

"You see, I make a distinction between patents already issued and those issued in the future. There is a distinction.

"The CHAIRMAN: Is it your conception of the law that the Government cannot use its condemnation powers and take private property with due compensation?

"MR. FOLK: Only where the public use is involved, and that doesn't mean use for Tom, Dick, and Harry or anybody that wants it. The Government doesn't condemn real estate and divide it up among its citizens."^{27}

The issue really boils down to what public purpose is to be served by the Government confiscating all patents now existing, and all future patents. The public purpose is not difficult to find.

Licensing

Directly tied up with the patent provisions of the Atomic Energy Act, but transcending into other fields, is the power of the Commission to grant a license to any person to "... manufacture, produce, or export any equipment or device utilizing fissionable material or atomic energy or to utilize fissionable material or atomic energy with or with-

^{26}Hearings before the Committee on Military Affairs on H. R. 4280, 79th Cong., 1st Sess. 49 (1945).
^{27}Hearings before the Special Committee on Atomic Energy on S. 1717, 79th Cong., 2nd Sess. 306 (1946).
out such equipment or device. . . .” But no license may be issued if other fissionable materials are produced incident to the activity licensed, unless the licensed activity was concerned with research.

The restrictions on the Commission’s power to issue licenses is worthy of note. It must report to the President on the use to be made of the license. The President in turn must report to Congress, and if within 90 days thereafter, during which time Congress shall be in session, no expression of disapproval is heard from Congress, the Commission may issue the license. The Commission may refuse to license any particular firm where it determines that such licensing would be “inimical to the common defense and security”, but the Act does direct the Commission to issue licenses on a non-exclusive basis to those who will produce some useful purpose, with proper safety precautions as to health, explosions or other hazards, and who will keep the Commission informed.

The President’s message of October 3, 1945, pointed the way toward the licensing provision of the bill by declaring:

“. . . Under appropriate safeguards the Commission should also be permitted to license any property available to the Commission for research development, and exploitation in the field of Atomic Energy. Among other things such licensing should be conditioned, of course, upon a policy of widespread distribution of peacetime products on equitable terms which will prevent monopoly.”\(^\text{28}\)

The bill has certainly gone as far as the President has suggested in this regard, and it is worth noting that one reason for compelling licenses to go through Congress for approval is, because:

“The Committee is aware, nonetheless, that the sudden introduction of certain devices utilizing the power released by nuclear fission might precipitate profound economic disorganization. Great industrial installations representing Nation-wide investments, employing many thousands of workers, might be rendered obsolete.”\(^\text{29}\)

It is undoubtedly true that Congress has here the machinery set up for the greatest government business yet undertaken in this country. Yet, there has been very little criticism of the licensing parts of the Act. The attitude has been more along the lines that private industry has no desire to assume the tremendous and vital responsibility of handling atomic energy except under government-established limits. This point of view is not only one of common sense, but one which necessarily follows from the tremendous responsibility which would fall on any company which had the temerity to begin such experimentation.


Dr. Bush, Director of O. S. R. D., expressed this view by saying:

"The manufacture of fissionable materials is by long odds the most dangerous manufacturing process in which men have ever engaged. The process is accompanied by the production of radioactive by-products as poisonous as the basic material itself. . . . Improper or incautious manipulating of substantial amounts of fissionable materials by inadequately trained or irresponsible investigators is a danger to the public safety which government must avert."\(^{30}\)

This reasoning was not difficult for all interested persons to follow, if indeed they needed any persuasion to believe that only in the hands of the government could this new source of energy be guided properly.

**INTERNATIONAL CONTROLS**

International controls are not within the scope of the problems here outlined, but as a matter of interest, a very brief summary of international developments will serve to round out this discussion.

The United States has made definite proposals to the United Nations with the view in mind of accelerating the time when international safeguards become "adequate" enough so that we may share what secrets we have left in return for international guarantees respecting the use of the atomic bomb in any future war. Mr. Bernard Baruch presented the proposals of the United States to the United Nations on June 14, 1946.\(^{31}\) The first report of the United Nations Atomic Energy Commission to the Security Council was presented December 31, 1946.\(^{32}\) In the main, little has been accomplished other than a restatement of the problems involved in international control of atomic energy.

Perhaps the most troublesome aspect of adequate international control is the problem of how such international agreements could be checked to insure that countries who have agreed to abide by the terms of such an international agreement are doing so. This control problem calls for inspectors empowered to go into each country to look into and inspect any and all buildings, mines, plants, etc. They would then report any suspicious circumstances to the United Nations. It is obvious that the authority needed for such a group of international inspectors would be difficult for many countries to accede to and accept.

The practical difficulties which an adequate control of atomic energy in international fields will encounter, suggest that the United Nations has a most difficult assignment.

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\(^{30}\)Heard before the Special Committee on Atomic Energy on S. 1717, 79th Cong., 1st Sess. 149 (1945).

\(^{31}\)The United States and the United Nations, Ser. No. 2 (Dep't. State 1946).

\(^{32}\)The United States and the United Nations, Ser. No. 8 (Dep't. State 1946).
Summary

One of the issues presented by the Atomic Energy Act is the problem of governmental control versus private industry. This encompasses not only the problems involved in the production of fissionable materials but goes back even to the source materials and the question of how such materials shall be controlled after they are mined.

Another unusual feature of the Act is the extraordinary powers given the Atomic Energy Commission. These powers are, without question, sufficient to accomplish any objectives the members of the Commission shall deem necessary. The control over the Commission by Congress is extremely unusual in that the Commission's power to issue licenses, for example, is limited by the requirement that Congress approve the proposed licensing. Then there is set up a permanent Joint Congressional Committee which will probably remain in continuous session to investigate for itself what the Atomic Energy Commission is doing.

The powers of the President over the Atomic Energy Commission seem more nearly traditional than other provisions of the Act. Perhaps the two powers of the President, one to determine the amount of fissionable material and atomic bombs to be produced, and the other to recommend to Congress the granting of licenses for use of fissionable material in private industry, are the two most unusual provisions relating to the powers of the President under the Act.

The restrictions affecting freedom of speech and press are a radical departure from our traditional concept of such liberties. Undoubtedly this is going to be one of the most controversial provisions of the Act because the Commission's power to restrict freedom of speech and of the press, when in their estimation such restrictions are necessary, is carte blanche. Along with the control exerted over freedom of speech and of the press is the Commission's absolute power to control the dissemination of information, both technical and industrial.

The patent provisions of the Act have been called socialistic, and they undoubtedly are. Of course, the system of compulsory licensing under the Act, and the provision that all patents involving fissionable material shall become the property of the Government, are confiscatory. While it should be borne in mind that the granting of patents is exclusively under the control of Congress, it is quite true that as regards present patents the patent provisions of the Act, to be upheld at all, must come under the power of eminent domain. This involves the concept
of taking private property for public use. Compulsory licensing is merely another part of the provision affecting patents. If a basis can be found for upholding the patent provisions of the Act, the compulsory licensing feature must necessarily follow, for this is but an adjunct of the control of patents. It is interesting to note, however, that while the Act specifies that such licenses shall be issued on a non-exclusive basis, it is within the power of Congress to approve or disapprove the issuance of any such licenses. Conceivably, pressure could be exerted on Congress to nullify the intent of the non-exclusive issuance of licenses to the extent that licenses would be issued to a favorite few or to a particular segment of industry.

The legal problems of an effective international control of atomic energy cannot even be visualized. If such an international control calls for inspectors who must necessarily go into each country with the authority to investigate and inspect any and all industry, both private and governmental, our Constitution undoubtedly would present obstructions. Any effective international inspection would necessarily involve a further contraction in the Anglo-Saxon concept of the inviolability of private property and individual rights. While effective international control of atomic energy is, to say the least, nebulous, the framework of the Act provides for the eventual control of atomic energy internationally.

MARTIN L. WOLF
RECENT DECISIONS

ADMINISTRATIVE LAW—A United States District Court Does Not Have Discretion to Deny Coercive Relief Enforcing a Subpoena of the Securities and Exchange Commission in the Absence of a Basis for Saying the Commission’s Demand Was Unlawful.

The Securities and Exchange Commission in connection with a lawful investigation of the Penfield Company issued a subpoena duces tecum to Young, an officer of the Penfield Company, requiring him to produce certain books of the corporation covering a four year period ending April, 1943. Young refused. The Commission then applied to the district court for an order enforcing the subpoena. After a hearing, the court ordered Young to produce the books. The order was affirmed by the circuit court of appeals. Penfield Co. v. SEC, 143 F.2d 746 (C. C. A. 9th 1944). Young persisted in his refusal. The Commission then applied to the district court for a rule to show cause why Young should not be adjudged in contempt. The district court, after hearing, adjudged Young to be in contempt and fined him $50. The fine was paid. The court refused to impose any coercive penalty to compel production of the records. The Commission filed notice of appeal. The circuit court of appeals reversed the district court and directed that Young be imprisoned until he produced the documents. SEC v. Penfield Co., 157 F.2d 65 (C. C. A. 9th 1946). The Supreme Court affirmed the circuit court of appeals and held that the payment of the fine erroneously imposed as a criminal penalty did not exhaust the jurisdiction of the court or destroy the Commission’s right to civil relief. In the absence of any basis for saying that the Commission’s demand was unlawful, the district court had no discretion to deny coercive relief enforcing the Commission’s subpoena, there being no finding that the Commission’s request had become moot. Since the Contempt proceeding was wholly civil, the criminal penalty was error as was the denial of civil relief. Penfield Co. v. SEC, 67 Sup. Ct. 918 (1947).

The first major issue involved in the Penfield case is the scope of a district court’s discretion in the enforcement of a subpoena of an administrative agency. A district court has some discretion in enforcing or not enforcing such a subpoena. This much is clear from the consistency with which Congress has refrained from granting to administrative agencies the power of enforcing their own subpoenas. Indeed the power to enforce such subpoenas would seem to be inherent in the judiciary under our Constitution as is implied by Mr. Justice Frankfurter in his dissenting opinion in the Penfield case.

This discretion, however, does not extend so far as to permit refusal to enforce a subpoena which is issued in accordance with statutory authority to procure evidence which is “not plainly incompetent or irrelevant” to a
lawful purpose of the administrative agency in the discharge of its duties under an act of Congress. *Oklahoma Press Publ. Co. v. Walling*, 327 U. S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943). The power of Congress to grant such power of subpoena to an administrative agency is encompassed within the “necessary and proper” clause. *Oklahoma Press Publ. Co. v. Walling*, supra. Holding that, in the absence of a basis for saying the demand of the Securities and Exchange Commission exceeds its lawful limits, the Commission is entitled to the aid of the court in obtaining the records requested, the *Penfield* case adds another link to this line of decisions.

Justices Frankfurter and Jackson, in dissent, seem to feel that this limitation on the courts’ discretion renders the courts mere automata and encroaches on proper judicial prerogative. However, the *Penfield* decision, following as it does the decisions in the *Endicott Johnson* and *Oklahoma Press* cases supra, still leaves the courts a considerable area of discretion in guarding against abuse in “too much indefiniteness or breadth in the things required [under the Fourth Amendment] to be, particularly described,” and as to whether the inquiry “is one which the demanding agency is authorized by law to make and whether the materials specified are relevant.” *Oklahoma Press Publ. Co. v. Walling*, supra at 208. Moreover, if the request of the administrative agency had become moot at the time the request for enforcement is acted upon by the court, the court might have discretion to deny enforcement upon such a finding. See *Penfield Co. v. SEC*, supra.

The second major question involves contempt proceedings and turns upon whether the contempt proceedings in the *Penfield* case were civil, criminal, or both. “The nature of the relief asked . . . . is determinative of the nature of the proceeding.” *Lamb v. Cramer*, 285 U. S. 217, 220 (1932). The relief asked in the *Penfield* case was the production of the records. The only penalty asked was “intended to be remedial by coercing the defendant to do what he had refused to do.” *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 422 (1911). The proceeding was thus exclusively civil.

“The same acts may justify a court in resorting to coercive and to punitive measures. Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice.” *U. S. v. United Mine Workers of America*, 330 U. S. 258, 298 (1947). However, this holding regarding mixed civil and criminal contempt proceedings is not affected by the *Penfield* case since the court based its judgment against Young in that case upon its determination that the proceeding was wholly civil. The contempt question presented in the *Penfield* case is essentially the same as that presented in *Gompers v. Bucks Stove & Range Co.*, supra and the judgment of the court here is entirely in accord with its judgment in the *Gompers* case.

HORACE BUCHANAN BAZAN
AGENCY—The United States May Not Recover for the Loss of Services of a Soldier Caused by Reason of a Negligent Injury to the Soldier by a Third Party.

The action grows out of a traffic accident which occurred on February 7, 1944, in Los Angeles, California, in which a truck of defendant, Standard Oil Company, driven by defendant, Ira Boone, an employee of Standard Oil, collided with and injured John Etzel, a soldier in the Army of the United States. As a result of these injuries, Etzel was unable to perform his duties as a soldier for a period of 29 days. During this period, Etzel received $69.31 in pay plus Army medical care and hospitalization, the reasonable and stipulated value of which was $123.25. The Government instituted suit in the District Court of the United States for the Southern District of California, 60 F. Supp. 807 (1945), to recover $192.56, the total of its payments during Etzel's incapacity. The Court held that the Government-soldier relation is a status similar to that of master and servant, and that therefore the Government had a cause of action for the loss of the soldier's services. The defendants appealed to the Circuit Court of Appeals, 153 F.2d 958 (C. C. A. 9th 1946), which court reversed on the ground that the case was controlled by California law, and the Government-soldier relation was not within the scope of the California statute defining the master's cause of action for the loss of an employee's services. The Government then appealed to the Supreme Court of the United States. Held, that although the case was governed by federal rather than by California law, the United States could not recover from the wrongdoer for negligent injury to a soldier, because it was a matter of federal fiscal policy determinable by Congress alone, and Congress had not created a right of action therefor. United States v. Standard Oil Co. of California, 67 Sup. Ct. 1604 (1947).

This case is one of first impression in this country, and it raises a question of importance, for more than 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at the expense of the Government, and payment of wages during incapacitation, were reported to the Department of Justice by the War Department during the three years prior to this case. There are two cases from foreign jurisdictions directly in point. The first of these, Attorney General v. Valle-Jones, [1935] 2 K. B. 209, held that the Crown was entitled to maintain a claim against defendant for the loss of services of the soldiers caused by the tortious act of the defendant's driver, and to recover any damages which it had thereby suffered, and that the measure of that damage was the amount of the wages and rations and hospital expenses during their incapacity, the amount of which payments, allowances and expenses, if they had not been borne by the Crown, could have been recovered by the men from defendant as damages. This case, however, was not given much weight by the Court in the instant
case because the principal issue, *i.e.* whether or not such a cause of action existed in the Crown, was conceded by the defendant. The other case directly in point is that of *Commonwealth v. Quince*, 68 Comm. L. Rep. 227 (1944), in which the High Court of Australia in a 3-2 decision held that the Government could not recover. The ground for the holding in this case was that though it is true that both at early common law and today many relationships are based on a status; such as, parent-child, husband-wife, and citizen-sovereign, still that does not mean that any two of these relationships can be analogized merely because both are based on a "status", even if the right to control and the duty to serve is apparent in all of them. The inference therefore is that though the master-servant relationship and the Government-soldier relationship may each be thought of as a status, it does not follow that what applies to one of those relationships must necessarily apply to the other.

In the principal case the Court, speaking through Mr. Justice Rutledge, found no difficulty in upholding the Government's contention that the case was governed by federal rather than by state law. Since the relation between the Government and persons in its armed forces is distinctively federal in character, the rule of *Clearfield Trust Co. v. United States*, 318 U. S. 363, (1943), rather than that of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), applies. This aspect of the case is interesting and important for the Court held that where essentially federal matters were involved there did exist an area of federal common law or more accurately an area of law of independent federal judicial decision, untouched by the decision in *Erie R. Co. v. Tompkins*, supra.

But having decided that the case was governed by federal law, the Court then proceeded to hold that the Government could not recover the damages sought. The decision was not based on the ground that no master-servant relationship actually existed as was held by a federal district court in a case arising subsequent to this one. *United States v. Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. C. 1946). Nor was it based upon the reasoning in *Commonwealth v. Quince*, supra. The real basis for the Court's decision was that the Government could not assert this right of action unless expressly authorized to do so by an act of Congress. In none of the cases hereinbefore mentioned had any court applied this line of reasoning, and it is difficult to see why the Supreme Court rested its decision on this ground. As Mr. Justice Jackson, the sole dissenter in the principal case, indicated, the principles of tort law which allow a husband or a parent to recover logically sustain the right of the United States to recover in this case. And it has been the courts which have almost exclusively developed the law of torts in England and this country. Why, then, could not the Court now apply well established common law principles to a case whose only novelty is in the facts? The Circuit Court of Appeals for the 7th Circuit did not hesitate to
do this in a recent case when it allowed a minor child to recover for the alienation of affections of its parent, Daily v. Parker, 152 F.2d 174 (C. C. A. 7th 1945), and it would seem that this is still a primary function of the courts if the law is to grow and develop by other than statutory methods.

The holding of the Court prohibiting recovery by the United States for lack of express authorization by Congress should be compared with the holding on this subject in another decision which the Court rendered the very same day. Thus in United States v. State of California, 67 Sup. Ct. 1658 (1947), the Court held that the Attorney General has broad statutory authority to institute and conduct litigation in order to establish and safeguard government rights and properties. And the fact that Congress twice failed to grant the Attorney General specific authority to file suit against the State of California would not justify restricting the Attorney General’s statutory authority to institute action against the State for a declaration of the rights of the United States as against California in the three-mile marginal belt off the California coast. Accord, Kern River Co. v. United States, 257 U. S. 147 (1921). This same principle is enunciated in United States v. San Jacinto Tin Co., 125 U. S. 273 (1888), where it was also stated that the right of the Attorney General to bring suit exists only when the Government has an interest in the remedy sought or the duty of the Government to the public requires such action.

It is submitted that in the principal case both of these last named elements were present. Certainly the Government had a definite pecuniary interest in the remedy sought. And the duty of the Government to the public did require such action for the following reason. If the person injured in this case had been a civilian, the wrongdoer would have had to pay the injured party damages which included his hospital expenses and lost wages. But because the injured party was a soldier these elements of damage are borne by the Government rather than by the defendants, the ultimate result of course being that the taxpayer shares part of the burden of making compensation for the defendants’ wrongdoing. The duty of the Government to the public therefore did require the bringing of this action. Hence according to other decisions of the Court rendered as far back as 1888 and up to and including the very same day that the principal case was decided, it would appear that the Government had the right, possibly even the duty, to bring this action without express authorization from Congress, and therefore the decision of the Court denying the Government recovery should have been based upon broader grounds.

F. SHEILD MC CANDLISH
CIVIL PROCEDURE—General Averments That Disclosure of Evidence Will Prejudice Case Are Not Sufficient to Invoke Rule 56 (f) in the Absence of Showing What Facts Are Involved and How Disclosure Will Prejudice the Case.

The assignee of the receiver of a bank sought to subject certain shares of stock of the Ronrico Corporation to the payment of a judgment obtained against the former president of the bank, Sol Meyer. It was claimed that Meyer had stock of a Florida corporation purchased by him and issued in the names of other defendants in order to defraud his creditors. The complaint was directed against the Ronrico Corporation because the Florida corporation had acquired fifty percent of the stock of Ronrico which had been transferred to a voting trust, of which the stockholders of the Florida corporation were the beneficiaries.

In support of their motion for summary judgment, defendants filed affidavits showing in complete detail that each acquired his stock in the Florida corporation independently, and not through, or from Sol Meyer. Plaintiff’s opposing affidavit failed in any material way to controvert the statements made by the defendants; instead it set forth (1) plaintiff’s belief that all of the allegations of the complaint were true in fact, and (2) a general claim that disclosure of certain additional facts would forewarn the defendants and give them opportunity for further concealment to the prejudice of his case. Held, first, affidavits which are made on belief or which fail to set forth facts admissible in evidence are not sufficient to forestall the granting of a motion for summary judgment (Rule 56 (e)); second, general averments that disclosure of evidence will prejudice the case are not sufficient grounds for invoking Rule 56 (f), but granting of the motion may be postponed to give the party making such averments opportunity to show how and why disclosure will prejudice his case. Peckham v. Ronrico Corporation, 7 F. R. D. 324 (D. P. R. 1947).

Rule 56 (e) of the Federal Rules of Civil Procedure requires that supporting and opposing affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence. Hence, plaintiff could not prevail if he relied solely on his affidavit of belief because it contained no competent evidence in support of his complaint.

Generally, summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, and where it is quite clear what the truth is so that no genuine issue remains for trial. Sartor et al. v. Arkansas Natural Gas Corp., 321 U. S. 620, 628 (1944). In order to defeat a motion for summary judgment, the papers opposing the motion, including pleadings, depositions, admissions on file and affidavits, must establish a genuine issue of fact. Fed. R. Civ. P., 56 (c). In each case the court must decide whether or not a genuine issue exists. What factors may properly be considered by
the judge in making the decision? Is he permitted to make any reasonable inferences from the facts presented in the papers? Should certain classes of cases generally be excluded from summary judgment procedure? When, if ever, is the credibility of affiants of such moment that their appearance and conduct upon cross-examination may change the outcome of a case so that a trial is essential?

In the Sartor case, supra, defendant's motion was supported in part by affidavits of expert witnesses who were in some way connected with the defendant or the gas business. The motion was denied and the case sent back for trial on the ground that interested affiants should not be allowed to escape cross-examination; their credibility was a matter of fact for the jury. Arnstein v. Porter, 154 F.2d 464 (C. C. A. 2d 1946), presents a similar situation. There defendant was charged with plagiarizing plaintiff's music. The record shows that Porter denied having access to or copying of Arnstein's work; both the challenged and challenging compositions were played for the court by way of the affidavit of Porter's pianist; and plaintiff admitted he had no direct proof to substantiate his charge. Granting of the motion was overruled on the ground that the credibility of the defendant and his witnesses was a fact to be passed on by the jury. The logical conclusion from the rule of these cases would seem to require automatic refusal of motions for summary judgment in almost all cases where there is suspicion of dishonesty, particularly in fraud, plagiarism and patent infringement cases. No type of case is reserved from the proper application of Rule 56, and judicial construction which generally denies motions for summary judgment in particular types of cases must certainly be labeled conservative.

A further manifestation of this view appears in a dictum by Judge L. Hand in Bozant v. Bank of New York, 156 F.2d 787, 790 (C. C. A. 2d 1946), to the effect that when a case depends upon what the opponent might draw out of the movant at the trial, motion for summary judgment should be denied. This is tantamount to a contention that there must be a trial when the facts are peculiarly within the knowledge of the moving party. Assuming that reasons have been given by the opponent why such is the case, the court is not required to deny the motion but may order "continuance to permit more affidavits to be obtained or depositions to be taken . . . or make such order as is just". (Rule 56 (f)). And surely the bare claim by an opposing party that his case must depend on what he can elicit from the moving party at trial, without more, constitutes no grounds for denying a motion. In Arnstein v. Porter, supra, Judge Frank, at page 471, alludes to an unreported case wherein a motion for summary judgment was denied despite a mass of affidavits which made the opposing party's case seem nothing but a sham; at the trial cross-examination revealed facts, theretofore unknown to the opponent which so riddled the movant's case as it had previously appeared that judgment was entered for several million dollars.
from which there was no appeal. The rationale behind the narration of this case reduces the summary judgment procedure to a glorified judgment on the pleadings which is concerned with matters of law only. Thus in *Dixon v. American Tel. & Tel. Co.*, 159 F.2d 863 (C. C. A. 2d 1947), a motion for summary judgment was granted where the moving party's affidavits argued laches; but laches raises a question of law. *Reconstruction Finance Corp. v. Goldberg*, 143 F.2d 752 (C. C. A. 7th 1944). Only in such clear-cut cases, the conservatives hold, should the motion be granted.

The liberal approach to summary judgment procedure, as exemplified by Judge Clark in *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469 (C. C. A. 2d 1945), assumes, and rightly so for the majority of cases, that there can be no genuine issue of fact when the opposing affidavits present no evidentiary facts or substantial reasons for failing to present them. If the procedure is to be an effective instrument for the efficient dispatch of litigation, allegations of fact in the pleadings must be probed in order to determine whether issues formally raised are, in fact, sham or otherwise unsubstantial. *Engl v. Aetna Life Insurance Co.*, supra; *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (C. C. A. 2d 1943). The conservatives believe that the liberal view penalizes silence and uses summary judgment in preference to inducing discovery. See Judge Frank's dissent in *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399, 407 (C. C. A. 2d 1945). The ruling of the Supreme Court in *Griffin v. Griffin*, 327 U. S. 220 (1946), that suspicions unsupported by facts are not a basis for denying summary judgment seems to indicate that failure to produce evidence is grounds for granting the motion. In this respect, the decision would appear to be a more liberal construction than was the case in *Sartor v. Arkansas Natural Gas Corp.*, supra.

The sole function of summary judgment procedure is the immediate adjudication of matters which ought not to be the subject of prolonged, time-consuming and expensive judicial proceedings. The haunting fear of those who expound the conservative view that a litigant may be deprived of a trial is a manifestation of commendable caution in behalf of the hapless litigant. However, the moving party is entitled to prompt settlement of the case consistent with human, not ideal, justice.

JOHN T. HENDERSON

CONFLICT OF LAWS—Jurisdiction Declined by District Court on Diversity of Citizenship Suit Where Plaintiff Failed to Make Real Showing of Convenience.

Appellant, policyholder of the Lumbermens Mutual Casualty Company, an Illinois corporation, brought suit “in the right of Lumbermens and on behalf of all its members and policyholders” against Lumbermen’s Mutual
Casualty Company, James S. Kemper, its president and manager, and against James S. Kemper & Co., an Illinois corporation, in the United States District Court for the Eastern District of New York, plaintiff's home jurisdiction, alleging breach of trust of the company officers. Defendants moved for dismissal of the suit under the doctrine of *forum non conveniens* on the grounds that the defendant corporations' domicile and principal place of business was in Illinois, the directors lived in Illinois, all records were kept in Illinois, no witnesses necessary to the case lived outside Illinois, the plaintiff would have to prove his case from books and records found in Illinois, the plaintiff's personal interest in the case amounted only to $250.00, Illinois law would largely govern, and the internal affairs of a foreign corporation would be involved. The District Court granted the motion to dismiss, which on appeal was affirmed by the Second Circuit Court of Appeals. The Supreme Court on March 10, 1947 affirmed the decision of the lower court. Held, a district court, in a derivative action, may refuse to exercise its jurisdiction when a defendant shows much harrassment and plaintiff's response discloses little countervailing benefit to himself. *Koster v. (American) Lumbermen's Mutual Casualty Company*, 67 Sup. Ct. 828 (1947).


The Supreme Court of the United States indicated its approval of this rule in the case of *Rogers v. Guaranty Trust Co. of N. Y.*, 288 U. S. 123 (1933), in which a New York citizen brought suit in a New York federal court against the American Tobacco Company of New Jersey. There, despite the facts that the American Tobacco Company's principal place of business was in New York, that the directors' meetings were held in New York, and that executive offices and records were in New York, the Supreme Court applied the doctrine of *forum non conveniens* on the basis that the suit involved inquiry into the internal affairs of a foreign corporation and that adjudication would require interpretation of New Jersey law, which interpretation was not free from doubt. However, in the dissent to that opinion Justice Cardozo
made the statement, frequently quoted, that the doctrine of *forum non conveniens* was an instrument of justice and the mere fact that the internal affairs of a corporation were involved should not be an obstacle to adjudication of the suit if justice would thereby be dispensed.

The dissent in the *Guaranty Trust Company* case became the majority opinion in *Williams v. Green Bay & Western RR. Co.*, 326 U. S. 549 (1946), when the Supreme Court held that litigation involving the internal affairs of a corporation did not, of itself, afford a basis for the application of the doctrine of *forum non conveniens*, in the absence of special circumstances that would make the suit oppressive and unjust. Since the principal offices of the Green Bay and Western RR. were in New York, five out of six of its directors and most of its executive officers lived in New York, and the company's books and records were kept in New York, it was thought improper to grant dismissal on grounds of *forum non conveniens*, despite the fact that the internal affairs of a Wisconsin corporation were being probed. In the Court's opinion, there was no oppressiveness or vexation visited on the defendant in adjudicating the suit in New York. The rule of the *Guaranty Trust Company* case was seemingly disapproved by the statement in the *Green Bay* case *supra* at 556 that "the fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it." The Court held, moreover, that the fact that the corporation law of another state was involved was not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. *Rogers v. Guaranty Trust Company* was not, however, expressly overruled and the Court cautiously proposed that each case should turn on its facts.

The present case fitted so snugly between the *Guaranty Trust Company* case and the *Green Bay* case that the Supreme Court divided five to four in its decision. Primarily, this case serves to show that in applying *forum non conveniens* no one factor is determinative. Every element of convenience and inconvenience must be considered, such as, "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive," as well as questions as to the enforceability of a judgment if one is obtained, and relative advantages and obstacles to a fair trial. *Gulf Oil Corporation v. Gilbert*, 67 Sup. Ct. 839 (1947). Balancing the scales, a court may then use or discard *forum non conveniens* as will best serve the convenience of the parties and the ends of justice. One point, however, is clear, and to that extent the doctrine enunciated in the *Green Bay* case remains the law; namely, that an application of *forum non conveniens* merely because the internal affairs of a corporation are involved is erroneous.
In the balancing of conveniences the advantage rests with the plaintiff, for the Supreme Court clearly stated that "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." Koster v. Lumbermens Mutual Casualty Company, supra, at 832. But it still remains true, as stated by Justice Cardozo in Travis v. Knox Terpezone Company, 215 N. Y. 259, 109 N. E. 250 (1915), that "to trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture."

The doctrine of forum non conveniens is developing and growing, as demonstrated in the case of Gulf Oil Corporation v. Gilbert, 67 Sup. Ct. 839 (1947), in which the doctrine was applied for the first time by the Supreme Court to an action at law. Its difficulties are those inherent in a legal doctrine bottomed on a factual basis. Its benefits have yet to be fully savored. It remains for later cases to clarify the extent and limitations of the discretion allowed by forum non conveniens and the relative weight to be given each factor involved before its defensive strength can be forecast by litigants with greater exactitude.

Elias C. Rodriguez

CONSTITUTIONAL LAW—Use of a "Blue Ribbon" Jury to Obtain Conviction in State Court Does Not Violate Due Process and Equal Protection Clauses of the Fourteenth Amendment Where Defendant Fails to Prove a Presently Existing Disparity in the Percentage of Convictions as between Special and Ordinary Juries, and Where No Systematic Exclusion of Jurors of His Economic Class Is Proved.

Joseph S. Fay and James Bove, labor union officers, were found guilty by the New York Supreme Court of the crimes of extortion and conspiracy to extort, and these judgments were affirmed both by the Appellate Division and the Court of Appeals of New York. People v. Fay, 270 App. Div. 261, 59 N. Y. S.2d 127 (1945); 296 N. Y. 510, 68 N. E.2d 453 (1946). Fay and Bove had collected upwards of $300,000 from several large construction concerns, but denied on trial that payment was induced by threats of unlawful injury to person or property, claiming that the payments, in the nature of bribes at the worst, were voluntary and in consideration for their efforts to assist the contractors in avoiding labor troubles. The jury panel was challenged in good time on the ground that use of a handpicked special panel, composed of certain classes of persons to the exclusion of others and allegedly resulting in juries much more prone to convict than general panel juries, operated as a denial of federal due process and equal protection of the laws.
The Supreme Court granted certiorari after the contention was overruled by all state courts. Held: The convicted defendant failed to prove that members of his economic class or group were systematically excluded from the special jury panel or that there existed a disparity in the percentage of convictions as between special and ordinary juries at the time of his trial and consequently showed no denial of due process or equal protection. Fay v. People of State of New York, 67 Sup. Ct. 1613 (1947).

The following principles have evolved from the due process concept as applied to juries:

(1.) Due process is defined as "law in its regular course of administration through courts of justice." Leeper v. Texas, 139 U. S. 462, 468 (1890).

(2.) In this tradition, dual jury systems are not as such violative of due process or equal protection. Gardner v. Michigan, 199 U. S. 325 (1905); Hall v. Johnson, 186 U. S. 480 (1901); Brown v. New Jersey, 175 U. S. 172 (1899); Missouri v. Lewis, 101 U. S. 22 (1879); People v. Meyer, 162 N. Y. 357, 56 N. E. 758 (1900); People v. Dunn, 157 N. Y. 528, 52 N. E. 572 (1899).

(3.) (a.) The standards used in selection of a jury may on their face or in their administration be unconstitutional if their effect is to exclude persons from jury service solely on account of race, color, class or condition. Obviously this applies to special as well as to ordinary juries. 18 Stat. 336 (1875), 8 U. S. C. 44 (1940); Norris v. Alabama, 294 U. S. 587 (1935); Thomas v. Texas, 212 U. S. 278 (1909); Martin v. Texas, 200 U. S. 316 (1906).

(b.) The exclusion must be shown to be intentional, that is, it must amount to discrimination. Hill v. Texas, 316 U. S. 400 (1942); Smith v. Texas, 311 U. S. 128 (1940); Thomas v. Texas, supra; Martin v. Texas, supra; Virginia v. Rives, 100 U. S. 313 (1879).

(c.) Exclusions of certain occupational groups have been uniformly held constitutional, e.g., lawyers, doctors, clergymen, firemen, etc. Rawlins v. Georgia, 201 U. S. 638 (1906); Williams v. Mississippi, 170 U. S. 213 (1898).

(d.) A state may deny women the right to serve as jurors. Commonwealth v. Welosky, 276 Mass. 398, 177 N. E. 656 (1931), cert. denied, 284 U. S. 684 (1932). Likewise, a state may prescribe that no woman shall be drawn for jury service unless she has previously filed a written declaration of her desire to be subject to such service. State v. Dreher, 166 La. 924, 118 So. 85 (1928), cert. denied, 278 U. S. 641 (1928).

(4.) Due process requires that a defendant receive his trial before a tribunal capable of conducting an actual trial, not the mere form of a trial. Tumey v. Ohio, 273 U. S. 510 (1927); Moore v. Dempsey, 261 U. S. 86 (1923).
The five to four majority opinion in the present case fits in with these principles. It serves to draw together the decisions concerned with exclusions of groups (principle (3)); further, it makes an important addition to principle (2), in a dictum which offers opponents of special juries a method by which a given special panel may be subjected to successful attack.

As to exclusions, defendants claimed that the special panel was unconstitutional in that (a) laborers, operatives, craftsmen, and service employees were systematically excluded, and (b) women were excluded. The Court, after quoting the Act of Congress of March 1, 1875, 18 Stat. 336 supra, held: "We say that since Congress has considered the specific application of this Amendment to the State jury systems and has found only these [racial] discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due Process." This holding effectively summarizes previous decisions mentioned under principle (3), supra.

As to denial of fair trial, principle (4), supra, the Court followed familiar law in finding: 1) That exclusion of women did not deny defendants due process, apart from the fact that the Court has never recognized a defendant's objection to exclusions save where he was a member of the excluded class, and 2) that the alleged intentional exclusion of "those having the point of view of the laboring man" was unproved. On this second point defendants had introduced a tabulation of occupations of the 2700 special panel jurors, which listed none of them under "working class" occupations. Comparison of this list with a tabulation of occupations of 900,000 employables in Manhattan presented a striking contrast. But the validity of the comparison was impugned on the ground that the classification of jurors' occupations was inaccurate and also because the percentage of New York employables in each occupation established no valid ratio for those of each occupation who should compose a fairly selected jury panel. Obviously, application of literacy and other tests would hardly act with proportional equality on all strata of society.

The Court made an addition to principle (2), supra, which opens a new means of attack on special juries. Defendants claimed that the special panel was more inclined to convict than the general panel. They offered studies of the New York State Judicial Council which showed that in 1933 and 1934 special juries convicted twice as often as ordinary juries. The Court noted that there was no allegation in these studies that a conviction had ever been obtained against an innocent defendant, and that abolition of special panels was something to be accomplished by the New York legislature. Nonetheless, it was stated that even without a showing that a special jury had ever convicted an innocent defendant, proof that such a disparate rate of convictions as prevailed in 1933-34 still existed in 1945 would mean that defendants'
being tried before such a jury amounted to denial of equal protection. Although defendants' claim was rejected because they failed to show that the disparity in conviction ratios existed when they were tried, this dictum suggests a method for successful attack, by use of conviction statistics, on special juries.

The dissent denies the validity of principle (2), supra. Mr. Justice Murphy insists that the dual system of juries is intrinsically wrong; that people eligible for general jury service must not be excluded from any jury panel, because the panel from which the trial jury is drawn must include the less intelligent and the less trained citizens, if it is to be truly a cross-section of the community. Smith v. Texas, supra, is cited in support of this view.

It is submitted, however, that Smith v. Texas was decided on the ground that the Negro defendant was denied equal protection of the laws because of discrimination against Negroes in the selection of the jury. The "representative of the community" language employed in the opinion is not the basis of the decision, although it is interwoven with it. It is true that three recent opinions in condemning exclusions of groups from juries have contained language suggesting that the Supreme Court has required juries to be representative of the community, but in these cases the Court was concerned with the administration of justice in federal rather than state courts, and each was concerned with the exclusion of a particular class or group. None contains a blanket condemnation of special juries. U. S. v. Ballard, 329 U. S. 187 (1946); Thiel v. Southern Pac. Co., 328 U. S. 217 (1946); Glasser v. U. S., 315 U. S. 60 (1942).

JOSEPH A. BARRY

CORPORATIONS—Production and Refining of Petroleum Products Held within Scope of Agricultural Marketing Coöperative Organized under Coöperative Marketing Act.

The Attorney-General of Kansas brought quo warranto proceedings against the Consumers Coöperative Association and sought a decree of dissolution, alleging that defendant was acting ultra vires of the Coöperative Marketing Act under which it was incorporated. The two issues raised by the State were: (1) that the operation of oil wells, refineries and printing plants, and other activities of this Association were outside the powers of an agricultural marketing coöperative, and (2) that the membership of Consumers Coöperative Association was illegal because it included coöperatives which were not incorporated under the Coöperative Marketing Act. Intervening as a third party defendant, the State Corporation Commission sought a declaratory judgment to determine whether or not the Consumers Coöperative Association must register its stock with the "Blue-Sky Department" and whether deferred
patronage refund certificates were securities and therefore subject to the Securities Act. Held, Consumers Coöperative Association was not acting ultra vires, that membership of a marketing coöperative could include non-marketing coöperatives, and that securities of Consumers Coöperative Association must be registered under the Securities Act. State v. Consumers Coöperative Association, 163 Kan. 324, 183 P.2d 423 (1947).

The Coöperative Marketing Act, now law in thirty states, was designed to allow farmers and agricultural associations to stabilize the market of farm products by coöperation. Coöperatives organized under the act normally deal in all activities associated with the transfer of produce from the farm to the consumer, e.g., trucking, receiving, grading, processing, standardizing, storing of produce, and selling. In recent years these groups have expanded beyond the mere marketing phase of agricultural economics and have begun to function as a source of supply of farm equipment. This Kansas Association for example not only has power to produce oil from its wells and refine it to the extent of an annual capacity of 130 million gallons of motor fuels, but it also owns lumber mills, and is empowered to manufacture paint, farm machinery, auto tires and accessories. Following such economic development, challenge of its legality is to be expected.

In general, there are two major categories of coöperatives. One type pools the products of its members and sells them through one agency to eliminate competition among the producers, and the other supplies to its members equipment or commodities. State v. Consumer’s Co-op. Ass’n., supra. The validity of the first type has been settled, Kansas Wheat Growers’ Ass’n v. Schulte, 113 Kan. 672, 216 Pac. 311 (1903). See note, 98 A. L. R. 1409 (1935). The issue now raised is the validity of a coöperative of the second type, i.e., a purchasing agency.

Since this question is raised by quo warranto, any decision rests solely upon what rule of statutory construction is applied, i.e., strict or liberal. Although a standard statute was drafted, the final enactments have differences which are quite likely to be used by courts to dismiss authority of other cases. A restrictive definition of the word “supplies” in the code caused a Virginia court to hold that the sale of gasoline, oil, and other consumers’ goods was outside the scope of business of marketing coöperative. Rockingham Coöp. Farm Bureau v. City of Harrisonburg, 171 Va. 339, 198 S. E. 908 (1938). In Missouri the operation of an electric utility was considered ultra vires of a coöperative because it was neither a “mercantile business” nor one for “the purpose of purchasing or selling to shareholders and others, groceries and other articles of merchandise”, these being the purposes of Missouri marketing coöperatives. State v. Sho- Me Power Coöp., 354 Mo. 892, 191 S. W.2d 971 (1946).

As passed in Kansas the Act provides that coöperatives may engage in any activity in connection with the manufacturing, selling, or supplying to its
members of machinery, equipment, or supplies. The controversy with Consumers Coöperative Association arose over whether this power must be interpreted in light of the first section of the Act which set out the purpose of the Act as fostering the stabilization of the marketing problem of agriculture producers.

The courts in recent years have liberally construed the Coöperative Marketing Acts in order to accomplish the objects for which they were enacted. Dark Tobacco Growers Coöp. Ass'n. v. Robertson, 84 Ind. App. 51, 150 N. E. 106 (1926); Lexington Mill & Elevator Co. v. Browne, 116 Neb. 753, 219 N. W. 12 (1928); Texas Certified Cottonseed Breeders’ Ass'n. v. Aldridge, 122 Tex. 464, 61 S. W. 2d 79 (1933). In Tobacco Growers' Coöp. Ass'n. v. Jones, 185 N. C. 265, 117 S. E. 174 (1923), it was recognized by the courts that the object of a coöperative is frustrated if it must rely upon its competitors and enemies for essential elements of its economic life. The rule of liberal interpretation of the act laid down in Kan. Wheat Growers’ Ass'n. v. Schulte, 113 Kan. 672, 216 Pac. 311 (1903), and Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936), provided ample authority for the holding that the preamble of the Act was not an essential part, that “motor fuel is merely synthetic hay and oats”, and that production of petroleum products therefore was a necessary supply to agricultural producers.

The restriction of membership to farm producers is an inherent characteristic of an agricultural marketing coöperative since the theory of associating under the Act is to prevent the waste, speculation, and losses from unrestricted competition that occur when farmers individually deal with large well-organized middlemen. It must be a non-profit association of benefit to farmers, and the Acts so provides. Kan. Gen. Stat., c. 17 §§ 1602, 1606 (1935). Sapiro, The Law of Coöperative Marketing, 15 Ky. L. J. 1 (1926); Coöperative Marketing, 8 Iowa L. Bull. 193 (1923).

Since, as shown in 26 Mich. L. Rev. 648 (1928), there are many other types of coöperatives besides those dealing in farm products, the question of the character of non-marketing coöperative members of Consumers Coöperative Association naturally arose here. This court recognized the basic distinction between a coöperative and a corporation in that a coöperative partakes of the nature of its members while a corporation does not. California Employment Comp. Dir. v. Butte County Rice Growers' Ass'n., 25 Cal. 624, 146 P.2d 908 (1944); Georgia Milk Producers Confed. v. City of Atlanta, 185 Ga. 192, 194 S. E. 181 (1937); Big Wood Canal Co. v. Unemployment Comp. Div., 61 Idaho 247, 100 P.2d 49 (1940); Wheat Growers' Ass'n. v. Sedgwick County Com’rs., 119 Kan. 877, 241 Pac. 466 (1925); Allen v. Commercial Casualty Ins. Co., 132 N. J. L. 269, 39 A.2d 447 (1944); Wilson v. Israel, 185 App. Div. 816, 173 N. Y. Supp. 842 (1919); Yakima Fruit Growers' Ass'n. v. Henneford, 182 Wash. 437, 47 P.2d 831 (1935).

There being no dispute in this case on the fact that all member coöperatives
were composed of agricultural producers the court sustained the legality of the membership of non-marketing coöperatives and laid down the rule that the only requirement for a coöperative to be a member of a marketing association was that it be composed of agricultural producers.

Although stock of non-profit associations normally is exempt from the Kansas Securities Act, it was decided that Consumers Coöperative Association stock must be registered because this was neither a fraternal nor benevolent group, that being essential for exemption. The status of the deferred patronage certificates was not determined here; this court considered them exempt from registration since they were not sold but constituted merely a means for distributing surplus.

T. R. LIEBERT

COURTS—District of Columbia Municipal Court Has Jurisdiction of a Joint Action Where Severable Claims Are Made, Each Within Jurisdictional Maximum, although the Total Demanded Exceeds that Limit.

A husband and wife were injured when the taxicab in which they were riding became involved in a collision. They filed a single complaint. Each sought $3,000. Thus separate and distinct claims were joined in the one complaint for a sum of $6,000. The action was brought in the Municipal Court, where the monetary maximum is $3,000. A section of the Municipal Court rule on permissive joinder (Rule 20) prohibits joinder if the entire amount demanded exceeds the jurisdiction of the court. Held, the jurisdictional criterion is not the aggregate of the claims but the amount of each separate claim, and this proviso of the Municipal Court rule is invalid because it is an attempt to limit jurisdiction. Taylor v. Yellow Cab Co. of D. C., 53 A.2d 691 (D. C. Mun. App. 1947).

It is a new question in the District of Columbia whether or not a jurisdictional maximum has been exceeded by the proper joinder of separate and distinct demands individually less than the limit but totaling beyond it. Elsewhere the general holding has been that the amount of each individual claim furnishes the test. The rationale for this rule is shown by Spetler v. Jogel Realty Co., 224 App. Div. 612, 231 N. Y. Supp. 517 (1st Dep't 1928). Three plaintiffs sued one defendant for personal injuries and loss of services in the City Court where the jurisdictional limit was $3,000. In each of the four causes of action $3,000 was demanded. The court held that although, under local law, the proper test of jurisdiction was the amount for which judgment was demanded in the complaint, each cause of action should be considered as a separate complaint. It was said that otherwise the beneficial provisions of the New York joinder statute would be denied at times to litigants. In Colla v. Carmichael U-Drive Autos, 111 Cal. App.
(Supp.) 784, 294 Pac. 378 (1930), the court adhered to this same rationale and held that each claim is a separate cause of action for jurisdictional purposes so that joinder can be effectuated. Vigil v. Cayuga Construction Corp., 54 N. Y. S.2d 94, 96 (N. Y. City Cts. 1945), is an extreme application of the rule. Here, over a thousand plaintiffs were joined and the total demanded was nearly one and a half million dollars. The monetary limit of the trial court was $3,000. The joinder was permitted. The opinion emphasized that the New York joinder statute "is a remedial one to facilitate the progress of litigation by permitting all persons where claims involved any common question of law or of fact . . . . to join in one action."

Dilworth v. Yellow Taxi Corporation, 220 App. Div. 772, 221 N. Y. Supp. 813 (2d Dep't 1927); and Myers v. Flewellen, 47 S. W.2d 657 (Tex. Civ. App. 1932), represented the contrary view and held that the aggregate of the claims was the criterion. Strict construction of the jurisdictional statute seems to have been the basis for these decisions. In the Dilworth case it was said that there was only one action and one summons and that the trial court lacked authority to hear the case because the sum demanded in the summons exceeded the jurisdictional maximum. In the Texas case the applicable law stated that there was no jurisdiction where the amount in controversy exceeded $1,000. The court said that the "amount in controversy" is the aggregate of the amounts claimed in the petition. That total was $2,300 and therefore it was held that the trial court lacked jurisdiction. Both these cases have been overruled. Merten v. Queen Rental Corporation, 241 App. Div. 831, 271 N. Y. Supp. 271 (2d Dep't 1934); Long v. City of Wichita Falls, 142 Tex. 202, 176 S. W.2d 936 (1944).

Many federal decisions have held that separate claims cannot be aggregated so as to achieve the monetary minimum of the district courts. Clark v. Paul Gray, Inc., 306 U. S. 583, 589 (1939); Fechheimer Bros. Co. v. Barnwasser, 146 F.2d 974 (C. C. A. 6th 1945); Scarborough v. Mountain States Telephone & Tel. Co., 45 F. Supp. 176 (W. D. Tex. 1942). Here, use of the amount of the separate claim as the criterion amounts to a strict construction of the jurisdictional statute, for it operates to keep the litigants out of the district courts. Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 337 (1895), illustrates the rule that federal jurisdiction statutes are rigidly construed. However, the case of Stanley v. Barker, 25 Vt. 507 (1853), indicates that strict construction should not be used to defeat jurisdiction in state courts. It might be thought that a doctrine of liberal interpretation of jurisdiction requirements is behind the application of the separate claim test by the state courts. Certainly use of that criterion amounts to liberal interpretation where there is a question of whether or not a monetary limit has been exceeded. In that case the parties are heard despite the fact their claims total beyond the maximum. However, the idea that a doctrine of free construction of jurisdiction statutes is a basis for state courts using the amount of each separate demand as the jurisdictional test is vitiated by the
fact that the courts often have applied that criterion where it barred litigants from adding their claims so as to get into a superior state court. That is strict construction of the jurisdiction statute. *Winrod v. Wolters*, 141 Cal. 399, 74 Pac. 1037 (1903); *Long v. City of Wichita Falls*, 142 Tex. 202, 176 S. W. 2d 936 (1944). The courts seem to interpret monetary jurisdictional limitation rules at once strictly and liberally so as to restrict suits in higher courts and to permit actions to be brought in lower courts.

It might be thought that if the Municipal Court were to try cases in which causes of action were joined so that the total claimed was in excess of $3,000 then the court might be forced to give judgments exceeding the $3,000 limit. However, Municipal Court Rule 20, itself, answers the objection. It provides that:

"Judgment may be given for one or more of the plaintiffs according to their respective rights, and against one or more defendants according to their respective liabilities." (Italics supplied.)

Furthermore, the authority conferred by statute to join several causes of action in one action has been held to carry with it the authority to enter separate judgments in such an action. *Lewis v. Bricker*, 235 Mich. 656, 661, 209 N. W. 832 (1926).

The amount of each individual claim is the measure of the amount involved in a suit and therefore the prohibition against joinder of claims which totaled over $3,000 was a limitation of jurisdiction. A rule of court must not abridge or extend jurisdiction. *United States v. Sherwood*, 312 U. S. 584, 590 (1941); *Chase Watch Corp. v. Heins*, 284 N. W. 129, 134, 29 N. E. 2d 646 (1940). Further D. C. Code, § 11-756 (b) (1940), states that the rules of the Municipal Court shall conform as nearly as may be practical to be the procedure obtaining under the Federal Rules of Civil Procedure. The attacked provision of Municipal Court Rule 20 eliminated the use of joinder where the claims aggregated more than $3,000. This was deviation from the "beneficent provisions" of the permissive joinder rule of the Federal Rules of Civil Procedure, (Rule 20), and is a further reason for invalidating this section of the Municipal Court Rule. *Covey v. Williamson*, 52 App. D. C. 289, 286 F. 459 (1923). (The rules of the Municipal Court must not be in conflict with any statute.) See Note, 110 A. L. R. 43 (1937).

Civil cases in the District of Columbia must be tried either by the United States District Court or by the Municipal Court. The amounts of these properly joined claims could not have been aggregated so as to achieve the monetary minimum of the District Court, and therefore this joinder was made possible only by invalidating this section of Rule 20 and permitting the joinder in the Municipal Court. Thus, this decision follows the trend in favor of joinder. It points to the use of one action in place of several and its effect will be to lessen the expense, delay and confusion which attend multiplicity of action.

Frank Forve
EVIDENCE—Illegitimacy of a Child Born to a Married Woman May Be Established by Means of the Recently Discovered RH Blood Grouping Tests.

Filiation proceedings were brought by Elsie Saks against her husband, Richard Saks, seeking support for her child, Karl Barnard. The child was born ten or eleven weeks after the marriage ceremony. When the husband denied paternity, the parties and the child submitted to blood grouping tests. Under two recognized tests the blood of the putative father and that of the child were compatible; however, under the recently discovered RH test, the possibility of the respondent’s being the father was excluded. Held, that the latter evidence, if credible, is admissible and is to be given the same consideration as any other type of testimony. Saks v. Saks, 71 N. Y. S. 2d 797 (N. Y. City Cts. 1947).

This case represents the most recent inroad on the once powerful presumption of legitimacy. For five centuries the English law had conclusively presumed that a child born to a married woman was legitimate. See In re Jones’ Estate, 110 Vt. 438, 443, 8 A. 2d 631, 632 (1939). The English courts later relented and held the presumption to be one of fact, rebuttable by evidence showing that the husband was impotent or absent beyond four seas during the wife’s pregnancy. Regina v. Murrey, 1 Salk. 122, 91 Eng. Rep. 115 (1795). This rule gave way to the modern doctrine that the presumption could be overcome by other competent and relevant evidence showing that the husband could not have been the father of the child. Rex v. Maidstone, 12 East 550, 104 Eng. Rep. 215 (1810). The United States courts have followed the latter doctrine, as exemplified by the case of Nolting v. Holt, 113 Kan. 495, 215 Pac. 281 (1923), where the presumption was overcome by showing that a mulatto child could not be born of two white parents.

It was inevitable that the problem of receiving the results of scientific tests as competent evidence to prove or disprove paternity would arise. Such evidence is opinion evidence. Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P. 2d 1043 (1937). It is admissible, if at all, only when the scientific method has passed from the experimental to the demonstrable stage. Frye v. United States, 293 F. 1013 (App. D. C. 1923); Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P. 2d 442 (1946); State v. Bohner, 210 Wis. 651, 246 N. W. 314 (1933).

In 1910 Karl Landsteiner discovered that:

"... the red corpuscles in the human blood contain two affirmative agglutinating substances, and that every individual's blood falls into one of four classes and remains the same through life. According to the Mendelian law of inheritance, this blood individuality is an hereditary characteristic which passes from parent to child and no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents." Arais v. Kalensnikoff, supra at 430, 74 P. 2d at 104.
Results from these blood tests have been widely accepted by the courts because they have a demonstrable certitude. *Beach v. Beach*, 114 F. 2d 479 (App. D. C. 1940); *Euclide v. State*, 231 Wis. 616, 286 N. W. 3 (1939); *State v. Wright*, 59 Ohio App. 191, 17 N. E. 2d 428 (1938); *In re Swahn*, 158 Misc. 17, 285 N. Y. Supp. 234 (Surr. Ct. 1936). See Note, 15 St. JOHN’S L. REV. 228 (1941). Blood grouping tests may only be employed negatively to disprove the alleged paternity of a particular person, and in no case may they be used positively to prove paternity. 1 WIGMORE, EVIDENCE § 165a (3d ed. 1940); see also Note, 1 U. of Chi. L. REV. 798 (1934). Since so large a portion of the population falls within each blood group, evidence of compatibility will only show the possibility, never the necessity, of paternity.

Because of the danger of human error in the conduct of these serological blood tests, the courts are generally reluctant to admit the results as conclusive evidence. According to the majority view, such evidence is like any other expert opinion which may be rejected by the jury if there is any other competent testimony or evidence. *Berry v. Chaplin*, supra; *State ex rel Walker v. Clark*, 144 Ohio St. 305, 58 N. E. 2d 773 (1944); *State ex rel Slovak v. Holod*, 63 Ohio App. 16, 24 N. E. 2d 962 (1939). However, if there is no other evidence, the courts will apparently consider such evidence as sufficient to support a verdict, although they will not direct a verdict solely on the basis of a blood grouping test.

In 1940 Drs. Landsteiner and Weiner discovered a new type agglutination (naming it RH), as a result of which two more blood types were distinguished—the RH positive and the RH negative, each with its own sub-classifications. The RH grouping is applied in the same manner as the other two recognized blood tests to establish non-compatibility of blood between parent and child. The medicolegal application of these RH blood types in cases of disputed parentage raises the chances of excluding parentage from about 33 per cent to almost 45 per cent. This new test has come before a court apparently for the first time in *Saks v. Saks*, supra, and the rationale of the decision is based upon the fact that the judge thought there was sufficient certainty in the test to give it probative value.

The decision in the instant case adheres to the majority view on the admissibility and conclusiveness of blood grouping tests as evidence. The court further stated that no other testimony was submitted in an effort to impeach the doctor’s credibility or his ability as a physician or to negative his conclusion. Therefore, “. . . the court could not without basis discard the testimony of a reputable and competent witness who had testified under oath.” *Id.* at 801.

The decision does not expand the doctrine of the admissibility of scientific evidence, but merely reenforces the theory that the results of scientific tests, made by competent persons and established as a matter of expert opinion, should be admissible in the same way as any other type of testimony, provided the validity and certitude of the method has been shown.

PAUL R. CONNOLLY

Appellee, a Michigan corporation, brought suit in Michigan for a declaratory judgment that appellant's patent (relating to "2-4-D" weed killer) was invalid and not infringed by appellee. Appellant was a Delaware corporation, having its principal place of business in Pennsylvania. It was licensed to do business in Michigan and had appointed a registered agent there to accept service of process. Appellant moved to dismiss for improper venue and commenced a suit for infringement in New York. The Michigan court denied the motion to dismiss and granted appellee's motion to enjoin appellant from proceeding in the New York suit. On appeal, reversed and held that patent declaratory judgment suits may be brought only in the district of which the defendant is an inhabitant unless defendant waives this privilege, and that taking a license to do business in another state and appointing an agent for service of process therein is not such a waiver. *American Chemical Paint Co. v. Dow Chemical Co.*, 161 F. 2d 956 (C. C. A. 6th 1947).

Venue in patent suits is controlled either by § 48 or by § 51 of the Judicial Code. Section 48 provides that in "suits brought for the infringement of letters patent", the action must be brought either (a) in the district where the defendant is an inhabitant or (b) where he has a regular place of business and has committed acts of infringement. 29 Stat. 695 (1897), as amended, 28 U. S. C. § 109 (1940), *Stonite Prod. Co. v. Melvin Lloyd Co.*, 315 U. S. 561 (1942). Suits for declaratory judgment, however, are not "brought for the infringement of letters patent" and are governed as to venue not by § 48 of the Judicial Code, but by § 51, 36 Stat. 1101 (1911), as amended, 28 U. S. C. § 112 (1940), the general venue statute. *Webster Co. v. Society for Visual Education Inc.*, 83 F. 2d 47 (C. C. A. 7th 1936).

Section 51 contains two provisions with respect to venue in civil actions. The first lays down the general rule that civil suits must be brought in the district where the defendant is an inhabitant, while the second makes an exception for suits where jurisdiction is grounded only upon diversity of citizenship, in which case suit may be brought in the home district of either the plaintiff or the defendant. Since jurisdiction in patent declaratory judgment suits is conferred by § 24 (7) of the Judicial Code, 36 Stat. 1092 (1911), 28 U. S. C. § 41 (7) (1940), quite independently of diversity of citizenship, it follows that the first provision of § 51 is controlling as to venue. Cf. *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501 (1910); *Branic v. Wheeling Steel Corp.*, 152 F. 2d 887 (C. C. A. 3d 1945). Accordingly, in the absence of waiver, a patent declaratory judgment suit may be brought only in the district where the patent owner (defendant) is an inhabitant.
Webster Co. v. Society, supra. For a corporate defendant, this means that suit must be brought in the state of incorporation. See Mississippi Publishing Corp. v. Murphree, 326 U. S. 438, 441 n. (1946).

However, the venue provided by §§ 48 and 51 is a privilege which the defendant may waive either by consent or by conduct. General Electric v. Marvel Rare Metals, 287 U. S. 430 (1932). When a corporation becomes licensed to do business in a foreign state and in accordance with the law of that state appoints an agent to accept service of process, it submits itself to the jurisdiction of the courts of the state. Does it by the same acts consent to be sued in the federal courts sitting in that state? In the case of Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165 (1939), 28 Geo. L. J. 1132 (1940), where § 51 was the applicable venue provision and where jurisdiction was founded exclusively upon diversity of citizenship, this question was answered affirmatively.

Lower court decisions since the Neirbo case have disagreed as to the limits of its application. A few courts have regarded the case as authority for the proposition that appointment of an agent according to state law is a consent to be sued in the federal courts of that state regardless of the question at issue, i.e., whether § 48 or § 51 or some other statute controls venue. California Stucco Products v. National Gypsum Co., 33 F. Supp. 61 (Mass. 1940); see Bowles v. L. D. Schreiber & Co., 56 F. Supp. 814 (Minn. 1944). However, where the point has been specifically decided, it has been held that the rule of the Neirbo case is limited to suits involving § 51 and does not apply to suits for patent infringement, falling under § 48. Blow-Knox Co. v. Lederle, 151 F.2d 973 (C. A. 6th 1945); Bulldog Elec. Prod. Co. v. Cole Elec. Prod. Co., 134 F. 2d 545 (C. C. A. 2d 1943).


The present case on the contrary holds that the consent to be sued in the state courts, which is implied from appointment of an agent to accept service of process, extends by the Neirbo decision to federal courts only
when they are applying the laws of the state, as in diversity of citizenship cases. Certain language in the Neirbo opinion supports this construction, and it is noteworthy that in the most recent Supreme Court discussion of the Neirbo case, Chief Justice Stone was careful to speak of it as a case wherein jurisdiction was based on diversity of citizenship. Mississippi Publ. Co. v. Murphree, 326 U. S. 438, 441, 442 (1946). The court in American Chemical Paint Co. v. Dow, supra, points out that there is no logical reason for distinguishing between the application of the Neirbo doctrine in cases falling under § 48 and those falling under the first provision of § 51, whereas if there is any basis for applying a different rule to § 48 cases than to the Neirbo case, it must lie in the fact that in one case federal jurisdiction does not and in the other case does depend on diversity of citizenship, i.e., in one case federal law and in the other case state law is to be applied. Thus if Blaw-Knox v. Lederle, supra, holding that appointment of an agent was not a waiver in § 48 cases, was correctly decided, so was the present case.

It is difficult to dispute the logic of this argument, yet many will feel that the major premise is fallacious and that both the Blaw-Knox and the American Chemical Paint cases were wrongly decided, or at least fail to follow the spirit of the Neirbo decision. When a corporation appoints an agent in a foreign state according to the law of that state, it does so in order to be permitted to do business there, and consents thereby to be sued in the state courts. It no more consents to be sued in the federal courts in diversity of citizenship cases than it does on federal questions; and if consent is to be inferred in the one case, as required by the Neirbo decision, there is no substantial reason for not finding it in the other. See Judge Chestnut in Vogel v. Crown Cork & Seal Co., supra at 75, 76.

In discussing the Neirbo decision, Judge Evans in Shelton v. Schwartz, 131 F. 2d 805, 809 (C. C. A. 7th 1942) wrote:

"... the implication of its holding, as well as the dissent, can not be ignored. The day of the foreign corporation's avoidance of liability to local residents with whom it has transacted business seems to be about over."

To prevent such avoidance of corporate liability appears to have been the primary objective of the Court in arriving at its decision in the Neirbo case. By giving a strict interpretation to the limits of that decision, the Circuit Court of Appeals for the Sixth Circuit has declined in the instant case and in Blaw-Knox v. Lederle, supra, to advance toward that objective.

C. MARSHALL DANN
BOOK REVIEWS


This is truly a unique volume. The title page carries the individual names of Professor Lewis M. Simes and Paul E. Basye, Esquire. The preface is by Professor Simes. His name appears alone on the cover, where the author of a book is usually listed. Yet the title "Problems in Probate Law" does not appear on the cover. There the title is "Model Probate Code". The title page carries, under "Problems in Probate Law" the two equal sub-titles: "A Model Probate Code" and "Monographs". The monographs reproduced here actually occupy the latter one-half of the page content of the volume. According to the preface: "The publication of the Model Probate Code, together with related monographs and appendix notes, serves a dual purpose. It is the report of a committee of the Probate Division of the American Bar Association. It is also the product of a research project carried on by the University of Michigan Law School." Obviously, the thesis of the book is the Model Probate Code. That Code might never have matured to its present stature had it not been substantially advanced by the Research Project under Professor Simes at the University of Michigan, aided by funds which had been made available by the late William W. Cook. That project was a valuable public service on the part of the Michigan University Law School. The unity of this book, however, as indicated by the title on the cover, consists in the publication of the Model Probate Code sponsored by one section of the American Bar Association.

The American Judicature Society probably has published no short series of papers more fruitful than the three by Professor Thomas E. Atkinson which instigated the production of this Code. Those papers might have been incorporated into the book to advantage. For the pur-


pose here is "to meet the rapidly increasing demand for a coherent, efficient and economical probate system."\(^3\) What about this demand? Is it tangible? Organized? Articulate? Powerful? "Probate reform began in this country more than a decade ago, and is still continuing."\(^4\) Less than ten states have acted in response to the demand to date.

A suggested new code is of interest to the experts. But there will need to be sustained activity on the part of many non-experts before out-moded and defective statutes will be supplanted.\(^5\) Professor Atkinson's specification of charges against the present probate set-up in many states aroused the experts in 1940 to the activity which produced this Code. A reading of those same specifications might have aided others now to appreciate the need, and to judge how well that need would be met by these code provisions.

Borrowing a campaign slogan: "The time for change has come." This Code is proposed. "Why?" asks the uninitiated. First, because the property passing through administration in the estates of decedents has increased tremendously during the last half century. Second, because improved methods of communication and transportation make the probate procedure provided for an earlier day too slow and inadequate. Third, because the more complex nature of property rights and liabilities today demand different handling than did the property of the agrarian civilization in which much of our present probate law had its roots. Fourth, because the experience of generations has demonstrated, and some legal theorists now have come to recognize, that it is a costly and time consuming mistake "to employ the rules designed for litigated cases to a class of matters which are predominantly non-litigious. . . . Probate procedure can and should be even less formal than the most modern civil procedure."\(^6\) Fifth, because it has come to be recognized by experts that the common law concept of administration—namely, "a personal representative accountable to the State . . . some person occu-

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\(^3\)Problems in Probate Law, p. 9 (1946).

\(^4\)Ibid.

\(^5\)Annually in the District of Columbia a joint committee from the Bar Association and the Bankers' Association recommends to the Bar Association agreed proposed changes in the probate statutes. Yet only two changes have been accomplished in twenty years: In 1935 the Women's Bar Association secured some modifications in the statutes of descent and distribution. (Act of March 6, 1935, 49 Stat. 39, ch. 28). In 1946 the Register of Wills secured an amendment giving him five deputies instead of two. (H. R. 6859, 79th Cong., 2d Sess.).

pying an official position under a supervisory Court)—can and should be dispensed with in two diverse types of situations. Administration of a decedent's estate is designed to collect his assets, pay his debts, and rightfully distribute the residue. But it is a useless and inexcusable waste of assets to require administration, first, in many small estates where no one could be adversely affected by the omission, and second, in many estates of substantial amount where all the parties having ultimate interests resolve their respective rights among themselves, and guarantee the rights of others.7

These and other considerations were explored by a Committee of the Real Property, Probate and Trust Law Section of the American Bar Association, which began in 1940 to prepare this Code. After three years spent formulating and organizing the outlines of the work, they received the aid of qualified research assistants, who studied all American Probate statutes. Aid was had from advisory committees appointed by some forty of the state bar associations. At Chicago, in 1944, the Committee reported that a draft of a model code had been prepared. They also reported that many problems encountered were concerned not with the use of words, or the form of the draft, but instead with the policy of the law. These were made the subject of correspondence with interested parties throughout the country, and they were on two or more occasions the subject of round table discussions at the Section's annual meetings. Ten different mimeographed drafts were proposed before the ultimate draft was published. Five monographs concerning problems resolved in the Code provisions, and some twenty-five memoranda which epitomize the statutory situation in the various states on problems handled in relevant code sections have been published with the Code. In addition, many sections of the Code are followed by comment which shows the genesis of the section, or which elucidates its aim, or which explains the content, in pursuit of that aim.

The principal features of the Code have been set forth by R. G. Patten, Esq., the Chairman of the Model Probate Code Committee,8 by Professor Lewis M. Simes, Chairman of the Research Project,9 and

929 AM. JUD. SOC. J. 71, October 1945.
by Professor Russell D. Niles of New York University. Only a resume will be attempted in this review.

In brief outline, the Code provides that probate courts shall not be inferior courts, but instead shall be the same as, or be coordinated with, the trial court of general jurisdiction. As corollaries to that provision, the judge shall have proper qualifications, and his decisions shall be subject to only one appeal, and that a true appeal and not a trial de novo. This probate court is given jurisdiction of real as well as of personal property. Uncontested matters are to be heard and determined by the clerks of court, subject to court review within thirty days.

Realty descends to the same persons and in the same shares as personality upon death of the owner intestate. Dower and curtesy are abolished.

Revocation of wills by circumstances is abolished, save that divorce revokes a will. But children born or adopted after the will take a child's share. The homestead is exempted from all claims, except existing liens against it. For the spouse or minor children, personality is made exempt up to $2000.00; and, in addition, they are granted a family allowance, in money, for their subsistence in their accustomed standard, during the normal administration period. Upon election against a will, a spouse may take his or her intestate share up to $5000.00; and beyond that, one-half of the intestate share. Issue take equally if in the same degree; otherwise, by representation. After issue, parents and brothers and sisters and the issue of deceased brothers and sisters take—the parents, brothers and sisters take per capita, the issue of deceased brothers and sisters take by representation. Then grandparents take equally. Then the nearest kin, by civil law rules, take per capita and without representation.

A will may be probated or administration granted without prior notice, except as the court may require, or unless an interested party requests notice. If notice is had, any contest must precede the probate, except that a subsequently discovered will may be offered prior to the final order for distribution, but not later. A notice prior to probate will also require creditors to file claims with the court within four months of the notice. Along with other usual disqualifications, a person "whom the court finds unsuitable" may not serve as domiciliary personal representative. (§ 96-b-6).

Upon the grant of probate or administration, without notice, there

must be a combined publication against interested parties and creditors, all of whom are absolutely barred after four months—except, again, as to after discovered wills, which may be filed prior to final distribution. The bar includes contingent and unmatured claims. The time for inventory and appraisal is short. The administration, which includes land, is to be completed nine months after the original petition.

The entire administration proceeding is declared to be a proceeding in rem, and to be one proceeding for purposes of jurisdiction. No notice is to be deemed jurisdictional except the initial notice, which necessarily either precedes or immediately follows the grant of administration. Under the Code the decree of final distribution, and not the will, is the significant muniment of title. That final decree determines the persons who succeed to decedent's estate and their interests, subject only to the right of appeal and the right to reopen the decree. (§ 183-d).

If there has been no petition for probate or administration within five years of decedent's death, none can be had, and creditors are foreclosed. Only a proceeding to determine heirship may follow.

There are three separate methods provided for dispensing with administration. These show, by contrast, the tragedy of the situation existing in the Nation's Capitol, where a widow administering her husband's estate of no more than $550.00 may be required to pay court costs of $10.00, bond premium of $10.00, attorney's fees of $50.00, and the balance to decedent's creditors. Only if the estate is insolvent is she granted the benefit of the exemption statute. Truly it is "a disgrace to the legal profession that means have not heretofore been adopted to provide for a summary and economical settlement of small estates." Why do the corporate fiduciaries not share this indictment? Are they excused because they have been occupied, in the interest of the estates with which corporate fiduciaries heretofore have been connected, in promoting the common trust fund rule, and the prudent man rule for investments? Or may an interest on their part in these proposals to dispense with administration be expected since "banks and trust companies now are announcing their willingness to settle estates as small as $1,000"?

The guardianship provisions of this Code cover minors and also persons "incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity"

11Id. at 332.
city (sic) of either managing his property or caring for himself or both". (§ 196). They distinguish guardianship of the person from that of the estate, and cover both, under the exclusive jurisdiction of the Probate Court. Questions of custody, however, remain distinct from guardianship, and claims against ward or guardian may be presented for allowance in Probate Court or by action elsewhere. The State Welfare Department is made eligible to become an interested party in any pending guardianship, and any public department or charitable organization charged with supervision, control or custody of any minor or other incompetent may be appointed guardian of his person or estate or both. These organizations are exempted from meeting the qualifications required of other guardians.

There is an unjustifiable duplication of provisions by a blanket adoption of the Uniform Veterans Guardianship Act, as though the money which comes to a child through the Veterans Administration is somehow different from the money the same child receives from its father's estate. The uniform act could have been recommended to states wherein minors are not otherwise adequately protected by local law, as an alternate, or ad interim expedient. But a Model Code should have incorporated all proper features needed for the protection of all minors, and of all property of any minor, with such supplementary sections as might apply solely to Veterans Administration affairs, without having in the same code duplicate provisions, for instance, as to the contents of a petition for guardianship. (§ 204, 242).

The provisions on ancillary administration consist entirely of acts promulgated or to be promulgated by the National Conference of Commissioners on Uniform State Laws.

This Model Probate Code is not offered as a uniform act. Its sponsors recognize that local conditions, local traditions and local prejudices may prevent it from being adopted anywhere in toto. Still it has value as a code. For legislators considering adoption of any part of this Code thus may see the framework into which such part can best be integrated. From all aspects this project shows evidence of careful planning, a thoroughly practical approach, and exceptionally competent execution. The need now is to build the fires which will infuse these fine potentialities with the active life of useful reality, which they can acquire only through legislative enactment.

VICTOR S. MERSCH*

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The economic opinions of the National Association of Manufacturers are fairly well-known, partly because of the organization's recent newspaper advertising campaigns. This book is a comprehensive presentation of those opinions. In a thousand pages nearly every controversial issue of our time has been treated in some measure, and a few have been treated rather thoroughly.

The "Economic Principles Commission", to which authorship is attributed, was made up of four academic economists (Willford I. King, Harley L. Lutz, Ludwig von Mises, and Ray B. Westerfield), one professor of law (John Hanna of Columbia), and ten business representatives. Six more corporation officials are named as having been members of the Commission at one time or another. Although the hands of some of these people are recognizable in certain chapters, it is impossible to place responsibility for any conclusion on any particular person. The work is a consensus of the members of the Commission, and is in some cases a consensus of the majority only. Deciding controversial points by majority vote of the membership was presumably not difficult.

The "tendency" of the book—its central thesis—is the old fashioned liberal one, grounded in the "Enlightenment" philosophy of the eighteenth century. There are five pillars of this wisdom: (1) The complete autonomy of the "individual"—every man pursues his own ends without reference to any common, objective, ethical standard other than that which prohibits him from illegally interfering with others who are trying to gain the same ends; (2) the "naturalness" of competition in free markets and great faith in the adequacy of this automatic regulating force to prevent injustice; (3) the freedom and "sanctity" of contracts; (4) private ownership, in the fee simple sense, of virtually all material goods; (5) the profit motive, or the maximizing of "utilities", as both the driving force and the highest end of all economic activity. These are the elements of the game. The role of the government is that of an umpire and no more. Economics merely explains the mechanics of the forces operating inside this framework. Some writers have been pessimistic about the nature of the final equilibrium, and some have been optimistic. The present authors are optimists.

These are the themes of the composition. There is nothing in the book
which has not been said many times before—and by those with less obvious axes to grind. Why was the work published at all?

During the past two decades the foundations of liberal economics have been under strong and effective attack, and not only from socialist writers, but from many groups with most respectable academic and political backgrounds. The long depression of the thirties destroyed the popular faith in the self-regulating nature of the system. Then the late, great Lord Keynes demonstrated eleven years ago to his academic colleagues that saving and investment are equilibrated, not by the interest rate, but by the general level of income and employment. It followed that there was no reason to expect full employment as an automatic result of the "free working of the system", and it also followed that the government could no longer be a mere umpire, but must play an active part in the game. In this country Professor Hansen and his followers have gone on advancing underemployment hypotheses, and suggesting government action to insure full production and employment.

But the stimulus of the war solved the employment problem for the time being. Indeed, the postwar slump predicted by so many Keynesians has not yet occurred, and it appears to some that we are once more "safely ensconced in a Ricardian world" and may take up again where we left off in the twenties. The reaction, of which this book is an example, will last just as long as the current shaky prosperity.

The purpose of the book thus appears to be to bring up to date the intellectual capital of the members of the Association; to equip them to combat the new ideas. There is a section of 52 pages on "Government Spending to Stimulate Business Activity" in which some difficult parts of Keynes' work are very well explained, and where Professor Hansen's mature economy thesis is examined. Major attention has been devoted to the inherent "fallacies" of both ideas, and to their harmful long-run effects. Throughout the discussion of business fluctuations "government interference" gets the lion's share of the blame. The memory of the Great Depression grows dimmer, but the authors' explanation of it as a "politically induced stagnation" may not satisfy many of their extramural readers.

One hundred and twenty-four pages are given to "Trends in Public Finance". The conclusions call for drastically lessening the degree of progression in the Federal income tax; abandoning taxes on capital gains; retaining the regressive general excise taxes; lowering the tariff—but gradually; abandoning the so-called "double taxation of corporate income"; and levying a new Federal retail sales tax to finance any welfare
spending which the national government may undertake, thereby forcing
the poor to pay their own way. Such studies of the incidence of Federal
taxes as have been made do not show a very high degree of progression
in the tax system as a whole, despite the spectacular rates of the income
tax on the largest incomes. The regressive indirect taxes effectively
counterbalance the high progression of the income tax. Consequently,
were the proposals of the “Economic Principles Commission” to be
adopted, we should have a very regressive tax system indeed.

The entire work is shot through with such confidence in the regulating
value and the justice of free competition that the reader might logically
expect the authors to be as determined as Mr. Thurman Arnold or Mr.
Wendell Berge to compel American business to compete with itself. But
here we are disappointed. The requirements of competition are not ap-
plied to all the players in the game with equal rigor, and this is of course
the fatal weakness in the intellectual position taken by the book. The
authors are not trust-busters. Only 32 pages are given to “Competition
and Monopoly”, and the treatment of the history of the great industrial
combinations, while not a whitewash, is far from a blackball. Certainly
it contains no admissions against interest. The theoretical treatment is
even poorer. The careful definition of pure competition which has been
formulated by Professor Chamberlin, Mrs. Robinson, and others—that
no single producer may be such a large part of the total supply that his
decisions have any influence on the market price—is ruled out as “un-
realistic” (page 589). This despite the obvious fact that the condition
is fulfilled in the case of the wheat market, and indeed in the markets
for farm products generally. In place of this concept the authors would
substitute the simple requirement that there must be at least two sup-
pliers:

“The only true test, and the basic distinguishing feature of competition, is
whether there are at least two suppliers of a market who make independent de-
cisions on the prices and conditions at which they will offer their goods and
services.” (Page 592; italics theirs)

Such identification of duopoly and competition is almost too crude to
merit criticism. Professor Chamberlin, in his Theory of Monopolistic
Competition, Chapter III, “Duopoly and Oligopoly”, concluded that if
there are a small number of sellers, price will never be as low as the
competitive level unless the sellers neglect the direct and indirect effect of
their own production on the price. Such a conclusion does not appear to
be “unrealistic”, either. At any rate, to ask us to put our trust in compe-
tition alone and then to define competition as the existence of only two suppliers for each market is asking too much. In the long (172 pages) section on "Employment Relations" we find a different stress on the factor of competition as an automatic regulator for the just distribution of the product of industry between capital and labor. Productivity wage theory is developed at some length and its conclusion accepted that:

"labor as a whole and in the long run inevitably does receive 'what it produces'. . . . In other words, so long as free market operations continue, without arbitrary interference by either government or employer or labor, just so long will labor receive 'its own actual product'". (Page 137)

Consequently the "monopolistic aspects" of collective bargaining are roundly condemned, and every form of the closed shop, union shop, maintenance of membership, union security, or preferential shop specifically rejected (Pages 192 to 196).

The schizoid character of this reasoning is obvious. Under their definition of competition the authors would hold that two producers of automobiles would be sufficient to insure the benefits of competition to the buyers of the automobiles. But if there were two union leaders with the power to withhold the labor for making the cars until their wage terms were met, would the "Economic Principles Commission" accept the situation as sufficiently competitive?

Efforts to control the market for one's goods or services are now multi-form and almost universal. Advertising, horizontal and vertical business combinations, fixing of retail mark-ups with legal approbation, trade unions, closed shops, union shops, gentlemen's agreements, basing point prices, collective bargaining, and so forth, are all restrictions on free competitive trade. And all of them must be condemned by sincere and consistent liberals of the old school because they all go counter to at least two of the pillars of liberal economic philosophy. But the critics must be consistent.

A more realistic view holds that free market competition, if it ever did exist, can never be re-established, if only because of the economics of large scale production in many industrial fields. And a very good case can be made for many of the restrictions on free trade. The vagaries of the free market can sometimes be so inhuman that men cannot live with it, and the "restrictions" or regulations can be justified on the general ground that they are necessary to provide sufficient stability to the economic basis of society. The problem is then to protect all groups, and
to find a just method of distributing the joint product. At present the
great unorganized sections of the society are being squeezed, and just
now the outcry is loudest against labor. But no solution will be found
by castigating or breaking up only the nether millstone.

While the National Association of Manufacturers is a large and very
influential group in the American business community, it is comforting
to reflect that there are other groups and other views—equally articulate
—in that community. For example, there are the Committee for Eco-
nomic Development and the business members of the National Planning
Association—who certainly cannot be accused of having “learned noth-
ing and forgotten nothing” since 1929.

SAM L. BROWN*

THE CRIMINAL LAW AND ITS ENFORCEMENT—by John Barker Waite. 
902. $7.50.

The laboratory method, or as it is better known, the case system of
teaching law, has undergone many modifications since the days of Lang-
dell at Harvard and Keener at Columbia. This gradual transformation
is well illustrated by Professor Waite's case book on “The Criminal Law
and its Enforcement”. It is not solely a maze of cases out of which the
student is required to evolve principles of law by a process of inductive
logic, as was true of the early case books. Professor Waite's collection
is not restricted to decisions of the courts, but in addition contains other
source material. Most chapters are preceded by short commentaries writ-
ten by the author. These commentaries are challenging and illuminating.
Taken together, they constitute a very helpful text for students of
criminal law.

The administration of criminal justice probably involves more prac-
tical elements than any other branch of the law. The vast majority of
criminal cases are disposed of on pleas of guilty. The percentage of
appeals taken in cases that are actually tried is very small. The result
is that an attempt to understand criminal law solely from the decisions
of appellate courts, gives one only a partial view of the subject. It is
evident that Professor Waite is fully cognizant of this situation. With-
out omitting any material needed for teaching the theory of criminal law

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in the traditional manner, he, nevertheless, also deals in considerable detail with the practical aspects of the administration of criminal justice. He achieves this result by his commentaries, as well as by some of the source material other than judicial decisions. For example, in addition to the conventional topics in the field of criminal law, he includes such matters as the examination of suspects.

One does miss a few old friends, such as *McNaughton's Case*. It may perhaps be doubted whether the cases selected on the topic of insanity contain an adequate exposition of the various tests of mental capacity to commit a crime, as applied by the courts. The reviewer realizes, however, that the selection of cases for a case book is a task somewhat similar to that of culling poetry for an anthology. Every reader complains that some of his favorites are omitted and that some material he does not care for is included. Consequently, these remarks are not intended as a criticism, but rather as a suggestion for use in the event that at some future date a new edition of this case book should be published.

In the opinion of the reviewer the case book is an excellent tool for the student, and in addition may also help the practicing lawyer.

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